PARTIES:	THE QUEEN
	v
	DAYNOR WILMOT EASOM TRIGG
	EX PARTE: NL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NO:	No 188 of 1994
DELIVERED:	27 February 1995
HEARING DATES:	19 September, 21 October 1994
JUDGMENT OF:	KEARNEY J

CATCHWORDS:

CRIMINAL LAW - Jurisdiction, practice and procedure - Committal proceedings - Summons to produce - Defendant charged with sexual assaults - Ruling that relevant community welfare file need not be produced - Disclosure permitted only to “the person to whom ... records relate” - Statute referring to victim of alleged abuse and not the person charged - Consequently no procedural unfairness - Prerogative or declaratory relief refused - Right to production of documents abrogated - Magistrate not obliged to inspect same - Whether sitting as a “Court” when conducting preliminary examination - Community Welfare Act 1983 (NT) s 97 - Justices Act 1928 (NT) s 23

STATUTES - Acts of Parliament - Interpretation - Particular statutes - Community Welfare Act 1983 (NT) s 97 - Disclosure permitted only to “the person to whom..... records relate” - Accused seeking relevant community welfare file - Summons to produce - Purposive approach - “Person” referring to alleged victim and not the person charged - Abrogation of rights by statute - Accordingly right to a fair trial not denied - Meaning of “Court” in context - Whether it includes a Magistrate sitting as a justice in committal proceedings - Community Welfare Act 1983 (NT) s 97 - Justices Act 1928 (NT) s 23

STATUTES - Acts of Parliament - Interpretation - Words and Phrases - Meaning of “courts”

STATUTES - Acts of Parliament - Interpretation - Words and Phrases - Meaning of “Person to whom the information or records relate”

Community Welfare Act 1983 (NT) s 97(3), 97(4)
Justices Act 1928 (NT) ss 23, 106, 121A(1), 121A(3), 123, 125

Ainsworth v Criminal Justice Commission (1991-92) 175 CLR 564
Alister v The Queen (1983-84) 154 CLR 404
Ammann v Wegener (1972) 129 CLR 415
Annetts v McCann (1990) 170 CLR 596
Attorney General v British Broadcasting Corporation [1980] 3 All ER 161
Attorney-General for NSW v Findlay (1976) 9 ALR 521
Barton v The Queen (1980) 147 CLR 75
Canadian Pacific Tobacco Co Ltd v Stapleton (1952) 86 CLR 1
Cheng Kui v Quinn (1984) 67 ALR 231
Connelly v Director of Public Prosecutions [1964] AC 1254
Davidson v T.I.O. (1981) 13 NTR 1
Dietrich v The Queen (1992) 177 CLR 292
Duperouzel v Cameron (1973) WAR 181
Ex parte Cousens; re Blacket [1947] 47 SR (NSW) 145
Grassby v The Queen (1989) 168 CLR 1
Hunt v Wark (1986) 40 SASR 489
Jago v The District Court of New South Wales (1989) 168 CLR 23
MacPherson v The Queen (1981) 147 CLR 512
Maddison v Goldrick [1976] 1 NSWLR 651
McKinney v The Queen (1991) 171 CLR 468
Moss v Brown [1979] 1 NSWLR 114
National Employers' Mutual General Insurance Association Ltd v Waind (1978-79) 141 CLR 648
NSW Bar Association v Muirhead (1988) 14 NSWLR 173
R v Cahill; ex parte McGregor (1984-85) 61 ACTR 7
R v Galvin; ex parte Bara (1983) 24 NTR 22
R v Harry; ex p. Eastway (1986) 39 SASR 203
R v Robertson; ex parte McAuley (1983) 71 FLR 429
R v Schwarten; ex p. Wildschut [1965] Qd R 276
R v Scott; ex parte Church [1924] SASR 220
R v Van Den Bemd (1993-94) 119 ALR 385
Sankey v Whitlam (1978) 142 CLR 1
Shell Co. of Australia Ltd v Federal Commissioner of Taxation [1931] AC 275
Simpson v The Nominal Defendant (1976) 13 ALR 218
Summers v Cosgriff [1979] VR 564
Wilde v The Queen (1988) 165 CLR 365

REPRESENTATION:

Counsel:

Applicant: Mr C McDonald
Respondent: Mr P Tiffin

Solicitors:

Applicant: Mr Stuart
Respondent:

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 188 of 1994

THE QUEEN

AND

DAYNOR WILMOT EASOM TRIGG a Stipendiary Magistrate conducting a preliminary examination under Part V of the Justices Act, at Darwin

Respondent

EX PARTE: N.L.

Applicant

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 27 February 1995)

The application for judicial review

On 11 August 1994 Mr Trigg SM made the ruling at par17 on p5 while conducting a preliminary examination under Part V of the Justices Act. Pursuant to Order 56 of the Supreme Court Rules, the applicant applied by originating motion dated

31 August 1994 for judicial review of that ruling, seeking remedies in the nature of certiorari and mandamus. In the alternative he sought a declaratory order that the ruling was void. The application was argued before me on 19 September. On 21 October I refused to grant the relief sought, for reasons to be published in due course; I publish those reasons today. Initials have been used instead of names, where appropriate, in view of s6 of the Sexual Offences (Evidence and Procedure) Act.

The relief sought in the originating motion, and the 5 grounds for that relief, were as follows, viz:-

> "1. The [Applicant] was at all material times a Defendant to an Information alleging certain charges under the Criminal Code in respect of unlawful sexual assault on a child N.
>
> - - -
>
> 3. The [Applicant] seeks a remedy in the nature of certiorari under Order 56 of the Rules of the Supreme Court seeking to have brought up and quashed the decision of the [Respondent] dated 11 August 1994 wherein the [Respondent] -
>
> (a) ruled that Section 97(4)(a) of the Community Welfare Act refers to the child being investigated and not to any other person; and
>
> (b) ordered that there was no need for the Department of Health and Community Services file brought to the preliminary examination pursuant to a summons issued [by the Applicant] under the Justices Act, to be produced to the [Respondent], and refusing access to it.
>
> The grounds of the application [for certiorari] are that in ruling and ordering as the [Respondent] did -
>
> (a) the [Respondent] denied the [Applicant] procedural fairness or natural justice in that he denied the [Applicant] access to materials, documents, interviews or reports in the Departmental file ("the materials") which the [Applicant] reasonably believed to

be relevant material for the purposes of cross-examination or of forensic value to the conduct of his defence before the [Respondent], and to which the [Applicant] had lawfully sought access by means of a summons issued and served on the Department of Health and Community Services for production;

(b) the [Respondent] wrongly denied himself jurisdiction to receive and inspect materials produced by the Department of Community Welfare in answer to the subpoena, which decision was an error of law which went to his jurisdiction;

(c) the [Respondent] wrongly refused to receive the file and consider an application for access to it, when he was under a duty to do so;

(d) the [Respondent] in his decision erred in law in his construction of Section 97 of the Community Welfare Act, which construction went to his jurisdiction.

(e) the [Respondent] erred in law in refusing the [Applicant] access to the Department of Health and Community Services file without, at least, himself first looking at the materials in the file and considering an application for access to it, which error went to his jurisdiction.

4. Further, the [Applicant] seeks a remedy in the nature of mandamus pursuant to Order 56 of the Rules of the Supreme Court directed to the [Respondent] commanding him to receive the materials [produced] in answer to the subpoena [sic, summons] issued on behalf of the [Applicant], and to hear and determine the questions of an application for access to the materials in accordance with law.

5. Alternatively to paragraphs 3 and 4 hereof, the [Applicant] seeks a declaration that the said ruling and orders of the [Respondent] on 11 August 1993 [sic, 1994] were void on the bases that the [Applicant] was denied procedural fairness, and [that the Respondent] breached the principles of natural justice, and that the [Respondent] erred in law in his construction of Section 97 of the Community Welfare Act and in refusing to look at the file produced by the Department of Health and Community Services."

The background to the application for judicial review

The background is conveniently and succinctly set out in the 18-paragraph "Statement of Agreed Facts" handed up by Mr McDonald of counsel for the applicant. Those facts, as far as relevant, are as follows:-

> " - - -
>
> 3. From approximately 1992 until 13th October 1993, [the Applicant] was living in a de facto relationship with K. Also residing with them were K.'s three children, J. - - - S. and the complainant N.
>
> - - -
>
> 6. The natural father of the three children is D. - - -
>
> 7. The first time that the [Applicant] or K. knew of any complaint of sexual assault of N. was when the police attended at the family's premises at - - - on 13 October 1993 and sought to interview the [Applicant].
>
> 8. On 13 October 1993 police searched the [family's] premises - - - with the consent of the [Applicant] and K. The [Applicant] agreed to accompany police to Berrimah Police Headquarters and was interviewed in a formal record of interview of the evening of 13 October 1993.
>
> 9. K., J. and S. were also interviewed by police on 13 October 1993.
>
> - - -
>
> 11. The [Applicant] was subsequently charged with four counts of sexual assault [upon N. between 22 August 1993 and 3 October 1993, when she was 10 years old] - - -
>
> 12. Committal proceedings were, on 27th June 1994, set down for hearing in Darwin on 11 and 12 August 1994.
>
> 13. On 8 August 1994 three summonses to produce documents were issued by the solicitors for the [Applicant] returnable at 2pm on 10 August 1994. - - -

14. At about 2pm on 10 August 1994 the summonses were called on before Mr D Trigg SM. Mr McDonald appeared for the [Applicant]. Mr Delaney appeared for the Director of Public Prosecutions. - - -

15. The summons to the Department of Health and Community Services was then called on. Mr William Caulfield appeared bearing a file in answer to the summons. He objected to the production of the file on the basis of s97 of the Community Welfare Act. Mr Trigg adjourned the proceeding until 10am the next day.

16. On 11 August 1994 the committal commenced before Mr Trigg. The charges were read to the [Applicant]. Then access was sought [by Mr McDonald] to the Department of Health and Community Services file.

17. Mr Trigg ruled that:-

"I rule that section 97(4)(a) of the Community Welfare Act refers to the child being investigated, and not to any other person. I order that there is no need for the file to be produced and access to the Community Welfare file is refused."

18. At the time of his ruling Mr Trigg was sitting as a Justice conducting a preliminary examination under the Justices Act. - - -"

Par4 of the affidavit of 31 August 1994 of the applicant's solicitor Mr Stuart, disclosed that the prosecution proposed to call as witnesses at the committal only N., her mother K. and two police officers.

Section 97 of the Community Welfare Act (herein "the Act") provides, as far as relevant:-

"(1) - - -

(2) A person shall not, directly or indirectly, except in the performance of his duties, or in the exercise of his powers or the performance of his functions under this Act, and while he is, or after he

ceases to be, an authorised person, make a record of, or disclose or communicate to any person, information, in respect of the affairs of another person, acquired by him in the performance of his duties or in the exercise of his powers or the performance of his functions under this Act.

Penalty: $500 or imprisonment for 3 months.

(3) A person who is, or has been, an authorised person shall not, except for the purposes of this Act, be required to -

(a) produce in a court a document that has come into his possession or under his control; or

(b) disclose or communicate to a court any matter or thing that has come under his notice,

in the performance of his duties or functions under this Act.

(4) Notwithstanding subsections (1), (2) and (3), an authorised person may disclose information or records that have come to his notice or into his possession in the performance of his duties or functions under this Act -

(a) to the person to whom the information or records relate;

(b) in connection with the administration of this Act;

(c) if the Minister certifies that it is necessary in the public interest that information should be disclosed - to such person as the Minister directs;

(d) to a prescribed authority or person;

(e) to a person who, in the opinion of the Minister, is expressly or impliedly authorised by the person to whom the information relates to obtain it; or

(f) subject to the approval of the Minister - to a person engaged in a bona fide research program where the person has given an undertaking in writing to the Minister to preserve the identity of and confidentiality relating to individual persons to whom the information and records relate.

> (5) An authority or person to whom information is disclosed under subsection (4), and any person or employee under the control of that authority or person, shall, in respect of that information, be subject to the same rights, privileges, obligations and liabilities under subsections (2) and (3) as if it or he were an authorised person and had acquired the information and records in the performance of his duties as such." (emphasis mine)

No doubt the perceived need for a provision such as s97(3) of the Act, despite the blanket prohibition in s97(2), was that a "court" is not a "person"; see *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1. It will be noted that his Worship in his ruling (par17 on p5) did not expressly refer to s97(3) of the Act, though the order that there was "no need for the file to be produced" reflects the language of that provision, which he clearly had in mind. It is desirable to set out in some detail what took place at the preliminary examination on 11 August.

The preliminary examination on 11 August 1994

Mr Caulfield, an "authorised person" under the Act, appeared in obedience to the applicant's summons of 8 August. He described himself as the "Senior Child Protection Worker with Child and Family Protective Services"; that is an office within the Department of Health and Community Services. He testified that to the best of his knowledge the file he had brought with him in obedience to the applicant's summons contained all the documents "relevant to the items asked for [items 1-4, pp8-9]".

The applicant's summons of 8 August was in Form 2B prescribed by the Justices Regulations, a "Summons to a Witness

to produce documents on Information" pursuant to s23 of the Justices Act. It was directed to -

> "The Officer in Charge of Child and Family Protective Services care of Department of Health and Community Services - - -."

That person is clearly a Mr George Barker; the applicant seeks no relief against Mr Barker in this application. It is not in dispute that the file in question came into the possession or under the control of Mr Barker, an "authorised person" for the purposes of the Act. It may be noted here, in view of Mr McDonald's submission (5) at p23, that the applicant did not direct his summons to the "Officer-in-Charge of the responsible Government Department".

Section 23 of the Justices Act provides, as far as relevant:-

> "23. If a Justice - - - is satisfied that any person is likely - - - to have in his possession or power any article (which term includes any document, writing, or thing) required for the purposes of evidence upon behalf of either party to any Information or Complaint, the Justice - - - may issue a summons to the person requiring him to appear, at a time and place mentioned in the summons, before such Justices as shall then be there, - - - to produce the article, - - - ."
> (emphasis mine)

The "articles" the applicant required to be produced by his summons of 8 August, were the following:-

> "1. The file opened, maintained and kept by the Child and Family Protective Services and/or the Department of Health and Community Services or their agents in respect of or relating to the complaint by N. resulting in this Information;
>
> 2. Any statements given to any officer of Child and Family Protective Services and/or the Department of Health and Community Services in respect of or relating to the complaint by N. resulting in this Information, given by :-

(i) K.
(ii) N.
(iii) J.
(iv) S.
(v) T.
(vi) D.
(vii) Any friend, doctor, school teacher or other person to whom N. has made a complaint or discussed the issues in any way.

3. Any medical or psychiatric report prepared concerning N. in relation to her complaint.

4. The notes of any assessment or interview taken from N. by any officer of the Department of Health and Community Services."

Mr Caulfield informed his Worship that the file he brought related "to the investigation of the report that the child [that is, N.] had been abused", and he had acquired the information it contained in the performance of his duties as an "authorized peron" under the Act. He explained to his Worship that he objected to producing the file because he considered that s97(3) of the Act (p6) was a statutory prohibition on his being required to do so and, in the circumstances of the case, s97(4) (p6) did not create an exception to that prohibition. He clearly also had in mind the general prohibition preventing him from disclosing such information "to any person", in s97(2); see pp5-6. In short, he believed that s97(2) of the Act prohibited him from providing his Worship with the articles sought in the summons, s97(3) prohibited his Worship from requiring him to do so, and s97(4) provided no exception to those prohibitions, in the circumstances of the case. He stated that no person had been "prescribed" for the purposes of s97(4)(d) of the Act; see p6.

Mr McDonald then sought to ascertain from Mr Caulfield whether there was information on the file which related to the applicant. Mr McDonald submitted that this information could be disclosed to the applicant under s97(4)(a); (see p6). In effect, his submission was that in the circumstances of the case the exception to the general prohibition on disclosure in s97(2) and (3), constituted by s97(4)(a) when properly construed, allowed an authorized person to permit the applicant to have access to information relating to him which was on the file. A major difference arose between Mr Caulfield and Mr McDonald on the proper construction of s97(4)(a). Mr McDonald submitted that, construing that provision purposively while bearing in mind the rules of natural justice in hearing criminal charges and the importance in the law of the liberty of the subject, the applicant as the person charged with having abused N., was included within the expression "the person to whom the information or records relate" in s97(4)(a). He referred to *Ainsworth v Criminal Justice Commission* (1991-92) 175 CLR 564, on what natural justice required.

His Worship then raised what became the critical question. He suggested that in the circumstances of the case the words "the person" in s97(4)(a) referred only to the person in relation to whose alleged abuse the information on the file had been gathered; that is, that here only the child N was a "person to whom the information or records [in the file] relate". If so, s97(4)(a) did not authorise disclosure of that information to the applicant, since ex hypothesi he was not such a person. In other words, the applicant could not found on the

exception to the prohibition in s97(2) provided by s97(4)(a). His Worship also observed that the basis of the prosecution case in the preliminary examination was material in the Police file, to which the applicant had already been given access, and not material in Mr Caulfield's file.

Mr McDonald responded that the relationship between the Police file and Mr Caulfield's file was not known either to the applicant or to his Worship. He referred to *R v Galvin; ex p. Bara* (1983) 24 NTR 22. I note that that case bore on the approach to construing s97(4)(a). There, a person was charged with murder. He refused to consent to having a sample of his blood taken. A magistrate ordered that a sample be taken. Muirhead J held that his Worship was empowered to do so, since the statute authorising him was unambiguous. At pp23-24 his Honour said:-

> "Mr McDonald emphasized that important matters of principle were at stake. He thoroughly analysed the authorities which refer to the preservation of traditional rights. He submitted that [the statutory provision empowering a magistrate to approve the taking of a blood sample] interferes with vested rights, creates inroads into the liberty of the subject and offends the long standing common law principles against self incrimination and protection against interference with the bodily integrity of the individual. He submitted quite correctly that the law will not permit interference with such rights unless Parliament so authorizes in unambiguous terms. He submitted, again correctly, that when construing statutes of penal nature or effect the courts will not interpret the statute so as to waive or intrude upon such rights unless the language is irresistible." (emphasis mine).

I respectfully adopt that approach to the construction of s97(3) and (4).

Mr McDonald also attacked the alleged statutory prohibition in s97(3) prohibiting Mr Caulfield from being required to produce the file to his Worship. He submitted that "a court" in s97(3) (p6) referred only to the Family Matters Court; he contended that the definition in s4(1) of the Act, viz:-

> "'Court' means the Family Matters Court established by Section 24"

must be read in to the word "court" in s97(3). If so, his argument ran, since his Worship was clearly not then sitting as the Family Matters Court, s97(3) did not affect the compulsive power of the summons pursuant to s23 of the Justices Act (p8) to "produce" the file.

Mr McDonald submitted, alternatively, that since his Worship was conducting a preliminary examination under Part V of the Justices Act, in doing so he was not sitting as "a court" of any description; he was conducting the examination in his capacity as a "Justice", exercising that function under s106 of that Act (see p13). Section 97(3) (a) which prohibited requiring an authorized person "to produce in a court" therefore simply did not apply in the present circumstances.

Mr McDonald summed up the thrust of his submissions succinctly, viz:-

> "Your Worship has a right to see the documents. The Department - - - has an obligation to furnish them to the court [pursuant to the summons], and it's then up to myself and Mr Delaney to establish our right of access to them. - - - The claim under [s] 97(3) cannot be sustained, by reason of the clear legislative definition of "Court" [in s4(1) of the Act], and that is the Family Matters Court which your Worship is not sitting in today."

His Worship ruled on the point immediately in the terms set out in par17 on p5. Mr McDonald then stated that he was instructed to seek a review of that ruling, under Order 56; the preliminary examination was adjourned to enable that to be done. Hence the application to this Court of 31 August.

The applicant's submissions on 19 September 1994

The essence of the applicant's complaint about his Worship's ruling of 11 August was that he had thereby been refused access to documents important to his defence; he also complained that the Magistrate had refused to inspect the file of those documents. Mr McDonald submitted that though the basis of his Worship's ruling (par17 on p5) was "slightly elliptical", his Worship must have considered both ss(3) and (4) of s97 of the Act (p6), in particular, to arrive at that ruling. I accept that from the submissions made and the language used in par17 on p5, his Worship clearly directed his mind to s97(2), (3) and (4)(a). Mr McDonald then made 9 submissions (see pp13-26) directed at establishing one or other of the grounds (a)-(e) relied on, at pp2-3; 6 submissions related to s97(3) of the Act, 2 to s97(4)(a) and (b) and 1 was general. They were to the effect that his Worship had erred in construing these provisions when making his ruling, and had thereby denied the applicant procedural fairness and his right ultimately to a fair trial. Mr McDonald's further 9 submissions, in reply, are briefly set out at pp36-39.

(a) Applicant's submissions directed to s97(3)of the Act

(1) Mr McDonald submitted that when his Worship made the ruling at par17 on p5 he was not then sitting as a "court" within the meaning of "court" in s97(3), but as a Justice of the Peace (see s6(1) and Schedule 1 of the Justices of the Peace Act) conducting a preliminary examination under Part V (ss100A-161) of the Justices Act into the indictable offences with which the applicant had been charged. Section 106 of the Justices Act provides, as far as relevant:-

> "106. - - - where a person appears or is brought before a Justice charged with an indictable offence - - - the Justice shall - - - take the preliminary examination or statement on oath of any persons who know the facts and circumstances of the case, and the defendant or his counsel or solicitor may cross-examine those persons." (emphasis mine)

He submitted that as a matter of statutory interpretation, of history, and of the purpose and policy of the Justices Act, a Magistrate (a Justice) conducting a Part V preliminary examination did not constitute a "court" of any description, and therefore did not fall within s97(3) of the Act. Consequently, s97(3) simply had no bearing on the duty of an "authorised person" summonsed to produce documents at a preliminary examination.

(2) Mr McDonald submitted that s97(3) should be construed having particular regard to s23 of the Justices Act (p8), which reflected the "important historical function of the use of subpoenas in criminal matters". He submitted that the compulsive power in s23 should be interpreted broadly, referring to *Alister v The Queen* (1983-84) 154 CLR 404 at 450-2 per

Brennan J, and at pp412-5 per Gibbs CJ; *Sankey v Whitlam* (1978) 142 CLR 1 at pp61-2, per Stephen J; and *Maddison v Goldrick* [1976] 1 NSWLR 651 at 658 and 666-7.

In *Alister v The Queen* (supra) the accused at his trial issued a subpoena to A.S.I.O. to produce documents allegedly generated by one Seary's investigation into the Ananda Marga organisation. The Attorney-General by affidavit stated that to disclose whether such documents existed "would be prejudicial to the national security", for reasons which he then stated. It can be seen that the production of the documents, or rather any acknowledgment that such documents existed, was resisted on the ground of public interest immunity, and not of an alleged statutory prohibition on production, as here. The trial Judge considered he should accept the Attorney's assertion of public interest immunity. He set aside the subpoena. The High Court held that he erred in doing so. Brennan J said at pp450-2:-

> "- - - the ground of complaint relates not to the use which the applicants sought to make of evidence available to them, but to their loss of an opportunity to obtain evidence.
>
> The right of an accused person to compulsory process to secure the attendance of witnesses is a right of some antiquity.
>
> [His Honour then traced the historical development of this right, and continued:]
>
> The right of an accused person to compulsory process as of course to secure witnesses has been acknowledged for nearly three centuries. It is so basic and important an aspect of our criminal procedure that a trial in which the right is denied cannot be, in my opinion, a trial according to law. There is no distinction to be drawn in this respect between a subpoena ad testificandum and a subpoena duces tecum:

see *Amey v Long* (1808) 9 East. 473, at pp84-85 [103 E.R. 653, at p658]. Lawrence J is there reported to have said during argument (1808) 9 East., at p481 [103 E.R., at pp656-657] that:

> "- - - he could not reconcile it to his mind to suppose, that the innocence of a person accused might depend on the production of a certain document in the possession of another, who had no interest in withholding it, and yet that there should be no process in the country which could compel him to produce it in evidence".

Of course, the applicants did not know and do not know now whether ASIO have possession of any document admissible in aid of the defence case. But the right to compulsory process cannot be dependent upon the party's ability to prove the existence and content of a document when the party has reasonable grounds to believe that a document exists and seeks to obtain it by subpoena. That would eviscerate the right and limit its enforcement to occasions when the party already has in his possession secondary evidence of the original document the production of which the subpoena is intended to secure.

In the present case, if the applicants were entitled by subpoena to compel ASIO to produce to the court documents answering the description in the subpoena, it could not be said that their trial was according to law. Lee J denied the applicants the benefit of the subpoena, for he set the subpoena aside. If he did so upon erroneous grounds, the applicants' trial was not according to law." (emphasis mine)

Gibbs CJ said at pp412-415:-

"The present case raises for consideration the analogous question [that is, "analogous" to the questions when, and the criteria upon which, the court should inspect documents for the purpose of deciding whether they should be produced] whether the court should require the production of any documents that may answer the description in the subpoena, to enable the court first to discover whether any such documents exist, and then to inspect them for the purpose of deciding whether they should be disclosed to the applicants.

Sankey v Whitlam (1978) 142 CLR 1 establishes that when one party to litigation seeks the production of documents, and objection is taken that it would be against the public interest to produce them, the court is required to consider two conflicting aspects of the public interest, namely whether harm would be done by

the production of the documents, and whether the administration of justice would be frustrated or impaired if the documents were withheld, and to decide which of those aspects predominates. The final step in this process - the balancing exercise - can only be taken when it appears that both aspects of the public interest do require consideration - - -. The court can then consider the nature of the injury which the nation or the public service would be likely to suffer, and the evidentiary value and importance of the documents in the particular litigation. But the anterior question arises - should the court look at the documents to assist it in answering these questions?

The fact that disclosure of the fact whether the documents sought by the subpoena in the present case exist, and their production if they do exist, would be harmful to the public interest is sought to be established by the affidavit of the Attorney-General. But *Sankey v Whitlam* decides that an objection [to production], even if properly taken, is never conclusive - - -

[His Honour then examined the grounds of objection stated in the Attorney's affidavit, and concluded:]

- - - I am not at all convinced that the public interest requires that ASIO should be able in all cases to refuse to disclose whether any document exists, and to refuse to produce it if it does exist.

On the other hand, the applicants are unable to say that any documents of the kind described in the subpoena exist or, if they do exist, that they are likely to assist the applicants' case. - - -

Both *Burmah Oil Co. Ltd v Bank of England* (1980) A.C. 1090 and *Air Canada v Secretary of State for Trade* [1983] 2 A.C. 394 support the view that where the Crown objects to the production of a class of documents on the ground of public interest immunity, the judge should not look at the documents unless he is persuaded that inspection would be likely to satisfy him that he ought to order production; - - - in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence. If, for example, it were known that an important witness for

> the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report could assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done." (emphasis mine)

In *Maddison v Goldrick* (supra) the Court of Appeal held that the defendant was entitled to have the witnesses' statements in the 'police brief' produced to him at the preliminary examination for a legitimate forensic purpose, those statements not being protected by solicitor-and-client legal professional privilege. The significant reason for the defendant to be allowed access to the witnesses' statements in the 'police brief' was that otherwise he might be quite unable to establish vital discrepancies where they in fact occurred, and so be unable to make his "full answer and defence", the right secured to him by the Justices Act 1902 (NSW). That appears to be the gravamen of Mr McDonald's complaint here. At p658 Samuels J.A. stressed that a defendant had the same right of cross-examination at a preliminary examination as at a trial; and at p659 that -

> "- - - the defendant has the right to answer the case sought to be made against him by any forensic means which the law allows."

I consider that these authorities are distinguishable in so far as they were not concerned with the question whether an Act expressly prohibited the reception of the materials.

Mr McDonald further submitted as follows. The importance of the "historical function" of s23 of the Justices

Act is that it provides a compulsive process by which to secure for a person charged with an offence one aspect of his substantive right to a fair trial. In this case, the practical effect of the ruling at par17 on p5 was that the applicant would ultimately be denied that substantive right, since it denied him access to information necessary to enable him effectively to test by cross-examination the evidence to be adduced by the prosecutor in the preliminary examination. Accordingly, his Worship was in breach of his duty to act fairly in conducting the preliminary examination. That the practical effect of the ruling went to a fair trial also constituted the "exceptional circumstances" necessary to warrant judicial review of the conduct of the preliminary examination.

Mr McDonald referred again to *Alister v The Queen* (supra) at p450-2 per Brennan J (see pp14-15), on the importance of the right of an accused person to secure the production of documents at his trial by compulsory process; he submitted that a defendant had the same and equally important right in a preliminary examination, stressing the requirement in s111(2) of the Justices Act that the Justice there take "any evidence tending to prove the innocence of the defendant". I accept that.

Mr McDonald submitted that one important purpose of the preliminary examination was to enable the defendant to test the evidence of the prosecution; see *Grassby v The Queen* (1989) 168 CLR 1 per Dawson J at 15. I accept that; see *Barton v The Queen* (1980) 147 CLR 75 at p99 per Gibbs ACJ and Mason J, and at

p105 per Stephen J, and the observations of King CJ in *R v Harry; ex p. Eastway* (1986) 39 SASR 203 at pp209-214. He submitted that these considerations pointed to s97(3) of the Act being so interpreted as not to rule out the use of the s23 process in the preliminary examination, to obtain access to the file; if the s23 summons was rendered ineffective by s97 of the Act, the preliminary examination and any consequent trial of the applicant, would necessarily be unfair.

I observe that a fundamental aim of the criminal justice system - the "central prescript of our criminal law", as Deane J put it in *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at p56 - is to secure to an accused person his right to a fair trial. The facets of a fair trial, in terms of an accused's rights, have been cut over the centuries: his right to cross-examine Crown witnesses goes back some 230 years; the concept that he has a right to make "full answer and defence" stems from the Trials of Felony Act 1836 (6 and 7 Wm IV, c. 114) (U.K.); the right of an accused to give evidence stems from the Criminal Evidence Act 1898 (U.K.); and so on. See generally *Grassby v The Queen* (supra) at pp11-15, per Dawson J. The Courts have historically moulded the laws of evidence and procedure to prevent unfairness to an accused; for example, see the analysis in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1347-1361 per Lord Devlin. A trial judge is bound to ensure that an accused has a fair trial; see *MacPherson v The Queen* (1981) 147 CLR 512 at p523, per Gibbs CJ and Wilson J. It must however be a fair trial "according to law";

see *Wilde v The Queen* (1988) 165 CLR 365 at p375, per Deane J. What a "fair trial" entails was closely examined in *Jago v The District Court of New South Wales* (supra), where it was held that there was no right at common law to a speedy trial; see at pp29 and 33-34 per Mason CJ, pp56-7 per Deane J, and p76 per Gaudron J. In *McKinney v The Queen* (1991) 171 CLR 468 the majority of the High Court said at p478:-

> "The central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial according to law. It is obvious that the content of the requirement of fairness may vary with changed social conditions - - -."

In *Dietrich v The Queen* (1992) 177 CLR 292, Mason CJ and McHugh J said at pp299-300:-

> 299 "The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system.
>
> - - -
>
> 300 There has been no judicial attempt to list exhaustively the attributes of a fair trial."

See also pp326-9, per Deane J; and cf pp362-5 per Gaudron J. It may be noted that Deane and Gaudron JJ considered that the common law right not to be convicted except after a fair trial according to law was entrenched in the Constitution by Chapter III, in relation to Commonwealth offences; see pp326, 338 and 362 respectively.

Mr McDonald conceded that the legislature could abrogate the fundamental and well-established right of a defendant to have access to information by s23 summons, but submitted that it could only do so by clear and unambiguous legislation to that effect. I accept that. He submitted that

s97 of the Act was not legislation of that character; that, I think, is the nub of the case. Accordingly, he submitted, the ruling at par17 on p5, made in circumstances where the applicant faced a prospect of severe criminal sanctions and damage to his reputation flowing from the preliminary examination, involved either a breach of proper criminal procedure as exemplified by s23, or a breach of natural justice in that ultimately it would deny the applicant his right to a fair trial.

Mr McDonald's third and fourth submissions were alternative to his first (pp13-14), in that they assume that his Worship was sitting as a "court" when conducting the preliminary examination and making his ruling.

(3) Although his Worship was sitting as a court at the time he did not constitute a "court" within the meaning of that word in s97(3), because the meaning of "court" in s97(3) was exhaustively and comprehensively defined in s4(1) of the Act (see p12). In other words, the only "court" which fell within the prohibition in s97(3) was the Family Matters Court, and clearly his Worship was not then sitting as that Court. The Act did not intend that courts exercising criminal jurisdiction be affected by the secrecy provisions in s97.

(4) Mr McDonald's fourth submission, in support of submission (3), was that the word "court" in s97(3), there spelled with a small "c", should be given the same meaning as "Court" spelled with a capital "C", as defined in s4(1) of the Act (that is, the reference in s97(3) was solely to the Family Matters Court), so as better to preserve the applicant's right to a fair trial. The fact that "court" was spelled with a small

"c" in s97(3), rather than with a capital "C", should be viewed as legislative drafting which was inadvertent rather than purposeful. The difference in the case of the initial letter should be treated as akin to a mere matter of punctuation for the purposes of construction, and accordingly should not control the meaning of "court" in s97(3); see par70, D.C. Pearce 'Statutory Interpretation in Australia' (2nd ed., 1981).

(5) His Worship when ruling did not keep in mind that the applicant's summons of 8 August was addressed to the officer-in-charge of the responsible Government Department. (I earlier noted (see p8) that this submission misapprehends the facts; the summons was not directed as suggested but was (correctly) directed as indicated on p8. Mr McDonald submitted that the only purpose of s97 was to ensure that "authorized persons" observed secrecy. The relevant Department, when obeying the summons, could have chosen to produce the file through an officer who was not an "authorized person" within s4(1) of the Act; s97 did not apply to such persons. Had the Department chosen to do so, it could still have objected to making the file available for inspection, if it wished, on grounds such as legal professional privilege or public interest immunity. I consider there is no substance in this submission, which proceeds upon an inaccurate premise as to the person summonsed; in any event, only an "authorized officer" could produce the file.

(6) His Worship was obliged to inspect the documents in the file himself "to ascertain at the very least whether they had been produced [that is, prepared] for the purposes of the

Act", and he had not done so. Mr McDonald submitted that if that inspection revealed interviews containing "leading questions or activity that could be said to have tainted the interview process", the documents could not be treated as having been prepared "for the purposes of the Act", those purposes being identified by the normal process of statutory construction. He also submitted that the failure by his Worship to inspect the documents constituted a non-exercise on his part of a discretionary power, and amounted to a denial of natural justice.

(b) Applicant's submissions directed to s97(4) of the Act

(7) His Worship had erred in construing the word "person" in s97(4)(a) of the Act restrictively, to mean only the child whose alleged abuse was being investigated. He submitted that applying s24(b) of the Interpretation Act to s97(4)(a), "person" may be read in the plural to embrace "persons"; "relate" means "have reference" to those persons. Accordingly, s97(4)(a) has a wider operation than that given it by his Worship in his ruling; "person" not only embraces the child allegedly abused but also persons whose reputations, interests or rights were potentially or actually affected by the information on the file. Giving s97(4)(a) that wider operation is more consistent with the application of the rules of natural justice. Further, Mr Caulfield had thereupon failed to consider the exercise of his discretionary power under s97(4)(a), due to his misinterpretation of that provision (see pp9-10).

(8) Mr McDonald's eighth submission founded on s97(4)(b) of the Act (p6). Mr McDonald submitted that his Worship had misconstrued s97(4)(b) in making his ruling. I note that no submission about the effect of that provision had been put to his Worship, and there is nothing in par17 on p5 to suggest that he was ruling upon its operation.

Mr McDonald informed me that it was common ground that N. had been in the Department's temporary custody for several days, under s62 of the Act; he submitted that this showed that authorized persons had "obviously exercised duties and functions 'in connection with the administration of the Act'". Further, their duties under the Act included the duty of complying with lawful process such as the summons. An "authorized person" in this case had at least to exercise the discretion under s97(4)(b) whether or not to "disclose - - - information that [had] come - - - into his possession in the performance of his [statutory duties] - - - in connection with the administration" of the Act; the exercise of that discretion had not been considered by the authorised person , due to his misinterpretation of s97(4) of the Act (see p9). Further, the authorised person had to satisfy the Justice that he had taken into account only proper considerations, when deciding in the exercise of his discretionary power under s97(4)(b) whether or not to produce the file.

In any event, in a criminal proceeding, as here, the words "may disclose" in s97(4) should be read as "shall disclose"; that is, in this case, there was no discretion, and the authorized person was required to disclose the information.

(9) Finally, when his Worship was apprised by Mr Caulfield of the reasons for his belief that he was unable to produce the file (see p9), natural justice required him to inform Mr Caulfield that those reasons were invalid, being based on a misinterpretation of s97, and to inform him of the correct interpretation; this his Worship had failed to do.

The materials relied on

In support of these submissions Mr McDonald relied on the statement of agreed facts (see pp4-5) and the affidavits of Cameron Kingston Stuart sworn 31 August and 7 September 1994. He referred to s24(b) of the Interpretation Act which provides that words in the singular or in an Act "shall include" the plural, and vice versa; by way of contrast to the definition of "Court" in s4(1) of the Act, the definition of "court" in s3 of the Sexual Offences (Evidence and Procedure) Act which specifically "includes a Justice acting under Part V of the Justices Act"; the Evidence Act ss4 (a wide definition of "Court" to include, inter alia, any Justice), 19 and 20 (dealing with proof of contradictory statements by witnesses, and their cross-examination as to previous statements in writing); s125(2) of the Justices Act, dealing with the time when a Magistrate becomes a Court, for the purpose of disposing of a "minor [indictable] offence"; the present system in NSW where the Local Court as such conducts committal hearings; and to ss24 and 62 of the Act, setting up the Family Matters Court, and providing for the Minister's temporary custody of a child.

He also referred to dicta in *R v Van Den Bemd* (1993-94) 119 ALR 385 at 386 supporting an interpretation of "an event

which occurs by accident" in s23 of the Criminal Code (Q'land) which "favours the individual"; and to *Attorney-General for NSW v Findlay* (1976) 9 ALR 521 at p522, to the effect that statements by persons who might be called as witnesses at a preliminary examination can be subpoenaed, must be produced to the Magistrate, may in his discretion be inspected by the defendant, and are not, as a class, subject to professional privilege.

He also referred to *Hunt v Wark* (1986) 40 SASR 489, which dealt with issues which arise when a s23 summons is sought to be set aside; *Cheng Kui v Quinn* (1984) 67 ALR 231, affirming that in committal proceedings a defendant is entitled to an order that statements of witnesses to be called by the prosecution be produced to the Magistrate, whose discretion to grant access to documents produced to him must be exercised in the interests of the fair conduct of the hearing; *Carter v Hayes* (unreported, Supreme Court (S.A.), 30 March 1994); *R v Cahill; ex p. McGregor* (1984-85) 61 ACTR 7; *Annetts v McCann* (1990) 170 CLR 596 at p598, where the High Court, citing various authorities, considered it settled that "when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment"; *Duperouzel v Cameron* (1973) WAR 181 at p182, to the effect that the word "means" is a word of true definition, so that "the

words following it stand as an exclusive statement of what the subject expression includes"; *R v Scott; ex p. Church* [1924] SASR 220; *R v Robertson; ex p. McAuley* (1983) 71 FLR 429; *Ex p. Cousens; re Blacket* [1947] 47 SR (NSW) 145 at p146 on the "essentially executive" nature of a preliminary examination; *Ammann v Wegener* (1972) 129 CLR 415 at pp435-8 per Gibbs J on the nature and history of preliminary examinations; *NSW Bar Association v Muirhead* (1988) 14 NSWLR 173 on whether a Commissioner of the Compensation Court was a "court", for the purposes of the law of contempt of court; *Shell Co. of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275 at 297 on whether the Board of Review was a Court or an administrative tribunal; *Attorney General v British Broadcasting Corporation* [1980] 3 All ER 161 at 180-2 on whether a local valuation court was 'an inferior court', for the purposes of the law of contempt; *Summers v Cosgriff* [1979] VR 564 at 568 on the discretionary power of a Magistrate in a preliminary examination to order that further and better particulars be given; *Simpson v The Nominal Defendant* (1976) 13 ALR 218 where Forster J (as he then was) commented on the meaning of the word "means", and on the use of purposive arguments in the construction of statutes; *Davidson v T.I.O.* (1981) 13 NTR 1 at 5 on the significance of punctuation (the use of commas) in the construction of statutes; and *National Employers' Mutual General Insurance Association Ltd v Waind* (1978-79) 141 CLR 648 on the question whether certain reports obtained by an insurer were protected by legal professional privilege when subpoenaed. He also referred to

D.C. Pearce, op.cit. par156; and to the Second Reading speech when the Bill for the Act was introduced.

The respondent's submissions

Mr Tiffin of counsel for the respondent submitted that the application involved only "two main points": first, the meaning of "court" in s97(3) of the Act; and second, the meaning of the phrase "a person to whom the information or records relate" in s97(4)(a) of the Act. I accept that.

Before dealing with these points Mr Tiffin pointed to one consequence of accepting Mr McDonald's first submission (pp13-14) on a "hybrid" offence, where an indictable offence is dealt with summarily with the consent of the accused under s121A of the Justices Act. Acceptance of that submission meant that production of the documents could be compelled only while the Magistrate was conducting the preliminary examination, because he was not then sitting as a "court" within s97(3); it followed that when he decided to hear the charge summarily under s121A, and thereafter sat as a court to do so, s97(3) would prevent the production of the documents in that hearing. Mr Tiffin submitted that such an outcome was absurd, and this pointed to Mr McDonald's first submission as being unlikely to be correct. He then turned to his "two main points".

(1) The meaning of "court" in s97(3)

He submitted that his Worship constituted a "court" at the relevant time, within the meaning of that word in s97(3) of the Act. He made 2 broad submissions, in support.

(a) First, various provisions dealing with a preliminary examination in Part V of the Justices Act, do not consistently draw the clear historical distinction between a 'court' and a 'justice conducting a preliminary examination' on which Mr McDonald relied in his first submission (pp13-14). Mr Tiffin submitted that the word "court" is now more widely used to refer to the body which conducts a preliminary examination, than was the case "one hundred years ago". I accept that. He submitted that as a consequence of this change, it is "inappropriate [when interpreting s97(3)] to categorise - - - a 'court' in some absolute sense"; rather, in determining whether a 'justice conducting a preliminary examination' constitutes a "court" for the purposes of s97(3), regard should be had to the purposes of the Act and of the Justices Act. The question is: what is a "court" for the purposes of s97(3), in the context of the Act? Mr Tiffin submitted that those purposes in that context point to a justice conducting a preliminary examination as falling within the meaning of "court" in s97(3).

In support of this submission, Mr Tiffin noted references to "Court" in provisions dealing with preliminary examinations in the Justices Act; see ss121A(1) and (3), and, in particular, s123 which provides, as far as relevant:-

> "123. (1) When a defendant appears before any Magistrate or Justices charged with any offence cognizable by a Magistrate or Justices under section 120, [that is, a minor indictable offence] the Court shall, when all the evidence offered on the part of the prosecution has been heard, determine whether it will deal with the case in a summary way or not, and inform the defendant of its determination.

> (2) If the Court determines not to deal with the case in a summary way it shall complete the preliminary examination.
>
> - - - " (emphasis mine)

I note also the reference to "Magistrate" in s121C, which clearly means the Court constituted by a Magistrate.

I observe that on the face of s123(2) the otherwise strict dichotomy in Part V of the Justices Act (apart from s121A(1) and (3)) between a justice conducting a preliminary examination and justices (or a Magistrate) constituting a Court of Summary Jurisdiction, no longer obtains. Section 123(2), introduced over 60 years ago, requires the "Court" as such to "complete the preliminary examination"; it is a special regime for dealing with minor (hybrid) indictable offences which the Court considers should not be dealt with summarily.

Further, I note that s123 must be read in the light of s125 which provides, as far as material:-

> 125. "(1) When Justices or a Magistrate proceed to dispose of any case as a minor offence, - - - the charge shall, in the case of a parol Information, be reduced into writing, and the defendant shall be asked whether he is guilty or not guilty of the charge.
>
> (2) Thereafter the Justices or Magistrate shall be the Court of Summary Jurisdiction within the meaning of this Act, and, subject to this Act, the procedure and the powers of the Court shall be the same, and the provisions of this Act shall apply, as if the charge were a complaint for a simple offence under this Act." (emphasis mine)

Section 125 re-affirms the traditional dichotomy between 'Magistrate' and 'court'; see also s106A(2)(a) and (3).

In support of the submission that "court" in s97(3) includes a Magistrate conducting a preliminary examination, Mr

Tiffin relied on a contempt case, *NSW Bar Association v Muirhead* (supra); at p185 Kirby P said:-

> "The determination of whether a body is a "court" to attract the protection of the law of contempt must be considered in the light of all of the characteristics of that body. Whether a body may be categorised as a "court" depends not upon an artificial check list of universal application but upon the purposes for which the categorisation is made. - - -
>
> There is no simple answer to this question, as the parties conceded. It is a matter of considering the criteria by which the categorisation is to be made and then examining the statutory and other material to decide whether the commissioners fall inside or outside the category for this purpose.
>
> The criteria by which bodies and office holders have been held to be a "court" for various purposes of the law have been explored in many cases. The Privy Council did so in *Shell Co. of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275; (1930) 44 CLR 530, in which it was held that the Taxation Board of Review was not a "court" exercising the judicial power of the Commonwealth. In the course of that review, a number of "negative propositions" were enumerated (at 297; 544) as useful for the determination of whether a body is, or is not, a "court".
>
> > "1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body.""
>
> (emphasis mine)

(b) Second, Mr Tiffin submitted that the meaning of the word "court" in s97(3) could not rationally be limited to the Family Matters Court. That is, its meaning was not defined by the definition of "Court" in s4(1), as Mr McDonald had submitted in his third and fourth submissions (pp22-3), because if it were, it would follow that documents containing information acquired by an 'authorized person' could be required

to be produced in any court other than the Family Matters Court, the court in which they would often be most relevant. This would be absurd in light of the purposes of the Act, especially of ss97(2)-(5) (pp5-7) which place "great importance" on maintaining the secrecy of information which comes into the possession of 'authorized persons', and a result unlikely to be intended.

Consequently, Mr Tiffin submitted, although the s23 summons was valid, by operation of the (later) legislative provision in s97(3) of the Act the "requirement [in the summons] to produce the documents [in the court] or to disclose information [to his Worship] is forestalled".

Mr Tiffin put his ultimate submission on s97(3) succinctly, viz:-

> "A Stipendiary Magistrate conducting committal proceedings constitutes a "court" as that term is used in ss(3) of s97; and - - - "court" in that subsection really means any body which otherwise has the power to compel the attendance of witnesses to give evidence or the production of documents - - -
>
> It is not of course strictly necessary for your Honour to decide that, but that would be an interpretation which in my suggestion is harmonious with the rest of s97 and in particular ss(2) and indeed harmonious with the whole of the Act."

(2) As to his second point (p29), Mr Tiffin submitted that in the phrase "to the person to whom the information or records relate" in s97(4)(a) of the Act, as a matter of statutory construction in light of the purposes of the Act, the word "person" has its ordinary meaning of the person the subject of the file made by the authorized person; that is,

in this case, the only "person" within the meaning of that word in s97(4)(a) is the child N.

He submitted that to ascertain the meaning of the phrase in s97(4)(a) the starting point was the words used. Notwithstanding s24(b) of the Interpretation Act, the fact that Parliament chose the singular form, "the person", instead of the plural "any person or persons", was not without significance.

He further submitted that the purpose of s97 of the Act was to impose a general blanket on disclosure of information by an 'authorized person', subject to limited exceptions; this supported a restrictive interpretation of "person" in s97(4)(a). Mr Tiffin observed that any file detailing an authorised person's investigation into the alleged abuse of a child would necessarily contain information about people other than the child in question. To interpret "person to whom the information or records relate" in s97(4)(a) as embracing such other people would "fly against the tenor of the Act", and was contrary to the severe restrictions on disclosure in the other provisions of s97(4). The wording of s97(4)(a) was not appropriate to a wide reading of the word "person", in light of the clear general legislative intent. If "person" were to be read widely, then as regards the persons to whom disclosure could be made Mr Tiffin asked rhetorically: "Where is the line to be drawn?" In essence, he submitted that if the meaning of the word "person" in s97(4)(a) were not confined to the person about whom the file was made - the child - floodgates would be opened to others to gain access to that information; and thereby the purpose of the Act, and in particular the secrecy provisions of s97, would be

defeated, even though the authorized person still had discretionary power over the flow of that information, under s97(4).

Mr Tiffin submitted that the applicant's fifth submission at p23 confused what was a statutory prohibition under s97(2) against disclosure (with the 6 discretionary exceptions in ss(4)(a)-(f)), with claims to resist compulsory process requiring disclosure, based on legal professional privilege or public interest immunity, or on some other common law basis of privilege which, if established, operates to excuse a person from the obligation to disclose. The need for the Court to balance competing interests to decide whether information should be disclosed may arise in such claims - for example, where the granting of the privilege would be contrary to public policy, or where the documents for which immunity is claimed are needed to mount a defence in a criminal case - but does not arise where there is a statutory prohibition on disclosure. In that situation, the legislature has in effect already done all the 'balancing', and has come down in favour of non-disclosure.

I note as illustrations of statutory prohibitions on disclosure of documents, cases on ss16(2)-(4) of the Income Tax and Social Services Contribution Act 1936 (C'th): *Canadian Pacific Tobacco Co. Ltd. v Stapleton* (supra) at pp5-7 per Dixon CJ, and, on appeal, at p10 per McTiernan J; and *Horne v Warden* (1955) Q.W.N.65; *R v Clarkson (No.2)* [1982] VR 522,

dealing with s5(1) of the Payroll Tax Act 1971 as well as the above provisions; and *Rowell v Platt* (1938) AC 101.

It followed in Mr Tiffin's submission that his Worship was not entitled in light of the statutory prohibition in s97(4) to inspect the documents produced by the authorized person pursuant to the summons under s23 of the Justices Act, and then to decide after applying a 'balancing' test, whether they should be disclosed to the applicant. I note that it is clearly correct that he did not have to apply a 'balancing' test, and that no point was taken on the words "except for the purposes of this Act" in s97(3).

Mr Tiffin observed that in this application the applicant had not sought relief against the person to whom the summons was directed, Mr Barker (see p8). Accordingly, he submitted that even if Mr McDonald's seventh submission (p24) as to the scope of s97(4)(a) were correct, the ruling to the contrary (par17 on p5) did not involve reviewable error by his Worship, because even on Mr McDonald's submission Mr Barker had a discretion under s97(4) whether or not to disclose the information to the applicant, and no relief had been sought as to his exercise of that discretion. It is not necessary to deal with this submission, in light of my conclusion on submission (7) at pp47-8, but it is correct that no relief was sought as to Mr Barker's (or Mr Caulfield's) exercise of discretion.

Applicant's submissions in reply

Mr McDonald made 9 submissions in reply: 2 of a general nature, 5 directed to s97(3), and 2 directed to s97(4), as follows. I set them out briefly.

(a) The applicant's general submissions, in reply

(1) Mr McDonald first observed, in relation to the his Worship's ruling (par17, p5):-

> "It's a difficulty, when no reasons are given for a decision, - - - to ascertain - - - the nature of the [decision]. - - - It ought not to be held against [the applicant] when, by reason of deficiency in any reasons given, - - - you have to try to glean what the basis was [for the decision]. - - - What I sought to [do] in the [9 submissions at pp13-25] was to - - - ascertain what were the range of appropriate bases that that decision could be justified on."

(2) Second, as to Mr Tiffin's last submission (p36) it was not appropriate in this application to have sought relief against Mr Barker. While his Worship's ruling stood, it bound the parties; it was necessary first to have that ruling set aside, by showing that it gave rise to a miscarriage of justice, in that his Worship did not "address certain issues, or - - - allow [certain] questions to be asked, that might have elicited that [the authorized person's] discretion had - - - miscarried."

(b) The applicant's submissions in reply, on s97(3)

(3) As to Mr Tiffin's submission (1) at p29, Mr McDonald stressed as his "submission throughout" his submission (3) (p22), that "court" in s97(3) was exhaustively and comprehensively defined in s4(1) of the Act as the "Family Matters Court", and accordingly the production of the documents

was compellable by the usual court process under s23 before any other court, including a Court of Summary Jurisdiction or the Supreme Court. The use of the upper case in the initial letter of "Court" in the definition of that word in s4(1) of the Act did not render the meaning of "court" in s97(3) ambiguous.

(4) The person to whom the summons was directed, was obliged pursuant to s23 of the Justices Act (p8) to produce the documents, "albeit not through an authorized officer"; he referred to his submissions (2) and (5) at pp14-22, and 23.

(5) Further, as to Mr Tiffin's submission (1), at p29, a careful reading of Part V of the Justices Act showed that the distinction therein between a "court" and a 'Justice conducting the preliminary examination' was carefully maintained. Sections 120 and 123 were within Division 2 of Part V, a special regime for the summary hearing of minor indictable offences, s123(2) being a special provision giving the Court of Summary Jurisdiction express power where it decided, after the prosecution evidence in the preliminary examination had been heard, not to hear the case summarily, but to complete the preliminary examination. I noted earlier that ss120 and 123 must be read in the light of s125; see generally p31. It must be said that there are obscurities in the Justices Act in this regard, an aspect shared by corresponding legislation throughout Australia.

(6) As to Mr Tiffin's submission (2) at p33, a balance had to be struck between the need to safeguard individual liberty by compelling the production of the documents in a preliminary examination, and the need to promote the

protection and care of children; and it was therefore necessary for his Worship to inspect the documents, to strike that balance. I reject this submission; the only purpose for which his Worship could inspect the documents was to ascertain whether they fell within s97(3), and it is difficult to see how inspection could assist in that regard.

(7) Further, as to Mr Tiffin's "ultimate" submission at p33, if the Legislative Assembly had intended the meaning of "court" in s97(3) to include any body with power to compel witnesses to produce documents, it would have said so expressly; instead, properly understood (see submission (3) at p22), it chose to define "court" in s97(3) in terms of the definition of "Court" in s4(1) of the Act.

In support, Mr McDonald relied on ss120, 121A(1), 123 and 125 of the Justices Act; *Summers v Cosgriff* (supra); *Duperouzel v Cameron* (supra); and on observations by Brennan J in *Alister v The Queen* (supra) at p456, on the need -

> "- - - to adopt a more liberal approach to the inspection of documents [in a criminal case, so as] to ensure so far as it lies within the court's power, that the secrecy which is appropriate to some of the activities of government furnishes no incentive to misuse the processes of the criminal law. - - -
>
> It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tilt that way": cf *Sankey v Whitlam* (1978) 142 CLR, at pp42, 61-62.

I note that those remarks were in the context of a claim for non-disclosure on the basis of public interest immunity; see pp14-17. That was not the case here.

(c) The applicant's submissions in reply, on s97(4)

(8) As to Mr Tiffin's rhetorical question (p34) as to 'where is the line to be drawn' if "person" in s97(4)(a) of the Act were not here limited to the child N, Mr McDonald submitted that s97(4)(a) had a "specific focus", in that it provided that the documents had to "relate" to the person seeking access to them. The ambit of s97(4)(a) was therefore limited to persons such as the applicant whose rights, expectations or interests were affected by the exercise of investigative power by the authorized person. I note the way Mr McDonald put this point in submission (7) at p24. He submitted that the fact that the authorized person's power was investigative in nature was important, because the High Court had held that the exercise of investigative power was subject to the rules of natural justice - see the authorities cited in *Ainsworth v Criminal Justice Commission* (supra) at p577.

(9) As to Mr Tiffin's submission (2) at pp33-35, Mr McDonald submitted that the process of interpreting the meaning of the words "the person" in s97(4) should start from the basis that s24(b) of the Interpretation Act applied, because it "is mandatory in its terms and [the Legislature in s97(4)(a)] may have done no more than adopted a drafting convention". The

Interpretation Act applied universally to Northern Territory Acts; they had to be interpreted in its light.

Conclusions

First, as to whether the remedies sought are open. Whether or not in the circumstances of the case judicial review by way of a remedy in the nature of certiorari was open, was only briefly addressed; see p19. The extent to which certiorari is applicable to committal proceedings is uncertain; for one view, see *Sankey v Whitlam* (1978) 142 CLR 1 at pp83-4 per Mason J, who stressed the duty to act judicially as a touchstone. In *R v Judge Mullaly; ex p. Attorney-General for the Commonwealth* [1984] VR 745 at pp747-750, Brooking J held that even if an erroneous decision was made as to the reception or exclusion of evidence, in the course of a trial on indictment, it could not be made the subject of prerogative writ. As regards judicial review, it is important that a magistrate's decision whether to commit is not conclusive; the Crown Prosecutor's discretion to proceed, or withdraw, or charge another offence, is not affected by it. Since the preliminary examination is merely an inquiry, and there is a large discretion in the decision whether or not to commit, at common law certiorari did not lie; see *Ex parte Cousens; re Blacket* (1947) 47 SR (NSW) 145, but cf. *R v Schwarten; ex p. Wildschut* [1965] Qd. R. 276, on prohibition. This stemmed from the emphasis on classification of functions as determining the availability of judicial review, but the modern approach recognizes that many non-judicial bodies are required to act

judicially, and are therefore amenable to judicial review. A preliminary examination is conducted in similar fashion to a summary hearing and the decision affects individual rights; the legality of what is done should be capable of being determined, before trial. The authorities favour the view that certiorari is not open; for the reasons indicated below, if open, it would be rarely granted.

In *Sankey v Whitlam* (supra) the High Court considered that there was jurisdiction to grant a declaration, though whether that extended to a declaration that particular evidence was admissible or inadmissible was doubtful; see per Gibbs ACJ at p25. Mandamus has frequently been granted; see *Wentworth v Rogers* [1984] 2 NSWLR 422. Error leading to a denial of natural justice is reviewable.

It is nevertheless generally undesirable for the Court to intervene in committal proceedings which are continuing before the Magistrate. The remedies sought are discretionary, and the Courts exercise restraint for good policy reasons. See *Young v Quin* (1986) 56 ALR 168 at pp171-2; Wilcox J said at p172:-

> "- - - it would normally be undesirable to enter into review of a magistrate's ruling on a matter of evidence except where the ruling related to a genuine and important question of legal principle not dependent upon the detail of the evidence in the particular case. *Sankey v Whitlam* [supra] furnishes an example of such a case."

It seems clear from the authorities that the discretionary power to grant declaratory or other prerogative relief should be exercised only in most exceptional cases and with great care, in

respect of a decision or ruling made in the course of committal proceedings. See *Sankey v Whitlam* (supra) at p26, per Gibbs ACJ; *Spautz v Williams* [1983] 2 NSWLR 506; *Gorman v Fitzpatrick* (1983) 4 NSWLR 286 at pp290-8; *Murphy v The Queen* (1985) 16 A Crim R 190 at pp192-3; *Waterhouse v Gilmore* (1988) 12 NSWLR 270 at pp275-7; *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11 at pp25; *Connell v Reynolds* (1993) 9 WAR 27; and the authorities there discussed. See also generally P. Fairall: 'Judicial review of committal hearings' (1986) 10 Crim. L.J. 63, especially at pp69-70.

As I say, these matters were not really agitated before me; I am prepared to proceed on the basis that the present case is one in which the grant of the relief sought is open; see *Shepherd v Griffiths* (1985) 60 ALR 176.

I turn to the matters raised in argument.

As to the applicant's submission (1) at pp13-14, it is clear that when ruling his Worship was sitting in his capacity as a Justice conducting a preliminary examination. In *Ammann v Wegener* (supra) Gibbs J said at p436:-

> "It may therefore be accepted that a preliminary inquiry with a view to deciding whether an accused person should be committed for trial is not a judicial proceeding.
>
> It does not necessarily follow that because a magistrate is not exercising judicial functions he cannot be said to sit as a court. In *Royal Aquarium and Summer and Winter Garden Society Ltd. v Parkinson* [1892] 1 Q.B. 431, at pp445-447, Fry LJ said: "There are many other courts which, though not courts of justice, are nevertheless courts according to our law. There are, for instance, courts of investigation, like the coroner's court." It might be thought that the words "courts of the States" in s51(xxiv) include all bodies which are courts according to the law of

> the States, whether or not those bodies exercise judicial power. However, it is not in my opinion necessary to decide whether a magistrate in South Australia when holding a preliminary examination for the purpose of deciding whether a person charged with an indictable offence should be committed for trial, or issuing a summons or warrant for the purpose of procuring the attendance of a witness at such a preliminary examination, can be described as one of "the courts of the States" within s51(xxiv) of the Constitution."

In *NSW Bar Association v Muirhead* (supra) Kirby P said at p185:-

> "Whether a body may be categorised as a "court" depends not upon an artificial check list of universal application but upon the purposes for which the categorisation is made. Thus, a decision that a body is a "court" for the beneficial provisions of the *Suitors' Fund Act* 1951, may not necessary determine whether that body is a "court" to attract the very great power which accompanies the application of contempt law: cf *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497 at 513 and the cases there cited."

I do not consider, therefore, that a Justice conducting a preliminary examination under Part V of the Justices Act cannot as such constitute a "court" for the particular purposes of s97(3) of the Act. Whether he is to be so characterized depends upon the proper construction of "court" in that provision. I reject submission (1).

As to the applicant's submission (2) at pp14-22, I accept that the compulsive power under s23 of the Justices Act should not be construed narrowly, in light of its basic importance in securing to an accused a fair trial according to law, as discussed in the authorities at pp15-21. The importance of a s23 summons and of committal proceedings to the process of fair trial, including the applicant's right to make "full answer and defence", is however but one aspect to be borne in mind when construing s97 of the Act. There is no balancing of interests

to be considered here, as there is when the claim for nondisclosure of documents is based on public interest immunity; the task here is the construction of s97. The applicant has the right to answer the charges against him "by any forensic means which the law allows" (see p18), but the question is whether the Act "allows" the production or disclosure of the documents which he seeks.

If s97 on its proper construction prohibits such production or disclosure, his Worship was not "in breach of his duty to act fairly in conducting the preliminary examination" (p19), because he had acted in accordance with the requirements of substantive law, and a committal is not unfair if it is conducted according to the substantive law. If on its proper construction s97 rendered the s23 summons ineffective, that does not mean that "the preliminary examination and any consequent trial, would necessarily be unfair" (p19); so to hold, in those circumstances, would presuppose that there are elements of fairness to which the trial process must always conform and which cannot be affected by an Act of the legislature. There are some recent suggestions that this may be so, in some cases; see per Deane and Gaudron JJ at p21. It is not the law as regards Territory offences; as stated by Brennan J, dissenting, in *Jago v The District Court of New South Wales* (supra) at p49:-

> "The legal question then is whether the trial - - - is unfair in the sense that it has not taken place according to law."

Common law rights to the fair trial of a Territory offence are always vulnerable to abrogation or removal by a statute, in the absence of an enforceable and entrenched Bill of Rights; as

Montesquieu said in 'L'Esprit des Lois' (1748) - "Liberty is the right to do what the laws permit."

That is not to minimize the importance to a fair trial of a s23 summons. It assists in protecting a fundamental common law right which can only be abrogated or curtailed by unmistakable and unambiguous language in the Act; see *Coco v The Queen* (1993-94) 120 ALR 415 at pp418-420, and Mr McDonald's concession at p21.

The question is whether s97(3) clearly and unambiguously abrogates the defendant's right to have the documents produced pursuant to his s23 summons. I consider that it does, the intention of the legislature being perfectly clear and obvious, and one which cannot stand with the defendant's right under s23, as far as production of those documents is concerned. It follows that the ruling at par17 on p5 that there was "no need for the file to be produced" was correct; that ruling did not involve a breach of criminal procedure or of natural justice, in that it cannot be said to have denied the applicant his right to a fair trial according to law.

As to the applicant's submissions (3) and (4) at pp22-3, I consider that the definition of "Court" in s4(1) of the Act has no application to the word "court" in s97(3). The difference in the cases of the initial letters of the words in s4(1) and s97(3), I consider, was the result of wholly intentional drafting. The words "court" in s97(3) extends beyond the Family Matters Court, and cannot be limited to that

Court for the purpose of better preserving the applicant's right to a fair trial.

As to submission (6) at p23-4, I do not consider that his Worship was obliged to inspect the documents in the file, before ruling on whether they were excluded from production under s97(3). In the appeal in *Young v Quin* (1984-85) 59 ALR 225, a case involving a claim to public interest immunity, Bowen CJ said at p226:-

> "Where a claim of public interest immunity is made in respect of *documents* it is for the court to decide whether or not to uphold the objection. The court may ask for a clarification or an amplification of the objection to production, being careful not to impose requirements which could only be met by divulging the very matters to which the objection relates. The court also has power to examine the documents privately. It has been said this power should be sparingly exercised. Indeed, the better view appears to be that the court should not inspect the documents unless it decides that, on balance, the documents probably ought to be produced *(Conway v Rimmer* [1968] AC 910 at pp952, 953 and 971, and see *Air Canada v Secretary of State for Trade* [1983] 2 WLR 494).
>
> These principles were applied by the High Court in *Alister v R* (1984) 50 ALR 41; 51 ALR 480; 58 ALJR 97. - - - Gibbs CJ, Murphy and Brennan JJ, were in favour of inspecting the documents in question. Wilson and Dawson JJ would have refused to have inspection. In the result, the court did inspect the documents." (emphasis mine)

I consider that his Worship was entitled to inspect the documents privately, to check that they were of the character asserted by Mr Caulfield; but he was not obliged to do so, and it would have been surprising had he thought it desirable to do so. In the circumstances, the fact that he did not do so could not amount to a denial of natural justice to the applicant.

The applicant's submission (7) at p24 is crucial. To my mind it is clear on a purposive construction of the Act that his Worship (and Mr Caulfield) were correct in their interpretation of s97(4)(a). An authorized person has extensive functions and powers under the Act in relation to a child in need of care, as well as other functions. I consider that the nature of the functions of an authorized person is such that the exceptions in s97(4) to the general secrecy provisions in s97(2) should be strictly construed, because frequently he could not expect to obtain necessary information about a child who might be in need of care, unless the person providing the information knew that it would be kept confidential.

I reject submission (8) at pp24-5, on the basis that s97(4)(b) was not raised or relied on before his Worship, and his ruling did not bear upon it. In any event, s97(4)(b) in my opinion is not directed to the matters referred to by Mr McDonald at p25; it is directed at disclosure for the purpose of the administration of the Act, a matter which does not include disclosure to the applicant in compliance with criminal process. I should add that I consider that "may disclose" in s97(4) imports a discretion in the authorized officer; see pp25.

In light of the foregoing, there is no substance in submission (9) at pp25-6.

In general, I accept Mr Tiffin's submissions at pp29; on (1) at pp29-30, and at pp32-3; and on (2) at pp33-6. It is however unnecessary for present purposes to go further on the meaning of "court" in s97(3) than that it embraces a Justice conducting a preliminary examination.

These are the reasons for the refusal on 21 October 1994 of all of the remedies sought by the applicant in pars3, 4 and 5 of his Originating Motion of 31 August 1994.

I should add that to avoid unnecessary delays, and since the granting of prerogative remedies or a declaration will be most uncommon, Magistrates engaged in committal proceedings should not treat applications such as this as if they operated as a stay of proceedings. In most cases, they should proceed with the preliminary examination and leave it to this Court to intervene by way of a stay in an appropriate case. See generally *Moss v Brown* [1979] 1 NSWLR 114.
