

MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Ward v Saleh* [2023] QMC 18

PARTIES: Heidi Ward (Complainant)

v

Mohamed Saleh (Defendant)

FILE NO/S: MAG-00069095/23(2)

DIVISION: Magistrates Courts

PROCEEDING: Application for strike out or permanent stay

ORIGINATING COURT: Proserpine Magistrates Court

DELIVERED ON: 22 December 2023

DELIVERED AT: Proserpine Magistrates Court

HEARING DATE: 6 October 2023

MAGISTRATE: Magistrate Howard

ORDER:

- 1. The proceeding is permanently stayed;**
- 2. The parties may file in the Court and serve on the other party any further written submissions of no more than 3 A4 pages as to the power of the Court to make an order for costs by 29 January 2024;**
- 3. The decision on the costs application is further reserved.**

CATCHWORDS: CRIMINAL PROCEDURE—PRE-TRIAL PROCEDURE—APPLICATIONS FOR STAYS OF PROCEEDINGS — where private complaint – where orders made by Court for particulars and subsequently for further and better particulars—where duty alleged to be breached by act or omission of Defendant is not specified – where complaint alleges perverse failure of Defendant to ‘adequately’ act – where standard against which adequacy is to be measured not specified – where complaint is duplicitous— whether the complaint contains the essential factual ingredients so as to engage the jurisdiction of the Court—whether the Complainant has failed to provide sufficient particulars as ordered by the Court —whether the complaint is foredoomed to fail and/or the Defendant has no case to answer

CRIMINAL PROCEDURE—PRE-TRIAL PROCEDURE—APPLICATIONS FOR STAYS OF PROCEEDINGS—

IMPLIED POWERS OF MAGISTRATES COURT—

whether the complaint is an abuse of process or frivolous or vexatious—whether jurisdiction of the Court is engaged by the Complaint—whether Complainant acting in accordance with prosecutorial duties – where private complaint—where the complaint does not contain the essential factual ingredients so as to engage the jurisdiction of the Court—where the Complainant has failed to provide sufficient particulars as ordered by the Court —where the complaint is foredoomed to fail

CRIMINAL PROCEDURE—SUMMARY

PROCEEDINGS—COSTS-- where Defendant seeks costs pursuant to s158 of the Justices Act 1886((Qld) – where proceedings permanently stayed—whether power to award costs

Criminal Code 1899 (Qld) ss 200, 564

Justices Act 1886 (Qld) ss 42, 43, 48, 158

Domestic and Family Violence Protection Act 2012 (Qld) s 100

Re Cameron [1996] 2 Qd R 218

Dupois v Queensland Police Service [2020] QDC 328

Grassby v the Queen (1989) 1 CLR 1

Harrison v President of the Industrial Court of Queensland (2017) 1 Qd R 515

J Hutchinson Pty Ltd v Guilfoyle [2022] QCA 186

Jago v District Court (NSW) (1989) 168 CLR 23

Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd [2009] HCA 43

Kirk v Industrial Court of New South Wales (2010) 239 CLR 531

Landsal Pty Ltd (in liq) v REI Building Society (1993) 41 FCR 421

P v H [2015] QSC 351

Pelechowski v The Registrar, Court of Appeal (NSW) (1999) 198 CLR 435

Power v Heyward [2007] 2 Qd.R 6

R v BDJ (2020) QCA 27

R v Trifyllis [1998] QCA 416

S Kidman & Co Ltd v Lowndes CM (2016) 314 FLR 358

Thiess Pty Ltd v Industrial Magistrate Elizabeth Hall & Ors

[2013] QSC 130

Upton v Commissioner of Police [2012] QCA 88

Walton v Gardiner (1993) 177 CLR 378

X7 v Australian Crime Commission (2013) 248 CLR 92

APPEARANCES: Ms Ward appeared on her own behalf as Complainant/Respondent to the application for permanent stay or strike out of the proceedings.

Mr Pemberton JP, of Counsel, instructed by QPS Legal Unit appeared on behalf of the Defendant/Applicant for permanent stay or strike out of the proceedings.

- [1] The Defendant is a serving police officer. He applies for strike out of the complaint, or permanent stay or dismissal of the proceedings brought against him by the Complainant, Ms Ward who is a private citizen. He also seeks an order for costs.
- [2] The Complainant opposes the application.

Background

- [3] On 14 April 2023, the Complainant brought a private criminal prosecution against the Defendant, by way of complaint and summons under the *Justices Act* 1886 (Qld) (JA).
- [4] The complaint is that on 2 April 2023, at an unspecified place in Queensland, the Defendant:

....Was employed in the public service, and perversely without lawful excuse omitted to adequately investigate apparent risks of domestic violence and criminal allegations which by virtue of his employment it was his duty to do so contrary to s 200 of the Criminal Code Act (Qld) 1899...

- [5] On 29 May 2023, on the Defendant's application, the Complainant was ordered by the Court to provide particulars of the charge and a brief of evidence within 14 days. On 6 June 2023, the Complainant provided a brief of evidence (the Brief) comprising a witness statement of the Complainant; copies of 2 recorded messages left by the Defendant, and material provided to her in criminal proceedings against her in this Court (including written statements of police officers, their body worn camera (BWC) footage and the related s 95 certificates under the *Evidence Act* 1977 (Qld).) A document entitled Court Brief (Full) was provided with (or as part of) the Brief. No document clearly provided the particulars ordered by the Court.
- [6] On 14 June 2023, the Defendant's legal representatives wrote to the Complainant seeking clarification whether the Court Brief (Full) document was to be treated as the particulars ordered by the Court. On 17 June 2023, the Complainant emailed another copy of the 'Court Brief (Full)' document to the Defendant's legal representatives without responding to their correspondence. On 23 June 2023, the Defendant's legal representatives wrote to the Complainant advising that they would take the 'Court Brief (Full)' document to be the document said to be in

compliance with the Court ordered particulars. The Complainant responded to the Defendant's legal representatives on 27 June 2023 advising that the 'original Brief' was in compliance with the order and the 'second one was to clarify your questions...'¹ A copy of the document, 'Court Brief (Full)' was not filed by the Complainant in the Court registry.

[7] The Defendant then filed an application seeking orders for further and better particulars. On 3 July 2023, the Complainant was ordered by the Court to provide further and better particulars by 24 July 2023.

[8] On 13 July 2023, the Complainant provided the Defendant's legal representatives with a document entitled 'Notice of Further and Better Particulars (NFB Particulars)'. It contained a statement to the effect that the Complainant sought a response from the Defendant:

...with specifics if not mentioned above by the 15th of July 2023, in order to allow time for the complainant to address the relevant issues the defendant's legal representative requires and to make reasonable effort to obtain and provide the information, in time to meet court orders'²

[9] On 3 August 2023, the Defendant's legal representatives wrote to the Complainant in response to the NFB Particulars, stating that the document does not provide particulars of the essential factual ingredients of the charge and was not sufficient for the Defendant to know the substance of the charge against him (nor address the matters referred to in the Defendant's submissions filed in the Court in support of the application for further and better particulars).³

[10] On 4 August 2023, the Complainant responded in a document entitled 'Submissions on behalf of the Complainant', which contained, among other things, the following:

A breach of duty should not have to be specifically explained to a member of the Queensland Police Service especially the Legal Team.

The Complainant did not wish to consume the Courts time, with a lengthy explanation of further and better particulars, considering the Defendant has not indeed made a plea.

One could only imagine if every person charged, would ambush the Prosecution (as all Police Prosecutions are private), with such large and detailed requirements and submissions before even making a plea, not limited to having an entire legal team the size of QPS and an external barrister of which they were indemnified for, for one charge only, the court would come to a stand still.

For the safety of our community nobody should have to explain the Duty of a Police Officers Duty to investigate Domestic Violence. If this was not their Duty it would be an outrage to society. The Defences request is very concerning.

¹ Affidavit of Alexandra Rose Gordon filed 27 June 2023, [10] and ARG-06.

² Affidavit of Alexandra Rose Gordon filed 13 September 2023, [7] and ARG-10.

³ Affidavit of Alexandra Rose Gordon filed 13 September 2023, [8] and ARG-11.

One must question if this is an Abuse of Court Process.⁴

- [11] On 7 August 2023, when the matter was before the Court the Defendant handed up and filed by leave submissions (they appear to be in the same terms as the submissions referred to in the previous paragraph). She subsequently sent an unsealed copy to the Defendant's legal representative on 14 August 2023, again setting out that she should not need to explain the Defendant's duty to investigate and containing extracts of provisions from legislation.⁵

The Defendant's application

- [12] The Defendant's application seeks orders as follows:
1. Pursuant to the implied powers of the Court:
 - (a) The private complaint be struck out on the ground it is deficient in failing to particularise the 'essential factual ingredients' of the charge;
 - (b) Further, or in the alternative, the proceedings be permanently stayed on the grounds that it is an abuse of process; or frivolous; or vexatious;
 - (c) Further, and in the alternative, the proceedings be dismissed being doomed to fail and no case to answer on the evidence disclosed.
 2. Costs pursuant to s 158 of the *Justices Act* 1886 (Qld) (JA), in accordance with the *Justices Regulation* 2014 (Qld), schedule 2.
 3. Such further or other orders as the Court sees fit.

The evidence and submissions

- [13] A considerable volume of material has been filed by the parties. I directed the filing of Lists of Documents by them to avoid difficulties in identifying the documents relied upon on the day of the oral hearing. The filing of Lists of Documents did not entirely achieve that aim.
- [14] The Defendant relies upon the material (including three Affidavits of Alexandra Rose Gordon filed on 25 May 2023, 27 June 2023, and 13 September 2023; and submissions filed on 13 September 2023, together with the NFB Particulars and Complainant's submissions filed 7 August 2023) as set out in his List of Documents filed on 18 September 2023, together with a further Affidavit of Alexandra Rose Gordon filed by leave at the oral hearing (sworn 4 October 2023) and marked Exhibit 1.
- [15] The Complainant filed a List of Documents (which includes the Complaint and Summons; NFB Particulars; her Submission filed 29 June 2023; an application filed on 'both files' (the other file relating to a different private prosecution brought by the Complainant) on 17 August 2023; the Brief dated 3 July 2023 (but not filed in the proceeding); the Defendant's Submissions of 27 June 2023 and 25 May 2023, together with Affidavits of the Defendant of 25 May 2023 and Alexandra Rose

⁴ Affidavit of Alexandra Rose Gordon filed 13 September 2023,[10] and ARG-12, typographical errors as per the Complainant's original document contained in ARG-12.

⁵ Affidavit of Alexandra Rose Gordon filed 13 September 2023, [11] and ARG-13

Gordon of 25 May 2023, together with a document identified as an ‘Affidavit Statement of the Complainant of ‘Unknown’ date.

- [16] When asked at the oral hearing to clarify the documents she relied upon, the Complainant said that she relied upon her Submissions of 22 September 2023 and a draft order provided with them, the NFB Particulars and her Submissions filed by email on 28 May 2023 and 7 August 2023, together with a draft Affidavit of the Complainant (signed but not affirmed or sworn) handed up and filed by leave (Exhibit 2). The Complainant clarified that the documents in her List of Documents entitled ‘Application both files’ and the Brief are not relied upon.
- [17] In my view, the Complainant’s submissions are often difficult to follow. They contain assertions made in reliance upon general legal concepts and precedents in a manner that suggests a misunderstanding of the concepts and authorities themselves, as the Complainant seeks to assert unrelated, and in the circumstances, sometimes irrelevant legal principles into submissions in support of her position. In some instances, to the extent a general principle relied upon has any application or relevance, it appears that the manner in which it might apply may be misapprehended. Further, some submissions, contain a recitation of sections from various statutes, both State and Commonwealth and are relied upon to support submissions that often lack clarity.
- [18] I have nevertheless sought to understand and consider the submissions to the fullest extent possible. I have set out some of the submissions, even when they lack clarity or apparent relevance to the issue to be determined. In my view, their content is relevant generally in considering, for example, whether leave to amend the complaint is necessary or desirable in the interests of justice; whether the Court could be satisfied that if the prosecution proceeds it would be fairly conducted; in considering whether the complaint constitutes an abuse of process and should be dismissed.

Relevant law –what constitutes an abuse of process, frivolous or vexatious

- [19] The High Court of Australia (the High Court) has held that a proceeding may be an abuse of process if proceedings are unjustifiably oppressive, manifestly unfair, or otherwise bring the administration of justice into disrepute.⁶
- [20] The then President of the Queensland Court of Appeal in *Re Cameron*⁷ held that whether a proceeding is vexatious involves a broad consideration of the circumstances. Relevant factors for consideration include whether there are reasonable grounds for the claims brought; the legitimacy of the motives of the litigant concerned; compliance or disregard for of the court’s practices, procedures and rulings; determined efforts to use the court’s processes to circumvent its decisions or other abuse of process; wastage of public resources; and unreasonable harassment of those who are the subject of the litigation.⁸

⁶ *Walton v Gardiner* (1993) 177 CLR 378; *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43.

⁷ [1996] 2 Qd R 218.

⁸ *Re Cameron* [1996] 2 Qd R 218, 220 where Fitzgerald P referred to a range of relevant circumstances as examples.

- [21] In *P v H*,⁹ a single judge of the Supreme Court of Queensland determined a security of costs application on appeal from a decision of a Magistrate to dismiss a complaint pursuant to s 102C(1) of the JA on the grounds that it was an abuse of process, frivolous or vexatious. The discussion in his judgment about the circumstances in which a private complaint may be an abuse of process, or frivolous or vexatious provides some guidance. In particular, Applegarth J identified matters that might indicate a complaint is likely to be an abuse of process, frivolous or vexatious.¹⁰ These include when the complaint is foredoomed to fail; if the manner in which it is prosecuted is itself an abuse of process, frivolous or vexatious; if the proceeding is instituted and prosecuted in the absence of a proper purpose; if it is a hopeless prosecution and so lacking in prospects of securing a conviction that no prosecutor acting in accordance with prosecutorial duties would persist; and in circumstances where the prosecution will not be fairly conducted.
- [22] Applegarth J observed there that the sincerity and belief of a private prosecutor as to the ‘correctness of the cause’ pursued ‘does not prevent the prosecution constituting an abuse of process or being vexatious.’¹¹

The relevant law—the implied powers of the Magistrates Court

- [23] In *Jago v District Court (NSW)*,¹² the High Court considered the inherent powers of the NSW District Court to permanently stay criminal proceedings to prevent an injustice. The High Court held in that case that delay did not justify a permanent stay. Chief Justice Mason considered in effect that a permanent stay will be justified when there is a fundamental defect which goes to the root of the trial and nothing can be done to alleviate the unfairness.¹³ He said:
- The question is not whether the prosecution should have been brought, but whether the court, whose function is to dispense justice with impartiality and fairness both to the parties and the community which it serves, should permit its processes to be employed in a manner that gives rise to unfairness.¹⁴
- [24] The High Court considered the difference between the inherent powers of superior courts and the implied powers of inferior courts in *Pelechowski v The Registrar, Court of Appeal (NSW)*.¹⁵ In doing so, the majority drew guidance from the leading judgment in the High Court in *Grassby v The Queen*¹⁶ where it was held that although an inferior court has limited jurisdiction and no inherent powers, the grant of power to the inferior court carries with it the implied powers as are necessary for effectively exercising its jurisdiction. In *Pelechowski*, the majority held that ‘necessary’ in this context means as are ‘reasonably required or legally ancillary’ to specified provisions in the legislation conferring jurisdiction on the court.¹⁷

⁹ [2018] 2 Qd R 32 (per Applegarth J).

¹⁰ [2018] 2 Qd R 32, [61- 64]

¹¹ [2018] 2 Qd R 32, [64].

¹² (1989) 168 CLR 23.

¹³ (1989) 168 CLR 23, 34.

¹⁴ (1989) 168 CLR 23, 28.

¹⁵ (1999) 198 CLR 435, 451 (per Gaudron, Gummow and Callinan JJ).

¹⁶ (1989) 168 CLR 1.

¹⁷ (1999) 198 CLR 435, 451 (per Gaudron, Gummow and Callinan JJ).

- [25] If a matter is regulated by a provision of statute or rules of court, a court may exercise its implied powers in respect of the matter, so long as this does not contravene a provision.¹⁸
- [26] A single judge of the Supreme Court of Queensland in *Power v Heyward*¹⁹ held that the Magistrates Court of Queensland has the implied powers reasonably necessary to enable it to act effectively within its jurisdiction.²⁰ The implied powers include, subject to legislation and rules of Court, the power to regulate its procedures in ensuring fairness in investigative and trial procedures,²¹ and to prevent an abuse of its process.²² The Queensland Court of Appeal in *Upton v Commissioner of Police*,²³ cited the decision with approval.
- [27] Subsequently, in *Thiess Pty Ltd v Industrial Magistrate Elizabeth Hall & Ors*²⁴ a different single judge of the Supreme Court of Queensland discussed *Pelechowski*, and observing that the Magistrates Court of Queensland has been held to have the implied powers reasonably necessary to enable it to act effectively within its jurisdiction,²⁵ held that the Industrial Magistrates Court also exercised implied powers to the extent that an express provision is not contravened. It held that power to strike out is an implied power reasonably necessary to ensure fairness in trial procedures and prevent an abuse of process.²⁶
- [28] Respectively in those three decisions, it was held that the Magistrates Court has implied powers to determine whether the prosecution was time barred so that it should be permanently stayed; whether a complaint should be dismissed on a no case submission; and to strike out a non-compliant complaint.
- [29] In *Dupois v Queensland Police Service*,²⁷ a Queensland District Court Judge held that the express power in s 146 of the JA to hear and determine a disputed complaint is supported by implied powers empowering magistrates to determine preliminary questions of law, even those issues which are determinative. In doing so, Her Honour relied upon the approach taken in *Power v Heyward*,²⁸ *Upton v Commissioner of Police*²⁹ and *Thiess Pty Ltd v Industrial Magistrate Elizabeth Hall*.³⁰

The relevant law -- formal requirements of a complaint

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- ¹⁸ *Landsal Pty Ltd (in liq) v REI Building Society* (1993) 41 FCR 421, 427.
- ¹⁹ [2007] 2 Qd.R 6 (per Byrne SJA).
- ²⁰ *Power v Heyward* [2007] 2 Qd.R 6, [16]. See also *Higgins v Comans* (2005) 153 Crim R 565, [15-16, 22, 28].
- ²¹ *Power v Heyward* [2007] 2 Qd.R 6, [16]; *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740, 746; *Neill v County Court of Victoria* (2003) 40 MVR 265, [31, 32, 43].
- ²² *Power v Heyward* [2007] 2 Qd.R 6, [16]; *Grassby v Queen* (1989) 1CLR 1, 17.
- ²³ [2012] QCA 88.
- ²⁴ [2013] QSC 130 (per Boddice J).
- ²⁵ *Power v Heyward* [2007] 2 Qd R 6.
- ²⁶ [2013] QSC 130, [29-30]. The Court further held the Industrial Magistrates Court has the implied power to strike out part of a complaint: [31-37].
- ²⁷ [2020] QDC 328, [29-30] (per Clare DCJ).
- ²⁸ [2007] QSC 26, [22] (Byrne J).
- ²⁹ [2012] QCA 88.
- ³⁰ [2013] QSC 130 (Boddice J).

- [30] The drafting and swearing of a complaint is not an insignificant or trifling matter and is not to be undertaken without due attention to detail. It is the commencement of a criminal proceeding against a defendant.
- [31] Relevantly, the JA provides for proceedings to be commenced by a complaint in writing: s 42.
- [32] The JA provides for the formal requirements of complaints in ss 43 to 47. Among other things, pursuant to s 43(1) of the JA, a complaint may generally be for one matter only, except as provided. If a complaint contains two or matters of complaint, if objection is taken to the non-compliance, the court shall require the complainant to elect on which one of the matters to proceed: s 43(3)(a).
- [33] Section 46 specifies that a description of persons or things as would be sufficient on indictment shall be sufficient for a complaint. Section 47 is entitled ‘What is sufficient description of offence’. It provides that the description of an offence in the words of the Act, order, by-law, regulation or other instrument creating the offence, or similar words, shall be sufficient in law.
- [34] Requirements as to the form of indictments in relation to descriptions required are provided for in s 564 of the *Criminal Code Act* 1899 (Qld) (Criminal Code). Relevantly, it provides that the indictment must set out the offence charged in such a manner and with such particulars as to the time and place of the alleged offence, and the person alleged to be aggrieved, as necessary to inform the accused person of the nature of the charge. It is sufficient to describe an offence in the words of the Criminal Code or the statute defining it: s 564(3).
- [35] The Criminal Practice Rules 1999 (Qld) (CPR) also relevantly provide for the statement of offences in section 15. In particular, it provides that the statement of an offence on indictment or complaint may be in the words of the schedule form for the offence with necessary changes consistent with the particular circumstances of the alleged offence.
- [36] Section 48(1) of the JA provides inter alia for amendment at the hearing of a complaint if there is a defect ‘in substance or in form’ other than non-compliance with s 43,³¹ then ‘if an objection is taken for any such defect or variance’—the Court shall³² or if no objection is taken – the Court may,³³ make an order for amendment as appears necessary or desirable in the interests of justice.
- [37] For a complaint to be sufficient, it must contain the necessary legal ingredients of an offence punishable by law;³⁴ inform the Court and the defendant of the identity of the offence it is required to deal with and the defendant the substance of the charge he or she must meet;³⁵ identify the ‘essential factual ingredients’ of the actual offence;³⁶ and specify the time, place and manner of the defendant’s alleged act or omission.³⁷

³¹ JA s 48(1)(a).

³² JA s 48(1)(d).

³³ JA 48(1)(e).

³⁴ *Harrison v President of the Industrial Court of Queensland* (2017) 1 QD R 515, [144].

³⁵ *NK Collins Industries Pty Ltd v President, Industrial Court of Queensland* (2014) 2 Qd R 304, [59].

³⁶ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, [26].

³⁷ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, [26].

- [38] In *R v BDJ*,³⁸ the Queensland Court of Appeal referred to the essential requirement of particularity of alleged criminal conduct to eliminate the ‘risk of duplicity’ and to provide sufficient particulars of the allegations against a defendant.³⁹ Further, the Court of Appeal held in that case that the degree of particularity required identification of one identifiable transaction which constitutes the charge, (distinct from any other similar incidents contained in evidence). Where the charge itself does not contain the relevant particulars, a defendant is entitled to have the specific transaction relied upon by the prosecution identified and to know the legal nature of the charge but also the particular act alleged to be the foundation of the charge.⁴⁰
- [39] The Defendant submits that a distinction must be drawn between the ‘essential factual ingredients’ and other particulars that may be obtained on the application of a defendant.⁴¹ Further, he submits the former must be disclosed by the complainant to the Court and the defendant, irrespective whether an application is made. He argues that failure to identify these deprives the Court of power to hear and determine the charge.⁴² On the other hand, particulars on application are to ensure procedural fairness in knowing the case to be met and confine evidence of the prosecution to relevant matters. Without the requisite particularity, the fundamental accusatorial nature of criminal proceedings,⁴³ is lost.⁴⁴
- [40] At common law, the absence of the necessary ingredients or the absence of the essential factual ingredients rendered a complaint a nullity.⁴⁵
- [41] The Queensland Court of Appeal in *Harrison v President of the Industrial Court*,⁴⁶ (*Harrison*) held that ‘not every failure to allege a necessary ingredient of a charge is beyond the power of amendment’⁴⁷, and a court should be slow to accept that a complaint is so defective as to be incapable of amendment not because it fails to allege required elements, but because it alleges too many other facts.⁴⁸ That said, it held that the reach of s 48 is informed by the fundamental principle that an indictment must disclose an offence punishable at law; an indictment or complaint is to confer jurisdiction on the court; and that a complaint for a simple offence or

³⁸ (2020) QCA 27, [98].

³⁹ (2020) QCA 27, [98]. See also *R v Trifyllis* [1998] QCA 416 and *R v Logan* [2012] QCA 210, [102-104].

⁴⁰ *R v Trifyllis* [1998] QCA 416 quoting from *R v Saffron* (1989) 17 NSWLR 395, 445-9.

⁴¹ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, [26].

⁴² Reliance is placed on *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, [74-75].

⁴³ *X7 v Australian Crime Commission* (2013) 248 CLR 92, [98-99].

⁴⁴ *Johnson v Miller* (1937) 59 CLR 467, 495. The submissions refer the Court to the consequences of failing to properly particularise a complainant’s case is illustrated by *Patel v The Queen* (2012) 247 CLR 531, 543 [43].⁴⁴ (which was initially so widely particularised it became a ‘roving investigation’); *Kirk v The Industrial Court (NSW)* (2010) 239 CLR 531 ⁴⁴ (where it was considered the defence provision could not operate effectively because of the lack of particularity); and *R v Quagliata* [2019] QCA 45, [15].⁴⁴ (where a lack of clarity and inadequate particulars resulted in the frustration of the adversarial nature of the trial in respect of questions of admissibility of evidence, directions deficient and forensic decision-making.)

⁴⁵ *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531

⁴⁶ (2017) 1 Qd R 515 (per Jackson J, McMurdo P and McMurdo JA agreeing).

⁴⁷ (2017) 1 Qd R 515, [132].

⁴⁸ (2017) 1 Qd R 515, [156].

breach of duty must be made within one year of its alleged occurrence.⁴⁹ The complaint in that case was held capable of amendment.

- [42] The Queensland Court of Appeal recently reviewed relevant authorities in deciding *J Hutchinson Pty Ltd v Guilfoyle*.⁵⁰ (*Hutchinson*). The Court of Appeal held ‘that the validity of a complaint was a matter to be determined in conjunction with the power of amendment.’⁵¹ *Hutchinson* involved an appeal from a District Court decision overturning a Magistrate’s decision to strike out a complaint as being a nullity beyond the reach of amendment. There, the complaint was absent the essential factual ingredients of the charge. However, the factual particulars had been provided separately before the strike out application was heard and there was no deficiency raised about the particulars. The Court cited with approval a decision of the Northern Territory (NT) Court of appeal in *S Kidman & Co Ltd v Lowndes CM*,⁵² (*Kidman*).
- [43] In *Kidman*, the complaint was defective in that it omitted an essential element of the offence and also did not include the particulars (the essential factual ingredients) required at common law. The NT Court of Appeal held the defects in the complaint did not lead to the conclusion that it was a nullity if the irregularity could be cured by amendment.⁵³ The NT Court of appeal considered whether the complaint was capable of amendment under the relevant equivalent (although not identical) legislative provision, deciding that it was, in circumstances that it ‘unquestionably’ disclosed an offence known to law.
- [44] In obiter comments, the Northern Territory Court of Appeal in *Kidman* referred to considerations applying in deciding whether the power of amendment may reach the irregularity, having observed that the power of amendment is to ensure that justice is not defeated where errors and omissions do not cause injustice.⁵⁴ In particular, it said that an amendment should not be permitted if it would have the effect of charging a different offence out of time,⁵⁵ or where the amendment would otherwise give rise to some material injustice or prejudice in the circumstances of the case.⁵⁶
- [45] The authorities leave open the question of when a complaint may be a nullity and beyond the reach of the power of amendment of s 48, in determining validity of a complaint in conjunction with the power of amendment. *Harrison* suggests that relevant considerations include the fundamental principle that an indictment must disclose an offence punishable at law; that an indictment or complaint is to confer jurisdiction on the court; and that a complaint for a simple offence or breach of duty must be made within one year of its alleged occurrence.⁵⁷ *Kidman* refers to the purpose of the power of amendment being to ensure justice is not defeated by errors where it does not cause injustice. The Court there considered amendment should not

⁴⁹ (2017) 1 Qd R 515, [144].

⁵⁰ [2022] QCA 186 (per Bowskill CJ, Morrison and Dalton JJ).

⁵¹ [2022] QCA 186, [30] (per Bowskill CJ, Morrison and Dalton JJ).

⁵² (2016) 314 FLR 358.

⁵³ (2016) 314 FLR 358, [104].

⁵⁴ (2016) 314 FLR 358, [115].

⁵⁵ (2016) 314 FLR 358, [117].

⁵⁶ (2016) 314 FLR 358, [118].

⁵⁷ (2017) 1 Qd R 515, [144].

be permitted if it would give rise to a material injustice in the circumstances of the case.

[46] In this case before me, the Complainant has not sought leave to amend the complaint. However, in the decision in *Hutchinson* the Court of Appeal held that is irrelevant. In circumstances where the Defendant has objected to the complaint as is the case here in seeking to strike out the complaint or otherwise bring the proceedings to an end, 48(1)(d) of the JA is engaged and accordingly the court shall make such order for amendment of the complaint as may be necessary or desirable in the interests of justice.

[47] Later in these reasons for decision, I consider whether the Complainant should be ordered to amend the complaint. Firstly, the Defendant's application must be considered.

What is the Complainant's Case?

[48] The complaint as sworn against the Defendant is that at an unspecified place in Queensland on 2nd April 2023, he:

Was employed in the public service, and perversely without lawful excuse omitted to adequately investigate apparent risks of domestic violence and criminal allegations which by virtue of his employment it was his duty to do so contrary to s 200 of the Criminal Code Act (Qld) 1899....

[49] The evidence before me reveals that the Brief disclosed by the Complainant to the Defendant consists of a statement of the Complainant dated 2 June 2023; two (undated) voice recordings of messages left by the Defendant on the Complainant's phone; and a USB containing all of the evidence disclosed to the Complainant by the QPS in criminal proceedings against her. The Defendant filed copies of the hard copy documents contained in the Brief.⁵⁸ The Brief refers also to some as yet undisclosed documents—Defendant's statement; and original evidence of 'dates and times of phone conversations.'⁵⁹ The Brief also includes the Court Brief (Full) document.

[50] The Complainant filed the NFB Particulars on 5 July 2023.

[51] The Defendant submits that the complaint is deficient. He submits that no particulars are included on the complaint as filed. There is no reference to what the alleged duty is said to be or how it is said to have required the Defendant to act; nor does it specify what is alleged not to have been done by the Defendant under the alleged duty. Also, an omission to 'adequately' investigate is alleged, without referring to the basis for the standard against which adequacy is to be measured.

[52] The Defendant submits, the charge is duplicitous also on its face because it alleges two separate omissions. First, it alleges failure in investigation of 'risks of domestic violence'. Secondly, it alleges failure in investigation of 'criminal allegations'. In the absence of sufficient particulars to disclose a single alleged transaction, he argues the Defendant must elect which she proceeds with.⁶⁰ Further, the Defendant

⁵⁸ Affidavit of Alexandra Rose Gordon filed 28 June 2023, paras [4-5] and ARG1 and ARG2.

⁵⁹ Affidavit of Alexandra Rose Gordon filed 28 June 2023, ARG1, p 3.

⁶⁰ Reliance is placed on *Harrison v President, Industrial Court* [2017] 1 Qd R 515, [99-104].

submits that neither the ‘Court Brief (Full)’ nor the NFB Particulars provide sufficient particulars of the charge.

- [53] The evidence before me reveals that the Complainant Received a Brief of Evidence from police in late March 2023 in relation to criminal charges against her (that is, brought by police against the Complainant).⁶¹ That Brief included BWC footage from three QPS officers (the Defendant is not one of the officers).⁶²
- [54] In the Court Brief (Full), provided to the Defendant in these proceedings, it is alleged that the ‘victim’ (the Complainant) reported allegations of domestic violence to police on either 1 April, 2023 or 2nd April 2023 (different dates appear in different places in the Court Brief Full and the NFB Particulars), namely that a person known to police had in BWC footage stated (that is, in police BWC footage provided in the Brief)⁶³ that the Complainant ‘*gives him so much anxiety, it makes me want to kill her.*’ When asked how often this happened, he said, ‘*not very often*’. It is apparent this is the reported allegation of domestic violence to which the Complainant refers in the charge brought against the Defendant.
- [55] It is further alleged in the Court Brief (Full) that the ‘*phone call complaint by the Victim to the Defendant was made at 5.07 pm on 2 April 2023..*’. The Complainant says she asked ‘him’ to investigate it and to look at the BWC footage, alleging that he did not seem interested and asked her, ‘*what do you want me to do about it.*’ In the NFB Particulars, it is alleged his tone was sarcastic, but he (the Defendant) ‘*stated he would look into matters*’.⁶⁴
- [56] It is further alleged that the Defendant phoned the Complainant at 5.30pm on 2 April 2023 and said he would not be taking any action. Both the Court Brief Full and the NFB Particulars allege the Defendant phoned back and left a message at 8.38pm on 1st April 2023 asking the Complainant to contact him, and again at 5.31pm on 2 April 2023, ‘*and left 2 recordings on the victim’s voice mail that he had marked it down as a Domestic Violence other order.*’ On 4 April 2023, the Complainant alleges she left a message with police that she wished to speak with the Defendant. When the Defendant contacted her on 5 April 2023, the Complainant asked if ‘*he believed he had done a proper investigation of the allegations of Domestic Violence and the threat to kill.*’⁶⁵ It is alleged he ‘*confirmed twice that he had watched the video footage and that he was not going to repeat himself*’ and became very rude towards the Complainant.
- [57] Allegations are then set out by the Complainant that the Defendant could not have retrieved and watched the video footage ‘*within 16 minutes on a Sunday afternoon*’ when it is about 15 minutes long, and that if he had watched it, he should have made investigations and interviewed the victim and the person who made the statements ‘*pursuant to the responsibilities of a Police Officer when Domestic Violence is reported.*’. Further, it is alleged the ‘*Defendant’s conduct was outside his official*

⁶¹ Affidavit of Alexandra Rose Gordon filed 28 June 2023, [4] and ARG 1 Affidavit of Heidi Ward para 4 confirms that is so.

⁶² Affidavit of Alexandra Rose Gordon filed 28 June 2023, ARG2.

⁶³ This is the BWC footage the Complainant received when a brief of evidence was provided to her by QPS in respect of criminal charges against her.

⁶⁴ Affidavit of Alexandra Rose Gordon filed 13 September 2023, ARG 10 para [9].

⁶⁵ Affidavit of Alexandra Rose Gordon filed 13 September 2023, ARG 10 para [15].

duties by failing to properly investigate or further investigate Domestic Violence and refused to perform his duties as a public officer.'

- [58] Having regard to the allegations, the Defendant contends that the charge of failure to 'adequately' investigate appears to be advanced by the Complainant on the basis that:
- (a) She believes/alleges that the Defendant could not have watched the BWC footage, despite him saying he did, in the 16 minutes between the telephone calls; and/or
 - (b) She alleges the Defendant did not interview her or the person known to police who made the statements pursuant to the responsibilities of a Police Officer when Domestic Violence is reported.
- [59] The Defendant submits that even if these alleged omissions could be proved (which on the available evidence he submits they cannot), the offence is not sustained. This argument is advanced on two bases. Firstly, because the offence provision in s 200 requires that the alleged omission must be required by the duty the Defendant was acting under. Second, having regard to the 'adequacy' requirement in the charge as drafted.
- [60] The Defendant submits that, even after two attempts by the Complainant to particularise the charge, the Court and the Defendant have not been informed of the alleged duty and the nature of the duty to allow an assessment to be made whether the factual allegations (even if they could be proved) amount to an omission sufficient to prove the alleged offence. He submits that this failure renders the complaint fundamentally deficient because it fails to plead the manner in which the offence is said to arise.
- [61] The Complainant's submissions extract a variety of sections from various statutes. These include s 200 of the Criminal Code;⁶⁶ s 290 of the Criminal Code;⁶⁷ s 100 of the *Domestic and Family Violence Protection Act 2012* (Qld) (DFVP Act) which is not explicitly alleged to contain the duty the subject of the charge but is extracted and referred to;⁶⁸ the Preamble (in which she highlights the Universal Declaration of Human Rights and the Universal Declaration on the Elimination of Violence Against Women), as well as ss 3, and 4 and 190 of the DFVP Act.⁶⁹ She also refers in submissions to the *Police Powers and Responsibilities Act 2000*(Qld) (PPR Act), the *Police Service Administration Act 1990* (Qld) (PSA Act) and the Operations Police Manual.
- [62] Section 200 of the CC does not contain the duty alleged by the Complaint not to have been fulfilled by the Defendant. Rather, it is the offence provision under which the charge has been brought. It does not specify the particular duty alleged to apply and to have not been met by the Defendant. Section 290 of the CC contains a duty

⁶⁶ Affidavit of Alexandra Rose Gordon filed 28 June 2023, [4] and ARG 1, p 3.

⁶⁷ Affidavit of Alexandra Rose Gordon filed 13 September 2023, ARG 12, ARG 13, [3] in Submissions of the Complainant filed on 7 August 2023; and Submissions of the Complainant filed 7 August 2023, [3]. and 22 September 2023, [35]

⁶⁸ Affidavit of Alexandra Rose Gordon filed 13 September 2023, ARG 10, [4]; Affidavit of Alexandra Rose Gordon filed 13 September 2023, ARG 13, [4-5]; Submissions of the Complainant filed 22 September 2023, [35]

⁶⁹ Affidavit of Alexandra Rose Gordon filed 13 September 2023, ARG 12, ARG 13, [5], [9]; Submissions of the Complainant filed 22 September 2023, [35].

(in respect of acts or omissions a person undertakes which is or may be dangerous to human life or health). It is not explicitly said to be the relevant duty, although the Complainant appears to submit that it applies.⁷⁰ However, it plainly could not be the relevant duty – it is not relevant here.

- [63] Section 100 of the DFVP Act is not explicitly said by the Complainant to be the duty either. It contains a duty. If relied upon, the Complainant has failed to articulate it as the duty relied upon. In any event, it does not require investigation of ‘apparent risks of domestic violence’. Further, it does not contain an ‘adequacy’ requirement. That may indicate that this is not the duty relied upon by the Complainant. I observe too that the Complainant’s treatment of this section varies in the Court Brief (Full)⁷¹ and the NFB Particulars.⁷² Also, it would not be relevant to investigation of alleged ‘criminal allegations’ which form part of the charge.
- [64] For completeness, there is some reference in the Complainant’s written submissions to s 100(4) of the DFVP Act and an allegation of written reasons not having been provided to her. This also could not be the duty alleged and in any event concerns a requirement in relation to record-keeping of investigations by police officers. The other parts of the DFVP Act referred to by the Complainant have no obvious relevance either. That said, once again in Complainant’s submissions filed and provided to the Defendant (although not in either set of the particulars provided), the Complainant submits that s 190 of the DFVP Act contained the duty – in that case also submitting the refusal was deliberate and dishonest.⁷³ That provision concerns protection from liability for police officers and could not be the duty.
- [65] The Complainant’s oral submissions at the hearing suggest that none of these provisions contain the duty relied upon. Those submissions were to the effect that she ‘simply asked them to investigate’, (and in effect as I understand the submission), that it was a matter of ‘join the dots’ and that when police say they are going to investigate, it is an ‘inherent, automatic duty’. She seemed to contend that police could have declined to investigate but, as the Defendant said he would investigate, she relied upon the PSA Act, the PPRA Act and the Operations Police Manual. The provision/s thereof alleged to contain the duty were not specified. Further, she submitted in essence that there were ‘*all of the technicalities*’ but ‘*at the end of the day, it’s a death threat*’ and that it is a ‘*matter of my human rights under common law*’ that she seeks to bring forward ‘*as a matter of justice.*’
- [66] Further, and in any event, the Complainant submits that a breach of duty should not have to be specifically explained to the Defendant or, it appears his legal representatives, and that she does not wish to take up the Court’s time with a lengthy explanation of it.⁷⁴

The Defendant’s application for strike out or permanent stay or dismissal

- [67] Three alternative grounds are advanced by the Defendant in support of the application for strike out, permanent stay or dismissal of the complaint. In summary, they are that the complainant has not particularised the ‘essential factual

⁷⁰ Submissions of the Complainant filed 7 August 2023, [3].

⁷¹ Affidavit of Alexandra Rose Gordon filed 28 June 2023, ARG 1, page 3.

⁷² Affidavit of Alexandra Rose Gordon filed 13 September 2023, ARG10, [4].

⁷³ Submissions of the Complainant filed 7 August 2023, [5].

⁷⁴ Submissions of Complainant filed 22 September 2023, page 8.

ingredients'; the Complainant has failed to particularise the charge sufficiently; and the Complaint is doomed to fail.

[68] Each of the grounds is considered in the paragraphs that follow.

Has the complainant particularised the 'essential factual ingredients'?

[69] The Defendant submits that the Complainant has not particularised the duty and the nature of it alleged not to have been undertaken. Therefore, the Defendant submits that the Court cannot assess, in the absence of a particularised duty (or duties) whether the alleged required act (that is, to investigate) was required by the duty to be done by the Defendant in his role as a police officer. He submits that as a consequence, the complaint should be struck out as the essential factual ingredients have not been provided.

[70] The Complainant brought the complaint and has been ordered by the Court on two subsequent opportunities to particularise it.

[71] For the offence as alleged to be made out, the Defendant must have had a duty as a police officer to undertake an act (that is, here to 'investigate'), and he must have failed to do the act 'adequately' or omitted to do something required by the duty. In my view, this plainly requires the articulation of the source and nature of legal duty alleged to fall upon the Defendant as a police officer to do the act. Further, the charge is that the Defendant failed to 'adequately' do the act. Therefore, the basis for the alleged inadequacy, or standard against which it is alleged the act was not done to the required standard, must necessarily be articulated.

[72] There are other issues with the charge as brought. On its face, it identifies two distinct acts said to be the subject of the duty (or duties) to 'adequately investigate,' namely 'risks of domestic violence' and 'criminal allegations'. Putting aside for the moment the provisions of s 43 of the JA as regards duplicity in a complaint, if it is alleged two separate duties have been breached by the Defendant, they both need to be articulated, so that an assessment can be made whether such acts (that is, the investigations) were required in each case under the alleged duties as part of the Defendant's employment as a police officer.

[73] The Defendant's submissions in support of his application for further and better particulars specifically outline the minimum further particulars⁷⁵ which he contends are required. These included specifying the source and nature of the duty said to apply to the Defendant by virtue of his employment.

[74] The Complainant's submissions are made at a high level of generality in relation to the identification of a duty (or duties), and in any event she should not have to specify a duty. Referring to a range of legislative provisions broadly and referring generally to a variety of statutes as the Complainant has done, does not constitute identifying the duty (or duties) alleged. Further, as discussed earlier, the Complainant's oral submissions belatedly introduced an alleged broad inherent duty. If there is a duty, it must be one which is recognised at law and articulated.

[75] The Complainant further makes submissions to the effect that the matters raised by the Defendant are merely trivial matters of technicality. As I understand it, she

⁷⁵ Submissions of Defendant filed 28 June 2023, [45].

argues that the Court and the Defendant should in effect ‘*join the dots*’ because there are serious matters of her human rights that do or should override all other or usual considerations. Also, as discussed, the Complainant submits that a breach of duty should not have to be specifically explained to the Defendant or, it appears his legal representatives, and that she does not wish to take up the Court’s time with a lengthy explanation.⁷⁶ This latter submission is remarkable given the considerable volume of documents filed in the proceeding. The submission particular suggests that the Complainant may refuse to particularise the duty, rather than that she has failed in attempting to do so, but in any event the consequence is the same. The duty has not been identified by the Complainant.

- [76] The Complainant prosecutor requested, in providing the NFB Particulars, that the Defendant alert her to any further perceived deficiencies (despite two attempts and the detailed written submissions provided by Defendant in applying for an order for further and better particulars) so that she may seek to address them within the time frames of the Court’s order. This is also remarkable.
- [77] I make the observation here that the overall conduct to date in the proceeding and submissions of the Complainant suggest she significantly misapprehends the nature and purpose of these proceedings, and her role as prosecutor in them. She swore a complaint. This is a serious matter. She has brought a criminal charge against the Defendant, a sworn police officer. She as prosecutor in these proceedings has assumed all usual prosecutorial duties. Her submissions suggest that she considers that because she is a self-represented private citizen, that some degree of lenience should be afforded to her. Further, she appears to consider that her non-compliance with what she considers to be technical requirements, orders of the Court, and performing the role and responsibilities of prosecutor in the proceeding should be excused or diminished in light of what she considers to be matters of her human rights.
- [78] The Complainant’s self-representation is not relevant and does not detract from the obligations on her as prosecutor of a criminal charge, nor afford her lenience. To the extent that human rights are relevant here, the right of the Defendant to procedural fairness and a fair trial should concern her as prosecutor. She has an obligation to properly particularise the charge according to law. She has been ordered to do so on two separate occasions by the Court but has not done so.
- [79] I accept that it is patently essential that the specific duty alleged must be identified because it is intrinsic to the criminality of the alleged act or omission. I find that it is an ‘essential factual ingredient’ in the sense earlier discussed. The Complainant has now had three opportunities to specify the duty. Also, she has filed a variety of submissions in the course of addressing the Defendant’s applications. I find that she still has not particularised the duty, either because she cannot do so, or refuses to do so.
- [80] The Court does not know the offence it is called upon to deal with. In practical terms, (whether or not the complaint is a nullity or is amenable to amendment), the lack of particularity deprives the Court of the ability to determine whether the alleged offence occurred, and therefore, its ability to hear and determine the charge.

⁷⁶ Submissions of Complainant filed 22 September 2023, page 8.

Further, the Defendant in absence of this particularity, does not know the substance of the charge he is required to meet.

- [81] I also accept that here the deficiency in failing to specify the alleged duty is compounded by the allegation about the ‘adequacy’ of the act alleged to be the subject of the duty. In effect, the allegation is that how the act (that is in context, the investigation) was undertaken was in some way below some standard of adequacy. As drafted, it therefore appears the alleged duty must be one which contains a standard against which the act is to be assessed. In the absence of an identified particularised duty, such an assessment cannot be done by the Court. The Defendant submits, and I accept, that this also renders him unable to properly investigate or assess any defences available to him in relation to the alleged omission.
- [82] Has the Complainant sufficiently particularised the charge?
- [83] There is overlap between this issue and whether the ‘essential factual ingredients’ have been particularised.
- [84] The purpose of particulars is to provide fairness to the Defendant. On two occasions, the Court has ordered that the Complainant particularise the charge. On the second occasion, the Complainant had the Defendant’s submissions filed in support of his application for further and better particulars discussed in previous paragraphs.
- [85] The Defendant submits that the Complainant has failed to sufficiently particularise the following:
- (a) Having regard to the charge indicating two omissions, which of the two alleged omissions in investigations the Complainant elects to proceed with in order ‘*to demonstrate the one identifiable transaction meeting the description of the charged offence, which is distinguishable from any other similar incidents contained in the evidence.*’;
 - (b) The specific source and nature of the duty alleged the Defendant acts under by virtue of his employment;
 - (c) The nature and requirements of the duty, including by reference to alleged adequacy standard said to derive from the duty;
 - (d) Regarding the alleged adequacy requirement, stating what should have been done to achieve adequacy, and what wasn’t done in failing the standard;
 - (e) Why, and how, the Defendant’s alleged omissions ‘perversely’ breached the duty; and
 - (f) Why, and how, the alleged omission is said to be ‘without lawful excuse,’ having regard to the open defence in s 31 of the CC.
- [86] The Defendant submits that as a consequence, he still does not know with certainty the case he is to meet, and for which he must prepare. He submits that the Complainant must identify a single transaction said to meet the charge, whereas currently, the Complainant simply recites alleged facts, but not the facts intended to prove the case alleged. He argues that the Complainant’s submissions to the Court indicate that the Complainant does not understand the legal requirements of particularising the essential factual ingredients of the charge, nor the purpose or need for it as a matter of fairness to the Defendant; that she either cannot or will not

(because she contends she should not have the explain the duty) particularise the charge; and that she takes a combative and unhelpful approach in the proceedings contrary to her duties and obligations as prosecutor.

- [87] The Defendant submits that as a consequence, he does not know with precision the case he is to meet, and the accusatorial criminal law process is lost. This prevents him from assessing admissibility of evidence, defences and from making forensic decisions. Consequently, he submits the proceeding is an abuse of process.
- [88] The Complainant's submissions as discussed earlier respond at a high level only. In effect, her submissions, as I understand them, are that the proceeding should continue because she is entitled to bring the complaint; in fairness to her (that is, the Complainant) it should continue; and it is in the interests of justice for it to proceed since the complaint is brought in the public interest because there are systemic issues in the police service.
- [89] The JA provides for the bringing of a complaint by a person. As discussed earlier, the Complainant, having done so, assumes fully the role, responsibilities and duties of prosecutor of the complaint. Having instigated the proceeding by complaint, the Complainant must conduct herself and the proceeding according to law in discharging her duties as prosecutor. As discussed earlier, the Complainant's and submissions, and her actions to date as prosecutor based on the evidence before me, that she fails to fully apprehend the nature and purpose of the accusatorial criminal proceedings she has brought, and her role as prosecutor in them. The Defendant is entitled to procedural fairness and a fair trial. Provision of sufficient particulars falls within those obligations.
- [90] Sufficient particulars have not been provided. The Complainant has not provided the particulars outlined in the Defendant's submissions. I accept that those particulars are required to be specified in order to provide sufficient particulars. Based on the Complainant's submissions and the evidence before me, either the Complainant does not understand her obligations as prosecutor to particularise, or alternatively, refuses to do so. As a consequence, the Defendant is unable to properly prepare for a trial.
- [91] Is the complaint doomed to fail?
- [92] The Defendant submits that the evidence disclosed by the Complainant is limited, containing little, if any, evidence relevant to the substance of the charge. He submits that even if the case was properly particularised, the evidence as disclosed, taken at its highest,⁷⁷ 'cannot sufficiently prove the omissions (being the presently stated factual *inadequacy* of the investigation) alleged, being an essential element of the charge.'⁷⁸
- [93] Further, he contends that this is so because there is no direct evidence of police records as to the steps taken by the Defendant to investigate, discretion exercised and why. He submits that the factual chronology of the Complainant about phone calls and conversations even if accepted (he submits that if the matter proceeds much of it would be objected to as hearsay), cannot establish what investigation was undertaken by the Defendant, nor therefore the 'adequacy' of it. The case outlined is

⁷⁷ *R v P* [2016] QSC 50, [19-20].

⁷⁸ Submissions of Defendant filed 13 September 2023, [123].

therefore circumstantial and relies upon the Court being prepared to draw inferences in favour of the prosecution to what was and was not done by the Defendant, in the absence of evidence of what was actually done. Because ‘circumstantial evidence can prove a fact beyond a reasonable doubt only if all other hypotheses are excluded,’⁷⁹ the Defendant submits that the Complainant’s evidence as disclosed cannot exclude other reasonable hypotheses, and accordingly, it is doomed to fail.

- [94] The Complainant does not appear to directly address the Defendant’s submissions on this issue other than to say that she is a competent witness in the proceeding;⁸⁰ and that ‘on the face of it’, it can be identified that no investigation was done with regards to domestic violence and a threat to kill.⁸¹ As I understand it, the latter assertion is based on an allegation that the Complainant was not asked for a written statement; a domestic violence other action was issued by the Defendant; and ‘*an evidentiary certificate for the Domestic Violence was requestedpursuant to s 189 of the*’⁸² DFVP Act, by the Complainant from the Defendant but not produced. Again, various sections of different statutes are extracted or referred to in the Complainant’s written submission (s 3 of the *Copyright Act* 1968 (Cth); and sections of both the *Evidence Act* 1962 (Cth) and the *Evidence Act* 1977 (Qld)). How they are said to be relevant is not apparent. How some of them could have any possible or potential relevance is not apparent.
- [95] The Complainant’s submissions do not address the specific arguments raised by the Defendant. Again, broadly speaking the Complainant’s submissions are made at a high level of generality. The Complainant cannot give evidence as to the investigation the Defendant took. Putting aside for the moment the issues identified as to the particularisation of the charge, if it was necessary to do so, I would accept that the evidence disclosed by the Complainant, even taken at its highest, does not directly support the charge, whatever the duty intended to be alleged. The evidence does not include details of the investigation undertaken. The prosecution could only succeed if the Court drew inferences as to the investigation, (and its adequacy). However, because the evidence relied by the Complainant does not and cannot exclude other reasonable hypotheses, I would accept that the prosecution cannot succeed.
- [96] The Defendant submits the pleaded case, combined with the lack of direct evidence, and complete reliance upon inferences being drawn, renders the case as ‘hopeless’ or ‘so lacking in prospects of securing a conviction ... that no prosecutor acting in accordance with his or her duty would persist with it.’⁸³ The Complainant says that it would be ‘frivolous, vexatious, abuse of court process, scandalous, outrageous, a cardinal prosecutorial sin and a death knell would be (sic) bring a complaint’ of this nature ‘without any Prima Facie Evidence or Believing that the Complainant would have to bear the costs of flights and accommodation of both a Solicitor and barrister to represent each person on one charge, further not being able to cross examine the Defendant.’⁸⁴

⁷⁹ *Doney v R* (1990) 171 CLR 207, [8].

⁸⁰ Submissions of Complainant filed 22 September 2023, [3].

⁸¹ Submissions of Complainant filed 22 September 2023, [33].

⁸² Submissions of Complainant filed 22 September 2023, [33-34].

⁸³ Submissions of Defendant filed 13 September 2023, [129] relying upon *P v H* [2018] 2 Qd R, [63].

⁸⁴ Submissions of Complainant filed 22 September 2023, [6].

- [97] Once again, the Complainant's submissions are confusing and do not seem to me to address the arguments made by the Defendant. If I understand them correctly, she submits that the awarding of costs against her, including disbursements as to flights and accommodation, would amount to an abuse of process. Further, she contends in effect that the prosecution is not an abuse of process or frivolous or vexatious unless brought without 'prima facie evidence'. Additionally, she contends in effect that it would be an abuse of process if she as prosecutor is not allowed to cross-examine the Defendant.
- [98] In my view, it is again a case of the Complainant failing to properly apprehend the nature of the proceeding she has commenced, and her role in it as prosecutor to prove the charge brought beyond a reasonable doubt. Further, she does not understand the fundamental right of the Defendant to silence. The Defendant cannot be compelled to give evidence and if he chooses not to do so, then he cannot be cross-examined by the prosecution. There is no abuse of process identified by the Complainant.
- [99] If it was necessary to do so, I would find that the Defendant has no case to answer. I am satisfied that the case is foredoomed to fail.

Is the complaint amenable to amendment or should the complaint be struck out; permanently stayed or dismissed?

- [100] I must undertake a broad consideration of the circumstances in determining what the interests of justice require in considering the power to amend in s 48(1)(d) and a consideration of whether the complaint should be struck out; permanently stayed or dismissed in the implied powers of the Court on the basis that it fails to particularise the essential factual ingredients of the charge; it constitutes an abuse of process or frivolous or vexatious; or is foredoomed to fail.
- [101] Section 48 (1)(d) of the JA is engaged. Whether the proceeding is a nullity is to be determined in conjunction with the power to amend. In this case, unlike the situation in *Harrison and Hutchinson*, this is a private prosecution and the necessary ingredients still have not been provided. Nevertheless, in light of the power to order amendment, the law is unclear as to whether it is a nullity in the circumstances of the case.
- [102] In a practical sense, it is of no consequence whether it is a nullity or not: in light of my conclusions, it should not proceed further. However, the manner of disposition is affected. If it is a nullity, I would accept that it is liable to be struck out in the exercise of the Court's implied powers. If it is not a nullity, for the reasons explained below, I would not make an order for amendment under s 48 of the JA, because it is not necessary or desirable in the interests of justice to do so because the proceeding is an abuse of process. In that case, the proceeding should be permanently stayed in the exercise of the Court's implied power.
- [103] The power of amendment is available. Having regard to the decision in *Hutchinson*, s 48(1)(d) is engaged even in the absence of an application to amend. I proceed on the basis that the complaint although defective is not beyond the reach of the power of amendment.

- [104] I proceed on the basis that I could order the Complainant to amend the complaint to provide details of the duty and its nature, as well as the other currently unspecified particulars. That said, the Complainant has already twice been ordered to provide the particulars by the Court. Even with the benefit of the Defendant's detailed submissions setting out the particulars required, the Complainant has not done so.
- [105] Further, as discussed, the Complainant's has now also filed numerous submissions in the Court setting out a variety of submissions and made oral submissions but none of them indicate with clarity the duty and nature of the duty alleged to have been breached by the Defendant or the other particulars sought. Some of the submissions are to the effect that she should not have to explain the duty. The Complainant believes that there are systemic issues in the training of police officers and because she believes that police corruption is a serious issue. The Complainant submits that the proceeding should continue because of her fundamental human rights and that the 'technicalities' should be overlooked.
- [106] However, as discussed, the Defendant's human rights to a fair trial should concern her as prosecutor. Also, the 'technicalities' cannot be overlooked in affording the Defendant a fair trial. The Court does not know the charge to be determined and the Defendant does not know the issues in order to prepare for a hearing. That the Complaint may hold strong convictions about the correctness of her cause, as the Court said in *P v H*,⁸⁵ does not prevent the prosecution from constituting an abuse of process or being vexatious.
- [107] I have found the 'essential factual ingredients' are not disclosed because the duty and nature of it have not been specified. Further the Complainant has failed to sufficiently particularise the complaint. The Defendant does not know the case he is to meet and cannot prepare for trial. Nor does the Court know the charge to be determined at hearing. Also, the case is foredoomed to fail based on the evidence relied upon by the Complainant.
- [108] If I made an order for amendment of the complaint pursuant to s 48(1)(d) of the JA, putting aside the question whether the complaint is not a nullity when determined in conjunction with s 48 power to amend, I could have no confidence that the Complainant would or could do so such that the proceedings would be fairly conducted. I reach this conclusion in light of her actions to date as prosecutor in the proceeding as outlined throughout these reasons for decision; her failures to comply with the requirement to particularise; the contents of her submissions; and her misapprehensions about her prosecutorial duties and obligations and failures to act in accordance with them. I am satisfied that to order amendment of the complaint would be to permit the Court's processes to be employed in a manner that gives rise to unfairness and that nothing can be done to alleviate that unfairness. Accordingly, it would be manifestly unfair and unjustifiably oppressive to the Defendant in the circumstances.
- [109] In light of my earlier findings, the proceeding is an abuse of process, frivolous or vexatious. The Complainant has not complied with the Court's orders to particularise and the complaint does not disclose all essential factual ingredients of the charge. Nor have sufficient particulars been provided. Also, it is a hopeless prosecution, so lacking in prospects of success that prosecutor acting in accordance

⁸⁵ [2015] QSC 351, [64].

with her prosecutorial duties would not persist with it. Further, in view of my findings, I am not satisfied the prosecution will be fairly conducted.

[110] In the circumstances, I am satisfied that it is not necessary or desirable in the interests of justice for an order to be made requiring amendment of the complaint. Further, I find that the proceeding is an abuse of process.

[111] The Defendant seeks that the proceeding be permanently stayed in the event that I find it is an abuse of process, or frivolous or vexatious. The authorities confirm that the Court has the implied powers necessary to act effectively within its jurisdiction. I am satisfied that the Court has implied power to permanently stay proceedings to prevent an abuse of process. I am satisfied that an order should be made to permanently stay the proceeding.

[112] **The costs application**

[113] Given the basis upon which I dispose of the application, the Defendant seeks costs pursuant to s 158 of the JA in the amount of \$4297.20. Section 158 provides that the Court may order a complainant to pay costs to a defendant as seem just and reasonable if a complaint is dismissed or struck out for want of jurisdiction. Section 158B provides that generally costs may be awarded only in accordance with the scale set out in the Justices Regulation.

In making orders permanently staying the proceeding, I am neither dismissing it nor striking it out for want of jurisdiction. Section 158 of the JA does not appear to provide for the making of a costs order in these circumstances. I consider the parties should have an opportunity to provide further submissions on this issue before I decide the costs application. I further reserve my decision on the costs application until after the date for submissions has passed.

Orders

[114] Based on my conclusions, I make an order permanently staying the proceeding.

[115] Further, I make directions for the filing of written submissions for costs.