

# Case note - High Court

by Mark Hunter

*Northern Territory of Australia  
-v- GPAO*

High Court No. D172/1997

*Judgment of Full Court  
delivered 11 March 1999*

CONSTITUTIONAL LAW -  
FEDERAL JURISDICTION -  
OPERATION OF  
COMMONWEALTH AND  
TERRITORY LAWS

By a majority of six to one the High Court allowed the Territory's appeal against an order of the Full Court of the Family Court. The Family Court had declared inoperative a provision of the *Community Welfare Act 1983* (NT) ("CWA") restricting the production of Child and Family Protective Services files on the basis that it was inconsistent with the *Family Law Act 1975* (Cth) ("FLA") and the *Evidence Act 1995* (Cth) (the "*Evidence Act*")

The First Respondent to the Territory's appeal was the father of a four year old child the subject of proceedings in the Family Court. In support of her application for sole residence and the discharge of access orders, the mother of the child alleged that the First Respondent had sexually abused the child.

A subpoena requiring the production of the child's file was issued by the Registrar of the Family Court on application of the father pursuant to Order 28 Rule 1 of the Family Law Rules, and served on the Director, Child and Family Protection Services.

Section 97(3) of the CWA prohibits the production to a court (or other disclosure) by an "authorised person" of documents or information arising out of the performance of that officer's functions under the CWA.

The Family Court was exercising jurisdiction with respect to a matter under Part VII of the FLA which applies in the Northern Territory pursuant to section 69ZG of that Act.

**Held** (Kirby J dissenting)

1. The appeal should be allowed.
2. Section 97(3) of the CWA was not rendered inoperative by the FLA or the *Evidence Act* and was binding on the Family Court.

per Gleeson CJ, Gummow and Hayne JJ - Section 79 of the Judiciary Act (Cth) makes binding on all Courts exercising federal jurisdiction State and Territory laws except as "otherwise provided by the constitution or the laws of the Commonwealth". Section 112AD of the FLA provides for sanctions in respect of failure to comply with Court orders only where the failure to comply is "without reasonable excuse".

Reliance upon the immunity provided for by section 97(3) of the CWA constitutes a "reasonable excuse". Since the two sections are able to operate concurrently, section 97(3) is not rendered inoperative by Part VII of the FLA.

Section 65E of the FLA makes the best interests of the child the "paramount consid-

eration" in determining whether to make a particular parenting order. The operation of the paramouncy principle is not compromised by section 97(3) which is itself aimed at protecting the interests of children by securing confidentiality of information.

Per McHugh and Callinan JJ - The Family Court was not exercising "federal jurisdiction" when it commenced to hear the matter because this phrase does not include matters arising under enactments made pursuant to section 122 of the Constitution.

Although section 79 of the Judiciary Act did therefore not "pick up" section 97(3) of the CWA, the latter provision affects the operation of the Family Court's power to require the production of documents. This is because the FLA does not authorise conduct "which is specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory in which the Act would be done". (See *P-v-P* 181 CLR 583 at 602).

## Appearances

Appellant Counsel: Pauling QC, Riley QC, Webb and Lisson. Solicitors: Solicitor for the Northern Territory. First Respondent Counsel: McDonald, Maloney, Gearin, McNab. Solicitors: Chapman & Associates

Interveners: Attorneys General for the Commonwealth, South Australia and New South Wales

## LAWASIA

### Postponement of Environmental Law Special Training Program

LAWASIA advises with regret that its Environment Law Special Training Program for Judges and Lawmakers, set to take place in Darwin and the Kakadu National Park in June 1999 has now been postponed.

Fortunately, the conference is rescheduled for May/June 2000 and will now be expanded to include a shorter practitioners stream, largely in response to enquiries from members of the legal profession who have indicated a desire to take part in the program.

The concept of the original conference developed in response to a perception that

judges required to sit on environmental cases were often not equipped with a familiarity with scientific and policy issues.

The judicial program will begin in Darwin and will relocate to Kakadu National Park in order to use this area as a case study. Judicial delegates will travel to Kakadu, stopping en route to visit sites of land degradation and will be given further background to Kakadu by park rangers. Although the conference is to be an intensive work session, it is hoped that delegates will be able to take advantage of being in Kakadu to experience some of its splendours.

The practitioners stream will be a less lengthy event, without the Kakadu component, and the program will be an intensive package delivering a sound overview of the issues. Both streams will include sessions on air pollution, water pollution, land degradation and biological diversity.

This LAWASIA conference is an opportunity to acquire some valuable background to an area of law that is already important and growing in importance. For interstate and international visitors, it offers the chance to visit the NT in the context of examining some of the major issues affecting it.

Those interested in registering an expression of interest may contact the LAWASIA Secretariat Tel: +61 8 8946 9500, fax +61 8 8946 9595; E-mail: lawasia@lawasia.asn.au



### PLUS CARD

Interested on saving fuel?  
Contact the Law Society  
for an application.