The Witness Summons in the Family Division of the Children's Court of Victoria

Magistrate Randall Kune
Children's Court of Victoria
20 August 2020

1. A witness summons is an order of the Court in writing made upon the proper issuing of the appropriate court form.[1] The power to issue a witness summons is a statutory power, granted to the Children's Court by section 532 of the Children, Youth and Families Act 2005 (CYFA).

2. The types of witness summons match in some respects the old forms of subpoena, which were initially writs, being commands of the sovereign to attend court:[2]

- To give evidence - *subpoena ad testificandum;* and,
- To produce documents or things - *subpoena duces tecum.*

3. Specific procedural rules for witness summonses in the Family Division are set out in:

(a) Section 532 of the CYFA;
(b) Rules 9 to 9H and Forms 41, 41A and 41B of the Children, Youth and Families (Children's Court Family Division) Rules 2017;
(c) Practice Directions relating to witness summonses;
(d) Part II of the Evidence (Miscellaneous Provisions) Act 1958;
(e) Section 194 of the Evidence Act 2008;
(f) Sections 131 and 134 of the Magistrates Court Act 1989; and
(g) Various Acts and court rules regarding service outside Victoria.

4. There are further relevant principles of a more general nature. These include:

- section 10 of the CYFA that the best interests of the child are paramount;
- sections 215 and 522 of the CYFA concerning the conduct of Family Division proceedings;
- section 215B of the CYFA regarding case management of child protection proceedings; and,
- the implied jurisdiction of the Children's Court to prevent an abuse of its process, and the common law principles which have developed to prevent abuse of process.[3]

5. Even if a person has not been served with a witness summons, but they are present in court and a compellable witness, they can be required to give evidence until excused, or to produce any document in their possession.[4]

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[1] See the definition in rule 5 of the Children, Youth and Families (Children's Court Family Division) Rules 2017.
[2] See Commissioner for Railways v Small (1938) 38 SR (NSW) 564 at 573; 55 WN (NSW) 215; Penn-Texas Corp v Murat Anstalt (No 2) [1964] 2 QB 647 at 663; [1964] 2 All ER 594 at 598.
[3] Neill v County Court of Victoria [2003] VSC 328.
[4] Evidence Act 2008 s. 36. See sections 14 to 19 of the Evidence Act 2008 regarding compellability.

6. Historically, subpoenas issued well in advance of an interim or final hearing could be objectionable as being oppressive, as a subpoena was intended to allow a party to obtain and tender evidence at hearing.[5] Today, the law and practice are quite to the contrary, though care must still be taken to ensure a witness summons is not used for third-party discovery or as a "fishing expedition".[6]

7. Most jurisdictions allow or require early return and inspection of subpoenaed documents, well before a trial is due to commence. This approach is a case management strategy, designed primarily to encourage the parties to obtain a full knowledge of potential evidence before trial and thereby encourage early settlement, as well as to avoid spending time during a contested hearing by extensively reviewing or dealing with challenges to subpoenaed materials.

8. For this strategy to be effective, the solicitors or counsel for the parties should peruse the materials well in advance of hearing, and arguably before any directions or readiness hearing. How else can a forensic decision be properly made about the genuine bounds of the dispute and whether a witness is required to give evidence? See for instance Practice Direction 3 of 2015 in the Family Division, which requires subpoenaed documents to be returnable *no later* than second directions.

9. Some frequently asked questions about subpoenas in the Family Division are:

- How do I subpoena someone and their documents, and how can I inspect the documents before a hearing?
- How must documents be provided in answer to a witness summons?
- Can someone legitimately refuse to comply with a witness summons?
- How do I deal with a subpoenaed person's refusal to respond to my repeated attempts to contact them to arrange attendance at court?
- How can a witness be compensated for loss or expense incurred in compliance with a subpoena?

How must a witness summons be properly issued and served?

Proper issuing of a witness summons

10. A witness summons must be duly issued and served to be enforceable. Even then, limitations exist to ensure that the procedure does not become a source of injustice.

11. The Family Division may itself or on a party's application issue a witness summons: ss. 532(1) & (2) CYFA. In the usual case, a registrar will issue the witness summons at a party's request. Care must be taken to ensure the summons is addressed to the right person for the right things.

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[5] See Elder v Carter; Ex parte Slide and Spur Gold Mining Co (1890) 25 QBD 194. See also the NSW Supreme Court decision in Wilson v Department of Human Services; re Anna (No 2) [2011] NSWSC545 at [58] – [66].

[6] In *Associated Dominions Assurance Society Pty Ltd v. John Fairfax & Sons Pty Ltd* (1955) 72 WN (N.S.W.) 250, Owen J. (at 254) extrapolated the analogy and noted that fishing meant "that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not."

The most significant limitation on the issuing of a witness summons is the requirement that it be directed to someone with knowledge of facts relevant to the issues in dispute in the litigation, or with possession or control of documents relevant to those issues.

12. In particular, section 532(3) limits who a witness summons can be directed to:

> *(3) A witness summons may be directed to any person who appears to the Court or registrar issuing the summons to be likely—*
>
> *(a) to be able to give material evidence for any party to the proceeding or the Court; or*
>
> *(b) to have in the person's possession or control any documents or things which may be relevant on the hearing of the proceeding; or*
>
> *(c) both to be able to give material evidence and to have in the person's possession or control any relevant documents or things.*

13. These provisions substantially reflect the common law and the subsequent superior court rules that developed to deal with subpoenas.[7] They apply as much to an expert witness as they do to a lay witness.[8]

14. If these pre-requisites are satisfied, a party has a general right to have its witness summons issued by the Court, provided the right is not being used oppressively.[9] Nonetheless, the statutory power to issue a subpoena exists within a statutory framework. Due to the Children's Court's obligations under s. 10, its procedural guidelines under ss. 215 and 522, its case management powers under s. 215B and its implied power to ensure that its processes do not become the cause of injustice, the Court may refuse to allow a party to issue a witness summons, either at all or without leave of the Court.

15. In the ordinary course of events however, a witness summons is simply stamped by the court registry without detailed consideration of s. 532(3). If the subpoena does not satisfy the requirements of that subsection, it will provide sufficient reason for the Court to set the subpoena aside upon the request of the addressee.

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[7] Harmony Shipping Co SA v Davis [1979] 3 All ER 177 at 181; [1979] 1 WLR 1380 per Lord Denning MR; Rochfort v TPC (1982) 153 CLR 134 at 138 - 9.

[8] Harmony Shipping Co SA v Davis [1979] 3 All ER 177; [1979] 1 WLR 1380.

[9] See Raymond v Tapson (1882) 22 Ch D 430; Re Mundell; Fenton v Cumberledge (1883) 48 LT 776; Steele v Savory [1891] WN 195; London and Globe Finance Corp v Kaufman (1899) 69 LJ Ch 196; Commissioner for Railways v Small (1938) 38 SR (NSW) 564; 55 WN (NSW) 215.

Service of a witness summons

16. As to service, pursuant to s. 532:

> *(5) A witness summons must be served on a person a reasonable time before the return date by—*
>
> *(a) delivering a true copy of the summons to the person personally; or*
>
> *(b) leaving a true copy of the summons for the person at the person's last or most usual place of residence or of business with a person who apparently resides or works there and who apparently is not less than 16 years of age.*

17. These requirements have been relaxed in the context of the COVID-19 pandemic. The COVID-19 Omnibus (Emergency Measures) Act 2020 introduced several provisions into the CYFA, including section 600X, headed (a little misleadingly) "Additional methods of service – section 593". Section 600X(1) expands the methods of service which can satisfy the requirements section 593. However, section 600X(2) states (with emphasis added):

> *If a provision of this Act requires service to be in accordance with section 593* ***or requires service to be by registered post or personally or otherwise****, service by a method referred to in subsection (1) is taken to satisfy the requirement.*

18. Given the breadth of these provisions, a subpoena can now be served by delivering or sending a copy as follows:

- to the addressee using electronic communication that is confirmed as having been received by them;
- delivering or sending it to the addressee's authorised legal representative either personally, by registered post or by electronic communication that is confirmed as having been received by the authorised legal representative.
- sending by registered post addressed to the addressee's authorised legal representative;
- leaving it for the addressee at their authorised legal representative's place of business and with a person who apparently works there and who apparently is not less than 16 years of age;

19. Note that at present, these emergency measures are set to be repealed six months after their commencement on 25 April 2020.[10]

20. Essential to the Court's understanding of proper service will be what, if anything, was said if service was not personal. The nature of the witness summons should always be explained to the person served if it is not handed personally to the addressee, and that explanation should be recorded in the affidavit of service. One can easily imagine a situation where the recipient does

[10] Section 600ZC(1), COVID-19 Omnibus (Emergency Measures) Act 2020.

not appreciate the significance of the document and does consequently not provide it to the addressee.

21. According to s. 532(7), service on a company or registered body (within the meaning of the Corporations Act 2001) can be done according to the provisions of the Corporations Act 2001, either s. 109X (in the case of a company, company director or company secretary) or s. 601CX (in the case of a foreign company or a registered body such as a body corporate or unincorporated association). Interstate service must occur according to Part 3 of the Service and Execution of Process Act 1992 (Cth).

22. Courts have held that interference with a person who is attempting to serve a subpoena is a contempt of court and have treated that contempt seriously.[11]

Substituted Service

23. What can be done if service cannot be affected according to the rules? The Court has the power to order substituted service, allowing service by some other means: s. 532(6).

24. An application to the Court must be made, supported by either an affidavit or oral evidence. This evidence should explain the attempts made to affect service or why the usual methods of service cannot be affected. It should then identify the suggested method of appropriate substituted service by which the witness summons is reasonably likely to come to the attention of the intended recipient.

25. Methods of substituted service might include, for instance, sending the summons to a known email address, giving it to a person with whom the witness is known to have frequent contact, or identifying an address for service by post. Service via Facebook or other social media has been ordered in other jurisdictions.

How long before attendance at court must a witness summons be served?

26. The Court will not enforce a witness summons if the issuing party has not served it a reasonable time before compliance is due: s. 532(5).[12] What, then, is a reasonable time for service? The usual practice in the Family Division is to allow one full week between service and compliance.[13] What is reasonable may also depend on the extent of the burden placed on the addressee to comply with the summons. An excessively onerous witness summons can be considered oppressive and set aside on that basis (see further below).

[11] Re Hartridge; Ullathorne, Hartridge & Co Ltd v Green (1901) 27 VLR 22; Re Barnes [1968] 1 NSWR 697.
[12] The Magistrates Court General Civil Procedure Rules 2010 specify that a person is excused from complying with a subpoena if it is not served in a reasonable time: rr. 42.06(2) and 42.03(8).
[13] In the Supreme Court of Victoria, the general civil procedure rules require five days' notice: r42.03(8)(a). However, this excludes weekends and public holidays, so operatively it is a seven-day minimum as well.

Serving a copy of the witness summons on all other parties

27. Once a witness summons has been served, copies of the witness summons must be provided to all other adult parties and, if a child is legally represented, to the child's lawyer. This process enables all parties to be fully informed well in advance of hearing about which documents and witnesses each party has summoned.

28. One practical difficulty can arise where copies must be served on a self-represented party whose address is undisclosed for safety reasons. One option is for issuing party's lawyers to provide an undertaking to the Court that they will not disclose the address to their client. However, if the issuing party is also self-represented, then Child Protection may need to facilitate service of the copies, as part of its obligation as model litigant.

Adjourned hearings and the continuing obligations to attend and produce

29. What are the obligations of the addressee or issuing party if a hearing date is vacated, if a listed hearing is not reached or not completed, or if the proceeding is adjourned part-way through the evidence of the witness?

30. If the witness is part-way through their evidence and the proceeding is adjourned, whether overnight or for an extended period, the witness remains legally obliged to attend court to continue their evidence until the Court formally excuses them. Once excused, if the need arises for them to be recalled, a new witness summons must be served.

31. If a hearing is adjourned before the witness has complied with the subpoena, then notice of the new date by the issuing party operates to extend the obligations under the witness summons. By way of comparison, Rule 42.03.1 of the Magistrates' Court General Civil Procedure Rules 2010, headed "Alteration of date for attendance or production", allows an issuing party in a civil proceeding in the Magistrates Court to give notice to the addressee of a new date and time: r. 42.03.1(a). If the issuing party provides the addressee with notice of a new date and time, then the witness summons has effect as if it states the new date and time: r. 42.03.1(b). This approach is consistent with the forms of witness summons in the Children's Court. For instance, the witness summons to give evidence in Form 41 states that:

> *You are required by this witness summons to attend to give evidence and you must attend as follows unless you receive notice of a later date or time from the issuing party, in which case the later date or time is substituted.*

32. If the witness summons includes the obligation to produce documents, is there an obligation on the addressee to update the subpoenaed materials after initial compliance with the subpoena? What is the addressee's responsibility if relevant documents later come into their possession or are created by them due, for instance, to a therapeutic relationship or the ongoing creation of relevant case notes?

33. Once an addressee has complied with a witness summons to produce documents, the obligation would appear to be at an end. As Gibbs CJ explains of the obligation in Rochfort v Trade Practice Commission:[14]

> *A person who is properly served with a subpoena duces tecum in due form requiring him to produce specified documents must (subject to payment of any necessary conduct money) attend at the place directed by the subpoena and produce such of the specified documents as are in his possession.*

34. Any documents subsequently created would need to be called for during evidence if the witness attends court to give evidence. If a proceeding is adjourned following compliance with the summons, then a new witness summons would be required for updated documents on the adjourned date.

35. A more onerous obligation may lie with the Department of Health and Human Services. The Secretary is often served with a witness summons to product the department's file. Nonetheless, the department is arguably under a quasi-prosecutorial duty of continual disclosure of all documents in its possession relevant to the issues in dispute, whether those documents support the department's case or not.[15]

How must documents be provided in answer to a witness summons?

Production to the Court

36. First, it must be noted that production of documents in answer to a witness summons means production to the Court, not to a party. Lawyers and parties must not intercept and take possession of subpoenaed documents on its way to the court registry.[16]

37. The CYFA requires the addressee to produce the documents "for examination at the hearing": s. 532(4)(b).[17] The documents produced in answer to the witness summons can then only be provided by the registry to others for inspection upon the Court's direction: s. 532(11)(b). In other words, subpoenaed documents in the Children's Court cannot be inspected without court order, unless rules or practice directions provide for release without court order.[18]

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[14] (1982) 43 ALR 659 at 661.

[15] Retired Magistrate Peter Power's comments on this issue in his research materials are highly persuasive. The common law obligations of disclosure and fairness on prosecutors are extensive and detailed. See, for instance, those principles set out in Judicial College of Victoria's Criminal Proceedings Manual, Chapter 8.2 Counsel for the Prosecution (http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27554.htm).

[16] R v Mokbel (Ruling No 1) [2005] VSC 410.

[17] Cf. section 532(4)(c), which is not so specific about production "at hearing".

[18] The scheme in the Children's Court for producing documents is more limited than other civil courts in Victoria, where Order 42A of the civil procedure rules allows pre-trial production and inspection of subpoenaed material to the registry of the Magistrates' Court or County Court or the Prothonotary of the Supreme Court without the need for a court listing on that day.

38. The rules provide that the Court may give directions about inspection, copying, removal from and return to court of any documents produced in answer to a witness summons, to facilitate the inspection process.[19]

39. Practice Direction 10 of 2020, introduced to temporarily manage document production from witness summonses during the COVID-10 pandemic, allows the registry to provide lawyers for the parties with access to electronic documents produced in answer to a witness summons. By completing an online request to inspect, the lawyer will be provided electronic access to these documents, whilst undertaking that they will not copy, print or distribute them. Self-represented parties must still obtain a court order and would need to attend the registry to inspect documents unless the Court directs that they may have remote access.

40. Another recent illustration of such a direction is the standard form of directions to be made at the conclusion of a readiness hearing where a proceeding is listed for contest. These directions include these specific subpoenaed material procedural directions:

- All witness summonses to attend to give evidence at the contested hearing must be issued within 7 days of today's date and served within 7 days of the date of issue.
- All witness summonses to produce documents (including a witness summons to produce and to attend to give evidence) must be issued within 7 days of today's date returnable 21 days after the date of issue.
- All witness summonses to produce documents shall request that the documents be filed by electronic means where possible.
- Documents produced pursuant to subpoena which are not subject to any objection, shall be released for inspection by the lawyers for the parties and the DHHS officer on the usual terms on the return date, without the matter being listed for hearing before a magistrate. In accordance with Practice Direction 10 of 2020, the legal representatives may apply to inspect the subpoenaed material online.
- Where there is any objection to the production or inspection of a document or thing identified in the witness summons, the matter will be listed for hearing before the magistrate allocated to hear the contest for the objection to be heard and determined by a remote hearing in advance of the contested hearing.

Form of documents and return after hearing

41. Productions of copies, either photocopies or electronic copies on USB or disc, is sufficient unless the witness summons specifies an original, though even then the issuing party and the addressee can later agree on the production of copies only.[20]

42. The Court may make directions or orders for production in a specific format in a particular case, or a practice direction may set this out for all cases.[21] Practice Direction 10 of 2020 requires any

[19] Rule 9G, Children, Youth and Families (Children's Court Family Division) Rules 2017.
[20] Rule 9B, Children, Youth and Families (Children's Court Family Division) Rules 2017.
[21] Rule 9B(2)(c), Children, Youth and Families (Children's Court Family Division) Rules 2017.

party issuing a witness summons for production of documents to specify that production must be in electronic format unless impracticable to do so, and requires the addressee to produce documents in electronic format unless impracticable to do so.[22]

43. Upon producing documents, the addressee must declare, by completing part of the witness summons, which documents are copies and which, if any, are originals. Following the hearing, those documents which the addressee declares to be copies will be destroyed by the registry, and any originals returned.[23]

Can someone legitimately refuse to comply with a witness summons?

44. Once served, an addressee may apply to the Court either to have the witness summons set aside or to limit the disclosure of documents. The importance of this remedy has been highlighted by one author in their historical review of the writ of subpoena:[24]

> *Partly for the reason that the writ issued as of right, and partly for the reason that it operated as a peremptory demand carrying serious sanctions, the courts have guarded jealously against abuse; and as noted by Sir Frederick Jordan, a witness is always at liberty to apply to the court to have the subpoena set aside.*

Objections to production or inspection

45. An addressee or any person having a sufficient interest (other than a party) may object to the production of a document, or the inspection of a document by one or more parties to the proceeding.[25] A party may also object to another party or parties inspecting a subpoenaed document.[26]

46. The addressee of a witness summons has several options if they do not wish to comply. The first and most straightforward option is to communicate with the issuing party to raise their concerns, to see if an agreement can be reached before the compliance date.

47. Should there be no agreement, the addressee may need to file a formal objection with the Court.

48. Grounds of objection include that the subpoena is invalid, oppressive or an abuse of process.[27] Alternatively, an objector may claim that privilege or confidentiality should prohibit production or inspection of some or all of the documents.[28] The rules specifically allude to the possibility of

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[22] Note that this Practice Direction was introduced as part of the temporary arrangements needed to manage litigation during the COVID-19 pandemic.
[23] Rule 9H, Children, Youth and Families (Children's Court Family Division) Rules 2017.
[24] Wood, PM, "Challenging *subpoenas duces tecum:* Is there a third party view?" (1984) 10(2) Sydney Law Review 379 at 381.
[25] Rule 9D(1), Children, Youth and Families (Children's Court Family Division) Rules 2017.
[26] Rule 9E(1), Children, Youth and Families (Children's Court Family Division) Rules 2017.
[27] National Employers' Mutual General Association v Waind [1978] 1 NSWLR 372.
[28] R v Mokbel (Ruling No 1) [2005] VSC 410.

objections by a party to inspection of medical records by other parties, allowing them a first opportunity to inspect their subpoenaed medical records before having to lodge an objection.[29]

49. There are many illustrations of circumstances where Courts have set aside subpoenas on the grounds of an abuse of process.[30] For example, where the subpoena is filed for an illegitimate, unjustifiable or extraneous purpose, such as to apply pressure on a non-party for some ulterior motive, or to gain access to confidential commercial or medical information.[31] More broadly, a subpoena will be set aside if it has not been issued in good faith to obtain relevant evidence, such as by summoning a person entirely unconnected to the case.

Legitimate forensic purpose

50. A summons can only seek to produce evidence which will add to the determination of the issues in dispute between the parties.[32] The Court will only insist on production and inspection of documents insofar as they are necessary for the proper conduct of the litigation.[33] They must have a legitimate forensic purpose.

51. A subpoena may be objectionable as an abuse of process if there is no discernable legitimate forensic purpose for the documents sought.[34] It may once have been thought that documents had to be admissible in evidence to be compellable under subpoena. However, this principle has well and truly fallen by the wayside.

52. The test of legitimate forensic purpose:[35]

> *... contemplates a usage of subpoenas outside that of merely obtaining documents for admission into evidence. Indeed, the use of documents obtained on subpoena for the purpose of cross-examination, or ancillary to the examination, of a witness was a predicate in each case for the test expounded [in the older decisions].*

53. Justice Cavanaugh summarised the principles upon which a court should decide whether to set aside a subpoena, in the context of an appeal from the hearing of traffic offences, namely speeding

[29] Rule 9E(2), Children, Youth and Families (Children's Court Family Division) Rules 2017.
[30] See generally the decision of Powell J in Botany Bay Instrument & Control Pty Ltd v Stewart [1984] 3 NSWLR 98 at 99-100.
[31] National Employers' Mutual General Insurance Association Ltd v Waind [1978] 1 NSWLR 372.
[32] See Commissioner for Railways v Small (1938) 38 SR (NSW) 564 at 574, 575; 55 WN (NSW) 215; Spencer Motors Pty Ltd v LNC Industries Ltd [1982] 2 NSWLR 921 at 927; Purnell Bros Pty Ltd v Transport Engineers Pty Ltd (1984) 73 FLR 160 at 175; Collins v Campbell (No 2) [2014] NSWSC 1035
[33] National Employers' Mutual General Insurance Association Ltd v Waind [1978] 1 NSWLR 372.
[34] Note that the phrase "legitimate forensic purpose" appears nowhere in any relevant legislation. It arises from a court's inherent or implied jurisdiction to prevent abuse of process.
[35] Wood, PM, "Challenging Subpoenas Duces Tecum: Is there a third party view?" (1984) 10(2) Sydney Law Review 379 at 399.

charges based on road safety camera recordings. The accused had issued two subpoenas to the Traffic Camera Office, which sought:[36]

> *the production of documents relating to the condition, testing and maintenance of the relevant road safety cameras during certain specified periods and any operational errors or anomalies in the cameras, or challenges to the accuracy of the cameras, during those periods.*

54. In affirming the magistrate's decision to set aside these subpoenas, his Honour summarised the law as follows (emphasis added, original citations included):[37]

> *[17]. Where an accused in a criminal proceeding seeks production of documents pursuant to a subpoena, the accused must satisfy the Court that he or she has a legitimate forensic purpose. That purpose must be identified expressly and with precision.*[38]
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> *[18]. In order to demonstrate a legitimate forensic purpose, the accused must show that 'it is on the cards' that the documents would materially assist the accused in his or her defence.*[39] *The expression 'on the cards' means 'reasonable possibility'. Accordingly, the test for determining whether there is a legitimate forensic purpose is whether a reasonable possibility exists that the documents would materially assist the defence.*[40]
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> *[19]. The reasonable possibility test should be applied flexibly and with common sense in order to give the accused a fair opportunity to test the Crown's case and to take advantage of any applicable defences.*[41]
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> *[20]. Mere speculation that the documents might assist the accused's defence is insufficient to satisfy the reasonable possibility test.*[42] *This is because mere speculation amounts to a fishing expedition which can never constitute a legitimate forensic purpose.*[43] *Mere relevance to an issue in the proceeding is also not sufficient to establish a legitimate forensic purpose.*[44]

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[36] Holloway v State of Victoria [2015] VSC 526 at [1].
[37] Holloway v State of Victoria [2015] VSC 526 at [17] – [21].
[38] R v Saleam (1989) 16 NSWLR 14, 18 ('Saleam'); Commissioner of the Australian Federal Police v Magistrates' Court of Victoria [2011] VSC 3 (11 February 2011) [28] ('CAFP').
[39] Alister v The Queen [1984] HCA 85; (1984) 154 CLR 404, 414-15 ('Alister'); Saleam (1989) 16 NSWLR 14, 18; Shaw v Yarranova Pty Ltd [2011] VSCA 55 (3 March 2011) [26] ('Shaw').
[40] DPP v Selway [No 2] [2007] VSC 244; (2007) 16 VR 508, 510 [4], 514 [10] ('Selway'); Ragg v Magistrates' Court of Victoria [2008] VSC 1; (2008) 18 VR 300, 323-4 [95]-[97]; Johnson v Poppeliers [2008] VSC 461; (2008) 20 VR 92, 106 [42] ('Johnson'), CAFP [2011] VSC 3 (11 February 2011) [28]. Selway and Ragg were cited with approval by the Court of Appeal in Shaw [2011] VSCA 55 (3 March 2011) [26] n 32. Accordingly, in my opinion, the Court of Appeal's use (in obiter) of the expression 'appear likely that the documents will materially assist the applicant' does not reflect a preference for a different test. See Shaw at [26].
[41] Johnson [2008] VSC 461; (2008) 20 VR 92, 106-7 [42].
[42] A-G (NSW) v Chidgey [2008] NSWCCA 65; (2008) 182 A Crim R 536, 550 [58], 552 [68] ('Chidgey'); CAFP [2011] VSC 3 (11 February 2011) [28]; Shaw [2011] VSCA 55 (3 March 2011) [26].
[43] Alister [1984] HCA 85; (1984) 154 CLR 404, 414-15, 456; Glare v Bolster (1993) 18 MVR 53, 62 ('Glare'); Johnson [2008] VSC 461; (2008) 20 VR 92, 106 [42]; CAFP [2011] VSC 3 (11 February 2011) [28].
[44] Chidgey [2008] NSWCCA 65; (2008) 182 A Crim R 536, 550 [59] - [60]; CAFP [2011] VSC 3 (11 February 2011) [28].

[21]. Where the accused wishes to rely on a statutory defence, the absence of evidence from which an inference can be drawn that the documents sought will satisfy the requirements of

the defence does not necessarily mean that the reasonable possibility test is not met.[45] *This is particularly so where there is only one statutory defence available to the accused and that defence involves technical information exclusively in the possession of the Crown; insistence by the court that the accused present evidence which provides a basis for a positive inference that the documents sought will satisfy the requirements of the defence may effectively 'eviscerate' the defence.*[46] *It follows that the importance of the requested documents to an accused's ability to establish a defence can inform the application of the reasonable possibility test.*[47]

55. Proceedings in the Family Division of the Children's Court are civil proceedings, where the best interests of the child are paramount. Subject to considerations arising from those features of the jurisdiction, the principles set out above would have a substantially similar application in the Children's Court as they do in the criminal jurisdiction of other Victorian courts, though for different reasons.

56. In the criminal jurisdictions, the flexible and common-sense approach to the test of legitimate forensic purpose is designed to ensure the accused is given a fair trial, to avoid a potential miscarriage of justice. In the Children's Court, a similar approach is required to ensure the best interests of the child are paramount. It may require, for instance, identifying and assessing the arguments that a parent, child or other party wishes to mount regarding how the child's best interests should be met, or whether the child is in need of protection. See further discussion below regarding section 10.

Witness Summons is Oppressive

57. A subpoena may be set aside if it is oppressive or an abuse of process as part of the Court's implied jurisdiction.[48] Oppression has been defined as "seriously and unfairly burdensome, prejudicial or damaging."[49] For the Court to determine whether a subpoena is oppressive, it may need to assess the real purpose or intention of the party issuing the summons and also examine its impact on the subpoenaed non-party.[50]

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[45] Alister [1984] HCA 85; (1984) 154 CLR 404, 414-15, 451; Johnson [2008] VSC 461; (2008) 20 VR 92, 106-7 [42].
[46] Alister [1984] HCA 85; (1984) 154 CLR 404, 451; Johnson [2008] VSC 461; (2008) 20 VR 92, 106-7 [42].
[47] Johnson [2008] VSC 461; (2008) 20 VR 92, 107-8 [47].
[48] See R v Baines [1909] 1 KB 258; [1908-10] All ER Rep 328; Steele v Savory [1891] WN 195; Commissioner for Railways v Small (1938) 38 SR (NSW) 564 at 573; 55 WN (NSW) 215; Morgan v Morgan [1977] Fam 122; [1977] 2 All ER 515; Botany Bay Instrument & Control Pty Ltd v Stewart [1984] 3 NSWLR 98 .
[49] Oceanic Sun Line Special Shipping Co Inc v Fay [1988] HCA 32; (1988) 165 CLR 197 at 247-50, per Deane J; Hamilton v Oades [1989] HCA 21; (1989) 166 CLR 486 at 502 per Deane & Gaudron JJ; Trade Practices Commission v Arnotts Ltd [1989] FCA 248; (1989) 88 ALR 90 at 102 per Beaumont J.
[50] Beaumont J in Trade Practices Commission v Arnotts Limited (No 2) [1989] FCA 248; (1989) 88 ALR 90 at 102; Edmonds J in The Change Group International Plc v City Exchange Mart Pty Ltd [2012] FCA 1188 at [7].

58. The Court will set aside a witness summons where requiring the witness to attend or to produce the documents would be oppressive. This may occur where the request for documents is so broad as to amount to a notice for discovery from a non-party or would require the recipient to make subtle decisions about which documents are relevant, if it does not specify the documents with sufficient particularity or if it requests so many documents that make it unduly burdensome on the recipient. As Sir Frederick Jordan CJ stated in Commissioner for Railways v. Small:[51]

> *If (the subpoena) be addressed to a stranger, it must specify with reasonable particularity the documents which are required to be produced. A subpoena duces tecum ought not to be issued to such a person requiring him to search for and produce all such documents as he may have in his possession or power relating to a particular subject. It is not legitimate to use a subpoena for the purpose of endeavouring to obtain what would be in effect discovery of documents… A stranger to the cause ought not to be required to go to the trouble and perhaps to expense in ransacking his records and endeavouring to form a judgment as to whether any of his papers throw light on a dispute which is to be litigated upon issues of which he is presumably ignorant.*

59. Typically, the schedule of documents should identify specific documents or classes of documents by name, date, title or other description. On the other hand, a subpoenaed non-party may have sufficient knowledge or understanding of the issues in dispute to justify the use of a broader description of documents. It may be permissible in such circumstances to include in the schedule expressions such as "all documents relating to" a particular issue in dispute in the proceeding or "relating to" a specific subject matter, as opposed to identifying each document or class of document more specifically.

60. In McColl v Lehmann,[52] Kaye J did not accept that the use of the expression "relating to" resulted in all cases in abuse of process and adopted the opinion of the Full Court of the Federal Court in Lucas Industries Ltd v Hewitt,[53] in the following way:

> *In my opinion it reflects a realistic approach to a situation presented when the addressee of a subpoena duces tecum, because of all the relevant circumstances, ought reasonably to recognise the documents described by reference to a particular subject matter. To reject as oppressive or as an abuse of process a subpoena because it directs production of documents by reference to those relating to a specific subject matter within the recipient's knowledge, suggests an excessive indulgence in legalism. Determination of whether the description of documents by that mode satisfies the required test of specification by reasonable particularity ought to be made by taking into account the facts and circumstances within the knowledge of the party to whom the subpoena is addressed. It ought to be expected of the addressee, being mindful of the facts about the subject matter known to him, that he will read the subpoena sensibly.*

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[51] (1938) 38 SR (NSW) 564 at 573. See also National Employers' Mutual General Insurance Association Ltd v Waind [1978] 1 NSWLR 372 and the High Court in Lane v Registrar of Supreme Court of New South Wales (1981) 148 CLR 245 at 259; 35 ALR 332 at 332.
[52] [1987] VR 503 at 513; (1986) 24 A Crim R 234
[53] (1978) 18 ALR 555 at 569; 45 FLR 174.

61. A subpoena to attend to give evidence may be oppressive if, for instance, a witness is too sick to attend, has carer commitments or has made prior interstate travel plans (and the issuing party has not previously confirmed their availability).[54] Note that the burden is on the witness to show why it should be set aside, and so sufficient proof must be provided to the Court. It is open to the party issuing the subpoena in these circumstances to apply to have the evidence heard remotely, such as via video link or telephone.[55]

62. Although it does not commonly arise in the Children's Court, it is not objectionable to subpoena documents which relate only to the credibility of a witness, as opposed to the substantive issues in dispute.[56] The question is at first one of legitimate forensic purpose, and if the credit of the witness is an important issue, and the subpoenaed material has enough probative value, they would be relevant and hence could be the subject of a subpoena.[57]

Confidentiality and Privilege

63. The first and most apparent restriction due to confidentiality is the statutory prohibition of disclosing notifier details of reports made to the department under the CYFA: s. 190. This requires the identifier of those reporters to remain secret, allowing their redaction from documentary evidence and making it impermissible to ask or answer questions in evidence which may lead to identification of the reporter, in the absence of written consent by the notifier or leave of the Court.

64. One should also note the need to restrict evidence where an address is undisclosed pursuant to s. 265(1) of the CYFA. Where evidence must be given of reports that have been redacted or kept secret in accordance with sections 556(2), 559(2), 561(2), 562(4), 566(2), or 570(2), because the contents may be prejudicial to the physical or mental health of the child or a parent, then inspection of documents produced by those report writers may need to be limited.

65. The Court may order restrictions on who can hear certain evidence (such as by closing the Court)[58] or place limits on who can have access to all or part of subpoenaed documents. This may occur if, for instance, the documents are subject to client legal privilege, public interest immunity, privilege in aid of settlement or other privileges such as the restricted privilege against self-incrimination,

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[54] See, for instance, Castrucci v Australian Capital Territory Electricity Authority (1990) 94 ACTR 1; 101 FLR 8.
[55] Evidence (Miscellaneous Provisions) Act 1958, s. 42E. The Children's Court (Evidence - Audio Visual and Audio Linking) Rules 2008 facilitate applications to the Children's Court pursuant to ss.42E. Section 170, introduced by the COVID-19 Omnibus (Emergency Measures) Act 2020, states that the Court can make practice directions about making directions under s. 42E(1), namely appearances and evidence given by audio or audio visual link.
[56] Liristis v Gadelrabb [2009] NSWSC 441; Mackintosh v The Commissioner of Police (NSW) [2010] NSWSC 1064; Weeks v Nationwide News Pty Ltd [No. 3] [2019 WASC 268 at [16] (per Le Miere J).
[57] On the other hand, in Fried v National Australia Bank [2000] FCA 911; (2000) 175 ALR 194, Weinberg J in the Federal Court of Australia said that it was inappropriate to permit a subpoena to stand which does little more than to trawl for documents that may be used to impugn the credit of a particular witness. This is an illustration of a fishing expedition.
[58] CYFA s. 523(2).

religious confessions, and limited journalist privilege for the identity of an informant.[59] A court may also refuse to allow inspection of documents which contain private and irrelevant material.[60]

66. The Chief Commissioner of Police will regularly appear to press a claim for public interest immunity over a subpoena addressed to Victoria Police, if an alleged offence is still under investigation and disclosure might compromise it.[61] In such circumstances, the Secretary is placed in an invidious position, given its obligations under s.10 of the CYFA, and yet technically it is also the Crown. The issuing party must first satisfy the Court of a legitimate forensic purpose. If it does so, the police or other respondent must establish the public interest in maintaining the secrecy of the relevant information.[62]

67. Considerations of pure confidentiality, without a connected claim of privilege or immunity, were discussed in Hera Project Pty Ltd v Bisognin (No 4)[63], where Riordan J set out the fundamental principles applicable to a claim that the parties should have restricted access to subpoenaed documents based solely on the confidentiality of those materials. The passage is worth quoting in full:

> *[38] A lawyer is under a duty to keep inviolate the client's confidences; but only some confidential communications between the solicitor and the client and third parties will be subject to legal professional privilege. The distinction is important because privileged communications, absent waiver or statutory ouster, are protected from compulsory disclosure; but it is well established that an obligation of confidence, of itself, does not entitle the person who owes the duty to refuse to answer a question or to produce a document in the course of legal proceedings. As was observed by Logan J in Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd [No 4]:[23]*
>
> > *[S]ave in cases where a privilege is claimed, the whole document should be produced unless there were prior agreement to the contrary from the opposing party or some prior dispensation by the court.*
>
> *[39] Accordingly, the fact that a document, which is the subject of a subpoena, may be highly confidential is not of itself a basis for objection to inspection of the document.*
>
> *[40] The obligation to an addressee of a subpoena is to produce the subpoenaed documents to the Court – not to the parties. Accordingly, if an addressee has a legitimate claim for*

[59] Despite s215(1)(d) stating the Court "may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary", s. 215(7) states that "nothing in subsection (1)(d) prevents the application of Part 3.10 of the Evidence Act 2008", being the part dealing with privileges.
[60] See, for instance, R v Efandis (Ruling No 1) [2008] VSC 380; R v J (No 1) (1994) 13 WAR 342.
[61] See Ryan v State of Victoria [2015] VSCA 353, and the seminal case of Conway v Rimmer [1968] UKHL 2; [1968] AC 910.
[62] Attorney-General v Stuart (1994) 75 A Crim R 8; Royal Women's Hospital v Medical Board of Victoria (2006) 15 VR 22; [2006] VSCA 85; (Evidence Act 2008 s130. See also R v Robertson (1983) 21 NTR 11; R v Mokbel (Ruling No 1) [2005] VSC 410; R v Lewes Justices; Ex parte Home Secretary [1973] AC 388).
[63] [2017] VSC 270 at [38] – [42] (references and citations omitted in this paper).

confidentiality or the like, on producing the documents, it may request that the Court exercise its discretion and order that the parties only inspect redacted copies of the documents; or that the documents not be inspected by the parties. The onus of proving that inspection should be so limited rests on the addressee.

[41] Except in limited circumstances, a party will not be entitled to inspect a privileged document; but a party having a legitimate forensic purpose will not otherwise ordinarily be denied inspection of the subpoenaed document. As Hayne JA explained in Mobil Oil Australia Ltd v Guina Developments Pty Ltd:

> *Where it is said that the documents are confidential, it may be accepted that the fact that the documents are confidential will not ordinarily be a sufficient reason to deny inspection by the opposite party. In most cases, the fact that the documents may not be used except for the purposes of the litigation concerned will be sufficient protection to the party producing them. But where, as here, the party obtaining discovery is a trade rival of the person whose secrets it is proposed should be revealed by discovery and inspection, other considerations arise.*

[42] The exception referred to by Hayne JA is well established and the applicable principle was described by Brereton J (Portal Software International Pty Ltd v Bodsworth [2005] NSWSC 1115 [45]) as 'best encapsulated' in the judgment of Aldous J in Roussel Uclaf v Imperial Chemicals Industries Plc as follows:

> *Each case has to be decided on its own facts and the broad principle must be that the Court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The object to be achieved is that the applicant should have as full a degree of disclosure as would be consistent with adequate protection of the secret. In so doing, the Court will be careful not to expose a party to any unnecessary risk of its trade secrets leaking to or being used by competitors. What is necessary or unnecessary will depend upon the nature of the secret, the position of the parties and the extent of the disclosure ordered. However, it would be exceptional to prevent a party from access to information which would play a substantial part in the case, as such would mean that the party would be unable to hear a substantial part of the case, would be unable to understand the reasons for the advice given to him, and in some cases the reasons for the judgment. Thus what disclosure is necessary entails not only practical matters arising in the conduct of a case but also the general position that a party should know the case he has to meet, should hear matters given in evidence and understand the reasons for the judgment [[1990] FSR 25, 29-30. Also see Lenark Pty Ltd v TheChairmen1 Pty Ltd [2012] NSWSC 124 [11] (Black J).]*

68. Some confidential communications between patients and doctors or counsellors are privileged because of the complex provisions of Part 2 (ss. 28 – 32G) of the Evidence (Miscellaneous Provisions) Act 1958. These restrictions generally apply to evidence of "any information" given by

a patient to their doctor (s. 28), and then specifically to sexual abuse disclosures to a counsellor or medical practitioner in the absence of leave of the Court (ss. 32AB – 32G).

69. Finally, the recipient of a witness summons may object to the production of documents or the giving of evidence by claiming the privilege against self-incrimination.[64] Common law principles in relation to the privilege against self-incrimination apply to pre-trial disclosure, but where the privilege is claimed by a witness objecting to giving evidence, then s. 128 of the Evidence Act applies. Note that where the evidence is essential to the case, the Court can require oral evidence to be given over objection if it grants a certificate preventing the use of that evidence against the witness in subsequent charges (though this does not prevent a charge of perjury based on that evidence).[65]

Issuing a Subpoena, or Production or Inspection is not in the child's best interests or contrary to case management directions

70. Finally, but perhaps most importantly, is the obligation to act in accordance with the best interest principles in s. 10 of the CYFA. Any decision on whether to set aside a subpoena, or restrict access to the contents of documents, must take as the starting point the paramountcy of the child's best interests and the need to ensure that any decision considers the best interest principles set out in s. 10.[66]

71. Similarly, a Court may refuse to allow a witness to be summoned, or to allow production or inspection of certain documents, in accordance with the proper exercise of its case management powers as set out in s. 215B of the CYFA or pursuant to its implied power to manage proceedings. Relevant powers that a court might exercise in this context include:

- considering the needs of the child and the impact that the proceeding may have on the child: s. 215B(1)(a);
- conducting the proceeding in a manner that promotes cooperative relationships between the parties: s. 215B(1)(b);
- actively directing, controlling and managing the proceeding: s. 215B(1)(d);
- narrowing the issues in dispute: s. 215B(1)(e); and
- in deciding whether a particular step is to be taken, considering whether the likely benefits justify the costs of taking it: s. 215B(1)(h).

72. These powers must be exercised bearing in mind the Court's obligation to ensure the parties receive a fair hearing and the various other duties of the Court set out in provisions such as sections 215 and 522, all within the context of an adversarial proceeding where the child's best interests must be paramount.

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[64] Commissioner for Railways v Small (1938) 38 SR (NSW) 564; *Rochfort v Trade Practices Commission* (1982) 153 CLR 134; Evidence Act 2008 s. 128 regarding the giving of evidence.
[65] Evidence Act 2008 s. 128.
[66] Secretary, Department of Human Services v Sanding [2011] VSC 42.

Procedure to set aside or limit inspection

73. No provision of the CYFA expressly empowers the Court to set aside a witness summons or limit inspection. Those powers are implied. However, rules 9D, 9E and 9F of the Children, Youth and Families (Children's Court Family Division) Rules 2017 provide a procedure for the Court to deal with objections to production or inspection.

74. Where an objection is made by an addressee or a person having a sufficient interest (other than a party), the objection must be made in writing to the registry, setting out the grounds of the objection, and filed before the return date for the summons. Where a party objects to inspection, they must object in writing setting out the grounds of the objection before the return date of the summons. As an exception to this process, where a party is objecting to the inspection of medical records relating to them, they have the right to inspect those documents before making an objection. If upon inspection they wish to object, they must do so within seven days of the production of the documents.

75. If an objection is made, the registrar will refer the witness summons to the Court for determination. The registrar will notify the issuing party in writing of the objection and the date and time for the court hearing of the objection. The issuing party must then notify all other parties accordingly.

76. Who has a sufficient interest? One recent application in the Children's Court was made by a foster care agency to prevent inspection of documents where a subpoena had been issued for records from a psychologist who had treated the foster carer in the context of her struggles managing the children. Note it was the agency, not the carer, who objected. Neither the carer nor the agency was the owners of the notes. The carer no doubt had an interest in maintaining the confidentiality of the notes. This certainly would provide "sufficient interest" to apply, within the meaning of the rules.[67] What is the interest of the agency? How could this amount to an abuse of process or oppression?

77. Some solace can be gained for the recipient of a subpoena for documents by restrictions on their collateral use and the restrictions on publication of proceedings.[68] Documents produced under subpoena are always the subject of a Harman obligation,[69] which means the documents cannot be used for any collateral or ulterior purpose, outside of the litigation, except with leave of the Court. The obligation applies to anyone into whose hands the documents falls, such as lawyers or expert witnesses involved in the litigation.

[67] Compsyd Pty Ltd v Streamline Travel Service Pty Ltd (1987) 10 NSWLR 648 at 659-50.
[68] CYFA s. 534.
[69] See Hearne v Street [2008] HCA 36 at [98] and [107]- [108]. See also Visy Board Pty Ltd v D'Souza [2008] VSC 572 at [15]-[24].

78. In some circumstances, the Court may need to examine documents to assess whether they should be inspected.[70]

79. If an application to set aside a subpoena is granted, then costs would typically follow the event.[71] This may even involve an order against the legal representative.[72] As such, if there is a suggestion of opposition to the summons as it stands, then perhaps there may be a more refined or limited schedule of documents which could be prepared by negotiation to avoid conflict. Remember, the dispute lies primarily between the party who issued the subpoena and the addressee required to comply with it, and hence both can readily engage in discussion to resolve a dispute, to the exclusion of the Court and other parties. The benefit of preliminary discussions for the harmonious running of proceedings has long been acknowledged.[73]

How do I respond to a subpoenaed person's refusal to respond to my repeated attempts to contact them to arrange attendance at court?

80. Usually, a simple letter or email from the legal services branch to the witness or their lawyers, or a brief telephone conversation between them, will quickly facilitate the appearance of a witness who is being difficult to contact. Failing that, the Court will need to be informed of the difficulty and has several options open.

Contempt

81. There is specific reference in s. 528(3) of the CYFA to the applicability of s. 134 of the Magistrates Court Act 1989 in relation to punishing a person for contempt of court for non-compliance with a subpoena.

82. The conduct classed as contempt for a summoned witness is set out in s. 134(1):

> *(1) A person is guilty of contempt of court if—*
>
> *(a) having been summoned as a witness and having been given or tendered any conduct money required to be given or tendered, the person refuses or neglects without sufficient cause to attend or to produce any documents or things required by the summons to be produced; or*
>
> *(b) having been summoned as a witness and having attended as required, the person refuses to be sworn or affirmed or to answer any lawful question; or*
>
> *(c) being examined as a witness or being present in court and required to give evidence, the person refuses to be sworn or affirmed or to answer any lawful question or,*

[70] Commissioner for Railways v Small (1938) 38 SR (NSW) 564 at 574; 55 WN (NSW) 215. See also Burchard v MacFarlane [1891] 2 QB 241 at 247-8; [1891-4] All ER Rep 137; O'Born v Commissioner for Government Transport (1960) 77 WN (NSW) 81; National Employers' Mutual General Insurance Association Ltd v Waind [1978] 1 NSWLR 372. See also the comments of Lord Wilberforce in *Burmah Oil Co. v. Bank of England* [1980] AC 1090 at 1117.

[71] Kennedy v Wallace (2004) 136 FCR 114; [2004] FCA 636.

[72] Dewley v Dewley [1971] 1 NSWLR 264 at 270.

[73] Sheppard J in Bank of New South Wales v Withers [1981] FCA 51; (1981) 52 FLR 207; Riordan J in Hera Project Pty Ltd v Bisognin (No 4) [2017] VSC 270 at [35] – [37].

without sufficient excuse, to produce any documents or things that the person has been or is required to produce; or

(d) being present in court and required to give evidence, the person wilfully disobeys an order made under section 127 [witnesses out of court]; or

(e) in the opinion of the magistrate the person is guilty of wilful prevarication.

83. The rest of s.134 deals with the procedures and penalties for this manner of contempt.[74] It has never been used in the Children's Court.

Warrant for arrest

84. The Court has the statutory power under s.194 of the Evidence Act 2008 to issue a warrant for the arrest of a witness served with a summons and reasonable conduct money.[75] If although the witness has not yet been served, the issuing party proves that they are avoiding service, the Court may still issue an arrest warrant.[76]

Does the department have to pay for witnesses it subpoenas? If so, how much does it have to pay?

Conduct money

85. According to s. 532, provision of conduct money sufficiently in advance of hearing is essential to require compliance with the subpoena:

(8) A person to whom a witness summons is directed is, subject to subsection (9), excused from complying with the summons unless conduct money is given or tendered to the person at the time of service of the summons or a reasonable time before the return date.
(9) It is not necessary to give or tender conduct money to a person to whom a witness summons is directed if the person will not reasonably incur any expenses in complying with the summons.

86. The obligation to provide conduct money continues each day the witness is required to attend court until they are excused, according to s532(13):

The Court may direct that a witness who has attended before the Court in answer to a witness summons is entitled to receive from the party who applied for the issue of the witness summons conduct money for each day of attendance.

[74] Where the alleged contempt relates to non-production of documents, it must be established beyond reasonable doubt that the documents were in existence and were in the possession of the alleged contemnor: *Markisic v Commonwealth of Australia* (2007) 69 NSWLR 737; [2007] NSWCA 92, [61].
[75] Section 194(1)(c) Evidence Act 2008.
[76] Section 194(2)(a) Evidence Act 2008.

87. What is the proper amount of conduct money? The CYFA contains no definition of "conduct money", but in r. 42.01 of the Magistrates Court General Civil Procedure Rules 2015, it is defined, and would apply to the Children's Court:

> *"conduct money" means a sum of money or its equivalent, such as prepaid travel, sufficient to meet the reasonable expenses of the addressee of attending court as required by the subpoena and returning after so attending.*

88. Reasonable expenses can include not only travel costs but also the cost of sustenance or overnight accommodation.[77]

Expenses incurred from attending court and complying with a subpoena

89. Can a witness claim income loss either by attending to give evidence or because of the time spent in the preparation and production of documents?

90. There is no specific provision in the CYFA or the Children's Court rules concerning the costs and expenses of compliance with a subpoena or loss of income arising from it (as opposed to the provision of conduct money). However, s. 532(14) of the CYFA does state that "[n]othing in this section … (b) derogates from the power of the Court to certify that a witness be paid his or her expenses of attending before the Court."[78]

91. This provision refers to "expenses of attending before the Court". This appears to acknowledge the implied power of the Court to ensure that a witness is not out-of-pocket for expenses arising from compliance with a witness summons. It does not appear to extend beyond that, for instance to an "allowance" for giving evidence where income is lost.

92. Sections 131(1) and (2) of the Magistrates Court Act 1989 should be cited in full in this context:

> *(1) The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.*
>
> *(2) Subsection (1) applies unless it is otherwise expressly provided by this or any other Act or by the Rules or the regulations*

93. This section applies to the Children's Court by virtue of s. 528(2)(a) of the CYFA, and importantly there are no other Acts, rules or regulations of general applicability to the Family Division which expressly provide to the contrary. Section 131(1) therefore gives the Court an unfettered discretion to make a costs order.

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[77] Pyramid Building Society (in liq) v Farrow Finance Corp Ltd (in liq) [1995] 1 VR 464 at 467; Harris/D-E Pty Ltd v McClelland's Coffee & Tea Pty Ltd (1999) 149 FLR 204; [1999] NSWSC 36.
[78] This provision is identical to section 43(9) of Magistrates Court Act 1989.

94. The breadth of this section gives the Children's Court the power to order that a party to a child protection proceeding in the Family Division pay costs to the addressee of a witness summons.[79] The discretion must be exercised judicially but would cover an order for costs to compensate the addressee for expenses incurred either in compliance with or in challenging the subpoena, or for loss of income suffered due to their obligation to comply with the witness summons.

95. The Court may assess and fix those costs, or it may order, pursuant to section 131A of the Magistrates Court Act 1989, that any witness costs be assessed, settled, taxed or reviewed by the Costs Court.

[79] See the detailed discussion of Ashley JA (with whom Redlich JA agreed) surrounding the Country Court equivalent of s. 131 in Astbury v Wood & Anor (2009) 23 VR 302; [2009] VSCA 126.