SUPREME COURT OF QUEENSLAND

CITATION:	*Sharples v Crime & Misconduct Commission & Ors* [2004] QSC 162
PARTIES:	**TERRY PATRICK SHARPLES** (applicant) v **CRIME AND MISCONDUCT COMMISSION (QLD)** (first respondent) **ASSISTANT COMMISSIONER OF MISCONDUCT, CRIME AND MISCONDUCT COMMISSION (QLD) STEPHEN LAMBRIDES** (second respondent)
FILE NO/S:	SC No 1755 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	30 March 2004
JUDGE:	Mackenzie J

ORDER:

1. **Leave to further amend the application is refused.**
2. **The application for a statutory order to review and application for review ("the Application") is dismissed.**
3. **Subject to orders 4 and 5 the applicant for the Application pay the first to fourth respondents' and the Attorney General's costs of and incidental to the Application (including the applications to dismiss the Application) on the standard basis, to be assessed, such order to take effect at 4.01pm on 4 June 2004.**
4. **Order 3 shall not take effect if any party (including the Attorney-General) duly makes a submission that a different order should be made no later than 4pm on 4 June 2004.**
5. **For the purposes of order 4, a submission shall be deemed to be duly made if it is:**
   (a) in writing; and
   (b) served on the applicant or, as the case may be, the first to fourth respondents and the Attorney-

General; and

(c) given to my Associate by faxing it to 07 3247 5387 or by delivering it to the Registry;

in every case no later than 4pm on 4th June 2004.

6. A reply to a submission made under order 4 may be made by any other party or the Attorney-General no later than 4pm on Friday 11th June 2004, in the manner prescribed by order 5.

CATCHWORDS: ADMINISTRATIVE LAW – PREROGATIVE WRITS AND ORDERS – CERTIORARI – GROUNDS FOR CERTIORARI TO QUASH – GENERALLY – where applicant pleads – whether prerogative order could be sought to set aside a plea of guilty

ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – JURISDICTION AND GENERALLY – "DECISION" WITHIN THE ACT'S APPLICATION – GENERALLY – whether a report is a decision – where there was alleged conspiratorial criminal conduct – where there was a dismissal of a request to reopen an investigation

ADMINISTRATIVE LAW – PREROGATIVE WRITS AND ORDERS – CERTIORARI – NATURE AND APPROPRIATENESS OF REMEDY – WHETHER CERTIORARI OR SOME REMEDY OTHER THAN PROHIBITION APPROPRIATE – where decision is judicial, not administrative – where appeal by rehearing available

Crime and Misconduct Act (Qld) 2001, s52
Judicial Review Act (Qld) 1991, s48, s20, s7, s12, s13
Justices Act (Qld)1886 s40, s40, s71, s222, s223

Ainsworth v CJC (1992) 172 CLR 564 cited
Bell v Liebsandft [2004] QCA 68, followed
Macgroarty v A-G (Q) (1989)167 CLR 251
Reece v McKenna [1953] Qd R 258, considered
R v Kinsman, Ex parte Tucker and Dossel [1962] Qd R 38, cited
Stubberfield v Webster [1996] 2 Qd R 211, cited
The Queen v The Stipendiary Magistrate at Toowoomba, Ex parte McAllister [1965] Qd R 195, cited

COUNSEL: Applicant appeared on his own behalf
A J Rafter SC for the First and Second Respondents
B Thomas for the Attorney-General

SOLICITORS: Applicant appeared on his own behalf
Official Solicitor for the Crime & Misconduct Commission

for the First and Second Respondents
Crown Law for the Attorney-General

[1] **MACKENZIE J:** Steps taken to amend the proceedings have complicated this matter. However, it is the wish of the applicants before me that these procedural difficulties be put aside so that the merits of their applications may be tested. However, it is desirable to explain what the procedural complications are.

[2] The original application for a statutory order of review and application for review was filed on the 23 February 2004. It named the Crime and Misconduct Commission (CMC), the Assistant Commissioner of Misconduct (*sic*), Crime and Misconduct Commission (ACM) and the Chairperson, Crime and Misconduct Commission (Chairperson) as the first, second and third respondents respectively. A Magistrate was named as fourth respondent. (The costs orders will reflect this terminology in due course).

[3] On 2 March 2004 Muir J ordered, inter alia, that the applicant file and serve an amended application by 9 March 2004 and that the Attorney-General be made fifth respondent. The amended application filed 10 March 2004 was a total reformulation of allegations, but named only the CMC and ACM (the original first and second respondents) as first and second respondents to the amended application. The application also sought relief in the form of damages which is a form of relief unobtainable under this kind of proceeding.

[4] The particulars of the relief sought are set out in the amended application as follows:

> "9. An order in the nature of Mandamus remitting the matters raised by the Applicant back to the First and Second Respondent for review according to law additionally or in the alternative an Order and that the First and Second Respondents' perform their respective duties, pursuant to the Crime and Misconduct Act 2001 (Qld).
>
> 10. An Order that all documents and materials obtained by the First and Second Respondents' (*sic*) from solicitor Mr. David Frank over which legal professional privilege attaches, be forthwith returned to the Applicant.
>
> 11. A declaration that the applicant was denied due process and those parts of the report that are untrue and defamatory of the applicant as identified by the Court, be set aside.
>
> 12. Such other order as the Court deems fit.

13. Costs and unspecified damages."

It can be seen that there is no specific relief sought against the third, fourth and potential fifth respondents. There is also some ambiguity in paragraph 9, with the result that it will be necessary to consider issues extending beyond the ordinary reach of mandamus.

[5] When the present applications came before me, Mr Sharples was disposed to seek leave to include the third, fourth and fifth respondents. However, in addition to this, there was intended to be a significant expansion of the allegations against the fourth respondent included in the draft (further) amended application. The relief sought would remain identical to that in paragraph [4].

[6] Although no point was taken about it, it may also be thought that it is doubtful whether it is appropriate to join the various complaints in a single application. It is true that all have a connection in one way or another with legal proceedings in which Pauline Hanson and David Ettridge were involved but any other link of a sufficient character to justify joinder cannot be easily identified. The complaints about the Magistrate are concerned with events involving Mr Sharples during and as a consequence of the Hanson/Ettridge committal proceedings. The complaints against the CMC and its officers include allegations of failure to investigate complaints by Mr Sharples, past and present; denial of natural justice and alleged erroneous findings in a report entitled "The Prosecution of Pauline Hanson and David Ettridge"; obtaining material which was subject to legal professional privilege; and alleged undermining of Mr Sharples' reputation and his successful civil action which resulted in deregistration of One Nation as a political party. It can be seen from that brief summary that some of the matters could be conveniently joined but others should not. There are, in practical terms, several applications rolled up into one, as the more detailed analysis of the claims later will show.

[7] The applications before me were two applications for dismissal, pursuant to ss 12, 13 and 48 of the *Judicial Review Act* 1991. One is by the original first, second and third respondents. The other is by the Attorney-General in respect of inclusion in the amended application of 10 March 2004 of decisions and conduct by the Magistrate in relation to the Hanson/Ettridge committal proceedings.

[8] It can be gleaned from the amended application for review that there were two matters directly complained of against the second respondent. One concerned events associated with the committal hearing; the other was concerned with a decision not to reinvestigate Mr Sharples' complaints. The allegations in relation to the latter were that there were failures to take particulars of his complaint, in compiling evidence, in dealing with and analysing the evidence given by him to the second respondent and to properly assess the evidence and to conduct any investigation. It was alleged that he had breached the rules of natural justice in "dismissing on the grounds of no evidence or no reasonable suspicion", Mr Sharples' complaints in relation to his eviction from the committal proceedings and his subsequent charging, prosecution and conviction of contempt of court and "the

associated alleged conspiratorial criminal conduct" between the Magistrate, the Crown Prosecutor and the police officer. This is described as "Decision 1".

[9] "Decision 2," in respect of which the same conduct was alleged, was focused on the second respondent's dismissal of Mr Sharples request to reopen the investigation into his previous complaints upon the ground that an exhaustive investigation had already been conducted.

[10] It is desirable to set out the particular complaints in more detail. One aspect (paragraph 3.1) is that Mr Sharples says he was the victim of a criminal conspiracy that deprived him of his right under the Commonwealth Constitution to a fair trial and perverted the course of justice. As a consequence, his ability to meet the description of a "fit and proper person" for professional membership and registration as a tax agent was affected. The failure or refusal of the first and second respondents to exercise the powers available to them might have affected his right to a beneficial outcome.

[11] The second (paragraph 3.2) is that the report of the first respondent was in error and was an unconscionable abuse of statutory power given for particular purposes. Because the report had been tabled in Parliament, it was on the public record and defamed him. The third (paragraph 3.3) is that by failing to adequately explain the differences between criminal and civil proceedings, it undermined Mr Sharples' successful civil action which resulted in deregistration of One Nation as a political party. The report was therefore neither fair and reasonable nor an informed decision.

[12] The fourth (paragraph 3.4) is that the conduct and each of the decisions of the first and second respondents did not give Mr Sharples natural justice. The reasons advanced were:

(a) Failure to advise of or consult him about defects in or lack of evidence concerning his complaints;
(b) Failure to investigate all evidence and witnesses referred to by him;
(c) Failure by the first and second respondents to give information or the opportunity to defend the findings of fact and conclusions adverse to him, intended to be published;
(d) Failure to give him the opportunity to respond; and
(e) Failure to recognise his legitimate expectation that the matters of complaint referred to the respondents by the Premier would be properly investigated.

[13] The species of administrative error relied on were:

(a) In relation to the conduct of the second respondent and Decision 1, the procedures required by law to be observed were not observed. This focused on the adequacy of the investigation (paragraph 4.1);
(b) Breach of natural justice in relation to Decision 1 by failing to take into account relevant considerations and evidence (paragraph 5). This focused on the fact that the Magistrate both preferred the charge of contempt against Mr Sharples and convicted him. It was alleged that a reasonable

> person would apprehend bias, oppressive and unconscionable conduct and an exercise of the power that was unreasonable in the administrative law sense. A variety of particulars were given in paragraph 5.1. These may be summarised as referring to the conduct of the hearing on the day he was convicted, the Magistrate acting as Judge in his own cause, and having prejudged the matter.

[14] Although it is not in the amended application filed by leave of Muir J, a further group of particulars are included as paragraph 5.1(e) of the proposed (further) amended application. The focus is on events surrounding his eviction from the court on 3 May 2002 and events alleged to have occurred on 7 May 2002 and are relied on as evidence of actual bias. Most of these events are reflected in the transcripts in evidence. The allegation in 5.1(e)(iii) is not, as far as I can tell, supported by the evidence in the material before me. Paragraph 5.2 alleges a breach of Mr Sharples' legitimate expectation of and right to a fair trial by reason of the Magistrate, the Crown Prosecutor and the police officer discussing the contempt matter in the courtroom on 19 August 2003 in the absence of Mr Sharples. There is some evidence of the Magistrate, the Crown Prosecutor and "other staff" speaking together. However, there is evidence that at least one member of the public was still in the room and there is no evidence of the subject of the conversation (see further paragraph [30]).

[15] There is also a reference, in connection with the allegation of breach of natural justice, to "particulars pursuant to 6.1(a) to (d)". Since there are no such subparagraphs, the intention of the inclusion of that reference is obscure. Paragraph 6 alleges that in making Decision 1, the second respondent failed to take into account relevant considerations, that the Crown Prosecutor and police officer were biased against him because of matters particularised in paragraphs 6.1 to 6.4.

[16] With respect to the report, the allegation in paragraph 7 is that it contained incorrect findings of fact which were defamatory of the applicant. The particular focus of the complaint was that there was a statement that "Mr Abbott's activities gave financial support to Mr Sharples" and one that "Mr Ettridge asserts that, by funding Mr Sharples' actions to have Pauline Hanson's One Nation deregistered, Mr Abbott prevented One Nation voters from voting for the party of their choice". The latter is said to imply that Mr Sharples was part of a political conspiracy and improperly using the court system for political advantage. The complaint is that the implications are untrue, that Mr Sharples was unaware of the allegations and that he was not given the opportunity to answer them. He alleges that after the report was delivered, he supplied evidence in support of his contention that he did not receive financial support. The response given by the Chairperson was that there was no error to correct, for reasons advanced in the letter (see further paragraph [42]).

[17] In paragraph 8, and particulars in paragraphs 8.1 and 8.2, it is alleged that there were improper exercises of statutory power, abuse of the exercise of power and failure of statutory duty on the part of officers of the first respondent to investigate information given by Mr Sharples that named a person, Mr Smith, as a potential

witness who had tape recordings. If that information had been investigated, it would have rendered "a nullity" the statement in the report to the effect that evidence had not been found of Mr Abbott's involvement beyond what was already on public record and as to when his involvement ceased.

[18] Finally, in paragraph 8.3, it is alleged that documents of Mr Sharples subject to legal professional privilege were obtained in breach of the powers of the first respondent.

Events related to committal proceedings

[19] There are two aspects of this category. One concerns the consequences, including ejection from the court room and his later conviction for contempt, of Mr Sharples speaking certain words in court while a witness was giving evidence. The other is an allegation that during an adjournment in the contempt proceedings the Magistrate, the Crown Prosecutor and a police officer involved in the prosecution spoke to each other while Mr Sharples was not present, after all other persons had been ordered to leave.

[20] With respect to the eviction of Mr Sharples and the subsequent charge, prosecution and conviction of him, s 40(1) of the *Justices Act* 1886 provides for a Magistrate to make an oral order for removal of a person from court in circumstances listed in paragraphs (a) to (e). A person may also be convicted of contempt by the Magistrate.

[21] Mr Sharples referred to *Reece v McKenna* [1953] Qd R 258 in support of his argument that the Magistrate did not have jurisdiction to convict for contempt. This argument seems to be based on a misconception derived from remarks by Philp J in *Reece v McKenna* that the power to convict for words spoken in Court was confined to s 40; the power was statutory and needed to be considered quite apart from the general law dealing with contempt of court.

[22] At the time when *Reece v McKenna* was decided, s 40 was in a different form. In its present form, the statutory offence is described in s 40(1) as contempt. Use of that description by the Magistrate was not therefore objectionable. Further, if the Magistrate believed that conduct of a kind described in paragraphs (a) to (e) of s 40(1) had been engaged in, Mr Sharples' exclusion from the courtroom was authorised by s40(1). A purpose of the power is to allow such action to be taken summarily. The Magistrate also referred to s 71 on a later day.

[23] *Macgroarty v A-G* (Q) (1989)167 CLR 251, decided on s 105 of the *District Court Act* 1967 (identical in scope to s 40 of the *Justices Act*), authoritatively sets out what is required for a conviction under this kind of provision. Two essential

requirements are that the specific offence charged should be distinctly stated and that the person charged should be given adequate opportunity to answer the charge.

[24] Relevant events began over two years ago when a witness was giving evidence in the committal proceedings on 3 May 2002. There is no dispute that when the witness said something suggesting that Mr Sharples had been evading service of bankruptcy documents, which Mr Sharples believed to be untrue, Mr Sharples said words recorded in the transcript as "Oh, he'll die – he'll die for that". It appears from what occurred subsequently that the Magistrate did not hear the remark. Nor did the cross-examining solicitor. It seems likely that it was only picked up clearly by one of four tracks of the recorders in operation in the court room. It was, however, heard by a police officer and possibly by the Crown Prosecutor who drew it to the Magistrate's attention. Upon being asked by the Magistrate whether he heard the remark the witness said he had heard it. However, what he said he had heard was "Something to `I'll kill you' that's the only words I heard, Your Worship or `kill' was one of the words that came out". Later he repeated, more than once, that he had heard the word "kill". The tape was then played and what was said established authoritatively.

[25] After the police officer gave evidence that he had heard the remark, Mr Sharples obtained an adjournment. On 7 May 2002 the Magistrate read properly particularised charges under s 40(1)(a) and (c) to Mr Sharples. After further adjournments, according to the certificate of conviction, a plea of guilty was entered to the charge under s 40(1)(c).

[26] It is common ground that the charge under s 40(1)(a) was dismissed. There is a difficulty in accepting the certificate of conviction's accuracy, since the matter before me was conducted on the basis that there was no plea of guilty entered. That is consistent with Exhibit CRS1(C) to the affidavit of Cameron Ross Stewart, and with the tenor of other submissions.

[27] It was also common ground that there had been no appeal against the conviction. If there was a plea of not guilty or, in the absence of any plea, a plea of not guilty entered for the purpose of hearing the matter, there was a right of appeal under s 222 of the *Justices Act.* On these assumptions, although the evidence of what transpired on 19 August 2003 is sparse, there was provision in another law under which the applicant was entitled to seek a review. Under s 223, the appeal is by way of rehearing on the evidence before the Magistrate, subject to a discretion to allow further evidence. The matters raised in the present proceedings could have been agitated if an appeal had been instituted. Mr Sharples attributed his failure to appeal to his emotional state at the time. There is no independent evidence concerning this, but I am prepared to assume it is correct. About twenty-one months after the appeal as of right expired, there is no demonstrated reason on the evidence before me to allow the matter to be reopened, to any extent that it can be, in judicial review proceedings. An application for a prerogative order is also long out of time. It is also important to keep in mind, as Thomas J said in *Stubberfield v Webster* [1996] 2 Qd R 211 at 217, that judicial review is not to be regarded as a

substitute for the appellate system within the ordinary judicial process. Leaving aside the issue of availability of a prerogative order, a conviction cannot be set aside in these proceedings, insofar as they rely on s 20 of the *Judicial Review Act*, since the decision is one of a judicial nature, not one of an administrative character. (*Bell v Liebsanft* [2004] QCA 68).

[28] In a case where there is a plea of guilty, there is no right of appeal against conviction, by reason of s 222(2)(c) of the *Justices Act.* Where a prerogative order is sought to set aside a plea of guilty, there must be compelling circumstances to justify that course being taken. In this case, the requirement of the law that the charge be properly particularised was complied with. The offence was one known to law, although an issue was raised as to whether the evidence established it, and within the Magistrate's jurisdiction to hear. Mr Sharples' principal complaint is that he was advised only the afternoon before the hearing that legal aid was approved only for a plea of guilty. He said that he had mentioned that he was innocent of the charges and was denied the reasonable chance to call witnesses and give evidence in his defence. By the time the matter was determined, there had been several adjournments. The evidence is silent as to why this evidence had not been organised to be available at the hearing which, presumably, Mr Sharples intended to be a contested hearing.

[29] Where a plea of guilty has been entered, there is a particularly heavy onus on an applicant to demonstrate a basis for quashing the proceedings. (*R v Kinsman, Ex parte Tucker and Dossel* [1962] Qd R 38; *The Queen v The Stipendiary Magistrate at Toowoomba, Ex parte McAllister* [1965] Qd R 195. Had the matter to be determined on this basis, I would have been satisfied that on the material before me, a prima facie basis for an order of the nature of the former writ of certiorari has not been established.

[30] With regard to the second complaint against the Magistrate, it is apparent that at least one other person was in the courtroom at the time when the alleged conversation occurred, since a woman who was known to Mr Sharples gave a statutory declaration that she saw the Magistrate and staff speaking together and that she went looking, unsuccessfully, for Mr Sharples to tell him. She does not identify the police officer as one of them. She gives no evidence of what was said by the people during the conversation. The letter from ACM advising that, on the material provided, there was no suggestion that the discussion related to the charges concerning Mr Sharples is correct. Further, it appears that both the Crown Prosecutor and the police officer were made aware of the allegations of impropriety in relation to Mr Sharples and "categorically denied" them. It was pointed out by ACM that the duty to investigate depended upon a reasonable suspicion of official misconduct.

[31] The relief sought by Mr Sharples is review of the "decision and conduct" of the ACM communicated to the applicant that there was no evidence and no reasonable suspicion as to conspiratorial criminal conduct between them. In the absence of any evidence of improper discussion of issues in the case, the ACM could do no more

than advise in those terms. In the circumstances, there is no prospect of an application for review on administrative or prerogative grounds succeeding.

[32] It is convenient at this point to dispose of the argument based on the allegation that the Magistrate, by charging Mr Sharples and deciding adversely to him, was acting as judge in his own cause. Section 40 is concerned with the kind of conduct which, if committed in a superior court, would be contempt in the face of the court. It provides a summary remedy of a self protective nature which may be exercised by the judicial officer hearing the proceedings in the course of which the proscribed conduct is committed. This is evident from s 40(3)(d) which allows the Magistrate to act on the court's own view, ie what was observed by the Magistrate, or upon the evidence of a credible witness.

[33] Ordinarily, the power to charge and deal with a person under s 40 is exercised promptly. As far as can be ascertained from the evidence before me, the unusually long delay in doing so was to accommodate Mr Sharples' requests for the opportunity to prepare for his defence. However, the fact that such delay occurred did not deprive the Magistrate of the power given to him by s 40 to both charge him and decide his guilt.

CMC report

[34] On 11 November 2003 Queensland Parliament resolved to refer to the CMC for consideration and advice, in the context of the Hanson/Ettridge litigation, matters including:

> "The involvement of Federal Minister, Tony Abbott, and others in the original legal action against Pauline Hanson and David Ettridge."

The original legal action involving Hanson and Ettridge was initiated by Mr Sharples. On behalf of the first, second and third respondents it was submitted that there was no legitimate complaint in respect of the first respondent's conduct of the investigation concerning this term of reference. Mr Sharples' complaints were characterised as firstly a challenge to factual conclusions in the report. Secondly, it was a contention that Mr Sharples was denied an opportunity to answer or defend findings of fact and conclusions adverse to his character. Thirdly, it was that there was an assertion that the report undermined his successful civil action.

[35] The statements in the report of which Mr Sharples complains are set out in paragraph [16] above. It may be observed that the second is a recounting of the effect of Mr Ettridge's submissions, not a finding. It is immediately followed by the observation:

> "Whether correct or not, this assertion does not support the view that any improper conduct vitiated relevant court proceedings."

In context, that comment is probably concerned more with a consequence of the successful action being an alleged interference with political liberty rather than with the issue of whether funding occurred.

[36] On behalf of the first, second and third respondents, it was submitted that it was doubtful that the report is a decision to which the *Judicial Review Act* applies. It was also submitted that the applicant was not a person aggrieved by the report. It was submitted, however, that in any event the evidence disclosed that Mr Sharples had been invited to make submissions to the inquiry.

[37] I did not understand Mr Sharples to be contending that reporting in the terms complained of was a decision to which the Act applied. His complaint was concerned with the principles discussed in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. The aspect relied on, as I understood it, was that the report affected a legal right or interest such that the first respondent was required to proceed in a manner that was fair to Mr Sharples. The interest was said to be his reputation. Reputation is an interest attracting the protection of the rules of natural justice (*Ainsworth* at 578). The burden of his complaint was that what was said painted him as part of a political conspiracy.

[38] *Ainsworth* also points out that where a report has no legal affect or legal consequence, as is the case here, quashing of the report by an order in the nature of certiorari would not be available. However, it is the kind of case where a declaration might be made, if appropriate. A declaration in the kind of terms which are appropriate is sought in paragraph 11 of the amended application.

[39] It should be noted before going further that there was another complaint by Mr Sharples that his conviction for contempt affected his ability to fit the description of a fit and proper person to obtain professional registration. It seems uncertain that it would do so, but even assuming that a conviction of that kind would impact upon the issue of whether someone was a fit and proper person, it is irrelevant to this aspect of the matter.

[40] Unlike the situation in *Ainsworth*, Mr Sharples was given the opportunity to provide evidence of the activities of Mr Abbott, which he did not do. When he was spoken to by ACM, the conversation was recorded. There is a transcript of the relevant part of it which demonstrates diffidence about cooperating in relation to Mr Abbott's activities.

[41] The report, in the absence of evidence to the contrary, proceeded on the assumption that the published material supplied by Mr Abbott as to his involvement was substantially correct. That material included evidence that Mr Abbott had said that he had supported Mr Sharples' litigation with funds raised through a trust. He had told Mr Sharples that he had organised pro bono lawyers for him. Further, Mr Sharples' fax of 27 January 2004 to the Chairperson says, immediately after referring to the statement "Mr Abbott's activities gave financial support to Mr

Sharples", that Mr Abbott had reneged on his verbal and written promises to him "as referred to in the report". Consequently all financial resources were transferred to support another case which was also being supported. Mr Sharples continued: "Accordingly I received no financial support from Mr Abbott and the above statement is factually incorrect and in the circumstances negligent and defamatory" as it purportedly implicated him in activities of which he was never a part. He complained that the matter was not raised with him at his interview with officers of the Commission. He requested an immediate public correction. He also wrote, in rather more expressive terms but with similar sentiments, to the second respondent.

[42] The Chairperson replied that the statement was made on the basis of material before the CMC which suggested that Mr Sharples had received the benefit of pro bono legal assistance from the solicitors in relation to an application for an injunction as a result of Mr Abbot's activities. He said that the CMC did not agree that there was any need to make a public correction.

[43] After that, Mr Sharples replied, including documents that he said made it "bell clear", that whatever Mr Abbott promised to him, the solicitor did not act on a pro bono basis. In the alternative the claim that he had received a benefit was negated by the "legal mess" he was left in by the solicitors. The documents include evidence that the solicitors had rendered an account to him after he had withdrawn instructions and that Mr Sharples negotiated payment of a sum of about 7% of the total bill in full and final payment, as he said, to get access to at least some of his files. Accordingly, he said he received no financial support from Mr Abbott by way of money or purported pro bono legal services.

[44] Significantly the letter concedes that, factually, it may be true that the solicitor was paid from the trust fund since there was some evidence to support that contention. However, he reiterated that it was defamatory to state, in the circumstances, in a public report that Mr Abbott's activities gave financial support to his legal action when the truth was that he and his family funded and bore the brunt of a political legal matter at enormous personal cost.

[45] A further letter from the Chairperson, pointing out that the payment made was far short of any demand and of the full costs of a solicitor and senior counsel running an application for an injunction, was sent to Mr Sharples. The Chairperson said it was clear from all the material before the CMC that the involvement of senior counsel and the solicitors in a pro bono fashion was the result of Mr Abbott's endeavours and, as such, was of financial support to him in the sense of costs avoided. That explanation seems consistent with the way the conclusion is expressed in the report.

[46] In the end, the point reduces to an argument whether or not the statement in the report of which Mr Sharples' complains is a legitimate interpretation of the facts. When that is appreciated against the background of events following the parliamentary resolution, and in particular the invitation to Mr Sharples to assist the CMC and his disinclination to do so, I am satisfied that the application in so far as it

relates to a breach of natural justice with regard to the report discloses no reasonable basis for the application.

Undermining the effect of the civil trial

[47] In paragraph 3.3 of the application there is a complaint that the difference between civil and criminal actions were not adequately explained in the report. It was alleged that this had a tendency to undermine the successful civil action brought by Mr Sharples. It was alleged that the report was not fair and reasonable or an informed decision.

[48] Firstly, it is not easy to understand how the complainant is a "person aggrieved". A perception created by a report does not easily fit into the concept of a decision under an enactment. Even where a report is required to be made under a statute, the concept of a person aggrieved by the making of the report is linked to a person whose interests would be adversely affected if the decision were made in accordance with the report (s 7 *Judicial Review Act*). Dissatisfaction with the way a report is expressed, where it is alleged to have a tendency to undermine the civil action, falls short of these criteria.

[49] It is also not easy to understand the nature of the complaint. The report engages in extensive discussion of litigation which comprised the civil action brought by Mr Sharples against Ms Hanson and the Electoral Commissioner, the appeal against that decision, in both of which Mr Sharples was successful, the criminal trial of Ms Hanson and Mr Ettridge, and the appeal that resulted in their acquittal. There is extended analysis of the decisions in chapter 4. At page 12 there is a conventional explanation of why verdicts that may appear inconsistent can be reconciled and do not necessarily indicate a malfunction of the legal system.

[50] Whether or not such an explanation is accepted by a casual or, perhaps, uninformed reader as convincing is not to the point. The mere fact that an explanation is given in the report that may be interpreted by some as diminishing the effect of the judgment in the civil proceedings and by others as a reasonable explanation of the process by which the result reached in the criminal appeal can be rationalised with that in the civil proceedings is not something rendering the report amenable to judicial review.

Failure to investigate

[51] The inquiry into the matters set out in the parliamentary resolution was treated as one under s 52 of the *Crime and Misconduct Act* 2001. At page 2 of the report, the method of inquiry is explained. Mr Sharples was one of the persons specifically invited to make submissions. It is apparent from the part of the transcript forming CRS 2 (P) to the affidavit of Mr Stewart that, at the time of interview on 27 November 2003 with ACM, Mr Sharples was disinclined to assist the CMC Inquiry

with respect to Mr Abbott's involvement. The tenor of the conversation is that his view was that the focus on Mr Abbott alone was too narrow. Beyond a reference to the existence of other documents, principally in a solicitor's hands, there is a manifest disinclination to facilitate the investigation. To the extent that there is a complaint that there was a duty to inform him of deficiencies in the evidence supplied by him, it appears to be a hollow claim in light of what happened on that occasion.

[52] A particular complaint about the conduct of the investigation was that the CMC did not investigate all evidence and witnesses referred to them and that Mr Sharples' legitimate expectation that the first and second respondents would fairly and impartially perform their statutory functions and duties by a proper investigation of the complaints and matters referred to it by the parliamentary committee had been denied. Information had been given by Mr Sharples that a man named Smith had tape recordings in his possession that were "critical evidence". It was alleged that the CMC had failed to follow that matter up. It was asserted that, had that been done, it would have rendered "a nullity" a finding as to the duration of Mr Abbott's investigation made in the report.

[53] It appears from the transcript of the committal proceedings that Mr Smith gave evidence about tape recordings being taken of telephone calls with people other than Mr Abbott by Mr Sharples, using Mr Smith's telephone. The kind of information he might be able to give was therefore already known. It is unlikely that the tape recordings extend beyond those mentioned in evidence since a subpoena issued on behalf of Mr Sharples requiring Mr Smith to produce various items refers only to tape recordings involving people whose names had already been disclosed. Even assuming that it is correct that Mr Smith was not interviewed, I am not persuaded that failure to interview a particular person on the basis that it is claimed that he may have evidence is a decision or conduct that is reviewable in a case where a function under s 52(1)(c) of the *Crime and Misconduct Act* is being performed.

Privileged documents?

[54] One of the curious aspects of this ground of the application is that when interviewed on 27 November 2003 by ACM, Mr Sharples was not averse to the CMC speaking to persons in possession of his documents. However, the question of legal professional privilege was raised by ACM and the need for authority from Mr Sharples, if the documents were to be obtained, was raised. Mr Sharples sent a fax on 6 December 2003 in which he offered to assign or waive his privilege subject to conditions as to the use of the documents being limited to the investigation and that copies of the documents be supplied to him. This fax apparently crossed in transmission with a letter of 5 December 2003 from ACM advising that, contrary to the CMC's understanding, when the person in possession of the documents had been contacted, he provided copies of them from his files. Another person who also apparently had documents had decided to seek instructions from Mr Sharples before doing so. On receiving that letter, Mr Sharples faxed the ACM saying, *inter alia*,

that it did not explain how documents subject to legal professional privilege ceased to be so, but making no other specific complaint. (It was in this fax that Mr Smith was referred to as a possible source of information, although, apparently, likely to be an unwilling one.)

[55] In a case where there are grounds for concern that documents subject to legal professional privilege have come into the possession of another in circumstances where the privilege attaching to them may be breached, there are other adequate means of reviewing the matter according to law and obtaining appropriate relief. There is nothing to suggest that proceedings under the *Judicial Review Act* are, on the facts disclosed above, an appropriate means of seeking redress. This aspect of the application should be dismissed.

[56] For the reasons given above, I am satisfied that the various aspects of the application for statutory orders to review and application for review should be dismissed. Some fall within the scope of ss 12 and 13, assuming that there are reviewable matters. Others fall within s 48. To save unnecessary further expense, I will make provision for written submissions as to costs, with a guillotine provision to take effect if no party wishes to suggest that a different order should be made from the order provisionally made.

Orders

1. Leave to further amend the application is refused.
2. The application for a statutory order to review and application for review ("the Application") is dismissed.
3. Subject to orders 4 and 5 the applicant for the Application pay the first to fourth respondents' and the Attorney General's costs of and incidental to the Application (including the applications to dismiss the Application) on the standard basis, to be assessed, such order to take effect at 4.01pm on 4 June 2004.
4. Order 3 shall not take effect if any party (including the Attorney-General) duly makes a submission that a different order should be made no later than 4pm on 4 June 2004.
5. For the purposes of order 4, a submission shall be deemed to be duly made if it is:
   (a) in writing; and
   (b) served on the applicant or, as the case may be, the first to fourth respondents and the Attorney-General; and
   (c) given to my Associate by faxing it to 07 3247 5387 or by delivering it to the Registry;

   in every case no later than 4pm on 4th June 2004.
6. A reply to a submission made under order 4 may be made by any other party or the Attorney-General no later than 4pm on Friday 11th June 2004, in the manner prescribed by order 5.