



11 April 2019

The Honourable Margaret McMurdo AC
Commissioner
Royal Commission into the
Management of Police informers (Victoria)

Dear Commissioner,

Submissions of the Criminal Bar Association

By letter dated 28 February 2019, the Victorian Bar was invited to make a written submission on matters relevant to the Commission's inquiry.

The Criminal Bar Association (CBA) supports the submissions made by the Victorian Bar and wishes to complement them. We do so in order that recommendations necessary to improve future processes and practices may be made and that public confidence in the criminal justice system may be enhanced.

Background

1. The CBA is the peak body for barristers in Victoria practicing in the criminal law. Its members comprise almost one quarter of all barristers practicing in Victoria and it counts almost one third of Victoria's Judiciary among its Honorary Members. The CBA represents those who principally prosecute, those who principally defend and those who have a mixed practice. We regularly meet with the judiciary and government and are involved in the continuing legal education scheme of the Victorian Bar.
2. Members of the CBA appear in criminal cases of all types, both in Victoria, and across all states and territories of the Commonwealth. Further, such appearances are in matters involving all facets of the criminal law, both state and federal.
3. The focus of these draft submissions is on Terms of Reference 4, 5 and 6.

4. In summary, the CBA submits as follows:
 - a) The importance of client legal privilege is such that the role of legal representative in a given case is entirely inconsistent with that of maintaining a relationship of informer, registered or otherwise, with a related investigating agency.
 - b) The personal safety of members of the independent Bar can only be adequately guaranteed by an absolute prohibition against counsel acting in a given type of matter (eg, defending or prosecuting a state criminal matter) having any undisclosed relationship with a related investigation agency.
 - c) It is essential that the use of an informer in any given case be disclosed in an appropriate manner to the prosecution and defence to avoid a miscarriage of justice

Independence

5. The CBA is critically concerned with the integrity of the criminal justice system.
6. Any possible interference with the court's processes and the public confidence in them is unacceptable and inconsistent with the CBA's Rules and principles.
7. Our safety, and our ability to do our job – and thus the ability of the criminal justice system to reach just results – is impaired by a perception that lawyers may not be trustworthy recipients of our clients' confidences. The correction of that perception, as well as systemic measures to prevent the use of lawyers as informers, is important to our ability to do our job (as well as to our safety).
8. The CBA submits that there is no possible justification for counsel acting in a criminal matter to provide information to police unless strictly on instructions of the client. That is because:
 - a) Membership of the independent Criminal Bar requires counsel to be independent and thereby capable of fearlessly pursuing the client's interests (consistent with counsel's duties to the Court), unencumbered by any conflict with counsel's personal interest.
 - b) Being an informer entails an ongoing special relationship or obligation to provide information to police, without being able to know precisely how and in relation to whom that information is ultimately used.
 - c) Clients are not in a position to examine the personal interests or attachments of individual members of the Bar before engaging their services.

- d) The professional interest of the CBA is in ensuring public confidence in the Bar's independence.
- e) The CBA Rules state that: A member of the CBA may be expelled if guilty of conduct unbecoming a member or prejudicial to the interests of the Association.¹

Safety

9. Members of the CBA have a personal interest at stake, also. It is inevitable that many convicted persons will be discontented and will sometimes believe that the forensic decisions made by their Counsel contributed to an adverse result in a criminal trial. Hitherto, the assumption that a member of Counsel will always act ethically, in bona fide pursuit of their client's cause, has provided a bulwark against any suspicion that Counsel deliberately 'threw' a criminal trial. For this reason, notwithstanding that some criminals take violent steps against those they perceive to have deliberately harmed their interests, members of Counsel have generally been immune from such retribution. However, Nicola Gobbo's apparent duplicity – and the attendant publicity – has cast doubt over the assumption that has protected Counsel. It is in the nature of the criminal law that Counsel will sometimes be required to act for persons who have both suspicious (even paranoid) and violent tendencies. So long as the perception that members of Counsel might conceivably act as police informers is permitted to persist, there will be a risk to the safety of members of the CBA. The cab rank principle, which is fundamental to the operation of the justice system, precludes Counsel from choosing not to represent those who might be irrationally inclined to harm them, if an adverse result is reached in a criminal trial. In those circumstances, members of the CBA should not have their safety imperiled. The perception that a member of the CBA might be a police informer must be entirely eradicated.

Disclosure

10. The Commission's inquiry illuminates the deficiencies in proper and ongoing disclosure by police, particularly in the area of public interest immunity (**PII**), under which police fail to disclose to prosecutors relevant aspects of the investigation. The consequence is that prosecutors are ill-equipped to comply with their duty of disclosure. Arguably, the way PII issues are generally dealt with in Victoria is inconsistent with the law, as well as with best practice. As criminal lawyers, it is in our interest that the system operates in a way which permits prosecutors to comply with their duties, and which permits defence counsel to confidently rely on prosecutors doing their duty.

¹ Rule 7(1)(e) of the Rules of Criminal Bar Association of Victoria Inc..

11. The CBA submits that Victoria should adopt a similar system to that which is utilized in the United Kingdom. In short, a dedicated disclosure officer, separate from the lead investigator, should be appointed in all criminal matters. The disclosure officer would be required to compile two separate schedules to be disclosed to the prosecution and defence. First, a schedule of non-sensitive unused material that is in existence. Each item on this schedule would be individually described to easily identify it and would be provided to the prosecution and defence. Secondly, a schedule of sensitive material would be used to reveal to the prosecution the existence of relevant unused material which the disclosure officer believes should be withheld from the defence and the reason for its sensitivity. Self-evidently, the existence of an informer may well fall into this category. The prosecution is then in an informed position to consider their duties of disclosure and importantly there is a record of the existence of the material that has been collected. Further, the CBA supports the ability to seek judicial intervention should there be a perceived lack of disclosure.

The CBA would welcome the opportunity to contribute further to the work of the Commission should the issues above be of interest. Please contact me or our Secretary, Simon Moglia in the first instance.



Daniel Gurvich QC

Chair

Criminal Bar Association of Victoria