THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Litigation:RElw

15 May 2014

Mr Andrew Cappie-Wood
Secretary
Department of Police and Justice
GPO Box 6
SYDNEY NSW 2001

By email: justice.policy@agd.nsw.gov.au

Dear Mr Cappie-Wood,

Review of the *Vexatious Proceedings Act 2008*

I write to you on behalf of the Litigation Law and Practice Committee ("the Committee") of the Law Society of New South Wales to provide this submission in relation to the review of the *Vexatious Proceedings Act 2008* ("the Act").

The Committee has reviewed recent relevant Supreme Court and Court of Appeal decisions and suggests that the following aspects require attention:

1. The meaning of 'proceeding';

2. Whether the Act requires that an application for leave by a vexatious litigant must be heard or whether it can be dismissed by the Court on the papers;

3. The width of the prohibition on commencing proceedings.

The Courts have recognised that the Act gives rise to numerous questions of construction. The leading case on issues pertaining to the construction of the Act appears to be *Bar-Mordecai v Attorney General* (NSW): *Bar-Modercai v State of New South Wales* [2012] NSW CA 207 ("*Bar-Mordecai*"). Jackson AJA in that case has stated:

> it remains to be seen whether the legislation establishes an effective mechanism for dealing with applications for leave to institute proceedings made by persons subject to vexatious proceedings orders.

1. What constitutes a "proceeding"?

The relevant part of Section 4 of the Act provides:

> In this Act, proceedings includes:
>
> (a) any cause, matter, action, suit, proceedings, trial, complaint or inquiry of any kind within the jurisdiction of any court or tribunal, and

(b) any proceedings (including any interlocutory proceedings) taken in connection with or incidental to proceedings pending before a court or tribunal;

As Basten JA stated in *Bar-Mordecai*, "the very comprehensiveness of s 4 is problematic." This case raised the issue of whether all interlocutory applications are a "proceeding" pursuant to s 4. In *Bar-Mordecai*, Basten JA stated, "it could not be said that every interlocutory application gives rise to an interlocutory proceeding. On the other hand, some interlocutory applications may be said to involve the institution of proceedings within the guidance given in s 5(2) of the Act." Basten JA opined that there should be some limit on the scope of interlocutory applications which could be said to give rise to "interlocutory proceedings". This is because to give a broad interpretation to the concept of "interlocutory proceedings" in s 4(b) "could transfer much of the case management from the trial court to the Supreme Court and could lead to the constant interruption of trials for the institution of applications for leave in the Supreme Court." The Judge expressed the view that "the idea that an order for discovery, even though sought prior to trial, could not properly be resolved by a judge in the trial court, without a prior grant of leave from the Supreme Court to allow the trial court even to consider the application, would verge on the irrational".

This issue was also considered in *Attorney General in and for the State of New South Wales v Potier* [2014] NSWSC 118 .The Attorney General sought an order prohibiting Mr Potier from instituting any interlocutory proceedings in connection with or incidental to Mr Potier's appeal against his conviction for the charge of soliciting to murder. McCallum J observed that it was not clear what proceedings would fall within any such prohibition and he reasoned that arguably an application for bail is "proceedings" within the meaning of the Act. If that is correct, the order sought by the Attorney General would have the effect of precluding Mr Potier from making an application for bail without first satisfying the requirements of s 14 of the Act and obtaining leave of the court. McCallum J did not think it was appropriate to restrain Mr Potier's entitlement to apply for bail. Consequently, the Court did not grant this order sought by the Attorney General.

The Committee submits that the scope of sections 4 and 5 of the Act requires clarification.

2. Does the Act require that an application for leave by a "vexatious litigant" be heard or may it be dismissed earlier?

This issue was also considered by Basten JA in *Bar-Mordecai.*

Section 14 of the Act:

(a) confers on an applicant subject to a vexatious proceedings order a right to seek leave to institute proceedings (s 14(2));

(b) obliges the applicant to file, with the application seeking leave, an affidavit that complies with the requirements of s 14(3)(a)-(c);

(c) prohibits service of the application or the affidavit on any person, absent an order for service under s 16 (1)(a):s 14(4); and

(d) authorises the court to dispose of the application either by dismissing it or granting leave pursuant to s 16(4).

The fact that the applicant is required to file with the application an affidavit disclosing the material prescribed in s 14(3) and the requirement that the court dismiss the application if it considers that the affidavit does not substantially comply with s 14(3), suggests that dismissal may occur on the papers before any person is served and without a hearing. On the other hand, the inclusion in s 15(2) of the provision for the application to be dismissed "even if the applicant does not appear at the hearing of the application", suggests that the applicant must be given an opportunity to appear at a hearing before dismissal can occur (either to proffer further evidence or to make submissions).

The Committee submits that the legislation is unclear as to whether an application for leave by a vexatious litigant must be heard or may be dismissed earlier on the papers. Review of these provisions is therefore recommended by the Committee.

3. The width of the prohibition on commencing proceedings

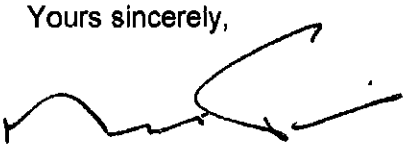
In *Singh v The Owners Strata Plan 11723 & Ors* [2013] NSWSC 1595 ("*Singh*"), Slattery J noted that, "it is a very serious matter to deprive a litigant of access to the courts. The Court has a power to make any necessary adjustments to the orders: the Act s8(7)."

A blanket order under s 8 was sought in *Singh*, which would have prevented Mr Singh from instituting proceedings in NSW. However Slattery J was of the view that "there seemed to be no immediate danger of Mr Singh commencing litigation against anyone other than the Applicant and the Owners Corporation". The orders were therefore limited to commencing proceedings against the Applicant himself and the Owners Corporation.

Arguably, orders made under s 8 of the Act should only be made in relation to parties who are in immediate danger of having litigation commenced against them. The Committee believes that consideration could be given as to whether the onus should be on the party seeking an order for vexatious proceedings to prove that a blanket prohibition under s 8 of the Act is appropriate.

The Committee is pleased for the opportunity to provide these comments. Should there be any questions arising from this letter, please contact Leonora Wilson, policy lawyer on (02) 9926 0323 or via email: leonora.wilson@lawsociety.com.au.

Yours sincerely,



Ros Everett
President