CITATION:	*McGregor & Ors v Jenkins* [2018] NTSC 84
PARTIES:	McGREGOR, Daniel v JENKINS, Trevor and CU, Nelson v JENKINS, Trevor and MILLIGAN, Sarah v JENKINS, Trevor and ROWBOTTAM, Ian v JENKINS, Trevor
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction

FILE NO/S:	97 of 2018 (21840546); 98 of 2018 (21840549); 99 of 2018 (21840553); 112 of 2018 (21844211)
DELIVERED:	29 November 2018
HEARING DATES:	22 and 28 November 2018
JUDGMENT OF:	Hiley J

CATCHWORDS:

CRIMINAL LAW – Practice and procedure – form and sufficiency of information and summons – validity of information – failure to identify offences alleged and to provide sufficient particulars – failure to comply with requirements of ss 22A(2), 22A(3) and 181 of the *Local Court (Criminal Procedure) Act* – information ineffective – information a nullity

Criminal Code (NT) s 3
Local Court Act (NT) s 45, s 47
Local Court (Criminal Procedure) Act (NT) s 20, s 22, s 22A, s 49, s 63A(1A), s 101, s 181, s 182, s 183, s 190
Public Sector Employment Management Act (NT) s 5F, s 49
Summary Offences Act (NT) s 47
Supreme Court Rules (NT) r 11.01, r 75.05, r 75.06
Vexatious Proceedings Act (NT) s 3

Director of Public Prosecutions v Kypri [2011] VSCA 257; (2011) 33 VR 157; *Gabriel v Williamson* (1979) 1 NTR 6, applied.

Ainsworth v Criminal Justice Commission [1992] HCA 10; (1992) 175 CLR 564; *Connor v Sankey* [1972] 2 NSWLR 570; *Director of Public Prosecutions (ACT) v Hiep Huu Le* (1998) 86 FCR 33; *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 346 ALR 1; *Glynn v Smith* (1984) 70 FLR 427; *Hanson v Radcliffe UDC* [1922] 2 Ch 490; *Harrison v President of Industrial Court* [2016] QCA 089; (2017) 1 Qd R 515; *Japaljarri v Cooke* (1982) 64 FLR 314; *John L Pty Ltd v Attorney-General (NSW)* [1987] HCA 42; (1987) 163 CLR 508; *Kirk v Industrial Court of New*

South Wales [2010] HCA 1; (2010) 239 CLR 531; *R v Iorlano* [1983] HCA 43; (1983) 151 CLR 678; *R v Murdoch (No. 3)* [2005] NTSC 77; (2005) 150 NTR 23; *Stanton v Abernathy* (1990) 19 NSWLR 656, referred to.

REPRESENTATION:

Counsel:

Plaintiffs:	L Peattie
Defendant:	In person

Solicitors:

Plaintiffs:	Solicitor for the Northern Territory
Defendant:	In person

Judgment category classification:	B
Judgment ID Number:	Hil1815
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McGregor & Ors v Jenkins [2018] NTSC 84
No. 97 of 2018 (21840546); 98 of 2018 (21840549); 99 of 2018 (21840553); 112 of 2018 (21844211)

BETWEEN:

DANIEL McGREGOR
Plaintiff

AND:

TREVOR JENKINS
Defendant

BETWEEN

NELSON CU
Plaintiff

AND:

TREVOR JENKINS
Defendant

BETWEEN

SARAH MILLIGAN
Plaintiff

AND:

TREVOR JENKINS
Defendant

BETWEEN

IAN ROWBOTTAM
Plaintiff

AND:

TREVOR JENKINS
Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 29 November 2018)

Introduction

[1] On various dates in 2017 the defendant purported to institute private prosecutions against a number of people including the four plaintiffs. He did this by filing informations in the Local Court (the **Informations**).

[2] On about 20 December 2017 the defendant caused the Registrar of the Local Court to issue summonses naming each of the plaintiffs and requiring them to appear at the Local Court at 10 am on 16 January 2018 (the **Summonses**). The defendant failed to appear and the complaints were dismissed for want of appearance. The defendant has not sought to set aside or appeal against any of these dismissals.[1]

[3] Notwithstanding the dismissal of the charges against them, the plaintiffs claim, and I agree, that the purported laying of the charges has ongoing detrimental effects upon each of them. Accordingly, each of them has brought proceedings in this Court seeking declarations that the informations laid against them were "ineffective to charge the plaintiff", alternatively were "a nullity".

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1 Cf s 63A(1A) *Local Court (Criminal Procedure) Act* (NT) (**LCCPA**).

Relevant facts

Materials and submissions

[4] Counsel for the plaintiffs read and relied upon the following evidentiary material in their respective proceedings:

(a) In proceeding no. 97 of 2018, the affidavit of Daniel Law McGregor affirmed on 25 September 2018 (**McGregor Affidavit**);

(b) In proceeding no. 98 of 2018, the affidavit of Nelson Cu affirmed on 25 September 2018 (**Cu Affidavit**);

(c) In proceeding no. 99 of 2018, the affidavit of Sarah Jayne Milligan affirmed on 25 September 2018 (**Milligan Affidavit**); and

(d) In proceeding no. 112 of 2018, the affidavit of Ian John Rowbottam affirmed on 22 October 2018 (**Rowbottam Affidavit**).

[5] The evidentiary material relating to proceedings numbers 97, 98 and 99 of 2018, together with the respective Originating Motions and Summonses, was served on the defendant on 4 October 2018 and that relating to proceeding number 112 of 2018 on 24 October 2018. The defendant has not entered any appearances and did not appear at the hearing on 11 October 2018. The matters were set down for a one-day hearing on 22 November 2018 and the defendant was directed to file and serve any affidavit on which he intended to rely at that hearing by

2 November 2018. The defendant did not file any material by that date.

[6] Although not required to, the solicitors for the plaintiffs filed written submissions[2] and emailed a copy of them to the defendant after close of business on 20 November. The defendant appeared late at the hearing of the matters on 22 November. He said that he had been trying to file material that morning, and required an adjournment of the hearing. He said that he had sworn affidavits in answer to the plaintiffs' affidavits and that he was in the process of having them and other documents typed up so they could be filed. The Court adjourned the hearing of the matter to 10 am on Wednesday, 28 November and directed the defendant to file and serve any relevant material by 2 pm on Monday, 26 November. He did not do that.

[7] However, the defendant did send a number of emails to my associate and to others, the first at 11.25 am on Saturday, 24 November. They attached documents that purported to be third-party notices naming Natasha Fyles (the Attorney-General of the Northern Territory) as third-party and other documents including draft unsigned affidavits. Even if the form of those documents otherwise complied with the *Supreme Court Rules* (NT) (**SCR**) and Practice Directions, which they would not, the filing of them would be impermissible without leave of

2 "Plaintiffs' Consolidated Written Submissions".

the Court. This is not only because of the effect of the *Supreme Court Rules* but also because the defendant has been declared a vexatious litigant and is prohibited from bringing third-party proceedings without leave.[3] Further, it appears most unlikely that the purported third-party notices would meet the threshold requirements of SCR r 11.01. Further, the assertions made in the documents were largely unintelligible, were not responsive to the affidavit material filed on behalf of the plaintiffs, and were irrelevant to the issues the subject of the Originating Motions and Summonses, namely the legal effectiveness and validity of the informations and summonses the subject of these proceedings.[4]

[8] At the hearing on 28 November the defendant attempted to rely upon much of the materials that he had circulated by email between 24 and 26 November. He said that he had been unable to swear his affidavits by 2 pm on 26 November because there was no one at the Local Court who was prepared to witness them. He denied that he had told the Court when seeking his adjournment on 22 November that he already had sworn affidavits. He sought a further adjournment so he could file materials and issue subpoenas requiring people to attend to give evidence. He also required the attendance of the plaintiffs for cross-

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3 Order 1 made 19 July 2018 and s 3(b) *Vexatious Proceedings Act* (NT).

4 The validity of a charge is to be judged on the basis only of what appears from the face of the charge and the summons. See references later in these reasons to authorities such as *Director of Public Prosecutions v Kypri* (2011) 33 VR 157 ***(Kypri)*** at [19] and [28].

examination.[5] These applications were refused. Apart from the fact that he had already failed to comply with two deadlines for the filing of materials it was clear that the matters that he wished to pursue were not relevant to the issue the subject of these proceedings but rather related to a wide range of complaints that he has about the conduct of the plaintiffs and numerous other people since early 2016.

[9] At the hearing the defendant objected to some parts of the plaintiffs' material being read. I rejected his objections. For the most part his objections did not go to the admissibility of the affidavits but sought to attack the character of the plaintiffs and the genuineness of their beliefs as to the prejudice flowing from the continued existence on record of the informations naming them as defendants. In the course of making his final submissions the defendant made a number of assertions critical of the conduct and character of each of the plaintiffs. I made it clear that I would be treating those assertions as submissions and not as evidence. The only part of his submissions that might have some, if any, relevance were those to the effect that the plaintiffs should not feel aggrieved by having the informations remain on the public record because they are all persons of bad character and they should expect to remain exposed to the defendant's allegations of their criminal behaviour. These matters, if true, might go against the Court

5 At about 7.40 am on the morning of the hearing the defendant sent an email requiring the attendance of three of the plaintiffs for cross-examination.

exercising its discretion before making the declarations sought. I reject those submissions and the contentions critical of the conduct and character of the plaintiffs.

The evidence

[10] The evidence established the following facts.

[11] Each of the plaintiffs is employed in the justice system, either as an office holder of the Court[6] or as a legal practitioner.[7] In the course of their duties, the plaintiffs had various dealings with the defendant and, from time to time, the defendant threatened to privately prosecute each of them.[8] Consistent with those threats, each of the plaintiffs was named as a defendant in an information filed by the defendant with the Local Court in purported reliance on s 101 of the *Local Court (Criminal Procedure) Act* (NT) (**LCCPA**). The informations were signed by the defendant on various dates in mid-2017. The seal of the Local Court appears on each information.

[12] On 11 January 2018 the defendant attended the Registry of this Court and left there for service a number of documents relating to those prosecutions which he had instituted against Daniel McGregor, Nelson Cu and Sarah Milligan, respectively the Sheriff, the Probate and Civil Appeals Officer and the Registrar of this Court. At about the same

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6 Milligan Affidavit, [1]; Cu Affidavit, [1]; McGregor Affidavit, [1].

7 Rowbottam Affidavit, [1].

8 Milligan Affidavit, [5]; Cu Affidavit, [4]; McGregor Affidavit, [4]; Rowbottam Affidavit, [2] and [3].

time the defendant attended the offices of the Director of Public Prosecutions (**DPP**) and left there documents relating to his prosecution of Ian Rowbottam, Supervising Prosecutor employed by the DPP.[9]

[13] In relation to each plaintiff the documents were an "Information for an Indictable Offence"[10] and a "Summons to a Person Charged with an Indictable Offence" [11]. Each of the Summonses were issued by the Local Court on 20 December 2017 and required the relevant plaintiff to "be and appear" at 10 am on 16 January 2018 "to answer the said charges and to be further dealt with according to law."

[14] Each of the plaintiffs, other than Ian Rowbottam,[12] duly attended the Local Court at 10 am on 16 January 2018.[13] Altogether, approximately 16 matters in which the defendant had commenced private prosecutions

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9 Milligan Affidavit, [4]; Cu Affidavit, [3]; McGregor Affidavit, [3]; Rowbottam Affidavit, [7]. None of the plaintiffs take issue with service of the Informations and Summonses. That service complies with s 27(b) of the LCCPA.

10 Milligan Affidavit, Annexures SJM1 & SJM3; CU Affidavit, Annexure NC1; McGregor Affidavit, DLM1; Rowbottam Affidavit, Annexure IJR1. Ms Milligan was also provided with a second Information for Indictable Offence but no accompanying Summons - Milligan Affidavit [3] and Annexure SJM3.

11 Milligan Affidavit, Annexure SJM2; CU Affidavit, Annexure NC2; McGregor Affidavit, DLM2; Rowbottam Affidavit, Annexure IJR2.

12 Ian Rowbottam was overseas at the time and was unaware of the proceedings: Rowbottam Affidavit, [5]-[10].

13 Milligan Affidavit, [7]; Cu Affidavit, [6]; McGregor Affidavit, [6]; Rowbottam Affidavit, Annexure IJR3.

were listed for that time and date. The matters were called on and the defendant, though called, did not appear.[14]

[15] The Court (Cavanagh J) dismissed all the complaints "in default of appearance" by the complainant, namely the defendant in these proceedings. The plaintiffs were not called on to make submissions about the matters. The judge said that even if Mr Jenkins had appeared he would have adjourned the matters for a month as it appeared that the Summonses were vexatious. He also stated that he would urge the Attorney-General to consider instituting proceedings under the *Vexatious Proceedings Act*.[15]

[16] After reviewing the respective informations, none of the plaintiffs understood the nature of the offences, the events to which they related, or how they were said to have committed those offences.[16]

[17] Despite the complaints having been dismissed, the purported laying of charges against the plaintiffs has ongoing effects, including that:

(a) Each of the plaintiffs now possesses a criminal history which discloses that he or she was charged with indictable offences. While those charges would not be shown on an ordinary criminal

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14 Milligan Affidavit, [8]; Cu Affidavit, [7]; McGregor Affidavit, [7]; Rowbottam Affidavit, Annexure IJR3.

15 Milligan Affidavit, Annexure SJM5; Cu Affidavit, Annexure NC3; McGregor Affidavit, Annexure DLM3; Rowbottam Affidavit, Annexure IJR3. See s 63 LCCPA.

16 Milligan Affidavit, [6]; Cu Affidavit, [5]; McGregor Affidavit, [5]; Rowbottam Affidavit, [11].

history check, they would be disclosed on a police antecedents report.

(b) The charges must be disclosed for certain purposes, such as when applying for renewal of a legal practicing certificate or to comply with the reporting obligations in clause 17.1 of the Code of Conduct (Employment Instruction Number 12), which is binding on each of the plaintiffs.[17]

(c) The charges impact on immigration and visa matters, not only of the plaintiffs but those close to them.

(d) Finally, and not least of all, the existence of the purported charges is personally embarrassing and offensive, particularly to those employed as officers of the Court.

The Informations and Summonses

[18] Each information was on a Form 38 titled "Information for an Indictable Offence" and each summons was on a Form 40. Each document was completed in handwriting, which appears to be that of Mr Jenkins.

[19] In relation to Mr McGregor:

(a) The Information was stated as taken on 12 July 2017 but was stamped as received by the Local Court on 5 September 2017. It

17 Sections 5F(1)(a)(iii) and 49(a) of the *Public Sector Employment Management Act* (NT).

alleged that at 9 am on 26 March 2017 in the Northern Territory Mr McGregor did "*attempt to pervert course of justice*".[18]

(b) The Summons stated that Mr McGregor was charged "this day" (20 December 2017) "for that on the 8th day of April 2016 at 10.30 am in the Northern Territory of Australia [he] did *assault obstruct justice*".[19]

(italics added by me for emphasis)

[20] In relation to Mr Cu:

(a) The Information was stated as taken on 8 June 2017. It alleged that on 7 June 2017 at Darwin Supreme Court in the Northern Territory Mr Cu did "*commit contempt*".[20]

(b) The Summons stated that Mr Cu was charged "this day" (20 December 2017) "for that on the 7th day of June 2017 at Darwin Supreme Court in the Northern Territory of Australia [he] did *commit contempt*".[21]

[21] In relation to Ms Milligan:

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18 McGregor Affidavit, DLM1.

19 McGregor Affidavit, DLM2.

20 Cu Affidavit, Annexure NC1.

21 Cu Affidavit, Annexure NC2.

(a) One Information was stated as taken on 8 June 2017. It alleged that on 7 June 2017 at Darwin Supreme Court in the Northern Territory Ms Milligan did "*commit contempt*".[22]

(b) The Summons stated that Ms Milligan was charged "this day" (20 December 2017) "for that on the 7 day of June 2017 at Darwin Supreme Court in the Northern Territory of Australia [she] did *commit contempt*".[23]

(c) Another information was stated as taken on 12 July 2017 but was stamped as received by the Local Court on 5 September 2017. It alleged that at 9 am on 26 March 2017 in the Northern Territory Ms Milligan did "*attempt to pervert course of justice*".[24] There is no evidence of a summons requiring Ms Milligan to respond to this information.

[22] In relation to Mr Rowbottam:

(a) The Information was stated as taken on 25 August 2017. It alleged that on 26 April 2017 at Darwin Local Court in the Northern Territory Mr Rowbottam did "*commit offensive behaviour contempt in face of court substantially annoy obstruct*

22 Milligan Affidavit, Annexure SJM1.

23 Milligan Affidavit, Annexure SJM2.

24 Milligan Affidavit, Annexure SJM3.

justice (deliberately lie misconstrue [illegible] *to gain advantage)*".[25]

(b) The Summons stated that Mr Rowbottam was charged "this day" (20 December 2017) "for that on the 26 day of April 2017 9 – 9.30 at Darwin Local Court in the Northern Territory of Australia [he] did *commit offensive behaviour contempt in face of court substantial annoyance obstruct justice conceal lie to advantage*".[26]

Legislation and principles

[23] The sole question in these proceedings is whether the informations served by the defendant were effective to charge each plaintiff.

Two pre-conditions

[24] Part V of the LCCPA governs proceedings for an indictable offence.[27] It contemplates at least two necessary preconditions to a person being effectively charged. The first is the laying of an effective information (s 101). The central role of the information in charging a person is confirmed by s 22(1) of the LCCPA which provides, relevantly, that a summons must require the defendant to be and appear before the Local Court at a certain time and place "to answer the charge *contained in the information*…". The second precondition is that the charge be properly communicated to the defendant. The mere filing of an information

25 Rowbottam Affidavit, Annexure IJR1.

26 Cu Affidavit, Annexure NC2.

27 For the definition of "indictable offence" and "summary offence" see s 4 of the LCCPA referring to s 3 of the *Criminal Code (NT)*.

would be insufficient to effect a charge, as a defendant would be unlikely to have knowledge of the matter without more. Accordingly Part V, Division 1A requires steps to be taken to ensure a defendant's attendance at court to answer the charge, either in the form of a warrant (s 103) or a summons (s 104).

[25] The existence of those two pre-conditions accords with the observations of Toohey J in *Gabriel v Williamson*[28] that charging a person requires "not only that a complaint be lodged but that, at least, it be brought to the attention of the defendant by service."[29]

[26] The requirements for particulars of the charge to be contained in the complaint and adequately communicated to the defendant are consistent with provisions such as ss 22(1), 22A and 181 of the LCCPA. Section 22(1) requires that every summons for the appearance of a defendant shall "be directed to the defendant charged by the information or complaint", "state shortly the matter so charged" and "require the defendant to be and appear before the court at a certain time and place mentioned in the summons to answer to the charge contained in the information or complaint and to be further dealt with according to law." See too s 20(1), which relates to warrants for the

28 (1979) 1 NTR 6 at 14.

29 See too *Japaljarri v Cooke* (1982) 64 FLR 314 at 318-9 per Toohey J; *R v Murdoch (No. 3)* (2005) 150 NTR 23 at [60]-[61] per Martin (BR) CJ.

apprehension of a defendant following the laying of an information or the making of a complaint.

Effectiveness and validity of a charge and summons

[27] Both under the common law and under the LCCPA the document which identifies the charge (for present purposes a complaint in the nature of an information)[30] and summons must meet certain minimum requirements before they can be effective to charge a person.

Common law

[28] At common law, a complaint or information which was defective, for example for failing to plead an essential element of an offence, was considered a nullity.[31]

[29] It is well established that the validity of a charge is to be determined according to the contents of the charge and summons and on the basis only of what appears from the face of the charge and summons.[32] That is so because the charge defines the issues and thus the evidence admissible in the litigation.[33]

[30] Per Nettle JA in *Kypri* at [16]:

> A charge is to be interpreted in the way in which a reasonable defendant would understand it, giving reasonable consideration to

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30 A "complaint" includes an information laid in respect of a charge of an indictable offence that is dealt with summarily. See s 4 LCCPA.

31 *Kypri* at [24] per Nettle JA (Ashley and Tate JJA agreeing).

32 *Kypri* at [19] and [28].

33 *Kypri* at [28].

> the words of the charge in their context. If, therefore, the contents of the charge and the summons are sufficient when read as a whole to bring home to a reasonable defendant the essential elements of the offence alleged, the charge will not be invalid. Failure to name the sub-section would be a breach of s 27 of the *Magistrates' Court Act 1989*. But that would be the sort of breach which could be rectified by amendment. It would not affect the essential validity of the charge or, necessarily, the validity of any conviction obtained on it. Where, however, as here, the charge and summons do not allege sufficient facts to enable a reasonable defendant to determine *ex facie* the sub-section of s 55 under which the requirement is alleged to have been uttered, the charge is defective because it fails to convey the nature of the offence alleged.
>
> (footnotes omitted)

[31] In other parts of his judgement in *Kypri*, Nettle JA reiterated the need for the charge to contain sufficient information to enable a reasonable defendant to know or determine the true nature of the offence alleged.[34] If the charge is capable of being amended in order to remedy such a defect, it remains "ineffective" until and unless it is so amended.[35] It ought not to be treated as a nullity if the defect can be cured by amendment.[36]

[32] Absent a statutory power of amendment, an information is invalid if it fails to identify an essential factual ingredient of the offence alleged. This will often require the information to properly particularise the criminal conduct alleged. An information which does not contain particulars that provide the accused with reasonable information as to

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34 *Kypri* at [36] – [39] and [41]. See too Ashley JA at [52] and [65] and Tate JA at [68], [70] and [72].

35 *Kypri* at [37].

36 *Kypri* per Tate JA at [68].

the nature of the charge is incurable, sufficient to render the information invalid and inadequate to satisfy a statutory requirement that a proceeding be commenced by information.[37]

Statutory modifications

[33] The common law has been modified to some extent by s 22A and ss 181 to 183 of the LCCPA.

[34] Section 22A provides as follows:

> **Description of offence in documents under this Act**
>
> (1) Any information, complaint, summons, warrant or other document under this Act in which it is necessary to state the matter charged against any person shall be sufficient if it contains *a statement of the specific offence* with which the accused person is charged, *together with such particulars as are necessary for giving reasonable information as to the nature of the charge*.
>
> (2) The statement of the offence shall *describe the offence shortly in ordinary language*, avoiding as far as possible the use of technical terms, and without necessarily stating *all* the essential elements of the offence, and, if the offence charged is one created by any law of the Territory, *shall contain a reference to the section of the law of the Territory creating the offence*.
>
> (3) After the statement of the offence, *necessary particulars of the offence* shall be set out in ordinary language, in which the use of technical terms shall not be required.
>
> (4) Any information, complaint, summons, warrant or other document to which this section applies, which is in such form as would have been sufficient in law if this section had not come into force, shall, notwithstanding anything contained in this section, continue to be sufficient in law.
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> (italics added by me for emphasis)

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37 See for example *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 520-1 per Mason CJ, Deane and Dawson JJ and 526-9 per Brennan J and *Stanton v Abernathy* (1990) 19 NSWLR 656 at 666F-667C per Gleeson CJ.

[35] Clearly these provisions impose mandatory requirements, in particular that the information and summons:

(a) describe the offence, in ordinary language – s 22A(2);

(b) set out necessary particulars of the offence, in ordinary language – s 22A(3); and

(c) identify the section of the relevant Act which creates the offence – s 22A(2).

[36] Section 22A also provides that it is sufficient if the relevant document contains the information set out in s 22A(1) or would have been sufficient at common law – s 22A(4). Further, it is not necessary for the document to state *all* the essential elements of the offence – s 22A(2).

[37] Section 181 provides that:

> It shall be sufficient in any information or complaint if the information or complaint gives the defendant a reasonably clear and intelligible statement of the offence or matter with which he is charged.

[38] Sections 182 and 183 state, in summary, that (a) an objection shall not be taken to an information because of any defect as to substance or form, (b) the Local Court may amend the information to cure any defect if it is in the interests of justice to do so, but (c), subject to such amendment, the Local Court must dismiss an information if the defect

has caused prejudice to the defendant or the information fails to disclose any offence. Those provisions disclose a statutory intention that a defective information will not be a nullity in all circumstances, relevantly where the defect is properly capable of being cured by amendment.

[39] In that context, the courts have recognised two categories of circumstance where the charge is defective:

(a) If a charge is defective (for example, for failing to plead an essential element of the offence alleged) but that defect can be cured by amendment pursuant to a provision like s 183 of the LCCPA, it may be amended and is not to be regarded as a nullity. However, until the charge is so amended, it remains ineffective.[38]

(b) In some cases the defect might be such that a power of amendment is not available or the court might decline to allow an amendment. In those circumstances the defects may be properly regarded as incurable and the information properly regarded as a nullity from the outset.[39]

[40] The requirements in s 22A(2) & (3) that the document "describe the offence" and set out "necessary particulars of the offence, and in s 181, are consistent with the requirements at common law. See too s 190

38 *Kypri* at [37] per Nettle JA (Ashley and Tate JJA agreeing).

39 *Harrison v President of Industrial Court* (2017) 1 Qd R 515 at [114] per Jackson J (McMurdo P and Morrison JA agreeing).

which relates to persons served with a notice to appear. Those provisions are important aspects of the statutory scheme. They are the means by which a defendant is given sufficient information to meet a charge. That necessarily requires not merely specification of the nature of the offence, but the particular act, matter or thing alleged as the foundation of the charge.[40] The requirements safeguard important private rights, principally the right to a fair trial.[41]

[41] For present purposes, the only relevant difference between the common law and the statutory scheme is the power of amendment conferred by s 183. In the present matter that power can no longer be invoked as the Informations have already been dismissed, and no attempts have been pursued for the purpose of reinstating them. Accordingly, any relevant defects in the Informations and Summonses can no longer be cured. The Informations, if defective, would remain ineffective and nullities.

Proceedings for summary offences

[42] The LCCPA also draws a clear distinction between the appropriate process for bringing proceedings for summary offences and that for indictable offences. The former are to be commenced by way of

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40 *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 519, 521 per Mason CJ, Deane and Dawson JJ. *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [26] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. See too *Gabriel v Williamson* (1979) 1 NTR 6 at 10.

41 See, by analogy, G Hill, *Applying Project Blue Sky – When Does Breach of a Statutory Requirement Affect the Validity of an Administrative Decision?* AIAL Forum No. 90, p 63.

complaint[42] and the latter by information.[43] Erroneous joinder of indictable and summary offences, or the pursuit of a summary offence by way of information, is not a mere technicality. Substantially different procedural regimes apply as between indictable and summary offences[44] and those procedures depend on the form of the initiating process filed. The nature of the power exercised is different. In the case of an indictable offence the Court is exercising administrative or quasi-judicial power.[45] Different sentencing considerations may apply where offences are joined on a single information. Accordingly, an information which purports to charge a defendant with a summary offence will be incompetent.[46]

Consideration of the Informations and Summonses

[43] None of the documents complied with the mandatory requirements of s 22A(2) or s 22A(3) of the LCCPA. Nor did they contain sufficient information of the kind contemplated in s 22A(1), s 22A(4) or s 181 of the LCCPA.

[44] In particular, none of them:

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42 S 49 LCCPA.

43 S 101 LCCPA.

44 Compare Part IV and Part V of the LCCPA.

45 *Glynn v Smith* (1984) 70 FLR 427 referring to the precursor provisions to the LCCPA.

46 *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 514-515 per Mason CJ, Deane and Dawson JJ and at 527-8.

(a) contained "a reference to the section of the law of the Territory creating the [alleged] offence – cf s 22A(2);

(b) contained necessary particulars of the offence – cf s 22A(3);

(c) gave the "defendant" a reasonably clear and intelligible statement of the offence or matter with which he or she was charged – cf s 181.

[45] Further, in relation to Mr McGregor (proceeding 97/2018):

(a) The Information and the Summons did not correspond. The offences described in the Summons (assault and "obstruct justice") were different to that described in the Information (attempt to pervert the course of justice).

(b) The alleged date of the offences described in the Summons (8 April 2016) was different to that described in the Information (26 March 2017).

(c) The Summons referred to an offence not known to the law ("obstruct justice") – cf s 182(b).

(d) The Summons purported to join offences without the requisite factual or legal relationship – cf s 101A(1).

[46] In relation to Mr Cu (proceeding 98/2018):

(a) The Information and Summons purported to charge him with committing contempt. There is no indication as to whether the contempt alleged was contempt of court or some other kind of contempt. If it was being alleged that the contempt was a contempt of court such a charge could not be laid by information. The Information states that the offence occurred at "Darwin Supreme Court". Order 75 of the SCR exhaustively prescribes the procedures by which a person may be dealt with for contempt of the Supreme Court. Relevantly, and putting aside the Court's power to deal with contempt summarily (Order 75, Part 2), Order 75 provides that an application for punishment for contempt "shall be by summons or originating motion in accordance with [SCR r 75.06]". That is plainly exhaustive: the word "shall" is directory[47] and the disjunctive "or" contemplates only two alternatives.[48] Accordingly, an information could not competently charge Mr Cu with contempt of court.

(b) The Information stated that the offence was created by the (non-existent) "*Local Court Admin Act*".

[47] In relation to Ms Milligan (proceeding 99/2018):

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47 See, for example, *Forrest & Forrest Pty Ltd v Wilson* (2017) 346 ALR 1 at [67] per Kiefel CJ, Bell, Gageler and Keane JJ, referring to s 74(1)(ca)(ii) of the *Mining Act 1978* (WA). That SCR r 75.06(1) is mandatory is confirmed by comparing that sub-rule to other sub-rules in Order 75 which use the word "may" and which are contrastingly facultative: *Director of Public Prosecutions (ACT) v Hiep Huu Le* (1998) 86 FCR 33 at 40-41 per Miles, Mathews and Madgwick JJ.

48 That is confirmed by SCR rr 75.06(2) and (3), the former of which applies in limited circumstances and the latter of which applies where sub-rule (2) does not apply.

(a) The first Information and Summons purported to charge her with committing contempt. There is no indication as to whether the contempt alleged was contempt of court or some other kind of contempt. The same comments made above in relation to Mr Cu have equal application here.

(b) The first Information stated that the offence was created by the (non-existent) "*Local Court Admin Act*".

(c) The second Information accusing the plaintiff of attempting to pervert course of justice was never the subject of a summons.

[48] In relation to Mr Rowbottam (proceeding 112/2018):

(a) The Information and Summons referred to an offence not known to the law ("obstruct justice") – cf s 182(b).

(b) The Information and Summons purported to charge Mr Rowbottam with contempt of Court. The Information states the offense occurred at "Darwin Local Court". That was incompetent for two reasons:

(i) The procedures for pursuing a charge of contempt of that Court are exhaustively prescribed by *Local Court Act* (NT), Part 4, Division 4 and Order 75, Part 3 of the SCR.[49] Neither

49 See SCR r 75.05(1)(c).

contemplates that a charge of contempt may be laid by information.

(ii) In any event, contempt of the Local Court is not an indictable offence and therefore cannot be pursued by information. Section 47(1) of the *Local Court Act* (NT) provides that the maximum penalty for such contempt is imprisonment for not more than six months. Unless the provision creating the offence states to the contrary (which s 45 of the *Local Court Act* does not), an indictable offence is one where the penalties that may be imposed on an individual offender is two years imprisonment or more.[50]

(c) To the extent the offences of "offensive behaviour" and "substantially annoy" fall within the scope of s 47(a) and (e) of the *Summary Offences Act* (NT), they are summary offences[51] and could not be pursued on information.

(d) The Information and Summons purported to join offences without the requisite factual or legal relationship – cf s 101A(1).

Relief and jurisdiction

[49] In the above circumstances, the grant of the declaratory relief sought by each of the plaintiffs is available and appropriate. The Court's

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50 S 3(2) *Criminal Code* (NT).

51 The maximum penalties for those offences are 6 months imprisonment: s 47 *Summary Offences Act* (NT). See too s 3(3) of the *Criminal Code* (NT).

jurisdiction to award such relief pursuant to s 18(1) of the *Supreme Court Act* (NT) is virtually unlimited[52], confined only by the boundaries of judicial power[53]. Such relief may be awarded whenever there is a "legal controversy" in respect of which the applicant has a "real interest".[54] Whether an information or compliant is valid and effective is a "legal controversy" permitting the grant of declaratory relief[55], and the vindication of a person's reputation is a "real interest"[56].

[50] Such relief is discretionary and not granted as of right. Counsel for the plaintiffs fairly identified and addressed two matters which, on their face, might suggest the discretion ought not to be exercised in some circumstances. The first matter is s 182 of the LCCPA, which provides that "no objection shall be taken or allowed to any information or complaint in respect of any alleged defect therein, in substance or in form". The second is, relatedly, the principle that superior courts ought not interfere with the ordinary course of criminal proceedings by entertaining applications for prerogative and similar relief.[57] However neither factor is relevant where, as here, the proceedings in the Local Court below are concluded.

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52 *Hanson v Radcliffe UDC* [1922] 2 Ch 490 at 507 per Lord Sterndale MR.

53 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (***Ainsworth***) at 581-2 per Mason CJ, Dawson, Toohey and Gaudron JJ.

54 Ibid at 582.

55 *Connor v Sankey* [1972] 2 NSWLR 570 at 594C-D per Street CJ.

56 *Ainsworth* at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

57 *R v Iorlano* (1983) 151 CLR 678 at 660 per curiam.

[51] On the contrary, the following factors support the positive exercise of the Court's discretion in each of these matters:

(a) The Informations and Summonses were grossly and incurably defective.

(b) The purported prosecutions were vexatious proceedings.[58] The defendant personally attended to service of the Informations but did not attend on their first return. It may be inferred that he had no intention of pursuing the prosecutions that he had commenced. Secondly, as I have found, the Informations and Summonses were grossly defective. Thirdly, the proceedings which the defendant commenced all appear unmeritorious on the face of the Informations and Summonses. Fourthly, by reason of the above, it can be inferred, and I do infer, that the charges were purportedly laid for the dominant purpose of harassing and annoying the plaintiffs and were an abuse of process.

(c) The plaintiffs do not have recourse to another remedy.

[52] Accordingly, in relation to each of these proceedings, I declare that the relevant Information was ineffective to charge the plaintiff and was a nullity.

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58 See the definition of "vexatious proceeding" in s 2 of the *Vexatious Proceedings Act* (NT).