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DPP

Commonwealth Director of Public Prosecutions

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Mr Johan Scheffer MLC
Chair
Law Reform Committee
Parliament of Victoria
Parliament House, Spring Street
East Melbourne VIC 3002

Dear Mr Scheffer

Inquiry into Vexatious Litigants

I refer to your letter of 24 April 2008 to Mr Chris Craigie SC, Commonwealth Director of Public Prosecutions.

The Office of the Commonwealth Director of Public Prosecutions welcomes the opportunity to make a submission to the Law Reform Committee's Inquiry into Vexatious Litigants.

I have attached a copy of this Office's submission to the Inquiry.

Yours sincerely

Jaala Hinchcliffe
A/Senior Assistant Director
Policy



DPP

Commonwealth Director of Public Prosecutions

SUBMISSION BY

THE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

PARLIAMENT OF VICTORIA LAW REFORM COMMITTEE

Inquiry into Vexatious Litigants

Introduction

1. The Office of the Commonwealth Director of Public Prosecutions ("CDPP") welcomes the opportunity to make this submission to the inquiry into vexatious litigants.
2. The CDPP is responsible for the prosecution of offences against the laws of the Commonwealth and for the confiscation of the proceeds of Commonwealth crime. Cases prosecuted by the CDPP include matters involving drug importation and money laundering, offences against corporate law, fraud on the Commonwealth (including tax fraud, medifraud and social security fraud), people smuggling, sexual servitude and terrorism.
3. The CDPP has no investigative function. It can only prosecute or take confiscation action where there has been an investigation by the Australian Federal Police (AFP), the Australian Crime Commission (ACC) or some other investigative agency. However, the CDPP has a role to play in assisting investigative agencies by providing legal advice if requested during the investigation stage. Accordingly, the comments in this submission reflect the CDPP's role in the prosecution process.
4. In particular, this submission addresses the power of the CDPP to take over and discontinue prosecutions under section 9(5) of the *Director of Public Prosecutions Act 1983* (Cth) (DPP Act), as requested in the Committee's letter to this office.

Intervention in a private prosecution

5. Traditionally, it has been open to any person to bring a private prosecution for a criminal offence. That right is protected in Commonwealth matters by section 13 of the *Crimes Act 1914* (Cth), and is expressly preserved under section 10(2) of the *DPP Act*.
6. Under section 9(5) of the *DPP Act*, the Director has the power to take over a prosecution for a Commonwealth offence that has been instituted by another person. The Director is empowered to either carry on the prosecution or, if appropriate, to discontinue it. Sections 9(5) and 9(5A) are outlined below:

(5) For the purposes of the performance of his or her functions, the Director may take over a proceeding that was instituted or is being carried on by another person, being a proceeding:

- (a) for the commitment of a person for trial in respect of an indictable offence against a law of the Commonwealth; or
- (b) for the summary conviction of a person in respect of an offence against a law of the Commonwealth;

and where the Director takes over such a proceeding, he or she may decline to carry it on further.

(5A) Where the Director is carrying on a proceeding instituted by another person, being a proceeding of the kind mentioned in paragraph (5)(a) or (b), the Director may decline to carry it on further even if the Director has not taken it over under subsection (5).

7. A decision to intervene in a private prosecution is made in accordance with the *Prosecution Policy of the Commonwealth*. The *Prosecution Policy* informs the practice of the CDPP. Its application to each case is designed to ensure that the practice of the CDPP is consistent and fair, and that the CDPP continues to perform its role in the criminal justice system effectively.

8. The relevant paragraphs of the *Prosecution Policy* are extracted below:

- 4.7 In a formal sense all prosecutions in the summary courts are private prosecutions, even if the informant holds an official position. For the purposes of the following paragraphs a private prosecution is defined as any prosecution where the informant is a private individual as distinct from a police officer or some other official acting in the course of a public office or duty.
- 4.8 The right of a private individual to institute a prosecution for a breach of the law has been said to be "a valuable constitutional safeguard against inertia or partiality on the part of authority" (per Lord Wilberforce in *Gouriet -v- Union of Post Office Workers* [1978] AC 435 at 477). Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed, or at the least should not be allowed to remain in private hands. The power under section 9(5) of the Act therefore constitutes an important safeguard against resort to this right in what may be broadly described as inappropriate circumstances.
- 4.9 The question whether the power under section 9(5) should be exercised to take over a private prosecution will usually arise at the instance of one or other of the parties to the prosecution, although clearly the Director may determine of his or her own motion that a private prosecution should not be allowed to proceed. Alternatively, some public authority, such as a government department, may be concerned that to proceed with the prosecution would be contrary to the public interest and refer the matter to the Director.
- 4.10 Where a question arises whether the power under section 9(5) should be exercised to intervene in a private prosecution, and the private prosecutor has indicated that he or she is opposed to such a course, the private prosecutor will be permitted to retain conduct of the prosecution unless one or more of the following applies:
 - (a) there is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence;
 - (b) there are reasonable grounds for suspecting that the decision to prosecute was actuated by improper personal or other motives, or otherwise constitutes an abuse of the prosecution process such that, even if the prosecution were to proceed it would not be appropriate to allow it to remain in the hands of the private prosecutor;

- (c) to proceed with the prosecution would be contrary to the public interest – law enforcement is necessarily a discretionary process, and sometimes it is appropriate for subjective considerations of public policy, such as the preservation of order or the maintenance of international relations, to take precedence over strict law enforcement considerations; or
- (d) the nature of the alleged offence, or the issues to be determined, are such that, even if the prosecution were to proceed, it would not be in the interests of justice for the prosecution to remain in private hands.

4.11 A private individual may institute a prosecution in circumstances where he or she disagrees with a previous decision of the DPP. If, upon reviewing the case, it is considered the decision not to proceed with a prosecution was the proper one in all the circumstances, the appropriate course may be to take over the private prosecution with a view to discontinuing it.

4.12 In some cases the reason for intervening in the private prosecution will necessarily result in its discontinuance once the Director has assumed responsibility for it. In this regard, once the decision is made to take over responsibility for a private prosecution the same criteria should be applied at all stages of the proceeding as would be applied in any other prosecution being conducted by the DPP.

4.13 If it is considered that it may be appropriate to intervene in a private prosecution, it may be necessary for the DPP to request police assistance with enquiries before a final decision can be made whether or not to do so, and if so, whether or not to continue the prosecution. In addition, pursuant to section 12 of the Act, the person who instituted or is carrying on the private prosecution can be required to furnish to the Director a full report of the circumstances of the matter the subject of the proceeding together with other relevant information or material.

9. Private prosecutions are usually brought to the attention of the CDPP when the defendant(s) the subject of the private prosecution contact the CDPP. In some instances the relevant court may also contact the CDPP.

Frequency of the exercise of the Director's power under s 9(5)

10. The frequency with which the Director's power under section 9(5) of the Act is exercised fluctuates from year to year.

11. In 2006-2007 the power to take over and discontinue a prosecution was exercised in relation to 11 private prosecutors who commenced private prosecutions against more than 50 people. Many of the charges were for treason. Many of the individuals charged were politicians, judges, magistrates and prosecutors. The power was exercised once in 2005-2006, 18 times in 2004-2005, 14 times in 2003-2004, 7 times in 2002-2003, and once in 2001-2002.

Scope of the power under s9(5) of the DPP Act

12. The scope of the power under section 9(5) of the DPP Act was tested in *Miller v Commonwealth Director of Public Prosecutions* [2005] FCA 482. In this matter the applicant sought a writ of prohibition prohibiting the Director from taking further steps in relation to a private prosecution instituted by the applicant, a declaration that his decision to take over and decline to carry on further the proceeding was invalid and erroneous in law, and an order setting aside that decision.

13. The applicant submitted that s 9(5) should be given a narrow interpretation such that it could only be invoked in circumstances where the Director had already made a decision to institute or carry on a prosecution, and then, for whatever reason, determined not to do so. The

applicant submitted that as the Director had not decided to institute or carry on this prosecution, and indeed had decided not to do so, the power conferred by s 9(5) could not be invoked. Justice Weinberg held that this argument was “misconceived and must be rejected.” His Honour ruled that “section 9(5) should be given its ordinary and natural meaning.”

14. Justice Weinberg observed (at 24-25):

In my view the subsection is intended to operate as a safeguard. There are cases, fortunately few, where private litigants have invoked the processes of the criminal law for wholly improper purposes. There are also cases where private prosecutions that are entirely misconceived have been brought. It may be oppressive, and is likely to be costly, to require a defendant to such a proceeding to take steps in court to have the charges dismissed. Section 9(5) permits the Director, who has the responsibility for ensuring compliance with the Prosecution Policy, to step in and prevent this form of harassment.

That this is the correct interpretation of s 9(5) is borne out by the Prosecution Policy itself. Paras 4.7–4.13 deal with intervention in a private prosecution.

Referring to the *Prosecution Policy*, Justice Weinberg also observed (at 26):

It is clear, from these guidelines (which have been in force for many years), that the Director has always proceeded upon the assumption that s 9(5) enables him to terminate a private prosecution that he considers should not be permitted to continue. In my opinion, that assumption is warranted. The guidelines recognise the importance of the right of a private individual to institute a prosecution for a breach of the law. However, they also recognise that the right is open to abuse. Moreover, there may be factors known only to the Director that would make it contrary to the public interest for a prosecution brought in good faith to be continued. These considerations explain why s 9(5) was enacted. They also explain why the subsection should not be given the narrow, and somewhat artificial, interpretation for which Mr Baker contends.

Brian William Shaw

15. The matter of Brian William Shaw demonstrates the importance of the CDPP’s power to take over and discontinue private prosecutions under s9(5) of the Act and the utility of subsequent vexatious litigant proceedings. Mr Shaw instituted numerous private prosecutions and civil proceedings in Victoria between 2002 and 2006 and in Western Australia in 2004. The CDPP was a party to the vexatious litigant proceedings in Western Australia but not in Victoria. Section 21(1) of the *Supreme Court Act 1986* (Vic) provides that only the Attorney-General may apply to the Court for an order declaring a person to be a vexatious litigant.

Vexatious litigant proceedings in Victoria

16. Brian William Shaw was declared a vexatious litigant under section 21 of the *Supreme Court Act 1986* (Vic) in *The Attorney-General for the State of Victoria v Shaw* [2007] VSC 148.
17. The declaration that Mr Shaw was a vexatious litigant arose out of Mr Shaw’s numerous private prosecutions. Mr Shaw had brought 35 separate criminal charges in the Magistrates’ Court of Victoria between September 2002 and August 2006, against 20 persons including the Governor-General, justices of the High Court, Judges and Masters of the Supreme Court of Victoria, the Director of Public Prosecutions for the State of Victoria, the Commonwealth Director of Public Prosecutions, and the Attorney-General for the State of Victoria. The charges included taking and administering unlawful oaths, attempting to pervert the course of justice, conspiracy to pervert the course of justice, treason, and a range of other offences under Victorian and Commonwealth law. Each proceeding was ultimately struck out by the Magistrates’ Court on the basis that the relevant Director of Public Prosecutions, who had taken over the prosecutions, withdrew the charges.

18. In declaring Mr Shaw a vexatious litigant, Justice Hansen held (at 66):

Viewing the matter overall, I am of the opinion that the defendant has habitually and persistently instituted vexatious legal proceedings, without any reasonable ground. The allegations made by the defendant are of the most serious nature, yet completely lacking in substance. In all the circumstances, I am satisfied that it is appropriate to declare that the defendant is a vexatious litigant and, subject to one exception, to order that he not commence or continue any legal proceeding (whether civil or criminal) in the Court, an inferior court or any tribunal constituted or presided over by a person who is an Australian lawyer, without leave of the Court. The exception is that, subject to further order, the defendant may continue the *Shaw v Fragapane* proceeding which I have not characterised as a vexatious proceeding.

Vexatious litigant proceedings in Western Australia

19. In *Attorney-General (WA) v Shaw* [2004] WASC 280, an application was brought by the Attorney General for the State of Western Australia and by the CDPD seeking orders declaring Mr Shaw a vexatious litigant under the *Vexatious Proceedings Restriction Act 2002* (WA). Commissioner Braddock SC of the Supreme Court of Western Australia ordered that:

No legal proceedings shall be instituted by Brian William Shaw or any person acting on behalf of Brian William Shaw in the State of Western Australia in the Supreme Court or in any inferior court or tribunal, unless Brian William Shaw shall first obtain the leave of the Supreme Court, or inferior court or tribunal (as the case may be) pursuant to section 6 of the Vexatious Proceedings Restriction Act 2002.

20. The CDPD sought leave from the Supreme Court, under section 4(2)(c)(ii) of the *Western Australia Act* to bring the application for orders against Shaw. In considering the application for leave, Commissioner Braddock observed:

[I]t is apparent that the Commonwealth Director of Public Prosecutions falls potentially within two headings under s 4(2)(c). The first is "a person against whom another person has instituted or conducted vexatious proceedings" [s 4(2)(c)(i)], and the second is "a person who has a sufficient interest in the matter" [s 4(2)(c)(ii)].

In granting the CDPD leave Commissioner Braddock SC held:

In my view, it is the public character of the obligations of the Commonwealth Director of Public Prosecutions which renders him a person with sufficient interest in the matter, being that interest raised by the statutory duty placed upon the Director where private prosecutions against laws of the Commonwealth are instituted. Thus, I determined that leave should be granted to the Commonwealth Director of Public Prosecutions, in that right, to bring these proceedings. His position is similar to those officers named in the Act as entitled to bring application and to the law officers who may initiate application for similar relief under the High Court Rules and Federal Court Rules.

Comparison between Victorian and Western Australian vexatious litigant provisions

21. A comparison of the *Supreme Court Act 1986* (Vic) and the *Vexatious Proceedings Restriction Act 2002* (WA) highlights important differences that are of direct relevance to the CDPD. As noted above, under the *Western Australian Act*, the CDPD is, with leave of the Court, able to seek orders against a person who has instituted or conducted vexatious proceedings. In Victoria this right is limited to the Attorney General.

22. Another important distinction is in the definition of 'vexatious proceedings' in the respective provisions. Section 3 of the *Western Australia Act* defines vexatious proceedings as proceedings:

- (a) which are an abuse of the process of a court or a tribunal;
- (b) instituted to harass or annoy, to cause delay or detriment, or for any other wrongful purpose;
- (c) instituted or pursued without reasonable ground; or
- (d) conducted in a manner so as to harass or annoy, cause delay or detriment, or achieve any other wrongful purpose.

The Victorian *Act* does not directly define 'vexatious proceedings' however it does provide that a 'vexatious litigant' is a person that has

- (a) habitually; and
- (b) persistently; and
- (c) without any reasonable grounds

instituted vexatious legal proceedings (whether civil or criminal) in the Court, an inferior court or a tribunal against the same person or different persons.

23. In addressing the relevant principles relevant to the application of s 21 of the *Supreme Court Act 1986* (Vic), Hansen J referred [at 5] to the summary provided by Ashley J in *The Attorney General for the State of Victoria v Horvath, Senior* [2001] VSC 269 at [28]:

[T]he following matters are, according to the authorities, relevant: first, where an order has been made dismissing an action as frivolous or, or striking a pleading out, it is not for a court considering a s 21 application to go behind the order and go into the merits of the argument as a court of appeal would do. Second, findings which are required do not depend on viva voce evidence or credibility of witnesses. The critical evidence is to be found in court files — documents, Judgments, orders and reasons. For that reason, any hearsay material contained in an affidavit in support of an application, even though objectionable, should be treated simply as distraction, and ignored. Third, the question is not whether the manner in which a proceeding is conducted is vexatious; it is whether, having regard to its nature and substance, it should be so characterised. Fourth, and this is a more general proposition with respect to s 21, in determining whether the Attorney-General has made out a case, the court is not concerned with a minute individual examination of each proceeding. It must consider the overall impression created by the number of proceedings, their general character and their results.

The precise definition of 'vexatious proceedings' in the Western Australian *Act* has the benefit of conveying a clear legislative intention regarding vexatious litigants. This is helpful when it comes to framing an application for orders under the *Act*.

Conclusion

24. It is important that the courts are able to efficiently and effectively perform their role while preserving the community's general right of access to the judicial system. The limited experience of this Office with the operation of section 21 of the *Supreme Court Act 1986* (Vic) is that it provides an adequate mechanism for responding to vexatious litigants. The CDPD does however draw the Committee's attention to the *Vexatious Proceedings Restriction Act 2002* (WA) for its consideration in reviewing this area.