Submission to Justice Strategy and Policy – The Effectiveness of Suppression and Non-Publication Orders

22 May 2019

Introduction:

Thank you for providing an opportunity to contribute a submission to the review of the effectiveness of suppression and non-publication orders. The Open Government, Information and Privacy Unit (OGIP) within the Office of the General Counsel regularly have direct contact with members of the public who seek information held by the Department of Justice. Some applicants have exhibited threatening and harassing behaviour over significant periods of time extending to the online publication of defamatory comments and the sharing of employee's personal information and information obtained/discussed during court proceedings. This conduct has occurred despite the making of a non-publication order by the NSW Civil and Administrative Tribunal.

Background:

The *Government Information (Public Access) Act 2009* ("the GIPA Act") makes limited provisions for dealing with vexatious or repeat access applicants. In fact, an agency can only refuse to deal with an application under the GIPA Act which involves an unreasonable and substantial diversion of the agency's resources, or where the Information Commissioner and NSW Civil and Administrative Tribunal (NCAT) refuse to deal with applications that are frivolous, vexatious, misconceived or lacking in substance. Notably, the provisions of the GIPA Act relate to the making of applications rather than addressing the conduct of vexatious applicants.

In a recent experience, a non-publication order was sought to prevent the online publication of defamatory material about employees within the Office of the General Counsel, Department of Justice. The person responsible for publishing the material has continued to publish material contrary to the non-publication order ('NPO'). The Crown Solicitor's Office has advised that obtaining proof of the required elements and the prospects of success for enforcing the NPO are generally poor; particularly when considering the shift of publication to online formats.

Difficulties enforcing non-publication orders:

The OGIP sought the respite of a non-publication order in the NSW Civil and Administrative Tribunal (NCAT) in relation to the persistent online publication of material by a GIPA Act access applicant following proceedings in the NSW Civil and Administrative Tribunal that were the subject of a non-publication order pursuant to section 64(1)(a) of the *Civil and Administrative Tribunal Act 2013 No 2* . Following

the granting of an order by the NCAT the applicant continued to publish material online specifically naming the individuals whose identities were intended to be protected by the order.

The applicant has established an internet website where he regularly publishes the names, images and personal details of OGIP employees under the moniker of a 'Wall of Shame'. Each employee listed on the Wall of Shame also has a Wall of Shame certificate of achievement with the employee's name and with the image of a rotten apple. These postings have been distressing to those employees named particularly given that the published material also states that each employee has a 'rap sheet' and 'unlawful offences'.

On 12 September 2018, an order was made by the NCAT prohibiting the applicant from disclosing the names of specific employees of the OGC pursuant to section 64(1)(a) of the *Civil and Administrative Tribunal Act 2013 No 2*. However, the applicant continued to publish the names of OGIP employees on his website following the making of the non-publication order. These actions are in addition to threats and ongoing vexatious complaints made to the Information and Privacy Commission, members of Parliament, the NSW Premier and the NSW Attorney General. The applicant has also submitted numerous access applications, made applications for numerous internal and external reviews of decisions and submitted large volumes of harassing emails and letters to the OGIP unit from various email addresses in an apparent attempt to disguise that he is the writer of the email.

Crown Solicitor's Advice:

The Crown Solicitor's Office provided advice on the commencement of proceedings for contempt in relation to this breach and potential difficulties that could be encountered in enforcing the non-publication order.

The advice stated that the process of enforcement is unwieldy and counterproductive. In order to successfully prove a breach of a non-publication order, where the breach occurred in an online format (like a website), it must be proven that the subject of the non-publication order is actually the person who is using the website. This would involve formally proving that the person is connected to the ISP which the website is operating under at the time of the breach and that the person was in fact operating the website at the time or has exclusive access. This is quite difficult to prove as most ISPs are not in Australia, so an Australian court cannot compel them to divulge the required information. Usually, proving that a breach has occurred requires the offender to make admissions to the fact.

The Crown Solicitor also advised that, following the making of the non-publication order, there are certain characters of applicants who do not respect the making of orders and the authority of the courts regardless of an order. As a consequence, the

threat of sanctions following a breach of a non-publication order does not act as a deterrent and may even incentivise some to act in defiance to achieve a level of notoriety and become a 'martyr' to their cause. The consequences for the breach are not considered strong enough and do not deter the applicant from committing further breaches. It is noted that, under section 16 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) ('the Act'), the maximum penalty for a breach is 1000 penalty units or imprisonment for 12 months or both. The penalty does not seem to act as a sufficient deterrent, especially considering that the order can be reviewed under section 13(2) of the Act.

Having a non-publication order in place does not necessarily result in a take-down order. It is important to note that proceedings for a breach of the Act do not necessarily result in the removal of the offending material. Even if the court were to issue a take-down order, its effectiveness is varied and dependent on the cooperation of either the subject of the non-publication order or the ISP.

The ISP may not be in the country and their compliance may be subject to their goodwill. This process is unwieldy, varied and incorporates the expenditure of vast amounts of valuable government resources. Essentially, commencing litigation against these individuals only serves to provide them with a platform to espouse their cause (even where the cause is unwarranted). As a consequence, the time and cost of litigation may actually be counter-productive.