**Chambers of the Hon. Diana Bryant**
**Chief Justice, Family Court of Australia**

# Submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Access to Justice (Federal Jurisdiction) Amendment Bill 2011

## 23 January 2012

I welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's ("the Committee") Inquiry into the Access to Justice (Federal Jurisdiction) Amendment Bill 2011 ("the Bill"), which was referred to the Committee on 25 November 2011 for inquiry and report. This submission is made by me in my role as Chief Justice of the Family Court of Australia ("the Court"), in consultation with and on the advice of the Court's Law Reform Committee. The views contained in this submission are my own and do not reflect those of the Family Court more broadly.

My comments are directed towards Schedule 3 of the Bill, which relates to vexatious proceedings. The form and content of legislation governing vexatious litigants and/or proceedings has been the subject of discussion between the Court and the Attorney-General's Department for many years.

By way of background, the Committee may wish to note that the principal source of the Court's existing power to restrain litigants declared to be vexatious from instituting further proceedings without first obtaining the Court's leave is to be found in section 118 of the *Family Law Act 1975* (Cth) ("the Act") and specifically section 118(1)(c). The Court maintains a list of persons to which an order has been made pursuant to section 118(1)(c). I understand that, as of 1 January 2012, 727 current orders were in place restraining named litigants from instituting proceedings of the type specified in the order.

For a variety of reasons, not least of which is the nature of family law itself, the number of litigants who persist in filing unmeritorious or mischievous applications with no realistic prospect of success, who pursue barren appeals against final and interlocutory decisions and who attempt to bring criminal proceedings against judicial officers and members of staff is disproportionately high in the Family Court as compared with other superior federal courts. Such litigants place a significant burden on the Court's judicial and administrative functioning, to the detriment of 'mainstream' court users.

There are significant limitations associated with the operation of section 118. For example, apart from an order dismissing the proceedings, the Court is confined to making orders on application by a party to the proceedings and cannot make a restraint order under section 118 of its own motion or on application by any other person, such as the

Principal Registrar of the Court. Further, the Full Court of the Family Court has held that the power in section 118(1)(c) can only be validly exercised where the Court has a) first dismissed the proceedings and b) dismissed the proceedings on the grounds that they were frivolous or vexatious (see *Vlug v Poulos* (1997) FLC ¶92-778). In the same case the Full Court also held that section 118 is limited to restraining the commencement of further proceedings and does not permit the Court to stay proceedings that are already on foot.

The Court has attempted to address the deficiencies of section 118 through the Court's rules. Rule 11.04 of the *Family Law Rules 2004* (Cth) provides that if the court is satisfied that a party has frequently started a case or appeal that is frivolous, vexatious or an abuse of process, it may dismiss the application and order that the party not file or continue an application without the court's permission. However, there have long been doubts about the validity of this rule, given the presence of section 118, and thus it has not necessarily been effective in overcoming all of the inadequacies of that section.

Subject to my later comments, I generally support the sprit and intent of Schedule 3 of the Bill. This is described in the Explanatory Memorandum as seeking to create "a consistent and more comprehensive legislative framework for the federal courts to deal with vexatious proceedings brought by persons who have frequently instituted or conducted vexatious proceedings in Australian courts and tribunals, or who are acting in concert with others who have done so."

I intend to comment on particular clauses and suggest ways in which, in my view, they could be improved. I will do so in the order of importance I accord to discrete issues and not sequentially as clauses appear in the Bill.

*Clauses 102QB(1) and 102QB(2)(b) "proceedings under this Act"*

Clause 102QB is concerned with making vexatious proceedings orders. Both sub-clauses 102QB(1) and 102QB(2)(b) include the term "proceedings under this Act". Two issues arise from the use of this terminology. The first concerns the conditions precedent to a court being able to make a vexatious proceedings order. The second concerns the ambit of any such order.

As to the first issue, which arises in sub-clause 102QB(1), it is important to understand that the Court variously exercises original and appellate jurisdiction in proceedings other than under the *Family Law Act 1975* (Cth). These include the *Marriage Act 1961* (Cth), the *Child Support (Registration and Collection) Act 1988* (Cth), the *Child Support (Assessment) Act 1989* (Cth) and, pursuant to section 1337C(1) of the *Corporations Act 2001* (Cth), jurisdiction in all civil matters arising under the Corporations Act. The Court also has jurisdiction in any proceedings under the *Bankruptcy Act 1966* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* upon transfer by the Federal Court,

as well as in consumer protection proceedings and taxation appeals, also upon transfer. Further, the Court has jurisdiction in matters over which it has no express jurisdiction under the Act but which are associated with other matters that do come within the Court's express jurisdiction and has the power to accrue non-federal jurisdiction where the controversy before it involves federal and non-federal issues.

Self-evidently, the limitation in clause 102QB(1) to "proceedings under this Act" would preclude the Court from making a vexatious proceedings order with respect to proceedings under other statutes which vest the Court with jurisdiction, even where the Court was otherwise satisfied that the conditions in clause 102QB(1)(a) and (b) had otherwise been met. This I believe to be an artificial and unnecessary restraint on the Court to control all proceedings properly before it; one that is inconsistent with the stated objects of the Bill.

I observe that the same limitation has not been imposed on the High Court, the Federal Court or the Federal Magistrates Court and I direct the Committee to clauses 77RN, 37AO and 88Q in this regard. I can see no reason for the proposed differential treatment of the Family Court and I strongly suggest that clause 102QB(1) be amended to read "This section applies if the Court is satisfied", or alternatively "This section applies if the Family Court of Australia or the Federal Magistrates Court is satisfied", consistent with the phraseology used in the clauses cited earlier.

As to the second issue, the effect of the reference to "proceedings, or proceedings of a particular type, under this Act" in clause 102QB(2)(b) would be to limit the Court to only preventing vexatious litigants from initiating proceedings under the Family Law Act. Again, I note that a similar restraint is not imposed on the High Court, the Federal Court or the Federal Magistrates Court.

Were clause 102QB(2)(b) enacted in its current form, the effect would be that the Family Court would be powerless to prevent a person who has conducted vexatious proceedings under the other Acts in which the Court has jurisdiction from continuing to do so. For example, both the Family Court and Federal Magistrates Court have jurisdiction under the Family Law Act and under child support legislation. As presently drafted, clause 102QB(2)(b) would enable the Federal Magistrates Court to prohibit proceedings in both jurisdictions. The Family Court, however, would only be able to prohibit proceedings initiated under the Family Law Act and could do nothing with respect to vexatious child support proceedings.

The net result is that the Family Court, which is a superior court, would have more limited powers to control vexatious proceedings than the Federal Magistrates Court, which is not a superior court. This, to my mind, is both illogical and inappropriate.

Further, as the Committee would doubtless recollect, the Second Reading Speech for the Bill (at page 5) states that "the intention is that, once nationally consistent laws are passed, a vexatious litigant will no longer be able to repeatedly initiate proceedings in different courts with hopelessly doomed litigation." However, I must cavil with that statement. The only way this could occur that I can discern would be through a significant amendment to the Bill that would enable any court to stay or restrain proceedings in any other court, whether federal or state. Even if the Second Reading Speech was intending to refer to federal courts specifically, the constraint imposed on the Family Court whereby the Court can only make vexatious proceedings orders with respect to proceedings under the Family Law Act still renders that statement fallacious.

It also seems internally inconsistent to me to permit the Court (pursuant to clause 102QB(2)(a)) to stay or dismiss <u>any</u> proceedings before it but not enable the Court to prohibit a person from commencing proceedings unless those proceedings fall within the Court's jurisdiction under the Family Law Act.

I urge the Committee to recommend that the words "under this Act" be excised from clause 102QB(2)(b) of the Bill where it first appears, which again would be consistent with the formulation used with respect to the other three federal courts.

The Committee may wish to note that the phrase "under this Act" also appears in clauses 102QD(1) and 102QE(1)(a) and these too should be deleted.

*Clause 102QB(1) "frequently" instituted or conducted vexatious proceedings*

I observe that clause 102QB(1) imposes a requirement that the Court must be satisfied that a person has "frequently" instituted or conducted vexatious proceedings before being empowered to make a vexatious proceedings order. The requirement of frequency is not one that presently appears in section 118 of the Act, which means the Court can make an order restraining a litigant from instituting further proceedings without leave in circumstances where there has been only one, or few, proceedings instituted that can be considered vexatious.

The Bill contemplates the retention of section 118 in an amended form (which I will discuss below) and the creation of a rule-making power that would enable rules to be made for or in relation to the prevention or termination of vexatious proceedings. This, as I understand it, is the route by which it is contemplated that the Court's existing power to make orders with respect to individual vexatious proceedings will be preserved. It seems to me however that this is an overly cumbersome and circuitous means by which to achieve that end. In the interests of simplicity and conformity with existing practice, my consistent preference has been for the requirement of frequency to be deleted from clause 102QB(1). Were the Committee to so recommend, there would be no utility in retaining section 118 and the Bill could be amended accordingly. However, I generally

support the insertion of an express rule-making power in relation to vexatious proceedings in section 123 of the Act and do not recommend any change to it.

*Absence of an express power to amend or vary a vexatious proceedings order*

Unlike the Standing Committee of Attorneys-General (as it was then called) model bill, upon which Schedule 3 is based, the Bill does not contain an express power to vary or set aside a vexatious proceedings order.

Clause 6 of the model bill states:

> *(1) The Court may, by order, vary or set aside a vexatious proceedings order.*
>
> *(2) The Court may make the order on its own initiative or on the application of—*
> *(a) the person subject to the vexatious proceedings order; or*
> *(b) a person mentioned in section 4(1).*

The Committee may wish to note that the three jurisdictions which have enacted legislation based on the model bill have all bestowed an express power on courts to vary or set aside a vexatious proceedings order (see section 7 of the *Vexatious Proceedings Act 2005* (Qld), section 8 of the *Vexatious Proceedings Act 2007* (NT) and section 9 of the *Vexatious Proceedings Act 2008* (NSW)). It is not clear to me why the decision has been reached to not include such a power in the Bill.

This is also particularly concerning when it is understood that the current provisions of section 118 contain such a power (in section 118(2)), yet the proposed amendments have the effect of repealing that provision. According to the Explanatory Memorandum, "the effect of the amendments is to omit existing paragraphs 118(1)(c) and subsection 118(2), since the issues dealt with by those provisions are covered by the new Part XIB." That is not the case. The effect of the amendment is to remove an existing express power and Part XIB does not otherwise create a specific power to vary or set aside vexatious proceedings orders or orders made under section 118. So that it is clear that the Court is empowered to vary or set aside vexatious proceedings orders, I suggest therefore that the Committee recommend that a specific power to vary or set aside a vexatious proceedings order be included in the Bill.

*Commencement*

Item 2 of the Bill provides that Schedule 3 of the Bill will commence on a day to be fixed by Proclamation and, if the provisions do not commence within six months of Royal Assent, on the day after the end of that six month period. This is particularly relevant to clause 102QC, which concerns notification of vexatious proceedings orders.

I believe that, when the Bill was being developed, it was proposed that there would be a central register of vexatious proceedings orders. The concept of a central register has been abandoned and it is now intended that individual courts will be responsible for receiving requests for information as to whether a person is or has been subject to a vexatious proceedings order and, if they are or have been, to issue a certificate specifying the date of the order and any other information specified by applicable Rules of Court. Assuming the Bill passes into law without amendment to clause 102QC, it will be incumbent upon the Court to make appropriate modifications to its electronic case management system, Casetrack, design a certificate, give consideration to whether any amendments to the *Family Law Rules 2004* (Cth) are required and make those amendments, and develop necessary policies and procedures around how requests for certificates should be managed.

The Court is currently subject to severe financial constraints that are not anticipated to abate. Absent additional resourcing, I estimate that this will take a minimum of three months and realistically closer to six months to undertake the tasks associated with the issuing of certificates, including substantial process modifications. I therefore urge the Committee to recommend that the commencement provisions be amended so that clause 102QC not commence any earlier than the day after three months after the Act receives Royal Assent.

I am available to discuss any aspect of this submission

Diana Bryant
Chief Justice