



# LAW REFORM COMMISSION

*Report*

## Prevention of Vexatious Litigation

[October 2010]

Port Louis, Republic of Mauritius

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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;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (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.

## **Executive Summary**

LAW REFORM COMMISSION OF MAURITIUS

### **Report**

### **“Prevention of Vexatious Litigation”**

**[October 2010]**

Vexatious litigation is legal action which is brought regardless of its merits, such as the filing of a lawsuit with the knowledge that it has no legal basis (including the continuation of a lawsuit after discovery of the facts shows it has absolutely no merit), with the purpose to bother, annoy, embarrass and cause legal expenses to the defendant(s).

In this Issue Paper, the Commission reviews, from a comparative perspective, the law as to restraint on vexatious litigation.

Vexatious litigation is regarded by many legal systems as an abuse of the judicial process.

In England, for instance, the Attorney-General may, under section 42 of the Senior Courts Act [formerly Supreme Court Act 1981] entitled “Restriction of Vexatious Legal Proceedings”, apply to the High Court to declare a litigant as ‘vexatious’:

Law Reform Commissions and Agencies in the Commonwealth have during the past years reviewed the law as to the prevention of vexatious litigation. In June 2005, the Law Commission of India, in its 192<sup>nd</sup> Report on “Prevention of Vexatious Litigation” - after reviewing legislation curbing vexatious litigation in UK, USA, Australia, New Zealand, and Canada – recommended the adoption of the *Vexatious Litigation (Prevention) Bill*. In April 2006, the Law Reform Commission of Nova Scotia released its Final Report on ‘Vexatious Litigants’. In December 2008, the Parliament of Victoria Law Reform Committee released its Final Report in respect of its ‘Inquiry into Vexatious Litigants’.

The Commission recommends that the Courts Act be amended to enable the Supreme Court, where it is satisfied that a person has persistently started vexatious proceedings or made similar applications in any court, to make an appropriate order so as to restrain the start of such proceedings or the making of such applications. The amendment should take into account the practice in other jurisdictions as well as the analysis made by various law reform agencies in the Commonwealth.

### **(A)Introductory Note: Background**

1. Vexatious litigation is legal action which is brought regardless of its merits, such as the filing of a lawsuit with the knowledge that it has no legal basis (including the continuation of a lawsuit after discovery of the facts shows it has absolutely no merit), with the purpose to bother, annoy, embarrass and cause legal expenses to the defendant(s).
2. The Commission has, from a comparative perspective, reviewed the law as to restraint on vexatious litigation. It has formed the opinion that in order to avoid abuse of the judicial process such a concept can be introduced in our law.

### **(B)Prevention of Vexatious Litigation: A Comparative Perspective**

3. Vexatious litigation is regarded by many legal systems as an abuse of the judicial process.<sup>1</sup>
4. In England, the Attorney-General may, under section 42 of the Senior Courts Act [formerly Supreme Court Act 1981] entitled “Restriction of Vexatious Legal Proceedings”, apply to the High Court to declare a litigant as ‘vexatious’:

***42. Restriction of vexatious legal proceedings***

*(1) If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground-*

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<sup>1</sup> Vide, for instance, Restriction of Vexatious Legal Proceedings (Guernsey) Law, 1985; California "vexatious litigant" statute (Cal.Civ.Proc.Code sec. 391 et seq); Florida 2000 Vexatious Litigant Law 68.093; Hawaii 1993 Vexatious Litigation Law; Ohio 1997 Vexatious Litigator Statute; Ontario Section 140(1) of the Courts of Justice Act; New South Wales Vexatious Proceedings Act 2008; Queensland Vexatious Litigants Act 1981.

- (a) *instituted vexatious legal proceedings, whether, in the High Court or any inferior court, and whether against the same person or against different persons; or*
- (b) *made vexatious applications in any legal proceedings, whether in the High Court or any inferior court, and whether instituted by him or another,*  
*the court may, after hearing that person or giving him an opportunity of being heard, order-*
- (i) *that no legal proceedings shall without the leave of the High Court be instituted by him in any court; and*
- (ii) *that any legal proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and*
- (iii) *that no application (other than an application for leave under this section) shall without the leave of the High Court be made by him in any legal proceedings instituted, whether by him or another, in any court.*
- (2) *An order under subsection (1) may provide that it is to cease to have effect at the end of a specified period, but shall otherwise remain in force indefinitely.*
- (3) *Leave for the institution or continuance of, or for the making of an application in, any legal proceedings by a person who is the subject of an order for the time being in force' under subsection (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application.*
- (4) *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 for the time being in force under subsection (1).*
- (5) *A copy of any order made under subsection (1) shall be published in the London Gazette.*

In *Attorney-General v Barker* (2000), the Lord Chief Justice of England and Wales, Lord Bingham of Cornhill, had this to say about vexatious litigation:

““Vexatious” is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a

purpose or in a way which is significantly different from the ordinary and proper use of the court process ...

From extensive experience of dealing with applications under section 42 the court has become familiar with the hallmark of persistent and habitual litigious activity. The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop.”

5. Law Reform Commissions and Agencies in the Commonwealth have during the past years reviewed the law as to the prevention of vexatious litigation.<sup>2</sup>
6. In June 2005, the Law Commission of India, in its 192<sup>nd</sup> Report on “Prevention of Vexatious Litigation” - after reviewing legislation curbing vexatious litigation in UK, USA, Australia, New Zealand, and Canada – recommended the adoption of the *Vexatious Litigation (Prevention) Bill*:

*The Vexatious Litigation (Prevention) Bill, 2005*

*A BILL to prevent the institution or continuance of vexatious proceedings, civil and criminal, in the High Courts and Courts subordinate thereto.*

*Whereas, it is expedient to prevent the institution or continuance of vexatious proceedings, civil and criminal, in the High Courts and in the courts subordinate to the High Courts; BE it enacted in the Fifty-Sixth Year of the Republic of India as follows:-*

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<sup>2</sup> Law Commission of India, 192<sup>nd</sup> Report on “Prevention of Vexatious Litigation”; Law Reform Commission of Nova Scotia, Discussion Paper on “Vexatious Litigants” [December 2005] and Final Report on “Vexatious Litigants” [April 2006]; Parliament of Victoria Law Reform Committee ‘Inquiry into Vexatious Litigants’: Issue Paper [April 2008] and Final Report [December 2008].

*1. Short title, extent and commencement:*

- (1) This Act may be called “The Vexatious Litigation (Prevention) Act, 2005”.*
- (2) It extends to the whole of India except the State of Jammu and Kashmir.*
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette specify.*

*2. Declaration of a person as a vexatious litigant:*

- (1) An application under sub-section (2) for declaring a person as a vexatious litigant, may be filed -
  - (a) by the Advocate General or in absence of office of Advocate General, by a Senior Advocate nominated by the High Court in this behalf; or*
  - (b) by the Registrar General of the High Court; or*
  - (c) with the leave of the High Court, by a person against whom another person has instituted or conducted proceedings, civil or criminal.**
- (2) If, on an application filed under subsection (1), the High Court is satisfied that any person has habitually and without any reasonable ground instituted vexatious proceedings, civil or criminal, in any court whether against the same person or against different persons, the High Court may, after giving the person who has instituted such proceedings, an opportunity of being heard, declare that person as a vexatious litigant and shall also order as stated under subsection (1) of section 3.*
- (3) When an application is filed by any person referred to in clause (b) or (c) of subsection (1), the Advocate General or, in the absence of such an office, a Senior Advocate nominated by the High Court in this behalf, as the case may be, shall also be heard on the application.*
- (4) Application filed under subsection (1) shall be heard by the High Court in a Division Bench.*

*3. Leave of Court necessary for vexatious litigant to institute or continue any civil or criminal proceedings:*

- (1) Subject to the provisions of subsection (2), when the High Court under subsection (2) of section 2 or under subsection (2) of section 6 declares a person as a vexatious litigant, it shall also order that -
  - (a) no proceeding, civil or criminal, shall be instituted by the said person in the High Court or any other court subordinate to that High Court; and*
  - (b) no proceeding, civil or criminal, if already instituted by the said person in the High Court or any other court subordinate to that High Court, shall be continued by him, without obtaining leave of the appropriate Court or Judge referred to in subsection (3).**
- (2) It shall not be necessary for the person declared as a vexatious litigant to obtain leave in the following cases:
  - (a) where such person is instituting a proceeding in the appropriate Court or before the appropriate Judge for the purpose of obtaining leave;*
  - (b) where, in any matter instituted against him, such person proposes to file or take appropriate proceedings to defend himself;**

- (c) *where, in a proceeding instituted or continued by such person after obtaining leave from the appropriate Court or the Judge, the said person proposes to file or take appropriate further proceedings.*
- (3) *In this section and in section 5, the “appropriate Court or appropriate Judge” means-*
- (a) *the High Court, in the case of a proceeding proposed to be filed or continued by the person declared as a vexatious litigant in the High Court;*
- (b) *the District & Sessions Judge, in the case of proceeding in any other Court subordinate to the High Court.*
- (4) *Leave shall not be granted unless the appropriate Court or the appropriate Judge, as the case may be, is satisfied that the proceedings are not an abuse of the process of the Court and that there is prima facie ground in the proceedings proposed to be instituted or continued by the person declared as a vexatious litigant.*

*Explanation: In this section and section 5, -*

- (a) *institution or continuation of civil or criminal proceedings does not include proceedings instituted or continued under Article 226 of the Constitution of India.*
- (b) *institution or continuation of “criminal proceedings” means the commencement or institution or continuation of a proceeding seeking ‘prosecution’ by filing a complaint before a Criminal Court.*

#### *4. Publication and Communication of Order:*

- (1) *A copy of every order made, - under subsection (2) of section 2, declaring any person as a vexatious litigant, shall be published in the Official Gazette and may also be published in such other manner as the High Court may direct.*
- (2) *Every order referred in subsection (1) shall also be communicated to all the courts subordinate to the High Court which passed such order.*

#### *5. Proceedings, civil or criminal, instituted or continued without leave of the appropriate Court to be dismissed and other consequences:*

- (1) *Any proceedings, civil or criminal, instituted or continued in any court by a person against whom an order under subsection (1) of section 3 has been made without obtaining the leave required to be obtained from the appropriate Court or appropriate Judge, shall be dismissed by the said court.*
- (2) *The court while dismissing the proceedings under subsection (1) shall, in addition, further direct such vexatious litigant to pay costs.*
- (3) *Every person referred to in subsection (1) who has instituted or continued any proceeding without leave as aforesaid, may also be liable for punishment for contempt of the High Court which had passed the order under subsection (1) of section 3.*

#### *6. Declaration and order by more than one High Court:*

- (1) *Where any person against whom an order under subsection (1) of section 3 has been*

*made by a High Court, institutes or continues any proceeding, civil or criminal, in another High Court or in a Court subordinate to such High Court, then the persons referred to in subsection (1) of section 2 may make an application to such High Court for declaring such person as a vexatious litigant.*

*(2) If, on an application filed under subsection (1), the High Court is satisfied that any person has been declared as a vexatious litigant under subsection (2) of section 2, by another High Court, the High Court may after giving an opportunity of being heard to the person who has instituted or continued any proceeding, civil or criminal, declare that person as a vexatious litigant and shall also order as stated under subsection (1) of section 3.*

*(3) Where an application under subsection (1) is filed, the provisions of subsections (3) and (4) of section 2, and sections 3, 4 and 5 shall apply in relation to such application.*

*7. Power to make Rules:*

*The High Court may frame rules for the purpose of implementing the provisions of this Act.*

*8. Saving:*

*The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law providing for striking out vexatious pleadings or prevention of abuse of process of law, or which require consent, sanction or approval in any form of any other authority for the institution or continuance of any civil or criminal proceeding.*

7. In April 2006, the Law Reform Commission of Nova Scotia released its Final Report on ‘Vexatious Litigants’. The Commission was of the view that

- (1) It would be appropriate to adopt a vexatious litigants provision in Nova Scotia;
- (2) The provision would explicitly empower the courts to make an order against a vexatious litigant. The order would preclude a vexatious litigant from starting any new proceedings (actions or applications), or continuing with an existing proceeding until court leave was granted to lift the order;
- (3) The provision should take a balanced approach, empowering the courts to deal effectively with vexatious litigants, but also permitting someone who is subject to such an order to seek court leave to have the order lifted;
- (4) The vexatious litigants provision should take the form of legislation;
- (5) The legislation would make it clear it is meant to be cumulative in relation to other remedies, and that it would not derogate from the courts’ current powers;

- (6) Rather than attempting to define the term “vexatious” or to use a substitute, a vexatious litigants provision could include a non-exclusive list of factors which could help to guide the court;
- (7) Examples of vexatious behaviour by a person in the context of court proceedings may include the following:
  - a) bringing one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
  - b) bringing an action which cannot succeed, which would lead to no possible good, or which has no reasonable expectation of providing relief;
  - c) bringing an action for an improper purpose, including the harassment and oppression of other parties;
  - d) inappropriately using previously-raised grounds and issues in subsequent actions;
  - e) a pattern of failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
  - f) persistently taking unsuccessful appeals from judicial decisions;
  - g) persistently engaging in inappropriate courtroom behaviour, such as being disrespectful to the court, failing to observe rulings and directions from the presiding judge, or engaging in unnecessarily protracted submissions;
- (8) A vexatious litigants provision should require notice to be provided to the Attorney-General of an application for a vexatious litigants order;
- (9) The Attorney General would also be entitled to appear at the hearing of the application;
- (10) An application for a vexatious litigants order would not require the Attorney General’s consent;
- (11) One should be able to appeal a vexatious litigants order;
- (12) Once a vexatious litigants order is in effect, one should not be able to appeal an unsuccessful application for leave to continue;

- (13) Courts should be given an express rule-making power to determine how a leave application should take place, including any limits on the frequency of such applications;
  - (14) A vexatious litigants provision should specifically and clearly permit courts to deal with both new and continuing proceedings;
  - (15) The language used in a vexatious litigants provision should include vexatious spokespersons or agents. More specifically, the provision should empower the courts to make an order against a vexatious agent based upon his or her cumulative history of commencing or conducting vexatious proceedings.
8. In December 2008, the Parliament of Victoria Law Reform Committee released its Final Report in respect of its ‘Inquiry into Vexatious Litigants’. It recommended, inter alia, that:
- (1) The Victorian Government should introduce legislation to replace the vexatious litigant provision in section 21 of the *Supreme Court Act 1986* (Vic) with new legislation providing for a graduated system of ‘litigation limitation orders’;
  - (2) The new legislation should give all courts the power to make a ‘limited litigation limitation order’;
  - (3) The Attorney-General and the Solicitor-General should be able to apply for this order. A person against whom the person has instituted or conducted proceedings that are without merit and a person who has a ‘sufficient interest’ in the matter should also be able to apply, subject to leave;
  - (4) The threshold test for this order should be that the person has brought two or more applications in the existing litigation that are without merit;
  - (5) The effect of the order should be to prohibit further applications in the existing litigation without leave;
  - (6) The new legislation should inter alia give the Supreme Court, the Chief Judge of the County Court, the Chief Magistrate the power to make an ‘extended litigation limitation order’;

- (7) The Attorney-General and the Solicitor-General should be able to apply for this order. A person against whom the person has instituted or conducted proceedings that are without merit and a person who has a ‘sufficient interest’ in the matter should also be able to apply, subject to leave;
- (8) The threshold test for this order should be that the person has frequently brought legal proceedings that are without merit;
- (9) The effect of the order should be to prohibit the person from continuing or bringing any applications or legal proceedings against the persons or organisations named in the order, or about the issues described in the order. Orders made by the Chief Judge or the Chief Magistrate should only prohibit legal proceedings in their respective jurisdictions;
- (10) The new legislation should give the Supreme Court the power to make a general litigation limitation order on the application of the Attorney-General and the Solicitor-General;
- (11) The Supreme Court should be able to make an order if it is satisfied that the person has persistently and without reasonable ground brought legal proceedings that are without merit in circumstances where an extended litigation limitation order would not be appropriate;
- (12) The effect of the order should be to prohibit the person from continuing or bringing any legal proceedings in any Victorian court or tribunal without leave;
- (13) The Victorian Government should publish information about litigation limitation orders, including how to apply for an order and how to ask the Attorney-General to apply for an order;
- (14) The Victorian Government should work with the courts to develop a protocol under which the courts can refer persons for whom a litigation limitation order may be warranted to the Attorney-General for consideration;
- (15) The Victorian Government should establish or designate an agency responsible for publishing information about litigation limitation orders, receiving and investigating referrals and advising the Attorney-General about applications. The

Government should develop and publish key performance criteria for the exercise of these functions.

### **(C)Concluding Observations**

9. The Commission recommends that the Courts Act be amended to enable the Supreme Court, where it is satisfied that a person has persistently started vexatious proceedings or made similar applications in any court, to make an appropriate order so as to restrain the start of such proceedings or the making of such applications.
  
10. The amendment should take into account the practice in other jurisdictions as well as the analysis made by various law reform agencies in the Commonwealth.