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LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne— 6 August 2008

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Mr P. Byrne, principal solicitor, policy and advice section, Office of Public Prosecutions.

The CHAIR — Peter, thank you very much for coming to this afternoon’s hearing and for the material which you have provided to us. I am sure you are aware that our discussion is protected under parliamentary privilege, but obviously that does not extend outside the confines of this hearing. Hansard is recording the proceedings and you will get a copy of the transcript. We have got about 40 minutes, so we will leave it open to you for however much time you want to perhaps set us up, talk to the submission and say whatever else you want to say in relation to the terms of reference, and then we will open it up.

Mr BYRNE — I do not plan to speak for very long initially, but there are a few things that I will reiterate in relation to the submission that was made by the Director of Public Prosecutions. The first aspect of it was that I think our office was asked to comment on the situation with the Public Prosecutions Act, which provides that the Director of Public Prosecutions can take over and conduct any proceedings that the director thinks appropriate to be taken over. Often what that means in the context of this discussion is that they will be taken over and discontinued or terminated, whichever way you want to describe it. I think the situation is that that will occur in cases other than cases involving what might be described as vexatious litigants. There may be other matters that are taken over just simply because there is a particular reason for it, but there certainly would be some cases where somebody will have taken criminal proceedings against a number of people on a number of different occasions and the director would have made a decision under section 22(1)(b)(ii) of the Public Prosecutions Act to take it over. On looking at the statistics of the number of matters that have been taken over in this way — we keep a database of matters where this has been done — I was able to count about 25 matters in the last five years where this has happened. Only a relatively small proportion of those might have been people who could theoretically come under the description of vexatious litigants. Certainly some would be people where criminal proceedings have been taken a number of times in some cases against public officers or parliamentarians and, in some cases, judges.

The CHAIR — No!

Mr BYRNE — They would be situations where it would have been considered that there would not have been a case that the person could really press home. It is what might be described as a reasonably regular but not very common occurrence — perhaps five a year. The director has a policy in relation to the taking over of proceedings, and within that policy there are certain criteria which are fairly basic, I suppose.

They really relate to situations where it is considered that there is some improper purpose in bringing a proceeding such as personal malice or gain, or there is insufficient evidence on which to base such a proceeding. But overall the sort of criteria the director would use would be similar to the criteria that the Supreme Court probably uses under section 21 of the Supreme Court Act, which I note is very well summarised in the document sent to our office — being that the Supreme Court has interpreted ‘vexatious’ to mean proceedings that are brought for an improper purpose or which are revealed to be hopeless. That is really the sort of criterion that the director would apply, not so much the issue of hopelessness, but really the issue of an improper purpose. I suppose there are a certain value judgements that are made in that which are not always necessarily stated, but I suppose it is a matter of experience and knowing the sort of matters that come within that category.

Obviously each case is looked at on an individual basis. It is not a case of saying, ‘This is a certain person who has been here before’. Every case is looked at on its merits as required, and certainly as required now under the human rights charter. I think as a public authority we would certainly be required to have regard to people’s rights, including the right to recognition and equality before the law, the right to a fair hearing, and matters such as that. Quite often the greater problem we would have would be after the director has made such a decision where the person may become aggrieved and may pursue proceedings in VCAT or FOI-type proceedings which may use up our resources to some extent. It is not a major problem within the office in terms of resources or generally.

One of the main submissions made by the director in the submission to the inquiry argues that perhaps the Chief Judge of the County Court and/or the Chief Magistrate could perhaps have some sort of power under some sort of legislation. Obviously there would have to be very strong safeguards in place, again particularly having regard to the human rights charter.

The CHAIR — Some power to — —

Mr BYRNE — Some power to perhaps either declare a person a vexatious litigant or to refer the person maybe to the Supreme Court if the matter was going to continue. Currently the Attorney-General is the only person

who can refer a matter. There is some thought that it might be good if certain senior judicial officers could have some sort of power in that respect as well. Obviously there is a very fine balance involved in people's rights.

The CHAIR — Do you think that power should be restricted to judicial officers if it is extended beyond the Attorney-General? Would it always be in the judiciary, or could other authorities in the community do it on behalf of aggrieved people?

Mr BYRNE — I think the view of the director would be that it would either be the Attorney-General or a judicial officer. I think it could be fairly dangerous to take it out of that realm, because it is such a major imposition on a person to take away their right to commence legal proceedings of any kind. I suppose that brings me to the point behind the submission as well — that is, when the director takes over a criminal matter — that often vexatious litigation probably happens in the civil process, but in the criminal field if the director takes it over it almost operates as if the director is declaring the person to be a vexatious litigant. I suppose in some cases it could be seen that way.

Certainly the director would not see it that way because the director would see it as being an individual matter looking at the merits, but I do not think the director would support the idea of other people having that power. I am not sure what sort of people you would be thinking of.

The CHAIR — I do not have any in mind particularly; it is just that during the course of today I had been thinking of this more as an action where the detriment was experienced by the court and the public in a sense — that it is the court's resources that are always talked about and it is the time that is taken to process these things. But in the course of discussions today it has come to light and people have given prominence to the fact that it can be — and we have used the term malicious — malicious abuse here. Clearly a human being can be the object and experience a detriment.

Mr BYRNE — Certainly.

The CHAIR — So in that case is the court the only body that can seek to protect that person?

Mr BYRNE — Could it be that a person who has been the subject of this type of behaviour by somebody else might perhaps apply?

The CHAIR — Yes, and it might be — I am thinking on my feet, in a sense — someone who would stand for that person who had been attacked. I am thinking on my feet; I should be more prepared.

Mr FOLEY — Or, indeed, is there an equivalent? If in the Office of Public Prosecutions the director takes over a matter and steps in, is there an equivalent ability in the civil area to do that?

Mr BYRNE — Probably not, I think. The director is in a peculiar position in that he is the person who effectively controls prosecutions.

Mr FOLEY — On behalf of the state.

Mr BYRNE — On behalf of the state, so unless you had some sort of litigation ombudsman or someone like that, I am not sure how that would work. But you might have some severe problems getting that through the human rights process.

Mr FOLEY — Yes. I suspect you are right, somehow.

Mr BYRNE — But certainly I think if you had a situation where the Chief Judge, the Chief Magistrate and the Chief Justice were able to do it, you could have a process where people could apply to a court.

Mr FOLEY — And is that what happens in a criminal matter? Does someone apply, or does the DPP just have a good look and say, 'This is funny. I'm stepping in'?

Mr BYRNE — That is the part I did not get to as well. The way we get to hear about these things used to be that the people who were named as defendants would contact us, tell us about these proceedings and say, 'Look, this is ridiculous. There is nothing in this, and we would like you to consider taking it over and discontinuing it'.

What has actually happened since 22 June 2006, when the principal registrar of the Magistrates Court issued a practice direction, has been that on receipt of a private prosecution the court in most circumstances — unless there are some particular factors that apply, such as the offence that is charged not being known to law or something like that — will actually provide us with a copy of the charges. That is happening more now. The Magistrates Court at Melbourne, for example, will send us details of the charges so that we can, if necessary, get involved early and help them, if you like, because otherwise it just clogs up their processes to have matters that have no merit and which are issued for an improper purpose, basically. I was going to give you some examples of some of the matters we have had. I do not know if you are interested in that.

The CHAIR — Yes, that would be very interesting.

Mr BYRNE — Some of the defendants who have been involved would include police or specific police. That often happens. You get people taking action against police they are aggrieved with. They include the Queen, the Governor, the Governor-General, the Victorian DPP and the commonwealth DPP. In some of these cases we get multiple rolled-up numbers of defendants of various of these kinds of people. They also include the grand master of Freemasons, the prothonotary of the Supreme Court, banks and finance companies, trustees in bankruptcy, the registrar of the Family Court and the Victorian Attorney-General. We get a lot of different people and a lot of different charges, and sometimes fairly serious charges, I suppose: fraud; perjury; contempt; treason, which is a fairly common one; stalking; and misconduct in public office. Those are the sorts of matters that will come up, and often it is fairly clear that the charges are misconceived, although in some cases we have to look a bit deeper to actually find out a bit more about what has happened, and we might ask for information.

In fact the normal process is for the director to write to the person and give them the chance to provide more information to enable us to work out whether there is something in it or not. Sometimes we receive more information and sometimes we do not.

The CHAIR — So an individual on one of those topics might bring an action against the Queen or the Governor-General or somebody, and they bring that to court.

Mr BYRNE — They will probably issue it in the Magistrates Court to start with, because that is where all process starts, indictable or summary.

The CHAIR — Then step us through the process of how it gets to the office of the DPP.

Mr BYRNE — What would normally happen now is that the court would actually send a copy of the charges to our office asking us to consider — —

The CHAIR — On the basis that they see it for what it is?

Mr BYRNE — On the basis that it is a private prosecution, and they just have this practice direction that any private prosecution — because they are fairly unusual, I suppose, and because they so often will lead to the director at least considering whether or not he should step in.

The CHAIR — But they make an assessment at that point?

Mr BYRNE — No, they do not make an assessment. They just send it to us, under their practice direction that has been issued by the registrar there, just to enable us to have a look at it, because the director is the person in Victoria who is responsible for the prosecution process effectively, so that he can consider whether or not he thinks it should go on, basically. The prosecutor, or the private prosecutor, if you like, is the person that we would normally then write to and say, or the director would write to, saying — what will sometimes happen is that the director will say, 'I don't think this is a matter that has any merit', or whatever and the person would be asked to provide material to justify the prosecution, I suppose. It might not be put in those terms. It might be put just simply as a query as to 'On what basis are you putting these charges?'. There have been cases where we have done that and the director has chosen not to intervene, and the matter has gone on as a private prosecution.

Mr BROOKS — When the director makes that decision about whether you step in or not, you mention in your submission about well-established criteria having been developed, ensuring a fair and consistent approach. Are they published and, if you can talk about them, what are they?

Mr BYRNE — At this stage they are not published. We do have policies published on our website. This one is not actually published on it. I am not entirely sure of the reason for that at this stage, but the criteria involved are effectively whether continuation of the proceedings would constitute an abuse of process; an abuse of process may occur where there is some improper purpose in bringing the proceeding, such as personal malice or gain, or there is a conflict of interest, or there is insufficient evidence on which to base the proceeding, or where there is no reasonable prospect of a conviction. They are the main criteria. They are very broad criteria — —

Mr BROOKS — Sorry, in terms of if someone has repeatedly issued proceedings or is a regular or habitual litigant, that is not one of the criteria?

Mr BYRNE — No, it is not, because the director does not see that as an appropriate criterion because of the fact that he is required to consider every case separately on its merits, and because he is not an official who is able to judge that a person is a vexatious litigant, effectively. The fact that it has happened a couple of times, it is a bit like similar fact evidence, I suppose; because somebody has done something before does not mean that they might not have a valid claim the next time. That is the basis that it is done on. It just so happens that we have had a number of different claims or proceedings.

The CHAIR — You said you have about five a year, is that right?

Mr BYRNE — Yes, I went through — —

The CHAIR — Have you got a data system that keeps records? The sorts of things we are interested in are the numbers by year, which you indicated you could provide, the courts that were involved, the types of defendants and offences and what the DPP's decision was. Is that documented, and could we have that?

Mr BYRNE — What we have is a database that we call Brucebase, which is named after Bruce Gardner, who is my manager. It is not a public database, but I could probably give you such information.

The CHAIR — If we wrote to you and asked you for it?

Mr BYRNE — Yes, I could certainly do a digest, if you like, of information from it. I went through it last week and was able to determine, in most cases, the people involved and the nature of the charges and whether or not the director had considered the matter, taken it over, discontinued it or not. We do have the dates and other details of all of those. They go in as a matter of course.

I might indicate that when I said 25, in some cases there would be multiple defendants, so it is a matter of whether or not you count those as individual cases. We have brought them all into one. For example, there has been one matter from 2006 that involves about 13 different defendants and 13 different sets of proceedings, but we counted them under one heading because they were all brought together.

Mr FOLEY — It is probably not a fair question of the DPP, but essentially my understanding from the civil side of things is that in the Supreme Court that is almost what happens when they corral a series of applications that perhaps lack merit and have a sort-of Thursday Morning Special that ploughs things through.

Mr BYRNE — I am not sure. In this particular case this is one particular person bringing proceedings against a whole lot of individuals. I think most of them are actually public officers of one kind or another; from various states too, so it is a combination. Often these are combined Victorian and commonwealth takeovers and discontinuations because often they are against both Victorian and commonwealth officials, for example.

Mr FOLEY — So they will apply in the federal magistrates court or — —

Mr BYRNE — No. They will bring charges in Victoria against, for example, the Victorian Attorney-General and the commonwealth Attorney-General or the Governor-General and the Governor. They will bring charges under Victorian law or commonwealth law as they can do in the Victorian courts, and you will get both DPPs becoming involved in the matter, or one can take over or deputise on behalf of the other.

The CHAIR — Is there a single agency that monitors all the private prosecutions in Victoria?

Mr BYRNE — That would probably be us, I think.

The CHAIR — So you have a database for everything?

Mr BYRNE — We would probably cover all of the private prosecutions, unless there are some that slip through in the country courts, possibly. It may be that some of the country courts just let them go through and actually take them through to conclusion, I am not sure about that. I would have to check that with our circuit people perhaps.

Mr BROOKS — Just a quick question: on page 2 of the director's submission, it says that process you have just been talking about:

... is relatively effective in dealing with criminal proceedings initiated by vexatious litigants, but it may put the DPP in a difficult situation from time to time.

I am just wondering if you could expand on that — we understand that there is at least one case where the DPP was defendant in a private prosecution — and on whether that presents difficulties in how you handle those sorts of cases.

Mr BYRNE — Yes, that is something I had not thought of but it is the case that a number of those have involved situations where the director himself has been one of the defendants. So it puts one of the defendants in the position of taking over the proceedings against himself and terminating them, which is probably a little unusual. It is even more unusual, I suppose, in the sense that it is not a decision that can be reviewed in any way; not that the director should be able to be reviewed, but perhaps that is what he was getting at.

Mr BROOKS — On page 3 the director describes how the current vexatious litigants laws work here in Victoria, and in the second paragraph it says in part:

This process is seen as involving an important safeguard, whereby a member of the executive branch —
referring to the Attorney-General —

of government refers the matter to the judicial branch. It is important that there are checks and balances ...

I just wanted to get your view as to if there are any changes to be recommended as to how vexatious litigants legislation works in Victoria and whether you think there still needs to be a check and balance of having the process run through both the judicial and executive branches of government.

Mr BYRNE — The view of our office would be that either there needs to be that sort of separation of powers aspect to it, or if it is going to be done by courts without that, then there have to be fairly liberal appeal processes, and that is why there was the suggestion that maybe if a person had been declared a vexatious litigant they should obviously have a right of appeal, and in fact it may be considered that they should be almost guaranteed legal aid on appeal. Obviously that is not something the director could really have an argument on, but it is just that strong safeguards are needed, I suppose, because while laws can be brought in at any time to change this and make it harder for people to bring proceedings, there always needs to be some check in place because you do not know what might happen in the future and what sort of things people might consider vexatious in the future. Does that make sense?

Mr BROOKS — Yes, it does, thanks.

The CHAIR — It also says in your submission that the procedure can involve a significant diversion of resources. Are you able to tell us how and how much?

Mr BYRNE — We tried to do an estimate of the average cost that would be involved in dealing with that fairly standard process where a proceeding is taken over, and I think the estimate we came up with was in the vicinity of \$5000 to \$10 000 per matter, with great difficulty in being any more precise than that. But in addition to that there would be the costs involved in some matters where the person carries on, if you like, to freedom of information proceedings, or VCAT proceedings, which we have had recently with a couple of these matters, so it is difficult to be precise; and if you are looking at five a year, at a cost of about \$5000 to \$10 000, then it is not a huge amount, but I suppose in the context of our budget it is still a reasonable amount. And that is probably a fairly low estimate. It is very difficult to be precise with it. It involves a number of different stages and people, including people actually attending court to deal with these things and people to deal with the correspondence, and the director is involved and other people.

The CHAIR — Do you think there are more effective ways of dealing with vexatious criminal proceedings? The example that we have thought through is that the courts could be given statutory power to summarily dismiss private criminal prosecutions — the courts themselves — or should court registrars have the power to refuse to file vexatious proceedings?

Mr BYRNE — I think the first option certainly has a lot of merit — the idea of a court being able to dismiss on that basis; but again it would have to have the sorts of safeguards that I have talked about such as the right of appeal and possibly even the right to funding for an appeal.

I think any attempt to bring in legislation like that would obviously have to go through that human rights process as well, and I think that would more particularly apply to the second option you were talking about, of not even filing the proceedings. I think that would be a pretty drastic step to take, to not even allow the proceedings to be filed, because that would be putting that decision in the hands of — I do not know who would actually decide that, whether it would be a registrar or a judge or a magistrate or who it would be.

The CHAIR — It has been proposed that the master does that in the Supreme Court.

Mr BYRNE — That is not something that we have considered actually, so I probably should not express an opinion on it to any great extent, but I suspect that that would be seen as being a bit difficult to justify. We are pretty much confined to the criminal side of things, I guess. We do not see what is going on on the civil side. It may well be that the courts have good reasons for wanting that to be the case.

The CHAIR — Sure. Has the OPP ever referred anyone to — sorry, has the Attorney-General ever referred a person who has brought vexatious criminal proceedings to the Attorney-General?

Mr BYRNE — Has the Attorney-General referred — —

The CHAIR — No, has the office ever referred a person — —

Mr BYRNE — To the Attorney-General? Not that I am aware; I do not think so, partly because the power is so definite, I suppose, that the director can make the decision, and I do not suppose the need has been sent to do that. But it could happen, I suppose; if it continued to happen, then the director could do that.

The CHAIR — I think that has taken us through everything we wanted to raise with you, so that is it.

Mr BYRNE — Thanks very much. Thanks for hearing me.

The CHAIR — Thank you very much, Peter. That is really useful. As I said before, you will get a copy of the transcript. That will be sent to you, and you can make any changes to that. Actually that information that we asked you for in relation to the data, the conversation — —

Mr BYRNE — You want something a little bit more.

The CHAIR — Yes.

Mr BYRNE — Okay. Certainly I can do that.

The CHAIR — Thank you very much.

Committee adjourned.