LAW REFORM COMMISSION

Opinion Paper

Appeal by Vexatious Litigant

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LAW REFORM COMMISSION

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About the Commission

THE LAW REFORM COMMISSION OF MAURITIUS consists of –

(a) a Chairperson, appointed by the Attorney-General;
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(d) the Director of Public Prosecutions or his representative;
(e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
(f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
(g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
(h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
(i) two members of the civil society, appointed by the Attorney-General.

Under the direction of the Chairperson, the Chief Executive Officer is responsible for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

The Issue

1. The issue is whether the denial of the right of appeal against an order declaring a person as a vexatious litigant and directing him not to initiate/continue proceedings without leave – as provided in the new section 197F of the Courts Act by the Courts (Amendment) Bill No. I of 2011 - conform with the Constitution and its human rights provisions and reflect best international practices.

The Mauritius Constitutional Framework

2. Section 81(1) and (2) of the Constitution of Mauritius provides for a right of appeal to the Judicial Committee of the Privy Council – as of right or with the leave of the Court – from final decisions of the Supreme Court. Subsection (4) of section 81 however excludes from its ambit "final decisions of a court that any application made to it is merely frivolous or vexatious".

The Law in England and its Conformity with Article 6 ECHR

3. In England, section 42(4) of the Senior Courts Act [formerly Supreme Court Act 1981] provides that no appeal shall lie from a decision of the High Court refusing leave for the institution or continuance of, or for the making of an application in, legal proceedings by a person who is the subject of an order to the effect that he is a vexatious litigant.

4. The issue of the conformity of debarring an appeal against an order declaring a person as a vexatious litigant, or where leave is refused for filing fresh actions, with the European Convention on Human Rights was addressed in *Bhamjee vs. David Fordstick* 2000(1) WLR 88. Lord Phillips referred to the Strasbourg principles in Belgian Linguistics case 1

EHRR 252, (283) (Para 9) where it was held that Art 6 did not guarantee a right of appeal but that where it was granted there should be no discrimination unless there was legitimate reason.

5. The European Court had observed in that case that:

> "Art 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However, it would violate that Article, read in conjunction with Art 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions."

6. Lord Phillips was of the view that where a litigant can be shown to have persistently abused the processes of the court by making applications and instituting proceedings which have been adjudged to be totally devoid of merit, despite earlier restraints, this is a legitimate reason why the time should come when he is limited to one chance of showing that the new action he wishes to bring, or the new application he wishes to make, is not totally devoid of merit. If it arguably has merit, then of course, it should be permitted to proceed in the usual way. Such a procedure of giving only one chance and not allowing a second chance in appeal is valid. In *Ebert vs. Official Receiver* [2001] EWCA (civ) 340: [2002] (1) LR 320 (CA), the Court held that the equivalent statutory procedure in section 42(4) of the 1981 Act was convention compliant.

7. Lord Phillips then referred to the situations in which an appeal could be foreclosed by judicial order (under section 42(4) refusing leave to appeal). He said:

> "If a litigant subject to an extended civil restraint order or a general civil restraint order, continues to make the requisite applications pursuant to that order which are customarily dismissed on the grounds that they are totally devoid of merit, a Judge may, if he thinks fit, direct that if any further application is dismissed on the same grounds, the decision will be final…. Thereafter the appeal court will

> have no jurisdiction to grant permission to appeal against any subsequent refusal of permission…"

Such restrictions will be Strasbourg compliant, Lord Phillips held.

<u>The Law in New Zealand</u>

8. In New Zealand, section 88A(3) of the Judicature Act, which relates to "Restriction on institution of vexatious actions", is to the effect that no appeal shall lie from an order granting or refusing leave.

<u>The Views of the Law Commission of India</u>

9. In June 2005, the Law Commission of India, in its 192nd Report on "Prevention of Vexatious Litigation" - after reviewing legislation curbing vexatious litigation in UK, USA, Australia, New Zealand, and Canada – proposed the adoption of the *Vexatious Litigation (Prevention) Bill* and recommended at page 90 that:

> "As to the right of appeal against an order declaring a person as a vexatious litigant and directing him not to initiate/continue proceedings without leave, inasmuch as we are recommending that such orders shall be passed only by a Division Bench of the High Court, it is not necessary to provide for any further right of appeal. Parties can always move the Supreme Court under Article 136 of the Constitution of India [by virtue of which the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.]"

The Views of the Nova Scotia Law Reform Commission

10. In its April 2006 Final Report on 'Vexatious Litigants, the Law Reform Commission of Nova Scotia considered (at page 27) that:

> "Apart from the Supreme Court of Canada, which serves as the final court of appeal for the entire country, all Canadian jurisdictions which issue vexatious litigants orders allow those orders to be appealed. An appeal is a court proceeding to set aside or vary a decision made by another court. This enables the subject of an order to challenge it, if he or she thinks the order was made unfairly or on improper grounds. The Commission agrees with this approach and suggests that a vexatious litigant provision in Nova Scotia should allow for an appeal of the granting of an order.

11. Once a vexatious litigants order has been made, all Canadian jurisdictions permit the subject of the order to apply to the court for leave to continue, in other words, for the order to be lifted. It is different from an appeal, in that the applicant is not suggesting that the order was flawed. Rather, the leave provision is meant to allow an applicant to bring to light details not available or in existence when the order was granted. It also permits a person to attempt to convince a court why an action should continue, despite the existence of an order. A leave application will produce one of three results: 1) an order will be lifted; 2) an order will be lifted, but with conditions (in other words, a partial lifting); or 3) no change to the order will be granted. If a leave to continue application is unsuccessful, four jurisdictions (Federal Courts, Manitoba, Ontario, P.E.I.) expressly prevent that decision from being appealed. In the interest of trying to reduce the effect of vexatious litigants on the judicial system, <u>the Commission is of the view that there should be no appeal of an unsuccessful application for leave to continue</u>. Instead, an unsuccessful applicant would again be entitled to seek leave to continue should relevant circumstances change."

Concluding Remarks

12. From the survey of the law and practice in other jurisdictions, as well as views of other law reform agencies, it can be stated that the proposed subsection (5) to the new section 197F is permitted by the Constitution and is comparable to what obtains in many other jurisdictions.