

15 April 2019

The Honourable Margaret McMurdo AC
Commissioner
Royal Commission into the Management of Police Informants

Dear Justice McMurdo

Royal Commission into the Management of Police Informants

The Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) welcomes the Royal Commission into the Management of Police Informants (**Royal Commission**) and its important role in examining the adequacy and effectiveness of Victoria Police's processes for recruiting, handling and managing human sources, and how human source information is used in the criminal justice system.

VEOHRC is the Victorian statutory authority responsible for regulating the conduct of public and private entities under the *Equal Opportunity Act 2010 (Vic)* (**EO Act**) and for discharging certain statutory functions under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**Charter**). VEOHRC has a number of regulatory functions under the EO Act, such as an external dispute resolution service, a systemic investigation function, education and research functions and a review of compliance function. In addition, under the Charter, VEOHRC has education and research functions, a review function, a strategic intervention function and an annual reporting function on the operation of the Charter.

Summary of VEOHRC Submission

VEOHRC will focus this submission on the relevance of the Charter to the Royal Commission's inquiry and proposed recommendations on 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. I write to inform the Royal Commission of the important framework that the Charter provides in relation to the operation of the criminal justice system through the lens of Victoria's human rights law.

VEOHRC Involvement in ABCDEF litigation

As the Royal Commission is aware, VEOHRC exercised its statutory function under section 40 of the Charter, to intervene in the confidential proceedings that related to Informer 3838 (the **ABCDEF litigation**) in the Supreme Court, Court of Appeal and High Court jurisdictions.

In the proceedings, and particularly in the Supreme Court, VEOHRC's intervention primarily focused on the 'procedural' Charter question, concerning whether the Supreme Court could, and should, determine the central issue of whether the public interest in protecting the identity of a police informer precludes disclosure by the Director of Public Prosecutions of information that might assist a convicted person to have a conviction quashed. In particular, the relevant Charter question before the Court was whether the Court can and should determine the issues raised by Victoria Police and grant the relief sought in the absence of any extant criminal proceedings and where the convicted

persons directly affected by the issues have not been named as parties to the proceedings, are not represented in the proceedings, and have not been notified of the proceedings. VEOHRC made submissions on how the Charter framework impacts upon the Court's determination of this issue of disclosure in the absence of the convicted persons. VEOHRC submitted, and it was accepted by the Court, that through the direct application of the Charter in section 6(2)(b), the Court itself had to act compatibly with the human rights of the convicted persons (relevantly fair hearing and criminal procedure rights), balanced against the rights of Informer 3838 and her children (relevantly the right to life, liberty and security and freedom from arbitrary interference with family).

Integral to the operation of the Charter in the context of the ABCDEF litigation, was the balancing exercise to be undertaken between the relevant rights of the Informer 3838 and her children, against the rights of the convicted persons who were her legal clients and who were the subject of confidential and privileged information provided by Informer 3838 to Victoria Police. Before the primary judge in the Supreme Court, VEOHRC made no submission as to how the balancing exercise should be resolved nor as to whether the proposed disclosure by the Office of Public Prosecutions can or should be made. However, the courts were assisted by our submissions on how the Charter framework applied to the central issues to be determined¹.

The Charter framework for Victoria Police's obligations as a public authority

The concept of a "public authority" is a key element in the scheme of the Charter. It is employed in s 38 of the Charter, which imposes obligations on public authorities to act compatibly with human rights and, when making a decision, to give proper consideration to relevant human rights.

Section 38 of the Charter relevantly provides:

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. (2) Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Relevantly, section 4(1)(d) expressly defines Victoria Police as a public authority.

Victoria Police's Obligations under s 38

It is well accepted that s 38(1) confers two distinct obligations on a public authority: a substantive obligation and a procedural obligation².

A useful roadmap for determining whether a particular act or decision of a public authority is unlawful under s 38(1) that has been endorsed by the Court of Appeal and the Trial Division³ is to ask the following questions:

- (a) is any human right relevant to the decision or action that a public authority has made, taken, proposed to take or failed to take (the relevance or engagement question);

¹ *AB v CD & EF* [2017] VSCA 338 [168]

² *Baker v DPP* [2017] VSCA 58, 13 [48] (Tate JA) (*Baker v DPP*); *Bare v IBAC* (2015) 48 VR 129 (*Bare v IBAC*), 205 [245] (Tate JA).

³ *Baker v DPP*, [56] (Tate JA with whom Maxwell P and Beach JJA agreed); *Certain Children v Minister for Families and Children & Ors* (No 2) 52 VR 441; [2017] VSC 251.

- (b) if so, has the public authority done or failed to do anything that limits that right? (the limitation question);
- (c) if so, is that limit reasonable and is it demonstrably justified having regard to the matters set out in s 7(2) of the Charter? (the proportionality or justification question);
- (d) even if the limit is proportionate, if the public authority has made a decision, did it give proper consideration to the right? (the proper consideration question);
- (e) was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted under s 32 of the Charter in a way that is consistent with the protected right (the inevitable infringement question).

It is clear on all authorities⁴ that a Charter right is not only engaged where a human right is unreasonably limited. The assessment of whether a right has been reasonably limited involves a distinct inquiry requiring the application of a proportionality test. In the VEOHRC's submission, this test is not applied before consideration is given to whether any Charter right is engaged by an act or decision.

What this means in practice for Victoria Police in their recruitment, handling and management of human sources, is that they must comply with their obligations under section 38 of the Charter. That is, Victoria Police must act compatibly with human rights and give proper consideration to human rights when taking decisions in relation to recruiting, handling and managing human sources, and how human source information is used in the criminal justice system.

Relevantly, in the case of Informer 3838, in order to comply with their obligations under the Charter, Victoria Police should have acted compatibility with, and given proper consideration to, both the rights of Informer 3838 and with the rights of her clients upon whom she was informing.

Acting compatibly with human rights

The Charter makes it unlawful for a public authority to act in a way that is "incompatible" with human rights.

It is well established that s 7(2) of the Charter applies to the obligation on a public authority to "act compatibly" with Charter rights⁵. Where a public authority limits a right but the limit is justified, the human right is not breached and there is no contravention of the obligation on a public authority to act compatibly with human rights under s 38 of the Charter⁶.

The burden and standard of proof

Where a public authority's act is prima facie incompatible with a Charter right, it is for the Defendants to show that any limitation on the Plaintiffs' rights is reasonable and "demonstrably justified" in a free and democratic society, having regard to the specific matters identified in s 7(2) of the Charter⁷. Not only is the burden of proof on the Defendants, but the "standard of proof is high"⁸. It "requires a 'degree of probability which is commensurate with the occasion'"⁹.

The content of the proportionality analysis

⁴ See for example *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] 48 VR 647 [102]; *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 [143] ('Certain Children').

⁵ *De Bruyn* 682 [100]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [99]; *PJB v Melbourne Health (Patrick's Case)* (2011)

⁶ *Baker v DPP*, 15 [57]; *Certain Children*, [206].

⁷ *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 (*Major Crimes*), 448 [147]; *R v Momcilovic* (2010) 25 VR 436 [143]-[146].

⁸ *Major Crimes*, 448 [147].

⁹ *Major Crimes*, 448 [147] citing *Bater v Bater* [1950] 2 All ER 458, 459 (Lord Denning).

The justification question involves an assessment made by reference to the matters listed in 7(2) of the Charter, “including (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve”¹⁰. Section 7(2) of the Charter embodies a proportionality test¹¹.

The relevant rights engaged of the client who is owed an obligation of confidentiality or legal privilege

The rights of an individual who is owed legal privilege or a duty of confidence by a police informer are fundamental to the proper administration of justice. In particular, the rights under the Charter to a fair hearing (s 24) and criminal procedure rights (s 25), are integral to ensuring that human rights are effectively protected through the civil and criminal justice systems, such is their fundamental importance.

Fair hearing right (s 24(1))

The Charter right to a fair hearing is a statutory expression of the fundamental common law right to a fair trial.¹² Its importance is underscored by the fact that the effective observance of human rights ultimately depends on the proper administration of justice.¹³

The fair hearing right applies in criminal and civil proceedings. Under the Charter, as for the common law, the right to a fair hearing is absolute in the sense that a fair trial is the only trial that a court can judicially conduct. However, what is required to ensure a fair trial may vary from case to case.¹⁴ The right requires that the proceedings, viewed as a whole, are “fair”.

The Charter right under s 24(1) should be construed broadly¹⁵ so as to apply to persons who are not parties to a proceeding, but whose rights and interests are directly affected by it. When a court or tribunal hears a proceeding in the absence of a person whose interests are directly affected, and without notice to that person, the person’s Charter right to a fair hearing is engaged.

Section 25(2)(b) of the Charter provides that “[a] person charged with a criminal offence is entitled without discrimination... to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her.” This minimum guarantee is an aspect of the requirement for a fair trial. In circumstances such as those of Informer 3838, where a lawyer is informing on her clients, the rights of those clients under section 25(2)(b) of the Charter are engaged, in so far as it raises issues concerning whether each of them had a proper defence with independent legal advice and representation.

¹⁰ *Baker v DPP*, 15 [57] (Tate JA with whom Maxwell P and Beach JJA agreed).

¹¹ *Momcilovic v R* (2011) 245 CLR 1, 39 [22] (French CJ).

¹² See, eg, *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300 (Mason CJ and McHugh J), 325-326, 353, 361 and 362; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29 (Mason CJ), 56 (Deane J), 72 (Toohey J), 75 (Gaudron J).

¹³ *Pham v Drakopoulos* [2013] VSCA 43 at [66] (Vickery AJA, with whom Whelan JA agreed).

¹⁴ *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [205] (Tate JA); *Knight v Wise* [2014] VSC 76 at [36]; *R v A (No 2)* [2002] 1 AC 45; [2001] UKHL 25 at [38] (Lord Steyn).

¹⁵ *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415; [2009] VSC 381 at [80] (Warren CJ); *DPP v Ali (No 2)* [2010] VSC 503 at [29] (Hargrave J); *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [97] (Bell J); *Antunovic v Dawson* (2010) 30 VR 355 at [71] (Bell J); *Castles v Department of Justice* (2010) 28 VR 141, [55]-[56] (Emerton J); and *DPP v Kaba* (2014) 44 VR 526 at [108] (Bell J).

Having regard to the fundamental nature of the fair hearing rights under the Charter and its inextricable link to the proper administration of justice, VEOHRC submits that Victoria Police's processes on the recruitment, handling and management of human sources who owe confidential and privilege obligations, should clearly address and give proper consideration to the Charter rights of the police informer's client(s), as well as the human rights of the police informer. In order to discharge their obligations to act compatibly with human rights, Victoria Police should balance competing human rights using the framework in section 7(2) of the Charter, and determine whether the use of a human source who owes an obligation of confidentiality or privilege to their client is a proportionate and justified limitation on the human rights of those clients.

The relevant rights engaged of the police informer with confidentiality or privilege obligations

The extent to which the human rights of a Victoria Police human source will arise depends on the identity of the informer and the risk to them if their role as informer is made known to their client. For example, in the Informer 3838 proceedings, EF and her children were in grave danger because of the identity of the convicted criminals (her former clients). Accordingly, the relevant rights engaged were the rights to life, liberty and security and freedom from arbitrary interference of the family.

Right to life (s 9)

Section 9 of the Charter provides:

Every person has the right to life and has the right not to be arbitrarily deprived of life.

This right is modelled on art 6(1) of the ICCPR. At international law, it is an absolute right. The UN Human Rights Committee has described it in General Comment 6 as "the supreme right".¹⁶ Under the Charter, rights may be limited in accordance with section 7(2), but the fundamental nature of this right must be considered in determining whether any limitation is justified. At international law, States parties have a positive obligation to ensure the protection of individuals against violations of ICCPR rights, which may be committed not only by its agents, but also by private persons or entities.¹⁷ Further, the European Court of Human Rights has found that, in certain circumstances, the right to life imposes a positive obligation on a State to protect life, or take steps to do so.¹⁸

This protective obligation extends to requiring authorities to put in place measures that would protect an individual whose life is being put at risk by another's criminal activity.¹⁹ The extent to which the positive obligation applies in Victoria is an open question. Unlike s 9 of the Charter, both ICCPR art 6(1) and ECHR art 2(1) contain a formal statement that the right to life shall be protected by law. If the positive obligation does exist under the Charter, then it is likely based on the requirement in s 38 that public authorities must give proper consideration to a Charter right when making a decision. This may require public authorities, such as Victoria Police and the Director of Public Prosecutions, to relevantly have regard to the right to life in their actions and decision-making.

Right to liberty and security (s 21)

¹⁶ At Para 1.

¹⁷ See *Peiris v Sri Lanka* (Communication No 1962/09).

¹⁸ *Osman v United Kingdom* (1998) VIII Eur Court HR 3124 [115].

¹⁹ See *Osman v United Kingdom* (1998) VIII Eur Court HR 3124 [115]; see also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (Constitutional Court) [46].

The right to liberty and security in s 21 of the Charter is related to the right to life in so far as the concept of 'security' refers to a person's physical security and mental health. The scope of a public authority's obligation to refrain from any interference with a person's security (unless in accordance with section 7(2)), is analogous with a State's obligations at international law to take protective measures to safeguard the right to life. In the Informer 3838 proceedings, the right to security is engaged in circumstances where Victoria Police claim that the proposed disclosure of her identity would threaten her life.

Right to be free from arbitrary interference with one's family (s 13) and the protection of families and children (s 17)

Section 13(a) of the Charter protects a person's privacy, family, home or correspondence from being "unlawfully or arbitrarily interfered with". The scope of the right to privacy in s 13(a) has been summarised as follows²⁰:

"The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability. The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person."

This aspect of s 13(a) is related to s 17(1) of the Charter, which states that families are entitled to protection by society and the State. Section 17(1) imposes a positive obligation on the State to "protect" families, recognising that they are the "fundamental group unit of society".

While s 13(a) and s 17(1) overlap and will often arise together on the facts of a particular case, the rights themselves are not co-extensive. Section 13(a) is a negative obligation that prohibits unlawful or arbitrary interferences with family, whereas s 17(1) imposes a positive obligation on society and the State.²¹

Section 17(2) grants children the right to such protection as is in their best interests and needed by them by reason of being a child. It requires that courts give paramount consideration to the best interests of any children who will be affected by the subject of the proceedings before it. This reflects the relative importance of s 17(2) as a right that protects the most vulnerable members of society. There are a number of examples in Victorian law that give primacy to the best interests of the child over other competing interests and rights.²²

The rights of Informer 3838 and her children in ss 13(a) and 17 of the Charter were engaged in the circumstances of her case, in the sense of being put at risk, in the event that the Court allowed the Office of Public Prosecutions to disclose Informer 3838's identity. However, the risk may be justified in circumstances where a police informer and their children will not be separated as a result of a Court's decision and where the purpose of the limitation is of such fundamental importance as upholding the rule of law and preventing a miscarriage of justice.

²⁰ *Kracke v Mental Health Review Board (General)* [2009] VCAT 646 [619]-[620] (Bell J).

²¹ Charter of Human Rights Bench Book, Judicial College of Victoria, at [6.7.2].

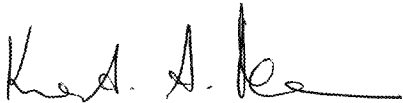
²² See for example section 10 of the Children Youth and Families Act 2005 and section 80 of the Family Violence Prevention Act 2008.

Conclusion

The Royal Commission's focus on the criminal justice system and public confidence in it, should include consideration of how Victoria's human rights laws impact upon public authority obligations in the administration of the criminal justice system. In particular, VEOHRC commends to the Royal Commission, the Charter as an integral aspect of the framework for Victoria Police's recruitment, handling and management of human sources, particularly in circumstances where those informants hold legal obligations of confidentiality or privilege. Through the application of section 38 public authority obligations, the human rights of both human sources and those being informed upon can be properly considered and balanced. The Charter's legal framework brings rigour, accountability and fairness to Victoria Police's conduct, which ultimately instils greater confidence in the administration of justice.

VEOHRC respectfully submits that any recommendations made by the Royal Commission as to the adequacy and effectiveness of Victoria Police's processes for recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, should emphasise Victoria Police's existing legal obligations under the Charter as an integral part of ensuring more robust and fairer outcomes in the administration of justice.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kristen Hilton', with a long horizontal flourish extending to the right.

Kristen Hilton

Commissioner