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VEXATIOUS LITIGANT ORDERS IN SOUTH AUSTRALIA: TIME FOR A NEW LOOK?

I Introduction

Discussions about the administration of justice routinely feature concerns about court delay and the efficient use of public resources, especially where an individual uses court resources to pursue vexatious litigation.[1] Courts seek to protect themselves, the people involved in litigation, and the wider community from such litigation in various ways. In the most extreme cases, courts can exercise statutory powers to prohibit individuals from commencing actions without court permission.

Two recent decisions of the Supreme Court of South Australia highlight the limits and limited utility of the Court's power to prohibit vexatious litigation.[2] That power is principally provided by s 39(1) of the *Supreme Court Act 1935* (SA) and may only be exercised where 'the court is satisfied that a person has persistently instituted vexatious proceedings'.

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1 See, eg: *PPG Development Pty Ltd v Capitanio* (2016) 126 SASR 307, 327 [79] (Doyle J); Chief Justice John Doyle, 'Imagining the Past, Remembering the Future: The Demise of Civil Litigation' (2012) 86(4) *Australian Law Journal* 240, 243–4. See also: Sean Fewster, 'Going Nowhere: Court Reforms Generate Zero Change', *The Advertiser* (online, 23 May 2021) <https://www.adelaidenow.com.au/truecrimeaustralia/police-courts-sa/reforms-introduced-five-years-ago-to-end-12month-wait-for-criminal-trials-have-resulted-in-a-12month-wait-for-a-criminal-trial/news-story/99279fab664974b64f6969516039b3a8>; Meagan Dillon, 'Australia's "Vexatious Litigants" Are Diverse: They Include a Mass Killer and an Inventor', *ABC News* (online, 27 June 2019) <https://www.abc.net.au/news/2019-06-27/more-than-100-people-declared-australian-vexatious-litigants/11225640>; South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2016, 6231–3 (Vickie Chapman, Shadow Attorney-General).

2 *Georganas v Barkla* [2021] SASC 47 ('*Georganas v Barkla*') (application for orders under s 39(1) of the *Supreme Court Act 1935* (SA) ('*Supreme Court Act*') or by exercise of inherent power of the Court); *Groom v Police* [2021] SASCA 1, [9]–[13] (referral of matter by Court of Appeal to the Attorney-General under s 39(2) of the *Supreme Court Act* (n 2)).

Unlike equivalent laws in almost every other jurisdiction in Australia (and New Zealand),[3] s 39 has not been significantly amended since its introduction in 1935 when it was adapted from 1896 English legislation.[4] Nor has it been reformed in this century to account for significant changes in the civil justice system.[5]

This article first discusses the policy underpinning vexatious proceedings legislation, common features in that legislation across Australia, and how those laws operate in practice. There is particular emphasis on the South Australian position. Second, the article considers whether s 39 of the *Supreme Court Act* fulfils its protective function having regard to its exercise to date and the contemporary understanding 'that the courts are concerned not only with justice between the parties … but also with the public interest in the proper and efficient use of public resources'.[6] The article concludes that it is time for a new, nuanced review of the content and practice of vexatious litigant legislation in South Australia.

II Managing Vexatious Litigants: Policy, Law and Practice

It is 'a fundamental right that every member of our society has of access to a court to seek remedies as a consequence of an alleged infringement of his or her rights'.[7]

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3 In Australia and New Zealand, this includes the following legislation enacted in the last 20 years: *Federal Court of Australia Act 1976* (Cth) pt VAAA, as inserted by *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) which provided equivalent provisions for the other Commonwealth courts; *Vexatious Proceedings Act 2008* (NSW); *Vexatious Proceedings Act 2006* (NT); *Vexatious Proceedings Act 2005* (Qld); *Vexatious Proceedings Act 2011* (Tas); *Vexatious Proceedings Act 2014* (Vic); *Vexatious Proceedings Restriction Act 2002* (WA); *Senior Courts Act 2016* (NZ) ss 166–69. The exception is *Supreme Court Act 1933* (ACT) s 67A, although in fairness that section was introduced in 1998.

4 *Vexatious Actions Act 1896* (Imp) 59 & 60 Vict, c 51.

5 See David Bamford and Mark Rankin, *Principles of Civil Litigation* (Lawbook, 3rd ed, 2017) ch 1; Alexander Vial, 'The Overriding Objective of Australian Civil Procedure' in Adrian Zuckerman (ed), *Zuckerman on Australian Civil Procedure* (LexisNexis Butterworths, 2018) ch 1; Jordan Tutton, 'Litigation in the South Australian Fast Track Streams' (2017) 6(3) *Journal of Civil Litigation and Practice* 108, 108–9.

6 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 189 [23] (French CJ) ('*Aon Risk Services*'). See also: at 211 [92]–[93], 213 [98], 214 [100] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *UBS AG v Tyne* (2018) 265 CLR 77, 93–4 [38] (Kiefel CJ, Bell and Keane JJ), remarking that '[i]ntegral to a "just resolution" is the minimisation of delay and expense'.

7 *Kowalski v Mitsubishi Motors Australia Ltd* (2011) 198 FCR 153, 162 [58] (Jacobson, Siopis and Nicholas JJ). Compare in the Supreme Court of the United States: *Chambers v Baltimore & Ohio Railroad Company*, 207 US 142, 148 (1907) (the Court remarking that '[i]n an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship').

Recognising and respecting that right, courts have developed strategies and procedures for managing litigants who are unfamiliar with law, or are unreasonable, emotional or quarrelsome.[8]

The predominant view is that only few people are sufficiently problematic to be regarded as vexatious. However, this 'small but vocal group of complainants … by persistence and insistence, consum[e] disproportionate amounts of time and energy'.[9] It is for this reason that Australian parliaments have introduced specific powers that enable courts to order that the right of these individuals to institute proceedings be qualified.

Vexatious litigant orders are intended to be protective, not punitive.[10] They are designed to guard against

> the debilitating and damaging effect that vexatious proceedings have on those against whom such proceedings are brought; the stress suffered by those who are the subject of vexatious allegations; and the waste of the court's scarce resources

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8 In psychiatry, research has sought to better understand the cognate 'querulous litigant'. See, eg, Grant Lester, 'Searching for the Spectrum of the Querulous' in Wayne Petherick and Grant Sinnamon (eds), *The Psychology of Criminal and Antisocial Behavior: Victim and Offender Perspectives* (Academic Press, 2017) 489. Lester defines the 'morbidly querulous [as] an individual who embarks on a persistent quest for restitution … through complaint … and sometimes litigation, with resulting negative impact on their … functioning': at 504.

Research on querulous litigants provides a scientific understanding of the spectrum of querulous behaviour, where early intervention can be achieved, how individuals might escalate in their conduct and effective means of managing deviant behaviour. See generally: Ian Freckelton, 'Querulent Paranoia and the Vexatious Complainant' (1988) 11(2) *International Journal of Law and Psychiatry* 127 ('Querulent Paranoia'); Christopher Adam Coffey, 'Litigation Overdone, Overblown, and Overwrought: A Mixed Methods Study of Civil Litigants' (PhD Dissertation, The University of Alabama, 2019) 2–4, 8–12, 53–61, 64–7; MWD Rowlands, 'Psychiatric and Legal Aspects of Persistent Litigation' (1988) 153(3) *British Journal of Psychiatry* 317.

9 Grant Lester, 'The Vexatious Litigant' (2005) 17(3) *Judicial Officers' Bulletin* 17, 17. See: Productivity Commission (Cth), *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 1, 444–8; Ian Freckelton, *Vexatious Litigants: A Report on Consultation with Court and VCAT Staff* (Report, 1 October 2008) 8–13 ('*Consultation with Court and VCAT Staff*') (reporting findings from focus groups conducted with Victorian court and tribunal staff); Ian Freckelton, *Vexatious Litigants: A Report on Consultation with Judicial Officers and VCAT Members* (Report, 1 October 2008) 11–18 ('*Consultation with Judicial Officers and VCAT Members*') (reporting findings from interviews with 20 Victorian judicial officers and tribunal members); Freckelton, 'Querulent Paranoia' (n 8) 139–42 (describing the experience of an Australian complaints authority).

10 *Official Trustee in Bankruptcy v Gargan [No 2]* [2009] FCA 398, [3] (Perram J); *Teoh v Hunters Hill Council [No 8]* [2014] NSWCA 125, [56] (Beazley P, Emmett JA and Sackville AJA).

> in dealing with vexatious litigation and the diversion of those resources from more worthy litigation.[11]

Protection is achieved by requiring that the vexatious litigant seeks judicial permission before instituting future proceedings.

Overall, vexatious proceedings legislation seeks to balance the protective imperative against the individual's right to access the court. To achieve that balance, a limited form of a vexatious litigant order will often be made. These limited orders will only affect the individual's right to institute proceedings against an identified respondent (or class of respondents) or in relation to an identified issue. Such an order may expire after a set time.

Turning from policy to legal doctrine, the laws enacted across Australia are broadly similar and almost wholly developed from research and consultations conducted in the 21st century. The Western Australian Parliament implemented recommendations made by the Law Reform Commission of Western Australia in 1999.[12] That legislation was the 'starting point'[13] for a model bill endorsed by the Standing Committee of Attorneys-General in 2003. The model bill was then implemented in Queensland, the Northern Territory, New South Wales, Tasmania and the Commonwealth.[14] Each of New Zealand and Victoria considered that model, reviewed the 'graduated' system used in England and Wales, and undertook separate law reform inquiries to determine their preferred approach.[15] There is now refinement of, and reflections on, these reforms.[16]

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11 *Shire of Katanning v Bride [No 2]* [2016] WASC 314, [74] (Tottle J). See also Law Reform Committee, Parliament of Victoria, *Inquiry into Vexatious Litigants* (2008) 83–92.

12 See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* (Final Report, Project No 92, September 1999) 161–6.

13 Diana Bryant, 'Self Represented and Vexatious Litigants in the Family Court of Australia' (Speech, Access to Justice: How Much Is Too Much?, 30 June – 1 July 2006) 37.

14 See Explanatory Memorandum, Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (Cth) 2–3, 407 [253]–[302] ('Explanatory Memorandum').

15 See: Law Reform Committee (n 11); New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act* (Report No 126, November 2012) 158–64; *Siemer v New Zealand Law Society* [2019] NZHC 3075, [7]–[12] (summarising the development of the law in New Zealand).

16 See, eg: Department of Justice (NSW), *Vexatious Proceedings Act: Statutory Review* (Report, May 2017); Clare van Balen, 'Beyond the *Vexatious Proceedings Act*: Victoria's Unfinished Business' (2018) 43(1) *Alternative Law Journal* 35; Productivity Commission (Cth) (n 9) vol 1, 451; Narelle Bedford and Monica Taylor, 'Model No More: Querulent Behaviour, Vexatious Litigants and the *Vexatious Proceedings Act 2005* (Qld)' (2014) 24(1) *Journal of Judicial Administration* 46.

Australian vexatious proceedings legislation is designed so that first, specific threshold criteria must be met before the power may be exercised. These criteria generally require that a person's past litigation:

- had an inappropriate, 'vexatious' quality. For example, proceedings must have been 'an abuse of the process of a court', or instituted 'without a reasonable ground', 'for an ulterior purpose' or for a 'wrongful purpose'; and

- was instituted in a persistent or frequent way, such as to warrant intervention by the court to prevent further litigation. Traditionally, this criterion has been of a qualitative nature (ie proceedings must have been instituted 'persistently' or 'habitually'), although with legislative reform this criterion has become more of a quantitative inquiry (eg 'frequently').

Second, if all threshold criteria are met, the court must regard it as appropriate in all the circumstances to exercise its discretion. An influential judgment summarises that 'the factors which will be relevant are informed by the protective purpose which the order serves,' but that the order is 'not lightly to be made'.[17]

The trend over time has been to make the threshold criteria easier to satisfy. One way this has been achieved is in the reduction of criteria required to be met.[18] Other approaches include the softening of the threshold criteria,[19] and permitting courts to have regard to a wider range of matters when assessing those criteria.[20]

A *Vexatious Litigant Orders in South Australia*

Section 39 of the *Supreme Court Act* remains in substantially similar terms as it was in 1935, although there was a mostly cosmetic reform in 1987.[21]

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17 *Official Trustee in Bankruptcy v Gargan [No 2]* [2009] FCA 398, [2], [12].

18 For example, by deleting the criterion that there be 'habitual' institution of proceedings: See *Supreme Court Act Amendment Act 1987* (SA) cl 2.

19 For example, by lowering the 'persistently' criterion to 'frequently'. See: Explanatory Memorandum (n 14) 42 [267]–[268]; *Ramsey v Skyring* (1999) 164 ALR 378, 390 [55] (Sackville J).

20 For example, by expanding the definition of 'proceedings' to include a wider range of interlocutory activity, as well as proceedings in tribunals and specialist courts. See: Explanatory Memorandum (n 14) 40 [257], 42 [266]; Department of Justice (NSW) (n 16) 11 [3.37]–[3.39].

21 In terms of substantive amendments since 1935, the 1987 amendment dropped the threshold criterion that proceedings be instituted 'habitually' and defined more clearly what constitutes a 'vexatious' proceeding: *Supreme Court Act Amendment Act 1987* (SA) cl 2 amending *Supreme Court Act* (n 2) s 39. In 1995, the section was amended so that applications could be brought by any 'interested person': *Statutes Amendment (Courts) Act 1995* (SA) cl 20 amending *Supreme Court Act* (n 2) s 39. In 2004, the forums to be considered for the s 39(1) criteria expanded to include State tribunals, following *A-G (SA) v Burke* (1997) 190 LSJS 28 (Perry J); *Statutes*

On an application for an order under s 39(1), the Court must be satisfied that:

- the individual has instituted proceedings[22] within a prescribed court;[23]
- those proceedings are vexatious in that they were instituted (i) to harass or annoy, (ii) to cause delay, (iii) for any other ulterior purpose, or (iv) without reasonable ground; and
- the individual has instituted those proceedings *persistently*.[24]

If all the criteria are satisfied, the Court will then consider whether to exercise its discretion to make an order against the individual.

There have been 10 successful applications for s 39 orders, with orders made between 1997 and 2016. Four of those were in a 'limited' form, controlling litigation only against specific parties or on specific issues. Of the six in 'general' form,[25] two were made against individuals already subject to limited orders.

Most of the 10 successful applications involved significant endeavour on the part of the party applying for the order, as well as for the court and judicial officer. For example, in the most recent s 39 application heard in South Australia:

- the Court managed the proceedings before trial (between March 2014 and May 2015), then heard the application over 15 days in mid-2015.[26] In December 2016,

Amendment (Courts) Act 2004 (SA) s 27 amending *Supreme Court Act* (n 2) s 39(6); South Australia, *Parliamentary Debates*, House of Assembly, 4 December 2003, 1142 (Michael Atkinson, Attorney-General).

22 The authoritative view is that instituting 'proceedings' requires 'invok[ing] the jurisdiction of the Court': *Garrett v Mildara Blass Ltd* [2009] SASC 19, [123] (Layton J). Different views have been expressed as to whether documents lodged, but rejected by, the Registry will count: *A-G (SA) v Kowalski* [2014] SASC 1, [932]–[934] (Blue J); *Georganas v Barkla* (n 2) [105]–[106] (Livesey J).

23 The 'prescribed courts' are the State courts, South Australian Employment Tribunal, South Australian Civil and Administrative Tribunal and Legal Practitioners Disciplinary Tribunal: *Supreme Court Act* (n 2) s 39(6); *Supreme Court Regulations 2018* (SA) reg 4.

24 As to the meaning of 'persistently', see: *Kowalski v Mitsubishi Motors Australia Ltd* [2005] SASC 433, [43] (Perry ACJ, Duggan and Anderson JJ); *Kowalski v Mitsubishi Motors Australia Ltd* (2011) 198 FCR 153, 163 [65], 164 [67] (Jacobson, Siopis and Nicholas JJ); *Georganas v Barkla* (n 2) [67]–[79] (Livesey J).

25 This includes *Workcover Corporation of South Australia v Moore-McQuillan* [2016] SASC 191 (Blue J) (where some proceedings were allowed to continue and so were 'carved out' of the vexatious litigant orders).

26 Ibid [323]–[325].

the judge delivered a 1,038-paragraph judgment (176 pages), concluding that the individual had instituted 63 proceedings without reasonable ground;[27]

- the matter was appealed, with the appeal dismissed in September 2017 (roughly three and a half years after the s 39 application was made);[28]

- the Court was supported by court staff (eg managing voluminous documents lodged in the Registry, communicating with parties, transcribing hearings, providing security for hearings) and each judge's staff (communicating with parties, preparing materials for the trial, assisting in-court and with judgment preparation);[29] and

- the applicant paid and instructed its legal team to prepare extensive documentary evidence and other court documents relating to 89 court proceedings, appear at all hearings (likely with counsel and at least one solicitor), and generally conduct the day-to-day management of the matter for those three and a half years.

In sum, one individual was responsible for initiating 63 proceedings without reasonable ground. To limit his ability to bring future claims (but not bar it), considerable public resources were expended over three and a half years.

The above application was unusual, given the respondent's conduct[30] and the possibility that some of the impugned claims were meritorious.[31] These features may

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27 Ibid [992]. The statistics do not record the significant time spent judgment writing by the judge. On a typical day, 40% of Australian supreme court judges will spend three hours or longer writing judgments: Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (Australasian Institute of Judicial Administration, 2012) 84 (Figure 11). One senior judicial officer estimates, from his own experience and after discussing with his judicial colleagues, that 'the time taken to write a judgment is on average some 150 per cent as long as the time taken to hear a case': Dennis Mahoney, 'Judgment Writing: Form and Function' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of NSW, 2003) 103, 103.

28 *Moore-McQuillan v Workcover Corporation of South Australia* [2017] SASCFC 113 (Kourakis CJ, Peek and Bampton JJ).

29 As to the impact of vexatious litigation on court staff, see Freckelton, *Consultation with Court and VCAT Staff* (n 9) 6–11. See also: Freckelton, *Consultation with Judicial Officers and VCAT Members* (n 9) 14, 17; *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* [2007] SASC 173, [245]–[247] (Anderson J); *Georganas v Barkla* (n 2) [17], app B (Livesey J).

30 Among other things, the respondent assaulted the applicant's barrister during the hearing: *R v Moore-McQuillan* [2018] SASCFC 121, [26], [38] (Kelly J).

31 That view finds support in the workers compensation decision that followed: *Moore-McQuillan v Return to Work SA* [2018] SAET 139 (Farrell DPJ and Lieschke DP finding in favour of the worker, Hannon DPJ dissenting). However, the Full Bench's orders were set aside by the Full Court: *Return to Work Corporation of South Australia v Moore-McQuillan* [2020] SASCFC 119 (Kourakis CJ, Kelly and Bleby JJ).

also reflect forensic decisions made by the applicant in prosecuting the matter. Nonetheless, this author's review of Australian vexatious litigant applications suggests that the Supreme Court of South Australia scrutinises the underlying proceedings more carefully and permits more witness examination than superior courts elsewhere.[32]

While statistics on hearing and judgment length are of limited value, the relative differences in those data suggest that the Supreme Court has often taken a different approach than other superior courts in Australia. First, few applications required more than three days to hear across all Australian courts. However, more than three days were required for four out of 10 South Australian cases.[33] Overall, South Australia has had the two longest vexatious litigant trials by a sizeable margin. Second, South Australian judgments appear disproportionately in the longest vexatious litigant judgments. Although only 10 judgments in the selection were produced by the Supreme Court of South Australia, six of the 10 longest judgments nationally were from South Australia.[34]

These quantitative data are crude measures. However, they suggest something is unusual about the analysis undertaken by the Supreme Court, its management of

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32 The author identified Australian cases where courts made a vexatious litigant order. When searching for cases, search terms and methods tended to favour applications made by Attorneys-General, cases that were subject to appellate review, cases that were cited positively in later judgments, and judgments published since 2000. One hundred cases were selected for study (representing almost all cases identified in the searches), with the author wishing to gather a mix of cases with different procedural histories, from different jurisdictions, under different legislation, involving different kinds of parties and relating to different areas of law. The search was not exhaustive other than for South Australia, although likely captured most matters having regard to the total number of vexatious litigants in Australia. The search deliberately excluded Family Court and Federal Circuit Court matters due to distinctive concerns arising in the family law jurisdiction. See: Bryant (n 13); Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report No 135, March 2019) 307–10 [10.37]–[10.50].

All cases were skim read, then subjectively coded as to whether the court 'went behind' the underlying judgments. Quantitative data were collected in the form of hearing and judgment length. Given the approach was not particularly rigorous, this article reports only on the broad, clearly discernible matters emerging from the review.

33 These were conducted in: the SASC (15 days); SASC (12 days); NSWSC (seven days) and VSC (seven days in two matters); NSWSC (five days) and SASC (five days); NSWSC (four days in two matters) and NTSC (four days) and SASC (four days). In contrast, 45 Federal Court and Queensland Supreme Court decisions were retrieved. On the face of those judgments, none appear to have been heard for more than two days.

34 In order of length, these judgments were delivered by the: SASC (1,994 paragraphs); SASC (1,038 paragraphs); SASC (358 paragraphs); NSWSC (346 paragraphs); SASC (294 paragraphs); SASC (289 paragraphs); NTSC (267 paragraphs); NSWSC (263 paragraphs); SASC (254 paragraphs); and NSWSC (234 paragraphs).

s 39 cases, and the evidence generally received on an application. The data cannot illuminate whether that difference arises from the requirements of s 39 or if it relates to a judicial practice in Adelaide.

Elsewhere in Australia, there is generally consensus that it is not 'necessary to re-examine the circumstances of each [underlying] proceeding',[35] and if a proceeding has been dismissed 'as frivolous or vexatious … it is not for a court considering [an] application to go behind the order and go into the merits of the argument as a court of appeal would do'.[36] The New South Wales Court of Appeal reasoned that decisions on the underlying proceedings are not 'determinative of an application', but '[o]rdinarily, the court that heard and decided the earlier proceedings will have been best placed to determine whether they were an abuse of process or instituted without reasonable grounds'.[37] The Court reasoned with reference to the policy underpinning vexatious proceeding legislation:

> It would be an odd result if [the earlier judgment] simply has to be ignored … The oddity of the result is reinforced by the likelihood that an application under the [legislation] would be prolonged if the findings made and views expressed in the earlier proceedings could not be taken into account. Indeed there would be a real risk that the court would be burdened with relitigation of issues of the very kind that the legislation is designed to avoid.[38]

It seems that the Supreme Court of South Australia is aware that its historic approach has sometimes been exceptional. For example in the s 39 trial described above, the judge remarked that 'ordinarily it may be expected that proceedings of this type should really be heard within a day or two'.[39] This observation is consistent with s 39 orders made in three low-profile South Australian matters without exhaustive examination and a prolonged trial.[40] It may be that on a future application, the Court more readily adopts the less rigorous approach, perhaps encouraged by the examples

35 *Kay v A-G (Vic)* (2000) 2 VR 436, 437 [1] (Ormiston JA). For a recent review of the authorities and the general consensus on how to approach a vexatious litigant application, see *Fokas v Trustee of the Estate of Maria Fokas [No 2]* [2020] FCA 30, [42]–[44], [51]–[53] (Wheelahan J) ('*Fokas [No 2]*').

36 *A-G (Vic) v Horvath* [2001] VSC 269, [28] (Ashley J).

37 *Teoh v Hunters Hill Council [No 8]* [2014] NSWCA 125, [52]–[53] (Beazley P, Emmett JA and Sackville AJA).

38 Ibid [53].

39 See *Workcover Corporation of South Australia v Moore-McQuillan* (Supreme Court of South Australia, Blue J, 4 May 2016), [34] quoted in *Moore-McQuillan v Workcover Corporation of South Australia* [2017] SASCFC 113, [29] (Kourakis CJ).

40 Limited-form orders were made in each matter: *Commonwealth Bank of Australia v Heinrich* [2003] SASC 322 (Debelle J); *Purins v Alpine Constructions Pty Ltd* [2008] SASC 11 (Debelle J); *Westwill Pty Ltd v Norman Waterhouse Pty Ltd* [2009] SASC 391 (Sulan J).

provided by senior judicial officers interstate or those accepted as appropriate by appeal courts.[41]

There is no empirical research on experiences and perceptions of s 39.[42] However, it may be instructive that each of the current and previous Attorneys-General not only consider vexatious litigants to be a problem in South Australia but also appear to be critical of s 39.

In 2016, the South Australian Parliament debated the Legal Practitioners (Miscellaneous) Amendment Bill 2016 (SA).[43] During debate the former Deputy Leader of the Opposition (who was Attorney-General from 2018–21) suggested, among other things, that s 39 'is a process which in itself is often quite lengthy'.[44]

The Attorney-General (at the time) appeared to agree with her observations about the s 39 procedure, replying:

> [The Deputy Opposition Leader] is speaking about people who are vexatious litigants …
>
> These people derive some bizarre satisfaction from conflict and participating in the legal system. They relish the opportunity to make complaints and are basically making a nuisance of themselves. There is a process, a very difficult process, whereby these people can be declared vexatious. They have to reach a really high bar before they can be declared vexatious. …
>
> The bottom line is that we have a situation where a very small number of people are wasting an enormous amount of time and money … in the courts and everywhere else. Eventually, we must get to the point where we can say, 'Look,

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41 Although the author has not reviewed the submissions made in all previous s 39 matters, it is unlikely that the Court was taken to the following examples decided under a stricter test: *Granich & Associates v Yap* [2004] FCA 1567 (French J) (one day, 38 paragraphs); *National Australia Bank Limited v Freeman* [2005] FCA 1895 (Spender J) (one day, 37 paragraphs, upheld on appeal); *Jones Lang Lasalle (Qld) Pty Ltd v Dart* [2005] FCA 1614 (Kiefel J) (one day, 44 paragraphs); *Velissaris v Maryvell Investments (in liq) [No 2]* [2008] FCA 511 (Gordon J) ('*Velissaris*') (one day, 21 paragraphs); *Tsekouras v Olsen* [2009] FCA 429 (Bennett J) (one day, 44 paragraphs); *Commonwealth v Scott* [2011] FCA 768 (North J) (one day, 23 paragraphs).

42 The empirical research conducted for the Victorian parliamentary inquiry offers insights for South Australia given the similarity between s 39 and the previous s 21 of the *Supreme Court Act 1986* (Vic). See: Freckelton, *Consultation with Court and VCAT Staff* (n 9); Freckelton, *Consultation with Judicial Officers and VCAT Members* (n 9). There is little empirical research on civil litigation in South Australia: See Tutton (n 5) 112.

43 The context giving rise to the following comments was a clause of that Bill that empowered the Legal Profession Conduct Commissioner to close a complaint immediately after receipt if the complaint was vexatious: See *Legal Practitioners Act 1981* (SA) s 77C(1)(a).

44 South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2016, 6231. See also Dillon (n 1), quoting and summarising the former Attorney-General's more recent comments.

> you have worn your welcome out. You have overdone it and you are actually wasting valuable public resources …' …
>
> What we are talking about here is people who make that job extremely difficult to do by clogging the system up with completely unmeritorious or tactical complaints …
>
> [T]he deputy leader is fully aware of who a number of these celebrity people are. … These people are basically abusing the system. I think the system, ultimately, when it gets to the point where it is being abused to this extent, should have the capability of defending itself.[45]

The Parliament seems to be aware of the difficulties arising from s 39 and the comments of these two politicians suggest discontent with its operation.[46] But what, if anything, should be done to address those difficulties?

III Legislative Reform of the Vexatious Litigant Law

The challenges presented by vexatious litigants can be managed in different ways. That might be at an organisational and registry level[47] or by individual judicial officers through the early finalisation of proceedings,[48] effective case management,[49]

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45 South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2016, 6232–3.

46 Similar comments were made in Parliament decades earlier. One Opposition member remarked during debate of the Supreme Court Act Amendment Bill 1987 (SA) that '[t]he problem of how we can dissuade people who abuse their rights under the law will no doubt test our legislative powers for many years to come. Certainly, this Bill does not seem to go any way towards improving the situation': South Australia, *Parliamentary Debates*, House of Assembly, 5 November 1987, 1743 (SJ Barker).

47 See, eg: Law Reform Committee (n 11) 83–92; Roderick Joyce and William Fotherby, 'Dealing with Querulous Litigants (Pt 1)' (2012) 1(2) *Journal of Civil Litigation and Practice* 66, 69–70; Lester, 'The Vexatious Litigant' (n 9) 19; Coffey (n 8) 61–4. See especially discussion about empowering the Registry to reject documents for being abuses of process (*Uniform Civil Rules 2020* (SA) r 32.3(1) ('*Uniform Civil Rules*')) and amending court rules to limit fee waivers for repeat litigants: Law Reform Committee (n 11) 111–14 [8.1.1]; Supreme Court of Victoria, Submission No 34 to Law Reform Committee, Parliament of Victoria, *Inquiry into Vexatious Litigants* (30 June 2008) 6; Roderick Joyce and William Fotherby, 'Dealing with Querulous Litigants (Pt 2)' (2013) 2(4) *Journal of Civil Litigation and Practice* 185, 187–8.

48 These include mechanisms for early resolution of a matter under the *Uniform Civil Rules* (n 47): applications for dismissal (rr 143.1 and 143.2), summary judgment (r 144.2) and/or strike-out (rr 34.1 and 70.3). See *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd* [2020] SASC 161, [41]–[70] (Doyle J) ('*Adelaide Brighton Cement*').

49 Such case management might include limiting the length of oral submissions (or determining applications on the papers), listing the substantive matter for hearing as early as possible (and so limiting unnecessary interlocutory disputes) or requiring evidence-in-chief to be given in writing.

or in-court management.[50] One should also be alert to the possible unintended consequences arising from a stricter approach to vexatious litigant orders,[51] as well as the benefits of an extra-legal response to the phenomenon of querulous litigants.[52] These are important matters to be considered in any fulsome discussion about managing vexatious litigants in South Australia.

Nonetheless, for the reasons discussed above with respect to the operation of s 39 in practice, the case for reform at the legislative level is such to merit a new look, perhaps towards a *Vexatious Proceedings Act* for South Australia.[53] In suggesting that, this article now poses questions as to whether legislative change — through slight tinkering or broader reform – should be contemplated.

A *Should There Be Some Limited Legislative Change? Is s 39 Fit for Purpose?*

Leaving to one side questions about whether s 39 achieves the desirable balance between important policy imperatives, there is a strong case in favour of at least minor legislative reform. Two recent Supreme Court cases illustrate this point.

Georganas v Barkla [2021] SASC 47 concerned a person who was prohibited from instituting proceedings in the Supreme Court of Western Australia in 2016,[54] and then in the Federal Court in 2018.[55] In 2019, he commenced an action in the Magistrates Court of South Australia against a federal parliamentarian, apparently connected to

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50 See, eg: Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) 126–8, 130–1, 143–6 (empirical research on how judicial officers manage the emotions of self-represented litigants); Bridgette Toy-Cronin, 'Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person' (PhD Thesis, University of Otago, 31 July 2015) 187–94, 246–7 (empirical research on how judges manage self-represented litigants in New Zealand courts).

51 For example, the likelihood that the now-vexatious litigant will transfer their grievances elsewhere. As Freckelton observes, 'there are still many targets for the often increasingly disconsolate and desperate renegade from the court system': Freckelton, 'Querulent Paranoia' (n 8) 132.

52 Lester, 'Searching for the Spectrum of the Querulous' (n 8) 513–15; Coffey (n 8) 65–7.

53 Compare the Victorian Law Reform Commission's conclusion that it 'is mindful of the reforms that have been implemented in other jurisdictions and believes similar reforms should be introduced in Victoria to ensure that vexatious litigants can be dealt with more effectively and efficiently': Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008) 598 [1.3.9]. Similarly, the Victorian Parliament Law Reform Committee found that 'reform is justified in *some* areas where [the legislation] does not appear to be working effectively': Law Reform Committee (n 11) 154 (emphasis in original). The former Victorian law was substantially similar in substance and practice to that in South Australia.

54 *A-G (WA) v Barkla* [2016] WASC 298 (Le Miere J).

55 *Barkla v Allianz Australia Insurance Ltd* [2018] FCA 2070 (Charlesworth J) ('*Barkla v Allianz Australia Insurance*').

his earlier litigation. The federal parliamentarian applied to the Supreme Court for orders under s 39 to stay the Magistrates Court claim and prohibit further claims.

The Supreme Court carefully analysed the history and case law concerning s 39. Justice Livesey held that the s 39 criteria were not met because the respondent had only commenced at best two proceedings in prescribed courts – notwithstanding that 30 proceedings had been initiated over about 10 years in other Australian courts.[56] In the alternative, Livesey J invited the applicant to make submissions on whether a limited form of the order could be made without use of s 39, through the inherent power of the Court. The Court found that it did have that power,[57] and it would be appropriate to make such an order.

The order is unlikely to be controversial to most readers. However, it is odd that to achieve that end, the Court could not exercise the legislative power that exists for the exact purpose of curbing vexatious litigation. Instead it had to embark upon a lengthy, cautious examination of its own powers to ensure there was some alternative basis to prevent future misuse of the Court's processes.

There is no clear, principled reason for why the Supreme Court cannot take into account litigation elsewhere in the federation.[58] All other Australian jurisdictions have removed the limitation.[59] The limitation is especially problematic given that vexatious litigants habitually cross between the courts west of King William Street and those east of it.[60] Perhaps for these reasons Livesey J remarked, *twice*, '[i]t is a matter for the Parliament to consider whether the definition of "proceedings" in s 39(6) should be broadened to embrace proceedings in any Australian court or tribunal'.[61]

The second of the cases, *Groom v Police* [2021] SASCA 1, highlights another limitation in the legislation. The decision concerned an application for permission to appeal from a Supreme Court decision (made in September 2020) to uphold a magistrate's decision (made in May 2020) to dismiss an application for revocation of an intervention order. The Court of Appeal refused permission to appeal on the

56 *Georganas v Barkla* (n 2) [119]–[121].

57 Ibid [224]. The inherent power was used for this purpose in two earlier Supreme Court matters: *Westwill Pty Ltd v Heath* [2010] SASC 358 (Gray J); *Manolakis v DPP (Cth)* [2009] SASC 193 (Gray J). Cf *Hunter v Leahy* (1999) 91 FCR 214 (French J).

58 A possible explanation arises from the enactment of s 39 pre-dating the Federal Court and the Federal Magistrates Court (established in 1976 and 1999 respectively).

59 This includes legislation pre-dating the model bill: see *Supreme Court Act 1933* (ACT) s 67A.

60 See, eg, *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* [2007] SASC 173, [65], [226], [231] (Anderson J) (the individual asserting that he would choose to 'take [his litigation] across to the Federal Court' if prohibited from filing in the Supreme Court).

61 *Georganas v Barkla* (n 2) [121], [225].

basis that the action was an abuse of process; the applicant was 'attempt[ing] to relitigate matters previously ventilated'.[62] In support of that proposition, the Court of Appeal identified three earlier Full Court judgments concerning the applicant's revocation request, as well as five single-judge Supreme Court judgments involving such requests (in addition to various Magistrates Court attendances).

Elsewhere in Australia, legislation allows courts to consider a vexatious litigant order on its own motion (or for a court registrar to apply for an order).[63] Faced with similar circumstances, those courts might invite the applicant to make submissions on the issue and if it considers an order is appropriate, make the order with little delay or further waste of resources. That course was recently taken by Sofronoff P of the Queensland Court of Appeal in comparable circumstances.[64] In 1984, the judges of the Supreme Court of South Australia commented that s 39 'depends upon an initiative of the Attorney-General. This may not always meet the needs of the situation and it is of some importance that the Court be empowered to make the order contemplated … of its own motion'.[65] The recommended amendment was refused in favour of the existing ability to refer matters to the Attorney-General for her or his consideration.[66] (And so the Court of Appeal referred Mr Groom's case to the Attorney-General.)

The cases show significant constraints in the existing legislation. Those issues have been considered and remedied in almost all other jurisdictions. The reforms in other jurisdictions have created vexatious litigant procedures which are logical, more responsive and better able to achieve the legislation's purpose. They are compelling examples of why even modest updating of s 39 would mean that it is more fit-for-purpose. But should there be more extensive reform and modernisation of the South Australian law?

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62 Ibid [10].

63 This was a clause of the model legislation. See: *Federal Court of Australia Act 1976* (Cth) s 37AO(3); *Vexatious Proceedings Act 2008* (NSW) s 8(4); *Vexatious Proceedings Act 2006* (NT) s 7(6); *Vexatious Proceedings Act 2005* (Qld) s 5(1); *Vexatious Proceedings Act 2011* (Tas) s 5(1); *Vexatious Proceedings Restriction Act 2002* (WA) s 4(2). In Victoria, the Supreme Court did not support an 'own motion' power: Supreme Court of Victoria (n 47) 2.

64 *Bradley v The Queen* [2021] QCA 101, [8]–[9] (Sofronoff P).

65 Chief Justice Len King, *Report of the Judges of the Supreme Court of South Australia for the Year Ended 31 December 1984* (Report, 6 April 1984) 11.

66 South Australia, *Parliamentary Debates*, Legislative Council, 6 October 1987, 949–50 (Christopher Sumner, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 15 October 1987, 1212–15. See also South Australia, *Parliamentary Debates*, House of Assembly, 5 November 1987, 1743 (Stephen Baker, Member for Mitcham) (where an Opposition member remarked that '[t]he Opposition supports the Bill … although it does not go anywhere at all, it certainly puts into the Act a practice that must surely exist today').

Without wishing to speculate, a certain frustration at the arrangement might be read in *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* [2007] SASC 173, [243]–[254] (Anderson J) (where Anderson J exercised the referral power twice in the same matter).

B *Should There Be Broader Legislative Changes? Is the Balance Struck by s 39 Consistent with Community Expectations as to the Administration of Justice?*

Vexatious proceedings legislation balances the need to respect an individual's right to access the courts against the need to protect the courts, people targeted by litigation, and the community. A broader policy question is whether, in the contemporary Australian legal system, s 39 strikes the desired balance between those two interests.

Traditionally, courts aspired to deliver substantive justice: 'justice was achieved when an individual claim or dispute concluded with a court judgment that was "substantively accurate"'.[67] John Sorabji argues that civil procedure reforms commencing at the turn of the century in England and Wales effected a 'shift in judicial philosophy',[68] where 'rights were [now] to be vindicated through the application of a new theory of justice'.[69] That new approach is 'committed to what has been described as proportionate justice' where 'substantive justice … is one aim amongst others, those being the pursuit of economy, efficiency, expedition, equality and proportionality'.[70]

In Australia, that shift is seen by comparing the High Court's position in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 to that in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.[71] In the latter case, a majority of the High Court remarked:

> [C]ase management … is now an accepted aspect of the system of civil justice administered by courts in Australia. It was recognised some time ago … that a different approach was required to tackle the problems of delay and cost in the litigation process. …
>
> The views … that justice cannot always be measured in money and that a judge is entitled to weigh in the balance the strain the litigation imposes upon litigants, are also now generally accepted.[72]

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67 John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014) 2 (citation omitted). Cf Chief Justice Doyle's remarks on how this kind of approach is contributing to the 'demise of civil litigation': Doyle (n 1) 240, 244.

68 Sorabji (n 67) 136, quoting *Three Rivers District Council v Governor and Company of the Bank of England [No 3]* [2003] 2 AC 1, 280 [153] (Lord Hobhouse).

69 Sorabji (n 67) 2.

70 Ibid 2–3 (citation omitted). See also: at 197–8; Vial (n 5) 1–4, 21–34.

71 Justices Dawson, Gaudron and McHugh remarked that '[c]ase management is … an important and useful aid for ensuring the prompt and efficient disposal of litigation. But … even in changing times … the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim': *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 154.

72 *Aon Risk Services* (n 6) 211 [92], 214 [100] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted).

In this contemporary context, the imposition of a vexatious litigant order may not seem as offensive as it once may have.[73] Recent decisions have been more nuanced in describing the precise nature of the infringement imposed by vexatious litigant orders. Justice Gordon emphasised that a vexatious litigant order 'does not preclude a litigant from pursuing a properly formulated claim if one should be presented to the court'.[74] Similarly, Wheelahan J characterised the order as a 'control', rather than a 'bar'.[75] In another decision, the Supreme Court of Western Australia contextualised the infringement of a litigant's right by explaining that although an order is not punitive, 'with every right comes a duty. The duty here is on the litigant to make proper and appropriate use of the courts' resources. That duty is breached when the same hopeless argument is run again and again.'[76]

The changing understanding of how 'justice' is to be achieved by the courts is, in some respects, recognised by legislative reform to their powers in other jurisdictions.[77] Recognising that there has been a fundamental shift in how the legal system understands justice, a new look at s 39 is sensible.

IV Vexatious Litigant Orders in South Australia: Time for a New Look?

Vexatious litigants are not a new phenomenon. Neither is the Supreme Court's procedure for dealing with them.

Having regard to the practice of s 39 applications analysed above, one might fairly observe that s 39 creates a rarely used, resource-intensive, costly and onerous procedure for responding to vexatious litigation. The effect of this is that a few individuals have – and will continue to – waste limited public resources through abuses of the court processes, harassing or annoying people targeted by those processes. Such conduct has – and will continue to – limit access to the courts for other members of the community, possibly eroding public confidence in the administration of justice.

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73 Cf Freckelton, *Consultation with Judicial Officers and VCAT Members* (n 9) 9 (one Victorian Supreme Court judge describes making vexatious litigant orders as 'such a draconian thing to do, the criteria should continue to be strict').

74 *Velissaris* (n 41) [20]. See also *Barkla v Allianz Australia Insurance* (n 55) [82]; *Hambleton v Labaj* [2010] QSC 124 (Applegarth J).

75 *Fokas [No 2]* (n 35) [36].

76 *A-G (WA) v Glew* [2014] WASC 100, [13] (Master Sanderson).

77 The legislation amending federal laws was titled the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth). The Act included various amendments intended to 'improve access to justice in a variety of ways', including by 'ensur[ing] that valuable judicial resources are used appropriately, efficiently and effectively: for the benefit of all litigants': Commonwealth, *Parliamentary Debates*, House of Assembly, 23 November 2011, 13555 (Brendan O'Connor). See also Victorian Law Reform Commission (n 53) 90–4 [4.1]; Law Reform Committee (n 11) 16–17.

Whereas all other state and Commonwealth courts have modernised their legislation, reasonable questions may be asked about whether the South Australian equivalent fits the purpose of vexatious litigant legislation, as well as the contemporary emphasis on achieving a just resolution of disputes by proportionate means. Those questions have previously been contemplated in a bipartisan way in the Parliament and arise on reading recent Supreme Court decisions.

The former Attorney-General stresses that 'access to justice in a timely manner is an important part of our civil justice system, which is why it is so important we have laws that help the courts deal with vexatious litigants in an appropriate manner'.[78] So in this modern court system explicitly concerned with 'the just, efficient, timely, cost-effective and proportionate resolution' of disputes,[79] perhaps it's time for a new look at old s 39.

78 See Dillon (n 1).

79 *Uniform Civil Rules* (n 47) r 1.5; *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd* [2020] SASC 161, [46] (Doyle J).