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Contributors are expected to adhere to the Journal's publishing guidelines. These guidelines are available in this Journal. All papers are peer-reviewed.

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Editorial

DR AMANDA DAVIES

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

In this edition we provide a summary of the RCMPI progress report, a sample of the submissions received, including the one submitted by AiPOL, and other related reading.

Welcome to this second edition dedicated to the Royal Commission into the Management of Police Informants. This edition draws together some of the key documents related to the RCMPI to provide readers with insight into the potential people, policies and professions which may be impacted by the outcome of the RCMPI.

The current available literature from submissions to the RCMPI and public press suggests a tension between concerned parties and a need for clarification as to the use of police informers for the purpose of intelligence gathering, criminal investigation and evidence within the Courts in relation to criminal prosecution. A catalyst for the current status was in the main, the decision by various courts and supported by the High Court that the use of a Solicitor as a Police Informant by the Victorian Police Force may have led to certain criminal cases being tainted.

The RCMPI was established to review the use of Informant X. The progress report from the RCMPI outlines the key events that led to the establishment of the Commission (including relevant reviews and court proceedings) and offers a summary of the Commission's first six months of inquiry and how it is addressing its terms of reference. The report does not present findings about cases that may have been affected, the conduct of Ms Gobbo (Informant X) or Victoria Police, or other matters arising from its terms of reference. In this edition we provide a summary of the RCMPI progress report, a sample of the submissions received, including the one submitted by AiPOL, and other related reading.

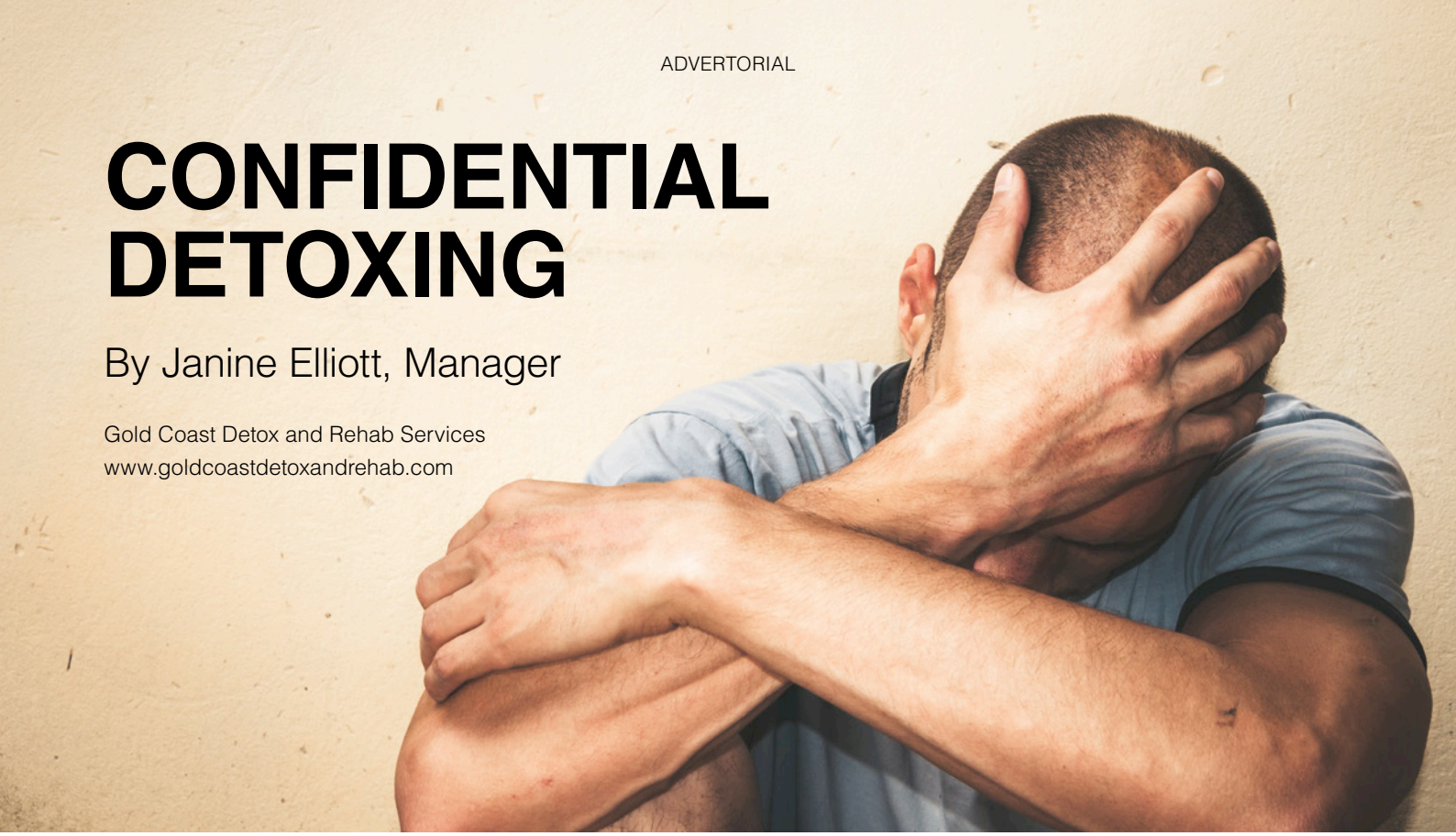
As at 19 June 2019, the Commission had held 22 days of hearings and examined 32 witnesses. Evidence to date has focused on Nicola Gobbo's contact with Victoria Police between 1993 and 2004. The Commission has received 131 submissions from members of the public and contacted over 130 individuals and agencies with expertise in policy and practices relevant to its terms of reference. It has issued 374 Notices to Produce and requests for information, resulting in the production of over 58,000 documents.

Fifteen submissions are now available on the Commission's website at https:// www.rcmpi.vic.gov.au. The submissions cover policy-related issues including the conduct of Victoria Police, the use and management of human sources, evidence obtained from human sources in the criminal justice system, and legal professional ethics and regulation. Remaining submissions, including many from people who claim to have been affected by Ms Gobbo's conduct, await publication while the Commission considers their treatment.

The recommendations of the RCMPI have the potential for far reaching impact on all police jurisdictions within Australia and on our international law enforcement and national security partners. AiPOL undertakes to provide a further update when the Commission next reports.

I trust that you will find this edition a valuable contribution to understanding the current status of the RCMPI.

CONFIDENTIAL DETOXING



By Janine Elliott, Manager

Gold Coast Detox and Rehab Services
www.goldcoastdetoxandrehab.com

Police Policy

The Police Force has duty of care to its employees to maintain a safe place of work and to provide to the community a comprehensive policing service, which is free of alcohol and other drug abuse.

Professional and confidential counselling services within the Police Force are provided for officers experiencing substance abuse problems, and to help their families. However, if your addiction requires quick intervention, external options may need to be considered.

Random drug and alcohol testing

Random, target and mandatory testing for police officers is mandatory and is part of the drug and alcohol state policy. This is part of the duty of care to all employees, and a commitment to the Police Force. Positive results are followed with counselling, rehabilitation or disciplinary action at the discretion of the Commissioner.

Detoxing outside

Privacy is vital for members. Should a Police Officer require specialised intervention for addiction other than in-house counselling, finding suitable private rehabilitation outside the Police Force may be necessary. Choosing a drug and alcohol withdrawal centre that values professional confidentiality is important. Public community services for detox and rehab may not be suitable for Police Officers. A small and discreet independent service can offer members 100% confidentiality to protect client identity.

Confidential Detoxing

Detoxing is a very difficult task on your own, even with the support of counselling services. Gold Coast Detox and Rehab Services offers confidential and discreet private detox and rehab programs for police officers looking to preserve their identity. This is retreat-style accommodation with 24-hour medical staff plus a high level of personal care and comfort. This facility allows you to safely withdraw from substance use, but it feels like you're on a holiday.

You can also enjoy a range of therapies during your program such as daily massage, fitness training, martial arts, acupuncture, yoga, surfing and beach walking. A qualified on-site Nutritionist prepares your meals to keep you in shape, and individual food preferences are catered for.

Medical withdrawal

A resident psychiatrist can prescribe medication during your withdrawal to minimise the side-effects of detoxing. 24-hour nursing staff are also available to make sure you remain safe and comfortable through your process. Trained addiction counsellors are available everyday who understand every step you need to take, so you are not alone.

Rehab phase

Once your withdrawal phase is complete, you can continue on to your rehabilitation phase onsite, where daily professional counselling is offered to prevent relapsing when you return home.

A medical detox is usually 7-14 days, depending on the substance. The rehab phase for treatment can be anywhere between 14-90 days. For permanent results, the longer the better. It takes time to come to terms with the deeper reasons behind addiction, and to identify underlying emotional and mental triggers.

PTSD

Post Traumatic Stress Disorder (PTSD) lies beneath many addiction clients. This is a complex diagnosis, which may go undetected among police officers. Recognising the signs are not always possible while using alcohol and drugs. Your rehab phase may indicate that PTSD is a driver of your addiction. With staff trained in trauma, you can get a proper diagnosis with a treatment plan before you complete your program.

Paper-only

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Royal Commission into the Management of Police Informants

Progress Report

The Honourable Margaret McMurdo, AC Commissioner
No. 43 Session 2018–19

Background

TIMELINE: ESTABLISHMENT OF THE ROYAL COMMISSION

2012–16

Comrie Review finalised

In July 2012, Mr Neil Comrie, AO, APM produced a confidential Victoria Police review into the use of Ms Gobbo as a human source and the adequacy of policies and practices relevant to her management from September 2005 to January 2009.

Kellam Report finalised

In February 2015, the Honourable Murray Kellam, QC delivered a confidential report for the Independent Broad-based Anti-Corruption Commission (IBAC) about Victoria Police's use of Ms Gobbo as a human source from September 2005 to January 2009. The report identified nine case study individuals who may have received legal assistance from Ms Gobbo while she was acting as a human source.

Champion Report recommends disclosure to relevant individuals

In February 2016, then DPP, Mr John Champion, SC, finalised a confidential report that considered whether the prosecution of individuals named in the Kellam Report resulted in miscarriages of justice. The report concluded that the DPP had a duty to disclose this possibility to relevant individuals.

The Chief Commissioner and Ms Gobbo seek to stop the disclosures

On 10 June 2016, the Chief Commissioner of Victoria Police lodged an application in the Supreme Court to stop the disclosure of information about Ms Gobbo's role as a human source on the basis it was subject to public interest immunity. On 11 November 2016, Ms Gobbo joined the proceedings.

2017–18

Supreme Court determines disclosures should be permitted

On 19 June 2017, the Supreme Court determined that the DPP should be permitted to disclose information about Ms Gobbo's role as a human source to seven individuals. This decision was appealed to the Court of Appeal by the Chief Commissioner of Victoria Police and Ms Gobbo.

Appeal dismissed by the Court of Appeal

On 21 November 2017, the Court of Appeal dismissed the appeal. The Chief Commissioner of Victoria Police and Ms Gobbo were granted permission to appeal the Court of Appeal's decision to the High Court on 9 May 2018.

High Court revokes permission to appeal

On 5 November 2018, the High Court revoked the permission to appeal that was originally granted. The High Court ordered that the hearing's occurrence and outcomes not be published until 3 December 2018.

Commission established and Letters Patent issued

On 3 December 2018, the Premier of Victoria announced the establishment of the Commission. On 13 December 2018, the Commission was formally established by Letters Patent issued by the Governor of Victoria.

2019

Commission's inquiry expands

On 7 February 2019, the Letters Patent were amended after Victoria Police's disclosure that Ms Gobbo was first registered as a human source in 1995 and other legal sector employees with obligations of confidentiality or privilege may have been used as human sources.

The Commission's hearings commence

In February 2019 the Commission's hearings commenced.

Ms Gobbo's name is released to the public

On 1 March 2019, the High Court's interim non-publication order preventing the wider public release of Ms Gobbo's name and image lapsed.

Court file becomes public

On 12 April 2019, the documents from the court proceedings, including redacted versions of the Comrie Review and Kellam and Champion Reports became publicly available for the first time.

Commission's deadline extended

On 25 May 2019, the Victorian Government agreed to extend the Commission's reporting date and provide additional funding in light of the Commission's expanded terms of reference. The Commission will now provide a final report on all terms of reference by 1 July 2020.

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Commission's Progress Report delivered

On 1 July 2019, the Commission delivered a progress report providing an overview of the Commission's first six months of operation.

HUMAN SOURCES IN THE CRIMINAL JUSTICE SYSTEM

A human source, also known as an 'informant' or 'informer', is commonly understood to be a person who covertly supplies information about crime or people involved in criminal activity to police or other law enforcement agencies.[16] The information that human sources provide may be used to aid in the investigation and prosecution of crimes. Human sources may also help police to understand the broader criminal environment and develop more effective policing techniques to help prevent crime.[17]

Generally, human sources can be distinguished from other people who assist police–for example, witnesses or victims of crime, or other members of the community who volunteer information to police about events they have seen or heard in the course of their day-to-day activities.

Human sources provide a critical source of information and intelligence for law enforcement, especially in efforts to combat serious and organised crime, corruption and acts of terrorism.[18] As they are sometimes involved in criminal conduct themselves, human sources can provide police with access to criminal networks and activities that are often impenetrable through other means.[19]

While the use of human sources has been described as 'one of the most effective weapons in the hands of the detective',[20] it can also be fraught with risks.[21] A person who provides information to police as a human source typically does so with the expectation that their identity will be protected.[22] Significant harm may come to the person if their role as a human source is revealed to the people or class of people they are informing on, and reduce the willingness of other individuals to assist police.[23]

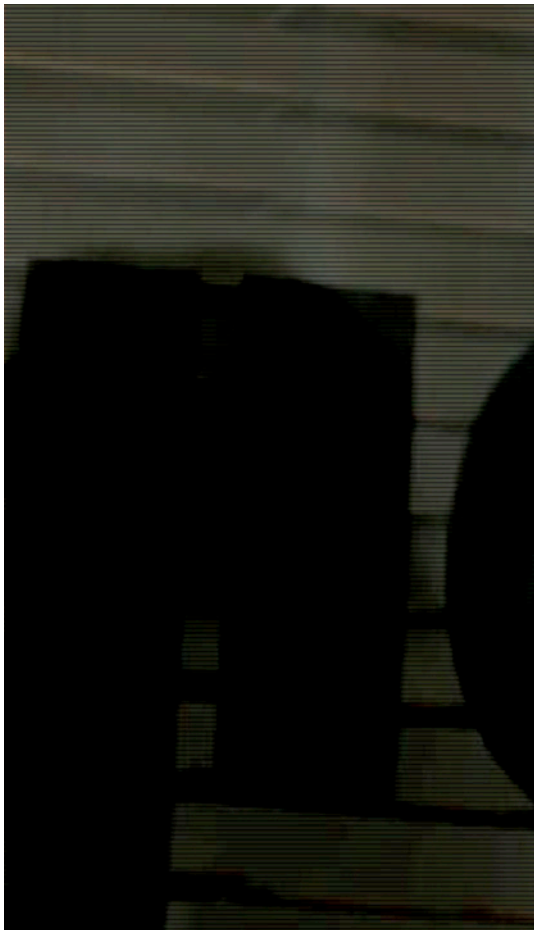
Other risks include improper associations between police and human sources; exploitation of police by the human source to gain an advantage or to engage in further illicit activity; the use of tainted or unreliable information provided by a human source; and manipulation of the human source arising from a power imbalance between police and the source.[24] The use of human sources by police is largely hidden from the public, both to protect the identity of the human source and to avoid jeopardising investigations. However, the covert relationship between police and human sources can '[lend] itself to corruption and unethical behaviour'.[25] Police must carefully manage and control these risks through robust policies, procedures and practices, with appropriate accountability and oversight.

Like all law enforcement agencies, Victoria Police relies on human sources to aid in its detection, investigation and prevention of crime.[26] Its recruitment, use and management of human sources has evolved significantly over the last 20 years, and is governed by various internal policies and procedures.[27] The Commission will report on the current adequacy and effectiveness of Victoria Police's policies and procedures guiding the management of human sources in its final report.

THE USE OF MS GOBBO AS A HUMAN SOURCE

The Commission's task arises due to the conduct of Ms Gobbo, also known as 'EF' or 'Informant 3838' or 'Lawyer X',[28] and the conduct of Victoria Police in utilising her as a human source.

Ms Gobbo represented a number of clients charged with criminal offences, some of whom were involved in Melbourne's so-called 'gangland wars'. Ms Gobbo was formally registered as a human source at various times between 1995 and 2009. Related legal proceedings,[29] and information obtained by the Commission, indicate that during that period, Ms Gobbo simultaneously informed on the criminal activity of individuals she may have legally represented or to whom she may have provided legal advice. Some of these individuals were subsequently convicted and sentenced to lengthy terms of imprisonment for serious crimes. Victoria Police has confirmed that after she was deregistered as a human source, Ms Gobbo continued to provide information to Victoria Police until 2010.[30]



As a lawyer,[31] Ms Gobbo owed a range of ethical and professional duties to her clients and the court.[32] The High Court held that she acted in a manner contrary to those duties when she provided confidential information to Victoria Police received from her clients. The Court described Ms Gobbo's actions as 'fundamental and appalling breaches' of her obligations to the court and to her clients.[33] The Court also stated: 'Victoria Police were guilty of reprehensible conduct in knowingly encouraging [Ms Gobbo] 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 accordingly to law without favour or affection, malice or ill-will'.[34]

PREVIOUS REVIEWS INTO THE USE OF MS GOBBO AS A HUMAN SOURCE

The use of Ms Gobbo as a human source by Victoria Police has been the subject of three previous reviews, each tasked to examine some, but not all, of the matters that fall within the scope of the Commission's inquiry. Their key findings

are outlined below. Consistent with the Letters Patent, the Commission will seek to avoid duplication of these reviews.

Given their sensitive nature, the reviews were undertaken confidentially. They later formed part of the evidence considered during litigation between the Chief Commissioner of Victoria Police, Ms Gobbo, and the DPP.[35] While the litigation was underway, orders were made for the content of the reviews and other relevant information to be restricted from publication until 12 April 2019.[36] In order to properly carry out its work, the Commission applied for and obtained permission from both courts to access the court files and details of the reviews in February 2019.[37]

COMRIE REVIEW

In 2012, the former Chief Commissioner of Victoria Police, Mr Neil Comrie, AO, APM conducted a review entitled *Victoria Police Human Source 3838–A Case Review* (the Comrie Review).

The review was commissioned by then Deputy Commissioner of Victoria Police, Mr Graham Ashton, AM, APM.[38]

The Comrie Review examined the policies, control measures and practices relevant to Ms Gobbo's management as a human source from September 2005 to January 2009. It found the 'utilisation of any source who may be bound by professional duties introduces complexities and risks that must be recognised and appropriately managed. Failure to give proper consideration to such matters may have dire consequences...'[39]

The Comrie review resulted in 27 recommendations, which called for a robust and ongoing risk assessment process for 'high-risk' human sources; consistent and thorough policies and procedures; improved supervision and monitoring; the requirement to obtain legal advice where the human source is occupationally bound by legal and ethical duties; and the development of a management plan for human sources who are transitioned to witnesses. The Comrie Review also endorsed the findings and 26 recommendations of an internal Victoria Police audit of human source management practices in 2010.[40]

The Commission is considering the Comrie Review as part of its inquiry into Victoria Police's implementation of the Kellam Report recommendations, discussed below.

KELLAM REPORT

On behalf of the IBAC,[41] in 2015 the Honourable Murray Kellam AO, QC produced a report entitled *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (the Kellam Report). This investigation arose following media reports of Victoria Police's use of a human source named 'Lawyer X' and a notification by the Chief Commissioner of Victoria Police to IBAC.[42]

The Kellam Report examined the conduct of Victoria Police officers in their use of Ms Gobbo as a human source, and the application and adequacy of its policies, control measures and management practices. Mr Kellam found 'negligence of a high order', concluding that Victoria Police had failed to act in accordance with appropriate policies and procedures.[43]

The Report identified and named nine individuals who received or possibly received legal assistance from Ms Gobbo while she was informing on them to Victoria Police and who were convicted of serious criminal offences. These individuals were Mr Antonios (Tony) Mokbel, Mr Rabie (Rob) Karam, Mr Frank

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Ahec, Mr Horty Mokbel, Mr Milad Mokbel, Mr Kamel (Karl) Khoder, Mr Darren Bednarski, Ms Zaharoula Mokbel and Person 7.[44] Mr Kellam found that the convictions of these nine individuals and the administration of justice could have been undermined due to the use of Ms Gobbo as a human source.[45]

The Kellam Report made 16 recommendations and endorsed the recommendations of the Comrie Review.[46] It called for changes to governing policies and guidelines to more thoroughly assess, manage and review the risks of using information from human sources bound by professional obligations of confidentiality or privilege. Other recommendations included obtaining legal advice in situations where human sources are bound by professional obligations; improving supervision and oversight; and developing procedures to guide actions where a human source may have significant mental health issues. The Report further recommended that the DPP should examine whether any prosecutions based on evidence involving confidential or privileged information obtained by Victoria Police from Ms Gobbo had resulted in miscarriages of justice.

The Commission is examining and will report on Victoria Police's implementation of and continued compliance with the Kellam Report's recommendations in its final report.

CHAMPION REPORT

In 2016, the then DPP, Mr John Champion, SC, produced a report entitled *Report of the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (the Champion Report). The Champion Report examined materials relied on by the Office of Public Prosecutions (OPP) in prosecuting the individuals named in the Kellam Report to ascertain whether miscarriages of justice may have occurred.

The DPP concluded that six of the nine individuals named in the Kellam Report had entered into, or potentially entered into, a lawyer-client relationship with Ms Gobbo.[47] These individuals were Mr Antonios (Tony) Mokbel, Mr Frank Ahec, Mr Milad Mokbel, Mr Kamel (Karl) Khoder, Mr Darren Bednarski and Person 7. Two of the nine individuals, Mr Horty Mokbel and Ms Zaharoula Mokbel, were not considered to be in a lawyer-client relationship with Ms Gobbo based on information available to the DPP, and one other individual, Mr Rabie (Rob) Karam, was found to be beyond the scope of the DPP's review, as he was prosecuted for federal offences by the CDPP.[48]

The DPP found that the circumstances surrounding the convictions of the six individuals activated the prosecutorial duty to disclose that Ms Gobbo's conduct may have tainted their convictions.[49] The DPP also observed that the CDPP would need to be informed about the circumstances to the extent that they affected federal prosecutions.

The Commission is considering the Champion Report in conducting its inquiry.

The DPP's proposed disclosure of post-conviction evidence to the affected individuals was challenged in a number of court proceedings by Victoria Police and Ms Gobbo. These are outlined below.

COURT PROCEEDINGS

During late 2016–18, Victoria Police and Ms Gobbo were engaged in extensive litigation to prevent the DPP disclosing Ms Gobbo's identity to seven individuals.[50] The proceedings were heard in closed court without notice to the individuals and publication of the proceedings was suppressed.[51]

The proceedings began following the completion of the Champion Report, when the DPP sent the Chief Commissioner of Victoria Police a copy of the letters intended to inform the seven individuals that Ms Gobbo was informing on them to Victoria Police. Six of these seven individuals, as identified in the Champion Report, were Mr Antonios (Tony) Mokbel, Mr Frank Ahec, Mr Milad Mokbel, Mr Kamel (Karl) Khoder, Mr Darren Bednarski and Person 7. The seventh individual, Mr Zlate Cvetanovski, was identified later by the DPP as an individual to whom disclosure should also be made.[52]

Victoria Police and Ms Gobbo sought to stop the DPP from disclosing this information, arguing that public interest immunity applied. The named individuals were not informed about these proceedings and did not take part in them. However, their interests were advanced by amici curiae[53] appointed by the Court and the Victorian Equal Opportunity and Human Rights Commission, which intervened in the case.[54]

Public interest immunity is a rule of evidence that applies in court proceedings. It allows a public agency to refuse to produce material in court on the basis that its admission into evidence or disclosure would be contrary to the public interest.[55] Public interest immunity claims are determined on the circumstances of each case. The court must balance various public policy considerations for and against disclosure.[56] In Victoria, the balancing exercise is expressed in the following terms:

> *If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.*[57]

Information is deemed to relate to 'matters of state' in certain circumstances, including if disclosing the information would prejudice the prevention, investigation or prosecution of a crime, or would enable a person to ascertain the existence or identity of a human source.[58]

The public interest in protecting the identity of a human source will generally outweigh the public interest in disclosing their identity.[59] However, this rule, known as the 'informer rule', is not absolute.[60] The public interests in favour of protecting a human source's identity, such as preventing the 'drying up' of human source information about crime and protecting the personal safety of the human source,[61] must be balanced against the public interest in promoting open justice and ensuring a fair hearing, including by affording an accused person an opportunity to fully challenge the prosecution's case against them.[62]

Victoria Police and Ms Gobbo first challenged the DPP's intended disclosures in the Supreme Court, then the Court of Appeal, and finally in the High Court. All three courts were in unanimous agreement that the public interest in the disclosures being made to the affected individuals outweighed the public interest in protecting Ms Gobbo's identity.[63]

On 5 November 2018, the High Court outlined its view of the impact of the actions of Victoria Police and Ms Gobbo:

> *[T]he 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 of Appeal held, that the public interest favouring disclosure is compelling: the maintenance of the integrity of the criminal justice system demands that the propriety of each Convicted Person's conviction be re-examined in light of the information. The public interest in preserving [Ms Gobbo's] anonymity must be subordinated to the integrity of the criminal justice system.*[64]

The High Court ordered that any information that would reveal the proceedings or the identity of relevant parties could not be published until 3 December 2018. This was to allow for appropriate security arrangements for Ms Gobbo to be made.[65] The Court also ordered that information from the proceedings could not be published until 5 February 2019.[66] On the application of the Chief Commissioner of Victoria Police, further orders were made by the High Court extending this date to 12 April 2019.[67]

SUBSEQUENT PROCEEDINGS TO PROTECT MS GOBBO'S NAME AND IMAGE

The orders of the High Court initially prevented Ms Gobbo's identity and image from becoming known.[68] This led to Ms Gobbo being variously referred to as 'EF' or 'Informant 3838' or 'Lawyer X'. The Commission's Letters Patent and terms of reference, consistent with the High Court's orders, do not name Ms Gobbo.

On 11 February 2019, the Commission was permitted by the High Court to issue Notices to Produce that named Ms Gobbo, and for persons to produce documents or information to the Commission in response, including documents referring to Ms Gobbo by her name or containing her image.[69]

On the same day, the Chief Commissioner of Victoria Police and Ms Gobbo made an application to the Court of Appeal for permanent non-publication orders preventing the publication of Ms Gobbo's identity and image, audio recordings between Ms Gobbo and police officers, her medical history and the identities of her children.[70] The application was opposed by the DPP and the CDPP. The Commission intervened in the proceedings, together with some media outlets, to oppose the application. Legal counsel were also appointed as *amici curiae*.

The Commission successfully argued that, to conduct the most thorough examination of cases that may have been affected by Ms Gobbo's conduct, the Commission would need to publish her name and image to seek information from individuals who may have been affected. The Commission also argued that the audio recordings would be important evidence in its inquiry.

The Court of Appeal refused to grant the permanent non-publication orders sought by the Chief

Commissioner of Victoria Police and Ms Gobbo.[71] The Court stated:

> *We accept that it is necessary, in order to maximise the prospect of identifying persons whose cases may have been affected by EF's conduct, that the Royal Commission publish details of her name and image in the course of seeking information and submissions from the public.*[72]

The Chief Commissioner of Victoria Police and Ms Gobbo then successfully sought non-publication orders to protect the names and images of Ms Gobbo's children in the High Court. The Commission did not oppose this application.[73]

On 1 March 2019, an order that prevented the wider public release of Ms Gobbo's name and image lapsed and the Commission identified Ms Gobbo on its website. The Commission also published notices including her image in Victorian prisons and in The Age and the Herald Sun. The notices invited submissions from people who were legally represented by Ms Gobbo and who believed their case may have been affected by her role as a human source.[74]

PREVIOUS REVIEWS INTO THE USE OF HUMAN SOURCES BY VICTORIA POLICE

The Comrie Review and the Kellam and Champion Reports[75] were preceded by several other reviews that examined Victoria Police's use and management of human sources generally. While these reviews did not specifically consider human sources with legal obligations of confidentiality or privilege, their findings point to a pattern of challenges and risks arising from the use of human sources. Some of these reviews are outlined below.

CEJA TASK FORCE

Victoria Police's Ceja Task Force was established in January 2002 to investigate drug-related corruption within the Victoria Police Drug Squad.[76] The Victorian Ombudsman produced two interim reports about Ceja in 2003–04 and the Office of Police Integrity (OPI) produced a final report in 2007.[77]

Based on Ceja's investigations, the OPI found that '[i]nadequate control and mismanagement of informers was central to some of the corrupt practices uncovered at the Drug Squad and elsewhere',[78] and that Victoria Police's governing policy on human sources required continued monitoring to determine its effectiveness.[79]

OFFICE OF POLICE INTEGRITY REVIEWS

The OPI was established in 2004 to detect, investigate and prevent police corruption and serious misconduct.[80] Early in its establishment, the OPI described human source management as an area 'where the risk of police corruption or serious misconduct is highest.'[81]

In 2007, the OPI concluded an extensive investigation into Victoria Police policies and practices relating to human source management.[82] The investigation recommended compulsory basic and specialist training in human source management; active management and supervision in high-risk policing areas to manage risks to human sources and police officers; improved sharing of human source registered numbers, particularly to identify the source of information in warrant applications; and regular audits of compliance with Victoria Police's Human Source Management Policy.[83]

The OPI continued to monitor and report on Victoria Police's management of the risks associated with the use of human sources until it was replaced by the IBAC in 2013.[84]

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INTERNAL VICTORIA POLICE REVIEWS

In 2010, Victoria Police's Corporate Management Review Division produced a report entitled Audit of Victoria Police Human Source Management Practices (the CMRD Audit). The purpose of the CMRD Audit was to identify whether risks associated with the use of human sources were being adequately managed by Victoria Police. The CMRD Audit reviewed a representative sample of 95 human source files and made 26 recommendations to improve human source management.[85]

In 2012, Victoria Police Intelligence and Covert Services Command completed a review entitled Covert Services Review 2012 (the ICSC Review), which examined Victoria Police's Covert Services Division. The ICSC Review recommended that the unit primarily responsible for the use and management of high-risk human sources, the Source Development Unit, be disbanded.[86]

KEY EVENTS RELEVANT TO THE COMMISSION'S WORK

The chronology over the following pages lists some key events that are relevant to the Commission's work, based on information received as at 19 June 2019 through witness statements, evidence provided in hearings and documents produced. The chronology includes four timelines, representing events relevant to Melbourne's 'gangland wars', Victoria Police's management of human sources, Ms Gobbo and Victoria Police's interaction with Ms Gobbo during the time period being examined by the Commission. The Commission's understanding of these and related events will continue to develop as additional information is gathered and analysed.

MELBOURNE'S 'GANGLAND WARS'

1998–2010

Melbourne's 'gangland wars', a series of violent disputes between rival gangs involved in drug trafficking and other illegal activity, result in the murders of numerous individuals. Victoria Police conducts a series of major investigations into 'gangland' and related activity, including Operations Landslip and Matchless (into the manufacture of methamphetamine at clandestine laboratories), Purana Taskforce (into unsolved homicides and drug trafficking enterprises related to the 'gangland wars'), Operation Posse (into drug trafficking enterprises and the criminal operations of the Mokbel family), Operation Briars (into the murder of Mr Shane Chartres-Abbott) and Petra Taskforce (into the murders of Mr Terrence Hodson, a human source used by Victoria Police, and his wife, Mrs Christine Hodson).[87]

VICTORIA POLICE USE OF HUMAN SOURCES

August 2001

Victoria Police commences an internal review of the Drug Squad. The review later identifies failures in the Drug Squad's handling of human sources.[88]

2003–2007

Reports by the Victorian Ombudsman and the OPI identify risks and failures in the management of human sources by the Drug Squad and Victoria Police more broadly.[89] This includes a 2005 report into the leaking of information relating to human source Mr Terrence Hodson, who was murdered in 2004.[90]

May 2004

Victoria Police undertakes work to develop a new human source management approach, including visits interstate and internationally to identify best practice. It subsequently establishes the Dedicated Source Unit, later renamed the Source Development Unit.[91]

June 2010

An internal audit by Victoria Police recommends measures to improve human source management. This is followed by a 2012 internal review of the Covert Services Division and disbanding of the Source Development Unit.[92]

MS GOBBO'S PRACTICE AS A LAWYER

November 1993

Ms Gobbo pleads guilty to drug charges after police search a property she was sharing with Mr Brian Wilson, who also pleaded guilty to drug charges.[93]

1997–2010

According to evidence before the Commission, Ms Gobbo represents or provides legal advice to over 1,000 individuals, many of whom were involved in Melbourne's 'gangland wars'. According to previous reviews and proceedings, Ms Gobbo informed on some of her clients to Victoria Police.[94]

April 1997

Ms Gobbo is admitted to practice as a lawyer.[95]

November 1998

Ms Gobbo signs the Victorian Bar Roll and commences practising as a barrister.[96]

July 2004

Ms Gobbo suffers a serious stroke and is unable to work until early 2005.[97]

August 2006

Mr Carl Williams makes a complaint about Ms Gobbo to the Legal Services Commissioner.[98]

March 2008

Ms Roberta Williams makes a complaint about Ms Gobbo to the Legal Services Commissioner.[99]

March 2009

Ms Gobbo ceases practising as a barrister.[100]

April 2010

Ms Gobbo commences civil proceedings against Victoria Police, which are later settled.[101]

VICTORIA POLICE'S MANAGEMENT OF MS GOBBO

1994–2004

Ms Gobbo is in contact at various times during this period with officers of Victoria Police, including from District Support Group A, Asset Recovery Squad, Drug Squad, Ethical Standards Department and Major Drug Investigation Division. She is formally registered as a human source in 1995 and deregistered in 1996. She is registered again in 1999 before being deregistered in 2000. Evidence provided to the Commission indicates she assisted police with investigations including Operation Scorn (into alleged drug trafficking) and Operation Ramsden (into alleged money laundering by a solicitor employed at the law firm where Ms Gobbo worked). In 2003-04, Ms Gobbo meets informally with officers of the Purana Taskforce.[102]

2005–2009

Ms Gobbo is registered as a human source by the Source Development Unit.[103] Around 5,000 informer contact reports are created from the

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information she provides to Victoria Police. Information is disseminated to investigations including Operations Purana, Posse, Briars and Petra.[104]

December 2008

At Victoria Police's request, Ms Gobbo covertly records a conversation with Mr Paul Dale to assist the Petra Taskforce.[105]

January 2009

A Victoria Police risk assessment concludes Ms Gobbo is at extreme risk of serious injury or death. She is later deregistered as a human source.[106]

2009–2010

Ms Gobbo continues to provide information to Victoria Police after her deregistration as a human source, resulting in the creation of 207 contact reports.[107]

August 2010

Chief Commissioner, Mr Simon Overland, APM issues an instruction to Victoria Police that information is not to be received from Ms Gobbo.[108]

The first six months

NUMBERS AT A GLANCE

As at 19 June 2019, the Commission has:

- Issued 374 Notices to Produce and requests for information
- Received over 58,000 documents
- Received 131 public submissions
- Received 34 applications for leave to appear
- Conducted 22 days of hearings
- Examined 32 witnesses
- Engaged over 130 experts and agencies
- Tendered over 235 exhibits

While only part way through its inquiry, the Commission has undertaken significant work to examine the matters within its terms of reference. It has collected a substantial volume of information through Notices to Produce, requests for information, public submissions, public hearings, closed hearings, and policy and research work. The Commission has identified numerous lines of inquiry that it will continue to pursue through further investigations, hearings, research and stakeholder consultations.

This section sets out the Commission's work to date and how it is approaching the terms of reference.

INFORMATION SOUGHT BY THE COMMISSION

A substantial part of the Commission's work involves piecing together events and interactions that occurred many years ago in the context of complex police investigations and criminal prosecutions.

As at 19 June 2019, the Commission has issued 374 Notices to Produce and requests for information from relevant individuals and agencies. The types of documents being sought include policies and procedures, court documents and records of contact between Ms Gobbo and Victoria Police between 1993 and 2010.

Reviewing the large quantities of documents provided is a challenging task. The Commission has received over 58,000 documents. There are more than 5,000 contact reports arising from Ms Gobbo's interaction with Victoria Police.[109] There are also thousands of entries from police officers' diaries and a formidable number of intelligence reports, court and interview transcripts, Steering Committee papers, policies and procedures, file notes and correspondence. A large number of documents remain outstanding, with many more expected to be produced over the coming months.

The Commission has encountered delays in the receipt of information needed to conduct its investigations. Agencies and individuals have been asked to locate documents created five, 10 and in some cases up to 20 years ago, when filing and document management systems were significantly less sophisticated than they are today. Lengthy manual processes have been needed to identify, collate and digitise relevant records.

Suppression and non-publication orders relating to court proceedings have inhibited the Commission's access to essential documents. While the Commission is taking steps to address these orders, some restrictions on the use and disclosure of information will remain. Given the sensitivity and quantity of relevant material, the Commission has established bespoke, protected-level document management, information technology and security systems to securely store documents received.

Operational sensitivities and associated claims of public interest immunity have also affected the Commission's ability to obtain and disclose documentation. As noted earlier in this report, public interest immunity restricts the production of otherwise relevant evidence in legal proceedings. In the context of this inquiry, claims of public interest immunity may be made where publication of documents or information would be contrary to the public interest in preserving the confidentiality of that evidence.[110] Claims of public interest immunity are commonly made in relation to covert police methodologies and the use of human sources.

The Commission will continue to engage with relevant agencies to ensure it is able to examine, and where possible make public, relevant documentation. To facilitate this process in a timely way, the Commission has established a protocol between Victoria Police, the State of Victoria and the Commission to deal with parties' claims of public interest immunity over documents required to be produced to the Commission. This protocol is published on the Commission's website.

The Commission is grateful for the continued cooperation of individuals and agencies that have provided information relevant to the inquiry, including the courts, IBAC, DPP, CDPP, Victorian Ombudsman and Australian Criminal Intelligence Commission, which are exempt from the Commission's compulsory powers under the Inquiries Act but have nonetheless provided material voluntarily.[111]

PUBLIC SUBMISSIONS

The views and experiences of the Victorian community are of critical importance to the Commission's work. The Commission has sought public submissions to inform its inquiry and taken steps to communicate its work to individuals who may have been affected by the use of Ms Gobbo as a human source by Victoria Police, as well as to the broader community. This has included advertising the Commission's call for public submissions in major metropolitan newspapers, prisons and via its website and the media.

The Commission encourages any individuals who believe they may have been affected by the conduct of Ms Gobbo and have not yet contacted the Commission to do so by 31 July 2019. If the Commission does not receive all relevant information, it may not be possible to assess whether a case may have been affected by Ms Gobbo's conduct as a human source.

Reviewing the large quantities of documents provided is a challenging task. The Commission has received over 58,000 documents. There are more than 5,000 contact reports arising from Ms Gobbo's interaction with Victoria Police.

As at 19 June 2019, the Commission has received 131 public submissions. Several submissions have come from individuals who state that they were legally represented by or received legal advice from Ms Gobbo and that their cases may have been affected by her use as a human source by Victoria Police. Some of these individuals were convicted and sentenced for offences, while other cases did not result in a conviction. Submissions have also addressed the conduct of Victoria Police officers in their use and management of Ms Gobbo and other human sources. Other submissions have addressed various issues relevant to the terms of reference, including lawyers' obligations and client legal privilege, legal professional ethics, legal services regulation, amendments to the Evidence Act 2008 (Vic), and the use of human sources subject to legal obligations of confidentiality or privilege. Some submissions relate to matters that fall outside the Commission's terms of reference.

Public submissions can be viewed on the Commission's website. While the Commission's preference is to make submissions available to the public, there are various reasons for non-publication–these include the author's preference for the treatment of their submission, the need to protect the safety of the author or other individuals, and legal reasons such as restrictions on the publication of information that might be subject to client legal privilege, public interest immunity or suppression orders. Some submissions relevant to the conduct of Ms Gobbo and Victoria Police cannot be published while the Commission progresses its investigations into the allegations made. The Commission will continue to progressively review submissions and publish them as soon as it is appropriate.

HEARINGS

Public hearings contribute to the conduct of an open and transparent inquiry and keep the Victorian community informed about the Commission's progress.

As at 19 June 2019, the Commission has conducted 22 days of hearings, examined 32 witnesses and tendered over 235 exhibits. Public hearings are live streamed on the Commission's website with a 15-minute delay to ensure that matters subject to public interest immunity, suppression orders or other sensitivities are not inadvertently broadcast. The website is also regularly updated with published witness statements, documents received into evidence and transcripts of evidence given by witnesses at the hearings. The names of witnesses who have appeared at the Commission's public hearings are listed in Appendix C.

In the Commission's first round of public hearings[112] Mr Neil Paterson, APM, Assistant Commissioner, Intelligence and Covert Support Command, Victoria Police, gave evidence about Ms Gobbo's dealings with Victoria Police from 1993 to 2010. This round of public hearings also explored interactions between Ms Gobbo and Victoria Police between 1993 and 1999, including her first contact with police when charged with drug offences prior to her admission as a lawyer, her initial registration as a human source in 1995 and subsequent registration in 1999.

The second round of public hearings[113] focused on Victoria Police dealings with Ms Gobbo between 1999 to 2003, with emphasis on Victoria Police's Drug Squad and Ethical Standards Department. The third round of public hearings[114] explored contacts between Ms Gobbo and officers of Victoria Police between 2003 to 2004, with a focus on Victoria Police's Major Drug Investigation Division and the Homicide Squad.

The fourth round of public hearings[115] is intended to focus on Victoria Police's Major Drug Investigation Division, along with Ms Gobbo's interactions with officers of the Purana Taskforce, which was established to investigate unsolved homicides and drug trafficking offences associated with Melbourne's 'gangland wars'.

So far, the Commission has heard evidence about Ms Gobbo's professional and personal associations with Victoria Police officers and the information she provided them, both while registered as a human source and at other times while not formally registered. Victoria Police officers have also given evidence about their understanding of client legal privilege, lawyers' duty of confidentiality to their clients, the prosecution's duty of disclosure, and the training that officers have received in relation to these issues.

A number of witnesses have recounted events and interactions that date back many years, sometimes aided by police diary entries and other records made at the time. Several witnesses indicated that they could no longer recall the matters raised by Counsel Assisting the Commission in these hearings, due to the significant time lapse.

The Commission has received 34 applications for leave to appear at the hearings. If the Commission grants a person leave to appear at a hearing, they (or their lawyer) can participate in part or all of that hearing.[116] If a person or organisation is granted leave to appear, they may also apply for leave to cross-examine relevant witnesses.

The Commission has granted unconditional leave to appear (allowing parties to participate in all of the Commission's hearings and for all terms of reference) to the DPP and Solicitor of Public Prosecutions, the State of Victoria, Victoria Police and the Chief Commissioner of Victoria Police. Ms Gobbo has been granted unconditional leave to appear in relation to hearings relevant to terms of reference 1 and 2. A range of other parties have been granted more limited leave to appear for certain parts of the Commission's hearings and to cross-examine certain witnesses.

Where necessary to protect people's safety or to avoid jeopardising other proceedings or investigations,

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the Commission has redacted sensitive information from exhibits and transcripts, classified some evidence as confidential and conducted closed hearings. The Commission has heard arguments from Victoria Police, the media and other relevant parties about how closed hearings should be conducted.

As at 19 June 2019, the Commission has made 21 exclusion orders under section 24 of the Inquiries Act, limiting public and sometimes media access to parts of the proceedings. It has made 38 non-publication orders under section 26 of the Inquiries Act, requiring certain witnesses to be referred to by pseudonyms and prohibiting the publication of any material that could identify such witnesses. Two orders have since been lifted in full or in part.

POLICY AND RESEARCH

The Commission has commenced a substantial body of policy and research work to support its inquiry, particularly in relation to the use of human sources subject to legal obligations of privilege or confidentiality and the use of evidence obtained from human sources in the criminal justice system.

The Commission has written to over 130 individuals and agencies with relevant expertise and experience, including Australian and international law enforcement agencies, prosecuting authorities, police oversight, integrity and anti-corruption agencies, legal services regulatory organisations, peak bodies and researchers who specialise in policing, human source management and the criminal justice system.

The Commission is grateful to the large number of agencies and individuals who have demonstrated a willingness to share their insights and experience.

APPROACH TO THE TERMS OF REFERENCE

This section outlines how the Commission is approaching its terms of reference, including some of the key concepts, considerations and avenues of inquiry identified to date.

Term of reference 1: Cases that may have been affected by the conduct of Ms Gobbo as a human source

Term of reference 1 requires the Commission to inquire into and report on the number of, and extent to which, cases may have been affected by the conduct of Ms Gobbo as a human source. The Commission has prioritised its work on this term of reference as it concerns individuals who have been convicted of criminal offences, some of whom are still in custody.

Term of reference 1 and term of reference 2 are inextricably linked. Examining the extent to which cases may have been affected by the use of Ms Gobbo as a human source under term of reference 1 may also involve some consideration of the conduct of current and former officers of Victoria Police, as required under term of reference 2.

The term 'may have been affected' is important because it conveys the parameters and limitations of the Commission's task. The role of the Commission is not to conclude that a case was in fact affected, nor to dispute or question the overall outcome of a case, such as whether a conviction was appropriate. These are matters for the courts to determine, if individuals decide to challenge their convictions or sentences. The courts apply specific legal frameworks and rules of evidence to the individual facts they find in each case to assess whether it was properly conducted and whether a conviction should stand or be overturned.

The Commission's task is to examine the conduct of Ms Gobbo in her dual role as a lawyer and human source and determine whether it is reasonably arguable that because of this conduct, a case may have been affected in a manner that breached laws or legal principles or denied an individual their legal rights.

Term of reference 1 is perhaps the most challenging of all the Commision's tasks. The review of cases is heavily reliant on the provision of information by various parties including Ms Gobbo, Victoria Police, prosecuting and other agencies, and people who were represented by or received legal advice from Ms Gobbo. Some of these people may choose not to come forward. In other cases, particularly those dealt with by the criminal justice system many years ago, relevant records may not be easily accessible or may no longer exist. In cases that may have been indirectly affected by the use of Ms Gobbo as a human source, obtaining full and complete evidence presents additional challenges.

Despite these constraints, the Commission is taking all feasible steps to develop a comprehensive understanding of the cases that may have been affected. The matters under examination raise unusual and perhaps unique facts and complicated legal uncertainties. There are no clear precedents to precisely guide the Commission in its assessment.

There are, however, general laws and legal principles that are relevant. The following section, while not exhaustive, outlines some of these principles.

RELEVANT LAWS AND LEGAL PRINCIPLES

Breach of client legal privilege and associated duties

A client who engages a lawyer has a right to client legal privilege,[117] which protects disclosure of certain communications or documents shared between a lawyer and client for the dominant purpose of litigation or providing legal advice, unless, for example, this privilege is waived by the client.[118] Protecting certain communications that occur between lawyers and clients is essential to the administration of justice.[119] The importance of client legal privilege has been described as follows:

> *The proper administration of justice requires that clients are able to communicate freely and frankly with their lawyer, without fear of disclosing any information relevant to the legal advice they are seeking. It is well understood that, in the absence of the privilege, legal proceedings may be delayed or even miscarried as lawyers may not be able to properly represent their client, or bring relevant matters to the attention of the court.*[120]

A breach of client legal privilege could include disclosure to third parties of confidential communications between a client and their lawyer, which were for the dominant purpose of the lawyer providing legal advice.

A client's right to claim privilege over communications with their lawyer is not absolute. Client legal privilege can be lost in circumstances where the client, their lawyer or a third party engage in communications or prepare documents in furtherance of a fraud, an offence, or an act that renders a person liable to a civil penalty or a deliberate abuse of statutory power.[121]

Individuals communicate with a lawyer for various reasons, including to obtain legal, business, strategic or other advice. Depending on the circumstances, some client-lawyer communications may be protected by client legal privilege and others may not.[122] In reviewing cases, the Commission is examining the nature of the information that Ms Gobbo provided to Victoria Police and whether it was subsequently used in criminal investigations and prosecutions. This will include an assessment of the circumstances in which the information was provided to, or obtained by, Ms Gobbo to identify whether it may have been the subject of client legal privilege.

Breach of confidentiality

Lawyers also have a broader duty of confidentiality to their clients, which requires that they do not disclose confidential information acquired from a client-lawyer relationship.[123] This duty enables an individual who seeks legal assistance to discuss relevant matters freely, with the knowledge that any sensitive information provided will not be disclosed. Without this confidence, a person might choose not to obtain legal advice.[124] The duty of confidentiality also assists lawyers to provide better advice and representation to their clients, including advice that might dissuade them from engaging in illegal conduct, and ultimately supports the public's trust in lawyers and the legal system.[125]

There are limited exceptions to the duty of confidentiality. These might include where the client consents to the information being disclosed; where the information is obtained by the lawyer from another person in circumstances that do not attract confidentiality; or where disclosure is necessary to prevent probable serious crime or imminent serious physical harm to the client or another person.[126]

Discussions between a lawyer and client that occur socially but in circumstances where a client believes the relationship to be one of confidence, while not attracting client legal privilege, may still be deemed confidential.[127] In assessing whether information Ms Gobbo provided to police may have been subject to client legal privilege, the Commission is also examining whether information may have been disclosed in breach of the duty of confidentiality.

Breach of the duty of loyalty or conflicts of interest

Lawyers also hold a duty of loyalty to their clients.[128] This duty requires a lawyer

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to promote and protect the interests of their client and avoid conflicts of interest.[129] It is fundamental that the client can rely on and trust that their lawyer is acting in good faith and in accordance with their best interests.

Conflicts of interest can arise when a lawyer's duty to their client conflicts with the duties they owe to another current or former client, or with the lawyer's own personal interests.[130] For example, a lawyer may be restricted from representing two clients in the same matter where the clients' interests may diverge. This is because there is a chance that the lawyer will not be able to act in the best interests of each client.

A breach of this duty may have arisen if Ms Gobbo represented multiple persons in the same case and there were inconsistent interests among these clients. A breach may have also occurred where Ms Gobbo's own personal interests conflicted with her duty to act in the best interests of her client.

In examining the interaction between the duty of loyalty and Ms Gobbo's conduct as a human source, the Commission will consider a range of circumstances in which a lawyer's conflict of interest, failure to disclose conflicts of interest and breach of the duty of loyalty could occur. Examples might include circumstances where a lawyer:

- had previously represented and continued to act for a central witness in the case against the client
- provided information about a client or relayed the content of conversations with a client to police
- taped conversations with a client to provide to the police
- in the course of a criminal investigation or proceedings, provided information to police that was calculated to strengthen the prosecution case against a client
- was the source of evidence contained in a prosecution brief of evidence against a client
- held themselves out as independent and able to provide objective and sound legal advice to a client while being a source of the evidence against the client.

Breach of duty to the court

Upon admission to the legal profession, lawyers become officers of the court and their paramount duty is to act independently in the interests of the administration of justice.[131] For example, lawyers must not deceive or knowingly or recklessly mislead the court, withhold information or documents that are required to be disclosed, or waste the court's time.[132] The duty to the court ensures the integrity of the justice system. Lawyers must not act singularly in their client's interests to the detriment of ensuring justice is delivered in accordance with the law.[133]

A breach of the duty to the court is also likely to arise in the circumstances described earlier, where there has been a breach of another duty–such as a lawyer's failure to disclose a conflict of interest. Thus, if the Commission finds that Ms Gobbo may have breached a client's legal privilege or acted in a manner that conflicted with her client's interests, a failure to disclose such breaches or conflicts to the court may also amount to a breach of her duty to the court.

Other relevant legal principles

There are various rules and procedures that ensure investigations and prosecutions of individuals for criminal offences are conducted fairly. For instance, there are specific duties that require the prosecution to disclose relevant material to an accused person.[134] Courts also have a responsibility to ensure fair hearings, including by making decisions about the evidence that can be used in a criminal case.[135]

In its review of cases, the Commission is considering how information obtained from Ms Gobbo was used in investigations and prosecutions and whether relevant rules and procedures were followed. For example, if evidence relied on in a trial against an accused person was obtained from information provided by Ms Gobbo in breach of her obligations as a lawyer, a question may arise as to whether that evidence was improperly or illegally obtained by Victoria Police. In this way, the review of cases under term of reference 1 is closely linked to the review of Victoria Police conduct under term of reference 2.

As the Commission receives further documentation and progresses its review of cases, other relevant legal principles and scenarios may emerge and inform its determination about whether and to what extent a particular case may have been affected.

THE COMMISSION'S REVIEW OF CASES

The Commission's approach to reviewing cases involves multiple interconnected stages.

The first stage is to identify individuals represented by Ms Gobbo during the period she operated as a human source. From the information gathered to date, the Commission understands that over 1,000 individuals were legally represented by or received legal advice from Ms Gobbo during the relevant period. It is important to note that not every such individual was necessarily the subject of information she provided to Victoria Police.

The Commission has also received material related to individuals who were not represented by Ms Gobbo in court proceedings, but whose cases may nonetheless have been affected–for example, because Ms Gobbo acted for a co-accused. Some individuals who were not ultimately convicted of a criminal offence (but rather were acquitted or had charges withdrawn) have also submitted that their cases may have been affected.

The second stage of the Commission's review involves collecting relevant documents and information from law enforcement agencies, prosecuting authorities and other parties. This includes relevant court documents, contact reports and audio recordings.

The third stage involves analysis of the material received to assess whether a case may have been affected by the conduct of Ms Gobbo as a human source, and if so, the extent to which it may have been affected.

While the review of cases requires consideration of exceptional and possibly unique facts and circumstances, the Commission has developed key questions to guide its analysis, informed by the laws and legal principles described earlier in this report. The questions listed below, while not exhaustive, form a critical part of the Commission's review:

- Did Ms Gobbo's conduct involve a breach of legal obligations of confidentiality or privilege?
- Did Ms Gobbo's conduct involve a failure to disclose any identified conflicts of interest?
- Was evidence in the case obtained as a consequence (directly or indirectly) of Ms Gobbo's conduct as a human source?

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- How important was this evidence in the case?
- Did Ms Gobbo provide information about, influence, or act for, witnesses, co-accused or other persons involved in the case?
- What was the nature and extent of Ms Gobbo's role in obtaining instructions from, advising, and/or appearing for the accused person in the case?
- Was the accused deprived of an opportunity to take, or attempt to take, a different course in their proceedings because of Ms Gobbo's involvement or influence on the case as a human source?
- Was there a failure to disclose material or information to an accused person, which would have been favourable to the accused person and in breach of the prosecution's duty of disclosure?
- Did Ms Gobbo have a personal relationship with police officers involved in the investigation or prosecution of the case at the time of the investigation and prosecution, which may have constituted a conflict of interest?

This task is complicated by a range of factors, including the magnitude and interconnected nature of the criminal offending in some cases and overlapping police operations involving multiple coaccused. Further, some documentation prepared by law enforcement agencies in the relevant cases runs to tens of thousands of pages. Finally, extensive interaction between Ms Gobbo and police over many years, and the volume of information she provided, makes it difficult to trace the passage of such information from her human source handlers to other police for use in often protracted investigations and prosecutions.

As it progresses its review of cases, the Commission is giving priority to those involving individuals who are currently in custody or who have made submissions to the Commission that their case may have been affected. During each stage of the review and as more information is obtained from hearings, submissions and the production of further documents, it is anticipated that the Commission may identify additional cases, along with additional questions and considerations to guide the review process.

POSSIBLE IMPLICATIONS OF CASES AFFECTED BY THE CONDUCT OF MS GOBBO

As noted earlier in this report, individuals whose convictions may be called into question by Ms Gobbo's conduct may seek to have their conviction or sentence overturned by a court. It is important to re-emphasise that the Commission has no power to effect these outcomes. The potential avenues of recourse that may be available to a convicted person are summarised below.

Avenues of appeal

Appeals against conviction

A person convicted of an offence in the County Court or Supreme Court can apply for leave to appeal their conviction by the Court of Appeal. Section 276(1) of the *Criminal Procedure Act 2009* (Vic) provides that an appeal must be allowed if the Court is satisfied that:

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or

(c) for any other reason there has been a substantial miscarriage of justice.

There are several circumstances in which a court may determine that there has been a substantial miscarriage of justice, and they cannot be rigidly defined. The High Court has stated that the kinds of miscarriage referred to in section 276(1) include, but are not limited to, three kinds of cases.

These are:

- where the jury has arrived at a result that cannot be supported having regard to the evidence
- where there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial
- where there has been a serious departure from the prescribed processes for trial.[136]

If an appeal against conviction is successful, the Court will overturn the conviction and order that a new trial is held or that the person is acquitted.[137] Any sentence imposed for the offence (for example, a term of imprisonment, Community Correction Order or a fine) will also be set aside. If the person is in custody, they will likely be released. Exceptions would include if the person is also serving a sentence of imprisonment for another, unrelated offence, or if the Court orders a new trial and bail is refused.

In considering an appeal against conviction, the courts also have an inherent power to order a permanent stay of criminal proceedings. The effect of a permanent stay is that the proceedings come to an end. The power to order a permanent stay comes from the court's power to protect the integrity of its processes and ensure fairness.[138] It is only used in exceptional circumstances, where a defect cannot be remedied by other powers available to the court.[139]

Petition for mercy

If a person wishes to challenge their conviction but they have already unsuccessfully appealed, the only way that the conviction can be reviewed is to apply for a petition for mercy. On considering a petition for mercy, the Attorney-General has the power to refer the case to the Court of Appeal.[140] If this occurs, the case is treated as an appeal against conviction.[141] The Attorney-General also has the power to refer a specific point of law to the Supreme Court, which can provide an advisory opinion.[142]

Other orders arising from a conviction

If an appeal is allowed, in addition to the conviction and sentence being set aside, there are other orders that may be affected. Some of these are outlined below.

Subsequent sentencing orders

During sentencing, a court must have regard to, among other things, an offender's previous character, which may include prior criminal history.[143] This means a person with relevant previous convictions could be sentenced more severely than someone without any relevant past criminal convictions. As a result, it is possible that sentences that are currently being served for convictions not directly affected by the conduct of Ms Gobbo could still be subject to an appeal against sentence.[144] That is, an individual may argue that the sentence imposed was higher than it should have been because the court considered a prior conviction that was subsequently overturned.

Asset confiscation and associated orders

In certain circumstances, the State has the power to require the forfeiture of an offender's assets. Generally, forfeiture of assets occurs after a finding of guilt for serious profit-motivated offences (for example, drug trafficking) or following a conviction for certain offences where property is found to have been used, or intended to be used, in connection with an offence. Where there is no property to forfeit (for example, when an offender has already spent the proceeds of crime), a court can make an order requiring the offender to pay an amount of money equivalent to what they gained from the crime through a pecuniary penalty order.[145] The State also has the power to forfeit a person's assets in some circumstances where a person has not been charged or convicted of a criminal offence.[146] The Confiscation Act 1997 (Vic) sets out a process for any property forfeited (or the value of any property forfeited) to be returned if a conviction is set aside by a court.[147]

Post-sentence supervision and detention orders

A court can order an offender who has committed a serious sex offence or a serious violence offence to be subject to post-sentence supervision or detention after they have completed their sentence of imprisonment.[148] Offenders on a post-sentence supervision order are supervised by Corrections Victoria after they are released into the community from prison and must comply with a range of conditions. Offenders subject to a post-sentence detention order are detained in prison for the duration of the order. A person subject to a post sentence supervision or detention order who has their original conviction set aside would no longer be subject to the post-sentence order.[149]

ONGOING DISCLOSURE

Alongside the work of the Commission, both the OPP and CDPP have been conducting searches of their databases to identify any cases they prosecuted that may have been affected by the use of Ms Gobbo as a human source. This has involved identifying matters where Ms Gobbo appeared for the defence over the relevant timeframe and seeking information from Victoria Police about those matters so that the OPP and CDPP can determine whether information must be disclosed to potentially affected individuals.

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In addition to the seven individuals who received disclosure in December 2018 following the High Court's decision,[150] the DPP and CDPP have made subsequent disclosures to other individuals based on information provided by Victoria Police. The Commission understands that the DPP and CDPP will continue to do so if they identify any further cases where this is required.

Evidence to support disclosures to affected individuals is also being sought from Victoria Police in cases where individuals have applied for a petition for mercy or sought leave to appeal. Mr Faruk Orman has applied for a petition for mercy and Mr Zlate Cvetanovski, Mr Antonios (Tony) Mokbel and Mr Rabie (Rob) Karam have applied for leave to appeal their convictions to the Court of Appeal. The Court of Appeal has set timeframes to progress the disclosure of documents from Victoria Police to enable these applications to proceed. The Commission is taking all reasonable steps to assist the prosecuting authorities in their ongoing disclosure obligations.

Term of reference 2: The conduct of Victoria Police in managing Ms Gobbo as a human source

Term of reference 2 requires the Commission to inquire into and report on the conduct of current and former officers of Victoria Police in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source.

Just as lawyers have duties and obligations that arise from their profession, police officers must promise to discharge their duties faithfully and according to law, without favour or affection, malice or ill-will.[151] The importance of individual police officers acting honestly, fairly and with integrity is reflected in the laws and professional and ethical standards that apply to Victoria Police officers.

As police officers are responsible for the collection of evidence that forms part of criminal prosecutions, how that evidence is obtained is relevant to whether the investigation and prosecution have been conducted lawfully. For example, courts have restricted the use of evidence obtained by police through search warrants that were not appropriately sworn.[152] Accordingly, and as outlined earlier in this report, the issues arising from term of reference 2 may also be relevant to the Commission's assessment of whether, and to what extent, a case may have been affected as required under term of reference 1.

To address term of reference 2, the Commission is inquiring into the nature and extent of police officers' involvement in and knowledge of the use of Ms Gobbo as a human source. This includes examining the extent to which police officers complied with relevant policies and procedures; the appropriateness of their conduct in recruiting and managing Ms Gobbo as a human source; police governance and other organisational arrangements in place at the time; and the extent to which issues relating to police accountability, leadership and culture played a role in the events that transpired.

The Commission is also required to examine Victoria Police disclosures concerning the use of Ms Gobbo as a human source. This includes its disclosure of relevant material to prosecuting authorities and affected individuals at the time that these individuals were being prosecuted, and its continued disclosures after the High Court decision allowed the prosecuting authorities to notify certain affected individuals of Ms Gobbo's use as a human source.

The Commission is not empowered to conduct a broad inquiry into the operation, effectiveness or integrity of Victoria Police, nor its management of human sources generally. Term of reference 2 is confined to the conduct of police officers relating to their use of Ms Gobbo as a human source. The Commission faces an enormous task in fulfilling this term of reference, in part because of the extensive interaction between Ms Gobbo and many different officers, divisions and taskforces within Victoria Police over a period of 18 years. The Kellam Report noted that, notwithstanding the need to keep Ms Gobbo's identity and management as a human source confined to a small number of individuals, evidence provided to the investigation indicated that at least 150 police officers were aware of Ms Gobbo's identity as a human source by 2009.[153]

So far, the Commission has called a number of current and former officers of Victoria Police who had interactions with Ms Gobbo to give evidence at hearings. It has also heard from senior Victoria Police officers involved in the management and oversight of human sources generally.

Term of reference 3: The current adequacy and effectiveness of Victoria Police processes and practices

Term of reference 3 requires the Commission to consider the current adequacy and effectiveness of Victoria Police's processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege. This includes examining Victoria Police's compliance with recommendations of the Kellam Report.[154]

The Commission has heard that there have been many changes to policies, procedures and practices for the management of human sources since the time that Ms Gobbo was first registered as a human source. Victoria Police has given evidence that all of the recommendations of the Kellam Report have now been implemented.[155] The Commission will continue to examine whether Victoria Police's current practices comply with these recommendations and are otherwise appropriate.

This will include assessing the extent to which current policies and procedures reflect best practice in the management of human sources with legal obligations of confidentiality of privilege, and the extent to which Victoria Police has taken all necessary steps to ensure its officers understand and apply relevant requirements and safeguards.

To address this term of reference, the Commission requires timely access to relevant policies and procedures. The Commission appreciates the sensitivities of covert policing methodologies, including the use of human sources, and the need to treat this information carefully. Some jurisdictions, such as the United Kingdom, have legislative schemes and published codes of practice guiding the use of human sources.[156] Much information, however, particularly that detailing covert or sensitive operational methodologies, is not easily accessible.

The Commission will be reliant on the expertise, collaboration and

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cooperation of law enforcement agencies in Australian and international jurisdictions as it continues its work to fulfil term of reference 3. To date, the Commission has had positive engagement and cooperation from several law enforcement agencies in other jurisdictions.

Term of reference 4: The use of specified human source information in the criminal justice system

Term of reference 4 requires the Commission to examine the adequacy of Victoria Police's current practices for the disclosure of information from human sources who are subject to legal obligations of privilege or confidentiality to prosecuting authorities (such as the DPP, the CDPP and Victoria Police prosecutors in the Magistrates' Court).

The Commission is also required to examine whether there are adequate safeguards in relation to the ways in which Victoria Police and the DPP prosecute matters when the investigation has involved human source material.

As outlined earlier in this report, prosecutors have a duty to disclose all relevant material to an accused person. The duty of disclosure applies to 'the prosecution' in a broad sense. This includes police prosecutors, the DPP and other lawyers who act on behalf of the DPP to prosecute a crime. For the purposes of the prosecutorial duty of disclosure, law enforcement agencies are part of the prosecution.[157]

The use and identities of human sources are often the subject of claims of public interest immunity. This is partly because of the substantial risk of harm to them and their families if their identities become known, and partly because of the community safety benefits to be gained from the continued use of human sources, who require confidence that their identities will be protected. Claims of public interest immunity are relevant to prosecutorial duties of disclosure as they may affect the ability of the prosecution to disclose information to an accused person and discharge this obligation appropriately.

The Commission is examining Victoria Police's disclosure practices in relation to human sources with obligations of confidentiality or privilege. Its task is limited to these circumstances and does not extend to Victoria Police's broader practices for disclosure to prosecuting authorities.

The Commission has been and will continue to consult widely with Australian and international agencies and individuals to assist in the development of evidence-based reforms.

To address this term of reference, among other things, the Commission is examining information from Victoria Police about the current operation of disclosure processes, procedures or guidelines in relation to prosecutions that involve specified human sources. The Commission aims to develop an understanding of how human source material is being used in the criminal justice system. The Commission will also examine the safeguards currently in place, how they protect specified human sources and the collection of information, and how these considerations are balanced against the right of an accused person to a fair trial.

Under the Inquires Act, the Commission cannot inquire into entities such as the DPP.[158] That does not, however, prevent such agencies from voluntarily giving evidence or producing information.[159] The Commission gratefully acknowledges the DPP's and CDPP's cooperation to date on this and other terms of reference.

Term of reference 5: Recommended measures – Other human sources and any systemic failures

Term of reference 5 requires the Commission to recommend measures to address the use of any other human sources who are or have been subject to legal obligations of confidentiality or privilege and come to the Commission's attention during the inquiry. Victoria Police has disclosed the use of several human sources who are not lawyers or legal practitioners but who may be, or may have been, subject to legal obligations of confidentiality or privilege.

Term of reference 5 does not require the Commission to forensically examine the use of such human sources to the same extent that is required in the case of Ms Gobbo. However, if the Commission forms the view that a case may have been affected by the use of such a human source, it will promptly provide any relevant information to the appropriate prosecuting authority.

There is no formal definition of 'legal obligations of confidentiality or privilege', nor an exhaustive list of the professions that might be subject to such obligations. The Commission is examining the approaches adopted in other jurisdictions, some of which call for specific safeguards for the use of human sources likely to hold confidential or privileged information, including lawyers, medical professionals, journalists, Members of Parliament and ministers of religion.[160]

This term of reference also asks the Commission to recommend measures to address any systemic or other failures relating to the management of human sources subject to legal obligations of confidentiality or privilege and the use of such human source information in the broader criminal justice system. In this vein, the Commission has an important role in preventing relevant misconduct or systemic failures by Victoria Police in the future.

Term of reference 6: Any other relevant matters

Term of reference 6 enables the Commission to inquire into and report on any other matters necessary to satisfactorily resolve the matters set out in terms of reference 1 to 5.

The Commission has received public submissions that raise other matters relevant to the Commission's terms of reference, including regulation of the legal profession, Victoria Police's transition of human sources to witnesses, and the management and protection of witnesses. The Commission will consider these submissions and other evidence received insofar as they relate to its inquiry into terms of reference 1 to 5.

Next steps

While the Commission has undertaken substantial work to progress its inquiry, there is still considerable work to do.

GATHERING FURTHER EVIDENCE

In the coming months, the Commission will progress its review of cases relevant to term of reference 1. It will also continue to seek relevant documents, conduct hearings, examine witnesses and analyse material to support its inquiry.

The Commission intends to call additional current and former officers of Victoria Police to appear at hearings in relation to terms of reference 1 and 2. Hearings expected to commence from 22 July 2019 will examine the work of the Victoria Police Source Development Unit. This unit was responsible for managing Ms Gobbo as a human source between 2005 and 2009 and is central to the Commission's inquiry. The Commission also intends to call current and former members of Victoria Police senior command to give evidence about a range of matters, including the decision-making, governance and oversight arrangements relevant to Ms Gobbo's use as a human source.

On 5 June 2019, the Commission held a directions hearing to address, among other things, how the hearings relating to Ms Gobbo's interactions with the Victoria Police Source Development Unit will proceed. The Commission also heard from the legal representatives of several individuals whose convictions may have been affected by the conduct of Ms Gobbo and who seek leave to appear in those hearings.

On the information presently before it, the Commission considers it important to afford potentially affected individuals appropriate opportunities to participate in hearings relating to terms of reference 1 and 2. In turn, the ability of these individuals to participate meaningfully relies on them having access to information relevant to their cases.

As submitted by Counsel Assisting the Commission at the 5 June 2019 directions hearing:

> *There are a number of reasons why that's important but significantly it enables them to assist the Commission to determine the extent to which their cases may have been affected. In order for them to do so, in our view, they're entitled to know what information was provided to Victoria Police handlers and investigators by Ms Gobbo and how such information was used, if it was, in their prosecutions by the Crown and whether such information should have been disclosed to them prior to their trials.*[161]

The Commission will continue to afford individuals and agencies appropriate opportunities to participate in the Commission's hearings, and to reiterate its expectation that Victoria Police provides potentially affected individuals with all material relevant to their cases.

The Commission will also give Ms Gobbo the opportunity to give evidence before the Commission and work with her lawyers to facilitate her participation.

Following a series of stakeholder consultations over the coming months, the Commission intends to call relevant witnesses to give evidence at the Commission's hearings about the adequacy and effectiveness of current Victoria Police policies, procedures and practices, and national and international best practice for the management of human sources subject to legal obligations of confidentiality or privilege.

The Commission's upcoming hearing schedule will be published on the Commission's website as soon as practicable prior to hearings. As far as possible, the Commission will continue to hold its hearings in public. Where necessary, for example to protect people's safety, the Commission will continue to hold closed hearings, redact exhibits and make non-publication orders.

The Commission will endeavour to allow Commission-accredited media to be present in closed hearings. As the inquiry progresses, the Commission will also review the exclusion and non-publication orders it has made and lift any orders that are no longer necessary. To Inform these decisions, the Commission may hold directions hearings to enable Victoria Police, media organisations and other relevant parties to appear and make submissions.

EXAMINING BEST PRACTICE AND DEVELOPING REFORMS

Over the coming months, the Commission will continue to progress its policy and research work, including engagement with relevant experts to examine current best practice and to compare Victorian approaches with those of other jurisdictions. This will assist the Commission to identify legislative, policy, procedural and other measures needed to build on, and strengthen, Victoria's framework for the use and management of relevant human sources.

The Commission is acutely aware of the need for a balanced and operationally practical approach to the use of human sources that also ensures appropriate governance, accountability and transparency. As the Commission has stated publicly, the proper and principled use of human sources is a critical tool for police in the prevention, detection and investigation of crime. The Commission is also conscious of the need to consider the specific legal and operational context in which Victoria Police and the Victorian criminal justice operate when developing its findings and recommendations.

The Commission has been and will continue to consult widely with Australian and international agencies and individuals to assist in the development of evidence-based reforms. The Commission also intends to hold selective roundtables with key experts and practitioners later in the year to refine proposed reforms.

In developing findings, the Commission will also afford relevant parties appropriate opportunities to respond. If the Commission proposes to include an adverse finding in its report, it will ensure that the person has had an opportunity to respond and will consider and fairly set out the person's response in its final report.[162]

The Commission will deliver its final report on 1 July 2020, including recommendations to ensure that any future use of human sources bound by obligations of confidentiality or privilege is robust and effective, and supports the continued integrity of Victoria's criminal justice system.

Endnotes can be found at https://www.rcmpi.vic.gov.au

Victorian Legal Services Board & Commissioner

Submission to the Royal Commission into the Management of Police Informants

The use of lawyers as human sources in Victoria's criminal justice system.

Introduction

The Victorian Legal Services Board (the Board) and the Victorian Legal Services Commissioner (the Commissioner) are the independent statutory entities responsible for regulating Victoria's legal profession. The two entities effectively operate as one body, known as the VLSB+C, and together have regulatory responsibility for the approximately 23,000 solicitors and barristers who currently hold practising certificates.

The VLSB+C's key strategic goal is to maintain and enhance public trust and confidence in Victoria's legal profession, in recognition that the integrity of the profession is fundamental to the legitimacy of the justice system and the protection of the rule of law.

The VLSB+C welcomes the opportunity to provide information that may assist the Royal Commission into the Management of Police Informants (the Royal Commission) in considering the past and future use of lawyers as human sources, having regard to the regulatory framework in place over the course of the period under consideration as well as the current regulatory framework.

The VLSB+C's submission comprises four sections, which are as follows:

1. **An overview of existing and previous legal regulation:** this section provides information about the legislation governing the legal profession since 1997, and how regulation of the profession has changed over that time frame.
2. **Lawyers' key professional duties and obligations:** this section outlines, at a high level, the duties and obligations owed by lawyers to the court and their clients, including areas of uncertainty in relation to those duties and obligations.
3. **The use of lawyers as human sources:** this section sets out the VLSB+C's position on the use of lawyers as human sources.
4. **The VLSB+C's regulatory powers:** this section sets out information about the VLSB+C's powers in respect of lawyers who have breached their professional obligations.

At this stage the VLSB+C's submission is, of necessity, high level. However, as facts emerge in the course of the Royal Commission, the VLSB+C may be in a position to provide further assistance to the Commission, including as to the adequacy or clarity of the rules that govern the profession.

1. Overview of existing and previous regulation of the legal profession

This section provides information about the regulatory framework for the legal profession in Victoria. This is background information designed to assist the Royal Commission in understanding the VLSB+C's role and powers, as well as changes that have occurred in the regulation of lawyers since the mid-1990s, particularly in relation to the role of professional associations in regulating the profession.

1.1 Regulation of the legal profession-overview

The legal profession has been regulated in Victoria for over a century. The Legal Profession Uniform Law (the Uniform Law) currently provides a robust and effective regulatory framework with a strong consumer protection focus through promotion, monitoring and enforcement of the high professional standards of legal practitioners[1]. The VLSB+C works co-operatively with the Law Institute of Victoria (the LIV), the Victorian Bar (the Bar)[2] and a range of other organisations, including interstate regulators forming part of the Uniform framework,[3] in support of these standards. As at 30 June 2018, 22,438 lawyers held practising certificates in Victoria.[4]

The Uniform Law commenced on 1 July 2015 in Victoria and New South Wales, establishing a common 'uniform' framework for regulation across both states. Western Australia is set to join the Uniform Law from 1 July 2020. In Victoria, the Uniform Law forms Schedule 1 to the Victorian *Legal Profession Uniform Law Application Act 2014* (the Application Act) and is implemented in Victoria through that Act. One of the main objectives of the Uniform Law is to provide and promote inter-jurisdictional consistency in the regulation of legal practitioners.

The Application Act establishes the Board and the Commissioner as the two key independent statutory entities with responsibility for regulating Victoria's legal profession. As noted previously, the two entities effectively operate as one body, known as the VLSB+C. The VLSB+C share staff employed by the Commissioner.

Although VLSB+C operates effectively as one body, the Board and Commissioner are allocated separate regulatory functions under the Application Act and the Uniform Law.

The Board is responsible for a broad range of regulatory functions, including most relevantly to this submission, the functions of issuing, renewing,

suspending, cancelling and imposing conditions on practising certificates, including making decisions about the whether an applicant is a fit and proper person to practice law.

The Commissioner is responsible for the receipt, management and resolution of complaints about the professional conduct of lawyers by members of the community, other lawyers, or on the Commissioner's own motion. Complaints can extend to a lawyer's conduct outside of legal practice, as well as about the conduct of a legal practice as an entity through the responsible principals of that entity. Complaints can include allegations of failures to comply with the Uniform Law, the Application Act and the supporting sets of Uniform Rules, including relevantly for this submission the respective professional conduct rules for solicitors and barristers[5]. A complaint may also raise allegations of misconduct at common law.[6]

Any investigation of a complaint may result in the Commissioner taking a variety of disciplinary actions, including imposing fines, issuing reprimands and requiring further education or counselling[7]. The more serious allegations of professional misconduct must be brought before the Victorian Civil and Administrative Tribunal (VCAT) for decision[8] . Regulatory actions taken by the Commissioner against lawyers are in addition to any other criminal or civil sanctions that may be imposed by other authorities.

The Commissioner also has an important statutory role in the education of the community and the legal profession as to regulatory and other issues of relevance to the legal profession, and the delivery of legal services to the community.

1.2 The Board and the Commissioner

The Board comprises seven members; four members appointed by the Victorian Government (including the Chair, Ms Fiona Bennett) and three members (one barrister and two solicitors) directly elected by the Victorian legal profession. The Application Act sets out the skills and experience required for government appointments to the Board. Of the three appointed members, at least one must be a person who has experience in financial or prudential management and at least one must represent the interests of consumers of legal services.

The Commissioner, Ms Fiona McLeay, is an independent statutory appointment made by the Victorian Government. Ms McLeay is also the Chief Executive Officer to the Board.

1.3 Eligibility to work as a lawyer in Victoria

In order to work as a lawyer in Victoria, a person must be both admitted to practice and have a current practising certificate. The Supreme Court admits lawyers to practice, as being 'admitted' means that the lawyer is listed on the roll of lawyers which the Court holds. A person is eligible for admission only where they have been certified by the Victorian Legal Admissions Board as both having completed the necessary academic and practical training, and being fit and proper.[9] The Supreme Court is also the only body that can 'strike off a lawyer so that their name is removed from the Court roll and they can no longer practice[10] The Court retains an inherent jurisdiction with respect to the control and discipline of members of the profession[11]

The Board has responsibility for the granting and renewing of practising certificates. A practising certificate is a lawyer's licence to appear in court, provide legal advice and represent their clients.

The Board has powers to suspend or cancel a lawyer's practising certificate at any time, if the Board reasonably believes that the lawyer is unable to fulfil the inherent requirements of an Australian Legal Practitioner.[12]

Like many professions, lawyers must comply with professional conduct rules to remain eligible to hold a practising certificate and must undertake continuing professional development (CPD). They must apply to renew their practising certificate every year and have to disclose to the Board any behaviour or personal circumstances which might impact on their ability to fulfil the requirements of being a lawyer, so that these can be taken into account before their application to renew their practising certificate is granted. The Board must not renew a practising certificate if it considers the person is not a fit and proper person to hold the certificate.[13]

There are a range of factors that the Board considers in determining whether or not a lawyer is fit and proper to hold a practising certificate. Lawyers are required to answer a series of questions every year. The information provided by lawyers at an application for grant or renewal of a practising certificate provides the Board with information on which to make a decision as to whether a person is fit and proper. However, any other information received by the Board may also influence the Board's decision. This includes information that may have come to the Board's attention as a result of disciplinary action taken by the Commissioner, or patterns of behaviour identified when investigating complaints or undertaking trust investigations or behaviour directly referred to the Board by a court or tribunal.

The legal profession comprises solicitors and barristers. The Board makes all decisions in relation to practising certificates for solicitors. However, for barristers, the Board delegates its powers to grant and renew practising certificates to the Bar, which is the professional association for Victorian barristers. This means the Bar makes the decisions about whether or not barristers are fit and proper to continue to hold practising certificates. The Board does not review decisions about practising certificates made by the Bar.

The Commissioner has responsibility for receiving complaints about lawyers and taking disciplinary action against lawyers who engage in conduct that may amount to unsatisfactory professional conduct or professional misconduct. None of the Commissioner's powers to regulate solicitors are delegated. However, the Commissioner does delegate some powers about the conduct of barristers to the Bar, including powers to handle certain consumer and disciplinary matters. Nonetheless, the Commissioner still receives complaints about barristers, and chooses which complaints to refer to the Bar. All decisions to close complaints are made by the Commissioner.

The delegations to the Bar made by the Board and the Commissioner recognise that barristers are a small and highly specialised cohort within the legal profession as a whole. The Bar provides extensive professional oversight of and services to Victorian barristers, including the Bar Readers Course (relevant to new barristers), and the Bar's Ethics Committee, which provides guidance to barristers of all levels of experience.

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1.4 The evolution of the involvement of professional associations' in legal regulation

In Victoria, historically, the Bar and the LIV have played a key role in the regulation of the legal profession. However, since the mid-1990s there has been a movement away from the professional bodies playing a direct role in regulation and towards independent statutory regulators. Key steps in this progress are set out below:

(a) In 1997, the professional associations had specific responsibilities and powers under the *Legal Practice Act 1996* to grant and renew practising certificates, undertake complaints investigations, and bring disciplinary proceedings against lawyers. This meant the professional associations had direct powers to regulate the profession. There was also an independent Legal Ombudsman who was accountable to the Victorian Parliament and had general oversight of professional associations' investigations, as well as its own separate power to receive and investigate complaints, and take necessary disciplinary action.

(b) In 2005, the introduction of the *Legal Profession Act 2004* resulted in the removal of direct regulatory powers from the professional associations and the establishment of separate statutory regulators: the Legal Services Board and the Legal Services Commissioner (the VLSB+C's predecessors). However, in practice the professional associations still played a key role in the regulation of the profession. This was because the Board and Commissioner delegated many of their powers to the LIV and the Bar to exercise on their behalf.

(c) In 2014, the Board removed the LIV's delegations in relation to the grant and renewal of solicitors' practising certificates. In 2013, the then Commissioner removed delegations from the LIV to investigate complaints about solicitors.

(d) The LIV and the Board have agreed to remove the LIV's delegations relating to the conducting of investigations of solicitors' trust accounts. This will take effect from 1 July 2019, meaning the LIV will only have delegations from the Board to conduct CPD audits of lawyers and undertaking compliance audits of law practices.

(e) The Bar currently holds delegations from the Board in relation to the grant and renewal of barristers' practising certificates and from the Commissioner relating to the assessment and investigation of complaints about barristers. The terms of the relevant delegations are set out at Attachments A and B to this submission.

The following table (Table 1) provides an overview of the legislation under which Victoria's legal profession has been regulated since 1 January 1997. It sets out where responsibility lay, at various times, for:

(a) admitting individuals to the Victorian legal profession;

(b) determining whether or not to grant practising certificates to admitted persons; and

(c) investigating complaints and bringing disciplinary proceedings against lawyers.

Table 1: Legal regulation in Victoria from 1 January 1997 to present

Legal Practice Act 1996 Commenced 1 January 1997; repealed 12 December 2005 by section 8.1.1(2) of the *Legal Profession Act 2004*		
Admissions authority	**Responsibility for practising certificates**	**Ability to investigate and/or bring disciplinary proceedings**
Pursuant to section 6, the Supreme Court of Victoria. Pursuant to section 341, the Board of Examiners considered admission applications and certified to the Supreme Court that applicants met requirements of admissions rules.	Pursuant to section 22, either: (a) a Recognised Professional Association (RPA) accredited under section 299, or alternatively (b) the Legal Practice Board established by section 347. The Victorian Bar Incorporated and Victorian Lawyers RPA Limited were deemed to be RPAs on the Act's commencement (see clause 15 of Schedule 2 to the Act).	Division 3 of Part 5 of the Act enabled the following entities to investigate disciplinary complaints and bring disciplinary proceedings: (a) the Legal Ombudsman established under Part 18 of the Act (b) an RPA, or (c) the Legal Practice Board. Note that the Legal Ombudsman could refer complaints to the RPA and Board, and similarly, the RPA and Board were able to refer complaints to the Legal Ombudsman. The Legal Ombudsman was responsible for monitoring RPA and Board investigations.

Legal Profession Act 2004 Commenced 12 December 2005; repealed 1 July 2015 by section 157 of the *Legal Profession Uniform Law Application Act 2014*		
Admissions authority	**Responsibility for practising certificates**	**Ability to investigate and/or bring disciplinary proceedings**
Pursuant to section 2.3.6, the Supreme Court of Victoria. Note that section 2.3.6 allowed the Court to rely on the recommendation of the Board of Examiners (made under section 2.3.10) in determining whether to admit a person.	Pursuant to section 2.4.3, the Legal Services Board established under Part 6.2. On 14 December 2005, pursuant to section 6.2.19, the Board delegated its powers to grant practising certificates to: (a) the Law Institute of Victoria Ltd (in respect of persons engaged as solicitors only), (b) the Victorian Bar Incorporated (in respect of persons engaged as barristers only), and (c) the Legal Services Commissioner (in respect of persons engaged either as barristers or solicitors). The Board revoked delegations to the LIV to grant practising certificates on 1 July 2014.	Under Division 3 of Part 4.4 of the Act, the Legal Services Commissioner appointed under Part 6.3 had powers to investigate disciplinary complaints and bring disciplinary proceedings. Pursuant to section 4.4.9, the Commissioner could also refer disciplinary complaints to a "prescribed investigatory body" (PIB) to investigate on the Commissioner's behalf. Clause 8.14 of Schedule 2 to the Act deemed the Law Institute of Victoria Ltd and the Victorian Bar Incorporated to be PIBs for the purposes of the Act. The findings of all PIB investigations were reported back to the Commissioner, who made the final decision on the matter. In the financial year 2013-14 only four investigations were referred to the Bar. Previously complaints relating to solicitors were referred to the LIV, but by mid 2013 delegations to the LIV to deal with complaints were removed.
Legal Profession Uniform Law *Commenced 1 July 2015 *Established by Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (the Application Act)		
Admissions authority	**Responsibility for practising certificates**	**Ability to investigate and/or bring disciplinary proceedings**
Pursuant to section 16, the Supreme Court of Victoria. However, the Supreme Court may only admit a person as an Australian Lawyer if, among other things, the designated local regulatory authority for the purposes of section 16 (i.e. the Victorian Legal Admissions Board established under section 19 of the Application Act) has provided the Court with a compliance certificate in respect of the person.	Pursuant to item 4 in table 1 of section 10(1) of the Application Act, the Victorian Legal Services Board referred to in section 28 of the Application Act. However, in accordance with its powers under section 44 of the Application Act, the Board has delegated its responsibilities in relation to practising certificates under Chapter 3 of the Uniform Law to: (a) the Victorian Legal Services Commissioner, and (b) the Victorian Bar.	Pursuant to item 7 in table 1 of section 10(1) of the Application Act, the Victorian Legal Services Commissioner established under section 48 of the Application Act. Since 28 August 2015, the Commissioner has delegated various investigative functions, in respect of complaints made against barristers, to the Victorian Bar. In 2017-18 five such investigations were referred to the Bar. The outcomes of any investigations undertaken by the Bar are reported back to the Commissioner who makes the final decision on whether disciplinary action is to be taken.

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2. Lawyers' key professional duties and obligations

Lawyers have various professional ethical duties and obligations, which arise from the common law, regulatory provisions, and professional conduct rules. The breach of any of these duties or obligations may give rise to the potential for disciplinary action by the Commissioner, for either unsatisfactory professional conduct or the more serious charge of professional misconduct.

2.1 Professional conduct rules for lawyers

The Uniform Law provides the Legal Services Council (the LSC) with a general power to make Legal Profession Uniform Rules, including Legal Profession Conduct Rules (Conduct Rules)[14].

The Conduct Rules may provide for any aspect of the professional conduct of Australian legal practitioners and the conduct of Australian legal practitioners as it affects their suitability, and may include provisions concerning what legal practitioners must do or refrain from doing in order to protect and promote their various duties[15], including:

(a) uphold their duty to the courts and the administration of justice, including (relevantly for the purposes of this submission) rules relating to obeying and upholding the law, maintaining professional independence and maintaining the integrity of the legal profession;
(b) promote and protect the interests of clients including rules relating to client confidentiality; and
(c) avoid conflicts of interest.

The Conduct Rules for solicitors and barristers are, respectively, the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (the Solicitors' Conduct Rules) and the Legal Profession Uniform Conduct (Barristers) Rules 2015 (the Barristers' Conduct Rules).

The Uniform Law gives the Law Council of Australia (the LCA) powers to develop proposed Conduct Rules for solicitors and the Australian Bar Association (the ABA) powers to develop Conduct Rules for barristers[16]. In developing Conduct Rules, the Uniform Law requires the LCA and ABA to specifically consult with the Legal Services Council and the Legal Services Uniform Commissioner and undertake a mandated period of public consultation.

Following the close of public comments, the LSC has the power to approve the Conduct Rules for submission to the Standing Committee (comprising the NSW and Victorian Attorneys-General) for final approval. Any amendments to the Conduct Rules that the LSC proposes must, under the Uniform Law, be agreed with the LCA or ABA before they can proceed to the Standing Committee.

2.2 Duties to the court and the administration of justice, and other general duties

Lawyers become officers of the court when they are admitted to the legal profession. The Supreme Court of Victoria holds admission ceremonies throughout the year. A key part of the admission ceremony involves the new lawyers swearing an oath or making an affirmation to personally uphold the responsibilities that come with being an officer of the court. This oath or affirmation arguably sets the legal profession apart from other professions that may also have ethical obligations and codes. As participants in the justice system, lawyers are expected to respect and uphold the law.[17] It has been noted that "The legal profession is grounded on honesty and trust. In exchange for the privilege of practising law, the practitioner had a duty in the public interest to act honestly and in a manner which furthers the administration of justice"[18] .

By publicly committing to the role of officer of the court, a lawyer is acknowledging their privileged role within the community and agreeing to submit themselves to a higher ethical standard of behaviour. The duty lawyers owe to the court and the administration of justice is a duty owed by lawyers, rather than to an individual client. It is why this duty has been described as being the paramount duty owed by all lawyers.

The duty to the court and the administration of justice is enshrined in rule 23 of the Barristers' Conduct Rules and rule 3.1 of Solicitors' Conduct Rules. These rules provide, respectively, that barristers have an "overriding duty to the court to act with independence in the interests of the administration of justice" and that a "solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty".

Lawyers are also subject to general obligations to behave honestly, and not to engage in conduct which is dishonest, or which would prejudice or diminish public confidence in the administration of justice, or which would bring the profession into disrepute. These obligations are enshrined in rules 4 and 5 of the Solicitors' Conduct Rules and rule 8 of the Barrister's Conduct Rules.

Consistent with these general obligations, the VLSB+C submits that a lawyer's position in the justice system is assisted by the lawyer ensuring that they maintain a professional relationship with their clients.[19] That is because fitness to practise law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges.[20] That confidence is undermined where lawyers assist clients to breach the law[21] or could be seen to lack the objectivity that their position requires[22] In this respect, it is clear that "[c]onduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands.[23]

It is in the context above that other, specific, duties of a practitioner must be considered.

2.3 Duties of confidence and obligations of legal professional privilege

The other key duties that require discussion for the purpose of this submission are the duties owed by lawyers to their clients to maintain their confidences.

The Conduct Rules made under the Uniform Law enshrine lawyers' duty of confidentiality to their clients[24], with similar duties arising in contract[25] and equity.[26] It is a duty based, in part, on the public policy interest in ensuring that lawyers' clients are able to provide full and frank information when seeking legal advice, without fear of subsequent disclosure.

The duty of confidentiality owed by all lawyers to their clients operates in conjunction with the principle of legal professional privilege, which prevents certain communications arising out of the lawyer-client relationship from compulsory disclosure. These are protections that are afforded to the client, rather than to the lawyer.

Compliance with these duties is critical. The protection of privileged and confidential discussions between lawyers and clients is well understood by the public and therefore is a key measure by which public confidence in the legal system is fostered and maintained. Legal professional privilege is accorded the status of a fundamental right or immunity[27] precisely because of the public interest served by that confidence. The VLSB+C submits that the public interest in legal professional privilege is only served when the overarching obligations of a practitioner to the Courts and the administration of justice are likewise respected.

The duty of confidentiality is generally confined to the parties to the lawyer-client relationship[28] Confidentiality is not absolute and there are limited circumstances where lawyers can disclose confidential information obtained in the course of legal practice in a manner that is consistent with their obligations.

Rule 9 of the Solicitors' Conduct Rules permits a solicitor to disclose confidential information if:

(a) the solicitor is permitted or compelled by law to disclose the information;
(b) the disclosure is made for the sole purpose of avoiding the probable commission of a serious criminal offence; or
(c) the disclosure is made for the purpose of preventing imminent serious physical harm to the client or another person.

By contrast, Rule 114 of the Barristers' Conduct Rules only contemplates disclosure of confidential information, where the disclosure is compelled by law. That general position is modified by the operation of rule 82 of the Barristers' Rules, which enables a barrister whose client threatens the safety of any person to advise the authorities if the barrister believes on reasonable grounds that there is a risk to any person's safety.

In considering the operation of these specific Conduct Rules, it is relevant to note that:

(a) There does not appear to be a clear rationale for a different test for disclosure between the two branches of the profession. In the absence of such a rationale, the VLSB+C considers a uniform approach would be more appropriate.
(b) In relation to rule 9 of the Solicitors' Conduct Rules, the concepts of "imminent" and "serious" physical harm are vague. On a plain reading of the rule, it appears that a solicitor may not disclose information for the purpose of preventing physical harm that is serious (but not imminent) or physical harm that is imminent (but not serious). Similarly, it is unclear what constitutes a "serious criminal offence". The VLSB+C queries the practical utility of this rule, insofar as it is intended to balance a lawyer's duty of confidentiality with broader public interest concerns.
(c) In relation to the Barristers' Conduct Rules, there is a lack of clarity about the extent of the risk to a person's safety necessary to justify reporting the risk to the authorities, particularly given the propensity for harm from the commission of a crime generally.

It is the VLSB+C's submission that, given the crucial role that obligations of confidentiality play in underpinning client confidence in their lawyers, the limits and exceptions to those obligations in the Conduct Rules should be clear and unambiguous.

Separate to the Conduct Rules, equity has long recognised that *'there is no confidence as to the disclosure of iniquity.'* [29] In this respect, the equitable position appears to mirror the position in the Conduct Rules: i.e. that an obligation of confidence will yield to the public interest in preventing apprehended serious crime, provided disclosure is limited to the extent necessary to achieve that end.[30] This is to be contrasted with the situation where a practitioner becomes aware of a *previous* criminal act where there is no question of continuing illegal activity. In this circumstance, the obligation of confidentiality is more likely to continue (although it does not follow that a practitioner must continue to act for a client).

2.4 Conduct that impairs lawyers' ability to comply with their professional duties generally

Lawyers need to be vigilant in their dealings with clients and other people with whom they associate. In particular, lawyers should be careful about the extent to which they form personal relationships, or socialise, with clients or their associates. Lawyers should also be mindful of situations where they could be exposed to information about potential criminal activities from individuals who are not their clients and to whom they do not owe any obligations of confidentiality or privilege.

These behaviours, while not directly prohibited by the Conduct Rules, can compromise a lawyer's independence, and ability to act ethically and in the best interests of their client. Depending on the particular circumstances, they may result in a court restraining a lawyer from acting for a client,[31] and can also expose a lawyer to disciplinary action for unsatisfactory professional conduct or professional misconduct.

Lawyers should always remember their role as officers of the court and the higher standard of behaviour they accepted when they chose to become lawyers.

3. The use of lawyers as human sources

A human source is a person who used by a police force as part of overall intelligence gathering for the purposes of detecting and preventing crime. It can be contrasted with a person who inadvertently witnesses a crime, or is a victim of a crime. There is generally no restriction on witnesses or victims giving evidence of their observations as part of the criminal justice system. The observations of the VLSB+C should not be seen as being relevant to those situations.

The VLSB+C submits that lawyers should not generally be considered appropriate human sources for use by police forces. That is because of the position occupied by lawyers in the justice system. They are to be (and must be seen to be) independent, with a primary duty to their Court, and then their client. A further, separate duty that is undisclosed and covert will generally be inconsistent with those obligations. There is a real risk that the position could be seen as contradictory.[32]

Within this context, it is useful to examine the following possible scenarios involving lawyers who provide information to the authorities.

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Scenario 1: Witnessing a crime

The first scenario occurs where a lawyer experiences or witnesses a crime or becomes aware of suspicious activity in their neighbourhood. In this scenario, the VLSB+C does not consider there to be any ethical issues with the lawyer reporting crimes or providing information about suspicious activity to police.

The VLSB+C does not consider that this position would be altered if the person committing the crime was the lawyer's client at the time the events took place. Such conduct could not fall within the lawyer-client relationship, or carry the necessary expectation of confidentiality.

Scenario 2: Information obtained by a lawyer from a client that is privileged or subject to the duty of confidentiality

The second scenario occurs where a lawyer obtains information that may be of interest to the police directly from their client in the course of legal practice, while acting for that client.

Generally, that information is privileged and confidential, and there is a strong public interest served in the maintenance of that confidentiality, to ensure that legal advice is sought and obtained to facilitate the proper operation of the justice system. The system would be fatally undermined if individuals ceased obtaining legal advice for fear that the content of their instructions could be easily provided to authorities. The VLSB+C notes that this is consistent with the observations of the High Court in *AB v CD; EF v CD*[33] where their Honours referred to Ms Nicola Gobbo's conduct in *"... purporting to act as counsel for the Convicted Persons while covertly informing against them" as "fundamental and appalling breaches of [her] obligations as counsel to her clients and of EF's duties to the court."*[34]

As discussed in section 2 of this submission, there are limited exceptions where lawyers are permitted to divulge information obtained from their client as part of privileged and confidential discussions to authorities such as the police.

However, the VLSB+C submits that it would be entirely inconsistent with a lawyer's obligation to continue acting for a person while systematically divulging information obtained from their clients as part of privileged and confidential discussions to authorities, over a period of time.

Scenario 3: Information obtained by a lawyer from individuals who are not their clients but with whom they have a personal or professional relationship

The third scenario involves a person, who is not a lawyer's client, providing information to the lawyer that is unconnected to the client's retainer but may be of interest to the police. In this scenario the person providing the information does not enjoy the protections of confidentiality and privilege as they are not a client. Therefore, the

VLSB+C submits that a lawyer in these circumstances is not under any obligation to keep this information confidential.

However, if the lawyer is mixing socially with their clients and their clients' friends and associates, the professional and personal boundaries may be unclear, meaning the person providing the information may not necessarily understand that they are not engaging with the lawyer in a professional capacity. Therefore, this behaviour is not condoned and, as previously noted in section 2 of this submission, is considered by the VSLB+C to be inappropriate behaviour for a lawyer.

While this conduct is not condoned, it may not necessarily amount to a breach of the lawyer's professional obligations to provide information arising from interactions with the associates of their clients to the police.

4. The VLSB+C's powers in respect of, lawyers who breach their legal and professional obligations

Any person may make a complaint to the Commissioner about a lawyer in relation to conduct that would amount to unsatisfactory professional conduct or the more serious charge of professional misconduct. The Commissioner also has the power to initiate a complaint.

A lawyer's personal conduct can be considered in disciplinary proceedings for professional misconduct.

When the Commissioner receives complaints or becomes aware of potential misconduct, the Commissioner first undertakes a preliminary assessment under section 276 of the Uniform Law, and may subsequently further investigate the complaint.

If a lawyer has engaged in conduct that breaches their obligations, the regulatory powers available to the VLSB+C to address those breaches include:

(a) bringing charges of unsatisfactory professional conduct or professional misconduct against the lawyer before VCAT;
(b) issuing a reprimand (a serious sanction which appears on their public record for five years, along with a description of the conduct that led to the reprimand);
(c) placing a condition on their practicing certificate (such as requiring them to undertake training or be supervised by another lawyer);
(d) requiring the lawyer to undertake to do or not do certain things (the breach of an undertaking itself attracts disciplinary action);
(e) issuing a fine;
(f) ordering that the lawyer pay compensation to a client; or
(g) suspending or cancelling their practising certificate.

The Board has the power to apply to the Supreme Court for the lawyer to be removed from the roll of practitioners.

Conclusion

As the independent regulators of the legal profession in Victoria, the Board and Commissioner are committed to ensuring that legal services in Victoria meet the highest standards of excellence. The VLSB+C is committed to assisting the Royal Commission with its work, and will provide any further assistance the Commissioner requires, as particular facts relevant to this Royal Commission emerge.

Instrument of Delegation

Legal Profession Uniform Law Application Act 2014 Legal Profession Uniform Law (Victoria)

1. This instrument revokes the instrument of delegation conferred on the Victorian Bar Incorporated ABN 42 079 229 591 ("the Victorian Bar") by the Victorian Legal Services Commissioner pursuant to section 56(1) of the *Legal Profession Uniform Law Application Act 2014* (Vic) ("the Act") and dated 3 July 2015.
2. Pursuant to section 56(1) of the Act I, Michael Keith McGarvie, Victorian Legal Services Commissioner, hereby delegate to the Victorian Bar, being a local professional association, my functions duties and powers hereinafter specified, as they relate to barristers, subject to the conditions specified herein:

Part 5.2 of the Legal Profession Uniform Law (Victoria)- Complaints

Division 1 - Making complaints and other matters about complaints

- Section 266(2) - only in respect of disciplinary matters that arise as a result of interactions between Victorian barristers
- Section 269(1)
- Section 271

Division 2 - Preliminary assessment of complaints

- Section 276
- Section 277 - only in respect of disciplinary matters that arise as a result of interactions between Victorian barristers
- Section 278 - but the recommendation can only be made to the Victorian Legal Services Board, not the Victorian Bar as delegate of the Victorian Legal Services Board,

Division 3 - Notifications to and submissions by respondents

- Section 279
- Section 280
- Section 281

Division 4 - Investigation of complaints

- Section 282
- Section 283 - only in respect of disciplinary matters that arise as a result of interactions between Victorian barristers
- Section 284

Part 5.3 of the legal Profession Uniform Law (Victoria)- Consumer Matters

Division 2 - Provisions applicable to all consumer matters

- Section 286
- Section 287
- Section 288
- Section 289

Division 3 - Further provisions applicable to costs disputes

- Section 291(1)

Part 5.4 of the Legal Profession Uniform law (Victoria) - Disciplinary Matters

Division 1 - Preliminary

- Section 297(2)

Part 5.5 of the Legal Profession Uniform Law (Victoria) - Compensation Orders

- Section 307(4)

Michael K McGarvie
Victorian Legal Services Commissioner

28 - 8 - 2015

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Instrument of Delegation

Legal Profession Uniform Law Application Act 2014 Legal Profession Uniform Law (Victoria)

1. This instrument revokes all previous delegations conferred on Victorian Bar Inc (ABN 42 079 229 591) ("the Bar") by the Victorian Legal Services Board (ABN 82 518 945 610) pursuant to section 44(1) of the *Legal Profession Uniform Law Application Act 2014* (Vic).
2. Pursuant to section 44(1) of the *Legal Profession Uniform Law Application Act 2014* (Vic) ("the Act"), the Victorian Legal Services Board hereby delegates to the Bar its functions, duties and power hereinafter specified, only insofar as they apply to persons who engage in practice solely as Barristers, and subject to the conditions specified herein:

Part 4 of the Act-Admission, Practising Certificates and registration Certificates

Division 2 - Australian practising certificates

- Section 73(4)
- Section 75(2)

Part 5 of the Act - Trust Accounts

Division 3 - Approved Clerks

- Section 88(1)

Part 10 of the Act - General

- Section 153(1)
- Section 154

Part 3.3 of the Legal Profession Uniform Law (Victoria) - Australian Legal Practitioners

Division 2 - Australian practising certificates

- Section 44
- Section 45

Division 3- Conditions of Australian practising certificates

- Section 47
- Section 50(2)-(5)
- Section 53

Part 3.5 of the Legal Profession Uniform Law (Victoria) - Variation, Suspension and Cancellation of, and Refusal to Renew, Certificates

Division 2 - Variation, suspension or cancellation of certificates

- Section 74
- Section 76
- Section 77
- Section 78

Division 3 - Variation, suspension or cancellation on specific grounds

- Section 82
- Section 83
- Section 84

Division 4 - Show cause procedure for variation, suspension or cancellation or, or refusal to renew, certificates

- Section 87
- Section 88
- Section 89
- Section 91
- Section 92
- Section 93
- Section 94

Division 5 - Miscellaneous

- Section 95

Part 3.9 of the Legal Profession Uniform Law (Victoria) - Disqualifications

Division 1 - Making of disqualification orders

- Section 119

Part 4.2 of the Legal Profession Uniform Law (Victoria) - Trust Money and Trust Accounts

Division 2 - Trust money and trust accounts

- Section 151
- Section 152

Part 9.5 of the Legal Profession Uniform Law (Victoria) - Notices and Evidentiary Matters

- Section 446

Part 9.6 of the Legal Profession Uniform Law (Victoria) - Injunctions

- Section 447

Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015

- Rule 13
- Rule 14
- Rule 15
- Rule 16

Conditions

1. In accordance with section 42A of the Interpretation of Legislation Act 1984 (Vic), this delegation does not prevent the discharge, exercise or performance by the Board of the functions, duties and powers herein delegated.
2. In any particular case where at any stage the Board gives notice to the delegate that the Board intends to discharge, exercise of perform its functions, duties and powers herein delegated, the delegate shall not commence to discharge, exercise or perform those functions, duties and powers, or shall cease to do so, as indicated in the notice from the Board.
3. This instrument of delegation applies to the exclusion of all revoked instruments of delegation in relation to the functions, duties and powers herein delegated that have not yet been discharged , exercised or performed by the delegate even in circumstances where the delegate has commenced action to discharge, exercise or perform the relevant function, duty or power under a revoked instrument of delegation but has not yet done so.

THE COMMON SEAL of the VICTORIAN LEGAL SERVICES BOARD
was hereunto affixed by the authority of the Board in the presence of:

Fiona R Bennett
Board Member

Catherine Dealehr
Board Member

29 - 5 - 2018

References

[1] The six objectives of the Uniform Law are set out in section 3 of Schedule 1 to the Application Act.
[2] Some statutory functions are delegated to these bodies, for example, continuing professional development compliance is a function delegated to the LIV.
[3] Including the Commissioner for Uniform Legal Services Regulation, the Legal Services Council and the NSW regulators.
[4] Extensive further data may be found in the VLSB+C's Annual Report for 2017-2018.
[5] There are several sets of Uniform Rules made under the Uniform Law, all of which have the status of subordinate legislation. Professional conduct rules deal with matters such as lawyers' fundamental duty to the court, management of conflicts of interest and maintaining client confidentiality.
[6] The common law test for professional misconduct is set out in *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 as "conduct which would reasonably be regarded as disgraceful or dishonourable by professional brethren of good repute and competency".
[7] See Division 2 of Part 5.4 of the Uniform Law.
[8] See Division 3 of Part 5.4 of the Uniform Law.
[9] See section 17 of the Uniform Law.
[10] Although such a step can be taken by the Court on the application of the Commissioner or VCAT: see section 23 of the Uniform Law.
[11] *Re Legal Profession Act; re OG, a lawyer* (2007) 18 VR 164, Warren, CJ, Nettle JA and Mandie J, [126]: see also s 16(4) of the Uniform Law.
[12] See section 82 of the Uniform Law.
[13] See section 45(2) of the Uniform Law.
[14] See sections 419 and 420 of the Uniform Law.
[15] See section 423 of the Uniform Law.
[16] See section 427 of the Uniform Law.
[17] Re B [1981] 2 NSWLR 372, at 382 per Moffitt P; see also the comments of Gillard Jin Frugtniet v Board of Examiners [2005] VSC 332 per Gillard J, [27] - [31].
[18] *Legal Profession Complaints Committee v Brickhill* [2013] WASC 369, [23].
[19] Dal Pont, G.E Lawyers' Professional Responsibility, 5th edn, [19.05].
[20] *Legal Practitioners Complaints Committee v Thorpe* [2008] WASC 9.
[21] *Legal Practitioners Complaints Committee v Segler* [2009] WASAT 205, (Justice Chaney, Judge Pritch and Mr Mansveld), [100]; see also Solicitors' Conduct Rules, rule 4.1.5 and rules 3, 4 and 35 of the Barristers' Conduct Rules.
[22] *Adam 12 Holdings Pty Ltd v Eat & Drink Holdings Pty Ltd* [2006] VSC 152, [38] per Whelan J.
[23] *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 298 per Kitto J.
[24] Rule 9 of the Solicitors' Conduct Rules and rule 114 of the Barristers' Conduct Rules.
[25] *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [43]; *Unioil v Deloitte* (1997) 17 WAR 98,108 (Ipp J); *Crowley v Murphy* [1981] FCA 31; (1981) 34 ALR 496,517 (Lockhart J); *Parry-Jones v Law Society* [1969] 1 Ch 1, 7 (Lord Denning MR).
[26] *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [43]; *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209, 229 (Gummow J); *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41, 96 (Mason J).
[27] *Daniels Corporations International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, McHugh J at 563, [44].
[28] There is some recognition that duties may extend to "quasi-clients": *Re a Firm of Solicitors* [1992] 1 QB 959 at 970; *Village Roadshow Ltd v Blake Dawson Waldron* [2003] VSC 505 or to corporate alter egos: Macquarie Bank v Myer [1994] 1 VR 350, 359 per Marks J, who said that *'The protection afforded to the client has sometimes been extended to one who, though not strictly speaking the client, might said to be virtually in the same position through his association with the one who was, strictly speaking, the client.'*
[29] *Gartside v Outram* (1857) 26 LJ Ch (NS) 113, 114 (Wood, V-C).
[30] The equitable rule as to the disclosure of iniquity was criticised by Gummow J (as a Judge of the Federal Court) in *SmithKline and French Laboratories (Australia) Ltd v Department of Community Service and Health* [1990] FSR 617. Gummow J argued it was "not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence". In A v Hayden (No 2 (1984) 156 CLR 532, the proposition that the public interest in the disclosure of iniquity to the appropriate authority would always outweigh the public interest in the preservation of private and confidential information was expressly disapproved as *"too broad"*, unless "iniquity" was confined to mean "serious crime", per Gibbs CJ, at 545-6; see also Mason J, at 560.
[31] See *12 Holdings Pty Ltd v Eat & Drink Holdings Pty Ltd* [1] [2006] VSC 152 and *Kallinicos and anor v Hunt and Ors* [2005] NSWSC 1181.
[32] In *The King v Sussex Justices*, ex p McCarthy [1924] 1 KB 256, the Court (at 259) said that the "manifest contradiction" between a person's role as an acting clerk of court, and as a member of a firm of solicitor's acting for one of the parties necessitated the overturning of the decision of the Court.
[33] [2018] HCA 58.
[34] [2018] HCA 58, [12].

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Organised Crime, Police, Lawyer X & Royal Commission

Submission to the Royal Commission into the Management of Police Informants

1. The Australasian Institute of Policing (AiPOL) welcomes the opportunity to provide a submission to the Royal Commission into the Management of Police Informants in regards to:

(a) The adequacy and effectiveness of Victoria Police's current processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege; and

(b) The use of such human source information in the broader criminal justice system, including whether these procedures should be used, and if so, how they can be best implemented in the future.

2. AiPOL was established in 2007 to act as a professional body for policing in Australia and New Zealand and to promote the profession and the police professionalisation process.

3. AiPOL advances the professional interests of police in Australia and New Zealand collaboratively, but unconstrained by the organisational, political and industrial requirements of various police agencies, unions and state, territory and federal governments.

4. AiPOL strives to ensure that policing and law enforcement operates to the best of its capabilities to effectively protect the people of Australia and New Zealand from criminal attack whilst providing a safe and free society under the rule of law.

5. AiPOL was formed with the object to:

(a) promote the policing profession;

(b) promote professional practice standards within the policing profession;

(c) endorse education related to the policing profession;

(d) certify individual practitioners;

(e) develop, promote and encourage ethical standard of policing practice;

(f) to facilitate the sharing of research and information as to best practice policing;

(g) to enhance public confidence in the police profession and ether service provided to the public by members of the policing profession; and

(h) to promote professional mobility of police practitioners.

Descriptors

6. For the purpose of this submission AiPOL has adopted the following descriptors:

Criminal Intelligence

The definition of criminal intelligence refers to information collected and organised in order to help prevent illegal activity from taking place and to help stop those engaged in illegal activity. The information collected may not be admissible in legal proceedings.

Criminal intelligence analysis

Criminal Intelligence analysis is characterised as a philosophy which approaches the investigation of crime and criminals by using the intelligence and information collected concerning them.[1]

EF

EF is the pseudonym given to Ms Gobbo in recent court proceedings and she has been referred to as informant '3838' and other informant numbers by Victoria Police, and was referred to as 'Lawyer X' in the media.

Human Source

A human source, also known as a police informant or informer, can be described as an individual who covertly supplies information to police about crime or people involved in criminal activity. This information might be used in the investigation and prosecution of a crime.

Generally, human sources can be distinguished from other people who might provide information to police-for example, witnesses to an accident or victims of crime.

Legal obligations of confidentiality or privilege

Lawyers have legal obligations of privilege and confidentiality to their clients. Client legal privilege, or legal professional privilege, is a right that protects the disclosure of certain communications between a lawyer and a client when these communications are for the dominant purpose of seeking or providing legal advice, or for use in legal proceedings.

Communication not under the protection of legal obligation of confidentiality or privilege

7. AiPOL believes that there is an important issue that needs to be explored in this submission in order to fully address the terms of reference.

8. AiPOL notes that in the Royal Commission's Frequently Asked Questions site, it fails to explain to the public that there is communication/ information that does not fall within the legal obligation of confidentiality or privilege, that a person who is subject to legal obligations of confidentiality or privilege, may be privy too. It also does not articulate what that person, who is subject to legal obligations of confidentiality or privilege, is required to do either under legislation, or under their relevant codes of conduct rules.

9. This is unfortunate as it inadvertently misleads the public by failing to inform

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them that there is communication/ information that can not be protected under legal obligation of confidentiality or legal privilege.

10. AiPOL also notes that in the Royal Commissions Frequently Asked Questions site it fails to explain to the public that there is no legislation or laws in Victoria or indeed Australia, that prohibit police registering a human source who is subject to legal obligations of confidentiality or privilege. It should be noted that it is also police practice with our key international law enforcement partners. Indeed the UK has specific legislation for such registration - *The Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010*.
11. This is again unfortunate as it inadvertently misleads the public by failing to inform them that the actions of Victoria police officers were found to be lawful. It is important that there is public confidence in the police profession and the service of which Victoria Police provide to the public.

RECOMMENDATION 1
That the Frequently Asked Questions on the Royal Commission website articulates examples of communication not under the protection of legal obligation of confidentiality or client legal privilege.

RECOMMENDATION 2
That the Frequently Asked Questions on the Royal Commission website articulates that Police are legally able to register a Human source who is subject to legal obligation of confidentiality or client legal privilege.

12. AiPOL is obviously not privilege to any information other than public record in relation to this matter. However, AiPOL would like to draw to the attention of the Commissioner, the letter from EF to the Victoria Police Commissioner dated 30 June 2015. As can be seen from the below extract, EF relied on her understanding that the information she provided to police did not fall within the protection of legal obligation of confidentiality or privilege.
13. In EF's letter she states in part:
My motivation in assisting police was not for self gain, but rather borne from the frustration of being aware of prolific large commercial drug trafficking, importations of massive quantities of drugs, murders, bashing, pervert 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 even fall under under the protection of legal professional privilege by a client.[2]

Communication not under the protection of legal obligation of confidentiality or privilege - conflicting advice on reporting requirements

14. There is an array of barrister and solicitor rules, guidelines, legislation and commentary addressing where communication/information does not fall within the protection of client legal privilege and the reporting requirements that should be taken. However it is neither comprehensive, consistent or consolidated.
15. For example:

Legal Professional Privilege is 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[3]

As a barrister, the current legal ethics legislation is the Legal Profession Uniform Conduct (barristers) Rules 2015 (Vic). The only reason to disclose would be if they reasonably believe someone's safety is at risk which varies from client to client (81&82). The evidence Act 2008 (Vic) also provides for legal privilege... the lawyer is not to reveal confidential communications. When the privilege is lost it is due to fraud and abus. of powers. (s125).[4]

Rule 82 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 (Vic) states: 'A barrister whose clients 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.[5]

Victorian Bar President Dr Matt Collins QC says:
Confidential communications between clients and practitioners are privileged if they are made for the dominant purpose of giving or obtaining legal advice, or the the dominant purpose of actual, anticipated or pending legal proceedings… Privilege does not attach to communications that are made in furtherance of a crime or fraud or in deliberate abuse of power.'[6]

Ms Rebecca Treston QC, President of Bar Association of Queensland says:
[I]t is important to understand that not every communication between lawyer land 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 furtherance of a fraud or crime are not protected by legal professional privilege... This is not an exception to the rule... The privilege never attached to them in the first place - their illegal object has prevented that.[7]

(2) For the purposes of this Order-
(a) communications and items are not matters subject to legal privilege when they are in the possession of a person who is not entitled to possession of them, and
(b) communications and items held, or oral communications made, with the intention of furthering a criminal purpose are not matters subject to legal privilege.[8]

Exceptions to Legal Privilege
There are a number of exceptions to legal professional privilege, even when the dominant purpose test is satisfied. These exceptions apply in circumstances where:

- *The privilege has been waived.*
- *It is in the public interest.*
- *A statute modifies or removes the privilege where the legislature affords a competing public interest a higher priority.*
- *The communication is for the purpose of facilitating a fraud or crime.*[9]

Client legal privilege concerns only the admissibility of communications into evidence. That means the statutory protection only applies to evidence led in court.[10]

Loss of client privilege: misconduct s.125
In general terms, this provision results in loss of privilege if a communication or document was made or prepared by a client, lawyer or party in furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty. Further, the privilege will be lost if the communication or document was known, or should reasonably have been known, by the client, lawyer or party, to have been made or prepared in furtherance of a deliberate abuse of statutory power: s 125(1)(a) and (b): S Odgers, Uniform Evidence Law, 10th edn at [1.3.11620]-[1.3. 11640].
In Kang v Kwan [2001] NSWSC 697, the plaintiff had carried out work on certain property at Castle-crag owned by the second and third defendants. There was evidence to show that the first defendant colluded with the others to create a false mortgage, participated in a sale of the property to a third party, received "payment" of the mortgage monies and dissipated the funds overseas. The privilege argument centred on legal advice and other confidential communications passing between various lawyers and the defendants. Santow J held that there were reasonable grounds to hold that both limbs of s 125 were established and that privilege had been lost.[11]

FUNDAMENTALDUTIES OF SOLICITORS
3. PARAMOUNT DUTY TO THE COURT AND THE ADMINISTRATION OF JUSTICE
3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.
9. CONFIDENTIALITY
9.2 A solicitor may disclose information which is confidential to a client if:
9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
9.2.5 the solicitor discloses the information for the purpose of preventing imminent.serious physical harm to the client or to another person;

EVIDENCE ACT 2008 - SECT 125 states:
s.125 Loss of client legal privilege-misconduct
(1) This Division does not prevent the adducing of evidence of-
(a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer in 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; or
(b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.
(2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that-
(a) the fraud, offence or act, or the abuse of power, was committed; and
(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power-the court may find that the communication was so made or the document so prepared.
(3) In this section, "power" means a power conferred by or under an Australian law.
Summary of continuity and change - moderate change
- *The Uniform Evidence Act (UEA) retains the common law approach whereby privilege is lost by reason of fraudulent or criminal conduct of the client or the lawyer, and expands it to include by reason of an act that renders a person liable to a civil penalty.*
- *The UEA also clarifies what is a deliberate abuse of statutory power.*

1. By s125, client legal privilege is lost for confidential communications made, and documents prepared:
- *in furtherance of a fraud, offence, or act that renders a person liable to a civil penalty; or*
- *for a deliberate abuse of statutory power.*

2. Section 189 deals with general procedure for determining whether evidence should be admitted. Section 133 permits a court to order a document to be produced to it for inspection.
3. The 'burden of proof' is on the party who asserls privilege has been lost. The standard of proof is the balance of probabilities (s142).'commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty': s125(1)(a)
4. Privilege will be lost where the client is knowingly involved in the fraud, offence or other act rendering a person liable to a civil penalty (Amcor Ltd v Barnes [2011] VSC 341 at [49]-{51] per Kyrou J). A client will be knowingly involved in the act of another person by:
- *conspiring with that person to commit the act;*
- *being a knowing participant in the other person's act; or*
- *knowingly providing other forms of assistance to that person in relation to the act.*

5. Privilege will also be lost where a client obtains legal advice in order to assist another person to commit a fraud, offence or act rendering a person liable to a civil penalty (Amcor Ltd v Barnes [2011] VSC 341 at [52] per Kyrou J; Talacko v Talacko [2014] VSC 328 at [15] per Elliott J).
6. Section 125 does not require a court to find that a fraud, offence or act rendering a person liable to a civil penalty has been committed. Instead, a court must be satisfied on the balance of probabilities that there are reasonable grounds for making

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such a finding (Amcor Ltd v Barnes [2011] VSC 341 at [32] per Kyrou J; Talacko v Talacko [2014] VSC 328 at [15] per ! Elliott J).

7. New South Wales courts have imputed a requirement of dishonesty into s125(1)(a) (Van Der Lee v New South Wales [2002] NSWCA 286 at [61] per Hodgson JA; Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 222 at [63] per Hodgson CJ in EQ).

8. The correctness of this approach has, however, been doubted in Victoria. In Amcor Ltd v Barnes [2011] VSC 341, Kyrou J, referring to principles deriving from common law privilege, concluded that misconduct includes equitable fraud falling short of actual dishonesty (Amcor Ltd v Barnes [2011] VSC 341 at [40]-[47]; see also Talacko v Talacko [2014] VSC 328).

9. In applying this provision, courts have adopted a broad concept of fraud that is not limited to 'legal fraud' in a narrow sense (Kang v Kwan [2001] NSWSC 698 at [37] (9) per Santow J; ATH Transport v JAS (International) [2002] NSWSC 956 at [12] per Barrett J).

10. Evidence of prior wrongdoing is not sufficient. There must be an intention to facilitate a current or future fraud (Carbotech-Australia Pty Ltd v Yates [2008] NSWSC 1151 at [25] per Brereton J, citing Watson v McLernon [2000] NSWSC 306 at [116] per Hodgson CJ at CL; Zamanek v Commonwealth Bank of Australia (unreported, Federal Court of Australia, Hill J, 2 October 1997)).

11. The privilege is not lost if a third party caused a communication or document to be made. It will be lost, however, if either a client or lawyer or both knew, or ought reasonably to have known, that the communication or document was prepared in furtherance of the commission of a deliberate abuse of power (Carbotech-Australia Pty Ltd v Yates [2008] NSWSC 1151 at [21]-[24] per Brereton J). '... a deliberate abuse of power': s125(1)(b)

(i) Relevance of s11(2)

12. The UEA does not affect the powers of a court with respect to abuse of process in a proceeding (s11(2)). These powers include the power to receive evidence and may override privilege (Van Der Lee v New South Wales [2002] NSWCA 286; see Stephen Odgers, Uniform Evidence Law (12th ed, 2016), [EA.125.120]). (ii) Scope

13. For an act to be 'deliberate', a person must know that the impugned acts constitute an abuse of power. It is not sufficient for a person to deliberately perform acts, which of themselves constitute an abuse of power if that person does not know that this is so (Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 222 at [64] per Einstein J).

14. Power is defined under s125(3) as 'a power conferred by or under an Australian law'. Bringing or defending legal proceedings constitutes the exercise of a power that is 'conferred by or under an Australian law'. Thus, any dishonest communication to a court, that is done in order to further a purpose that is beyond the scope of the relevant legal process and therefore constitutes an abuse of process would constitute a deliberate abuse of a power for the purposes of s125(1)(b) (Kang v Kwan [2001] NSWSC 698 at [37] and [42] per Santow J).

15. This conclusion was subsequently supported by the New South Wales Court of Appeal in Van Der Lee v State of New South Wales [2002] NSWCA 286. In that case, the Court held that the power to bring a cross claim (as a procedural right sourced in the Supreme Court Act 1970 (NSW)) is sufficiently specific to fall within s125 (Van Der Lee v State of New South Wales [2002] NSWCA 286 at [24] per Mason P; at [68] per Santow J (Hodgson JA dissenting)).

16. Privilege will be lost if a client causes a communication to be made or a document to be prepared that offends s125 (and the lawyer was unaware of this purpose) (Kang v Kwan [2001] NSWSC 698 at [45] per Santow J). 'In furtherance of': s125(2)(b)

17. The word 'furtherance' means 'the act of being helped forward; the action of helping forward; advancement, aid, assistance' (Amcor Ltd v Barnes [2011] VSC 341 at [59] per Kyrou J; Talacko v Talacko [2014] VSC 328 at [15] per Elliott J).

18. This concept may incorporate conduct which occurs after a fraud, offence or act is committed (Amcor Ltd v Barnes [2011J VSC 341 at [58]-[61J per Kyrou J; Talacko v Talacko [2014] VSC 328 at [15] per Elliott J). However, legal advice and any related matters which are relevant to a past fraud do not fall within the bounds of the concept of 'in furtherance of' (Amcor Ltd v Barnes [2011] VSC 341 at [62] per Kyrou J). Significant other sections that are or may be relevant

- *Relevance (s55 - s58)*
- *Loss of client legal privilege (s121 - s126)*
- *Application of Division to preliminary proceedings of courts (s131A)*
- *Court to satisfy itself that the witness or party is aware of the rights to make applications and objections (s132)*
- *Court may inspect etc. documents (s133)*
- *Inadmissibility of evidence that must not be adduced or given (s134)*
- *General discretion to exclude or limit use to be made of evidence (s135 and s136)*
- *Admissibility of evidence - standard of proof (s142)*
- *The voir dire (s189)*
- *Advance rulings and findings (s192A)Further references*
- *Stephen Odgers, Uniform Evidence Law (12th ed, 2016) [EA.125.30] [EA.125.210].*[12]

16. As can be seen from the above examples there is the ability for a person who is subject to legal obligations of confidentiality or privilege to disclose certain information. However, it is not clear when and to whom this information should be disclosed.
17. For example s.125 requires the Court to decide if privilege is lost for the purpose of inducing evidence into the Court.
18. The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 under the Legal Profession Uniform Law Application Act 2014 (Vic) states under 9.2 and 9.3 that a solicitor can disclose information which is confidential to a client if it is for the sole purpose of avoiding the probable commission of a serious

criminal offence or for the purpose of preventing imminent serious physical harm to the client or another person. However it does not articulate who they should disclose it too and when they should disclose it.

19. The Legal Profession Uniform Law Australian Barristers' Conduct Rules 2015 under the Legal Profession Uniform Law Application Act 2014 (Vic) Rule 82 only states: 'A barrister whose clients 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'. That is, there is no instruction to Barristers advising them that they can disclose information to avoid a commission of a serious criminal offence.

RECOMMENDATION 3

The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 under the Legal Profession Uniform Law Application Act 2014 (Vic) rule 9.2 should be amended to read 'A solicitor *shall* disclose information to *Police or other appropriate authorities* which is confidential to a client if: …[13]

RECOMMENDATION 4

The Legal Profession Uniform Law Australian Barristers' Conduct Rules 2015 under the Legal Profession Uniform Law Application Act 2014 (Vic) be amended to replicate 9.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 as amended in RECOMMENDATION 3.

20. If the Commission accepts that the communication/information in furtherance of a fraud or crime does not fall under the protection of confidentiality or legal professional privilege by a client, then the information is never able to be privileged, so it is just information. There is no restriction on any person providing that information to police or becoming a police informer (human source) to provide on going information of this type.
21. Interestingly EF could have gone 'online' on Crime Stoppers and anonymously provided the same information that she provided police and the criminal intelligence would have been utilised by the police without any knowledge of any potential breach of legal confidentiality or client legal privilege. The information would have remained as criminal intelligence and not crossed over to criminal evidence.
22. If of course, in the course of this Royal Commission inquiry that it is found that EF has only provided communication/information that falls outside of the protection of the legal obligation of confidentiality or legal privilege then a gross mis-justice has been done to EF and the Victoria Police.
23. The substantial damage of EF being exposed, inappropriately, will have a life time consequence to her, her family and loved ones. In addition it will have unnecessarily severely damaged the ability of law enforcement to recruit human sources in the future, due to the fear of being identified at a later time by the Courts.
24. If in the course of this Royal Commission inquiry that it is found that EF also provided communication/information that fell under the protection of legal obligation of confidentiality or legal privilege, AiPOL believes it would be in the public interest that the Commission identifies in percentage% terms how much communication/information that she provided fell outside of the legal obligation of confidentiality or legal privilege and how much fell within it.
25. The scales of justice should balance the public interest of 20 convicted organised crime figures (who have now been informed by the Director of Public Prosecution that their lawyer had been exposed as a police informer) and of whom some have actually pleaded guilty, plus EF providing police with information that led to the arrest and charging of 386 people, versus the percentage of information that she should not have provided police due to legal confidentiality or legal privilege.
26. There is a competing public interest. The public interest in protecting the legal obligation of confidentiality or privilege versus the public interest of protecting the community and the administration of justice.
27. Melbourne was in the grip of what now is known as the gangland wars. The risk to the community at this time was significant. A genuine sense of urgency was enveloping the criminal justice system, including police. Organised crime spiralled out of control on the streets of Melbourne, even where school children were the witnesses to a gang land double murder. There was a competing public interest occurring.
28. 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. The difficulty that arises in relation to the legal professional privilege 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.
29. The Australian Government has declared organised crime as a National Security Threat. If EF had provided the same communication/information and it led to the prevention of a terrorist attack at the Melbourne Cricket Ground, she would be a heroine and not have been publicly vilified by the Courts. Indeed, she, and the information that she provided would have been protected under National Security legislation. There is an opportunity for the Victorian Government to legislate to allow disclosure of communications subject to the protection of legal confidentiality and privilege when it relates to organised crime.

(a) **The adequacy and effectiveness of Victoria Police's current processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege.**

30. AiPOL is of the view that the Victoria Police's current processes for recruiting, handling and managing human sources who are subject to legal obligations of confidentiality or privilege are adequate and effective.

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31. AiPOL understands that Victoria Police has addressed the inadequacies previously identified by former Chief Commissioner of Victoria Police, Neil Comrie, concerning Victoria Police's general handling of EF as a human source and the application of policies, control measures and management practices relevant to her handling from September 2005 to January 2009. As the Comrie Review report is not publicly available AiPOL is relying on public statements made by the Victoria Police.
32. AiPOL also understand that Victoria Police has addressed the inadequacies identified in a report prepared in 2015 by the Honourable Murray Kellam QC on behalf of the IBAC, concerning Victoria Police and its handling of EF as a human source. As the Kellam Report is not publicly available AiPOL is relying on public statements made by the Victoria Police.
33. There is no legislation prohibiting a lawyer acting as a human source for police. Based on the witness statement from Victoria Police Assistant Commissioner Neil Paterson from Intelligence and Covert Support Command, it appears that all internal policies on use of human sources did not, and still do not, prohibit registering a legal practitioner as a police informant.

RECOMMENDATION 5
AiPOL is of the view that the Victoria Police's current processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, is adequate and effective.

(b) **The use of such human source information in the broader criminal justice system, including whether these procedures should be used, and if so, how they can be best implemented in the future.**

34. AiPOL is of the strong view that there should be no restriction on who can be a human source and no restriction on the obtaining of criminal intelligence through lawful means. To do otherwise, would dangerously restrict police and other law enforcement bodies from utilising a legitimate avenue of inquiry.
35. It is well known that in cases of corruption and organised crime, that the criminality is often only discovered through the use of a human source who is trusted within the criminal structure.
36. It is important to note that the Australian Government's National Security Framework characterises serious and organised crime as a national security issue.
37. It is also well known with the advent of high level encryption devices that traditional methods of obtaining criminal intelligence, particularly from organised crime groups and terrorist organisations, is now becoming more and more difficult for police and law enforcement. This is placing even greater importance on the utilisation of human sources.
38. AiPOL accepts that within the broader criminal justice system human source information where client legal privilege may apply, becomes more problematic. The crossing over from criminal intelligence to criminal evidence is where the tension lays.
39. Some in the legal fraternity would like to see the Client Legal Privilege provisions of the Uniform Evidence Act apply to investigatory stages by Police. Such a proposal has potential negative impact on the provision of evidence for investigations, criminal intelligence gathering within policing and the broader law enforcement community.
40. To prohibit Police from recruiting, handling and managing human sources who are subject to legal obligations of confidentiality or privilege or the use of such human source information in the broader criminal justice system, is a dangerous precedent.
41. It is important to note that our key international law enforcement partners, in the UK, EU, Canada, NZ, USA, all have the ability to register human sources who are subject to legal obligations of confidentiality or privilege.
42. Scotland Yard, RCMP, FBI and DEA all have policies with Scotland Yard having over-arching legislation -the Regulation of Investigatory Powers (covert human intelligence sources: matters subject to legal Privilege) Order 2010. (UK)
43. In Australia no jurisdiction has legislation and police agencies rely on policies and procedures.

RECOMMENDATION 6
AiPOL does not support the extension of legal confidentiality or privilege to non-curial activities such as investigative processes.

Measures Needed to improve Future Processes and Practices

44. AiPOL believes that the use of human source information involving persons who are subject to legal obligations of confidentiality or privilege should be standardised across State, Territory and Federal policing jurisdictions. This can be done through collaboration between police jurisdictions or through the Australia and New Zealand Policing Advisory Agency (ANZPAA).

RECOMMENDATION 7
That the Australia & New Zealand Policing Advisory Agency (ANZPAA) be requested to develop a standardised approach for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege and the use of such human source information in the broader criminal justice system.

45. If it is the view of the Commission that processes and practices could be improved through legislation, AiPOL's preferred approach would be that the starting point in the legislation would be that a confidential communication would be protected from disclosure. However, the protection would not

apply where disclosure is required in the interests of justice, including on the following grounds:

- The interests of national security; (subject to appropriate safeguards to protect against disclosure of sensitive information in evidence).
- Protection of 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.
- The disclosure would expose the commission of a fraud or other serious criminal offence, or participation in serious or organised crime.
- The disclosure is necessary to demonstrate the innocence of an accused.
- Where the investigative functions of regulatory agencies are otherwise impeded.
- The Court would otherwise be prevented from enforcing a court order.
- Matters that impact the finances of the Commonwealth, States and Territories.

46. In relation to a person who is subject to legal obligations of confidentiality or privilege, if the person believes on reasonable grounds that there is a risk to any person's safety, or whether one of the above circumstances applies, or the interests of justice otherwise allows the disclosure of the information, they shall advise the police or other appropriate authorities.
47. In relation to the use of a person who is subject to legal obligations of confidentiality or privilege, who wishes to provide communication/ information to police, it will be a matter for the Police Commissioner to determine whether one of the above circumstances applies, or the interests of justice otherwise allows the disclosure of the information, in which case the Commissioner can authorise that the person is registered as, or continues as, a registered human source.
48. In relation to criminal evidence, it would be a matter for the court to determine whether one of the above circumstances applies, or the interests of justice otherwise requires the disclosure of the information, in which case the court can direct a witness to answer the relevant questions.

RECOMMENDATION 8

That whilst AiPOl supports the standardisation of the processes of recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, it believes that the policies and procedures can be adopted by Police and law enforcement bodies through collaboration rather than legislation.

RECOMMENDATION 9

If the Royal Commission is inclined to legislate, AiPOl's preferred approach would be that the starting point in the legislation would be that a confidential communication would be protected from disclosure.
However, the protection would not apply where disclosure is required in the interests of justice.

AiPOL would be happy to provide further information to the Commissioner if invited to do so.

Thank you again for the opportunity to provide this submission to the Royal Commission inquiry into the Management of Police Informants.

For Your Consideration.

Jon Hunt-Sharman President
Australasian Institute of Policing

References

[1] See http://www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal_Intelligence_for_Analysts.pdf at p 7

[2] Letter to Victoria Police Commissioner Steve Fontana dated 30 June 2015 from LawyerX

[3] Robert McDougall, Aspects of Evidentiary Privileges in Australia, Law Asia Conference Public Interest/ Corporate Law Presentation Wednesday 20 September 2017

[4] https//lawpath.com.au/biog/lawyer-turned-informant-draw-line-legal professional privilege 7 December 2018

[5] A barrister whose client threatens the safety of any person may, notwithstanding rule 114, if the barrister believes on reasonable grounds that there is a risk to any person's safety, advise the police or other appropriate authorities. Legal Profession Uniform Law on 26 May 2015.

[6] Lawyers Weekly, Jerome Doraisamy - Privilege, policing and the pub test: Questions to be answered from the Lawyer X scandal

[7] ibid

[8] The UK Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010

[9] www.vgso.vic.gov.au/content/understanding-legal-professional-privilege Victoria Government Solicitors Office

[10] Evidence Act 1995 (Cth), ss 118, 119.

[11] https://www.judcom.nsw.gov.au/publications/benchbks/civil/privilege.html

[12] http://www.judicialcollege.vic.edu.au/eManuals/UEM/28693.htm

[13] https://www.legislation.nsw.gov.au/regulations/2015-244.pdf Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Law Institute of Victoria)

Victorian Bar

Royal Commission into the Management of Police Informants

12 April 2019

VICTORIAN BAR

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Dear Commissioner,

1. The Victorian Bar refers to the letter from the Commissioner for the Royal Commission into the Management of Police Informants (Commission) dated 28 February 2019, inviting submissions in respect of the Terms of Reference.
2. The Victorian Bar welcomes the opportunity to make this submission, which is in respect of the Terms of Reference of the Commission, other than term 1 (which concerns the number of and extent to which cases may have been affected by the conduct of "EF" as a human source).
3. For the most part, terms 2 to 5 of the Terms of Reference raise issues concerning the conduct, practices and procedures of Victoria Police in respect of the recruitment, handling and management of human sources, and the use of information provided by human sources to Victoria Police. Those matters are not with in the knowledge of the Victorian Bar. As a result, at this stage of the Commission's process, it is not possible for the Victorian Bar to make submissions about those matters.
4. The Victorian Bar wishes, however, to make submissions under term 6 of the Terms of Reference (being any other matters necessary to satisfactorily resolve the matters set out in terms 1 to 5) about two critical issues that underpin the Terms of Reference: namely, the role of legal professional privilege in the Victorian legal system, and the potential for harm that arises in the context of the use of practising legal practitioners as police informers.

The importance of legal professional privilege

5. Legal professional privilege is a fundamental tenet of the Australian justice system. The Victorian Bar considers that its sanctity is of the utmost significance. Having regard to the importance of the right, as set out below, it opposes any weakening of or qualification to the privilege.
6. 'Legal professional privilege' refers to the right that protects confidential communications made between (principally) a client and their lawyer for either the dominant purpose of the lawyer providing legal advice, or the dominant purpose of the client being provided with professional legal services relating to anticipated, pending or actual legal proceedings to which the client is or may be party.[1] It is an answer to the production of documents or disclosure of information in both civil and criminal proceedings.[2]
7. The purpose of this submission is not to examine the tests that govern when privilege attaches to communications. Rather, its purpose is to articulate the nature and importance of this right in the Victorian legal system, as this must frame the Commission's consideration of any proposals to diminish or qualify that right.
8. The doctrine of legal professional privilege has been recognised since the reign of Elizabeth I.[3] The privilege arises out of, and is a necessary corollary of, the right of any person to obtain skilled advice about the law, "secure in the knowledge that, in the absence of a statutory command to the contrary, what passes between them is confidential and forever safeguarded from disclosure unless the communication is made to facilitate the commission of a crime or a fraud or the abuse of an exercise of a public power or the frustration of the order of a court".[4]
9. Legal professional privilege is an absolute privilege. It is not required to be balanced against other competing rights that are also grounded in public interest.[5] For example, not even the public interest in courts having all relevant evidence before them to determine a case, or the possibility that privileged documents might contain information that could exonerate an accused, has been considered sufficient to override the public interest in maintaining the unqualified operation of the privilege.[6] The High Court of Australia has opined that it ought not be narrowly construed or artificially confined.[7] To undermine the doctrine of privilege is to subvert the court's procedure for conducting adversarial litigation.[8]

10. This principle is fundamental to the interests and administration of justice in our common law legal system. It is more than a 'mere' rule of evidence: it is a substantive rule of law.[9] In this regard, legal professional privilege has been described as "a practical guarantee of fundamental, constitutional or human rights".[10] It is "a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality",[11] and a "precondition of the informed and competent representation of the interests of the ordinary person before the courts and tribunals of the land".[12]
11. Courts have recognised the public policy considerations that underpin legal professional privilege since at least the 19th century. In 1833, the House of Lords observed that the privilege is maintained :[13]
out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.
12. An other early statement of the common law ration ale for privilege was made by Knight Bruce V-C in 1 846: [14]
The discovery and vindication and establishment of truth are main purposes certainly of the existence of Court s of Justice; still, for the obtaining of these objects ... not every channel is or ought to be open to them ... Truth, like all other good things, may be loved unwisely- may be pursued too keenly - may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.
13. In the context of litigation, therefore, the privilege can be said to "promote trust and candour between the client and the legal adviser and to assist the legal adviser to advise with confidence whether legal action should be initiated, defended or compromised".[15]
14. Without such a doctrine, or with a substantially weakened doctrine, the administration of justice in an adversarial legal system would be impeded.[16] This risk is particularly acute in the context of the criminal justice system, where there is (typically) already a disparity in the respective resources of accused and State.
15. It is important to observe that administration of justice is not the function of the courts alone.[17] As Brennan J observed in *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121, "[t]he law is administered more frequently and more directly by legal advisers than it is by judges". In this context, legal professional privilege ensures that "the law's writ can run effectively whenever a legal problem arises or a person seeks to chart a course of conduct in conformity with the law".[18]
16. There are, of course, "exceptions" to the operation of privilege. As codified in Victoria, privilege does not protect, for example, communications made or documents prepared in furtherance of the commission of a fraud, an offence or an act that renders a person liable to a civil penalty.[19] Communications or documents that are designed to facilitate future wrongdoing are excluded from the protection of the privilege.[20] Privilege may also be lost or waived in other contexts, which are not the subject of further consideration in this submission.[21]

Police informers are also vulnerable because they engage in conduct that is, by its nature, kept covert from everyone other than the police, and concealed especially from those who might otherwise be sources of independent advice to them.

The use of practising legal practitioners as police informers

17. For policing authorities, the receipt of intelligence about planned crime and its perpetrators is material to effective policing.[22] Courts have recognised the role played by confidential police informers in this context.[23] In particular, courts have been cognisant of the balancing act involved in determining whether the identity of an informer ought to be disclosed to an accused in a particular case.[24]
18. Whilst there are doubtless different and sometimes overlapping motivations for becoming a police informer (such as a sense of duty), informers are usually persons in positions of particular vulnerability. Often, they become informers as the price of obtaining some concession from police in respect of their own criminal misconduct. In other circumstances, they may become informers because they are vulnerable as a result of the company they keep. "EF" was particularly vulnerable because she appears to have had these characteristics.
19. Police informers are also vulnerable because they engage in conduct that is, by its nature, kept covert from everyone other than the police, and concealed especially from those who might otherwise be sources of independent advice to them.

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20. This last characteristic of vulnerability is heightened in the case of an informer, like "EF", who was also a practising legal practitioner. In circumstances of confidential informing, the informer is unlikely to confide in any of the persons or bodies which might otherwise advise them on the discharge of their professional obligations. In the case of practising counsel, this includes formal sources of independent advice, such as professional associations, the Victorian Bar's Ethics Committee, the Victorian Bar Council (which is the subject of delegation of authority from the Victorian Legal Services Commissioner) or the Victorian Legal Services Board. It also includes important informal sources of independent advice, such as, in the case of a practising barrister, the barrister's chambers colleagues, their particular Bar association/s (for example, the Criminal Bar Association) and their clerk. All of these persons and bodies would ordinarily operate as 'checks and balances' on the conduct of a practitioner, to promote the high standards of professional conduct expected of an officer of the court. In circumstances where a practitioner has deliberately removed themselves from these positive spheres of influence, the risk of behaviour which transgresses professional standards and goes undetected is heightened.
21. In these circumstances, the Victorian Bar considers that a very significant burden is imposed upon the policing authority responsible for informers to ensure that professional standards are not compromised by virtue of that person's status as an informer. In particular, a policing authority should not use the significant power that they inevitably have with respect to an informer to encourage, induce, support or procure that person to breach their professional obligations (or otherwise be wilfully blind or reckless as to the potential for this to occur). Those obligations include not just the preservation of a client's legal professional privilege, but also equitable obligations of confidence which can arise both as an incident of, and independently from, the relationship between counsel and their clients.

As the High Court put it, police officers who knowingly encourage the provision of information from an informer in such circumstances are "guilty of reprehensible conduct" and "involved in sanctioning atrocious breaches of [their] sworn duty ...

22. The Victorian Bar believes that, at least as a practical matter, this burden will in most cases be impossible to discharge satisfactorily in respect of informers who are practising legal practitioners.
23. Most obviously, in cases where information is sought from an informer about an accused in respect of charges or proceedings in which the informer appears for the defence, the provision of the information will involve a clear and egregious breach of legal professional privilege and the practitioner's duties. As the High Court put it, police officers who knowingly encourage the provision of information from an informer in such circumstances are "guilty of reprehensible conduct" and "involved in sanctioning atrocious breaches of [their] sworn duty ... to discharge all duties imposed on them faithfully and according to law without favour or affect ion, malice or ill-will."[25]
24. However, the risks posed by the use by police of informers who are practising lawyers are not limited to such cases.
25. The line between information provided in a privileged, and a non-privileged, context can often be difficult to discern. The privilege is that of the client, not the practitioner. It cannot be waived without the authority of the client. Practitioners who are in a vulnerable position by reason of their status as informers may be disposed to waive their clients' privilege without authority, and in any event are in an inherent position of conflict such that there can be no confidence in their capacity to protect adequately the interests of t heir clients. All of these risks are hostile to, and inconsistent with, the rationale for legal professional privilege, and the integrity and administration of the justice system.
26. Further, barristers practise in a highly collegiate environment in which an 'open door' policy is deliberately fostered amongst counsel. Barristers are encouraged to, and do, routinely discuss their cases with disinterested colleagues, who are subject to strict obligations of confidentiality in respect of such matters.[26] This collegiality, and the maintenance of strict confidentiality in communications of that kind, serve the public interest generally, and the interests of clients in particular cases, by encouraging the highest standards of ethical and professional conduct. These interests will be wholly undermined where a member of counsel discloses information to a colleague who, unbeknownst to the former, is a police informer and passes the information on to police.
27. In the Victorian Bar's view, these risks tell against the use of legal practitioners as informers in any circumstances in which there is a risk of a breach of professional obligations. This risk is a general one, although it might be said to be particularly acute in the criminal law context. In this regard, Brennan J made the following observations about the operation of legal professional privilege in the context of a criminal law trial: [27]
If the prosecution, authorized to search for privileged documents, were able to open up the accused's brief while its own stayed tightly tied, a fair trial could hardly be obtained; in a . criminal trial, to give the prosecution such a right would virtually eliminate the right to silence. It would deprive an accused of such

right to an acquittal as he has by reason of a weakness in the Crown case which could be, but must not be, remedied by disclosure of the accused's instructions to his legal advisers [...]

28. It cannot be a permissible response to point to the 'ends' (namely, the incarceration of accused who are believed to be guilty of their charges) that may be achieved via the 'means' of utilising a practising legal practitioner in the manner that is the subject of the Commission's enquiry.[28]
29. The efficacy of legal professional privilege "as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced".[29] The doctrine is "not to be sacrificed even to promote the search for justice or truth in the individual case or matter".[30]

Yours sincerely,

Dr Matt Collins QC
President Victorian Bar

References

[1] The doctrine has been codified (in part) as 'client legal privilege' in ss 118-119, *Evidence Act 2008* (Vic).
[2] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 160 (McHugh J).
[3] Ibid 162.
[4] Ibid 162.
[5] Ibid 161.
[6] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at [6]; see also *R v Derby Magistrates' Court* (1995) UKHL 18.
[7] *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 491 (Deane J).
[8] *Baker v Campbell* (1983) 153 CLR 52 at 109 (Brennan J), cited in *Mann v Carnell* (1999) 201 CLR 1 at 36 [114].
[9] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 160 (McHugh J); *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 (Deane J).
[10] Ibid.
[11] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 161 (McHugh J).
[12] *Attorney-General (N T) v Maurice* (1986) 161 CLR 475 at 49 0 (Deane J).
[13] *Greenough v. Gaskell* (1833) 1 My. and K., 98, cited in *R v Derby Magistrates ' Court* (1995) UKHL 18 at [49]; see also *Bolton v. Corporation of Liverpool* (1833) 1 My. and K. 88, cited in *R v Derby Magistrates' Court* [1995) UKHL 18 at [50]
[14] *Pearse v Pearse* (18 46) 1 De G· & Sm 12, cited in *Mann v Carnell* (1999) 201 CLR 1 at 35 [111].
[15] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 160 (McHugh J).
[16] Ibid.
[17] Ibid 127 (Brennan J).
[18] Ibid.
[19] Section 125, Evidence Act 2008 (Vic).
[20] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 163 (McHugh J).
[21] See ss 121-126, Evidence Act 2008 (Vic).
[22] *AB v CD* [2017] VSCA 338 at [51], citing *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171.
[23] Ibid.
[24] Ibid at [45] ff.
[25] *AB v CD* (2018) 362 ALR 1 at [10].
[26] A barrister must not accept or a brief if "the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises": Legal Profession Uniform Conduct (Barristers) Rules 2015, rule 101(m).
[27] *Baker v Campbell* (1983) 153 CLR 52 at 108.
[28] Being circumstances where the agency of police informer has been so abused as to corrupt the criminal justice system: *AB v CD* (2018) 362 ALR 1 at [12].
[29] *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490, cited in *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 161 (McHugh J).
[30] Ibid.

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Submission from Brendan Moss

Royal Commission into the Management of Police Informants

1. I, Brendan Moss from Victoria, say as follows:
2. I make this submission in relation to the terms of reference of the Royal Commission into the Management of Police Informants (the Royal Commission), as a concerned member of the public;
3. I hold concern that the use of human sources by the Police will be diminished by the Royal Commission. Police require the use of human sources to gain valuable information and evidence to support charges, and I feel the negative media gained by the incidents involving Informant 3838 (3838) is likely to prevent people from considering becoming registered human sources in the future;
4. The matter involving 3838 has gained a large amount of media attention, which appears to be mostly negative against Police actions. 3838 was acting as a Defence Solicitor and providing information at the time relating to her clients to Police, who would then use that information against the accused. It is reported that the use of this information by Police was inappropriate, given how it has been obtained. I feel an investigation is warranted to confirm that 3838 was acting without coercion in providing the information, and was not promised anything to provide that information;
5. It is my understanding that the Police are required to present all the evidence they have obtained to Court, even when it goes to show the accused innocence. As 3838 was presenting information regarding her clients, the Police were required to present it to Court and have the Court decide on its admissibility. At the time of the incidents, the information given by 3838 was accepted on numerous occasions by Victorian Courts and gained the Prosecution multiple convictions, in some cases, according to media outlets, for serious offences including large drug trafficking and murder charges;
6. I feel that the matters that 3838 informed on were of major public interest, and therefore feel the evidential value of the information provided far outweighs the prejudicial value of the manner the information was collected;
7. 3838 and her clients were under the provisions of legal privilege at the time she was informing. I acknowledge that this blurs the line between Defence Solicitors and their clients. I feel that the reasonable persons test would suggest the information provided by 3838 to be fair and reasonable as it was enough to convict offenders on serious charges, and the majority of the community errs in favour of victims rights over rights of the offender;
8. This should not impinge on the rights the accused has to a fair trial, however I feel changes to legal privilege should be made to allow Solicitors and members of the Clergy to report serious offending to Police without fear of legal retribution, similar to mandatory reporting that Doctors, Teachers and Police etc have for the suspicion of family violence;
9. In relation to the offenders that 3838 provided information on, I feel that society would lose further faith in the justice system should those offenders were re-trialled, and the information provided by 3838 was excluded. The information goes to prove an offence, as the offences are serious, the community would expect that information be included;
10. I feel that the community has certain expectations on Police to solve criminal activity and put alleged offenders before the Courts. I feel that further restrictions on human source recruitment will place strain on the Police to put offenders before the Court, and place bias against the prosecution in Court proving offences. It should be considered that if the accused deserves a fair trial, the Victims should also expect the same fairness, and information provided by human sources, especially from Solicitors, would provide the Victim similar fairness;
11. I feel that society would be happy to accept the notion that Defence Solicitors have the power to inform Police of serious offending by a client. I feel that the only people who would stand to lose anything by that would be the people who are already guilty beyond reasonable doubt. I feel that 3838 may have felt she was showing a higher set of morals by presenting Police with information in her cases, instead of having knowledge of her clients guilt and still attempting to gain a not guilty verdict.

Brendan Moss
Friday 8 March 2019

Royal Commission into the "Lawyer X" / Informer 3838 Scandal

DR OLIVIA GROSSER-LJUBANOVIC*

Shhh

Can You Keep a Secret?

Everything happens for a reason, and we must be on the right side of reason!'

Shhh. Can you keep a secret? The concealed weapon in the lawyers' arsenal is as much double-edged sword as it is shield for these defenders of the underclass; proponents of justice and embodiments of truth. If legal practitioners sound like briefcase-toting superheroes, the reality is much more sobering. As members of an ancient and esteemed profession who have responded to the honourable calling to plead at the bar, these advocates have advanced their clients' interests from behind the legal provision known as Legal Professional Privilege. Mired in controversy, the contemporary embodiment of 'privilege' has again come to the fore courtesy of the "Lawyer X" / Informer 3838 Scandal.

* Olivia Grosser-Ljubanovic is a Doctor of Law, specialising in the field of Legal Professional Privilege. In addition, she holds an L.L.B. (Hons. 1), GDLP and RA. in English.

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LEGAL PRINCIPLE: Legal Professional Privilege

PROPOSED LAW REFORM: To give renewed clarity to the principle of legal professional privilege by reducing and reverting the scope of the rule so only confidential client-counsel communications made for the express purpose of (1) giving or receiving legal advice; and/or (2) communications made with a view to actual or pending litigation are covered. Any and all other communications, including, but not limited to, those occurring outside the formal legal setting, are extraneous and not to be covered by the rule.

RE-INTRODUCE: The 'Sole Purpose' Test

FACTUAL SCENARIO: Lawyer X is alleged to have breached legal professional privilege by disclosing confidential client-counsel communications to Victoria Police's Purana taskforce for the purpose of effecting successful, albeit improper, prosecutions and inaccurate legal outcomes. Lawyer X indicated that she 'began to provide intelligence to Victoria Police· and … helped because [she] was motivated by altruism rather than for any personal gain'.[ii]

BACKGROUND

The starting point in assessing how the "Lawyer X" / Informer 3838 travesty came to pass lies not in the immediate controversy in which Lawyer X is embroiled. Rather, the antecedents giving rise to this Royal Commission can be examined through the lens of two entwined High Court cases in which the principle rose to prominence. The 1976 case of Grant v Downs[iii] was the leading authority for the principle that the privilege should be contained within strict limits. I raise this as a critical point for consideration because had the criminal clients of X had a bright-line test that clearly identified where the privilege began and ended – there could have been no doubt that many of their communications fell outside the ambit of the rule.

In *Grant*, Barwick CJ commented that the courts in this country were not bound by any statement of authority with respect

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to the principle. Accordingly, the *Grant* Court was required to determine and state the relevant principle which should operate in Australia.

In a 3:2 decision, the Court formulated the 'sole purpose' test as the applicable criterion for legal professional privilege. Through confining the application of the rule to communications and/or materials solely created for the purpose of legal advice or use in litigation, the high Court restrained the privilege from travelling beyond the underlying rationale to which it is intended to give expression. In simple terms, if the privilege's sweep was too broad, the search for the truth would be compromised because a greater number of justifications would exist to shield communications from discovery. The Court went so far as to label the privilege 'an impediment, not an inducement, to frank testimony [which] detracted from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise'.[iv]

By contrast, the 1983 case of *Baker v Campbell*[v] broadened the scope of confidential client-counsel communications so that if the *dominant* purpose of communications was legal advice, this sufficed to bring the communication within the ambit of the rule (irrespective of whether or not it was connected to anticipated or actual litigation). The view articulated by Wilson J in *Baker* is particularly significant because, in reaching his decision, he conceded that he had been plagued by 'much anxious thought, in the course of which [his] opinion fluctuated from one conclusion to another'.[vi] Wilson J ultimately distinguished his judgment in *Baker* from an earlier privilege case over which he presided[vii] and acknowledged that he had finally 'arrived at the only result which afforded him lasting satisfaction'.[viii]

This 'conscience' ruling, if you will, was not based on precedent or any other established form of legal authority, yet it provided the impetus for courts to extend the application of the privilege well beyond the limits required for the administration of justice. How any moral line can be drawn at this boundary, or how the law can protect a deliberate plan to defy the law and oust another person of his rights, is unfathomable.

HOW TO AVOID FUTURE FAILINGS: Keep legal professional privilege within justifiable bounds.

In the wake of Lawyer X's transgressions, which have caused incalculable injury to the integrity of the legal profession and the justice system (including the perversion of evidence); legal professional privilege should conform to a 'test of necessity' and we should be willing to restrict the concept accordingly. I see no virtue in retaining the 'dominant purpose' test. In my estimation, it is the 'Sole Purpose' test to which the privilege should now revert. In drawing this conclusion, I have conducted detailed analysis of historical texts, case law and legislation. I put it to the Commission that the clients engaged by Lawyer X believed, in all likelihood, that everything they confidentially revealed to X was protected from disclosure, yet it is difficult to justify why communications between counsel and client should be immune if legal advice and/or litigation is not anticipated.

To extend legal professional privilege without limit to *all* client-counsel communication upon matters within the ordinary business of a barrister/solicitor and referable to that relationship is too wide. Such a 'loophole' effectively enables clients to exploit the rule. Although the conduct of Lawyer X – in showing a flagrant disregard for the privilege – is inverse to the intent and operation of the rule; the adoption of the 'Sole Purpose' test is significantly easier to satisfy given that it can easily be understood. By keeping it within a very narrow compass, we create a bright line for determining where the protection commences and concludes.

A narrowing of the scope also deals with the argument of a 'risk' arising whereby legal practitioners are placed on the slippery slope of having to judge which confidences can be revealed and which cannot. Instead of client trust being compromised on the basis of confidential disclosures now being subject to discovery, the client would in fact own the discretion of whether to reveal or withhold information and any such disclosure would be at their own risk and to their own gain.

The conduct of Lawyer X has created an unhealthy moral state and double-minded attitude, with the barrister engaging in dual and inconsistent capacities as both informer and confidante. Given that the privilege has been wielded as both sword and shield, it is my desire to see the 'Sole Purpose' test become a permanent fixture of the 21st-century rationale of legal professional privilege. A positive change in the application of, and exception to, legal professional privilege has the potential to produce a recognised and lasting effect.

Legal Professional Privilege: Genuine Endeavour or Clever Marketing Scheme?

...Nimble and sinister tricks and shifts, in which they prevented the plain and direct course of the courts and brought justice into obliques and lines and labyrinths.[ix]

Practitioners and academics contend that legal professional privilege is one of the most sacred relationships in the law because it is said to promote the necessary confidence between client and legal practitioner. The argument goes that through encouraging clients to communicate information they would otherwise withhold from legal practitioners, confidentiality is deemed to enhance the quality of legal representation by building trust between counsel practitioner and client. A closer look at the history of the rule reveals an altogether different justification. In the late Middle Ages, when the continued existence of the legal profession was in doubt, *attornati* (as they were then termed) utilised, manipulated and moulded legal professional privilege as a tool to justify their usefulness as a profession. The privilege acted as marketing strategy of sorts by ensuring *attornati* were indispensable to the proper functioning of the legal system and the administration of justice.

The integrity of the legal profession has been repeatedly questioned in public discourse. In *Bleak House*, Dickens described the absurdity of the 19th-century legal profession:

> The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense.[x]

Fast-forward two hundred years and

legal professional privilege still accords real or fancied protection and prestige to the legal profession which affords them a competitive advantage over other professional groups. I put it to the Commission that the privilege is not merely an ideology, but a marketing strategy in which strong confidentiality rights emerge as a more valuable advantage than legal expertise. According to Fred Rodell, the law's prestige lay in the ability of lawyers to 'blend technical-competence with plain and fancy hocus-pocus to make themselves masters of their fellow men ... To guide us, incidentally, through a maze of confusing gestures and formalities that lawyers have created'.[xi]

This, in turn, puts a premium on legal services as exemplified by the fact that many legal practitioners insist it is their duty to exploit loopholes in the interests of their clients. According to Lawyer X, 'solicitors [were] perverting the course 'of justice and conspiring with criminals to try to ensure a number of gangland murders would remain unsolved or uncharged'.[xii]

The abhorrent actions and conduct of Lawyer X, which are prejudicial to the administration of justice, undoubtedly lead to the implication that 'laws' practically invite legal practitioners to write their own ticket, with the legal trade a high-class racket which favours a narrow cost-benefit analysis when weighing the harm to litigation more heavily than the harm to other values. Legal advice may be framed in such a way that it assists clients bypass a law by casting their affairs in a way that technically conforms to it but ultimately defeats its purpose through skilful evasion. The net effect of confidentiality may therefore be to reduce compliance with the law.

The orthodox view holds that non-disclosure, in applying to members of the legal profession, increases the value of services that practitioners are uniquely placed to offer, 'Every lawyer … has the same thing to sell, even though it comes in slightly different models and at varying prices. The thing he has to sell is The Law'.[xiii]

Lawyer X, however, sold out everyone, herself included.

Lawyer X-A Wolf in Sheep's Clothing

It would be ironic if [we] punished a lawyer whose only concern was that justice be done.[xiv]

Legal professional privilege has evolved into a code of conduct steeped in hypocrisy, whereby legal practitioners, whose collective reputation as defenders of the underclass, proponents of justice and embodiments of truth are now parodied and relegated to the top of 'least trustwo1thy profession' lists or shackled together at the bottom of the ocean courtesy of plentiful jokes that parody a once-historically esteemed profession.

The appalling sequence of events, as revealed by Lawyer X, mean that a total of 386 people have been arrested and charged based upon information she covertly supplied to the Purana Taskforce.'[xv] This calls into doubt the validity of those prosecutions. Moreover, the unsavoury practices engaged in by Lawyer X are incompatible with elevated integrity or even common honesty. Although X noted that the revelation of her status as informer/human source has had dire consequences on her life,[xvi] she asserts her motives were altruistic:

> [D]uring 2005, I became aware of ... a variety of serious criminal activity by virtue of the contact I had with certain clients … I also watched as Police either totally failed to investigate … or failed in being able to obtain evidence to arrest and charge offenders.[xvii]

To my way of thinking, her motives in misusing the principle represent her sense of 'personal gratification', yet X's attitude, together with the strict confidentiality provisions promote and reinforce the perception of practitioners as 'hired guns'. When the attack originates from within the legal profession which is responsible for espousing the tenets of legal and ethical advocacy, it is even more baffling. The "Lawyer X" Scandal may be most aptly described as an event which provides an immediacy and humanity to the presentation of ethical issues in the legal setting. It certainly 'raises the question of whether the regulations and codes of conduct create ethical conflict by assigning legal practitioners a professional duty that conflicts with other ethical values, particularly the good of alleviating needless suffering.

The vicarious trauma sustained by Lawyer X in (initially) keeping her client's secrets – and the ripple effect on her family, colleagues and the wider legal profession – would have been mitigated, if not altogether removed, had the ambit of the privilege been constrained within tighter limits, If the rule was narrowed in its ambit, any confidential information revealed to X by her criminal clients would never have come within the rule. While it remains a point of contention as to whether X could have then disclosed information to Victoria Police, she would have at least been relieved from the prospect of breaching legal professional privilege.

It must be borne in mind that the rule is promoted as a safeguard for weighty and legitimate competing interests. For Lawyer X, the burden and intolerable pressure of keeping her clients' secrets combined with the subsequent revelation that she contravened the privilege by acting as a human source, has resulted in the decline of her 'mental, emotional and physical health ... In addition to ... anxiety, fear, severe depression, PTSD and paranoia …'[xviii] She remains under the care of a clinical psychologist and a doctor and continues to endure paralysing fears and uncertainty as well as heightened danger.[xix] X acknowledges that 'this nightmare is not simply going to go away'.[xx]

Legal Professional Privilege and the Presumption of Innocence

The problem has been difficult from the beginning.
Better no light from history, however, than false light.[xxi]

LEGAL PRINCIPLE: Wrongful Conviction and/or Malicious Prosecution

PROPOSED LAW REFORM: While exceptions exist to legal professional privilege in the forms of the 'crime-fraud' and 'future crime' exceptions, no such exemption exists for past crimes.

INTRODUCE: The 'Past Crime' Exception

The "Lawyer X" Scandal illustrates classic examples of difficult and dangerous situations which lead to wrongful convictions including: vindictive or improper prosecutions, incentivised witnesses, indifferent or hampered defence counsel and tainted police officers. Each of these scenarios has played a part, to some extent, in attaining the wrongful conviction of 386 imprisoned men.

I put it to the Commission that Victoria Police and Lawyer X violated their professional obligations under the purported pretext of seeking justice.

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The police were able to perpetrate malicious, or in the alternative, improper, prosecutions by virtue of the fact that their unrestricted access to Lawyer X provided guilt-to-order. By gaming the situation as they did, Victoria Police is guilty of a plethora of misconduct and positioned itself to get what it needed without giving up anything; without losing tactical advantage.

The Police bent the truth about evidence tampering and curtailed justice in order to protect their own rates of conviction. They failed to disclose the existence of inducements offered to Lawyer X to obtain said evidence / testimony and misreported the extent of those inducements. In doing so, due process has again be compromised. As a result of police fabrication, whereby they intentionally presented inadmissible and/or manufactured evidence for the purpose of furthering an injustice, they themselves perpetrated a gross injustice; not merely a result of legal error, negligence or mistake, but illegality and significant procedural impropriety. They played fast and loose with the truth.

Lawyer X, for her part, reported privileged communications to police; thereby perpetrating an egregious violation of her duty to uphold legal professional privilege. Lawyer X has emerged as a cog in the wheel of a machine that has sent some these men to prison absent due process. If corrupted evidence and/or testimony enables these men to remain wrongfully imprisoned due to the operation of the privilege, the "Lawyer X" Scandal will stand for something far worse. The question to be answered is which is the greater of two evils?

The golden thread of criminal law is directly tied to the fundamental presumption of innocence. Clearly there is force in the argument that legal professional privilege should, as a matter of policy, give way in any case and particularly a criminal one, where a wrongful or improperly attained conviction may be produced.

Victoria Police, in corroboration with Lawyer X, orchestrated the collection of evidence to fit the argument it sought to advance. This conspiracy to act in furtherance of improper prosecutions could not have been more harmful to the justice system and arguably involved the manipulation of people and the twisting of the truth in which unlawfully-obtained evidence was elicited and admitted in order to establish crucial facts on which the jury found Lawyer X's criminal clients guilty.

The toughest and most perplexing dilemma faced by members of the legal profession is to assess whether the moral and philosophical implications of disclosure outweigh the competing self-interest considerations which include a desire to preserve one's professional integrity by eliminating potential exposure to civil liability and damage to person, reputation and business. It is an undeniable fact that ethical issues abound regarding the limits and application of legal professional privilege and whether or not its existence hinges on a tenuous link. At some point, every defence barrister has to choose between their own need to know the truth versus the best interests of their client/s.

The privilege undoubtedly provides additional incentive for clients with something to hide to hire legal practitioners such as Lawyer X so as retain control over communications and not risk having their secrets compromised or divulged. The effect of legal professional privilege is that it places clients in the novel position of being beyond the reach of the law. Deceitful clients with something to hide can confide in legal practitioners, while wrongfully accused defendants are obstructed from accessing information which could help prove their innocence. Lawyer X stated that she acted out of her 'own frustration with the way in which certain criminals were seeking to control what suspects and witnesses could … say to Police via solicitors who were not … acting in the best interests of their clients because of undue influence and control of "heavies"'.[xxii]

Accordingly, there is little to fear if the privilege is not available in every circumstance and situation; for client-counsel communications are unlikely to be inhibited. This is further reason to invoke the 'Sole Purpose' test.

I submit that the entrenched views of those who promulgate a 'dominant purpose' test overlook the contention that any fixed or unnecessarily-wide rule devalues the rhetoric that legal professional privilege enhances the administration of justice. The actions of Lawyer X have wrought damage to the integrity of the justice system and simultaneously undermined and impaired the functioning of the broader legal system. As a means of rectifying the damage done, it must clearly be stated that (1) any communication which is not made pursuant to legitimate legal advice and /or litigation is not covered; (2) no client can rely on the privilege to attain immunity if/when confiding to past wrongdoing; and (3) if the client no longer has any grounds upon which to assert a recognisable interest in having communications protected, the privilege must yield to competing interests of equal or greater value.

Competing interests incurred by the application of legal professional privilege are most keenly felt in criminal law, The "Lawyer X" Scandal throws up the dichotomy of opposing legal entitlements by juxtaposing the public's right to be informed about certain criminal conduct against the right of the client to insist that such revelations remain confidential.

Legal practitioners should be imbued with a positive duty to assist the court to reach the truth. While the precise nature of this duty needs to be carefully defined, I cannot conceive of a law which would actively encourage a legal practitioner to withhold information which, if disclosed, might enable a defendant to establish his innocence; account for a past crime or resist an allegation of guilt. The privilege must yield if one of these factors are on the line.

I further submit that a balancing of interests falls in favour of admitting communications; which is not to say the abhorrent conduct of Lawyer X should in any way be endorsed. If a balancing approach is however applied to the privilege, this produces an attractive proposition which assigns a priority to one fundamental right over another; the right that no one should be wrongfully convicted, with its ancillary right of access to evidence establishing innocence, prevailing over the right to invoke a claim of privilege.

It is my view that benefits availed by the privilege are, in a practical sense, doubtful. The principle, by virtue of its existence, has the capacity to produce wrongful convictions. To this end, a distinction should be drawn between the application of legal professional privilege in civil and criminal proceedings because, in the criminal context, a danger exists if communications

which may benefit an accused are screened from a jury. The right to counsel in the criminal law context is linked to the notion of autonomy, client dignity and the· presumption of innocence. No person should be required to defend a criminal charge, prosecuted by the State, without the assistance of a competent and ethical legal practitioner. It is clear that the procedural limitations of the privilege are conducive to injustice through preventing full disclosure of all relevant facts. Such inaccuracies make possible the conviction of persons whom the criminal law says are innocent. Livelihoods can be resurrected. Lives cannot.

From a practical viewpoint, history has witnessed an uprising of sorts from members of the profession, including Lawyer X whose disobedience of the rule has forced an examination of the theoretical justifications for allowing a permissive or mandatory disclosure rule.

Although the actions perpetrated by Lawyer are inverse to those discussed in this section; that is to say she elected to breach the privilege with the aim of seeing her own clients prosecuted, I submit that under its ordinary operation, legal professional privilege must not stand in the way of the truth. As an extension of this argument, I question how a revocation of the privilege in wrongful conviction cases impairs the provision of services to dishonest clients who have confessed to perpetrating crimes for which another person has been falsely accused, tried or imprisoned.

The codes of professional conduct, as they presently stand, also enable a legal practitioner, when questioned about the propriety of assisting his or her client, to hide behind the nondisclosure rules which enable them to avoid the cost of bad publicity and community disapproval of their conduct. On the other hand, to knowingly have withheld information is to have assisted the conduct of a felon; to have become an active participant in the concealment of a crime; to have engaged in an act of evil and to have hidden a fugitive from the law. Indeed, if 'a stance lacks moral comprehensiveness, coherence or authenticity, then so do the moral imperatives which have been discerned from within the stance'.[xxiii]

A Final Word

A man lives only one lifetime, but in the annals of history, his deeds can live on forever.

The "Lawyer X" Scandal provides a fascinating glimpse into the legal professions' battle between client and conscience. The convening of this Royal Commission is an acknowledgement that the law with respect to legal professional privilege is in an unsatisfactory state. We have a system of justice which is marred. The implementation of the 'Sole Purpose' test should be proposed in order to streamline the administration of justice, modernise its procedures and, I reiterate, bring it within justifiable bounds. I strongly urge the Royal Commission (1) recommend law reform by having further exceptions grafted onto the privilege; and (2) reducing the ambit of legal professional privilege by restoring it to its original, intended purpose so clients and legal practitioners will be left in no doubt as to the outer limits of the rule.

The legal profession has a moral voice. If that voice is diminished by the scandals of incompetent counsel and vexatious prosecutions, it presents a serious problem. Surely, the aim of making practitioners accountable in the fact-finding process would go some way to restoring credibility and integrity to a much-maligned profession. Given Lawyer X's startling transgressions, I put it to the Commission that it would be irresponsible to move forward with the current 'dominant purpose' test. The problem with the existing scope of the rule is that it elevates the principle to a realm of untouchable reverence and deprives those who should benefit from it most. Let the "Lawyer X" Scandal mark the end to this era of jurisprudence. In the words of Dr Philip Opas, 'It is a heavy burden when in the last analysis it may all depend on you'.[xxiv]

END NOTES

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[ii] *'In her own words: Why a top criminal barrister became Informer 3838'* The Age Newspaper, 3 December 2018.

[iii] [1976] HCA 63

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[v] (1983) 153 CLR 52, 75 (Mason J).

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[vii] *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.

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[ix] Francis Bacon, cited in Edmund Christian, *A Short History of Solicitors: Attorneys under Elizabeth I and James I* (Reeves & Turner, 1896), 47.

[x] Charles Dickens, *Bleak House, Vol II* (Chapman & Hall, 1911) 128.

[xi] Fred Rodell, *Woe Unto You, Lawyers!* (Pageant-Poseidon, 1939) 3.

[xii] *'In her own words: Why a top criminal barrister became Informer 3838'*, above n ii.

[xiii] Fred Rodell, above n xi, 3.

[xiv] Letter from Richard Rosen to Grievance Commission; North Carolina State Bar (2 April 2007)

[xv] '*In her own words: Why a top criminal barrister became Informer 3838'*, above n ii.

[xvi] Ibid.

[xvii] Ibid.

[xviii] Ibid.

[xix] Ibid.

[xx] Ibid.

[xxi] Geoffrey Hazard, 'An ·Historical Perspective on the Attorney-Client Privilege' (1978) *66 California Law Review* 1061, 1091.

[xxii] *'In her own words: Why a top criminal barrister became Informer 3838'*, above n ii.

[xxiii] Joseph Bernardin and Thomas Fuechtmann, 'Consistent Ethic of Life' (1998, Sheed & Ward) 191.

[xxiv] Australian Coalition Against the Death Penalty, 'Ronald Ryan: Hanged Innocent in Australia <http://www.ronaldryan.info/>.

Community Advocacy Alliance Incorporated

Submission to the Royal Commission into Management of Police Informants 26th February 2019

Your Honour

Ever since the formation of professional police forces, police have relied upon information gained from many sources. One such source is from informants, paid or otherwise. In Common Law it was once an offence of 'Misprision of Felony' to fail to report a felony if one knew the felony had been committed and by whom. The basis of this offence was obviously that every citizen has a civic duty to preserve the law. That this duty applies even to lawyers except where lawyer client privilege exists is self-evident.

The offence of 'misprision of felony' was abolished in Victoria. With some exceptions, when it was active it consisted of failing to report knowledge of a felony to the appropriate authorities. In a number of jurisdictions, the offence has been replaced by a statutory offence. No corresponding statutory offence has been legislated in Victoria.

It is submitted the need for such a statutory offence is essential to the maintenance of law and order in Victoria.

In the case of Lawyer "X," or Victoria Police Informant 3838, and now allegedly other lawyers, there may have been blatant breaches of lawyer client privilege. It must be noted that, if so, it was the lawyers who acted improperly and 3838 has since been rightly disbarred as a consequence.

The High Court described police use of Informer 3838 as reprehensible conduct which involved sanctioning "atrocious breaches of the sworn duty of every police officer". However, what the High Court did not say was that the Victoria Police had acted illegally. Nor did the High Court specify what the 'atrocious breaches of the sworn duty of every police officer' were, other than by inference, using 3838 as a paid informer.

The Court also found that lawyer 3838 had engaged in a "fundamental and appalling breach" of her obligations as a barrister.

If police had acted unlawfully one could reasonably expect that the High Court would have so said.

It is submitted that legislative clarity is required in relation to police informers so that everyone knows what they can do and what they cannot. Clear legislative guidelines will prevent the difficulties relating to 3838 and others from arising again. In the Royal Commission making recommendations it is urged that there does not arise the 'law of unintended consequences'.

Victoria has had a "Crime Stoppers" program since 1987. The Program receives information from the public, sometimes anonymously and sometimes through identified persons, with many of the latter paid for their information. Between 1987 and 2017 information gained through Crime Stoppers resulted in 871,755 contacts, 20,275 arrests, 80,725 charges laid and $203 million in contraband seized. It is clear that the ability of police to receive information and intelligence is, in part, the lifeblood of combating crime.

It is submitted that any recommendations regarding police use of informers must not be at the expense of limiting such an effective weapon against crime as Crime Stoppers. To do so would be unconscionable.

That the conduct of the Victoria Police was most unwise cannot be disputed. Those involved at the highest levels ought to have known better, at least to the extent of assuring themselves that they were not sanctioning breaches of lawyer client privilege. Where no such privilege applied, why should police not have gained as much information about very serious crimes, including murders and extensive drug trafficking, as possible? Lawyers are also citizens.

The CAA would, with respect, reserve the right to make further submissions as and when appropriate in our view, as the Royal Commission proceeds.

Submitted by and on behalf of;
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Submission to the Royal Commission into Management of Police Informers...2 21st March 2019

Your Honour
The tragedy in New Zealand of mass slaughter on 15 March 2019 highlights the need for police to gather intelligence. Intelligence gained may allow police to prevent such occurrences. Such intelligence may be gained from informers, paid or otherwise.

In the context of legal professional privilege the dilemma of balancing the right of people to consult their lawyers without fear of those discussions being made public and the doctrine of public interest raises issues that must be confronted.

If, for example, the New Zealand shooter had consulted a lawyer to have a Will prepared in the event he was killed in the process of carrying out his heinous crime and has informed the lawyer of his intention to do something so horrific how is the lawyer to respond? Failing to report such an event must make the lawyer unable to live with themselves when carnage results.

Clearly there must be some limits placed on the scope of legal professional privilege in the public interest.

The same issues may be evident if a lawyer becomes aware that a client intends to import large quantities of illegal drugs. As a case in point, two men involved in the importation of more than four tonnes of ecstasy hidden in tomato tins were sentenced to more than 10 years in jail.

Customs officers at the Port of Melbourne intercepted the ecstasy in the form of 15 million tablets hidden in 3,000 tins arriving from Naples, Italy, in 2007.

The drugs, found packed in a shipping container, weighed more than 4.4 tonnes and had an estimated street value of $122 million.

The Community Advocacy Alliance Inc. (CAA) submits that any lawyer becoming aware of the impending importation has a clear duty to report that knowledge to the appropriate authorities in the public interest. It would be unconscionable to ignore such a degree of potential harm.

How could a workable solution be provided for such situations?

The CAA submits that a legislative provision can be formulated to deal with this issue. It is submitted that a legislative provision could read along the following lines:

"The doctrine of legal professional privilege shall be maintained at all times subject only to the limitation of when overridden in the public interest. In the event of a legal practitioner seeking to breach the doctrine of legal professional privilege such legal practitioner, except in a case of dire emergency that threatens the life of any person, shall make application to the Supreme Court of Victoria for leave to breach legal professional privilege. On approval by the Supreme Court the legal practitioner shall be indemnified from all criminal, civil and disciplinary action whatsoever

In any case of a dire emergency, as soon as practicable after the breach of legal professional privilege the legal practitioner must report the full circumstances of their action to the Supreme Court. The Supreme Court may then indemnify the legal practitioner as set out in the preceding clause.

A legal practitioner who becomes aware of an impending serious crime and who believes such a crime is likely to be perpetrated and fails to seek leave of the Supreme Court to breach legal professional privilege fails in their duty as a sworn Court Officer and shall be liable to such action as the Supreme Court deems appropriate."

The CAA submits that the limits thus imposed on legal professional privilege would be fair and reasonable.

The CAA would, with respect, reserve the right to make further submissions as and when appropriate in our view, as the Royal Commission proceeds.

Submitted by and on behalf of;
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Lawyer X Nicola Gobbo played 'minimal' role in bringing down Carl Williams, cop tells inquiry

BY SARAH FARNSWORTH

Updated 2 Jul 2019

Defence barrister Nicola Gobbo only played a small role in bringing down triple murderer Carl Williams despite her concerns her life was at risk, a high-profile police officer has told a royal commission.

Victorian Police Commander Stuart Bateson says Nicola Gobbo was not "just any barrister".

Commander Stuart Bateson has told the inquiry the "chink" in the criminal code-of-silence came after the arrest of one of Williams' associates for a gangland murder in 2003 – two years before Ms Gobbo was re-registered as a police informer.

The man, who cannot be named, implicated Williams in that murder and two others.

The snitch would later be jailed for 10 years for one murder, despite admitting to several others.

The commission heard police secretly taped the man during a car trip from prison after his arrest, when he blabbed about several murders despite being under caution.

They used his information as leverage.

Mr Bateson, who was a detective sergeant with Purana Taskforce at the time, said police already had "overwhelming evidence" against the man, and said it was common for criminals to turn on each other to get the best deal.

"He thought he held all the cards. This was something he was always going to do," Mr Bateson told the inquiry.

The inquiry heard Ms Gobbo was the snitch's lawyer and feared Williams would be upset about the role she played – as the man had implicated Williams in several gangland murders.

Counsel assisting the commissioner, Chris Winneke SC, told the inquiry the man got away with murder for helping police.

"He was never charged with murders he admitted to," Mr Bateson agreed.

But Mr Bateson said he believed Ms Gobbo had acted in the best interest of her client at the time.

"The significance in her involvement was quite minimal," Mr Bateson said.

However, he said he later removed Ms Gobbo's name from his police diary notes.

Mr Bateson admitted he didn't get legal advice before "scrubbing" her name, but did it as he had "concerns for her safety".

Ms Gobbo later rang him to thank him for keeping her name out of the case.

From that day on, she would repeatedly call Mr Bateson and offer information.

By September 2005, Ms Gobbo was once again officially a police informer.

Mr Bateson said Williams saw Ms Gobbo as more than just his lawyer, but rather "part of his crew" and she feared she had placed herself at risk.

"She wasn't just any barrister.

"My belief at the time was Carl Williams at the time looked to her as part of their network.

"Acting for him as she did would be something they would be upset with."

Earlier, Mr Bateson was quizzed about Ms Gobbo's professional relationship with her clients.

He said there were concerns she and other lawyers were in too deep with criminal networks.

"From my point of view, there was a small group of criminals lawyers that … we believed were actually part of the criminal enterprise. That they were facilitating that activity," Mr Bateson said.

"Providing advice to get around bail applications, subpoena arguments, discovering informers, acting outside what I would have thought was proper conduct for a legal practitioner.

"If I ever had evidence to charge those barristers and solicitors, I would have."

Asked if she was assisting clients to pervert the course of justice, Mr Bateson said she was helping them "stay up and operating".

While he couldn't recall if Purana had Ms Gobbo under surveillance, Mr Bateson said she was captured at social events with criminals under surveillance, including the christening of Williams' daughter Dhakota at Crown Casino.

Asked if he was concerned about conflicts of interest Ms Gobbo might have as she continued to represent other associates of Williams, Mr Bateson said it was not his problem.

"It was not a matter for us to resolve," Mr Bateson said.

"The conflicts were well known by the director, the OPP [Office of Public Prosecutions], the courts and I think the ethics committee," he said.

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