MINISTRY OF JUSTICE
Tāhū o te Ture

14 September 2015

Liam Stoneley
fyi-request-2959-c926da46@requests.fyi.org.nz

Dear Mr Stoneley

I refer to your email of 20 July 2015 requesting, under the Official Information Act 1982:

- all documents, manuals or reports regarding private prosecutions in New Zealand; and
- anything that helps citizens understand the process of how to proceed with private prosecutions.

We do not hold any documents relating to the second part of your request ("anything that helps citizens understand the process of how to proceed with private prosecutions") and do not have any reason to believe this information would be held by another agency. Accordingly, this part of your request is declined under section 18(g).

On 17 August, this request was extended for a further 20 working days under section 15A of the OIA as the consultations required to prepare an answer to your request were such that a proper response could not be made within the original time limit.

We are providing number of documents to you that fall within the scope of the first part of your request ("all documents, manuals or reports regarding private prosecutions in New Zealand"). However, our consultation process has taken longer than anticipated and we are unable to provide all documents that fall within the scope of your request at this time. We apologise for this delay. We will provide the remaining documents to you by 23 September 2015.

Approach to your request

The table below lists documents that fall within the scope of your request and contains details of the information in these documents which is released to you.

Parts have been withheld under section 9(2)(a) of the OIA in order to protect the privacy of individuals; 9(2)(g)(i) to protect the free and frank expression of options between officials and Ministers of the Crown; and 9(2)(h) to maintain legal professional privilege. Other parts of the documents have been released to you.

Where information has been withheld under the OIA I am satisfied that there are no other public interest considerations that render it desirable to make the information available.

	Document	Date	Comment
1	Report to Minister of Justice from Ministry of Justice about Ministerial correspondence	31/06/1996	Names and details of individuals withheld to protect the privacy of those individuals
2	Attachment to document 1: correspondence between the Minister of Justice and a member of the public	31/06/1996	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals.
3	Correspondence between the Minister of Justice and a member of the public	July 1997	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals.
4	Correspondence between the Minister of Justice and a member of the public	November 1997	Details of individuals are withheld under 9(2)(a) to protect the privacy of those individuals.
5	Briefing to Minister of Justice about recent media interest in private prosecutions	09/09/2000	Released in full.
6	Briefing to the Minister of Justice from the Ministry of Justice		Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals. Other parts withheld under 9(2)(g)(i) to protect the free and frank expression of options between officials and Ministers of the Crown.
7	Note to the Minister of Justice from Office of Legal Counsel	1 September 2004	All withheld under s9(2)(h) to maintain legal professional privilege.
8	Correspondence between the Minister of Justice and a member of the public	March 2006	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals.
9	Legal advice from Office of Legal Counsel to Ministry of Justice	21/07/2009	All withheld under s9(2)(h) to maintain legal professional privilege.
10	Drafting instructions for Parliamentary Counsel Office on the Criminal Procedure Simplification Bill	27/09/2010	All withheld under 9(2)(h) to maintain legal professional privilege.

You have the right under section 28(3) of the OIA to complain to the Ombudsman about the delay, and the decision to withhold some of the information requested.

Yours sincerely,

Brendan Gage
Manager
Criminal Law Team
Ministry of Justice

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IN 09

31 May 1996

MINISTER OF JUSTICE 9(2)(a)

REPORT ON MINISTERIAL 843 FROM _____

You requested a report on the attached letter from dated 22 April 1996 proposing that the Court be given the ability to make an order for security of costs against the prosecution where a private prosecution is bought.

Issue

The proposal arises from concern that although the Costs in Criminal Cases Act 1987 allows for awards of costs against the prosecutor, the Act is of little use where the prosecutor is a private individual who does not have the financial resources to meet an award. Of particular concern to 9(2)(a) are cases where the proceedings are malicious or vexatious. He notes that even if the Court ultimately dismisses the charge as an abuse of process the defendant will still have incurred legal costs as well as been subject to considerable suffering. The defendant's ability to receive compensation is entirely dependent on the financial position of the private prosecutor. The ability for a Court to make an order for security of costs will, in 9(2)(a) view, ensure that there are monies available to pay any awards of costs against the prosecutor and may deter persons from bringing vexatious proceedings.

Current Law

Section 77A of the Summary Proceedings Act 1957 provides that :

> "The Attorney-General may, at any time after an information has been laid against any person under this Part of this Act and before that person has been convicted or otherwise dealt with, direct that an entry be made in [[the Criminal Records kept pursuant to section 71 of this Act]] that the proceedings are stayed by his direction, and on that entry being made the proceedings shall be stayed accordingly.]"

Given that the proceedings can be stayed from the outset the defendant is likely to have incurred only the most minimal costs. The same ability to stay proceedings is provided for in relation to indictable offences pursuant to section 173.

Enforcement

Orders for Awards of Costs in the District Court

Where an award of costs has been made against the private prosecutor under the Costs in Criminal Cases Act 1967, section 7 of that Act provides that where the order is made by a District Court it is enforceable as if it were an order made under Part II of the Summary Proceedings Act.

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The enforcement provisions are set out in Part III of the Act. The provisions refer to "fines" but fines is defined to include any sum of money adjudged or ordered to be paid by a conviction or order, whether described as a fine, or as costs, expenses, fees or otherwise.

If a person does not pay an award of costs then the Registrar may, pursuant to section 87, issue a warrant to seize property, or make an attachment order attaching any salary or wages payable or to become payable. Where the award continues to remain unpaid despite having taken action under section 87 or where the Registrar is satisfied that the person does not have the means to pay or enforcement action under section 87 would not be likely to be effective, the registrar must refer the matter to a District Court Judge with a report on the circumstances of the case and may order that the defendant be brought before the Judge and, if necessary, issue a warrant for the person's arrest.

After considering the report and the financial position of the person the District Court Judge has a variety of options including the power to issue a warrant of commitment, remit the fine or part of the fine, or impose a sentence of community service or periodic detention.

Orders for Awards of Costs in the High Court and Court of Appeal

Where any order for costs is made against a person (except the Crown) by the High Court or the Court of Appeal, other than on appeal under Part IV of the Summary Proceedings Act, the order has the effect of a judgement once filed in the High Court. The order can then be enforced by means of any one of a variety of execution processes, namely, a charging order, a writ of sale, a writ of possession, a writ of arrest or a writ of sequestration.

Comment

9(2)(a)

We do not support proposal. The current law adequately provides for situations where the private prosecutor instigates vexatious proceedings or has insufficient funds to meet any award for costs. Orders for security of costs are not needed to deal with the problems Mr Moses has identified. They could create an undesirable barrier to bringing private prosecutions and limit access to remedies of that nature to the wealthy. Such a situation would offend the general principle that every person have equal access to the law.

We have enclosed a draft reply to 9(2)(a) for your signature if you approve.

Fiona Leonard
for Secretary for Justice
TITLE:Ltr: Private Citizens Launching Private Prosecutions

LRD FILE NO:LRD 93-15; IN 09

AUTHOR:Fiona Leonard

DATE:31 May 1996

9(2)(a)

Dear 9(2)(a)

I have had the opportunity of considering your letter of 22 April 1996 regarding the enactment of a provision granting the Court power to make an order for security of costs in relation to private prosecutions.

While appreciating your concerns I do not support the enactment of legislation empowering the courts to make orders for security of costs against private prosecutors. They could create an undesirable barrier to bringing private prosecutions and limit access to remedies of that nature to the wealthy. Such a situation would offend the general principle of law that every person have equal access to the law.

In addition, I am of the opinion that the current law already adequately provides for situations where a private prosecutor instigates vexatious proceedings. First section 77A of the Summary Proceedings Act 1957 provides that:

> "The Attorney-General may, at any time after an information has been laid against any person under this Part of this Act and before that person has been convicted or otherwise dealt with, direct that an entry be made in [[the Criminal Records kept pursuant to section 71 of this Act]] that the proceedings are stayed by his direction, and on that entry being made the proceedings shall be stayed accordingly.]"

Given that the proceedings can be stayed from the outset the defendant is likely to have incurred only the most minimal costs. The same ability to stay proceedings is provided for in relation to indictable offences pursuant to section 173.

Second, where an award of costs has been made against the private prosecutor pursuant to the Costs in Criminal Cases Act 1967 pursuant to section 7 the Act provides that where the order is made by a District Court it is enforceable as if it were an order made under Part II of the Summary Proceedings Act. Thus it can be enforced pursuant to the Summary Proceedings Act.

The enforcement provisions are set out in Part III of the Act. The provisions refer to "fines" but fines is defined to include any sum of money adjudged or ordered to be paid by a conviction or order, whether described as a fine, or as costs, expenses, fees or otherwise. Accordingly it includes awards of costs.

If a person does not pay an award of costs then the Registrar may, pursuant to section 87, issue a warrant to seize property, or make an attachment order attaching any salary or wages payable or to become payable. Where the award continues to remain unpaid despite having taken action under section 87 or where the Registrar is satisfied that the person does not have the means to pay or enforcement action under section 87 would

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not be likely to be effective, the registrar must refer the matter to a District Court Judge with a report on the circumstances of the case and may order that the defendant be brought before the Judge and, if necessary, issue a warrant for the person's arrest.

After considering the report and the financial position of the person the District Court Judge has a variety of options including the power to issue a warrant of commitment, remit the fine or part of the fine, or impose a sentence of community service or periodic detention.

Where any order for costs is made against a person (except the Crown) by the High Court or the Court of Appeal, other than on appeal under Part IV of the Summary Proceedings Act, the order has the effect of a judgement once filed in the High Court. The order can then be enforced by means of any one of a variety of execution processes, namely, a charging order, a writ of sale, a writ of possession, a writ of arrest or a writ of sequestration.

Yours sincerely

Douglas Graham
Minister of Justice

TITLE:Ltr: Private Citizens Launching Private Prosecutions

LRD FILE NO:LRD 9-3-15; IN 09

AUTHOR:Fiona Leonard

DATE:31 May 1996

3

9(2)(a)

Dear 9(2)(a)

I write in response to your letter of 18 July 1997 in which you brief me on developments regarding your company and comment on the recent decision made by the Solicitor-General on the involvement of Crown Solicitors in private prosecutions.

Although I am following this issue with interest, I should note that the Solicitor-General is responsible for the conduct of Crown Solicitors and it would not be appropriate for me, as Minister of Justice, to interfere with his decision.

The Ministry of Justice is monitoring developments in this area and will consider the need for any reform on the law relating to criminal prosecutions further in the context of the ongoing work of the Law Commission.

Thank you for taking the time to write.

Yours sincerely

Douglas Graham
Minister of Justice

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9(2)(a)

Dear 9(2)(a)

Thank you for your letter of 30 November 1997 in which you enquire about the privatization of the courts and prosecution systems.

Issues relating to fines enforcement fall outside my direct responsibilities as Minister of Justice. The Department for Courts is responsible for ensuring compliance with court orders to pay fines and debts. Accordingly, I am referring your letter to my colleague the Hon. Wyatt Creech, the Minister for Courts, so that he may answer your questions directly.

With regard to private prosecutions, you may not be aware that these are already provided for under the Summary Proceedings Act 1957 and the Crimes Act 1961. The ability to bring a private prosecution is a feature of most common law systems. Private prosecutions are an important safeguard against the capricious, corrupt or biased failure by the Crown to prosecute. They may also protect victims' rights by giving them the ability to prosecute where the Crown fails to do so.

However, the right to bring a private prosecution is not absolute. Private prosecutions may be stayed on the direction of the Attorney-General. In addition, there are a number of other controls on private prosecutions which can prevent their misuse. For example, some statutes limit who can lay an information in certain situations, and costs can be awarded against prosecutors under sections 5 and 7 of the Costs in Criminal Cases Act 1967.

Earlier this year, the Law Commission issued a discussion paper on criminal prosecution. Private prosecutions were considered briefly in this document. Public submissions closed in May 1997 and the Law Commission is currently analysing the submissions it has received. It is expected that a second report in light of this analysis will be released early next year.

The Ministry of Justice will continue to monitor developments in the area and will consider the issue further in the context of the ongoing work of the Law Commission.

Yours sincerely

Douglas Graham
Minister of Justice

IN 09/03/00/00

MINISTER OF JUSTICE

PRIVATE PROSECUTIONS

Introduction

Over the last two weeks there has been considerable media interest in private prosecutions. You will recall that Private Prosecutions Ltd is a private company established to investigate and prosecute white collar crime. The firm has indicated its intention to specialize in helping the corporate sector pursue criminal actions that the police or crown solicitors were unwilling or unable to take. A company spokesperson suggested that Government agencies such as Social Welfare may be interested in using their services.

The proposals as reported in the media were that private investigators would look into alleged crimes brought to their attention by clients. If the police did not prosecute, an independent review panel set up by the company would determine whether or not a private prosecution would be pursued. If the decision was made to proceed, the case would be referred to a law firm for prosecution. Private Prosecutions Ltd hoped that the Crown Law Office would be available in this role.

An editorial in the Press suggests there is an urgent need to put a stop to the proposal.

The purpose of this paper is to brief you on the comments made in the media, and to outline the current law and our preliminary view on the need for urgent reform.

Comments in the media

Media comments have highlighted two issues.

The first issue is whether crown solicitors should be able to accept instructions to conduct private prosecutions. The second is whether the company should be permitted to operate at all.

The first issue is by and large resolved. The Solicitor-General has stated that there would be "unacceptable conflicts of interest" if crown prosecutors were to act for private companies providing prosecution services. He argues that this would be "inconsistent with the independence of the public prosecution system". Before the Solicitor-General's media release, the Attorney-General had already indicated that it

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was unlikely that using the services of crown solicitors in a private prosecution would be permitted.

The Vice President of the New Zealand Law Society has publicly supported the Solicitor-General's position.

On the second issue there have been a number of comments. Law Commission President Justice Baragwanath has raised concerns regarding Private Prosecutions Ltd's proposal. In particular, he noted that the potential interference of the profit motive with the fair operation of the justice system was problematic. His concern was that prosecutors were selected with care and were required to advise judges and defendants of any relevant facts. He thought that private prosecutors might "look the other way", especially if they were paid only for successful prosecutions.

The Minister of Police has stated that he has no particular objections to the proposal. He argued that it was no different from offering people private health care. However, statements by the Assistant Police Commissioner and the Police Association do not appear to favour the commercialization of private prosecutions. The Labour justice spokesperson the Hon. Phil Goff said the proposal would lead to a two-tiered justice system, with people getting justice only if they can afford to pay for it.

Some private companies (specifically those in the banking and insurance industries) have expressed cautious interest in using private prosecution services. However, the Insurance Council has expressed reservations and said it preferred lobbying the police executive and the Government in the first instance for more action on insurance fraud. If not satisfied by the response, then it would investigate the option of private prosecutions fully.

Current legal position

On the face of it, there appears to be no legal impediment for the company to proceed. However, if the company wished to act as a private investigator, it may need to obtain a private investigator's licence pursuant to section 16 of the Private Investigators and Security Guards Act 1974.

Both the Summary Proceedings Act 1957 and the Crimes Act 1961 contemplate private prosecutions. Section 37 of the Summary Proceedings Act provides that any person may file an information. Section 345(2) of the Crimes Act provides that an indictment may be filed by the Attorney-General or a Crown Solicitor in any case, or by the informant in the case of a private prosecution.

Where a private prosecution is commenced, the Attorney-General may stay the prosecution (sections 77A and 173 of the Summary Proceedings Act 1957).

There are a number of other controls on private prosecutions which can prevent their misuse. For example, some statutes limit who can lay an information in certain situations, and costs can be awarded against prosecutors under sections 5 and 7 of the Costs in Criminal Cases Act 1967.

In summary, although private prosecutions are provided for in New Zealand legislation, this right is not absolute. Most importantly, private prosecutions may be stayed on the direction of the Attorney-General.

Private prosecutions in practice

While used relatively rarely, some individuals and companies do bring private prosecutions. Crown Law Office advises that there are approximately 5 or 6 private prosecutions per annum. Examples have included proceedings instigated by the Motor Vehicle Dealers' Institute against unlicensed dealers, and a criminal prosecution brought by an assault victim subsequent to a complaint to the Police Complaints Authority. In this case, the complaint over the police's decision not to prosecute was upheld. The private prosecution was initiated after it became apparent that, notwithstanding the Complaints Authority's finding, no prosecution would be instigated.

Proposals for reform

Earlier this year, the Law Commission issued a discussion paper on criminal prosecution. Issues surrounding private prosecutions were considered briefly in this document. The Commission favoured retention of the ability to conduct private prosecutions but argued that the leave of a District Court judge should be required for a private prosecutor to file an information. This proposal primarily aims to guard against unmeritorious private prosecutions while avoiding placing unduly onerous restrictions on the practice.

A further option mentioned but rejected by the Law Commission was the possibility of requiring security for costs when a private prosecution was commenced.

The report has been circulated for comment to interested agencies, and the Law Commission is currently analysing the submissions it has received.

Private prosecutions in other jurisdictions

United Kingdom

Private prosecutions have a long history in English common law. Currently, subject to a few statutory exceptions, anyone may institute or conduct criminal proceedings to which the Director of Public Prosecutions' duty to take over the conduct of proceedings does not apply (section 6(1) of the Prosecution of Offences Act 1985). The Attorney-General retains the right to intervene in private prosecutions, and his or her consent may be required before certain criminal proceedings may be undertaken.

Canada

Currently the Canadian Criminal Code provides for private prosecutors, but requires that they obtain the consent of the court before proceeding on an indictment. In most provinces, there is a policy of intervention by the Attorney-General in all private prosecutions.

The Canadian Law Reform Commission issued a working paper on private prosecutions in 1986. The Commission recommended that the right to prosecute privately be retained and extended where it was restricted. This included the abolition of restrictions pertaining to indictable offences that required the prosecutor to obtain the consent of the court or the Attorney-General before proceeding. However, it was recommended that the ability to prosecute privately should be subject to the right of the Attorney-General to intervene in order to carry a case forward, stay proceedings or withdraw charges.

Australia

Private prosecutions are provided for in section 13 of the Commonwealth Crimes Act 1914.

Under the Director of Public Prosecutions Act 1983, the Director has a supervisory role over the prosecution of offences against Commonwealth law, and is empowered to intervene at any stage of a prosecution for a Commonwealth offence instituted by another.

The right to prosecute privately is also available under State laws, subject to similar qualifications and limitations.

Views of the Ministry of Justice

The ability to bring a private prosecution is a feature of most common law systems. Private prosecutions are an important safeguard against the capricious, corrupt or biased failure by the Crown to prosecute. Arguably they also protect victims' rights by giving them the ability to prosecute where the Crown fails to do so.

We appreciate the concerns mentioned in the media about the commercialization of the right to bring a private prosecution. However, in our view, any attempt to restrict the ability to bring a private prosecution further needs to be approached with caution.

Two main arguments have been given in media comment against the private prosecution company. First, it may result in a two-tier justice system (with a better system for the rich). We have reservations about how much weight can be attached to this argument. The company intends to prosecute only when the police choose not to do so. The police will continue to prosecute most crime. A private individual is currently able to instruct a solicitor to bring a private prosecution on his or her behalf. It is not entirely clear why the interpolation of a private prosecution company into this process will necessarily advantage the rich. The existence of the company merely provides another means of bringing a private prosecution.

The second argument is that private solicitors are less likely than crown solicitors to be scrupulous about presenting the facts of a case fairly. However, against this is the fact that all lawyers, whether employed by the Crown or not, have ethical duties as officers of the Court. These include a duty not to mislead the Court. A lawyer acting as a private prosecutor who suppressed facts could be dealt with by complaint to the

Law Society and by a range of disciplinary measures, including in an extreme case being struck off the roll.

There are already a range of measures available to protect against any abuses by the private prosecution company, including the powers of the Attorney-General to stay a prosecution.

Accordingly, we do not recommend urgent reform at this stage. The Ministry will continue to monitor developments in the area and will consider the issue further in the context of the ongoing work of the Law Commission.

Mandy McDonald
Deputy Secretary
Criminal Justice Policy

IN 05 00 00 00

Minister of Justice

PRIVATE PROSECUTIONS

Background

1. After Constable Abbott was committed for trial earlier this year, 9(2)(a) wrote to the Police Commissioner, with a copy to yourself, requesting consideration of greater safeguards for police officers who are required in the course of their duty to use lethal force.
2. The Commissioner's response focused on two issues: identity suppression, and protecting police officers from private prosecution. The Commissioner noted his intention to seek the assistance of relevant agencies and Ministers in developing measures of this kind.
3. In subsequent correspondence between the Commissioner and the Ministry of Justice, officials noted that in relation to identity suppression you had already fully considered the issue and formed the view that legislative action was not appropriate, subject to future media co-operation in this area. Officials further noted that in 2000 the Law Commission (in consultation with, among others, police and the Ministry of Justice) decided against limiting the right to private prosecution, because of its important role as a constitutional check on potential abuses of state power. However, it was agreed that following the outcome of *Wallace v Abbott*, police and Justice officials might need to review their earlier conclusions in this area.
4. Since the public announcements by both the Police Commissioner and the Police Association that they advocate changes to the private prosecution process with a view to preventing the prosecution of police officers who have acted in the course of their duty, there have been further discussions between Ministry officials and the police. Officials understand that the police are preparing a detailed policy proposal for further consideration.
5. In relation to identity suppression, you will be aware that a Police Complaints Authority (Conditional Name Protection) Amendment Bill was recently drawn out of the Members' ballot. A separate briefing is being prepared for you on that Bill.

Existing safeguards

6. Private prosecutors are not bound by the Solicitor-General's prosecution guidelines, with which police and Crown prosecutors are required to comply, and which require objective assessment of the evidence, and consideration of whether it is in the public interest to proceed with a prosecution.
7. However, it does not follow that defendants (and particularly police) are unprotected from vexatious private prosecutions. Existing safeguards include the following:
   - Some statutes limit categories of informants (but not the Crimes Act).
   - Under sections 77A and 173 of the Summary Proceedings Act 1957, and 378 of the Crimes Act 1961, the Attorney-General may issue a stay of proceedings. A stay finally determines proceedings with the effect that the person cannot be prosecuted again in relation to the same matter. A stay is invariably issued in consultation with the Solicitor-General. However, as both the Attorney-General and the Solicitor-General are officers of the Crown, the power to stay is necessarily exercised sparingly, to avoid subverting the whole purpose of private prosecutions.
   - Both the District Court and the High Court have an inherent jurisdiction at common law to prevent abuse of court processes. This includes power to discharge a defendant.
   - In indictable proceedings, a judge has the power to discharge an accused either at preliminary hearing under section 167 of the Summary Proceedings Act, or after the person is committed for trial under section 347 of the Crimes Act 1961. In relation to both pre- and post-committal discharge, the test is whether there is sufficient evidence (taking into account both prosecution and defence evidence) on which a jury could properly convict. However, the effect of the two is different. A person who has not been committed for trial can have the same charges laid against them again. Post-committal discharge is deemed to be an acquittal, and the person cannot be recharged.
   - There are various financial constraints on private prosecutors: they are not eligible for legal aid, if they are not successful and are subsequently found not to have acted in good faith a costs order may be made against them under the Costs in Criminal Cases Act, or they may be sued civilly for malicious prosecution. The Law Commission considered whether an additional security for costs requirement should be imposed on private prosecutors, but concluded that this would unfairly discriminate against informants without means.

Are further measures necessary?

8. The police attempted to obtain Department for Courts statistics about the number of private citizen vs police prosecutions during the last decade. This proved difficult, because Courts put all private criminal prosecutions in a residual "other" category, that includes non-Crown agency prosecutions such as local government and the SPCA.
9. The police therefore conducted an informal survey of District Commanders. Fifteen private prosecutions were identified (some naming multiple officers as defendants). Two stays were issued by the Attorney-General, charges against three officers were dropped, and all other cases except Constable Abbott's were dismissed pre-trial, mostly without the officer having to appear in court.
10. The implication is that with the exception of Constable Abbott, the safeguards described above were effective in weeding out spurious prosecutions.
11. Nonetheless, the police remain concerned about the possible flow-on effects of the Abbott trial, for example officers refusing to bear arms, or avoiding confrontational situations to the peril of the public. It is not clear what evidence (if any) they have to suggest that this is, or will be, a problem.
12. The list of cases obtained from the police was notable for the absence of any private prosecutions leading to conviction. However, officials are aware of at least one case, in 1983, where a Palmerston North police constable received a $200 fine and 12-month suspended sentence for assault and wilful damage. A private prosecution was brought after police rejected the complaint. The Palmerston North police commander expressed the view that the complainant was laying charges "for the hell of it". This conviction, coupled with the Chief Justice's decision in *Wallace v Abbott* that there was sufficient evidence on which to proceed to trial, tends to suggest that private prosecutions are not invariably ill-founded.

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Other jurisdictions

13. Information was obtained from comparable jurisdictions, specifically the United Kingdom, Canada (federal), and Australian states.

14. Most of these allow private prosecutions, but provide as a safeguard that the state prosecuting agency can take over and withdraw or omit to prosecute vexatious cases. The exceptions are Canada (leave of court required), Tasmania (the Director of Public Prosecutions must authorise), and Western Australia (leave of court required for indictable offences and private prosecutions for murder prohibited).

15. The Western Australian model is preferred by police. They believe that Elias CJ in dicta in *Wallace v Abbott* implicitly supported this approach, which is not a view shared by the Ministry of Justice. Her Honour summarised the law in Western Australia, concluded that there is currently no basis in New Zealand law that would allow her to limit the right to privately prosecute in that way, and noted that the application of general criminal law to police officers is standard in other jurisdictions.

Options for reform

Statutory limits

16. The preliminary view of the Ministry of Justice is that a statutory exemption from private prosecution, whether for police officers or any other specified occupation, is untenable. Other occupations that may be at risk of private prosecution arising from the exercise of public functions include medical personnel, CYFS, a fireman who crashes and kills another driver on the way to a call-out, or a teacher who fails to adequately supervise a child. As a general rule, the criminal law should apply equally to all. To the extent that the right of private prosecution should remain available as a safeguard to enable victims to take action against those who have acted unlawfully against them, it should exist regardless of the occupation of the perpetrator.

17. The only other option therefore would be to statutorily bar all private prosecutions. The Ministry of Justice supports the view of the Law Commission in this regard: that private prosecutions, while rare, have an important constitutional role and ought to be retained.

Make explicit the Solicitor-General's ability to take over and terminate vexatious prosecutions

18. A power of this kind, although explicit in other jurisdictions, would not differ significantly from the power the Attorney-General already has to issue a stay of proceedings, which is done in consultation with the Solicitor-General.

19. One would expect that if the Solicitor-General's ability to intervene in this way was made explicit, it would be constrained by the same considerations that are currently taken into account by the Attorney-General. In particular, an officer of the Crown must act with circumspection before interfering with a right that is itself designed as a check on state powers. Moreover, in the New Zealand context, police decisions not to prosecute are reviewed in indictable cases by the Solicitor-General, who has the final decision-making power. This means that the subsequent termination of a private prosecution by that office would appear to lack the necessary impartiality, due to the Solicitor-General's prior involvement in the case.

Independent prosecutorial authority

20. Conflicts of interest experienced by the Solicitor-General in these kinds of cases could be mitigated to some extent by establishing an independent state prosecutor. In New Zealand, this would be a fundamental change with significant resource implications, requiring broader justification than currently appears to exist.

Judicial leave requirement

21. The Law Commission considered a judicial leave requirement, and concluded that this would be incompatible with private prosecution as a check on the state. The reasoning behind this conclusion was not clearly set out, and Justice officials disagree, on the basis that the courts are regularly required to mediate between Crown and private citizen, and for this reason stringently safeguard their independence.

22. Susan Hughes, counsel for Constable Abbott, who presented a paper to a Criminal Law Symposium recently held in Wellington, also proposes this as one possible solution.[1]

23. Ms Hughes' proposed threshold at which leave would be granted is that "on the balance of probabilities, there is a reasonable prospect of conviction". In this she is trying to strike a balance between raising the bar for private prosecutors to weed out vexatious cases, while leaving open the possibility that Crown investigators/prosecutors can make a mistake.

24. The balance of probabilities is not a high standard, and courts are invariably reluctant to second-guess what a jury might reasonably do. Officials' preliminary view is therefore that Ms Hughes' proposed test is not significantly different from that currently applied by the courts in determining whether a defendant should be committed for trial or discharged ("is there sufficient evidence on which a jury could properly convict": *Wallace v Abbott*).

25. The real problem in *Wallace v Abbott* was that the case turned on questions of credibility and reasonableness. According to the Chief Justice (following Court of Appeal authority in *R v Flyger* [2001] 2 NZLR 721), these are necessarily jury issues in all but the most exceptional cases (for example, if a witness is obviously incapable of belief, or there is no possible basis on which a jury could conclude that the defendant was acting unreasonably). In *Abbott*, while there were inconsistencies between the accounts of some witnesses, in the view of Elias CJ none were inherently implausible, and it was therefore not up to her to decide which evidence to accept, or predict the likely outcome of a jury deliberation.

26. Ms Hughes therefore proposes that, before determining the proposed leave application, a judge should be specifically empowered to inquire fully into the merits of a case, including consideration of what would normally be jury questions (credibility/reasonableness). Officials' preliminary view is that one judge is no better placed to answer such questions than 12 jurors, especially in a borderline case like *Abbott*.

27. However, notwithstanding these preliminary views, the Ministry of Justice considers that further work is warranted as to the viability of a judicial leave requirement.

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[1] Ms Hughes also refers to judicial review of the Crown decision not to prosecute, and treats this and a judicial leave requirement as the same thing. In fact they are different: the focus of judicial review is whether the decision was procedurally sound and within the bounds of reasonableness, and its effect is to the benefit of prosecutor rather than defendant, by potentially requiring the Crown to review its decision not to proceed. An application for judicial review of the Solicitor-General's decision not to prosecute can already be made under section 4 of the Judicature Amendment Act 1972, which provides that the High Court may review the "exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power".

Police Complaints Authority procedure

28. The primary role of the PCA is to receive and oversee or investigate complaints relating to police misconduct or neglect of duty. The police have expressed concern that the Authority does not act early enough as an independent check on police decision-making in controversial cases, because it invariably defers investigation of such cases until the police investigation and any subsequent judicial or other processes are concluded. The reason for this administrative practice is that the PCA considers that it would be inappropriate to be seen to pre-empt criminal, civil, or disciplinary proceedings, and that other bodies are established to fulfil those purposes such as the police, courts, and coroners.

29. The provisions of the Police Complaints Authority Act 1988 provide the Authority with quite extensive powers, including the ability to play a leading role in controversial cases if it determines that this is appropriate:

- The long title provides that it is an Act to "make better provision for the investigation and resolution of complaints against the police by establishing an independent Police Complaints Authority".
- The Authority must be notified by the Police Commissioner of incidents that occur in the execution of an officer's duty resulting in death or serious bodily harm (section 13).
- The Authority may investigate if satisfied that there are reasonable grounds to carry out an investigation in the public interest (section 12).
- The manner of the investigation may take various forms: no action, deferred action, overseeing a police investigation, or investigation by the Authority itself (section 17). In relation to police investigations, the Authority has the power to intervene in various ways, including taking over the investigation, reviewing police conduct of the investigation and giving directions as to how it should be conducted, reviewing proposals arising from an investigation and directing that they should be reconsidered (section 19).
- At present, under section 23 of the Act, the Authority's investigations are conducted in private. It may hear or obtain information from such persons as it thinks fit. It is not necessary for the Authority to hold a hearing, and no person is automatically entitled to be heard.
- Where the Authority has investigated, it shall make recommendations including whether disciplinary or criminal proceedings should be considered or instituted (section 27).

30. In the early days of the Authority, it chose to conduct hearings in two controversial cases (including the Papadopoulos death in Wellington), but it has not recently done so. Sir Rodney Gallen, who reviewed the PCA in a report released in 2000, found that major practical difficulties were encountered in holding these hearings, such as the lack of an appropriate venue, and limited powers available to the Authority to direct the management of proceedings in the face of disruptive behaviour. Recommendations for change in this area will be implemented by the provisions of the Independent Police Complaints Authority Bill that was introduced on 4 December.

31. In *Wallace v Abbott*, the PCA did not involve itself in the initial investigation and decision-making, and it is officials' understanding that the Authority has still not examined the case.

32. The may have been fuelled by the fact that the role of the Solicitor-General in that decision was seen to be neither independent nor transparent and that no other independent check appeared to be available.

9(2)(g)(i)

33. The Ministry of Justice therefore considers that further work is warranted as to both the investigation and decision-making processes used in cases involving fatalities (and possibly also serious injuries) inflicted by police officers, and that this further work should address the respective roles of both the Solicitor-General and the PCA.

Recommendations

34. The Ministry of Justice recommends that you:

- **note** that officials are awaiting a detailed policy proposal from police in the area of private prosecutions; and
- **agree** that in the meantime, further policy work should be undertaken in the areas of a judicial leave requirement for private prosecutions, and the investigation and decision-making processes employed in cases involving death and serious injury inflicted by police officers.

P J Divett
Manager, Criminal and International Law Team
Crime Prevention and Criminal Justice Group

9(2)(a)

Dear Mrs 9(2)(a)

Thank you for your further letter of 17 March 2006, regarding private prosecutions and legal aid. Your letter raises four specific questions which I address in turn below.

The first question you ask is why legal aid is not available for private prosecutions? There are separate arrangements for the state-funding of prosecution services as compared to the funding of defendants in criminal cases or civil litigants who have insufficient means. In common to both forms of state-funding is the need to balance access to justice while ensuring public money is appropriately spent.

One of the reasons for state-funded prosecution services is to remove the 'price tag' on justice for those who would otherwise not have the resources to take a case to Court. Prosecutions are generally based on the "public interest" issues and a number of factors are considered before initiating a prosecution.

In contrast, the legal aid scheme provides defendants in criminal cases with access to legal representation if certain criteria are met. Eligibility criteria are used to identify whether it is appropriate to provide state funding in a particular case. An application for criminal legal aid may be declined on the basis that the "interests of justice" do not require a grant to be made.

Legal aid funding is not available for a private prosecution, as the issue of the appropriateness of public funding has already been determined (i.e. through a Department's or Agency's decision not to prosecute).

A departmental decision not to prosecute may be open to judicial review, for which civil legal aid is available (subject to relevant criteria being met). This provides an important safeguard to ensure natural justice. Furthermore, as I noted in my previous letter, a successful private prosecutor may apply for costs under the Costs in Criminal Cases Act 1967.

(8)

Your second question, is why comments made by the Justice and Electoral Committee in its report back on the Legal Services Amendment Bill (No 2) (the Bill) have been ignored? Your letter quotes the comments made by the minority of the Committee. The majority view of the Committee, and that of the Government, is that the changes in the Bill will provide more consistency and fairness in the administration of legal aid to eligible people, which represents a significant improvement on the current provisions.

Third, you have asked why I did not inform you of the opportunity to make a submission on the Bill to the Justice and Electoral Committee? I am sorry that you were unaware of the Committee's consideration of the Bill for which public submissions closed on 12 August 2005. The Bill followed a public discussion document circulated in December 2002.

As I advised in my previous letter, I am unable to comment on issues that are before an administrative tribunal or a court. This is to ensure that tribunals and courts can make decisions free from political interference (whether perceived or actual). At the time you wrote to me, the issue of a *civil* legal aid application for a private prosecution (lodged by your son) had not been decided by the Legal Aid Review Panel. It would have been inappropriate for me to suggest you make a late submission to the Justice and Electoral Committee as this might have implied I had a view on your son's proceedings.

Finally, you ask what action is being taken to correct what you consider to be a 'lacuna' in the Legal Services Act? The Government does not intend to make legal aid available for private prosecutions, for the reasons I have outlined.

Yours sincerely

Hon Mark Burton
Minister of Justice

Cc Hon Peter Dunne, MP for Ohariu Belmont, Leader, United Future