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"FORENSIC USE OF THE SUBPOENA IN CRIMINAL PROCEEDINGS"

"What a man does by compulsion of law cannot be called maintenance". This may be a strange way to commence a dissertation on the use of subpoenas in committal proceedings. But it is always useful to look at a historical background to understand why and how a particular procedure developed. We know that the jury system changed radically over several hundred years of English law. For much of the earlier period the jury were part investigators, part fact finders. They were not remote from the issue. On the contrary they were chosen precisely because of their local knowledge of the facts, and they could, and often did, make further inquiries as they wished. But such persons as they questioned were not expected to come to court to give evidence. Indeed a person who came to court to volunteer

evidence was looked on with great disfavour as a dangerous meddler.. He stood considerable risk of being himself sued for maintenance i.e. undue interference in the court processes. In 1450 it is reported in the Year Books that a judge said:

> "If he had come to the Bar out of his own head and spoken for one or the other it is maintenance and he will be punished for it" (Y.B. 28 H. VI 6, 1 - quoted in Wigmore Vol VIII para 2190 - see also Holdsworth H.E.L. Vol IX 182-185).

As the modern concept developed, and jurors became fact finders on evidence placed before them by witnesses, it was necessary to reverse the earlier disapproval of witnesses and protect them from suits for maintenance. Hence the quotation at the commencement of this paper. For if a witness were <u>compelled</u> to come to court he must

necessarily be acquitted of any intent to meddle by his own gratuitous act.

The statute of Elizabeth 1562-3 which created the statutory offence of perjury, was the first to provide that witnesses duly served with process to attend and testify should be liable to a penalty (i.e. sub poena - under punishment) if they did not appear. The common law courts therefore adopted the process of subpoena already established in Chancery. (Holdsworth H.E.L. Vol IX - p.185). This procedure was applied first in civil cases and only later on behalf of the accused in criminal cases; because of the earlier rule that a person accused of crime could not call witnesses or give evidence himself. It was only at the beginning of the 18th century that an accused was allowed to call witnesses and compel their compulsory attendance. (Wigmore - Vol VIII - para 2190). It took nearly two more centuries before he was allowed to give

evidence himself; a right which many great advocates of the time, such as Marshall Hall, considered to be of dubious value.

Once an accused could subpoena witnesses, the next step was to determine what evidence such witnesses could give; for the law recognised various exclusions. Some of these were only swept away comparatively recently (e.g. the incompetency of spouses to testify against each other): others remained, but the rationale for exclusion changed. The most interesting example was the concept of legal professional privilege. Originally this was the lawyer's privilege, and was based on the concept that, as a matter of honour, the lawyer should not be compelled to disclose the secrets of his client. Later that concept was repudiated in favour of the modern view that it is necessary to promote freedom of consultation between lawyer and client and, therefore, it is the client's privilege. (See Wigmore Vol VIII paras 2290-2291).

It was, however, recognised that there was no difference in principle in calling a witness to give evidence and calling him to produce documents. In each case the search is for evidence in the witnesses' possession. As Wigmore says (Vol VIII - para 2193) "To give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions". There can be, of course, a considerable difference once the witness attends; for he may be merely the custodian of the documents he produces, and be unable to give any evidence as to the truth of their contents, or the circumstances in which they were created.

Although the general right to subpoena is now recognised, the law is not free of difficulty in its application. This is because, in this field, as in so many others, the law had to balance different concepts based on the broad grounds of public policy. What has changed, in

many cases, is that unruly horse public policy. An obvious instance is the example I have already given of legal professional privilege, moving, from a rationale of personal honour, to recognition that a lawyer can only properly serve his client (and therefore in the broad sense the community) if the client is free to give him the full facts without fear of disclosure. But public policy dictates limits to the privilege. The leading case of R v Cox & Railton (1884) 14 QBD 153 decided that if a client applies to a solicitor for advice intended to facilitate the commission of a crime or fraud, the solicitor being ignorant of the purpose for which the advice is sought, the communication is not privileged. Incidentally this must be a case of great authority, for it was a unanimous decision of no less than 10 judges sitting as the Court of Crown Cases Reserved. They must have been leisurely times to spare so many judges from their other duties.

So, also, as a matter of public policy, the welfare of a child will prevail over professional privilege. A solicitor can be compelled to give evidence of his client's address, if known to him, if the client has taken and kept a child in breach of a custody order. R v Bell ex. p. Lees (1980) 146 CLR 141.

It is this sort of conflict which gives rise to problems in the criminal law when subpoenas seek production of documents which might assist the conduct of the defence; but which, it is claimed, are protected by legal professional privilege or public interest. It is the thesis of this paper that, provided a proper basis on reasonable grounds is shown that the production of the documents sought might assist the case for the defendant, public policy favours, though not exclusively, the production of such documents over the claims for privilege. Even cases where national security is invoked will usually be subjected to

the scrutiny of the courts to balance the rights of the individual against those of the State. Sankey v Whitlam (1978) 142 CLR 1: Alister v R (1984) 154 CLR 404. Those two cases illustrate a significant shift in emphasis from cases such as Asiatic Petroleum Company v Anglo-Persian Oil Company (1916) 1 KB 822 and Duncan v Cammell Laird (1942) 1 All ER 587 where it seems to have been accepted that a mere assurance from the executive that production of the documents would be contrary to public interest was conclusive. Those cases may be understandable because of wartime exigencies, but the later cases emphasise that a blanket assertion of this nature will not normally deter the court from examining its validity.

The claim for legal professional privilege can be countered by a wider public interest. The leading case is one familiar to Territory lawyers. Although it is not in the criminal field I think the principles are sufficiently

widely stated to include it. We have the authority of the High Court that the doctrine of legal professional privilege is, in the absence of any statutory restriction, applicable to all forms of compulsory disclosure of evidence.

Baker v Campbell (1983) 153 CLR 52.

The case I refer to is Attorney-General (Northern Territory) v Kearney (1985) 158 CLR 500. You will remember that regulations were made in the Northern Territory under the Town Planning Ordinance and the Planning Act bringing substantial areas of Darwin and Katherine under those Acts. If the regulations were valid, parts of the land claimed in both areas by the Northern Lands Council could not be the subject of a claim under the Aboriginal Lands Rights (Northern Territory) Act of the Commonwealth. It was the contention of the Northern Lands Council that the regulations were made for an extraneous purpose, to defeat actual or apprehended claims under the Aboriginal Land

Rights Act. In earlier proceedings R v Toohey Ex. p. Northern Land Council (1981) 151 CLR 170 the High Court held that it was open to the Commissioner to examine the exercise of the regulation making power, and that the Northern Land Council was entitled to challenge the regulations on the ground that they were made for the purpose of defeating the traditional land claims of Aboriginals. Orders were therefore made in that case that the Northern Territory Government make discovery of documents relating to the making and bringing into force of the regulations. An affidavit of discovery was duly filed in Kearney's case in which privilege was claimed on the ground that the documents contained confidential communications between officers of the Northern Territory Department of Law and the Northern Territory Ministers or public servants. The Commissioner ordered the documents to be produced for inspection. Orders nisi for Writs of Prohibition and Certiorari were then sought and granted, prohibiting further proceedings. In the

Federal Court the Orders were discharged and in the High Court the decision of the Federal Court was affirmed. The majority of the Federal Court (Woodward & Neaves JJ) held that if the Northern Territory Government could claim the privilege in the circumstances (as to which they seemed doubtful - see 55 ALR at p. 556) it was displaced by the public interest. Their Honours said:-

> "The community's respect for and observance of the law will not be enhanced by the law itself casting a shroud of secrecy around the subordinate law making process, and to do so would subvert the principles upon which the privilege is founded".

It is, however, important to note the observations of these two judges at p. 556:-

"This however is not to say that the privilege is to be displaced by a mere assertion that a statutory power has been exercised for an ulterior purpose. A proper basis must be shown for such an assertion but, once it is shown, there is no scope for the principles of legal professional privilege to operate to protect from disclosure documents relevant to the proper resolution of that issue".

Gibbs C.J. in the High Court, with whom Mason and Brennan JJ agreed, also held that

"It would be contrary to the public interest which the privilege is designed to secure - the better administration of justice - to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that

abuse to prevent others from exercising their rights under the law". (p. 515). However he too warned that, "the privilege is, of course, not displaced by making a mere charge of crime or fraud or, as in the present case, that powers have been exercised by an ulterior purpose".

Although this case was concerned with the power to examine the making of subordinate legislation I consider that a broad principle may be derived that a claim of legal professional privilege may be examined and denied if a proper basis can be established that the privilege may be being used for an ulterior or improper motive. Using the words of their Honours Woodward and Neaves JJ it seems well within the principle that a "shroud of secrecy" should not be unnecessarily cast over prosecution documents in a criminal trial. That is not to say that the privilege cannot be properly taken. There are obviously police

procedures and communications which may lose their value if they become known to professional criminals. Some informants may be put to considerable personal risk if their identity be known. The line will always be a difficult one to draw but we do not live in a Police State and, in so far as one can judge general public views, I would believe that those views are, "the less concealed the better". I think this is the rationale for the growth of freedom of information legislation throughout Australia. I think it also lies behind the approach of the High Court in Alister v R that the court will not normally accept an executive claim for immunity without itself examining the documents on which that claim is based. See the remarks of Brennan J. at pp.455-6, and particularly his view that "In a criminal case it is appropriate to adopt a more liberal approach to the inspection of documents by the court".

"Public interest privilege" likewise steers a middle course in the manner discussed by Lord Reid in Conway v Rimmer (1968) AC 910:-

> "There is the public interest that harm shall not be done to the nation or the public service by the disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done." See also Sankey v Whitlam (1978) 142 CLR 1 at 38-9 (per Gibbs CJ) and the comments of O'Leary J (as he then was) in R v Robertson (1983) 21 NTR 11 at 19.

I turn therefore to the more specific cases where subpoenas have been issued in criminal proceedings seeking to compel disclosure of information or documents in the possession of the prosecution.

In R v Cahill (1985) 61 ACTR 7 the solicitors for the defendant served on the Commissioner of Police a summons to produce statements made by complainants. The objection was taken that legal professional privilege applied. It was not disputed that there was the necessary legal relationship between the informant and the Crown law authorities. The magistrate before whom the charges were being heard made an order for production of the statements.

On an application for prohibition Gallop J. held that the magistrate did not lack jurisdiction to require the Commissioner of Police to produce documents nor to decide the question whether the documents should be produced. But His Honour took the view that legal professional privilege had been established. He held that the magistrate had erred in concluding that the evidence of one constable had left him in doubt whether the sole purpose of getting certain statements was for the purposes set out in Grant v Downs

(1976) 135 CLR 674, i.e. that the documents had been brought into existence for the sole purpose of being submitted to legal advisers for advice or use in legal proceedings. His Honour was satisfied that they did come into this category and made absolute the order for prohibition. Basically therefore this case turned only on whether the privilege was established within the ruling Grant v Downs. See also R v Dainer (1988) 78 ACTR 25.

The case illustrates a simple situation where legal professional privilege was properly claimed and established, and no reason was shown for displacing it. What is significant is His Honour's comment that "there was no evidence of duality of purpose". This is consistent with the cases I have already referred to that it is not enough merely to seek documents where privilege is claimed without showing some basis upon which it might reasonably be suspected that some ulterior motive existed.

In his judgment His Honour referred to Choo v Quinn (1984) 21 ACR 447. That was a case where the Full Court of the Federal Court was not satisfied that legal professional immunity had been made out. Beaumont J. took the view that at least one purpose underlying the preparation of a statement sought by the defence was to obtain immunity for the witnesses. He considered that such a purpose was not of the kind necessary to be established to make out a claim for legal professional privilege (P.458). However the court refused to upset the magistrate's decision to refuse access to the statement; on the basis that the proceedings were by way of judicial review under the Judicial Review Act and that, in respect of the Court's exercise of its powers in relation to committal proceedings, those powers should be exercised only in the most exceptional cases.

However, quite apart from overriding the claim of legal professional privilege where some ulterior motive can

be shown there would seem to be a further basis on which documents can be disclosed even if the privilege is well within the Grant v Downs principle. The case of R v Barton (1972) 2 All ER 1192 has not, so far as my researches show, been specifically followed: but nor has it been overruled. It was a decision of a single judge on circuit faced with the usual difficulties of research in those circumstances. The decision was, as His Honour conceded, not supported by any authority, and His Honour said that he was therefore working on what he conceived to be the rules of natural justice. The facts were that it was believed that a solicitor who had been subpoenad by the Crown to give evidence at the trial, and was later subpoenad by the solicitor for the accused, had possession as a solicitor of certain documents relating to winding up of certain estates which did not apparently have any connection with the charges against the accused. Counsel for the accused alleged that certain of those documents would help to

further a point raised in his client's defence. The solicitor, as I think he was bound to do, claimed privilege. Caulfield J. took a robust view. "If", he said, "there are documents in the possession or control of a solicitor which on production help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown".

Perhaps the case should be restricted to its own peculiar facts. But it could be the foundation of a wider principle that an investigation on behalf of an accused person may prevail over professional privilege, properly taken, if it can be shown that the investigation might assist the defence. In Alister v The Queen (1984) 154 CLR 404 Gibbs CJ was dealing with a very different situation and

was discussing a question of public interest immunity. Nevertheless, at p.414, His Honour remarked:

> "in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial".

That may lend some support to the approach of Caulfield J. Otherwise, I do no more than leave Barton's case for you to consider either as a spent fuse or a time bomb.

Assuming no objection of public interest or legal professional privilege is taken, the issue of a subpoena duces tecum in criminal proceedings has the same effect as in civil proceedings. The steps in the procedure are usefully set out in Waind v Hill (1978) 1 NSWLR 372, ...

1. Obedience to the subpoena by the witness bringing the documents to court and handing them to the judge or magistrate.

2. The decision of the judge concerning the preliminary use of the documents, including whether or not permission should be given for inspection.

3. Admission into evidence in whole or in part.

The subpoena can be set aside if it is improperly issued or is being used for the purpose of discovery: Burchard v McFarlane (1891) 2 QB 241: or is fishing Young (1983) 9 ACR 58: or oppressive R v Robertson (1983) 21 NTR 11: or is not shown to be required for some legitimate forensic purpose. Maddison v Goldbrick (1976) 1 NSWLR 651. These rules are common to civil and criminal matters.

I leave aside the question as to how far subpoenas can be used if the practice of "hand-up briefs" becomes more prevalent or even becomes mandatory. That may raise questions of considerable importance because the opportunity to test evidence or call for documents by the use of subpoenas becomes severely restricted on a trial.

I add, however, that many of the difficulties or imagined difficulties which prompt the use of a subpoena in committal proceedings can be and I am sure frequently are circumvented by common sense on behalf of both Crown and Defence. There may be times when to rely strictly on privilege may be unwise or unnecessary on behalf of the Crown. Equally an undue enthusiasm to spray subpoenas about like confetti at a wedding may not be in the best interests of the defence. Verbum sapientis sufficit.