

18 April 2019

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

### **Submission regarding the second term of reference of the Royal Commission**

I write in respect of the second term of reference of the Royal Commission regarding the adequacy and effectiveness of Victoria Police's current processes for recruiting, handling and managing human sources who are subject to legal obligations of confidentiality or privilege, the use of such human source information in the broader criminal justice system and measures to improve future processes and practices.

#### *About Victoria Legal Aid and our criminal law services*

Victoria Legal Aid (VLA) is an independent statutory authority established under the *Legal Aid Act 1978* (Vic). We receive funding from the Commonwealth and Victorian governments and through the Victorian Public Purpose Fund, but are independent of government. The Legal Aid Act sets out our responsibilities to provide legal representation, advice and assistance, and to administer the Legal Aid Fund to Community Legal Centres and private practitioners who provide eligible services.

VLA funds approximately 80% of criminal trials in Victoria.<sup>1</sup> In the 2017/18 financial year, VLA funded 840 trials and made \$24.7 million in payments to barristers (either briefed by private practitioners or VLA inhouse).<sup>2</sup> VLA's also has the largest criminal law practice in Victoria, providing duty lawyer services, advice, and representation to eligible persons in almost every court across the state. VLA Chambers is a specialist group of in-house advocates.

Given this role, VLA has a significant interest in ensuring that people's rights in criminal proceedings are upheld, that the criminal law system functions effectively and that the public has confidence in the criminal justice system. Critical to protecting the integrity of the criminal justice system is the maintenance of a high level of ethical and professional standards, and appropriate oversight and accountability of all criminal justice agencies.

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<sup>1</sup> Victoria Legal Aid, *Delivering High Quality Criminal Trials: Consultation and Options Paper*, January 2014, p4.

<sup>2</sup> Victoria Legal Aid, *Annual Report 2017/18*, p77, this includes all costs paid to barristers including circuit fees, travelling cost and other expenses.

### *Limits on the recruitment of human sources*

The High Court correctly described the use of Ms Nicola Gobbo's informant information, as having "debased fundamental premises of the criminal justice system".<sup>3</sup> Legal practitioners are bound by a number of obligations to their clients, including the duty of confidentiality and fiduciary relationships.<sup>4</sup> These duties are a necessary precondition for maintaining a relationship of trust and confidence between lawyers and their clients, as well as general trust in the integrity of the legal profession and the legal system.

VLA does not propose changing those duties or regulation of the legal profession, but does propose limits on how legal practitioners and associates of law practices can be used as human sources.

In our submission, the starting point is that investigative agencies should not recruit any legal practitioner as a human source. There may be exceptions to this general rule, but only where an independent oversight body can be satisfied that there is no risk of breach of professional obligations and that there is no link between the lawyer's practice and their role as a human source. This would operate in a similar way to the presumption that a lawyer does not act in a way that is in conflict with a current or previous client, with certain exceptions.

Legal practitioners' duty of confidentiality typically only extends to their current and past clients, not their clients' associates or others. However, where providing information about a person who is not a client may not breach a direct duty of confidentiality, if the person has any connection to the client, the practitioner may nevertheless be breaching the fiduciary duty. Furthermore, the lack of transparency in the use of human source information necessitates a clear boundary between investigating agencies and legal practitioners.

Legal practices typically employ paralegals and administration support who have access to clients' confidential and privileged information. We note that some people in this position have also been registered as police informants. It is our view that similar rules should apply to associates of a law practice, as defined by the *Legal Profession Uniform Law (Vic)*, to lawyers.<sup>5</sup> This encompasses non-practitioner staff, who are not bound by legal practitioner conduct rules. Non-practitioner employees are required to maintain the confidence and privacy of their clients' information, and it is important that clients can trust that the security and privacy of the information that they provide to their lawyer will not be compromised by non-practitioner staff of the practice.

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<sup>3</sup> *AB (a pseudonym) v CD (a pseudonym) & Ors, EF (a pseudonym) v CD (a pseudonym) & Ors* [2018] HCA 58 at [10] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ.

<sup>4</sup> Legal Profession Uniform Conduct (Barristers) Rules 2015; Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015. Legal Profession Uniform Conduct (Barristers) Rules 2015 state that "A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential." (Rule 114). Solicitors are bound by corresponding obligations in the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

<sup>5</sup> An *Associate of a law practice* is defined as a person who is a principal of the law practice, a partner, director, officer, employee or agent of the law practice or a consultant to the law practice (*Legal Profession Uniform Law Application Act 2014* (Vic), Schedule 1 Legal Profession Uniform Law).

We would not propose that there should be a complete prohibition on providing information to the police. We appreciate that there are occasions where a lawyer becomes aware of risks to others' safety posed by their clients, and this causes an ethical dilemma. For example, on occasions, VLA lawyers have reported credible threats to a person's safety made by our clients. However, where such a disclosure is required, the lawyer will then immediately cease to act for that client and inform the client of the disclosure. In those circumstances, the client would be referred to another practitioner to ensure that the client continues to receive representation in accordance with a lawyer's professional obligations.

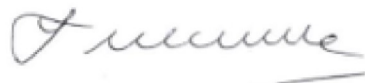
*External monitoring of the use and management of human source information*

In our submission, the Royal Commission should make recommendations for stronger external, independent oversight and monitoring of Victoria Police's use and management of human source information, including to give effect to our proposals above. This oversight and monitoring should be able to take place "in real time" as investigations proceed. This would provide transparency and accountability over these covert intelligence practices. VLA is not making a recommendation about which body should fulfil the role.

As the vast majority of criminal matters are heard summarily, it is essential that any oversight and monitoring systems are also effective in respect of summary investigation and prosecution, as well as indictable trials. The Commission may also wish to consider whether there are appropriate processes to oversee investigations and prosecution in respect of summary matters more broadly, not just in respect of the use of human sources.

Please do not hesitate to contact me to discuss this letter.

Yours faithfully



**LOUISE GLANVILLE**  
Chief Executive Officer