

# AiPOL

Australasian Institute of Policing

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Rochelle Thorne, *Executive Director, Technology, Australian Criminal Intelligence Commission*



Justin Gallagher, *Law Enforcement Liaison Lead, Uber Australia and New Zealand*



Dr John Coyne, *Head of Border Security Program, Australian Strategic Policy Institute*



Greg Tyrrell, *Executive Director, Australian Association for Unmanned Systems*



Assistant Commissioner Erin Dale, *Strategic Intelligence Division, Australian Border Force*



Dr. Richard Davis, *Chief Technology Officer National Security, Department of Defence, Science & Technology*



Deputy Commissioner Steve Gollschewski, *Specialist Operations, QLD Police*



Anthony Morgan, *Research Manager Serious and Organised Crime Research Lab, Australian Institute for Criminology*



Dr. Isaac Kfir, *Director, National Security Program & Head, Counter-Terrorism Policy Centre, Australian Strategic Policy Institute*



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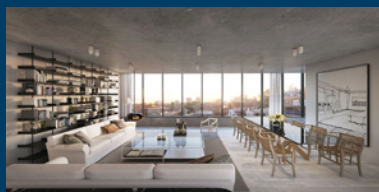
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**RJS** ALUMINIUM

**A** 5 Cottam Avenue Bankstown NSW 2200  
**T** 02 9790 3445  
**F** 02 9796 1944  
**W** [www.rjsaluminium.com.au](http://www.rjsaluminium.com.au)  
**E** [sales@rjsaluminium.com.au](mailto:sales@rjsaluminium.com.au)



# Editorial

## DR AMANDA DAVIES

Editor, Assistant Professor Policing and Security at the Rabdan Academy, Abu Dhabi



*This edition is dedicated to placing the emerging mass of literature associated with what can reasonably be labelled a conundrum for both police and the legal fraternity... into a helpful order to enable a level of clarity...*

Welcome to the first edition for 2019. Early Indications suggest this is going to be a very interesting year ahead. Specifically on the legal landscape as the judiciary, law enforcement, civil liberty advocacies and interested parties navigate the ever increasing commentary associated with both client/lawyer confidentiality, use of police informants and indications of the nexus between these areas in the Lawyer X revelations.

This edition is dedicated to placing the emerging mass of literature associated with what can reasonably be labelled a conundrum for both police and the legal fraternity into a helpful order to enable a level of clarity around what is known about the issue to date.

A brief summary of the general circumstances which have led to the

Lawyer X debate is provided by Calla Wahlquist and is helpful in offering a starting point from which to graduate to the more legally based following articles. An extract from the High Court of Australia document gives insight into the decision which has fueled the ensuing debate associated with client/lawyer privilege specifically in the context of such privilege being potentially connected to policing informant practices.

The media release by the Victoria State Government on Monday 3 December 2018 informing of a Royal Commission into Management of Informants demonstrates the political will to investigate, understand, review and recommend in this highly litigious area.

Whilst it may appear lengthy I commend the conference paper presented in 2017 by Robert McDougall to readers as an excellent (for its breadth of understanding of the topic, clarification of the various complementary and competing legal insights into the issue)

comprehensive reference. Similarly, the extract from the Australian Law Reform Commission informs on Privilege with a focus on professional confidential privilege.

At this preliminary stage, information available in the public domain in consideration of this conundrum falls in two categories; (1) current legislation and legal argument; (2) public commentary positive and negative towards all parties involved.

Appreciatively, in time as the Royal Commission moves forward, there will be those who are and will be impacted by the process and outcomes. There will be those in the legal fraternity and police agencies who will discuss, debate the multitude of scenarios associated which could be considered in determining recommendations.

Whilst we follow this evolving situation, it is hoped all involved do not lose sight of the continual commitment by our police officers to place themselves on the line for the protection of the community.



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# Gangsters, cops and Lawyer X: the police informant scandal that has shocked Australia

'Appalling' breach of duty castigated and 22 criminals may challenge convictions after revelation that defence barrister doublecrossed her clients

**CALLA WAHLQUIST**

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**Athens police escort Australian gangland figure Tony Mokbel outside court in 2007. Mokbel used Lawyer X until he skipped trial in 2006 and fled to Greece. Photograph: AFP/Getty Images.**

In 2005, eight years after the murder of the underworld figure Alphonse Gangitano kicked off a long and bloody gangland war on the streets of Melbourne, a prominent criminal barrister agreed to become a registered police informant in exchange for a promise that her identity would be kept secret.

The woman – known variously as Lawyer X, EF, and informer 3838 – had represented some of the gangland war's

most infamous figures, including Carl Williams and Tony Mokbel.

Thirteen years later, a royal commission has been announced into what has become one of the biggest legal scandals and most appalling cases of police misconduct in Australian history.

Lawyer X is still alive but has refused to go into witness protection, her trust in police so shaken by leaks to the media and the attempt to use her as a witness in

the murder trial of a disgraced ex-police officer that she says she no longer believes the force could keep her and her children safe.

At 9am on Monday, suppression orders concealing the extent of her involvement in the prosecutions that ended the gangland war were lifted. Within hours state and commonwealth

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*continued on page 6*



**Carl Williams' widow Roberta follows his coffin at his funeral in Melbourne in 2010. Photograph: William West/AFP/Getty Images.**

*continued from page 5*

prosecutors had written to 22 people, including a number of her former clients, informing them that they may have grounds to challenge their convictions.

The Victorian premier, Daniel Andrews, called a royal commission to calculate the number of criminal convictions affected and urgently review the management of police informants.

And the state's police minister, Lisa Neville, has already been forced to defend the chief commissioner of police, Graham Ashton, against allegations that he knew or ought to have known about the use of Lawyer X as an informant.

Ashton has confined his own comments to a written statement saying police "acted in good faith" and urging the public to remember what Melbourne was like more than a decade ago, when the gangland war was at its height. It was, he said, "a desperate and dangerous time".

He defended the actions of police in taking their objections against the release of the information to Lawyer X's past clients all the way to the high court, saying: "At all times when handling these matters our absolute concern has been for the protection of the lawyer and their family,

who Victoria Police believed would be murdered if this information was released."

The high court decision, delivered last month but published when the suppression order lifted, said the very real risk to Lawyer X's life could be managed in witness protection (notwithstanding her refusal to enter it) and that the concerns raised by both Lawyer X and police did not supersede the overriding public interest in restoring the integrity of a justice system that encouraged a lawyer to inform on clients.

Lawyer X's conduct, the high court ruled, was a "fundamental and appalling" breach of her obligation to her clients and her duty to the court. The conduct of police, it said, was "reprehensible" and an "atrocious" breach of duty.

"If EF chooses to expose herself to consequent risk by declining to enter into the witness protection program, she will be bound by the consequences," the court said. "If she chooses to expose her children to similar risks, the state is empowered to take action to protect them from harm."

### **A brief history of the gangland killings**

Melbourne's gangland war is usually said to have begun with the murder of Alphonse Gangitano in 1998. Gangitano

was the face of the so-called Carlton Crew, an offshoot of the Calabrian mafia, who murdered a petty criminal, Greg Workman, in the bayside suburb of St Kilda in 1995 and was murdered in turn in his underwear in the laundry of his Templestowe home three years later.

Jason Moran, whose underworld heritage ran back to the waterfront disputes of the Painters and Dockers union in the 1960s, was implicated in the killing but never charged.

Moran and his brother, Mark, were also implicated in the 1999 non-fatal shooting of Carl Williams, who later rose to head his own crime family.

Williams killed Mark Moran outside his luxury Aberfeldie home in 2000. In 2003 Jason Moran and Pasquale Barbaro were shot dead in a car as they watched a junior football clinic in Essendon, with five children as witnesses.

In total, more than 40 deaths are connected to the so-called gangland killings. Many of the hits took place in public.

The events were the basis for a popular Australian television series, *Underbelly*, which spawned several prequels and spin-offs. In the true crime history of Australia, nothing has gripped public imagination like Melbourne's gangland war.



Tony Mokbel arrives at the supreme court in Athens, while fighting extradition to Australia. Photograph: Miloš Bicanski/Getty Images.

Producers are already reportedly interested in adapting the story of Lawyer X into what would be the show's eighth season.

Her role was, by her own account, instrumental. In a 2015 letter to the assistant police commissioner Stephen Fontana, published in full in a 2017 supreme court judgment released this week, Lawyer X said the evidence she had provided had led to the arrest of at least 386 people and named a "top 10" that included the arrests of Rob Karam and 35 others over the import of 4.4 tonnes of ecstasy in 2007.

In the letter, Lawyer X said she had been motivated to become an informant out of frustration with the way some criminals, specifically Williams, were "seeking to control what suspects and witnesses could and could not do or say to police".

She described herself as having "played a pivotal role in convincing Thomas Hentschel", convicted, with Victor Brincat, of a killing hot dog salesman and street-level ecstasy seller, Michael Marshall, on Williams' orders in 2003, to "roll over" on Williams and Brincat.

Hentschel's decision to turn state witness, she wrote, has since been recognised as having "laid the foundation for the prosecution of numerous murderers, and others followed his example".

***If EF exposes herself to risk by not entering the witness protection program, she will be bound by the consequences -High court ruling***

At another point in the supreme court judgment, Lawyer X's decision to become an informant was attributed to her desire to get free of Mokbel.

#### **Avenues of appeal**

Karam has already begun legal action challenging his conviction because of Lawyer X's role as an informant, and Mokbel, who had previously exhausted all avenues of appeal, is expected to follow suit. Faruk Orman, now serving a 14-year sentence for acting as getaway driver in the murder of the suspected police killer Victor Peirce – a crime he has long denied – is also reported to be challenging his conviction.

Both Mokbel and Karam had suspected the woman was the informant identified as "Lawyer X" since the News Corp-owned newspaper the Herald Sun

published a series of stories coining the moniker in 2014.

At that point, the Victorian Independent Broad-Based Anti-Corruption Commission had already begun investigating the management of Informer 3838. Notifying Mokbel and six of his associates that their cases could be affected by Lawyer X's actions was one of the key recommendations of the commission's report, suppressed until this week, which began three years of legal actions.

Ashton, who became police commissioner in 2015, said police had changed their management of informants on the basis of that report and that a case such as the mishandling of Lawyer X could never happen again.

*continued on page 9*





Kevin Harrington as Lewis Moran and Vince Colosimo as Alphonse Gangitano in the hit *Underbelly* television series about Melbourne's gangland war. Photograph: Greg Noakes.

*continued from page 7*

It was also the end of Lawyer X's trust in police.

Four successive court decisions which found in favour of notifying a group of Lawyer X's former clients that she was working as a police informant while purporting to represent them also found that confirming the rumours about her involvement would substantially increase the risk to her safety.

Threats have already been made against her oldest child.

### The unravelling

Lawyer X met with a detective on the Purana taskforce, which was investigating the gangland war, six times and provided information in "the strictest confidence".

She was registered as a police informer on 16 September 2005 and remained on the books until 12 January 2009, when she fell out with the force over a decision to list her, under another pseudonym, as a witness in the murder trial of the disgraced police officer Paul Dale for the 2004 double killing of Terrence and Christine Hodson.

Terrence Hodson was himself a police informant and had agreed to give

evidence implicating his police handler, David Miechel, and Dale in a burglary that covered up connections to the drug trade.

The couple were murdered, execution-style, in their home in Kew.

Dale was alleged to have paid the underworld hitman Rodney Charles Collins \$150,000 to kill Hodson, and was charged with one count of murder in 2009 (Collins was charged with two counts) after Lawyer X recorded conversations with Dale for the police.

The case against Dale was dropped when Carl Williams, a key witness and former client of Lawyer X, was murdered in prison in 2010.

Williams is reported to have been suspicious of Lawyer X and warned Mokbel to drop her as a lawyer.

Mokbel continued to use Lawyer X until he skipped trial in 2006 and fled to Greece. He was extradited to Australia in 2008 and sentenced in 2012 to 30 years in jail, with a minimum of 22 years, for running a drug syndicate.

It is a decision that, ironically, could provide his only avenue of release. Mokbel was convicted on a guilty plea but could, potentially, argue that he had

suffered a miscarriage of justice by being denied independent legal advice.

Lawyer X sued the then police commissioner, Simon Overland, and his predecessor, Christine Nixon, as well as the state of Victoria in 2010.

The case settled, and Lawyer X said she had deliberately maintained close relationships with a number of underworld figures as part of a "strategy of plausible denial" about the level of her cooperation with police.

The revelations this week mean that strategy can no longer protect her family.

Advice provided to the supreme court by police said attempts to protect Lawyer X and her children if they did not enter into witness protection would be "unsustainable".

At a media conference announcing the royal commission this week, Daniel Andrews, who was briefed on the high court case the morning after winning a second term of government, said the conduct of Victoria police in encouraging and managing Lawyer X as an informant had made a number of high-profile convictions "unsafe".

"As I get more and more information on this I am left in no doubt that a royal commission is the thing we need to do," he said.



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# High Court of Australia

## KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

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Matter No M73/2018  
AB (A PSEUDONYM)  
APPELLANT  
AND

CD (A PSEUDONYM) & ORS  
RESPONDENTS

Matter No M74/2018  
EF (A PSEUDONYM)  
APPELLANT  
AND

CD (A PSEUDONYM) & ORS  
RESPONDENTS

AB (a pseudonym) v CD (a pseudonym)  
EF (a pseudonym) v CD (a pseudonym)  
[2018] HCA 58

5 November 2018

M73/2018 & M74/2018

ORDER

The orders of the Court, as varied on 23 November 2018 and as further varied on 3 December 2018, are as follows:

1. Special leave to appeal granted on May 2018 is revoked in each matter.

2. The following orders made by the Honourable Justice Nettle are revoked:

(a) Orders 1 and 2 made on 21 December 2017, as varied on 25 May 2018; and

(b) Order 2

(c) made on 17 October 2018.

3.1. Pursuant to s 77RE(1) of the Judiciary Act 1903 (Cth), by reason of the necessity to prevent prejudice to the proper administration of justice within the meaning of s 77RF(1)(a) of the Judiciary Act, there be no disclosure other than disclosure in accordance with Orders 4.1-4.9 herein, whether by publication or otherwise, of:

(a) any document filed in these proceedings (including in proceeding No. M183 of 2017 and No. M185 of 2017);

(b) any information derived from any document filed in these proceedings (including in proceeding No. M183 of 2017 and No. M185 of 2017);

(c) any order made in these proceedings (including in

proceeding No. M183 of 2017 and No. M185 of 2017);

(d) any transcript of any hearing in these proceedings (except the directions hearing on 21 December 2017 and the granting of special leave to appeal on 9 May 2018 in proceeding No. M183 of 2017 and No. M185 of 2017);

(e) any information derived from the hearing on 5 November 2018, or from the transcript of that hearing; or

(f) the real name or image of EF in connection with these proceedings and with proceeding No. M183 of 2017 and No. M185 of 2017, until 5 February 2019.

3.2. Pursuant to s 77RE(1) of the Judiciary Act, by reason of the necessity to prevent prejudice to the proper administration of justice within the meaning of s 77RF(1) (a) of the Judiciary Act, there be no disclosure other than disclosure in accordance with Orders 4.1-4.9 herein, whether by publication or otherwise, of any information tending to reveal the identity of the other parties to these proceedings (including proceeding No. M183 of 2017 and No. M185 of 2017), until 9am on 3 December 2018.

4.1. AB may provide the Legislation Committee of the Victorian Cabinet, being the Cabinet Committee that has oversight of significant litigation, any information about these proceedings that AB considers necessary for the purpose of briefing that Committee about these proceedings from time to time as the occasion requires.

4.1 A. Neither Order 3.1 nor Order 3.2 prohibits disclosure for the purpose of briefing the following persons holding office in the State of Victoria about these proceedings from time to time as the occasion requires:

(a) the Premier;

(b) the Attorney-General;

(c) the Minister for Police;

(d) the Special Minister of State;

(e) the Secretary to the Department of Justice & Regulation; and

(f) the Secretary to the Department of Premier and Cabinet.

4.2. AB, CD or the Commonwealth Director of Public Prosecutions may provide a copy of these orders, the transcript of the hearing on 5 November 2018 and this Court's reasons for decision relating to the revocation of special leave to the President of the Court of Appeal of the Supreme Court of Victoria, the Honourable Christopher Maxwell AC, or in his absence the Acting President of the Court of Appeal, who may provide copies of the same to or inform any of the Judges of the Supreme Court as he considers necessary.

4.3. AB and CD may provide the Honourable Robert Redlich QC, Commissioner of the Independent Broad-based Anti-corruption Commission, any information about these proceedings that AB or CD considers necessary for the purpose of keeping Mr Redlich QC informed about these proceedings, including copies of any applications and orders made in these proceedings, from time to time as the occasion requires.

4.4. The Commonwealth Director of Public Prosecutions may provide the Attorney-General for the Commonwealth and the Attorney-General's Chief of Staff, any information about these proceedings that the Commonwealth Director of Public Prosecutions considers necessary for the purpose of briefing the Attorney-General about these proceedings from time to time as the occasion requires.

4.5. The Commonwealth Director of Public Prosecutions may provide the Commissioner of the Australian Federal Police any information

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*continued on page 12*

- about these proceedings that the Commonwealth Director of Public Prosecutions considers necessary for the purpose of briefing the Commissioner about these proceedings from time to time as the occasion requires.
- 4.6. Order 3.1 does not prohibit disclosure from 3 December 2018 of:
- (a) any document filed in proceeding No. S CI 2016 03143 or No. S CI 2016 04688 in the Supreme Court of Victoria, and any judgment given or order made in those proceedings;
  - (b) any document filed in proceeding No. S APCI 2017 0082, No. S APCI 2017 0083 or No. S APCI 2017 0087 in the Court of Appeal of the Supreme Court of Victoria, and any judgment given or order made in those proceedings.
- For the avoidance of doubt, Order 4.6 does not otherwise affect the operation or the effect of any suppression order in respect of such documents made by the Supreme Court of Victoria (including the Court of Appeal).
- 4.7. Order 3.1 does not prohibit CD from 3 December 2018 from sending, to each of the persons named in paragraph 2(b) of the orders sought in the Notice of Appeal in proceeding No. M73 of 2018 dated 23 May 2018, letters substantively in the terms identified in exhibits JRC-11 and JRC-17 to the confidential affidavit of John Ross Champion SC sworn 2 August 2016 and filed in the Supreme Court of Victoria in proceeding No. S CI 201603143.
- 4.8. Order 3.1 does not prohibit disclosure from 3 December 2018 of:
- (a) the terms of these orders;
  - (b) the fact that there was a hearing on 5 November 2018, in proceeding No. M73 of 2018 and No. M74 of 2018 in the High Court of Australia, to determine whether special leave to appeal, which was granted on 9 May 2018, should be revoked;
  - (c) the fact that special leave to appeal was revoked, and the date on which special leave was revoked;
  - (d) the fact that the appeals were appeals from a decision of the Court of Appeal of the Supreme Court of Victoria in proceeding No. S APCI 2017 0082, No. S APCI 2017 0083

- and No. S APCI 2017 0087 which are the subject of orders made by the Court of Appeal under the Open Courts Act 2013 (Vic); and
- (e) this Court's reasons for decision relating to the revocation of special leave to appeal.
- 4.9. Order 3.1 does not prohibit disclosure, by AB, CD or the Commonwealth Director of Public Prosecutions to any person to whom they owe obligations of disclosure, from 3 December 2018 of any information tending to reveal the identity of any of the parties to these proceedings (including proceeding No. M183 of 2017 and No. M185 of 2017), provided they do not use EF's real name or image.
5. The whole of the Court's file shall remain closed until 5 February 2019.
6. Any party which seeks limited redactions from materials on the Court file shall make application to the High Court no later than 2.30pm on 21 December 2018 identifying in the application the specific information to be redacted by reference to the specific documents on the Court file.
- On appeal from the Supreme Court of Victoria

### Representation

N C Hutley SC with E M Nekvapil and D P McCredden for AB in both matters (instructed by Victorian Government Solicitor)

S B McNicol QC with C T Carr and K A O'Gorman for CD in both matters (instructed by Solicitor for Public Prosecutions (Vic))

P W Collinson QC and C M Harris QC for EF in both matters (instructed by Minter Ellison)

W J Abraham QC with R J Sharp and M R Wilson for the Commonwealth Director of Public Prosecutions in both matters (instructed by Director of Public Prosecutions (Cth))

C J Horan QC with K M Evans for the Victorian Equal Opportunity and Human Rights Commission in both matters (instructed by Victorian Equal Opportunity and Human Rights Commission)

W B Zichy-Woinarski QC with J M Davidson appearing as amici curiae in both matters (instructed by Russell Kennedy Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to

formal revision prior to publication in the Commonwealth Law Reports.

### CATCHWORDS

**AB (a pseudonym) v CD (a pseudonym)  
EF (a pseudonym) v CD (a pseudonym)**

Criminal law – Prosecution's duty of disclosure – Public interest immunity – Where legal counsel for several accused ("EF") was enlisted as police informer – Where EF provided information to police that had potential to undermine each accused's defences to criminal charges – Where each accused convicted of criminal offences – Where first respondent proposed to disclose to each convicted person information about EF's conduct – Whether information subject to public interest immunity – Whether first respondent permitted to make proposed disclosures.

Practice and procedure – High Court – Special leave to appeal – Whether special leave to appeal ought to be revoked.

Words and phrases – "adequately protect", "disclosure", "police informer", "integrity of the criminal justice system", "public interest immunity", "witness protection".

*Witness Protection Act 1991 (Vic)*, s 3B(2)(b).

1. KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ. Early in February 2015, the Victorian Independent Broad-based Anti-corruption Commission provided to the Chief Commissioner of Victoria Police ("AB"), and AB in turn provided to the Victorian Director of Public Prosecutions ("CD"), a copy of a report ("the IBAC Report") concerning the way in which Victoria Police had deployed EF, a police informer, in obtaining criminal convictions against Antonios ("Tony") Mokbel and six of his criminal associates ("the Convicted Persons"). The Report concluded among other things that EF, while purporting to act as counsel for the Convicted Persons, provided information to Victoria Police that had the potential to undermine the Convicted Persons' defences to criminal charges of which they were later convicted and that EF also provided information to Victoria Police about other persons for whom EF had acted as counsel and who later made statements against Mokbel and various of the

- other Convicted Persons. Following a review of the prosecutions of the Convicted Persons, CD concluded that he was under a duty as Director of Public Prosecutions to disclose some of the information from the IBAC Report ("the information") to the Convicted Persons.
2. In the months which followed, Victoria Police undertook an assessment of the risk to EF if CD were to disclose the information to the Convicted Persons. The conclusion reached was that, if the information were disclosed, the risk of death to EF would become "almost certain". On 10 June 2016, AB instituted proceedings in the Supreme Court of Victoria seeking declarations that the information that CD proposed to disclose and other information in the IBAC Report was subject to public interest immunity and thus that CD is not permitted by law to make the proposed disclosures. On 11 November 2016, EF was added as a plaintiff to the proceeding. On 15 November 2016, EF instituted a separate proceeding in the Supreme Court of Victoria seeking similar relief on the basis of an equitable obligation of confidence.
  3. Both proceedings were heard together in camera without notice to the Convicted Persons and with publication of the proceedings being suppressed. The Convicted Persons' interests were, however, amply represented throughout the proceedings and subsequently on appeal to the Court of Appeal of the Supreme Court of Victoria, and before this Court, by amici curiae. The Victorian Equal Opportunity and Human Rights Commission intervened in the proceeding instituted by AB and the Commonwealth Director of Public Prosecutions was granted leave in the Court of Appeal to intervene in support of disclosure.
  4. On 19 June 2017, Ginnane J gave judgment in each proceeding dismissing AB's and EF's claims for relief. Relevantly, his Honour dismissed the claim for public interest immunity on the basis that, although there was a clear public interest in preserving the anonymity of EF as a police informer, and thus in keeping her and her children safe from the harm likely to result from disclosure of the information, there was a competing and more powerful public interest in favour of disclosure because of the assistance that the information might afford the Convicted Persons in having their convictions overturned and, more fundamentally, in order to maintain public confidence in the integrity of the criminal justice system.
  5. On 21 November 2017, the Court of Appeal of the Supreme Court of Victoria (Ferguson CJ, Osborn and McLeish JJA) dismissed AB's and EF's appeals from the orders of Ginnane J. Like Ginnane J, the Court of Appeal held that, despite the risk to EF and her children, the very great importance of ensuring that the court's processes are used fairly and of preserving public confidence in the court meant that the public interest in disclosure outweighed the public interest in immunity.
  6. On 9 May 2018, AB was granted special leave to appeal to this Court on grounds to the effect that the Court of Appeal erred in failing to appreciate that there is a discrete public interest in the State of Victoria adhering to the responsibility which it assumed by reason of the assurances given by Victoria Police to EF that her identity as a police informer would not be disclosed. At the same time, EF was granted special leave to appeal on grounds to the effect that the Court of Appeal erred by assuming, contrary to the evidence, that EF might choose to enter into the witness protection program once it was determined that the information would be disclosed, by finding and taking into account that EF's refusal to enter witness protection may become unreasonable, and by not concluding that the public interest favoured non-disclosure given the gravity of the consequences of disclosure to EF and her children.
  7. The full written arguments thereafter presented by all parties and interveners made it apparent, as it was not apparent at the time of granting special leave to appeal, that the only arguable issue underpinning the various grounds of appeal was whether it was no longer possible adequately to protect the safety of EF and her children in the event of disclosure. Accordingly, in order to clarify the relevant facts that had been the foundation of the grant of special leave, the Court sought from AB, and was provided with, further detailed evidence as to what can be done to secure the safety of EF and her children in the event of disclosure. The effect of that evidence is that the safety of EF and her children may adequately be protected if EF agrees to enter into the witness protection program<sup>1</sup>.
  8. Given that conclusion, the parties were invited to present oral argument as to why special leave to appeal should not now be revoked, and, today, their oral arguments were heard in camera. Having now considered those arguments, the Court is unanimously of the view that special leave to appeal should be revoked.
  9. As Ginnane J and the Court of Appeal held, there is a clear public interest in maintaining the anonymity of a police informer, and so, where a question of disclosure of a police informer's identity arises before the trial of an accused, and the Crown is not prepared to disclose the identity of the informer, as is sometimes the case, the Crown may choose not to proceed with the prosecution or the trial may be stayed.
  10. Here the situation is very different, if not unique, and it is greatly to be hoped that it will never be repeated. EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will<sup>2</sup>. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system. It follows, as Ginnane J and the Court

*continued on page 15*

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of Appeal held, that the public interest favouring disclosure is compelling: the maintenance of the integrity of the criminal justice system demands that the information be disclosed and that the propriety of each Convicted Person's conviction be re-examined in light of the information. The public interest in preserving EF's anonymity must be subordinated to the integrity of the criminal justice system.

11. To say so is not to overlook that, on the evidence before the courts below and now before this Court, EF and her children will be at grave risk of harm unless EF agrees to enter into the witness protection program. Nor is it to ignore that, thus far, EF has declined to do so, taking the view that Victoria Police cannot be trusted to

maintain confidentiality and apparently that she would prefer to wear the risk than subject herself and her children to the limitations and burdens that witness protection would surely entail. It is further not without significance that Victoria Police may bear a large measure of responsibility for putting EF in the position in which she now finds herself by encouraging her to inform against her clients as she did. But large though those considerations may be, they do not detract from the conclusion that it is essential in the public interest for the information to be disclosed.

12. Generally speaking, it is of the utmost importance that assurances of anonymity of the kind that were given to EF are honoured. If they were not, informers could not be protected and persons would be unwilling to provide information to the police

which may assist in the prosecution of offenders. That is why police informer anonymity is ordinarily protected by public interest immunity. But where, as here, the agency of police informer has been so abused as to corrupt the criminal justice system, there arises a greater public interest in disclosure to which the public interest in informer anonymity must yield. If EF chooses to expose herself to consequent risk by declining to enter into the witness protection program, she will be bound by the consequences. If she chooses to expose her children to similar risks, the State is empowered to take action to protect them from harm<sup>3</sup>.

13. Either way, however, it is appropriate that special leave to appeal be revoked in these two proceedings and the decision of the Court of Appeal be allowed to take effect.

## References

1. See Witness Protection Act 1991 (Vic), s3B(2)(b).
2. See Victoria Police Act 2013 (Vic), Sch 2, and formerly

Police Regulation Act 1958 (Vic), Second Schedule.

3. See Children, Youth and Families Act 2005 (Vic), s240.

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# Royal Commission into Management of Informants



## Media Release

Monday, 3 December 2018

### **THE HON DANIEL ANDREWS MP**

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Premier

### **THE HON JILL HENNESSY MP**

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Attorney General

### **THE HON LISA NEVILLE MP**

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Minister for Police and Emergency Services

The Andrews Labor Government has today announced that it will establish a Royal Commission to independently inquire into Victoria Police's recruitment and management of one of its informants.

The informant was a criminal defence barrister for several people who were convicted of criminal offences over the past two decades. At the same time, this barrister acted as an informant to Victoria Police about some of these people.

The decision of the High Court released today calls into question whether some convictions have occurred fairly and in accordance with law.

The integrity of the criminal justice system is paramount and all people charged with crimes are entitled to a fair trial, no matter who they are.

The Victorian Government has received assurances from Victoria Police that its practices have changed since the barrister's recruitment as an informant, and an IBAC report in 2015, which inquired into Victoria Police's management of informants, did not find that any unlawful conduct had occurred.

The Victorian community, however, has a right to further independent assurance that these past practices have been stamped out, as well as an understanding of what happened in this

instance. The Royal Commission will provide that assurance.

The terms of reference will be finalised once Commissioners are appointed, but the inquiry will consider matters including:

- The number of, and extent to which, cases were affected by the conduct of informant 3838 as a human source, and the recruitment, handling and management of 3838 as a human source by Victoria Police
- The adequacy of current management processes for human sources with legal obligations of confidentiality or privilege, including continued compliance with the recommendations of the 2015 IBAC report
- The use in the criminal justice system of information from human sources who are subject to legal obligations of confidentiality or privilege, including whether there are adequate safeguards in the way in which cases are assessed and recommended for prosecution, and prosecuted by Victoria Police and the Office of Public Prosecutions
- Recommended measures that may be taken to address any systemic or other failures in Victoria Police's processes for the recruitment,

handling and management of human sources who are subject to legal obligations of confidentiality or privilege, and in the use of such human source information in the broader criminal justice system, including how those failures may be avoided in future.

The inquiry will provide an interim report by 1 July 2019 and provide a final report by 1 December 2019.

#### **Quote attributable to Premier Daniel Andrews**

*"While these events took place many years ago, the Victorian public has a right to know that every part of the justice system acts fairly and lawfully at all times."*

#### **Quote attributable to Attorney-General Jill Hennessy**

*"Only a Royal Commission will get the answers needed so that something like this can never happen again."*

#### **Quote attributable to Police Minister Lisa Neville**

*"Victoria Police has changed the way it handles informants, but a Royal Commission will provide greater public certainty that these changes are here to stay."*

# **JRL ALUMINIUM**

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# Melbourne gangland lawyer explains why she became a police informant

The informer was given the number 3838. She was a defence barrister-turned-police informer who claimed to have helped Victoria Police in at least 386 cases involving notorious figures from Melbourne's underworld.

A number of criminals, including murderers and drug kingpins, could launch legal bids for freedom as a result of the arrangement.

Victorian Premier Daniel Andrews has announced a royal commission into the matter, and former homicide squad detective Ron Iddles says up to 15 senior police officers turned a "blind eye" to the consequences of the arrangement.

The barrister involved cannot be named.

On June 30, 2015, she wrote a letter to Victoria Police Assistant Commissioner Steve Fontana which can now be published after the lifting of suppression orders on the case in the High Court on Monday.

The court found covertly informing on clients was a "fundamental and appalling breach" of the barrister's obligations. But in the letter, she described how she was motivated by altruism rather than any personal gain.

The letter sets out in detail her story of why she became an informer and the consequences she faced as a result.

The letter is published in full as it appears in court documents, with minor edits for clarity.

Re: Assistance to Victoria Police

I refer to our meetings in 2014 and to the letter I wrote to the then chief commissioner Ken Lay (in October 2014) in which I articulated some of my concerns and fears as well as the impact that the revelation of my informer/human source role in the media has had on my life.

I refer to and repeat the content of that letter which I will attach to this one in the event that you have not read it.

For the sake of completeness, the response I received from Victoria Police in late 2014 to my letter was nothing but disingenuous and offensive.



**The police informer addressed her letter to former assistant commissioner Steve Fontana, pictured here in 2013. (ABC News).**

For the writer to reply by inferring that anyone other than police members were responsible for the leaking of highly sensitive confidential information detailing my role was and is simply absurd.

Of course that was prior to the IBAC report being handed down in which His Honour Justice Kellam made a number of findings, specifically that the manner in which Victoria Police handled me, as an informer/human source, was grossly negligent.

Given that I was not invited to give evidence at the IBAC hearing and nor has any investigator ever spoken to me or offered any kind of explanation as to how not just the fact of my assistance, but the intricate details as well, have become a matter of public knowledge, I remain in a situation in which I accept that this nightmare is not simply going to go away.

Nor am I able to take comfort in knowing that those police members who betrayed me have been identified, disciplined or prosecuted.

As I think I mentioned to you (or at least to Detective Inspector Ian Campbell), my handlers were aware of

intricate personal information about me and when I contemplate where such information may now be, I am disgusted all over again.

As an aside, I consider myself very fortunate that the media appears to have forgotten that when the IBAC inquiry was first announced, their (the Government's) own media release made it clear that the inquiry was not a general one about informers but rather a specific enquiry into the "Lawyer X scandal".

Whilst I am grateful that Victoria Police applied for and obtained an injunction preventing publication of the IBAC findings, it is clear that some of the content of His Honour's report has been leaked to the media.

I have accepted that I will have to continue to live with the prospect that more details may emerge publicly and, with the assistance of a clinical psychologist and a doctor, I will need to continue to manage the literally paralyzing fears and uncertainty as well as heightened danger that impacts upon my existence.

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*continued on page 20*

To enable you to try to comprehend the level of actual stress and anxiety I have to manage, I learned only this week that the Calabrian crime family (Pat Barbaro, Sam Zirilli and co) have been informed that police were provided with a copy of the Bill of Lading pertaining to the importation of what remains the world's largest ever single seizure of MDMA in 2007; they have been told by a journalist that their Bill of Lading was given to police by an informer and that IBAC was provided with the same document which was the subject of specific comment by His Honour Justice Kellam in his final report.

It is an understatement to say that over 12 months after the public revelation of me being an informer/human source for Victoria Police, the confirmation that an extremely dangerous Italian organised crime family has learned this type of detail is nothing short of horrifying.

To make any kind of long-term decisions about my future is very difficult because of the continuing problems arising from the original leak to the media of the "Lawyer X scandal".

My treating psychologist has said on occasion that were it not for my children, she does not think I would still be alive; such is the level of my depression, anxiety and PTSD.

I have struggled to cope with the fact that my reputation has been completely destroyed and my ability to obtain employment within the legal profession or even utilising my four degrees and experience is hopeless.

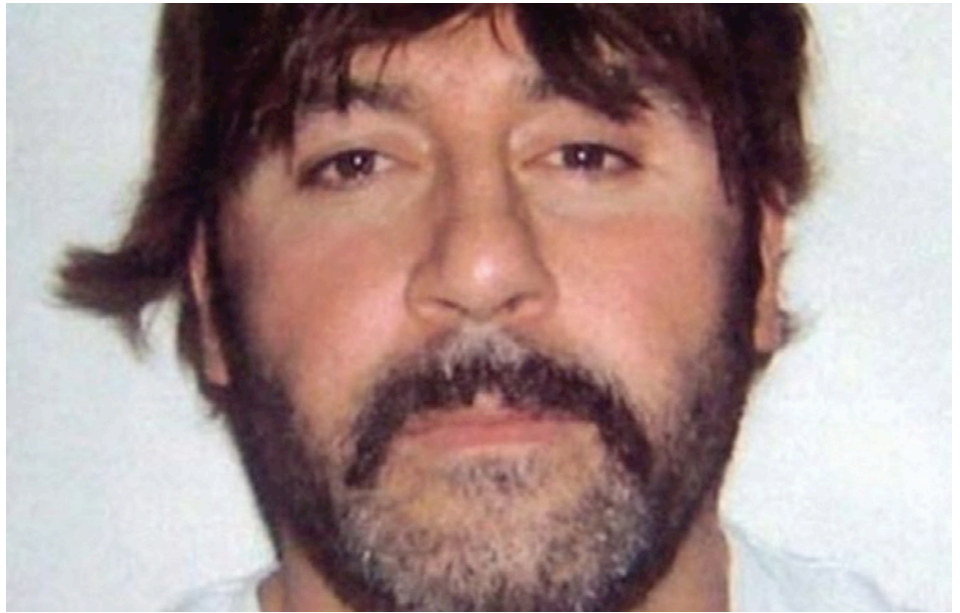
A Google search of my name is quite literally sickening (to me), let alone googling "Lawyer X scandal".

I also struggle to deal with the fact that any of this has happened given all the assurances I was given (by police) that my assistance would never be a matter of public knowledge.

I have been forced to live day to day with a degree of hyper-vigilance and fear as to what will come out next and what impact it will have on my life.

My anxiety and fears are compounded by the fact that but for some contact I maintain with a handful of former clients (now convicted offenders), neither I nor, more importantly, Victoria Police, would be aware of just how dangerous the leaking remains.

I have lost faith in assurances I have been given that the IBAC report has not



**Convicted drug trafficker Tony Mokbel in disguise in Greece in 2007. (ABC News)**

been leaked because it is plainly obvious that the very offenders convicted as a consequence of my assistance are well aware of some of IBAC's findings.

In any event, the whole issue of how and by whom any information about my assistance was leaked to the media and became a matter of public knowledge, let alone the leaking of IBAC's findings, remains a matter for your organisation to investigate or resolve.

Obviously if I am forced into litigation with respect to Victoria Police's negligence in failing to keep confidential my assistance and failing in its duty to me as an informer, then the question of which members were involved and who is responsible would be a matter for a Supreme Court judge to consider.

I sincerely hope that I do not have to pursue any of this by way of Supreme Court proceedings; the further damage and stress it would cause me aside, the embarrassment and problems it would create for Victoria Police would be significant.

It has been conveyed to me that it would assist you if I was able to provide details of a "Top 10" kind of list of operations/investigations in which I played a role.

It would be unfair and a failure to appreciate the level of my diligence and commitment if that was the only measure by which you assessed my assistance.

For that reason, knowing that there are literally thousands of hours of recorded conversations and debriefings as well as many thousands of documents proving without doubt, the immense

assistance I provided over a number of years, I am also including some detail as to how and why I began to provide intelligence to Victoria Police and what my assistance included.

As I hope you are aware, I helped because I was motivated by altruism, rather than for any personal gain.

My actual assistance to Victoria Police began informally via Purana not long after the taskforce was initially formed in 2004.

I met as he then was, Detective Sergeant Stuart Bateson, on a number of occasions starting in early 2004, which of course was at the height of Melbourne's gangland war, and at a time when the refusal to assist police by anyone involved or with any knowledge was frustrating investigators.

What led me to do that was my own frustration with the way in which certain criminals (Carl Williams) were seeking to control what suspects and witnesses could and could not do or say to police via solicitors, who were not in my view, acting in the best interests of their clients because of the undue influence and control of "heavies" such as Williams.

I provided Bateson with information that was of value to investigators in the months prior to suffering a stroke in late July 2004 and again afterwards.

In the lead-up to my illness, I played a pivotal role in convincing Thomas Hentschel to "roll over" on Williams, Victor Brincat and others and withstanding undue pressure from the Williams crew (and Tony Mokbel) to try to get him to stay silent.

I kept Bateson informed of all of this, including solicitors perverting the course

of justice and conspiring with criminals to try to ensure a number of gangland murders would remain unsolved or uncharged.

As has been documented in the years that followed Hentschel deciding to help police, his actions (in becoming a witness for police) created a precedent for others to follow and was the crack in the dam wall of silence that led to a flood.

He laid the foundation for the prosecution of numerous murderers and others followed his example.

During 2005 I became aware of high-level drug trafficking, money laundering, witness tampering, firearm offences and a variety of other serious criminal activity by virtue of the contact I had with certain clients and their "crews" and "supporters".

I also watched as police either totally failed to investigate much of this offending, or failed in being able to obtain evidence to be able to arrest and charge offenders.

By September 2005 certain events and circumstances led to me formally starting work as registered informer 3838 (again as an aside, journalists have used that detail as well as the names of my handlers when informing me of the information police sources have provided to them).

My breaking point came when I was threatened by Tony Mokbel to ensure that a first-time offender who was operating pill presses and manufacturing tens of thousands of MDMA pills for him, kept his mouth shut and pleaded guilty after he was arrested by the then MDID.

Although Mokbel did not actually say that his underling was being financed and supplied by him, it became obvious to me when I was provided with a remand summary and later a brief of evidence by police.

This kind of scenario had happened numerous times in circumstances in which I was dealing with high-level drug syndicates, all of whom had individuals who were the targets of police investigations and many of which were involved, directly or indirectly, with the gangland murders.

To try to encompass my actual value, reliability and work for Victoria Police in any summary is immensely difficult because from September 16, 2005, I spoke to my handlers on a daily basis, often seven days a week for a couple of years.

Again, the media has informed me that there are approximately 5,500



**Former Victoria Police chief commissioner Simon Overland, pictured in 2011. (Peter Giasis: ABC News).**

information reports generated from information I provided to police.

There was no topic, criminal, organised crime group or underworld crime that was "off limits" during the many debriefing sessions that occurred or during the years that followed until Overland decided to utilise me as a witness in 2009 when everything fell apart.

I didn't appreciate that at the time I made the decision to become a witness for Victoria Police, I had been put in a situation in which every assurance given to me was a lie and more importantly, that the investigators who took my statement were not made aware of the very real problems with respect to my safety and status.

As you are no doubt aware, that led to me issuing civil proceedings against Overland after enduring 18 months of severe stress and uncertainty when no-one seemed to be capable of making any decision about what to do with regard to the issue of dealing with my informer role when I was called to give evidence.

Those proceedings resolved at a mediation in late 2010 (again as an aside, the evening before that mediation my gynaecological oncologist had diagnosed me with the return of cancerous tissue that required surgery and foremost in my mind then and in the time that followed was my health).

For completeness, as I am sure you are aware, those proceedings were public and the writ did not include any reference to my role as an informer. (I do not want there to be any suggestion that

I have previously been compensated in any way for my assistance to police.)

I subsequently spent a fortune getting my life and health back together and by 2014 when the nightmare of my informer status being made public started, I had managed to regain my health to the level of being able to conceive a daughter after 15 months of IVF treatment and I had also overcome great difficulties within the legal profession and been able to do some casual work as an employee solicitor.

Since the "Lawyer X" publicity started, it would be fair to say that my mental, emotional and physical health are in decline and I feel the impact of this nightmare almost every single day.

In addition to my anxiety, fear, severe depression, PTSD and paranoia, my reputation is gone and I will ever be able to work as a lawyer again.

The legal community in Victoria, including its judiciary, have formed a view that means I have now lost many friendships and relationships (professional and personal).

Ironically, but for some limited communication with a few of the criminals that I helped to convict (and that communication comes with its own stress), I would be unaware of some of the dangerous and life-endangering detail that the media continues to reveal (from what I understand to be their police sources as well as leaks from the IBAC findings) and more importantly, so would Victoria Police.

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*continued on page 23*



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I make these comments because I would like you to try to put yourself in my shoes for a moment to try to comprehend my almost complete disillusionment with the very organisation which assured me as an informer, that what I did for police and the detailed information I provided, would remain a highly protected secret and would never see the light of day.

Now, but for my children and a handful of loyal supportive friends and family, each day is a nightmare as to what might come out next or indeed, the consequences for my safety and wellbeing.

For the avoidance of any doubt, during the time I was working as an informer for Victoria Police, with the exception of a couple of token thank yous (including a pen), I, unlike any other informer, did not receive any financial assistance or support to enable me to work as an informer.

In fact the contrary is true.

I paid for all kinds of things that police usually provide finance for such as incessant phone calls to criminals, entertaining (coffees not alcohol), countless trips to prison etc.

In addition, the greatest impact was upon my practice because I had to invent reasons to excuse myself from accepting a multitude of briefs to appear for various accused, because I had a conflict of interest in so far as I had contributed directly or indirectly to those persons being arrested and charged in the first place.

One of the more insane costs borne by me was having to pay for the monthly spend of \$190.00 for [\*Redacted] after his arrest and remand.

Those payments went on for months and months, as well as \$1,100 for his computer.

The fact was that in order to obtain the detail of his manufacturing, including the location of labs, I had to spend considerable time with him so he perceived there to be more of a friendship than there was in reality.

Once he was arrested and with my support and intervention, decided to assist police and make [\*Redacted] statements and become a star prosecution witness, he was isolated and had almost no friends to rely upon for support.

Your organisation will have records of the actual expenditure on my part where [\*Redacted] is concerned because eventually Purana took over those payments (without [\*Redacted] knowing obviously).

My point is essentially that I was not given any money at all as it seemed to be taken for granted that whatever I had to outlay to spend time with those, whom I informed on, would be borne by me because I was working and had an income.

I took no issue with this at the time because Detective Inspector [\*Redacted] assured me that this would all be taken into account whenever I finished and made application for a reward.

On that note, you should be aware that I was advised by [\*Redacted] himself when I spoke to him for the last time in early 2009, that his crew had finished what he referred to as an "A to Z" of the extent of my assistance to police and that when any reward application was made that report was finalised and ready to be produced.

Fortunately for me all those meetings were recorded by Victoria Police, lest you be in any doubt as to the veracity of what I am saying I was told.

There were a total of 386 people arrested and charged that I am specifically aware of based upon information I provided to Victoria Police, but there are probably more because as you would know, I did not always know the value or use of some of the intelligence that I was providing.

There was over \$60 million in property and assets seized/restrained based upon my assistance and intelligence (a fact reported in The Age in an article about the results obtained by Purana in decimating the gangland criminals in 2009).

My motivation in assisting police was not for self-gain, but was rather borne from the frustration of being aware of prolific large commercial drug trafficking, importations of massive quantities of drugs, murders, bashings, perverting the course of justice, huge money laundering and other serious offences all being committed without any serious inroads being made by police.

I maintain (despite what I understand from the media to be an incorrect ill-informed view taken by IBAC based upon who knows what version of events),

that anything told to me or said in my presence about crimes being planned or committed cannot ever fall under the protection of legal professional privilege by a client.

Most significantly, I did not approach the police because I had committed (nor have I since) any crime for which I required some kind of "get out of jail free card", as is most often the reason people choose to assist police.

The most significant crimes and/or arrests:

1. Karam, Higgs, Barbaro and 33 co-accused for the largest ever seizure of ecstasy in the world
2. Horthy Mokbel, Milad Mokbel and their co-accused and associates such as Stephen Gavanas
3. [\*Redacted]
4. David Ilic
5. Joe Mannella (and Karam) for the multiple seizures of hundreds of kilos of cocaine and other drugs that were not the subject of charges, but were intercepted and seized by Australian Customs
6. [\*Redacted]
7. [\*Redacted] (as a result of information provided by me, Purana were able to get him to a position where he was confronted with a mountain of evidence which led to him becoming a witness for police)
8. Faruk Orman (for the murder of Victor Pierce)
9. Mick Gatto and the Carlton crew (regrettably this was a work in progress when I was handed over to Petra as a witness)
10. Kamel Khoder [\*Redacted], money laundering for various criminals, principally the Mokbel family and associates. As a finance broker he obtained fraudulent loans for anyone referred to him; despite his conviction and the confiscation of all his properties, he is still committing frauds via false loan applications and deceptions.

Once again, I am, if necessary, prepared to meet with you to try to reach a mutually acceptable agreement.

Again, I would ask you to consider this option seriously, because it is in no-one's best interests for my role and involvement as an informer/human source to be detailed in a writ or explored in civil proceedings.

I look forward to your earliest reply.

A photograph of the Melbourne skyline, featuring various skyscrapers and the historic Flinders Street Clock Tower. The CI-SECURITY logo is overlaid at the top in orange.

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# Aspects of Evidentiary Privileges in Australia

## LAW ASIA CONFERENCE PUBLIC INTEREST / CORPORATE LAW PRESENTATION

Wednesday 20 September 2017 Tokyo, Japan Robert McDougall

### INTRODUCTION

1. An evidentiary privilege is an immunity exempting a party or witness from disclosing information that the law would otherwise require be disclosed.<sup>1</sup> There are many such privileges, but in this paper I shall deal only with two. The Australian Law Reform Commission ("ALRC") has recently issued a report titled 'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws'.<sup>2</sup> That report considers whether the current operation of the common law privilege against self-incrimination ("PSI") and legal professional privilege ("LPP"), their expression in the so-called Uniform Evidence Legislation,<sup>3</sup> and their abrogation by certain Commonwealth legislation strike a fair balance between the competing interests at stake, and whether that balance helps or hinders the administration of justice in Australian courts. That is the topic I propose to examine.
2. In this paper, I will first consider the history and rationale behind each privilege. A return to the privileges' respective foundations will inform the analysis of their current operation and relevance. An exploration of the history and rationale demonstrates that the privileges themselves are the product of a balancing exercise of various public and private interests, and have evolved and transformed over time. Next, I will consider the privileges' operation at common law and under the Uniform Evidence Legislation.
3. Neither the PSI nor the LPP is immutable and both may be subject to statutory encroachment. A case study of the information-gathering powers conferred on the Australian Securities and Investments Commission ("ASIC") will show how

that encroachment can operate in practice. This case study will consider the tension between the rights enshrined in the LPP and the PSI on one hand and the coercive information-gathering powers that may be conferred on regulatory bodies – powers that, in some cases, abrogate common law privileges – in the name of the public interest in effective regulation on the other. The ALRC touched on this in its report, commenting that the abrogation of the PSI in the Australian Securities and Investments Commission Act 2001 (Cth) ("the ASIC Act") warranted further review.<sup>4</sup>

### PART ONE: LEGAL PROFESSIONAL PRIVILEGE

#### Introduction

4. The LPP originated as a fundamental common law principle that entitles a person to "resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services."<sup>5</sup> It is a substantive common law right, as opposed to a mere rule of evidence.<sup>6</sup> Accordingly, it is applicable to all forms of compulsory disclosure, including pre-trial procedures,<sup>7</sup> and non-judicial or quasi-judicial proceedings.<sup>8</sup>
5. The Uniform Evidence Legislation contains a statutory equivalent of the LPP, named the "client legal privilege".<sup>9</sup> This title was chosen because the traditional description was thought to suggest "that the privilege is that of the members of the legal profession, which it is not. It is the client's privilege".<sup>10</sup> This is substantiated by the fact that at common law and under statute

the privilege can only be waived by the client. For convenience, I will continue to use "LPP" to refer specifically to the common law form of the privilege. This is because the common law privilege is this paper's point of departure. Maintaining the different titles will also be useful when distinguishing between the privilege at common law and statute. At times, at the risk of confusion, I will refer to the privilege generally.

#### History and evolution of the privilege

6. The LPP has existed for over 400 years,<sup>11</sup> and has been strictly applied by the High Court of Australia since 1908.<sup>12</sup> Like the PSI, its history is contested. However, unlike the PSI, there is less preoccupation on the part of judges and academics with the LPP's origins. I suggest this is because the LPP has a rationale that is defensible and relevant to the modern Australian legal system, and accordingly, recourse to its historical foundations is not necessary to justify its existence.
7. The LPP has evolved overtime. Significant developments include:
  - extension to non-judicial contexts in the 20th century, in response to the creation of government agencies with broad coercive information-gathering powers;<sup>13</sup>
  - adoption of the "sole purpose test" in place of the prevailing "dominant purpose test" in 1976. The result was to limit the protection to documents brought into existence for the sole purpose of obtaining legal advice or use in legal proceedings;<sup>14</sup> and
  - rejection of the "sole purpose test" and return to the "dominant purpose test" in 1999, which again extended the LPP to documents brought into existence for the dominant purpose of seeking legal advice or use in

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*continued from page 25*

legal proceedings,<sup>15</sup> and brought the LPP into line with the statutory client legal privilege.

8. This brief list gives weight to the observation that “a glance at the numerous cases in Australia and the United Kingdom which have concerned [the LPP] in the last 20 years or so indicates twists and turns in the application of the general principles within single jurisdictions.”<sup>16</sup> The LPP’s development was also complicated or “bedevilled” by majority decisions of the High Court.<sup>17</sup> Sackville J, speaking extracurially, aptly referred to the transitional periods between these developments as “a paradigm example of law reform generating an urgent need for further law reform.”<sup>18</sup> That further law reform occurred through the introduction of the Uniform Evidence Legislation and the further development of the common law by the High Court to render it consistent with the statutory privilege. While there are some divergences in the various State

iterations of the Uniform Evidence Legislation, there are limited relevant differences for our purposes. Those differences that do exist tend to arise out of rules of the Court.

#### **The rationale behind the privilege**

9. Generally, the effect of a successful privilege claim is that information which may be important for the proper administration of justice is suppressed. In that circumstance, Dr McNicol has recognised that “it is important to ascertain whether there are worthwhile rationales behind each head of privilege such that each privilege can be defended against the valid competing claims of the proper administration of justice.”<sup>19</sup> There is a clear and ongoing conflict between what can be referred to as utilitarian public interest arguments in favour of disclosure and libertarian private interest arguments in defence of privilege.<sup>20</sup> The difficulty that arises in relation to the LPP is that the principal rationale behind it is the public interest in the administration of justice. Accordingly, a unique situation arises where the competing

interests are both public interests, and in fact, both said to be in pursuit of the same end.

#### *An instrumentalist rationale: the administration of justice*

10. The LPP is said to have a truth-promoting effect – clients will be more inclined to disclose all relevant information to their legal adviser if they are assured that those communications will remain confidential.<sup>21</sup> Facilitating and promoting “full and frank” disclosure between clients and their legal advisers is said in turn to facilitate the provision of proper advice and representation.<sup>22</sup> There is a concern that “if the privilege did not exist ‘a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.’”<sup>23</sup> For the proper conduct of litigation, “litigants should be represented by qualified and experienced lawyers rather than ... appear for themselves.”<sup>24</sup> Proper representation contributes to the efficient functioning of the adversarial system and thus, the administration of justice.

11. Another benefit that flows from full and frank disclosure is that legal advisers are better placed to, where appropriate, discourage litigation in favour of settling or other alternative dispute resolution.<sup>25</sup> This reduces the burden on the adversarial system, which is again in the public interest.
12. The LPP also applies to the provision of legal advice generally, not related to existing or contemplated litigation. There is an unresolved, but for the purposes of this paper irrelevant, controversy regarding whether the LPP is a single privilege with two applications – legal advice and litigation – or two privileges with different functions. In any event, the application of the LPP to legal advice also encourages compliance with the law.<sup>26</sup> In situations where a client approaches a legal adviser to determine the legality of a course of action that they wish to take, “full and frank disclosure”<sup>27</sup> enables the adviser to “chart a course of conduct [for the client] in conformity with the law.”<sup>28</sup> Compliance with the law again reduces the burden on the Court’s resources, facilitating the administration of justice.

#### *A rights-based rationale*

13. The LPP has also been recognised as protecting private interests. It has been said to protect the right to privacy and the right to consult a lawyer, as well as the client’s freedom and dignity. It has been described as “an important human right deserving of special protection” and a “bulwark against tyranny and oppression ... not to be sacrificed even to promote the search for truth and justice.”<sup>29</sup> However, for the most part, the rights-based rationale appears to be secondary to the instrumentalist rationale, or alternatively, a supporting framework for the instrumentalist rationale.

#### *The first balancing exercise*

14. The LPP balances competing public interests. The benefits seen to flow from the LPP, promoting the efficient conduct of legal business and litigation, are considered to outweigh the conflicting public interest in having all the information available to the court to assist in decision making.<sup>30</sup> It follows that the LPP is bound by contradiction, and at once both helps and hinders

***LPP is also not available if a client seeks advice in order to facilitate the commission of a crime, fraud or civil offence, or where the communication is made to further an illegal purpose.***

the administration of justice. Dr Desiatnik acknowledges this: “[t]antalisingly, the greater [the LPP’s] successful application, the greater its failure”.<sup>31</sup> This conundrum also explains the aforementioned “twists and turns” in the development of this doctrine,<sup>32</sup> and the courts’ difficulty in striking the right balance.

15. The High Court has clarified that: ... legal professional privilege is itself the product of a balancing exercise between competing public interests and that, given the application of the privilege, no further balancing exercise is required.<sup>33</sup>
16. Thus, the High Court considers the public interest served by the LPP to outweigh the public interest in disclosure. The former is paramount.<sup>34</sup> However, in the event of statutory abrogation, there is in fact a second balancing exercise, this time undertaken by Parliament. This is where the LPP’s rationale has work to do.

#### **The privilege at common law**

17. Because of the competing public interests at stake, Courts have imposed several conditions on the LPP’s operation. In brief, there must be a communication, which must be made for the dominant purpose<sup>35</sup> of submission to the legal adviser for advice or use in existing or anticipated litigation.<sup>36</sup> The communication may be oral,<sup>37</sup> or in the form of written or other material.<sup>38</sup> Documents or other material that are merely delivered to the legal adviser are not protected,<sup>39</sup> unless they were physically brought into existence and communicated for the relevant purpose.<sup>40</sup> The LPP is also not available if a client seeks advice in order to facilitate the commission of a crime, fraud or civil offence, or where the communication is made

to further an illegal purpose.<sup>41</sup> The LPP may be lost through implied or explicit waiver. The privilege is waived where “the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect”.<sup>42</sup>

#### *Dominant purpose*

18. There has been extensive debate over the element of purpose, and specifically, the requisite degree or extent of the connection between the purpose of the document’s creation and the provision of legal advice or preparation for litigation. Over time it has been argued that it must be the sole purpose, the dominant purpose, a substantial purpose or merely a purpose of the communications’ creation. This question was settled by the High Court in *Esso*. That decision overturned the former “sole purpose” test and introduced the “dominant purpose” test. The majority – comprised of a joint judgment by Gleeson CJ, Gaudron and Gummow JJ, and the judgment of Callinan JJ – held the “dominant purpose” test strikes a just balance between the competing public interests at hand. This brought the test into conformity with the statutory form of the privilege in the Uniform Evidence Legislation, concluding a five year period where Courts were required to apply different tests depending on the jurisdiction or the phase in the litigation. The “dominant purpose” test is used in other common law jurisdictions, including England, New Zealand, Ireland and Canada.
19. The dominant purpose is the “ruling, prevailing, or most influential purpose.”<sup>43</sup> In *Esso*, Gleeson CJ and

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Gaudron and Gummow JJ said that the following test “appears close to a dominant purpose test”:

“[I]f a document is created for the purpose of seeking legal advice, but the maker has in mind to use it also for a subsidiary purpose which would not, by itself, have been sufficient to give rise to the creation of the document, the existence of that subsidiary purpose will not result in the loss of privilege.”

20. Batt JA also explained the meaning of “dominant” as follows: “In its ordinary meaning “dominant” indicates that purpose which was the ruling, prevailing, or most influential purpose. Barwick CJ, whose view in *Grant v Downs* propounding the test of dominant purpose has now been adopted by the majority decision in *Esso Australia Resources*, distinguished “dominant” from “primary” and “substantial”. Lord Edmund-Davies in *Waugh [v British Railways Board]* [1980] AC 521, in adopting the test propounded by Barwick CJ, was of the view that the element of clear paramountcy should be the touchstone. That, as it seems to me, shows the meaning of “dominant”.<sup>44</sup>
21. The purpose of the communication is to be determined as at the time of creation<sup>45</sup> having regard to its contents, the intention of the maker or the intention of the person requiring the document or communication be brought into existence,<sup>46</sup> the function or identity of the maker, and the routine procedures of the individuals involved.<sup>47</sup> The Court may inspect a document to determine the dominant purpose.<sup>48</sup> The dominant purpose test is of particular importance to privilege claims by in-house counsel, and I will return to that point.

#### Statutory expression in the Uniform Evidence Legislation

22. In addition to the change of name, which I have already mentioned, there are several differences between the (common law) LPP and the (statutory) client legal privilege. Fortunately, following *Esso* and amendments in 2008,<sup>49</sup> many of these have been ironed out. For the purposes of considering whether the LPP helps or

hinders the administration of justice in Australian courts, the primary remaining difference is scope.

#### Scope

23. Client legal privilege concerns only the admissibility of communications into evidence.<sup>50</sup> That means the statutory protection only applies to evidence led in court. In all other contexts (such as pre-trial or non-judicial), the LPP remains available. Some are of the view that there is an undesirable inconsistency where a Court is required to apply the LPP to pre-trial procedures and the client legal privilege to evidence adduced at trial. Despite attempts by members of the judiciary to construe the client legal privilege as applicable to pre-trial procedures, the High Court held that it is not.<sup>51</sup> However, the position has been modified in some Australian states by legislation in relation to pre-trial procedures. For example, in New South Wales courts, the Uniform Civil Procedure Rules 2005 (NSW) (“UCPR”) extend the application of the statutory client legal privilege to pre-trial processes. Accordingly, in those states one test is applied consistently.

#### Novel privilege

24. There is also a novel privilege for unrepresented parties in the Uniform Evidence Legislation. Section 120(1) prevents evidence being adduced if, on objection by an unrepresented party to litigation, the court finds that adducing the evidence would result in disclosure of a confidential communication which was prepared by the party for the dominant purpose of preparing for or conducting the proceedings.

#### Loss of privilege

25. Section 121 of the Uniform Evidence Legislation also specifies three general situations in which the client legal privilege can be lost:
- evidence concerning the intentions, or competence in law, of a client or party who has died;
  - evidence required to enforce an order of an Australian court; and evidence that affects a right of a person.

#### Abrogation of or exceptions to the privilege

26. What I shall call the second balancing exercise occurs where Parliament considers the LPP does

not strike the right balance between these competing interests, because of particular circumstances.

However, perhaps due to the Court's warning in *Esso*<sup>52</sup> or the ALRC's earlier recommendation that the LPP only be abrogated in “exceptional circumstances”,<sup>53</sup> Commonwealth laws that abrogate the LPP are rare – the ALRC identified only 7 laws that abrogate the LPP, as opposed to over 30 laws that abrogate the PSI.<sup>54</sup>

27. In an earlier report, the ALRC provided guidance to Parliament by way of criteria justifying an abrogation of the LPP, including:
- whether the inquiry concerns a matter of major public importance;
  - whether the information sought can be obtained in a timely and complete way by using alternative means that do not abrogate the LPP; and
  - the degree to which the privilege claim will hamper or frustrate the investigation.<sup>55</sup>
28. In brief, these criteria set out a proportionality approach (or, as I have called it, the second balancing exercise) – a consideration of whether the abrogation has a legitimate objective, is necessary to meet that objective, and is in the public interest.
29. Interestingly, in the context of the LPP and in stark contrast to the PSI, the second balancing exercise rarely results in abrogation. In very limited circumstances, the public interests in open and accountable government have been relied on to justify statutory abrogation of the LPP.<sup>56</sup> Again, in very limited circumstances, the LPP has been abrogated regarding production of a document, information or other evidence relating to a serious terrorism offence,<sup>57</sup> and in relation to the proceeds of crime.<sup>58</sup> These laws tend to confer compensatory statutory protections for the abrogation in the form of evidentiary immunities. This means the privileged material is not admissible in evidence against the person.<sup>59</sup>
30. In Australia, Commonwealth agencies with coercive information-gathering powers do not have the power to require the production of

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material subject to LPP.<sup>60</sup>Historically, there was some doubt regarding whether the ASIC Act abrogated the LPP. However, since 2007 ASIC itself has notified persons subject to compulsory powers that they are not required to provide documents or information that are subject to the LPP and its Information Sheet 165 indicates that a person may withhold information that attracts a valid claim of LPP.<sup>61</sup>

31. Whilst this appears reassuring, there is an historical exception which may be cause for concern. The James Hardie (Investigations and Proceedings) Act 2004 (Cth) abrogated the LPP specifically and only in relation to James Hardie investigations or proceedings.<sup>62</sup>This permitted ASIC and the Commonwealth DPP to use evidence obtained under its information-gathering powers for the purpose of the James Hardie Special Commission of Inquiry. The justifications for this Act included:
- the prevalence of 'claims for [LPP] that [the witness] knew could not honestly be made'<sup>63</sup>;
  - the need for efficient use of ASIC's information-gathering powers;<sup>64</sup>and
  - the importance of the regulation of corporate conduct, financial markets and services.<sup>65</sup>
32. Whilst the Act had a very limited application, some practitioners have expressed concern that the language in the Explanatory Memorandum and other extrinsic materials may indicate a growing preference for prioritising the public interest in effective regulation over, and thus compromising, the public interests served by the LPP.<sup>66</sup>It is conceivable that there will be further movement away from the paramountcy of the LPP. As Desiatnik warned, the scope of legal principles justified by public interest grounds are particularly susceptible to change because "the grading of values accorded to competing interests can change."<sup>67</sup>This would also correspond with the steady trend of statutory limitation of the PSI.<sup>68</sup>Part Two of this Paper illustrates the consistent prioritisation of the public interest in effective regulation over the private interests

protected by the PSI. Irrespective of where the right balance between interests lies, it is clear that we are all in Parliament's hands.

#### The LPP and its application to in-house counsel

33. Significant recent case law deals with the privilege in the context of in-house counsel. In recent years, the landscape of the profession, and the structure of the domestic and international commercial sectors has changed significantly. Lawyers are no longer faced with a clear choice between operating as a sole practitioner or in a partnership. Today, an alternative career option exists – namely, as a salaried lawyer within a corporation. The rise of multinational companies with cross-jurisdictional work and permanent in-house counsel has caused questions regarding the LPP's application to salaried lawyers and foreign lawyers to come to the fore.<sup>69</sup>
34. The Courts have recognised that in-house counsel have a unique position, different to other legal advisers. This is because they are both legal adviser and employee. It follows that the type of work and the structure of the relationship differs. In-house counsel often have dual responsibilities in an organisation, and are more likely to have commercial or managerial functions as well as legal ones.<sup>70</sup>The distinction between legal and non-legal work can be blurred. In fact, in large organisations it has been recognised that a "multiplicity of purposes is commonplace."<sup>71</sup>
35. Accordingly, there was initially some debate concerning whether communications between commercial and legal branches of the same entity can or should be privileged. In 2008, the federal government commissioned the ALRC report, "Privilege in Perspective: Client Legal Privilege in Federal Investigations",<sup>72</sup>to consider these issues. The ALRC noted "strong opposition" to treating in-house counsel differently.<sup>73</sup>Following "some initial hesitancy by the common law",<sup>74</sup>the courts have adopted an approach that places paramount importance on the "independence" of in-house counsel, in addition, of course, to the

dominant purpose test.

36. Before exploring these requirements, it is important to recognise that the regulatory framework governing practising lawyers imposes the same common law duties, statutory obligations, government scrutiny and self-regulation on all practitioners – be they employees of or partners in a law firm, sole practitioners or in-house counsel. At the outset it is clear that even if the roles and functions of in-house counsel vary, the ethical duties remain the same.<sup>75</sup>
37. It should also be acknowledged that the same changes in the legal profession that gave led to the rise of in-house counsel also contributed to a change in the repertoire of private practitioners. Lawyers in private practice are now expected to provide their clients with commercial advice and expertise. There is a "close association between the legal and corporate worlds",<sup>76</sup>which has been recognised in case law.<sup>77</sup>Accordingly, these cases also provide a lesson for private practitioners whose work has multiple purposes, and who "wear both a corporate and a legal hat"<sup>78</sup> – to keep on the correct side of that blurred line between legal and non-legal work.<sup>79</sup>

#### Independence

38. Numerous high profile Australian cases illustrate the courts' concerns as to the conduct of in-house counsel.<sup>80</sup>The key difference is the dependence and proximity between in-house counsel and their corporate employers. The internal lawyer is dependent on the employer client for their salary. In addition, Professor Dal Pont notes that an in-house counsel is often in a more onerous position with respect to advice and conduct than the external lawyer, because of their proximity to client information.<sup>81</sup>
39. The question was first addressed in *Waterford v Commonwealth of Australia*.<sup>82</sup>There, the High Court held that the LPP can attach to communications between clients and their salaried legal advisers provided the lawyers in question are independent from their employer and competent. Brennan J reasoned that the rationale of the privilege can only be fulfilled where the legal adviser is competent and independent:

Competent, in order that the legal advice be sound and the conduct of litigation be efficient; independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client.<sup>83</sup>

40. I interpose that this demonstrates the utility of the privilege's rationale – it provides an example of the rationale being “resorted to as a solid foundation against which to test the [application of the privilege].”<sup>84</sup>
41. Accordingly, communications between in-house counsel and their employer may remain subject to the LPP provided they are able to establish “an appropriate degree of independence” from their employer.<sup>85</sup> This is a question of fact, and each case will depend on the way in which the position is structured and executed.<sup>86</sup> Importantly, some degree of commercial involvement will not automatically negate any privilege claim.<sup>87</sup>
42. As Tamberlin J, writing extracurially, and Bastin observed: Involvement which might be regarded as vitiating the independence of the in-house counsel may include membership of certain committees, intensive dealings with the finance or policy arrangements of the organisation, employment in other non-legal offices such as secretary or director of the corporation, or a devotion of a majority of the employee's time to activities not relating to the provision of legal advice.<sup>88</sup>
43. In short, the requisite degree of independence requires in-house counsel to be lawyers first and employees second.

#### *Dominant purpose*

44. The requirements of independence and competence relate to the lawyers. Once those requirements are met, attention turns to the communication itself, which of course must be one made for the dominant purpose of obtaining legal advice or preparation for litigation. However, determining the dominant purpose in the context of in-house counsel can be a difficult task. It is particularly problematic

where in-house counsel hold dual commercial and legal roles.

45. For example, merely copying in-house counsel into an email intended for other recipients within the business is not sufficient to attract privilege.<sup>89</sup> Likewise, “routine reports and other documents prepared by subordinates for the information of their superiors” will not attract privilege just because it is in “the ordinary course” of procedure at that business to provide such documents to the in-house counsel.<sup>90</sup>
46. The facts in *Singapore Airlines Ltd v Sydney Airports Corporation Ltd & Anor*<sup>91</sup> illustrate the difficulties that arise in this context. I heard this case under the Uniform Evidence Legislation. My decision was upheld on appeal. In that case, there was an incident at Sydney Airport when an aerobridge came into contact with a door of a Boeing 747-400 aircraft owned and operated by Singapore Airlines. Singapore Airlines claimed to have suffered substantial loss. Shortly after the incident occurred, an in-house lawyer employed by Sydney Airports Corporation Ltd (SACL) commissioned an expert report. Singapore Airlines sought an order for production. SACL claimed the report was privileged.
47. The primary issue concerned the purpose for which the report was prepared. It was possible to assign at least three purposes: (1) for use in the litigation that SACL's in-house counsel thought was “likely”; (2) to enable SACL to allay the concerns of the Airline Operations Committee (AOC), both in relation to the particular aerobridge and in relation to other similar aerobridges, so as to persuade the AOC to allow the aerobridge to be put back into service; and (3) for SACL's own operational reasons: to seek to ensure that similar incidents would not occur again.
48. SACL was unable to establish that the first purpose was the dominant purpose for commissioning the report. In the ordinary case, the purpose would be that of the person who brings the document (in which the relevant communication is embodied) into existence. In *Grant v Downs*, Barwick CJ referred

to the dominant purpose as being “of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence”.<sup>92</sup> In this case, the relevant purpose is that of the corporation, because the in-house lawyer was the human agent whose thoughts and actions were those of the employer.

49. The three identified purposes included a purpose specific to the in-house solicitor's legal function (the first purpose); and two others that more generally, were managerial or commercial purposes (the second and third purposes). The evidence did not demonstrate that the first purpose was “dominant”. Nor was it possible, looking at the matter objectively, to say that one purpose was inherently such that it should be regarded as dominant. Accordingly, the report was not privileged. The judgment was upheld on appeal. Spigelman CJ (Sheller JA and Campbell AJA agreeing), also commented that the status of the legal practitioner (as an in-house counsel or external solicitor) was “not irrelevant” to the dominant purpose inquiry.<sup>93</sup>

#### *Foreign lawyers*

50. Changes in the legal landscape also raise the question of whether foreign lawyers advising on Australian law, or vice versa, are entitled to the privilege. This is connected to the general requirement that the adviser be engaged in a legal capacity. This has been said not to amount to a requirement that the adviser have a current practising certificate.<sup>94</sup>
51. Three situations arise: (1) when a foreign lawyer advises on Australian law; (2) when an Australian lawyer advises on foreign law; and (3) when a foreign lawyer advises on foreign law.
52. At common law, it has been clarified that the advice of a foreign lawyer on Australian law is entitled to privilege<sup>95</sup> and the advice of an Australian lawyer on foreign law is also entitled to privilege.<sup>96</sup> The third situation, whether communications relating to a foreign lawyer advising

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on foreign law was privileged in proceedings in Australia, arose in *Kennedy v Wallace*.<sup>97</sup>Allsop J, divided this into two separate situations, namely where the communications would have been privileged in the foreign jurisdiction in question and where they would not. Allsop J considered that the reality of modern commercial business and the LPP's rationale justified its application to communications from foreign lawyers advising on foreign law in Australian proceedings. His Honour held that the privilege should not be a "jurisdictionally specific right" and that there was "no basis for viewing foreign lawyers and foreign legal advisers differently to Australian lawyers and legal advice."<sup>98</sup>However, he clarified that "nothing I have said should be taken as expressing a view on the existence of privilege in Australia where, under the legal system governing the foreign lawyer, or under the legal system of the state where the advice was given, no privilege would attach."<sup>99</sup>Accordingly, this question is left open.

53. In 2008, the Uniform Evidence Legislation was amended so that the definition of "lawyer" now includes "Australian registered foreign lawyers" and "overseas registered foreign lawyers."<sup>100</sup>The Explanatory Memorandum referred to the LPP's rationale and indicated that the amendment was in line with the LPP's rationale and intended to reflect the reasoning in *Kennedy v Wallace*.<sup>101</sup>It follows that client legal privilege under the Uniform Evidence Legislation may extend to communications from a foreign lawyer advising on foreign law, and protect them from compulsory production in Australian legal proceedings. However, the Explanatory Memorandum did not refer to the first two situations I mentioned –where a foreign lawyer advises on Australian law or an Australian lawyer advises on foreign law. In any event, the Uniform Evidence Legislation does not change the common law.
54. In summary, the case law relating to in-house counsel and foreign

lawyers reminds both salaried lawyers and external practitioners that to satisfy a privilege claim, communications must be brought into existence in a professional capacity, must retain an independent character, and must be for the dominant purpose of providing legal advice.

### Does the LPP help or hinder the administration of justice in Australian courts?

#### *Against the LPP: theoretical concerns*

55. For some, the very existence of the LPP is an obstacle to the administration of justice. This is because, in their view, the interest in both the parties and the decision-maker having unfettered access to information should be higher in the hierarchy of public interests than the benefits that flow from the LPP. In short, those who object to the LPP argue that it hinders the Court's search for truth.<sup>102</sup>Jeremy Bentham, the English philosopher and legal positivist, is among their number. According to Bentham, the LPP operates to shield guilty clients and withhold relevant information from the parties and the decision-maker. This is based on an argument that the innocent have nothing to hide, and therefore the LPP only assists guilty people. It follows, he said, that removal of the LPP would result "in a guilty person not being able to derive quite so much assistance" and access to all relevant information for the parties and the decision-maker.<sup>103</sup>
56. This argument is flawed for several reasons.
57. First, it assumes a bright line distinction between innocent and guilty, which, particularly in civil litigation, does not always exist.<sup>104</sup>That is recognised, even in the criminal sphere, by the Scottish verdict "not proven"; more generally, a verdict of "not guilty" need convey no more than that one or two of 12 citizens was not persuaded beyond reasonable doubt of the accused's guilt.
58. Second, this line of criticism wrongly assumes that the client can discern which facts are legally incriminating and which are exculpatory. Conversely, as recognised by the public interest rationale in support

of the LPP, clients may require skilled legal advice in order to determine relevance. Without the immunity provided by the privilege, a client may unnecessarily withhold information that he or she misconstrues as incriminating. Accordingly, removing the privilege would not automatically mean that the Court would gain access to more and significant evidence. In fact, there is every possibility that less information, or indeed false information, would be volunteered instead. In addition, without the opportunity for candour and full and frank disclosure between the client and the lawyer, the client may not learn of a defence available to them. In this sense, the privilege helps, rather than hinders, the administration of justice. Compelling disclosure of confidential communications would not automatically make the court any wiser.<sup>105</sup>

59. Third, this argument really only addresses the litigation component of the LPP. As has been acknowledged, the LPP relates also to the provision of legal advice unconnected to existing or contemplated litigation. For example, people often consult lawyers to determine the legality of some action they are considering taking. Proponents of the LPP assume that most clients would refrain from doing an act if they are told that it is unlawful.<sup>106</sup>Whether that assumption is naïve is a topic on which I do not feel qualified to express an opinion.
60. At least theoretically, the LPP is supportable and contributes to the administration of justice. Even so, there remains room for legitimate criticism of the absolute nature of the privilege. This is a point picked up by Lord Taylor, in *R v Derby Magistrates' Court; Ex parte B*,<sup>107</sup>and adopted by Finkelstein J, writing extracurially.<sup>108</sup>Lord Taylor recognised that "if a balancing exercise was ever required in the case of [LPP], it was performed once and for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client's individual merits."<sup>109</sup>Finkelstein J suggested a reform of the LPP to give the

court discretion to admit privileged evidence, where the interests of justice require it. Essentially, he argued that the balancing exercise should be performed by the judiciary on a case by case basis.<sup>110</sup> Judges have a not dissimilar balancing exercise to perform when considering whether the LPP has been waived or whether client legal privilege has been lost on the ground of inconsistency.

#### *Against the LPP: practical concerns*

61. Despite having arguably sound theoretical foundations, it is plain that the privilege, like any legal principle, could be misused to the point where it causes harm. For instance, it may tempt practitioners and their clients into false swearing.<sup>111</sup> More readily available are examples of privilege claims leading to time-consuming interlocutory disputes.<sup>112</sup> Such practices do not support the just, quick and cheap resolution of legal disputes, and are arguably incompatible with the administration of justice.
62. The inadvertent disclosure of privileged documents during the discovery process can give rise to lengthy and complex disputes. The volume and nature of electronically stored information in the information age heightens the risk that privileged material will not be identified and protected during discovery.<sup>113</sup> There may also be circumstances where the cost and burden of performing a review to identify privileged documents will be too great, and documents theoretically entitled to client legal privilege will be inadvertently disclosed.<sup>114</sup>
63. The High Court considered the mistaken provision of privileged documents in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*.<sup>115</sup> This case started life in the Commercial List of the Equity Division of the Supreme Court of New South Wales. In that case, the discovery process involved reviewing approximately 60,000 documents. The defendant inadvertently omitted to claim the LPP for 13 confidential documents that were disclosed to the plaintiff. The plaintiff declined to return the privileged documents and claimed

***A person is not bound to answer any question or produce any document or thing if that material would have a tendency to expose that person to conviction for a crime.***

- that the client legal privilege had been waived upon disclosure.
64. The High Court reasoned that the provision of the privileged documents occurred as part of the process of discovery, which is a court-ordered process subject to regulation under the UCPR.<sup>116</sup> Orders for discovery are subject to the overriding purpose of facilitating the “just, quick and cheap resolution of the real issues in the dispute or proceedings” (the “overriding purpose”).<sup>117</sup> The High Court held that it followed from this that the Supreme Court had all the powers necessary to resolve the dispute, including “essentially, that a party be permitted to correct a mistake.”<sup>118</sup> Mistakes do happen and the risk is certainly higher in large cases where the volume of discovery is vast.<sup>119</sup> Accordingly, the correct approach would have been for the primary judge to permit the correction of the verified list of documents and order the return of those entitled to privilege. This endorsement of “robust and proactive”<sup>120</sup> case management demonstrates that the Supreme Court has adequate powers to deal with inadvertent disclosure.
65. The High Court’s reasoning reiterated the court’s broad powers to facilitate the overriding purpose. That is not to say that judges may engage in a second balancing exercise. The privilege remains a substantive right protected by the principle of legality, which may only be abrogated expressly by statute. In addition, it was stressed by the High Court that the parties and their lawyers also have a duty to assist the court in achieving the overriding purpose.<sup>121</sup> There is thus some uncertainty regarding the

extent to which disputes should be solved by the law governing the parties’ substantive rights or by the application of case management powers or choices by the parties.<sup>122</sup> Some authors have queried whether the High Court’s comment that “[u]nduly technical and costly disputes about non-essential issues are clearly to be avoided”<sup>123</sup> suggests that “a decision to dispute an issue should turn on the identification of the issue as “non-essential”, as well as being unduly technical or costly.”<sup>124</sup> No such general rule has been articulated. Following the *Expense Reduction* decision, it is at least clear that it is not intended that the privilege should take on independent life in “satellite interlocutory litigation” in Australian courts.<sup>125</sup> The practical effect of the High Court’s guidance will unfold through case by case implementation in the lower courts.

## **PART TWO: THE PRIVILEGE AGAINST SELF-INCRIMINATION**

### **Introduction**

66. The PSI confers immunity from an obligation to provide information tending to prove one’s own guilt. A person is not bound to answer any question or produce any document or thing if that material would have a tendency to expose that person to conviction for a crime.<sup>126</sup> In Australia, the PSI is a substantive common law right.<sup>127</sup> However, it is not an entrenched constitutional right. Like the LPP, it is not immutable and must be balanced against competing rights and interests.
67. The ALRC has raised a number of issues for consideration concerning legislative provisions that abrogate the PSI, including:

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- (1) "whether the extensive abrogation of or encroachment on the privilege by Commonwealth laws is justified;
  - (2) if abrogation or encroachment is justified, whether use immunity, partial derivative use immunity, or full derivative use immunity is appropriate;
  - (3) if partial derivative use immunity is appropriate, then whether the inherent powers of the court already provide, or could provide, such an immunity, or whether statutory protection is necessary;
  - (4) whether compelled examinations of persons subject to charge, regarding the subject matter of the charge, should be permitted, and if so, under what conditions; and
  - (5) whether it is appropriate for a prosecutor to be given transcripts of compelled questioning."<sup>128</sup>
68. In considering the impact of the PSI on the administration of justice, this paper really picks up the first three points.

#### History of the privilege

69. The history of the PSI has been the subject of historiographical controversy. Until recently, it was thought the PSI emerged in the 17th century, born out of dissatisfaction with the practices of the prerogative and ecclesiastical courts of the High Commission and Star Chamber.<sup>129</sup> This theory, which is chiefly based on the writings of Professors Wigmore<sup>130</sup> and Levy,<sup>131</sup> contends that the abolition of these bodies and the oath ex officio in 1641 inspired the introduction of the PSI into the common law. However, research by modern legal historians who have had access to material that was not available to earlier scholars has now 'convincingly demonstrated'<sup>132</sup> that the modern form of the PSI, which protects an accused and defendant before and at trial, did not originate until the mid-19th century or later.<sup>133</sup> At this time, the PSI developed gradually as a result of the 'lawyerisation' of the criminal trial and the adoption of the adversarial system.<sup>134</sup> Prior to this, defendants were unrepresented and disqualified from testifying.<sup>135</sup>

70. A third theory suggests the PSI is a modern iteration of the ancient common law maxim *nemo tenetur prodere seipsum*.<sup>136</sup> It could be thought that this does not say very much about the origins of the PSI.
71. Ultimately, these three theories can coexist. Cumulatively, they highlight the many facets of the PSI and demonstrate the PSI's evolution over time. It has been recognised that the PSI encompasses 'a disparate group of immunities, which differ in nature, origin, incidence and importance'.<sup>137</sup> More specifically, the PSI encompasses three distinct privileges: (1) a privilege against self-incrimination; (2) a privilege against self-exposure to a civil or administrative penalty; and, (3) a privilege against self-exposure to the forfeiture of an existing right.
72. The PSI can be claimed in three circumstances: (1) by a witness; (2) by a defendant during trial; and, (3) by a suspect during pre-trial investigation. The PSI is also related to other rights. For example, other jurisdictions, including Hong Kong, South Africa and Europe, incorporate the PSI as an integral part of the right to a fair trial,<sup>138</sup> or refer to the PSI interchangeably with the right to silence.<sup>139</sup>
73. In my view, the incremental history of the PSI demonstrates that it is susceptible to re-evaluation and evolution, in conformity with shifts in the complexity of society (and the economy) and in society's identification of key values.

#### The rationale behind the privilege

74. As mentioned in Part One, a rule's rationale should justify its existence and help to define its scope and operation. However, a number of competing rationales claim to justify the existence of the PSI.

##### *Rights-based rationales*

75. The first group of rationales may be called the rights-based rationales. These include the protection of privacy, autonomy and the presumption of innocence; the undesirability of the State's subjecting individuals to the 'cruel trilemma' of self-accusation, perjury or contempt; and a fear that self-incriminating statements may be elicited by inhumane treatment and thus be inherently unreliable.

It will be seen that individually, the rationales are problematic and cumulatively, they are overbroad or inconsistent. Some of this confusion was resolved by the High Court's modern restatement of the PSI's purpose, framed specifically in terms of human rights.<sup>140</sup> In the alternative, recourse can be had to the instrumentalist or utilitarian rationales.

#### Prevention of abuse of power

76. Traditionally the PSI was intended to prevent a potential abuse of power: Once the Crown is able to compel the answering of a question, it is a short step to accepting that the Crown is entitled to use such means as are necessary to get the answer. ... By insisting that a person could not be compelled to incriminate himself or herself, the common law thus sought to ensure that the Crown would not use its power to oppress an accused person or witness and compel that person to provide evidence against him or herself.<sup>141</sup>
77. This argument contends that the PSI exists to prevent evidence from being elicited by torture, inhumane treatment or abuse.<sup>142</sup> However, on one view, it is unlikely that this remains a real risk in the context of Australian police or regulatory examinations. This is because that risk is diverted by other laws.<sup>143</sup> Lord Templeman considered the PSI 'profoundly unsatisfactory when no question of ill-treatment or dubious confession is involved'<sup>144</sup> and was quoted with approval by Lord Griffiths, who added "days [where people were tortured into providing evidence] are surely past".<sup>145</sup> Thus, if this is the sole, or even main, rationale for the PSI it could be concluded that the PSI is an 'archaic and unjustifiable survival from the past'<sup>146</sup> based on fear rather than reason.
78. Nevertheless, this rationale continues to be invoked because it 'resonate[s] well ... [in] the twentieth century'.<sup>147</sup> Even acknowledging the protections available in Australia,<sup>148</sup> I am not prepared to dismiss this rationale entirely. Historically, in societies where freedom from self-incrimination is not available,

coercive means have been used to compel a person to speak. The treatment of suspected “terrorists” and “jihadists” after the initial phase of the current war in Afghanistan shows that the lessons of history remain relevant today. A nation that has the PSI enshrined in its Constitution has denied it to others within its power, and has at the least condoned the use of illegitimate means in furtherance of the denial.<sup>149</sup> Hence, no doubt, the casuistry as to what is or is not “torture”.<sup>150</sup>

#### Protection of the presumption of innocence and the adversarial system

79. The PSI was also intended to protect the adversarial system of criminal justice. The fundamental principle of Australia’s adversarial system is that the Crown bears the onus of proof beyond a reasonable doubt. The presumption of innocence until proven guilty underpins the PSI against self-incrimination. Those who allege another’s guilt should not be able to compel the accused to give evidence against themselves;<sup>151</sup> a proposition that begs rather than answers the question, and that might surprise lawyers and judges trained in the civilian/inquisitorial system.

#### Protection from the ‘cruel trilemma’

80. The ‘cruel trilemma’ refers to the choice between lying and risking punishment for perjury, refusing to answer and risking punishment for contempt and answering honestly and providing incriminating evidence.<sup>152</sup> This has been criticised as an appeal to emotion rather than reason. The prosecution of individuals is an integral part of the adversarial system, from which the PSI developed, and which the Psi is apparently intended to serve. The trilemma is only relevant to individuals who have contravened the law, and it is reasonable that they may be required to confront this choice, albeit unpleasant or difficult. It is difficult to see how this could be considered cruel. In isolation, this rationale does not support the existence of the PSI.

#### The rights-based rationale

81. In *Environment Protection Authority v Caltex Refining Co Pty Ltd*<sup>153</sup> the

High Court, after considering the traditional position, provided a reassessment of the underlying rationales for the PSI. The “modern rationale” frames the PSI in terms of human rights: specifically the rights to dignity, privacy and freedom. This rationale underpins the concept of the PSI as a substantive human right rather than simply a rule of evidence. Murphy J in *Rochfort v Trade Practices Commission* said that: [t]he privilege against self-incrimination is a human right, based on the desire to protect personal freedom and human dignity.<sup>154</sup> On this view, the privilege prevents “the indignity and invasion of privacy which occurs in compulsory self-incrimination.”<sup>155</sup>

82. Again, this view of the PSI could be seen to justify it in a self-referential and essentially circular way. More significantly it could be seen to elevate the suggested right above the numerous and weighty public interests in the criminal justice system: vindication of the law, punishment, protection, and all the other ends that the criminal justice system serves.

#### Instrumentalist rationales

83. In its recent Report, the ALRC also referred “in more utilitarian terms” to other “benefits”<sup>156</sup> that it said flowed from the PSI. These included that the protection provided by the PSI may encourage witnesses to cooperate with investigators and prosecutors,<sup>157</sup> may prevent unlawful coercion to obtain evidence,<sup>158</sup> and may reduce the incidence of false confessions<sup>159</sup> or untruthful evidence.<sup>160</sup> Like the utilitarian rationales, these are not bullet-proof. For instance, ascertaining evidence, and the truth or falsity of it, is a necessary component of any police or regulatory investigation and the PSI only has the potential to assist. It will be seen that these by-products could also be achieved through the provision of statutory use immunities.

#### The privilege at common law

84. At common law, the PSI entitles a natural person to refuse to answer any question if the answer would have a tendency to expose him or her, either directly or indirectly, to the risk of incrimination.<sup>161</sup> The PSI is available to natural persons who are suspected of a crime,<sup>162</sup> in

criminal proceedings,<sup>163</sup> in civil proceedings<sup>164</sup> and in non-curial contexts.<sup>165</sup> Its operation has been described as ‘wide and inclusive’, because it applies in circumstances where the answer would have a tendency to expose the person to incrimination<sup>166</sup> as opposed to applying only where the answer actually does expose the person to incrimination.

#### Type of evidence

85. Not all evidence is protected by the PSI. The PSI protects against compulsion to provide testimonial evidence. It does not apply to the production of non-testimonial evidence, such as fingerprints or DNA samples.<sup>167</sup> This reflects a settled conceptual distinction between compulsion to produce real evidence, which exists independently of the person, and compulsion to create testimony.<sup>168</sup>
86. There is some debate as to whether the PSI extends to the production of documents in Australia. While certain decisions have indicated that it does,<sup>169</sup> three judgments of the High Court referred to documents as non-testimonial evidence, suggesting that the PSI may not apply.<sup>170</sup> The production of documents is also not protected by the PSI in the United States and the United Kingdom.<sup>171</sup>

#### Application to corporations

87. A corporation is not entitled to the PSI.<sup>172</sup> The High Court’s modern restatement of the rights-based rationale behind the Psi has no application to corporations. In Australia as in England, a corporation “has no body to be kicked or soul to be damned”,<sup>173</sup> and cannot suffer an encroachment on its human rights.
88. Further, application of the PSI to corporations would prevent the effective administration of justice: In practice, corporate conduct is often complex. Assessment of a corporation’s conduct may only be possible through an examination of its documents. ... A true understanding of [a] corporation’s procedures is likely to be gained only through evidence from the corporation itself, particularly from its records.<sup>174</sup>

#### Statutory expression in the Uniform Evidence Acts

89. A statutory form of the Psi is provided in the Uniform Evidence Legislation.

- Unlike the PSI, the statutory protection only applies to disclosure of information in a court proceeding.
90. Section 128 of the Evidence Act provides that an individual may object to giving particular evidence of the ground of self-incrimination. If the objection is found to be justified, the Court may issue a certificate, the effect of which is to provide some (although not complete) protection, and thereafter require the witness to answer the question.
  91. Section 187 of the Evidence Act reflects the common law position and expressly denies the PSI to corporations.

#### *Application to documents*

92. Section 128 is not directed in terms to the production of documents under compulsion of law; s <sup>187</sup> suggests that the legislature was well aware of the distinction between answering questions and producing documents.
93. There is however in s 87 of the Civil Procedure Act 2005 (NSW) a regime broadly equivalent to s 128 of the Evidence Act in relation to the provision of evidence, including by the production of documents, pursuant to an order of a court. Also note the definitions of "privileged document" and "privileged information" in the Dictionary to the Uniform Civil Procedure Rules, in relation to (for example) the discovery process and notices to produce.<sup>175</sup> Thus, an individual may (subject to legislation) resist producing documents even where the documents that form the subject of the subpoena or notice to produce provide the only evidence as to impropriety.

#### **Abrogation of or exceptions to the privilege**

94. Despite the numerous rationales justifying the PSI, none has been strong enough to prevent statutory erosion. I repeat that in Australia, the PSI is not an entrenched constitutional right. There are circumstances where the legislature has decided that the public interest in the full investigation of a matter outweighs the public interest in the maintenance of the PSI. In these cases, Parliament has conferred on government agencies the power to compel a person to answer questions or produce documents. These agencies include

- the Australian Crime Commission ("ACC"), the Australian Competition and Consumer Commission ("ACCC"), the Australian Security Intelligence Organisation ("ASIO"), and ASIC.
95. In an attempt to strike a fair and workable balance between Parliament's objectives and the common law right, statutes that abrogate the PSI tend to provide compensatory protection by way of either direct use immunity or derivative use immunity. Direct use immunity provides that the compelled testimonial evidence is not admissible against the person in a subsequent proceeding. This means the person is compelled to give evidence, however the subsequent use of that evidence is limited. Derivative use immunity renders inadmissible any material subsequently derived, directly or indirectly, from the information disclosed by the statement-maker.<sup>176</sup>

### **PART THREE: THE ASIC CASE STUDY**

#### **Operation and evolution of s 68**

96. Section 68(1) of the ASIC Act abrogates the PSI in relation to the giving of information, the signing of a record or the production of books and governs the admissibility of evidence compulsorily obtained under ASIC's information-gathering powers. That abrogation has been in operation for 25 years, having come into force in the precursor to the ASIC Act in May 1992.<sup>177</sup>
97. Before 1991, direct use immunity was available for compelled testimony and no immunity was available for the act of producing books. From January 1991 to May 1992, direct use and derivative use immunity was available for compelled testimony and the act of producing books. This was the high watermark of protection. After less than a year, the Parliamentary Joint Committee on Corporations and Securities ('PJCCS') conducted an inquiry. Following their recommendations, in May 1992,<sup>178</sup> Parliament removed derivative use immunity in relation to compelled statements and removed all immunity in relation to the act of producing documents. Since that

time, the provision has not been amended.

98. Section 68 operates as follows. Direct use immunity is conferred by s 68(3). This means that a self-incriminating or penalty-exposing statement, or the fact that a person has signed a record, is not admissible in subsequent proceedings against that person.<sup>179</sup> Such evidence is only admissible in a proceeding against that person in respect of the falsity of the evidence.<sup>180</sup> There is no prohibition against the admissibility of the evidence against another person or corporation.<sup>181</sup> This is because there is no privilege against 'other-incrimination'.<sup>182</sup> The direct use immunity in s 68 also does not apply to the act of producing incriminating books and records. It is a condition of the direct use evidential immunity contained in s 68(3) that the subsequent proceeding must be a criminal proceeding or a proceeding for the imposition of a penalty.<sup>183</sup> There is no protection against use in civil proceedings.<sup>184</sup>

#### **Justifications for abrogating the privilege**

99. It is reasonably settled that the abrogation of the PSI by the ASIC Act is justified.

#### *Effective regulation*

100. Regulatory regimes that compel evidence are understood to be pursuing the following legitimate end: '[T]he full investigation on the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation'.<sup>185</sup>
101. A limitation on the availability of the PSI is more likely to be justified if it avoids serious risks and is in the public interest. Effective investigation and prosecution of corporate malfeasance is important. ASIC has significant responsibilities for safeguarding Australia's financial system and millions of consumers and investors. Australia's financial and insurance sector contributes 4.9% of Australia's real gross value added by industry (second

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only to the 'Information Media and Telecommunications' sector); employs 3.6% of Australia's total workforce (over 460,000 people); and holds assets of A\$7,500 billion (4.5 times Australia's nominal GDP).<sup>186</sup> Contraventions of the law can damage the Australian economy and can damage individuals' financial or social positions. This sector is of 'national strategic importance to Australia'<sup>187</sup> and it is settled that '[t]he honest conduct of the affairs of companies is a matter of great public concern'.<sup>188</sup>

#### *The corporate context*

102. In addition, as I mentioned, there are unique difficulties associated with enforcement of corporate law that render compulsory testimony useful, and often necessary, for regulation and law enforcement. Enforcement in this context has been recognised as 'notoriously' difficult for three reasons.<sup>189</sup> First, the evidence is extremely complex and can be unreliable. It is often necessary to have direct assistance from the perpetrator to comprehend the thousands of available documents.<sup>190</sup> In addition to their sheer quantity, the documents may be inadvertently or intentionally incomplete, or may have been created to deceive.<sup>191</sup> Second, the corporate structure may be manipulated to obfuscate illegal activity,<sup>192</sup> and subordinates 'may not know the full story'.<sup>193</sup> Third, there is often no clear victim capable of giving evidence.<sup>194</sup> Combined, these factors mean that greater assistance is required from the perpetrator.<sup>195</sup> It follows that compelled testimony would indeed facilitate law enforcement.
103. An alternative way to demonstrate the utility of the limitation is to consider ASIC's operation without it. The High Court has often observed that ASIC's powers, and thus its ability to regulate, would be frustrated and rendered nugatory if they were subject to the PSI.<sup>196</sup> It has been recognised that 'the shield of PSI as applied to corporations [would be] a formidable obstacle to the ascertainment of the true facts in the realm of corporate

activities'.<sup>197</sup> Accordingly, because of the nature of the corporate context, a limitation on the availability of the PSI facilitates the completion of ASIC's function, and in turn, the administration of justice.

#### *Implied waiver*

104. There is also an argument that abrogation of the PSI may be justified where the person affected participates voluntarily in a regulated activity or market.<sup>198</sup> This argument suggests that those who choose to operate in the corporate, markets, financial services or consumer credit sectors thereby choose to submit to the regulatory scheme that governs them, and have impliedly waived their right to the PSI (the "implied waiver argument"). These people generally enjoy benefits because of the scheme. The limitation is justified not only by the person's voluntary involvement and acceptance of the requirements of the scheme, but also because to do otherwise may undermine the scheme itself.<sup>199</sup> This argument has been relied on extensively internationally and by ASIC.<sup>200</sup> However because ASIC's information-gathering power applies to "any person",<sup>201</sup> ASIC seeks to extend the implied waiver argument to 'those who interact with [voluntary members of a regulatory scheme] (e.g. contractors, investors or consumers) or otherwise participate within the field of regulation'.<sup>202</sup> This argument is a stretch – mere participation in or interaction with the corporate, markets, financial services or consumer credit sectors cannot amount to a voluntary implied waiver of rights.

#### **Appropriateness of direct use immunity**

105. I turn to consider the form of the abrogation, and the available compensatory statutory protections in relation to the admissibility of the compelled evidence.
106. The primary objection to the availability of only direct use immunity is that the protection it affords is insufficient to protect the rights-based rationale. In 1991, the Law Institute of Victoria adopted the analogy of fruit from a tree to oppose the provision of only direct use immunity: '[t]here is little use in rejecting the tree when the fruits of the tree are

freely admissible'.<sup>203</sup> Direct use immunity also does not secure the instrumentalist 'truth-promoting effect'. Examinees armed with the knowledge that ASIC may derive clues from their testimony may be inclined to lie. However, the balancing exercise has in large part been determined by whether derivative use immunity is practical and operational, as opposed to the theoretical deficiencies in the direct use immunity model.

#### *The practical operation of derivative use immunity*

107. It has been argued many times that the practical difficulties allegedly associated with derivative use immunity outweigh its benefits. ASIC and its precursors have contended to the contrary that the introduction of derivative use immunity would render the regulator's investigative powers useless. They argue that derivative use immunity creates 'insurmountable obstacles' to prosecution and is inconsistent with the regulator's function.<sup>204</sup> At its highest, it was argued that the practical difficulties associated with derivative use immunity meant it was preferable to abstain from using the powers until they were amended.<sup>205</sup>
108. According to ASIC and the DPP, the difficulty lies in the task of establishing that a particular piece of evidence did not derive from the protected examination, and is thus admissible. It is argued that this would result in prolix, complicated and lengthy trials.<sup>206</sup> In reality, commentary regarding the operation of derivative use immunity in the ASIC context is mere speculation because it has not been tested in court in Australia.
109. In addition to concerns regarding difficulty, a Queensland Law Reform Commission Report and the Kluver Report (a report that reviewed the precursor to the ASIC Act and recommended the retention of direct use immunity only) observed also the risk that examinees might deliberately incriminate themselves to gain derivative use immunity.<sup>207</sup> However, there is no evidence of conscious exploitation occurring in Australia, which is hardly surprising given the non-existence of the test condition.

110. ASIC's objectives are important.

They serve the public interest.

They are difficult to manage and constrained by resources.

Accordingly, Parliament would be disinclined to grant ASIC's mandate and then frustrate its work with complicated information-gathering powers that are limited in utility.

Derivative use immunity may be a less restrictive intrusion on the PSI. However this factor alone will not render it justifiable. Direct use immunity facilitates the public interest in effective regulation, but does so consistently with the essence of the PSI. This is because it prohibits the admission of direct testimony, which is what the PSI, from its origins, was designed to protect.<sup>208</sup> While the libertarian view argues for full derivative use immunity, it is not conceptually effective, and is not rationally connected or reasonably appropriate and adapted to the legitimate end of regulation and law enforcement. Conversely, it misconceives and complicates that end. Accordingly, if the choice is between direct use immunity and derivative use immunity, practicality and efficiency dictate that the former is more appropriate to the Australian corporate context.

*Partial derivative use immunity*

111. As I have tried to show, the current direct use immunity model is a justifiable approach and can be defensibly maintained. However, a third option exists, namely, partial derivative use immunity.

112. Canada has implemented a 'partial derivative use immunity discretion'.<sup>209</sup> Under this model, trial judges have a flexible discretion to exclude 'derivative evidence that could not have been found or appreciated except [because] of the compelled testimony'.<sup>210</sup> This means that some derivative evidence is admissible; for example, evidence that would have been obtained under an alternative information-gathering power. *La Forest J* highlighted a conceptual distinction between compelled testimony, and real non-testimonial evidence derived from that testimony. Direct use of compelled testimony at trial

is the only circumstance where the accused has been compelled to create self-incriminatory evidence. Derivative evidence is, by definition, evidence that existed independently of the compulsion. The derivative evidence can only be called self-incriminatory because of the circumstances leading to its discovery, as opposed to being so by its very nature. This is an extension of the PSI's demarcation between testimonial evidence and non-testimonial real evidence,<sup>211</sup> and its protection only of the former. However, beyond the distinction between derivative evidence that could have been found and understood independently of the compelled testimony and derivative evidence that could not have been, the Canadian Courts have been hesitant to elaborate or 'imagine' the way in which the 'partial derivative use immunity discretion' will be exercised.<sup>212</sup>

113. The Canadian Courts also reiterate the importance of information-gathering powers and pre-trial investigation, bolstering the Australian jurisprudence. In formulating the partial derivative use immunity discretion, *La Forest J* relied on the importance of focusing investigations quickly and precisely, to increase effective regulation.<sup>213</sup>

114. The partial derivative use immunity model has the benefit of providing greater compensatory protection than the existing provision, and in turn, greater consistency with the PSI's rights-based rationale. At the same time, it does not operate to quarantine evidence to the point of frustrating completely a regulator's powers. It has been said to rely on and expand a settled and workable distinction between types of evidence.<sup>214</sup>

115. If this argument were to be put up for debate, it would be necessary to consider whether the analysis required is practicable; whether it is likely to complicate investigations, clog up the courts, and prolong trials; and whether it will have any other significant impact on the investigation of potential criminal activity. As an alternative, perhaps, one could ask whether the inherent powers of the court already provide,

or could provide, such an immunity, or whether statutory protection is necessary.

116. ASIC contends that the Court's inherent and statutory discretions to exclude evidence where its prejudicial effect outweighs its probative value are sufficient protection. That is not to the point. ASIC's suggestion looks at the use of evidence that has been obtained, as opposed to the way it has been obtained. They are difference exercises, both conceptually and practically.

117. Regardless, it is my view that, a carbon copy adoption of Canada's model would be problematic. Australian criticisms of derivative use immunity have largely focused on the concern regarding prolix and complicated trials concerning admissibility of evidence. A flexible judicial discretion based on the Canadian model would not necessarily solve this concern. The two types of derivative evidence delineated by the Canadian model – (1) evidence that could not have been found or understood without the compelled testimony and (2) evidence that could have been found and understood without the compelled testimony – are not always easily demarcated in practice. A statutory 'but for' test, while possible, would raise all manner of practical difficulties. In my view, it would be unlikely to create a consistent, practical application with predictable outcomes. On the contrary as I have suggested, it would be likely to create a diversion of public resources, for the benefit of the well-resourced malefactor and the detriment of the public interest.

118. Neither the historical development nor the PSI's rationales support a rule whose application is determined on a case by case basis, based on regard to the probative weight of evidence or other factors which the Canadian judiciary have been reticent to outline but accept may be present. The probative weight of evidence was a consideration used to demarcate whether the PSI applied to testimonial or non-testimonial evidence. Once settled, it did not

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*continued on page 40*

operate flexibly. While Australian judges maintain a residual discretion to reject admissible but unfairly prejudicial evidence, its exercise is an exception to the rule, as opposed to the rule itself. The consistent provision of blanket rules where the PSI has been abrogated by statute demonstrates Parliament's preference for this model.

## CONCLUSION

119. This paper has reviewed the common law LPP and PSI, their statutory expression in the uniform evidence legislation and their operation in the ASIC context. In relation to the LPP, its history and rationale were theoretically sound, and it follows that its statutory abrogation is rare. Its current

operation at common law and under the uniform evidence legislation has created some difficulties, but judicial and legislative efforts have clarified its scope and application. There remains room for misuse or error, however, the case management powers of Australian courts can contain its effect and ensure it has a positive contribution to the administration of justice. The PSI's foundations are less stable. Controversy surrounds its origins, development and current rationale. By consequence, it is frequently abrogated by Commonwealth laws, particularly in the regulatory context.

120. A case study of the ASIC Act has underpinned consideration and evaluation of the compensatory statutory protections conferred where the PSI is abrogated. Ultimately, it concluded that the current position

of direct use immunity is supportable. Evidentiary immunities have shaped investigations and prosecutions for over 150 years.<sup>215</sup> The modern corporate world is characterised by increasingly complex crime and limited resources. The perspectives of commentators, practitioners and judges have informed this evaluation; the way forward is in Parliament's hands.

121. Analysis of the LPP and the PSI and the case study of abrogation of the PSI in the ASIC Act suggests that:

- (1) at the level of theory, both forms of privilege are compatible with the effective administration of both criminal and civil justice; and
- (2) where problems are seen to arise, they are best dealt with by specific and targeted legislation, not by wholesale abrogation or limitations upon the privileges.

## References

To see references please refer to:  
<http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/>

[Speeches/2017%20Speeches/McDougall\\_20170920.pdf](#)

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# The Lawyer-turned-Informant: Where Does One Draw the Line On Legal Professional Privilege?

How a prominent criminal barrister sparked a royal commission.

It sounds like a plot from a 1990s Scorsese movie, but it happened in real life. Unfortunately, the consequences are very real too. On Monday, the media announced that a barrister acting in the cases of 386 Melbourne gangland criminals was in fact, a police informant. This means that the information she received while defending these criminals was used against them by the prosecution. The lawyer informant now faces serious threats to her safety.

This may sound highly unethical, and it is. But beyond this, it's a breach of one of the most important legal principles – the right of a defendant to disclose information to their lawyer in confidence. So what is legal professional privilege and a lawyer's duty of confidence?

Here, we'll explain what it means and how this case could see many incarcerated figures of Melbourne's underworld released.

## Legal professional privilege

As a barrister, the current legal ethics legislation is the **Legal Profession Uniform Conduct (barristers) Rules 2015 (Vic)**. The relevant sections include rule 114 which states that a barrister shouldn't reveal confidential information. This leads to the tension between a duty to the client (35) and the duty to the court (23). Even in the case that the client tells the barrister that they are guilty they

*...the lawyer is not to reveal confidential communications. When this privilege is lost it is due to fraud and abuses of powers 125.*

are still not to disclose this to the court (80). Furthermore if a client says they will disobey the court they still aren't to disclose this. The only reason to disclose would be if they reasonably believe someone's safety is at risk which varies client to client (81&82). This leaves the lawyer informant most likely as one who has breached legal privilege.

## Evidence Act & the Lawyer informant

**The Evidence Act 2008 (Vic)** also provides for legal privilege. Hence, the core concept is that the lawyer is not to reveal confidential communications. When this privilege is lost it is due to fraud and abuses of powers 125. Even, for this to take place, the person relying upon this must prove that the legal privilege doesn't apply and evidence must be provided. Ultimately, the crux is that a client should be candid and be able to trust their **criminal lawyer**.

## Overtaken Convictions

For three years a suppression order existed. The purpose of such an order is to prevent someone revealing the identity of the informant. However, the High Court found the breach of privilege to detract from the integrity of the legal system. As a result, the court authorised the publishing of the details. The issue of previous convictions relates to how the prosecution obtained the evidence. The Evidence Act 2008 (Vic) s 138 is about illegally obtained evidence. In this section some important considerations as to whether to use the evidence include its usefulness (probative value). However, there are other factors like if the breach was deliberate and the seriousness of the breach. The **courts** have held in the past that this section is a balancing act between the system sentencing the offender. The other being if the integrity of the court and legal system is reduced.

## References

<https://lawpath.com.au/blog/lawyer-turned-informant-draw-line-legal-professional-privilege> 7 December 2018



# Uniform Evidence Law (ALRC Report 102, Section 15)

8 February 2006

## Professional confidential relationship privilege

15.3 Under the common law, the only relationship in which communications are protected from disclosure in court is that between a lawyer and a client. In ALRC 26, the ALRC proposed the creation of a further discretionary privilege that would cover confidential professional relationships. Such a privilege would cover communications and records made in circumstances where one of the parties is under an obligation (legal, ethical or moral) not to disclose them.

15.4 The ALRC determined that there are many relationships in society where a public interest could be established in maintaining confidentiality.<sup>[1]</sup> These relationships could include, for example, doctor and patient, psychotherapist and patient, social worker and client or journalist and source.<sup>[2]</sup> In ALRC 26, the Commission noted that, for example, there are circumstances in which confidentiality is crucial to

the furtherance of an accountant and client relationship.<sup>[3]</sup> Given the controversial nature of some of these categories, and the aim of the uniform Evidence Acts to allow as much evidence as possible to be made available in court proceedings, the ALRC proposed that such a privilege be granted at the discretion of the court, stating: The public interest in the efficient and informed disposal of litigation in each case will be balanced against the public interest in the retention of confidentiality within the relationship and the needs of particular and similar relationships.<sup>[4]</sup>

15.5 This proposal was not adopted as part of the Evidence Act 1995 (Cth). However, the Evidence Act 1995 (NSW) provides for a professional confidential relationship privilege.<sup>[5]</sup> Section 127A of the Evidence Act 2001 (Tas) provides an absolute privilege for medical communications in civil proceedings.

15.6 In 1993, the Law Reform Commission of Western Australia

(LRCWA) recommended the enactment of a general discretion to protect information disclosed in the course of a confidential relationship. The recommendation was based on s 35 of the Evidence Amendment Act (No 2) 1980 (NZ) and was similar to the ALRC's recommendation, proposing that the court weigh the public interest in having the evidence disclosed against the public interest in the preservation of confidentiality between the confider and the professional.<sup>[6]</sup> This proposal has not been adopted in Western Australia to date.

## Confidential relationship privilege: New South Wales

15.7 Under s 126A of the Evidence Act 1995 (NSW), a 'protected confidence' for the purpose of the section means a communication made by a person in confidence to another person (the confidant):

- (a) in the course of a relationship in which the confidant was acting in a professional capacity, and

- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

15.8 Section 126B provides:

- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
  - (a) a protected confidence, or
  - (b) the contents of a document recording a protected confidence, or
  - (c) protected identity information.
- (2) The court may give such a direction:
  - (a) on its own initiative, or
  - (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:
  - (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and
  - (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
  - (a) the probative value of the evidence in the proceeding,
  - (b) the importance of the evidence in the proceeding,
  - (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,
  - (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,
  - (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,
  - (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,

- (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,
- (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

15.9 Although the ALRC's reports were canvassed in the context of the New South Wales amendments, Odgers cites the source of the privilege as the New South Wales Attorney General's Department 1996 Discussion Paper Protecting Confidential Communications from Disclosure in Court Proceedings.<sup>[7]</sup> The discretionary approach to such a privilege, as advocated by the ALRC, was adopted in the New South Wales amendments. The evidence must be excluded if there is a likelihood that harm would be or might be caused, whether directly or indirectly, to the person who imparted the confidence and the nature and extent of that harm outweighs the desirability of having the evidence given or the documents produced.<sup>[8]</sup>

15.10 Division 1A does not create a true privilege, but allows the court a discretion to direct that evidence not be adduced where it would involve the disclosure of a protected confidence.<sup>[9]</sup> The court must balance the matters set out in s 126B(4), including the probative value of the evidence in the proceeding and the nature of the offence, with the likelihood of harm to the protected confider in adducing the evidence, and then decide if it is appropriate to give a direction under the section.

15.11 There have not been a significant number of cases concerning Division 1A. In *Urquhart v Latham*, Campbell J considered how the test in s 126B should be exercised. His Honour noted that 'there is a policy concerning the protection of confidences which underlies s 126B, which requires matters favouring the protection of professional confidences, of the type defined in s 126A, to be

taken into account in the exercise of discretions about what evidence should be admitted in a hearing'.<sup>[10]</sup>

15.12 The limits of the term 'acting in a professional capacity' have not been tested yet in New South Wales. Odgers notes that the types of relationships referred to in the definition of a protected confidence could include doctor/patient, nurse/patient, psychologist/client, therapist/client, counsellor/client, social worker/client, private investigator/client and journalist/source.<sup>[11]</sup> It was the intention of the ALRC in its original proposal that the privilege be sufficiently flexible to allow the court to protect information in a range of relationships where confidentiality is particularly important.<sup>[12]</sup>

15.13 One relationship which has been brought to the attention of the Inquiry is that of medical and social researchers and their interviewees.<sup>[13]</sup> It is envisaged by the Commissions that this type of relationship may, depending on the nature of the research undertaken, fall under the confidential relationship privilege.

15.14 In supporting the adoption of a discretionary privilege for confidential relationships, the LRCWA identified the advantages of the privilege as providing greater flexibility for the courts to assess the individual merits of each case, and placing all confidential relationships (other than that between a lawyer and a client) on an equal footing. Some of the disadvantages were noted to be that the 'balancing test' could be difficult to assess in some cases, that the provision could not guarantee confidentiality and that it is undesirable to create further means whereby relevant evidence can be excluded from the court.<sup>[14]</sup>

### Journalists' sources

15.15 Since the publication of DP 69, the issue of protection of journalists' sources has received significant media attention. Under the common law, courts have consistently refused to grant journalists a privilege or lawful excuse under

*continued on page 44*

which they can refuse to reveal their sources.<sup>[15]</sup> The journalists' code of ethics prohibits a journalist from revealing a source once a commitment to confidentiality has been made. At the time of writing, legal proceedings had commenced against two Herald Sun journalists for protecting the source of leaked government documents regarding changes to veterans entitlements.<sup>[16]</sup> The Attorney-General of Victoria has indicated his support for a uniform national approach to journalists' sources.<sup>[17]</sup> The Australian Government Attorney-General has also announced that the issue would be considered by the Government.<sup>[18]</sup>

- 15.16 Journalism is a profession which falls under ss 126A and 126B of the Evidence Act 1995 (NSW). The adoption of the New South Wales provisions has been mooted by a number of submitters as a possible way forward in Australia as a basis on which a journalist may legally protect a source's identity. Since its enactment, few cases have considered the application of s 126B to journalists' sources. *NRMA v John Fairfax Publications* applied the section to a journalist and source relationship. In that case, Macready J considered the discretionary factors in 126B. On the first question of whether any harm would come about as a result of the revealing of the information, the Master stated that, in the circumstances, giving the evidence was likely to lead to proceedings against the protected confider. The initiation and running of proceedings might cause harm, 'although if the proceedings are justified, the relevance of the harm is lessened'.<sup>[19]</sup> The Master then considered the actionable breaches of the Corporations Act and other causes of action based on a directors' code of conduct (which was the information that the source has disclosed). Finally, Master Macready took into account policy considerations based on the desirability of the flow of information and the centrality of keeping the identity of sources confidential to

achieve this end. In that case, it was determined that the interests of justice in the plaintiff having an effective remedy outweighed the possible harm which could be caused to the reputation of journalists and their ability to obtain information if they were forced to reveal sources.<sup>[20]</sup>

- 15.17 The New Zealand Evidence Bill 2005<sup>[21]</sup> includes a specific privilege protecting journalists' sources, as well as a general confidential relationship privilege. The provision is a qualified privilege, and applies a balancing test similar to s 126B. Clause 64(1) of the Bill provides a general presumption that where a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered. However, a judge may order that subsection (1) does not apply if satisfied that the public interest in the disclosure of evidence of the identity of the informant outweighs any likely adverse effect of the disclosure on the informant or any other person; and also outweighs the public interest in the communication of facts and opinion to the public by the news media and, in the ability of the news media to access sources of facts.<sup>[22]</sup>
- 15.18 The New Zealand Law Commission recommended this section in its 1999 report on Evidence.<sup>[23]</sup> The Commission based this recommendation on the need to promote a free flow of information, which is a vital component of a democratic system. Whilst the original proposal was to have journalists' sources fall under the general confidential communications privilege, the Commission decided that a specific qualified privilege would give greater confidence to a source that his or her identity would be protected.<sup>[24]</sup>

## DP 69 proposal

- 15.19 In DP 69, the Commissions proposed the addition of a qualified

confidential relationship privilege to the Evidence Act 1995 (Cth) for the same reason it was supported in the previous Evidence inquiry. The provision of a discretionary privilege would allow the competing public interests to be taken into account when the court is assessing whether evidence ought in the circumstances to be compelled from witnesses, thus allowing the courts to be sensitive to the individual needs of witnesses and of relationships.<sup>[25]</sup>

- 15.20 Most consultations undertaken supported the adoption of a qualified confidential relationship privilege. Practitioners and judges were unaware of areas in which the operation of either privilege has caused concern in New South Wales.<sup>[26]</sup> Given the support expressed for the New South Wales provision, the Commissions argued it was in the interests of consistency and uniformity for the Commonwealth Act to adopt the New South Wales confidential communications provisions.<sup>[27]</sup> The Commissions further proposed that this privilege apply to pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and notices to produce documents, as well as court proceedings.<sup>[28]</sup>

## Submissions and consultations

- 15.21 A number of submissions were opposed to this proposal.<sup>[29]</sup> The Australian Securities and Investment Commission (ASIC) argues that the major policy rationale for legal professional privilege does not apply in the case of other professional relationships as it is not a fundamental requirement of the justice system that a client be free to obtain professional advice other than legal advice. Furthermore, not all other professions are subject to the same rigorous regime of professional obligations as legal practitioners, including the overriding obligation to the court. If privilege were extended to other professionals such as accountants, this would provide more avenues for abuse and pose greater

difficulties for ASIC in its attempt to uncover the full facts. ASIC submits that if privileges are to be extended beyond the obtaining of legal advice, any such extension should be confined to particular areas, such as sexual assault communications and medical communication privilege, but should not be extended to include business and commercial areas.<sup>[30]</sup>

15.22 This view was shared by the Commonwealth Director of Public Prosecutions (CDPP), which recommends that confidential relationships privilege not be enacted. In the CDPP's view, it is difficult to see that the interests of justice are served by introducing provisions which could operate to inhibit evidence being tendered to a court. Further, the policy rationale for legal professional privilege does not apply to relationships other than lawyer and client. The CDPP states that claims for legal professional privilege are currently abused in criminal investigations in Australia and the extension of a confidential relationship privilege to other professional relationships would be potentially open to the same abuse.<sup>[31]</sup>

15.23 The Office of the Director of Public Prosecutions (NSW) (NSW DPP) supports the adoption of the New South Wales provisions in the Commonwealth Act. However, the submission does not support extension of the privilege to the investigatory stage, as it could adversely impact on the ability of investigatory agencies to gather relevant material and identify leads for investigation.<sup>[32]</sup>

15.24 On the issue of protection of journalists' sources, the Press Council of Australia expresses support for the uniform Evidence Acts to adopt a provision based on the New Zealand Evidence Bill. However, as an alternative position, the Council supports adopting a provision equivalent to that in the Evidence Act 1995 (NSW).<sup>[33]</sup> The Media, Entertainment and Arts Alliance expresses a similar view in its submission, arguing that, although little litigation has occurred around s 126A and therefore it is unclear the extent of

the protection it offers, 'there is a strong argument for not reinventing the wheel'. The Alliance further supports the extension of the privilege to pre-trial processes, noting that, in most cases, issues of contempt arise at this stage of the proceedings.<sup>[34]</sup>

15.25 Corrs Chambers Westgarth makes a submission to the Inquiry on behalf of a number of major news and broadcasting services. In that submission, it is proposed that the uniform Evidence Acts be amended to give journalists a legal right to refuse to disclose the identity of confidential sources other than in exceptional circumstances. These circumstances include the protection of national security, prevention of the commission of a serious crime or protection of the physical safety of any person where it is in the public interest to allow disclosure. The submission further argues that it should be presumed that disclosure is unnecessary, and that journalists should be provided with protection from search and seizure powers which may lead to disclosure of a confidential source. The submission bases this proposal on the fundamental nature of the journalist's undertaking not to reveal sources, and the role of the media in encouraging political discussion, and scrutiny of the democratic process.<sup>[35]</sup> The submission notes a number of important cases where anonymous journalists' sources have exposed matters of public significance such as the Watergate investigations, and in Australia, the Khemlani loans affair and the political corruption which resulted in the Fitzgerald Inquiry in Queensland.<sup>[36]</sup>

15.26 The Office of the Victorian Privacy Commissioner submits that in considering the competing interests in privacy related matters, matters additional to the public interest test should be considered. These additional matters should include the effect of disclosure on the privacy of third parties, the availability of other, less privacy-invasive means of obtaining the information, and express consideration of ways to

ameliorate the harm, such as using pseudonyms and holding hearings in camera.<sup>[37]</sup>

15.27 The Litigation Law and Practice Committee of the New South Wales Law Society supports the proposal, and its extension to pre-trial contexts. It notes that s 126A does not create a true privilege, but rather a discretion to direct that evidence not be adduced. It would be inappropriate for the privilege not to apply to pre-trial matters, such as discovery, where the issues relating to protected confidences are most likely to arise.<sup>[38]</sup>

15.28 The Australian Government Attorney-General's Department submits that the Government supports the introduction of a qualified professional confidential communications privilege. However it considers that clearer direction should be given to the court in how to exercise its discretion, in particular by specifying certain circumstances in which the privilege would not apply. The Australian Government's preferred approach is that the legislation should create a presumption that a confidential communication will be protected from disclosure. However, the protection will not apply where: disclosure is required in the interests of justice, including interests of national security; there is a need to protect classified material (subject to appropriate safeguards to protect against the disclosure of sensitive information in evidence); the communication was made in furtherance of the commission of a fraud or other serious criminal offence, or participation in serious and organised crime; or the disclosure is necessary to demonstrate the innocence of an accused. It would be a matter for the court to determine whether one of the circumstances applies or the interests of justice otherwise require the disclosure of the information, in which case the court could direct a witness to answer the relevant question.<sup>[39]</sup>

15.29 One area in which the proposal will have a significant impact

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*continued on page 46*

is in relation to Family Court proceedings. The Commissions were told in a number of consultations that psychiatrists' and doctors' reports are often subpoenaed in child residency matters. This is sometimes crucial information for the court when making a parenting order. There were concerns raised that a confidential relationship privilege could prevent courts obtaining access to this information.<sup>[40]</sup> The Family Law Council submits that other relevant information that the court may need to access includes files from state and territory child welfare agencies, medical records and school counsellors' records. In the Council's view, it is imperative that the court has access to this information. If a parent is able to claim privilege, it may hamper the operation of the paramountcy principle in the Family Law Act 1975 (Cth) and limit the information the court has available to make the best possible decision.<sup>[41]</sup> The Family Law Council also has concerns about the effect of the privilege on projects such as the Family Court's Magellan project, which involves disputes which include allegations of serious physical and sexual abuse against children. The project is based on information sharing between agencies to reach fast resolution in matters, and a confidential relationship privilege may impinge on its successful operation.<sup>[42]</sup>

15.30 However, the Family Court of Australia agrees that, in the interests of uniformity and consistency, the Commonwealth Act should include a provision allowing the court to direct that evidence should not be adduced where it would disclose confidences made in the context of a professional relationship. In order to overcome the problem identified by the Family Law Council, the Family Court proposes that an additional balancing criterion be applied to the Evidence Act 1995 (Cth) stating that in family law proceedings concerning children, the best interests of

the child should be a paramount consideration. The Family Court also suggests that provision be made for the situation where a child is the protected confider. This will allow a representative of the child to make the claim for privilege on behalf of the child.<sup>[43]</sup>

### Commissions' view

15.31 The Commissions agree there is an ongoing tension between the codes of ethics and professional duties of many professions in Australia and the legal duty to reveal to the courts information said in confidence. In many of these relationships, there is a clear public interest that can be demonstrated in protection of a confidence, such as the encouragement of people to seek treatment or the provision of information that could expose corruption or maladministration in government. However, the exclusion of otherwise relevant evidence from the court's consideration is a very serious matter. The legal protection of professional confidential communications thus raises a 'difficult mix of fundamental private and public interests'.<sup>[44]</sup> The Commissions believe that the ALRC's original reasoning for proposing a confidential relationship privilege remains sound.

15.32 The Commissions agree that an analogy cannot be drawn between the lawyer and client relationship and other professional relationships. Client legal privilege affords an absolute protection because it is always considered to be in the interests of justice that a client knows that any facts relating to past events revealed to a lawyer will remain confidential.

15.33 A qualified professional confidential relationship privilege acknowledges that it may be in the interests of justice to protect the confidentiality of a particular relationship in the circumstances of that case. The view of ASIC regarding the potential abuse of such a privilege is noted. However, the Commissions believe that the fact that the privilege is discretionary, and that parties are able to make an argument as to why the material

should be disclosed, will allow a judge to circumvent illegitimate attempts to claim the privilege.

15.34 The different formulation of a confidential relationship privilege as proposed by the Australian Government Attorney-General's Department is noted. However, given the support expressed for the New South Wales provisions, and the lack of submissions indicating there is a serious problem with them, the Commissions believe it is in the interests of consistency and uniformity for the Commonwealth Act to adopt the New South Wales confidential professional relationship privilege provisions. [45] These provisions should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena, and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.

15.35 The Commissions agree that in family law proceedings concerning children, the interests of the child may outweigh the harm that may be caused, whether directly or indirectly, to the person who imparted the confidence. The Commissions support the suggestion of the Family Court that, in the adoption of s 126A in the Commonwealth Evidence Act, explicit reference should be made to consideration of the paramountcy principle in family law proceedings concerning children. The Commissions also note that, in family law proceedings, a child's interests are often represented by independent counsel. Provision should therefore be made for a representative of the child to make the claim for privilege on behalf of the child. It has been noted in consultations that additional hearing time will now be required to hear argument over whether the privilege applies to subpoenaed documents. [46] The Commissions acknowledge that the addition of a new privilege in the family law jurisdiction will have some resource implications for the Family Court, but believe the wider benefits of the adoption of the privilege in the Commonwealth

Evidence Act outweigh this concern. If adopted, the Family Court and the Australian Government should monitor the resource implications resulting from the proposal.

15.36 The Commissions therefore recommend that the uniform Evidence Acts be amended to provide for a professional confidential relationship privilege as set out in this recommendation. The proposed provisions are modelled (with some modifications) on the privilege available under Part 3.10 Division 1A of the Evidence Act 1995 (NSW). The principal elements of this privilege should be as follows.

- (a) The privilege should protect:
  - (1) protected confidences—communications made in the course of a professional relationship, whenever made, where the person to whom the communication was made was under an express or implied obligation of confidence. The Evidence Act 1995 (NSW) definition of protected confidence (in s 126A) should be clarified to ensure that the confidentiality obligations are not restricted to those arising under law; and
  - (2) protected identity information—the Evidence Act 1995 (NSW) definition of this concept (in s 126A) should be clarified so that it only relates to information from which the identity of the person making the confidential communication can reasonably be ascertained.
- (b) The court should be able to give such a direction on application by the person who made the confidential communication, or the person to whom it was made (whether or not a party).
- (c) In determining whether to give a direction, the court should be required to balance the nature and extent of the likely harm that would or might be caused to the person who made the confidential communication by adducing the evidence against the desirability of the evidence being given. However, if it finds that the former outweighs the latter, the court should be required to give the direction.
- (d) The uniform Evidence Acts should include a non-exhaustive list of factors that the court should be required to take into account under these provisions. That list should be the same as in the Evidence Act 1995 (NSW).

(e) The court should not be entitled to make an order where the person who made the confidential communication has consented to the evidence being given, or where the communication was made (or the document prepared) in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty. This provision should be similar to s 125(1)(a).<sup>[47]</sup>

(f) The court should have the power to make appropriate orders to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, as provided in the Evidence Act 1995 (NSW).

15.37 A draft of Part 3.10 Division 1A is included in Appendix 1. However, the draft does not deal with the implementation of Recommendation 15–3 regarding extension of privilege for the reasons discussed in Chapter 14.

#### Recommendation 15–1

The uniform Evidence Acts should be amended to provide for a professional confidential relationship privilege. Such a privilege should be qualified and allow the court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given. The confidential relationship privilege available under Part 3.10, Division 1A of the Evidence Act 1995 (NSW) should therefore be adopted under Part 3.10 of the Evidence Act 1995 (Cth).

#### Recommendation 15–2

If Recommendation 15–1 is adopted, Part 3.10, Division 1A of the Evidence Act 1995 (Cth) should include that in family law proceedings concerning children, the best interests of the child should be a paramount consideration and that, where a child is the protected confider, a representative of the child may make the claim for privilege on behalf of the child.

#### Recommendation 15–3

The professional confidential relationship privilege should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings

### Medical communications privilege: Tasmania

15.38 Under s 127A(1) of the Evidence Act 2001 (Tas), a medical practitioner must not divulge, in any civil proceeding, any communication made to him or her in a professional capacity by the patient that was necessary to prescribe treatment or act for the patient (unless the sanity of the patient is the matter in dispute).

15.39 This privilege was carried over from the Evidence Act 1910 (Tas) and can also be found in the evidence legislation in Victoria and the Northern Territory.<sup>[48]</sup> In these jurisdictions, the privilege is only available in civil proceedings.

15.40 As noted in Chapter 2, in addition to its participation in the joint review, the VLRC is also undertaking a review of the laws of evidence currently applying in Victoria. The VLRC has consulted widely on whether a medical communications privilege should remain in Victoria or whether a confidential relationship privilege is the preferred model. It should be noted that the VLRC has received submissions from health practitioners, nurses and pharmacists supporting the adoption of a confidential relationship privilege rather than a strict medical communications privilege.<sup>[49]</sup>

15.41 The ALRC considered this privilege in ALRC 26 and found three main benefits—protecting patients' privacy, encouraging people to seek treatment, and promoting the public interest in effective treatment of patients. Associate Professor Sue McNicol has criticised the privilege on the grounds that, particularly in personal injury matters, doctor-patient privilege could well constitute an impediment to the fact-finding process.<sup>[50]</sup> She further argues that the grant of the privilege is unlikely to induce or encourage patients to visit doctors, and therefore there is no sound policy rationale for the privilege.<sup>[51]</sup>

15.42 The ALRC noted that many of the arguments in favour of the privilege focused more on a right to privacy than on whether problems are caused by the

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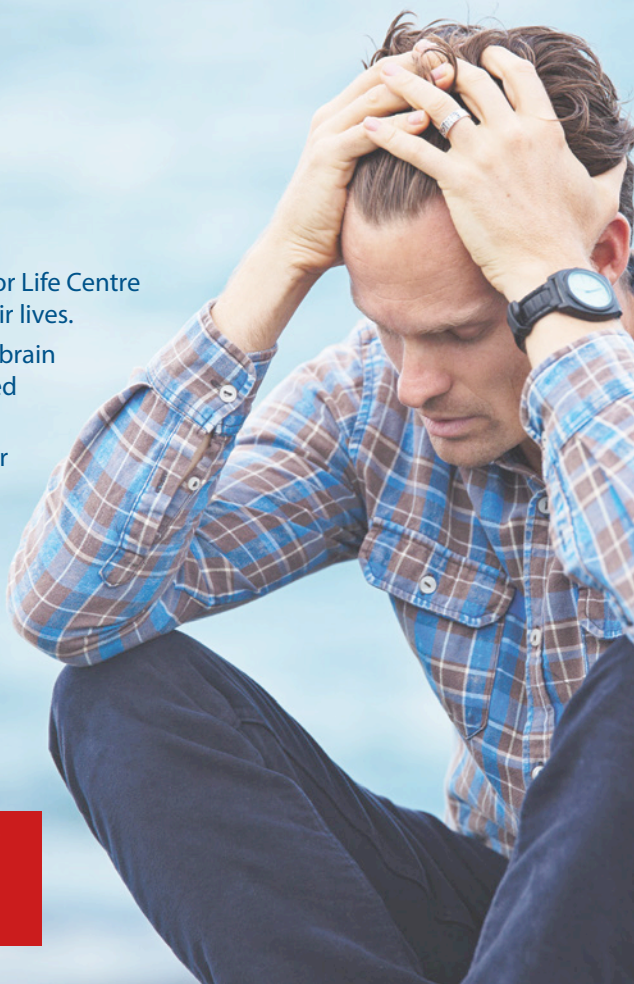
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absence of the privilege or benefits that would follow from its implementation.<sup>[52]</sup> The ALRC found that this rationale suggests a need for a power to excuse medical witnesses in certain cases, rather than to provide a blanket privilege or primary rule of privilege with exceptions.<sup>[53]</sup> It contrasted the position of a doctor with that of a lawyer. While each relationship is aided by confidentiality, and confidentiality will encourage people to seek professional services, different considerations apply to doctors and lawyers. Unlike the doctor's role, the lawyer's role cannot be performed if he or she can be compelled to give evidence against a client.<sup>[54]</sup> As such, the ALRC proposed that the doctor–client relationship should fall under the general privilege proposed to cover confidential relationships.

- 15.43 The LRCWA similarly found that the public interest in the protection of confidential information in the hands of doctors does not outweigh the public interest in courts having all relevant information available to them so as to justify the creation of a privilege.<sup>[55]</sup>

### Commissions' view

- 15.44 In DP 69, the Commissions did not support the inclusion of a medical relationship privilege in the Evidence Act 1995 (Cth) for the same reasons it was not supported in the previous Evidence inquiry. It was considered that proper protection of confidential medical communications could occur under the confidential relationship privilege. On that basis no recommendation regarding adoption of a medical communications privilege is made.

### Sexual assault communications privilege

- 15.45 Sexual assault communications are communications made in the course of the confidential relationship between the victim of a sexual assault and a counsellor. From the mid-1990s onwards, ongoing reform of sexual assault laws and procedure included the enactment of

legislation to limit disclosure of these communications.<sup>[56]</sup> The question whether these communications are privileged may arise where records of counselling session are subpoenaed, or where evidence of a communication is sought to be adduced in a proceeding.

- 15.46 Every state and territory except Queensland now has some restriction on access to counselling communications.<sup>[57]</sup> A number of the provisions are based on the model developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General in its 1999 report on Sexual Offences Against the Person.<sup>[58]</sup> Most jurisdictions allow the court to examine the evidence and then determine whether disclosure should be ordered, based on whether the public interest in protecting the confidentiality of the communication is substantially outweighed by the interest in its disclosure. In the ACT, Western Australia and South Australia, the court can only consider an application for disclosure once it has been satisfied by the applicant that there is a legitimate forensic purpose for the application.<sup>[59]</sup> Only Tasmania provides an absolute protection for such communications.<sup>[60]</sup>

Rationale for the privilege

- 15.47 The issue of the confidentiality of sexual assault communications emerged in the 1990s. Commentators at the time noted that, as an unintended consequence of the 'rape shield' provisions limiting questioning of a complainant's sexual history and conduct, subpoenas in criminal proceedings were increasingly being used by defence counsel to access counsellors' notes. The notes were sought with a view potentially to impugn the complainant's story.<sup>[61]</sup>
- 15.48 The Model Criminal Code Officers Committee (MCCOC) suggests a number of public policy reasons in favour of a sexual assault communications privilege. It argues that sexual assault counsellors now serve a crucial role in the justice system and that it is not unreasonable to assume that, if counselling notes are not

confidential, complainants will not seek counselling, or will not be entirely frank during counselling sessions. This will reduce the efficacy of the counselling process. Further, if complainants do not use the services of counsellors then the likely result will be lower reporting of sexual offences and withdrawal of complaints. If notes are not protected, sexual assault counselling services may adopt practices—such as minimal record keeping or making dummy files—that both inhibit the counselling relationship, and mitigate against the accountability of the counsellor.<sup>[62]</sup>

- 15.49 The MCCOC also suggests that records of counselling will have very limited relevance in cases involving allegations of sexual assault. Sexual assault counsellors argued that sexual assault counselling is concerned with the emotional and psychological responses of the complainant to the assault. As such, the 'facts' surrounding the assault are likely not to be discussed, and the exploration of feelings will undermine the forensic reliability of what is recorded.<sup>[63]</sup>
- 15.50 Sexual assault communications are also seen as deserving of protection because of the nature of the crime itself, which is widely considered a more distressing and intimate crime than other crimes involving physical injury. In supporting a privilege for sexual assault communications, the Supreme Court of Canada drew a distinction between sexual assault communications and other communications in a doctor/patient context.

A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong.<sup>[64]</sup>

continued on page 50

## Different models of sexual assault counselling privilege

15.51 While some form of protection is afforded to sexual assault counselling communications in each state and territory, the models adopted by different jurisdictions differ markedly. The main point of divergence is whether the privilege is qualified or absolute. Within that distinction, there is a further differentiation as to whether an absolute or qualified privilege applies in preliminary criminal proceedings such as committal proceedings.

15.52 A further issue encountered in this area is whether the privilege provisions apply in the context of inspection of documents produced on subpoena. A number of provisions were drafted in terms of 'adducing evidence'. This means that the provisions do not apply to prevent counselling records being subpoenaed and inspected.<sup>[65]</sup>

## An absolute or qualified privilege?

15.53 A common argument against the availability of a sexual assault communications privilege is that an accused must be able to access all available evidence that may be used in his or her defence. A mandatory prohibition or absolute privilege is supported on the basis that the policy arguments in favour of non-disclosure of the material are sufficiently strong to support a statutory exclusion of the type given to client legal privilege.<sup>[66]</sup> Annie Cossins and Ruth Pilkington have argued that the effect of disclosure, and its impact on complainants reporting or proceeding with claims of sexual assault, are serious impediments to the effective administration of justice.<sup>[67]</sup> In Canada, L'Heureux-Dube J drew this conclusion in *R v Osolin*: If the net result is to discourage witnesses from reporting and coming forward with evidence, then, in my view, it cannot be said that such practices would advance either the trial process itself or enhance the general goals of the administration of justice.<sup>[68]</sup>

15.54 The MCCOC rejects any analogy between client legal privilege and

a sexual assault communications privilege. It argues that the client/lawyer relationship is central to the operation of the law, and therefore requires the highest level of protection. While the outcomes of a failure to protect confidences between a complainant and a sexual assault counsellor may be regrettable if offenders are not brought to justice, the absence of a privilege does not affect the operation of the legal system.

<sup>[69]</sup> Further, the MCCOC's view is that an accused must have the right to seek production of and access to records, as a fundamental aspect of criminal procedure. In the MCCOC's view, a blanket prohibition will promote stay applications and increase the prospects of successful appeals against conviction on the ground that the particular conviction is unsafe and unsatisfactory.<sup>[70]</sup>

15.55 The MCCOC supports a qualified privilege, in which competing public interests are balanced. However, the MCCOC considers that the prohibition on the production of notes at committal is justified on the basis that once production and access to the material is gained for the purposes of bail proceedings or committal, the immunity is defeated for the purposes of the trial. The MCCOC also considers that the differentiation is consistent with other provisions in some states that limit the defence's scope to cross-examine a complainant at committal.<sup>[71]</sup> This model has been adopted in New South Wales and a number of other states, and was recently recommended by the Victorian Law Reform Commission.<sup>[72]</sup>

Qualified privilege: New South Wales

15.56 A qualified privilege for sexual assault communications is available under Part 3.10 Division 1B of the Evidence Act 1995 (NSW) and Division 2 of Part 5 of Chapter 6 of the Criminal Procedure Act 1986 (NSW). Originally, Division 1B of the Evidence Act 1995 (NSW) was inserted by the Evidence Amendment (Confidential Communications) Act 1997 (NSW) and applied in both civil and criminal proceedings. In 1999, part of Division 1B was re-enacted as (the then) Part 7 of the Criminal Procedure Act 1986

(NSW) and Division 1B was amended and confined to apply only in civil proceedings.<sup>[73]</sup>

15.57 The chief reason for re-enacting the provisions in the Criminal Procedure Act was the decision in *R v Young*.<sup>[74]</sup> It was held in that case that Division 1B applied only to the adducing of evidence and could not protect sexual assault communications in relation to discovery and the production of documents.

15.58 Division 1B now applies only to the adducing of evidence in civil proceedings 'in which substantially the same acts are in issue as the acts that were in issue in relation to a criminal proceeding'.<sup>[75]</sup> Further, the privilege only applies where the evidence is found to be privileged under Chapter 6 of the Criminal Procedure Act.<sup>[76]</sup> This effectively limits the privilege in civil proceedings to circumstances where a criminal proceeding has been brought and a privilege claim has been made and determined in that proceeding.

15.59 At the time of enacting the confidential relationship privilege, the New South Wales Government argued that communications between a sexual assault victim and a counsellor require a particular privilege.<sup>[77]</sup> At trial, the Criminal Procedure Act provides that evidence of counselling communications<sup>[78]</sup> is not be disclosed or admitted unless the defence can show the evidence has substantial probative value and that the public interest in protecting the confidentiality of the communications is substantially outweighed by the public interest in allowing disclosure. The requirement that the public interest in protection be substantially outweighed by the public interest in allowing disclosure is a higher test than, for example, the similar balancing exercise under the confidential relationship privilege.<sup>[79]</sup> In preliminary criminal proceedings, such as committal proceedings, there is an absolute prohibition on records being sought or evidence being adduced.<sup>[80]</sup>

15.60 Central to the granting of the privilege is the existence of a counselling relationship. Under s

296(5) of the Criminal Procedure Act, a definition of 'counselling' is given which includes a requirement that the counsellor has undertaken study or has relevant experience, and that support, encouragement, advice, therapy or treatment is given.<sup>[81]</sup> The counselling must also be given in relation to any harm the person may have suffered. Under s 295(1), 'harm' includes physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation or fear). Absolute privilege: Tasmania

15.61 The privilege for communications to sexual assault counsellors under s 127B of the Evidence Act 2001 (Tas) differs from the privilege under the Criminal Procedure Act as the former provides absolute protection of the communications unless the complainant consents to their production. Section 127B applies only to criminal proceedings and was enacted following a review of sexual offences in Tasmania.<sup>[82]</sup> After examining the New South Wales legislation, the Tasmanian government determined that, given the nature of the material, an absolute protection is warranted.<sup>[83]</sup>

Victorian Law Reform Commission report

15.62 In August 2004, the VLRC released its final report on sexual offences.<sup>[84]</sup> In that report, the VLRC considered both the New South Wales and Tasmanian models of sexual assault counselling privilege. Although considerable support was received for the Tasmanian approach of an absolute privilege, the VLRC recommended that the Victorian evidence legislation adopt a model closer to the New South Wales provisions. Under this recommendation, a counselling communication must not be disclosed except with the leave of the court.<sup>[85]</sup> Where a person objects to production of a document which records a counselling communication, he or she cannot be required to produce the document unless the document is produced for examination by the court for the purposes of ruling on the objection. Before ordering production, the court must be satisfied that:

- the contents of the document have substantial probative value;
- other evidence of the contents of the document or the confidence is not available; and
- the public interest in preserving the confidentiality of the communication and protecting the confider from harm is substantially outweighed by the public interest in allowing disclosure of the communication.<sup>[86]</sup>

15.63 Following the NSW and MCCOC model, the VLRC also recommended an absolute privilege in committal proceedings. This is the way the privilege currently operates in South Australia<sup>[87]</sup> and the ACT.<sup>[88]</sup> The VLRC argues that these recommendations strike the right balance between protection of the communication and the rights of the accused.

also heard strong support for an absolute privilege, from both academics and from sexual assault counsellors.<sup>[91]</sup> One academic argued that the public interest supports a need for victims of sexual assault to enjoy open and trusting relationships with counsellors, without the possibility that their communications will later be subject to scrutiny in court. This possibility, which is still present under qualified privilege, threatens the relationship of trust between a victim and his or her counsellor.<sup>[92]</sup>

15.66 Women's Legal Services Victoria argues that, in making the privilege qualified, the proposal will create disincentives for victims of sexual assault to seek counselling and may inhibit them from reporting the assaults to police. From a public

***Allowing the court to access these notes continues the invasions of privacy that those that have been sexually assaulted routinely experience.***

Our recommendations will allow evidence of confidential communications to be accessed by counsel and used in evidence where specified criteria are satisfied. These criteria balance the competing public interests of ensuring a fair trial for the accused and preserving the confidentiality of protected communications to the greatest extent possible.<sup>[89]</sup>

### Submissions and consultations

15.64 In DP 69, the Commissions proposed the adoption in the Evidence Act 1995 (Cth) of a qualified sexual assault communications privilege, as enacted in Division 1B of the Evidence Act 1995 (NSW) and Chapter 6 the Criminal Procedure Act 1986 (NSW).

15.65 As was the case following IP 28, the Commissions received support for a qualified privilege protecting sexual assault communications.

<sup>[90]</sup> However, the Commissions

policy perspective, both those outcomes are undesirable.<sup>[93]</sup> One sexual assault service agreed with this position, noting that the possibility of counselling session notes being viewed by the judge, and potentially by the defence, is a source of anxiety and distress for many victims (and counsellors). Allowing the court to access these notes continues the invasions of privacy that those that have been sexually assaulted routinely experience: beginning with violations of their bodily integrity at the time of the assault and persisting through the responses of the health and legal systems.<sup>[94]</sup>

15.67 Annie Cossins echoed this view, advising the Inquiry that her support for an absolute privilege was based on the fact that the notes serve little forensic purpose, and that some complainants will

*continued on page 52*

refuse to go to court if they know that the notes are going to be read, even if only by the trial judge.<sup>[95]</sup>

15.68 The advantage of the absolute privilege is that it addresses the policy concern of preventing subpoenas from being issued by the defence. Sexual assault counselling centres continue to be required to appear in court and argue privilege.<sup>[96]</sup> In this Inquiry, one service stated that counselling services use a substantial proportion of their limited resources defending subpoenas in court. Whilst those applications are usually successful, the cost is significant to the counselling service.<sup>[97]</sup>

15.69 One prosecutor notes that despite the rape shield laws, in an 'oath on oath' case, the character of the complainant is still often very much part of the case. In his view, it is problematic to be able to delve into one side's rehabilitative processes without the same capacity to delve into the accused's background.<sup>[98]</sup>

15.70 The New South Public Defenders Office (NSW PDO) does not support enactment of a sexual assault communications privilege in the Evidence Act 1995 (Cth), however, should one be recommended by the Inquiry, a qualified privilege is preferable.<sup>[99]</sup> The Law Society of New South Wales also does not support a sexual assault communications privilege, on the basis that defendants should be able to access any information that is exculpatory.<sup>[100]</sup>

### The Commissions' view

15.71 The Commissions agree with the finding of the VLRC (and the conclusion of the MCCOC) that such legislation serves the important public interest of encouraging people who have been sexually assaulted to seek therapy and may also encourage people who are sexually assaulted to report the crime to the police.<sup>[101]</sup>

15.72 As noted above, the MCCOC rejected an absolute privilege on the basis that a blanket prohibition would promote stay applications and increase the prospects of a successful appeal

***What stopped me was what was going to come out in the trial; knowing that the defence lawyer had researched all about me, like my medical history and employment, and the offender would hear all about me.***

against conviction on the ground that the conviction was unsafe and unsatisfactory.<sup>[102]</sup> The VLRC also notes in its Sexual Offences Interim Report that a complete prohibition on access to notes may result in some people being able to appeal successfully against their conviction.<sup>[103]</sup>

15.73 The decision to prevent what could otherwise be relevant information from consideration by a court is not one that should be taken lightly, especially in the context of a criminal trial. The strong view has been put that a failure to allow this evidence at least to be considered by a judge may result in a miscarriage of justice. In this Inquiry, the Commissions were told that it cannot be assumed that all sexual assault complainants are telling the truth.<sup>[104]</sup> Another view is that matters communicated to a rape crisis counsellor by a complainant shortly after the event might include relevant evidence that contradicts a later version of events.<sup>[105]</sup> In the VLRC Inquiry, the Criminal Bar Association of Victoria submitted that disclosure of counselling notes can reveal that the complainant is mentally ill, that alleged sexual misconduct did not occur, that the complainant has a documented motive to lie or that a child's disclosure has been 'infected' by a person in authority.<sup>[106]</sup>

15.74 It is the view of the Commissions, however, that this concern regarding a possible miscarriage of justice can be overstated. In a majority of cases, attacks on a complainant on the basis of disclosures made in a counselling context will be directed to the complainant's credibility. As has been discussed earlier, disclosures made in a counselling context may well be misleading for

a credit purpose due to the nature of the counselling relationship, the nature of the particular offence, and to the variances in the way that counsellors take notes.

15.75 Counsellors' notes are generally made for the purpose of providing therapy to the client, and not as a record of the assault. As part of the counselling process, a victim of a sexual assault is likely to discuss feelings of his or her own shame and guilt, and may disclose prior assaults or be unclear about the events surrounding the assault.<sup>[107]</sup>

15.76 This Inquiry has heard that, depending on the policies of the counselling service and the individual counsellor's preference, notes may be taken as a stream of consciousness or they may have the views of the counsellor interspersed with those of the client. The actual 'evidence' or facts of the case may be quite different to what is represented in the notes.<sup>[108]</sup> In most counselling practices, a client does not have an opportunity to check the notes that are taken, and so will not be able to correct the counsellor if an inaccurate version of his or her comments are recorded. Their forensic value cannot be equated to a police statement or other account.

15.77 Sexual assault is one of the most under-reported crimes in Australia. In its Interim Report, the VLRC found that it has the lowest reporting rate of any crime.<sup>[109]</sup> Studies have estimated that at least 85 per cent of sexual assaults never reach the criminal justice system, and, of those that do, very few reach trial.<sup>[110]</sup> The VLRC argues that concerns about the fairness of the criminal justice process contribute to substantial under-

reporting of sexual offences and may discourage people from giving evidence against alleged offenders at committal and at trial.<sup>[111]</sup>

- 15.78 Rape crisis centres have estimated that for twenty five per cent of clients the knowledge that sexual assault counselling notes can be subpoenaed had influenced the decision whether they would seek counselling or not.<sup>[112]</sup> Similar evidence was presented to the New South Wales Government prior to the enactment of the privilege in the original Division 1B of the Evidence Act 1995 (NSW).<sup>[113]</sup> The Australian Institute of Criminology has recently prepared a report studying the reasons behind a woman's decision to seek help from various services following a sexual assault.<sup>[114]</sup> The report found that, amongst other issues, two key concerns influencing the decision whether to report an assault to the police are confidentiality, fear of the assault becoming public knowledge, and the possibility of a defence lawyer being able to access details of medical and sexual histories.<sup>[115]</sup> One woman reported:

What stopped me was what was going to come out in the trial; knowing that the defence lawyer had researched all about me, like my medical history and employment, and the offender would hear all about me.<sup>[116]</sup>

- 15.79 It is clearly of the utmost importance that, in trying to make the legal system more supportive of the needs of complainants, the fundamental principles of a fair trial are not overridden. The VLRC commented: Prosecution for a sexual offence has very serious consequences for the accused, including life-long stigma and the possibility of a lengthy prison sentence if convicted. It is vital to safeguard the presumption of innocence and ensure that the criminal justice system treats people accused of offences fairly. However, the Commission does not accept the argument that this is the sole purpose of the criminal

justice system. The community has an interest in encouraging people to report sexual crimes and in apprehending and dealing with those who commit them.<sup>[117]</sup>

- 15.80 The Commissions are of the view that sexual assault communications fall into a special category outside that of other confidential professional communications. As concluded by the MCCOC, the Commissions believe it is reasonable to assume that an inability to protect the confidentiality of communications with a counsellor is likely to discourage sexual assault victims from going to counsellors. It is equally clear that sexual assault counselling is a vital part of ensuring that victims are helped appropriately to recover from an assault and also that they pursue complaints.
- 15.81 It has been the finding of other inquiries that have considered this issue that the balancing of the interests of justice is best served by allowing a judge to determine the admission of sexual assault communications by reference to a set of determined criteria. The Commissions support the argument that a qualified sexual assault communications privilege serves the broader public interest of ensuring the legal system is fair both to the accused and the accuser. Under the public interest test, the notes will only be admissible where they have substantial probative value and the public interest in protecting the confidentiality of the document is substantially outweighed by the public interest in allowing its inspection.
- 15.82 The Commissions agree with the VLRC that confidential sexual assault communications should not be disclosed in committal proceedings. It should be left to the trial judge to determine any issues of disclosure or admissibility. Enactment of the privilege as it currently stands in New South Wales would achieve this effect.
- 15.83 It is therefore recommended that the Evidence Act 1995 (Cth) be amended to adopt a sexual

assault communications privilege, consistent with that provided for under Division 2 of Part 5, Chapter 6 of the Criminal Procedure Act 1986 (NSW). This privilege should apply in both civil and criminal matters, as was the intention of the original New South Wales legislation.

- 15.84 The Commissions further propose that the confidential communications privilege and the sexual assault communications privilege apply to pre-trial processes. This is currently what occurs in New South Wales. It is noted that the extension of these provisions will resolve the difficulty in *R v Young* and allow the sexual assault communications privilege sections currently located in Chapter 6 of the Criminal Procedure Act 1986 (NSW) to be re-enacted in the Evidence Act 1995 (NSW). A draft of how this might be achieved in the Commonwealth Evidence Act is included in Appendix 1. This draft does not completely implement Recommendation 15–6 for the reasons discussed in Chapter 14 regarding the extension of Part 3.10 generally.

#### Recommendation 15–4

Part 3.10 of the Evidence Act 1995 (Cth) and Part 3.10, Division 1B of the Evidence Act 1995 (NSW) should be amended to include a sexual assault communications privilege based on the wording of Division 2 of Part 5, Chapter 6 of the Criminal Procedure Act 1986 (NSW) applicable in both civil and criminal proceedings. The amendment should include a general discretion privilege and an absolute privilege in preliminary criminal proceedings.

#### Recommendation 15–5

If Recommendation 15–4 is accepted, Division 2 of Part 5 of Chapter 6 of the Criminal Procedure Act 1986 (NSW) should be repealed.

#### Recommendation 15–6

The sexual assault communications privilege should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.

## References

To see references please refer to the document title on:

[https://www.alrc.gov.au/publications/15.%20Privilege%3A%20Other%20Privileges/privileges-protecting-other-confidential-communications July 2004](https://www.alrc.gov.au/publications/15.%20Privilege%3A%20Other%20Privileges/privileges-protecting-other-confidential-communications%20July%202004)

# Lawyer X and police informants: what is a lawyer's duty to their client and are there exceptions?



The police-informer relationship has come under scrutiny in the case of Lawyer X – a barrister who acted as counsel for a number of prominent criminal defendants. Victoria police initially reported Lawyer X had been registered as an informant between 2005 and 2009. This week, it was revealed Lawyer X was first registered as early as 1995.

Victorian Premier Daniel Andrews announced a Royal Commission in December, 2018 to determine if any criminal convictions have been affected by the scandal. The Commission is also expected to assess whether changes need to be made to how Victoria Police manages informants in the future.

The High Court criticised Lawyer X's actions as "fundamental and appalling breaches" of her obligations to her clients and to the court. And Victoria police were admonished for their "reprehensible conduct in knowingly encouraging" the barrister to inform against her clients.

***A barrister whose client threatens the safety of any person may ... if the barrister believes on reasonable grounds that there is a risk to any person's safety, advise the police or other appropriate authorities.***

So, what are the obligations of a lawyer to their client, and what rules govern a police-informer relationship?

## **Why use informers?**

Police informers are critical to the gathering of criminal intelligence. Human source information is also essential to intelligence gathered by organisations such as the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Australian Crime

Commission and the NSW Crime Commission.

But the organisation-informer relationship can be ethically fraught. Informers could fabricate or exaggerate facts in exchange for benefits, such as monetary payments, and reductions in criminal charges and sentences. Unreliable or false information can in turn result in unjustified convictions.

The relationship between the informer and handler of information is regulated by internal policies and protocols. There is

little by way of legislation to circumscribe how law enforcement agencies select and use informers. This lack of regulation, and the covert nature of the relationships, means they largely evade external scrutiny.

In addition, rigid secrecy provisions can dissuade whistleblowers from reporting potentially unethical conduct relating to informers. Without such scrutiny, we cannot know how many Australian lawyers or barristers may be registered as human sources.

On Thursday, the ABC reported up to six additional lawyers may be registered as informants with Victoria Police.

It is not known if other law enforcement agencies have lawyers “on their books”. The ABC’s Fran Kelly asked NSW barrister, Arthur Moses SC, President of the Law Council of Australia, if he “was aware of whether NSW police or indeed the police of any other jurisdiction” used criminal defence lawyers as informants.

Moses replied he wasn’t at liberty to disclose any matters he “may have come into possession of through some other means.” This raises the possibility additional lawyers are registered as informants.

### **A lawyer’s duty to their client**

Disclosing client communications to law enforcement may conflict with a lawyer’s obligations to their client. These include duties relating to confidentiality, promoting their client’s best interests, and avoiding and disclosing any conflicts of interest. It may consequently compromise a client’s right to a fair trial.

Rule 114 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 (Vic) provides that a barrister must not disclose or use confidential information obtained in the course of practice concerning any person to whom the barrister owes some obligation to keep the information confidential.

This is consistent with the observations of Dr Matthew Collins QC, President of the Victorian Bar, that:

All Australians are entitled to know that, when they seek legal advice, the information they provide to their lawyer will be treated in the strictest confidence.

Rule 35 stipulates a barrister must “fearlessly” promote and protect their client’s best interests to the best of the barrister’s skill and diligence. They must do this without regard to their own interest.

A barrister must also refuse to accept or retain a brief if:

- the client’s interest in the matter is or would be in conflict with the barrister’s own interest; or
- where he or she has already discussed the facts of the matter in any detail (even on an informal basis) with another party with an adverse interest (rule 101).

### **But, there are exceptions**

Victoria Police Commissioner Graham Ashton has defended the use of Lawyer X as an informant. He argued Victoria’s gangland wars – in which Lawyer X was said to have been used as a “weapon” – were “a desperate and dangerous time” where “a genuine sense of urgency was enveloping the criminal justice system, including police”.

On this issue, rule 87 states:

A barrister whose client threatens the safety of any person may ... if the barrister believes on reasonable grounds that there is a risk to any person’s safety, advise the police or other appropriate authorities.



**Police Chief Graham Ashton has defended the use of Lawyer X noting the gangland wars in Victoria were a dangerous time. ELLEN SMITH/AAP.**

Aside from the disclosure of confidential client information, the registration of criminal lawyers as informants in any circumstances may undermine the nature of the criminal trial. Where lawyers or barristers are registered as a human source, this may conflict with their duties to their client and their role as an officer of the court.

Revelations additional lawyers may be registered as police informants have the potential to undermine public confidence in the integrity of the criminal justice system. To maintain or restore this confidence, there

***Aside from legal profession rules, no legislation expressly prohibits lawyers from acting as human sources.***

In other words, a barrister may report confidential client communications to police where their client has threatened the safety of another person, for example, the client intends to seriously injure or kill someone. From what has been reported about the Lawyer X case, it is not clear whether her covert communications were limited to discrete instances where her clients threatened imminent harm.

is a need to review how legislation regulates lawyers’ disclosures of confidential client information to law enforcement.

Aside from legal profession rules, no legislation expressly prohibits lawyers from acting as human sources. The Royal Commission presents an opportunity to consider if new laws are needed to clarify the circumstances (if any) in which lawyers may act as a human source.



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# Privilege, policing and the pub test: Questions to be answered from the Lawyer X scandal

**JEROME DORAISAMY**

While the Royal Commission into Management of Informants will be held in and limited to Victoria, its ramifications for both justice and law enforcement will go further than the physical boundaries of the Garden State. In this feature, Jerome Doraisamy explores some of the broader issues at play, including the concept of professional privilege, community expectations of legal practitioners and the dangers of certain police tactics.

Victoria's recently-announced Royal Commission into Management of Informants gives rise to numerous questions. How and why did a criminal defence barrister collaborate with the state's police force? Were convictions against Melbourne gangland criminals fair and in accordance with the law? Are current management processes for police informants adequate?

One particular question we at Lawyers Weekly have been interested in is whether the case of Lawyer X – also known as Informer 3838 – a still-anonymous criminal defence barrister who represented numerous figures in Melbourne's so-called 'underworld' –

she represented – over the course of approximately five years, including a period as a registered informant.

It's a concept seemingly so bizarre and understandably has not just the nation's legal profession dumbfounded but also the wider Aussie community.

What will the fallout of such a unique commission be? How will this alter legal services as we know them today? And most importantly – given that a core principle of the Rule of Law is that justice must be accessible to all – are there any circumstances where a duty higher than one's practice obligations can be set aside, in favour of public interest, or even national security?



## Breaking it down

Victorian Bar president Dr Matt Collins QC says that the balance struck by the law provides a clear line for legal practitioners.

"Confidential communications between clients and practitioners are privileged if they are made for the dominant purpose of giving or obtaining legal advice, or the dominant purpose of actual, anticipated or pending legal proceedings," he explains, citing both common law and relevant sections of Victoria's Evidence Act.

More relevantly in the present context, he continues, privilege does not attach to communications that are made in furtherance of a crime or fraud or in deliberate abuse of a power.

For Rebecca Treston QC, the new president of Bar Association of Queensland, answers to such questions about privilege must engage with the rationale that underpin its very notion.

"Emphatically, it has nothing to do with protection of privilege of lawyers.

***Privilege does not attach to communications that are made in furtherance of a crime or fraud or in deliberate abuse of power.***

gives rise to reflection on the nature of legal professional privilege, and when or if it can ever be set aside.

After all, Lawyer X is known to have provided pages upon pages of information to the police about criminal associates and clients – some of whom

To answer these questions – and also consider the methodology of certain police actions and strategies – we spoke with the presidents of two state-based barrister associations, as well as the principal solicitor of a criminal law firm.

It arises from the basic right of every person in a democratic civilisation to get advice from a lawyer with confidence, and in confidence," she posits.

"Unrestricted communication between lawyer and client upon professional matters is, simply, necessary for the proper functioning of our legal system."

It is not open, she continues, to erode this privilege in individual cases, not even by invoking a "higher public interest". If that were to happen, she muses, the application of privilege would become uncertain and the intent behind it would be undermined.

Dr Collins is of a similar mindset, submitting that the definition of privilege and its application did not lead to the circumstances giving rise to the new royal commission. On the contrary, he says, a central cause was a failure by Victoria Police and Lawyer X to respect legal professional privilege.

"While the Victorian Bar will always be prepared to participate in a debate about whether the law strikes the right balance, confidentiality of communications between legal practitioners and their clients, where the dominant purpose is the giving or obtaining of legal advice or in connection with actual, anticipated or pending legal proceedings, is a bedrock foundation in our justice system for the protection of every Australian," he reflects.

"It is scarcely less important than the presumption of innocence, the privilege against self-incrimination, and the importance of maintaining an independent and incorruptible judiciary."

### The proverbial pub test

Discussion of the outcomes of this year's state-based royal commission will need to pass the proverbial pub test, and from a broader societal perspective, Ms Treston acknowledges that there is a need for the notion of privilege to be carefully explained.

"It can be understood that the private and inscrutable nature of privileged communications might give rise to speculation. Unjustified suspicions may be aroused," she notes.

"That is one reason why it is important to understand that not every communication between lawyer and client is privileged. For example, and as was explained by McHugh J in *Commissioner AFP v Propend Finance Pty Ltd* (1997) 188 CLR 501, communications in

***"Communication in furtherance of a fraud or crime are not protected by legal professional privilege" McHugh J. Commissioner AFP v Propend Finance Pty Ltd (1997) 188 CLR 501.***

furtherance of a fraud or crime are not protected by legal professional privilege."

This is not an exception to the rule, she outlines. The privilege never attached to them in the first place – their illegal object has prevented that.

Not even changes in an evolving legal marketplace can justify any rebalancing of the obligations owed by legal practitioners, argues Dr Collins, nor does he accept that there is an inherent conflict between a legal practitioner's obligation to protect his or her clients and the best interests of the community.

"The true position is quite to the contrary: the community is best served by maintaining a strong, independent and fearless legal profession whose members honour their paramount duty to the administration of justice, including by assiduously discharging their duties to courts and clients," he says.

"Fundamental to those duties is the sanctity of confidentiality in privileged communications between lawyers and clients."

### Public accountability

The unwavering nature of privilege, as surmised by Dr Collins QC and Ms Treston QC, seems particularly pertinent when considered in the context of 2018's Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, conducted on a federal level, which uncovered significant and wide-reaching patterns of misbehavior by Australia's major banking institutions.

On the question of how Australia's legal profession can ensure public trust is retained in 2019 – or at least how a potential loss of trust, such as that suffered by the financial services industry in 2018, can be staved off – Dr Collins says lawyers will maintain the enhance their reputation by

continually upholding the profession's values, and advocating for the importance of those lawyers in the public square, even where they may meet opposition.

"What the Lawyer X controversy has demonstrated already is that where ethical obligations are not honoured, corners are cut on the false premise that the ends may justify the means," he says.

"The fact that a royal commission is now required, and that convictions will need to be reviewed, demonstrates that the ends here most assuredly did not justify the means."

"It would be, I believe, quite wrong, to think that the circumstances involving Lawyer X and the royal commission are anything other than wholly unprecedented. The public can and should retain trust in Victoria's 2,100 practising barristers," he asserts.

Ms Treston thinks any comparisons between the banking royal commission and the new Victorian inquiry should be drawn cautiously.

"There were, for [the banking] inquiry, widespread systemic issues to be investigated. At present, we know of nothing that suggests [the Lawyer X] case has implications for any practising lawyer, or that it points to systemic issues in the legal profession," she says.

"It may be a different matter for the Victorian Police, but that is for the commission to determine. That said, the recommendations of any royal commission must always receive considered attention, and that will happen in this case."

### The fall-out

This case is certainly one that has demanded the attention not just of the legal profession, but that of the entire nation. It has elicited strong reactions from lawyers across Australia, including

National Criminal Lawyers principal solicitor Michael Moussa, who said he was “outraged and appalled” by the conduct of Lawyer X, in conjunction with Victoria Police.

“Charismatic, charming and in-control, this defence barrister convinced some of Australia’s most dangerous men to tell her everything. As it now turns out, [she] informed on her clients and others to the Victorian police department. Even more outrageous is the fact she was paid for her information,” Mr Moussa pens.

The head of the western Sydney-based boutique firm feels strongly that police powers are “ever-increasing” in Australian society, and that the saga of Lawyer X may be demonstrative of that increase.

“This includes changes of NSW bail laws, the introduction of Strike Force Raptor [in the state] to crack down on those not who have committed a crime but are thought may do so and other increasing police powers such as preventative detention, control orders and the like,” he submits.

As a criminal solicitor, Mr Moussa is particularly concerned about the prospect of the deployment of “effective covert forms of policing” by those in law enforcement. Lawyer X began providing information to Victoria Police in mid-2003, he muses, supposedly motivated to do so by an alleged mishandling of gangland investigations and having been bullied by certain crime figures.

“However, she only became a registered informer from 2005 to 2009, during that time formally providing information about criminal associates and clients, some while she was actually representing them in legal proceedings,” he says.

### **Moving forward**

Looking broadly at the Lawyer X case, Mr Moussa feels it important to recognise that there is a “new kind of policing” pervasive in our society.

“What I’ve discovered, through speaking with clients and my own research, is police and intelligence authorities now almost always attend either university or police college wherein they are taught amongst other tools of the trade, how to deploy effective covert forms of policing at the drop of the hat,” he says.

***police and intelligence authorities now almost always attend either university or police college wherein they are taught amongst other tools of the trade, how to deploy effective covert forms of policing.***

“These forms of policing are easily accessible online, [but it] is much more proactive. That is to say, nowadays there is a new kind of policing.”

New-age methodologies being undertaken that purport to prevent crime, rather than apprehend, are now “widely employed” in and around Australia, he posits, including but not limited to “clandestine” profiling/screening, the use of ‘honey traps’, sensory deprivation, psychological surveillance and manipulation of environment.

What does this all have to do with Lawyer X and the new Victorian royal commission, though? There has been no suggestion of the use of any such tactics by Victoria Police in this matter, nor any undue influence or duress placed on the barrister in question to serve as an informant.

A nexus exists, Mr Moussa theorises, via the engagement of Lawyer X to be a police informant in the first place, given that she was supposed to uphold the all-important duty of professional privilege to her clients.

He invoked the words of former Turkish president Ahmet Necdet Sezer in pronouncing that “unless we abandon elements which resemble a police state, we can’t meet the demands of being a modern society”.

For lawyers and barristers, this means abiding by the myriad duties demanded of practitioners while practising – including and especially privilege.

“Not abiding by those duties might not always equate to a criminal act, however, it could lead to being reprimanded and in some instances being removed from the roll of solicitors and barristers. In some instances, criminal charges can follow.”

“Without doubt, Lawyer X has severely breached fundamental legal rules with all the clients she informed police on. This is because the law creates several

legal duties for the person in whom the trust has been placed (the lawyer) vis-à-vis the client. In particular, the lawyer must act in the best interests of the client which is considered a paramount rule after their duty to the court,” he reflects.

There are inalienable duties for legal practitioners to adhere to, he continues, such as maintaining client confidence, avoiding conflicts of interest and compromises to integrity and professional independence, and being honest.

“While time will tell what happens for those members of the Victorian underworld who are appealing their convictions, in my opinion Lawyer X’s actions are an atrocious breach of her previous clients’ rights,” Mr Moussa surmises.

“Moreover, she has – in my view – placed justice, the rule of law and due process into doubt, leaving hundreds of other convictions now in jeopardy and ensuring lengthy and costly legal action will follow.”

No doubt, he adds, such legal action will unfold at the expense of the taxpayer.

“The time is nearly here when legitimate clients will no longer feel safe with the ability of solicitors and barristers to properly respect the duties owed to them. For this and other reasons, Lawyer X and the revelation of her actions has turned back the clock for lawyers and their clients to the times where nobody could trust anybody and to when informers were rife in the community,” he declares.

“With her unethical actions, [she] has brought law into a state of disrepute.”

It is perhaps no wonder that criminal solicitors and barrister associations alike deem it so fundamentally important for professional privilege to remain an immovable principle.

# Background & Outcome of Australasian Institute of Policing General Meeting

On Friday 14 December 2018 the Australasian Institute of Policing Inc. (AiPOL) held a General Meeting at 23 St Andrews Place, East Melbourne, Victoria.

The General meeting was in accordance with the Rules of the Institute as last amended on 25 October 2008.

In accordance with Rule 12 the Secretary and Public Officer Mr Luke Farrell, received a request to call a General Meeting from at least 5% of the financial members of the Institute. The reasons for the meeting were set out in the request.

On 23 November 2018 the Notice of the General Meeting was provided by email to all current financial members of the Institute. The Notice advised financial members that the purpose of the General Meeting was to:

- (i) Fill casual vacancies on the Committee of Management until the next Annual General Meeting;
- (ii) Elect Office bearers to the casual vacancies to hold office until the next Annual General Meeting;
- (iii) Advise relevant financial institutions and Regulatory bodies of the change in Office bearers and authorised signatories;
- (iv) Authorise the auditing firm Andrea's Business Solutions P/L to act as an authorised agent for the Institute; and
- (v) To determine a date for the Annual General Meeting.

## Election of committee of management

Mr Jonathan Hunt-Sharman, Mr Romi Gyergyak, Mr Dave Allen and Mr Russell Rowell, being financial members of

the Institute, were appointed to the casual vacancies on the Committee of Management and will hold office until the next Annual General Meeting of the Institute.

## Election of office bearers

Mr Jonathan Hunt-Sharman was elected to the vacant Office of President. Mr Dave Allen was elected to the Office of Vice-President. Mr Russell Rowell was elected to the Office of Treasurer.

Mr Luke Farrell was thanked for his tireless effort as the Public Officer and Secretary of the Institute and was reaffirmed as Public Officer and in the Office of Secretary.

## AiPol bank accounts, Paypal, AiPol website, AiPol Journal, reporting requirements etc

The Secretary/Public Officer advised that a number of signatories for various AiPOL administrative functions were now no longer financial members of the Institute. A motion was carried unanimously that all relevant financial institutions and Regulatory bodies be advised that the current Office bearers are authorised by the General Meeting to act on behalf of the Institute and to be authorised signatories on behalf of the Institute in accordance with the Rules of the Institute. Further, that all persons not current Office bearers have no ongoing authority to act on behalf of the Institute or be signatories on behalf of the Institute.

The General Meeting authorised the auditing firm Andrea's Business Solutions P/L to have access to all financial and administrative records held by the

Institute and have the legal authority to act as an agent of the Institute to obtain records from banking institutions and in relation to dealings with the regulatory agencies.

The Secretary/Public Officer advised that Dr Amanda Davies had been appointed to be editor of the Institute's journal and that the journal has continued to be produced by CW Austral on behalf of the Institute.

The Committee of Management formally thanks the previous editor of the AiPOL journal, Professor Roger Collins for his service to the Institute as well as thanking his recommended replacement, Dr Amanda Davies, for her efforts to date.

## Notice of annual general meeting

The meeting resolved that the Annual General Meeting and election of Office bearers is to take place within 60 days after the end of the 2018/19 financial year.

I thank all members for their ongoing support of the Australasian Institute of Policing. 2019 will be an exciting year for the Institute. I believe members will see a number of positive outcomes achieved by the Institute over the coming year.

I particularly like to thank the newly appointed Committee of Management and the newly elected Office Bearers who will be assisting me in 2019.

I wish you all the best in 2019 and again thank you for your continued support of the Institute.

Yours sincerely  
Luke Farrell  
Public Officer & Secretary  
AiPOL



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