



Australasian Institute of Policing Submission

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.

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

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 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

² Letter to Victoria Police Commissioner Steve Fontana dated 30 June 2015 from Lawyer X

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 purpose³

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 abuse 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 a power.'⁶

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

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Ms Rebecca Treston QC, President of Bar Association of Queensland says:

*'[I]t is important to understand that not every communication between lawyer and client is privileged. For example, and as was explained by McHugh J in Commissioner AFP v Propend Finance Pty Ltd (1997) 188 CLR 501, communications in 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

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.

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

FUNDAMENTAL DUTIES 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

¹¹ <https://www.judcom.nsw.gov.au/publications/benchbks/civil/privilege.html>

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 asserts 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 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 [2011] VSC 341 at [58]-[61] 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

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)

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.
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