

ABUSE OF PROCESS AND STAY APPLICATIONS IN CRIMINAL PROCEEDINGS

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Foley's List

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What will be covered?

- What is an abuse of process
- Court's powers to prevent an abuse of process
- Permanent stays
 - Courts with power to order a permanent stay
 - Circumstances that may warrant a permanent stay
 - Determination of an application for a permanent stay
- Tips for making a permanent stay application
- Tips for meeting a permanent stay application
- Appeals from decisions to grant, or to refuse to grant, a stay
- Legislation
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What is an abuse of process?

- Court has power to ensure it's processes are not used to produce unfairness.
- The question is not whether the prosecution should have been brought, but whether the court, whose function it is to dispense justice with impartiality and fairness both to the parties and to the community which it serves, should permit it's processes to be employed in a manner which gives rise to unfairness.
 - *Jago v The District Court of New South Wales* (1989) 168 CLR 23, 28 (Mason CJ)

Although the categories of abuse of process remain open, abuses of process usually fall into one of three categories:

- (1) the court's powers are invoked for an illegitimate purpose;
- (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or
- (3) the use of the court's procedures would bring the administration of justice into disrepute.
 - *Rogers v The Queen* (1994) 181 CLR 251, 286 (McHugh J)

There are two aspects to an abuse of process:

1. That of vexation, oppression and unfairness to the other party; and
2. The fact that the administration of justice may be brought into disrepute.
 - *Rogers* at 256 (Mason CJ)

Preventing an Abuse of Process

- The power to prevent an abuse of process is discretionary.
- Courts have all the necessary powers to prevent an abuse of process and to ensure a fair trial. This may include powers such as:
 - Ordering separate trials
 - Excluding prejudicial evidence
 - Adjournments
 - Limited or conditional stays
- In an appropriate case, the exercise of the power may extend to the grant of a permanent stay of proceedings.

Permanent Stays

Power to grant a stay of criminal prosecution will only be ordered in **exceptional or extreme** circumstances. The power is to be exercised “with the utmost caution” and “will rarely be justified”.

A permanent stay, in effect, operates as a continuing immunity from prosecution.

The power is a qualification on the prima facie right of a person to insist upon the exercise of jurisdiction by the courts where appropriate; a fundamental aspect of the rule of law.

Jago, 31, 33 (Mason CJ), 76 (Gaudron J), 38-39, 49 (Brennan J)

The Queen v Glennon (1992) 173 CLR 592, 599, 602 (Mason CJ and Toohey J)

Strickland v DPP (Cth) (2018) 266 CLR 325, 370 (Kiefel CJ, Bell and Nettle JJ)

A permanent stay may only be granted in an “extreme case” where there is “a fundamental defect that goes to the root of the trial of such a nature that nothing a trial judge can do in the conduct of the trial can relieve against its unfair consequences” (*Dupas v R* (2010) 241 CLR 237)

Which Court's may grant a stay?

- Power to grant a stay is, in the absence of an express statutory provision, an inherent power (superior courts) or an implied power (inferior courts).
- In Victoria, the issue of whether courts of summary jurisdiction have this power was considered by Redlich J in *Neill v County Court of Victoria* [2003] VSC 328, [32]-[34].
- However, in *Grassby v The Queen* (1989) 168 CLR 1, 17-19 (Dawson J, Mason CJ and Brennan JJ agreeing), the High Court held that the implied power for the New South Wales Local Court to grant a stay did not extend to the granting of a stay by a Magistrate in a committal proceeding.

When might a stay be sought?

- Courts are at pains to emphasise that the categories of an abuse of process are not closed, and it is not possible to describe exhaustively the circumstances that may constitute an abuse of process (*PNJ v The Queen* (2009) 83 ALJR 384, 385).
- Despite this ...

The following circumstances have either formed the basis of a stay order or been recognised by the Court's as potentially capable of giving rise to the grant of a stay depending on the circumstances of the case:

- Undue delay in the proceedings
- Where accused indicted on ex-officio indictment without a preceding committal or where preliminary examination required
- Where there has been default or impropriety on the part of the prosecution in pre-trial procedures
- An unlawful infringement on the right to silence
- Where accusatorial process for investigation, prosecution and trial has been fundamentally altered

- Unlawful compulsory examination of a person about offences in which they are a suspect, where they refused to be interviewed
- Where a proceeding effectively litigates anew a case which has already been disposed of in earlier proceedings
- Where proceedings can be clearly seen to be foredoomed or bound to fail
- Where plainly material evidence is no longer available, such as evidence necessary for the prosecution to prove its case or where it can be shown the unavailability of particular evidence means the accused is denied a defence
- Where a failure of the prosecution to comply with its duty of disclosure results in a 'tangible risk that the trial would be unfair' or that the 'trial is likely to be unfair'.
- Adverse pre-trial publicity

What does the Court take into account in determining a stay application?

Court must undertake a balancing exercise to decide where the interests of justice lie (*Barton v The Queen* (1980) 147 CLR 75, 101 (Gibbs ACJ and Mason J)).

This may involve weighing up of the accused's interests with the community's right to expect that persons charged with criminal offences are prosecuted (*Jago*, 33 (Mason CJ), *Barton*, 102 (Gibbs ACJ and Mason J)).

The test for a permanent stay has also been expressed as "whether, in all the circumstances, the continuation of the proceedings **would** involve unacceptable injustice or unfairness" (*Walton v Gardiner* (1993) 177 CLR 378).

The need to maintain public confidence in the administration of justice is another consideration to be weighed (*Rogers*, 256 (Mason CJ)).

Availability of other measures to address unfairness or defect giving rise to the abuse of process must be taken into account (*Jago*, 77-78 (Gaudron J))

Tips for making a stay application

- Onus of satisfying the Court that there is an abuse of process lies upon the party alleging it and is a “heavy one” (*William v Spautz* (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ)).
- Consider what evidence you will lead on the application to satisfy the Court that an abuse of process exists.
- Demonstrate why that abuse of process cannot be addressed by any measures other than a permanent stay
- Be prepared to address why the accused’s rights outweigh the need to ensure public confidence in the administration of justice.

Tips for meeting a stay application

- Consider whether unfairness alleged should be conceded or opposed.
- Prepare to cross-examine defence witnesses
- Consider whether to call or tender evidence in opposing the application.
- Determine what measures the Court could take to relieve against the unfair consequences. A well formulated approach for addressing the unfairness may tend against a permanent stay.
- Prepare to address the Court on the competing public policy considerations for imposing a stay.

Appeals from decisions to grant, or to refuse to grant, stays

- Reference should be made to state and territory legislation that may be relevant to the grant, or refusal to grant, permanent stays
- For example, s 295 *Criminal Procedure Act 2009* (Vic), read with the definition of “interlocutory decision” in s 3, specifically provides for appeals against decisions granting, or refusing to grant, permanent stays in the County Court and Supreme Court.
- As the decision to grant, or to refuse to grant, a stay is discretionary, the principles governing discretionary judgments apply (see *House v The King* (1936) 55 CLR 499).

Legislation

- Some legislation confers an express power on the Court to order a stay of criminal proceedings (see, for example, s 90 *Criminal Procedure Act 2004* (WA) or clause 21 of Schedule 1 of the *Criminal Code act 1983* (NT)).
- See also section 130(5)(f) of the *Evidence Act 2008* (Vic) which provides that in weighing up whether evidence subject to a public interest immunity claim in a criminal proceeding ought be admitted or not, the Court must have regard to whether the direction ought be subject to a condition that the prosecution be stayed.

Recent Cases in Victoria

Snyder (a pseudonym) v The Queen [2021] VSCA 96 (Priest, Kyrou and Kaye JJA)

Visser v DPP (Cth) [2020] VSCA 327 (McLeish, Emerton and Osborn JJA)

DPP v Roberts (Ruling 1) [2021] VSC 472 (Kaye JA)