SUPREME COURT OF QUEENSLAND

CITATION:	*Younan v Crime Reference Committee & anor*; *Hamdan v Crime Reference Committee & anor* [2012] QSC 225
PARTIES:	**PAUL YOUNAN** (applicant) **v** **CRIME REFERENCE COMMITTEE** (first respondent) and **JOHN DAVID CALLANAN** (second respondent)
FILE NO:	BS10190/11
PARTIES:	**HAYSAM HAMDAN** (applicant) **v** **CRIME REFERENCE COMMITTEE** (first respondent) and **JOHN DAVID CALLANAN** (second respondent)
FILE NO:	BS10192/11
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	22 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2012
JUDGE:	Margaret Wilson J
ORDER:	
CATCHWORDS:	PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION – GROUNDS FOR RESISTING PRODUCTION – PUBLIC INTEREST IMMUNITY – GENERALLY – where applicants seek judicial review of decisions of second respondent to issue them with Attendance Notices requiring their attendance at Crime and Misconduct Commission hearings – where interlocutory application to determine certain issues – where the applicants challenge the respondents' claims that certain documents were privileged from disclosure on the basis of public interest immunity - where applicants' substantive applications focussed on s 57 of the *Crime and Misconduct Act* 2001 (Qld) – the meaning of 'public interest' in s 57 of

the Act – whether the decisions not authorised – whether any unfairness to the applicants is outweighed by the public interest in non-disclosure of the documents

Crime and Misconduct Act 2001 (Qld), s 28, s 57, s 82
Uniform Civil Procedure Rules 1999 (Qld), r 391, r 439

Accused A v Callanan [2009] 2 Qd R 112, cited.
D v National Society for the Prevention of Cruelty to Children [1978] AC 171, cited.
Derbas v R [2012] NSWCCA 14, cited.
Sankey v Whitlam (1978) 142 CLR 1, cited.

COUNSEL: A Boe and P Morreau for the applicants
T D Gardiner for the second respondent

SOLICITORS: Nyman Gibson Stewart for the applicants
Official Solicitor, Crime and Misconduct Commission for the second respondent

[1] **MARGARET WILSON J**: By amended applications for statutory orders of review, the applicants seek orders quashing decisions of the second respondent to issue them with Attendance Notices requiring their attendance at Crime and Misconduct Commission ("CMC") hearings and declarations that the decisions were unlawful.

[2] This was an interlocutory hearing to determine -

(a) the applicants' challenge to the respondents' claims that the following documents were privileged from disclosure on the basis of public interest immunity –

(i) Application in Support of a Notice to Attend a Hearing pursuant to s 82 of the *Crime and Misconduct Act* 2001 ("the Act") dated 3 April 2009 (Younan);

(ii) Application in Support of a Notice to Attend a Hearing pursuant to s 82 of the Act dated 11 October 2011 (Younan); and

(iii) Application in Support of a Notice to Attend a Hearing pursuant to s 82 of the Act dated 11 October 2011 (Hamdan); and

(b) applications by the applicants for orders pursuant to r 391 of the *Uniform Civil Procedure Rules* 1999 (Qld) permitting cross-examination of the second respondent.

[3] The Court received written and oral submissions on behalf of the applicants and the second respondent.

[4] In the course of the oral submissions, counsel for the applicants asked me to rule only on the public interest immunity claims.[1] I observed that the applicants' reliance on r 391 may be misconceived: if they wish to cross-examine the deponent of an affidavit, r 439 would seem the more appropriate provision.

Background

[5] On 26 January 2009 a man was shot and killed in a road rage incident at Burleigh Heads on the Gold Coast. The Queensland Police Service promptly commenced a murder investigation, but no one has yet been charged with the murder.

[6] Section 27 of the Act authorises the Crime Reference Committee (the first respondent) to refer "major crimes" to the CMC for investigation. Murder is a major crime.[2]

[7] On 23 March 2009 the first respondent referred the murder to the CMC for investigation. Subsequently the second respondent, as the delegate of the chairperson of the CMC, appointed himself to conduct hearings in relation to the matter.

[8] On 3 April 2009 the second respondent issued Attendance Notices to Younan and three other persons. Hamdan was overseas and was not issued with an Attendance Notice.

[9] On 21 August 2009 an application by Younan and the other three persons to have the notices set aside was dismissed[3] ("the 2009 proceeding").

[10] Pursuant to the notices issued to them, the other three persons attended hearings in September/October 2009. At the time Younan was in custody in New South Wales, and a hearing to receive evidence from him was not convened.

[11] On 11 October 2011 another Attendance Notice was issued to Younan, and, for the first time, an Attendance Notice was issued to Hamdan.

***Crime and Misconduct Act* s 82**

[12] The chairperson of the CMC may issue an Attendance Notice pursuant to s 82 of the Act, which provides—

> **"82 Notice to attend hearing—general**
>
> (1) The chairperson may issue a notice (***attendance notice***) requiring a person to attend at a commission hearing at a stated time and place for 1 or more of the following purposes until excused—
> (a) for a hearing in relation to a crime investigation or misconduct investigation—
> (i) to give evidence; or
> (ii) to produce a stated document or thing; or

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1 Transcript 12 June 2012 page 1-36.
2 Section 12, schedule 2.
3 *Younan & ors v Callanan & ors* [2009] QSC 241.

(iii) to establish a reasonable excuse or claim of privilege under section 72 or 74;

(b) for a witness protection function hearing—to establish the reasonable excuse or claim of privilege the subject of the hearing.

(2) An attendance notice must state—

(a) whether it is issued in the context of—

(i) a crime investigation; or

(ii) without specifying which, a crime investigation or the witness protection function; or

(iii) a misconduct investigation; and

(b) so far as reasonably practicable, the general nature of the matters about which the person may be questioned at the commission hearing.

(3) A person does not, by giving evidence or producing a stated document or thing at a hearing in compliance with an attendance notice—

(a) contravene a provision of an Act or a law imposing a statutory or commercial obligation or restriction to maintain secrecy in relation to the evidence, document or thing; or

(b) incur any civil liability in relation to the evidence, document or thing.

(4) A failure to comply with subsection (2)(b) does not prevent the commission from questioning the person about—

(a) for an attendance notice issued in the context of a crime investigation or misconduct investigation—any matter that relates to an investigation; or

(b) for an attendance notice issued in the context of a witness protection function hearing—any matter that relates to the matter for which the attendance notice was issued.

(5) A person given an attendance notice must not—

(a) fail, without reasonable excuse, to attend as required by the notice; or

(b) fail, without reasonable excuse, to continue to attend as required by the presiding officer until excused from further attendance.

Maximum penalty—85 penalty units or 1 year's imprisonment.

(6) This section is subject to section 85."

[13] Failure to attend as required in the absence of a reasonable excuse is an offence.[4] Failure to answer a question put by the presiding officer is also an offence.[5] A witness is not entitled to remain silent, and the privilege against self-incrimination is

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4 Section 82(5).

5 Section 190(1).

not available to him or her.[6] Although an individual's answer to a question in relation to which he or she claims the privilege against self-incrimination is not admissible in evidence against him or her in any civil, criminal or administrative proceeding,[7] the information contained in the answer may be used derivatively.

The amended applications for judicial review

[14] Each of the applicants asserts that he is aggrieved by the decision to issue an Attendance Notice to him:

> "because the effect of the decisions is that he is required to attend and give evidence under compulsion at a hearing conducted by the Second Respondent without the usual protections of the criminal justice system and specifically without the protections of any privileges that arise under the common law other than legal professional privilege."

[15] The grounds of each application (as amended) are:

> "7. The decision was not authorised by the enactment under which it was purported to be made, namely, s 82 of the Act.
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> 8. The making of the decision was an improper exercise of power conferred by the enactment under which it was purported to be made, in that it involved failing to take a relevant consideration into account in the exercise of power.
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> 9. The making of the decision was an improper exercise of power conferred by the enactment under which it was purported to be made, in that it involved taking an irrelevant consideration into account in the exercise of the power.
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> 10. The making of the decision was an improper exercise of power conferred by the enactment under which it was purported to be made, in that it involved an exercise of a power for a purpose other than a purpose for which the power is conferred.
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> 11. The making of the decision was an improper exercise of power conferred by the enactment under which it was purported to be made, in that it was an exercise of a power in a way that is an abuse of the power.
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> 12. The decision involved an error of law."

[16] Counsel for the applicants informed the Court that his clients' substantive applications focussed on s 57 of the Act,[8] which provides:

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6 Section 190(2); *Accused A v Callanan* [2009] 2 Qd R 112 at [15]; *Witness A v Crime and Misconduct Commission* [2005] QSC 119 at [31]; *Witness C v Crime and Misconduct Commission* (2008) 187 A Crim R 322 at 326-7; *Witness D v Crime and Misconduct Commission* [2008] QSC 155 at [12].

7 Section 197.

8 Transcript 12 June 2012 page 1-4.

"57 Commission to act independently etc.

The commission must, at all times, act independently, impartially and fairly having regard to the purposes of this Act and the importance of protecting the public interest."

Matters to which the second respondent had regard

[17] The second respondent swore an affidavit in each application deposing to the matters to which he had regard in deciding to issue the Attendance Notices. In each case he exhibited a copy of an affidavit he swore in the 2009 proceeding.

[18] In paragraph 21 of the affidavit he swore in the 2009 proceeding, the second respondent said that the material considered by the first respondent in deciding to refer the crime to the CMC for investigation included the following description of it:

"(a) At approximately 10.25pm on 26 January 2009, the deceased sustained a single fatal gun shot wound to his stomach whilst standing at the driver's side of his 2001 Holden Rodeo Utility Qld Rego 508GNP on the Gold Coast Highway, Burleigh Heads, approximately 30 metres south of the intersection with 5th Avenue.

(b) The deceased was the driver of his vehicle and there were two male passengers. Witness statements have been obtained from the passengers which indicate that just prior to the fatal shooting, the deceased and the two passengers were involved in a 'road rage' incident involving a second vehicle, described as a small red 4 door sedan or hatch.

(c) The vehicle contained 3 male persons described as being of 'Lebanese' extraction. No vehicle registration was obtained by the witnesses at the scene. Investigations indicate that the deceased's vehicle has been 'cut off' by the suspects' vehicle whilst travelling south on the Gold Coast Highway at Miami. The occupants of each vehicle have then become involved in a verbal exchange whilst seated in their respective moving vehicles. Expletive hand gestures have also been exchanged. The vehicles have continued south on the Gold Coast Highway when the deceased's vehicle pulled over to the left hand side of the road, approximately 30 metres south of the intersection with 5th Avenue at Burleigh Heads. The suspects' vehicle has pulled over on the same side of the road approximately 15 metres behind.

(d) One passenger alighted from the deceased's vehicle and approached the suspects' vehicle. That passenger stated that the rear passenger door was opened as he approached. He walked to this open door and observed a 'Lebanese' male described as mid 20's, short greased blacked hair, olive complexion, and muscular build wearing a tight white t-shirt.

> This male person was holding what appeared to be a black handgun, possibly a semi or automatic firearm. This witness also observed 'Lebanese' males in the front passenger and drivers seats.
>
> (e) The witness did not enter this suspects' vehicle. The suspects' vehicle was observed to drive to the right hand side of the deceased's vehicle. The second passenger was standing next to the open rear left hand passenger side door at this stage and observed the suspects' vehicle stop next to the deceased's vehicle. He observed the 'Lebanese' male seated in the rear passenger seat place a black handgun out through the three quarter open rear passenger window. The male person rested his wrist on the window and fired two consecutive shots at the deceased. The suspects' vehicle then continued driving south down the Gold Coast Highway."

[19] Pursuant to s 28 the first respondent had to be satisfied (inter alia) that it was in the public interest to refer the crime to the CMC. In paragraphs 38 – 60 of his affidavit in the 2009 proceeding, the second respondent enumerated the matters the first respondent took into account in deciding that it was in the public interest to do so.

[20] In relation to Younan, the second respondent said he had regard to the same factors he considered in issuing the attendance notice in 2009 and some additional matters.

(a) The matters he said he took into account in 2009 were:

(i) the requirements of s 57;

(ii) the decision of the first respondent to refer the murder to the CMC for investigation when the material before the first respondent included specific reference to Younan as a proposed witness at investigative hearings;

(iii) the content of the application dated 3 April 2009 referred to in paragraph 2(a)(i) of these reasons; and

(iv) the absence of any material change in circumstances in relation to Younan since the first respondent's referral.

(b) He described the application dated 3 April 2009 thus:

> "The written application I had regard to largely rehearsed the statement as to the circumstances of the offence referred to above and the body of information referred to as criminal intelligence above. It also made reference to the public interest issues to which the CRC had regard and contained material relating to the relevance of the proposed witness which summarised, but did not materially alter, the information provided in the material considered by the CRC in relation to the circumstances of [Younan] and his relevance to the investigation."

(c) The additional material he had regard to was the application dated 11 October 2011 referred to in paragraph 2(a)(ii) of these reasons. He described this as providing:

> "… an update of the matter since hearings were held at the Commission in 2009. That is, following the finalisation of the previous (judicial review) proceedings, the Commission hearings which had been adjourned due to those proceedings were held in September and October 2009, with the exception of the Applicant's hearing. This was because the Applicant was at the time in custody in New South Wales and it was considered impracticable for him to attend a Commission hearing. As at 11 October 2011, the Applicant was no longer in custody and it was desired to proceed with his examination. Due to the passage of time, it was considered appropriate to issue a fresh attendance notice."

[21] In relation to Hamdan, the second respondent said -

(a) that he had regard to

(i) the requirements of s 57;

(ii) the content of the application dated 11 October 2011 referred to in paragraph 2(a)(iii) of these reasons.

(b) that the application in paragraph 2(a)(iii) largely rehearsed the statement as to the circumstances of the offence and the criminal intelligence referred to in the affidavit he swore in the 2009 proceeding. He continued:

> "It also made reference to the public interest issues to which the CRC had regard and contained material relating to the relevance of the proposed witness. In particular, the fact that following the murder the Applicant left Australia for Lebanon and has not been able to be questioned to date with respect to the matter."

[22] Counsel for the applicants submitted that the materials disclosed by the second respondent do not reveal:

(i) the evidence upon which the decisions were made;

(ii) how the requirements of s 57 were applied in each of the decisions;

(iii) the basis for coming to the view that the relevance of each of the applicants as a witness had been demonstrated;

(iv) what was contained in the "update of the matter since hearings were held" in late 2009.

Principles applicable to public interest immunity

[23] In *Sankey v Whitlam*[9] Gibbs ACJ said:

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[9] (1978) 142 CLR 1 at 38 – 39.

> "37. The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However, the public interest has two aspects which may conflict. These were described by Lord Reid in *Conway v. Rimmer*[10] as follows:
>
> > 'There is the public interest that harm shall not be done to the nation or the public service by 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.'
>
> It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in *Conway v. Rimmer*,[11] 'the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it'. In such cases once the court has decided that 'to order production of the document in evidence would put the interest of the state in jeopardy', it must decline to order production.
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> 38. An objection may be made to the production of a document because it would be against the public interest to disclose its contents, or because it belongs to a class of documents which in the public interest ought not to be produced, whether or not it would be harmful to disclose the contents of the particular document …"

That case was concerned with the production of documents in response to a subpoena duces tecum. The same principles are applicable to disclosure inter parties in the interlocutory phase of civil litigation.[12]

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10 [1968] AC 910 at 940.

11 [1968] AC 910 at 940.

12 See Heydon, *Cross on Evidence* at [27035] and the cases cited there.

[24] If it is established that there is a public interest in non-disclosure and a public interest in disclosure, then the court must conduct a balancing exercise to determine which aspect of the public interest predominates.[13]

Extent of challenge to public interest immunity claim

[25] The public interest immunity claim extended beyond the three applications referred in paragraph 2(a), and included a letter from the Commissioner of the Queensland Police Service ("QPS") to the chairperson of the CMC and enclosures, minutes of a meeting of the first respondent held on 23 March 2009, and an application pursuant to s 176 of the Act for authorisation to hold a closed investigative hearing.

[26] It was not until the oral hearing that the applicants confined their request for disclosure to the three applications.[14] Their counsel told the Court that his clients were "only interested in the documents which rate[d] the public interest".[15] He accepted that they were not entitled to documents disclosing the names of persons who had spoken to the CMC in closed hearings, and said they "[were] not seeking any of the documentation provided to the Commission either at the CRC stage or subsequently that [came] under the hand of any of the other agencies."[16]

Submissions in support of public interest immunity

[27] The second respondent's written submissions, which were prepared in advance of the oral hearing, advanced eight reasons why disclosure would be contrary to the public interest. Its counsel did not depart from those reasons, even though some of them clearly related to documents not sought by the applicants.

[28] These were the eight reasons advanced by Counsel for the second respondent:

(a) it would prejudice the further investigation of this crime and other major crime;

(b) it would irreparably compromise the proposed strategy of obtaining truthful accounts of the applicants' knowledge of the offence by questioning them in closed coercive hearings;

(c) it would alert the applicants to facts and circumstances disclosed by the investigation to date, and enable them to tailor their answers to questions accordingly;

(d) it would involve disclosure of criminal intelligence provided on a confidential basis by the New South Wales Police Force to the Queensland Police Service ("QPS"), and by the QPS to the first respondent and the CMC, with likely adverse effect on the free flow of information between the NSW Police Force and Queensland law enforcement agencies in respect of this and future investigations;

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13 *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 616.

14 Transcript 12 June 2012 page 1-3.

15 Transcript 12 June 2012 page 1-16.

16 Transcript 12 June 2012 pages 1-16, 1-17.

(e) it would likely discourage the existing practice whereby the QPS provides the first respondent with highly confidential and otherwise protected material in support of requests by the Commissioner of Police for the referral of serious incidents of major crime;

(f) concerns about the risk of disclosure being required in judicial review proceedings may lead to limitations on the material provided to the first respondent for its consideration in deciding whether to refer a major crime to the CMC for investigation;

(g) concerns about the disclosure of records of meetings of the first respondent may adversely affect candour in its deliberations;

(h) this is not a case where much of the material is already known by probable witnesses.

Submissions against public interest immunity

[29] Counsel for the applicants accepted that documents in the possession of an investigative commission can be the subject of public interest immunity.[17]

[30] He submitted that "in order ….. to properly be able to make submissions as to the propriety of the decisions under review" the applicants should have access to "the documents which purport to encapsulate, in fact, that decision."[sic][18] He submitted that in paragraph 61 of his affidavit sworn in the 2009 proceeding, the second respondent had merely provided a checklist of what he had done in deciding to issue the first Attendance Notice, without going into any detail about how s 57 was accommodated.[19]

[31] Counsel for the applicants submitted that the Court had to consider two conflicting aspects of the public interest – whether harm would be done by the production of the documents and whether the administration of justice would be frustrated or impaired if the documents were withheld.[20]

[32] He submitted that the second respondent's material did not provide any justification for non-disclosure of how the requirements of s 57 had been satisfied or for non-disclosure of matters taken into consideration in determining the relevance of evidence to be obtained from each of the applicants.[21]

[33] He submitted that there was real doubt about there being any forensic utility in the applicants being examined at hearings convened by the CMC,[22] and that the prospect of them tailoring their evidence in response to the contents of the documents was illusory.[23]

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17 Written submissions on behalf of the applicants para 34, citing *Maloney v New South Wales National Coursing Association Ltd* [1978] 1 NSWLR 60; *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1989) 1 ACSR 311; *Zarro v Australian Securities Commission* (1992) 36 FCR 40 at 46.

18 Transcript 12 June 2012 page 1-10. See also page 1-25 per counsel for the respondent.

19 Transcript 12 June 2012 page 1 – 5.

20 Transcript 12 June 2012 page 1-13.

21 Written submissions on behalf of the applicant para 32.

22 Transcript 12 June 2012 page 1-11.

23 Written submissions on behalf of the applicants para 30 – 31.

[34] He submitted that in paragraph 21 of his affidavit in the 2009 proceeding the second respondent had described the events surrounding the shooting, from the complainants' perspective, in considerable detail. At the time of the 2009 proceeding, the applicants (or at least Younan) knew the nature of the crime alleged. Since at least February 2009 the Australian Crime Commission had had information suggesting that Younan, Hamdan and a third (unidentified) person were responsible, and that Younan had links with a certain outlaw motorcycle gang[24] – although this was not referred to in the second respondent's affidavit. The applicants were aware that they are suspects.

[35] He acknowledged that there is a public interest in investigating a serious crime in which someone was killed. He acknowledged that there is a public interest in coercing witnesses who could assist the investigation to do so if they refuse, and accepted that coercive measures might be needed where there was suspicion of involvement with an outlaw motorcycle gang. He acknowledged that there is a public interest in not empowering criminals by making them aware of investigation techniques.[25] But, in his submission, this is a fairly straightforward case, and the investigations focussing on the identification of the people in the red car would be fairly obvious to any lawyer practising in the criminal jurisdiction – for example, the registration number of that vehicle, any disposal or other dealing with it, communications about the vehicle, call records relating to mobile phones used by the applicants at the time (to ascertain the places from which calls were made).[26] The applicants were not seeking documentation provided to the first respondent or the CMC under the hand of any other agency, and there had already been a fairly extensive disclosure of intelligence given to the CMC by other agencies.[27]

[36] He submitted that the public interest which he acknowledged had to be weighed against the public interest in treating the applicants fairly as suspects and as citizens.[28] The second notice to Younan was issued two and a half years after the first, without any compelling explanation for his not having been examined pursuant to the first notice or for the delay. Younan was in custody in New South Wales for some of that time, but, counsel submitted, he could have been served at the prison with notice of the hearing date and arrangements could have been made for his attendance. Hamdan was overseas from late January 2009 to late November 2010, and no explanation had been proffered for the delay after his return.

Examination of the documents

[37] I examined the documents in issue in order to rule on the claim of public interest immunity, without allowing the applicants' counsel to view them.[29] They reveal information about the incident and the conduct of persons after the incident beyond that in paragraph 21 of the second respondent's affidavit in the 2009 proceeding. They reveal the identities of at least some of the police investigators, and contain information which might lead to the identification of informers. They reveal investigation techniques and the exchange of criminal intelligence between interstate and Queensland agencies.

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24 Affidavit of Dennis Miralis sworn 27 January 2012 exhibit A.
25 Transcript 12 June 2012 pages 1-11 – 1-12.
26 Transcript 12 June 2012 page 1-7.
27 Transcript 12 June 2012 page 1-17.
28 Transcript 12 June 2012 page 1-12.
29 See *R v Kahsani-Malaki* [2010] QCA 222 at [53] per McMurdo P.

Discussion

[38] In *Derbas v R*[30] Meagher JA, with whom Hoeben and Rothman JJ agreed, said:

> "[21] As is pointed out in *Alister v The Queen,*[31] where a party seeks the production of and access to documents in respect of which a claim to immunity is made, the party seeking access first must demonstrate a legitimate forensic purpose for having the documents produced. It is only in the event that such a purpose is demonstrated, that both aspects of the public interest require consideration by the undertaking of the balancing exercise and, when doing so, the Court may inspect any documents produced[32]."

[39] In this case public interest immunity is claimed in the context of an ongoing investigation into the crime. No one has yet been charged.

[40] The applicants seek disclosure of the documents so that they may use them in their applications for judicial review of decisions to issue Attendance Notices to them pursuant to s 82 of the *Crime and Misconduct Act*. The case they wish to make in their substantive applications is that in making those decisions the second respondent erred in not having proper regard to the public interest as required by s 57.

[41] Counsel for the second respondent did not challenge the legitimacy of the applicants' forensic purpose in seeking disclosure. He drew a valid distinction between disclosure at the investigation stage and disclosure in the course of a prosecution. A document may be immune from disclosure at the investigation stage, but not necessarily so at the prosecution stage.[33]

[42] Investigation of a major crime by the proper authorities and the prosecution of those considered responsible for it are clearly in the public interest. It would be contrary to the public interest to compel disclosure of documents relating to the ongoing investigation of such a crime, because of the risk of seriously hindering that investigation and prejudicing criminal proceedings.[34]

[43] Co-operation between different law enforcement agencies in Queensland and interstate should not be stifled or discouraged by the prospect of confidential communications during the course of an investigation being disclosed.

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30 [2012] NSWCCA 14 at [21].

31 [1984] HCA 85; (1984) 154 CLR 404.

32 *Alister v The Queen* at 412, 414, 438-439, 456; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 436, 439; *R v Saleam* (1989) 16 NSWLR 14 at 18-19; *Attorney-General for New South Wales v Stuart* (1994) 34 NSWLR 667 at 675-676, 681, 690.

33 Transcript 12 June 2012 pages 1-24 – 1-25.

34 Similar considerations apply in relation to other investigations – for example, investigations by corporate regulators: *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 323; *Spargos Mining NL v Standard Chartered Aust Ltd & ors (No 1)* (1989) 1 ACSR 311 at 312.

[44] The public interest in non-disclosure of the identity of police informers has long been recognised. In *D v National Society for the Prevention of Cruelty to Children*[35]Lord Diplock said:

> "The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue on which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges which by the time of *Marks v Beyfus*[36] had already hardened into a rule of law, the balance has fallen on the side of non-disclosure except where on the trial of a defendant for a criminal offence, disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls on the side of disclosure."

There are differing views upon the extent to which there must be a weighing of conflicting interests when public interest immunity is claimed to protect the identity of a police informer.[37]

[45] In the present case the documents contain information which might lead to the identification of informers rather than their actual identities. The rationale for non-disclosure of the identity of police informers is, in my view, applicable to the disclosure of information which might lead to their identification.

[46] I do not accept that the prospect of the applicants' tailoring their evidence in response to the contents of the documents is illusory.

[47] The countervailing public interest consideration on which counsel for the applicants relied is the applicants' right to be treated fairly as suspects and as citizens.

[48] By s 57 of the *Crime and Misconduct Act*, the CMC is required always to act independently, impartially and fairly having regard to the purposes of the legislation (which include combating and reducing the incidence of major crime) and the importance of protecting the public interest. That obligation necessarily applied to the decisions to issue Attendance Notices. For the purposes of these applications, I accept that protection of the public interest within the meaning of s 57 includes protection of the public interest in respect for the rights of individuals in the position of the applicants, as well as protection of the public interest in the broader sense.

[49] As Applegarth J said in *Accused A v Callanan,*[38]the liberties of persons required to attend a crime investigation hearing are affected by the compulsion to attend and answer questions; their privilege against self-incrimination is abrogated; and the compulsory examination may confer a number of forensic advantages upon the

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35 [1978] AC 171 at 218.
36 (1890) 25 QBD 494.
37 *Derbas v R* [2012] NSWCCA 14 at [23] – [27].
38 [2009] 2 Qd R 112 at 118.

prosecution in the trial of an accused. But it was clearly the Legislative's intention that this should be so, and in my view this does not amount to "unfairness" in the relevant sense.

[50] Counsel for the applicants pointed to the delays in examining Younan, and in the decisions to issue the second notice to him and the notice to Hamdan. Even if the explanations proffered did not fully account for all of the delays, it is pertinent that the legislation places no time limitation upon the exercise of the CMC's powers.

[51] Any unfairness to the applicants is, in my view, outweighed by the public interest in non-disclosure of the documents.

Disposition

[52] The applicants have failed in their challenges to the second respondent's claims of public interest immunity.

[53] I will hear the parties on the form of orders which should be made, and on the directions which should be given for the further conduct of the substantive applications.