

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 barristers⁵. A complaint may also raise allegations of misconduct at common law.⁶

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".

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 counselling⁷. The more serious allegations of professional misconduct must be brought before the Victorian Civil and Administrative Tribunal (VCAT) for decision⁸. 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

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.

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.

¹³ See section 45(2) of the Uniform Law.

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 <i>Legal Profession Act 2004</i>		
Admissions authority	Responsibility for practising certificates	Ability to investigate and/ or bring disciplinary proceedings
<p>Pursuant to section 6, the Supreme Court of Victoria.</p> <p>Pursuant to section 341, the Board of Examiners considered admission applications and certified to the Supreme Court that applicants met requirements of admissions rules.</p>	<p>Pursuant to section 22, either:</p> <p>(a) a Recognised Professional Association (RPA) accredited under section 299, or alternatively</p> <p>(b) the Legal Practice Board established by section 347.</p> <p>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).</p>	<p>Division 3 of Part 5 of the Act enabled the following entities to investigate disciplinary complaints and bring disciplinary proceedings:</p> <p>(a) the Legal Ombudsman established under Part 18 of the Act</p> <p>(b) an RPA, or</p> <p>(c) the Legal Practice Board.</p> <p>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.</p> <p>The Legal Ombudsman was responsible for monitoring RPA and Board investigations.</p>
Legal Profession Act 2004 Commenced 12 December 2005; repealed 1 July 2015 by section 157 of the <i>Legal Profession Uniform Law Application Act 2014</i>		
Admissions authority	Responsibility for practising certificates	Ability to investigate and/ or bring disciplinary proceedings
<p>Pursuant to section 2.3.6, the Supreme Court of Victoria.</p> <p>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.</p>	<p>Pursuant to section 2.4.3, the Legal Services Board established under Part 6.2.</p> <p>On 14 December 2005, pursuant to section 6.2.19, the Board delegated its powers to grant practising certificates to:</p> <p>(a) the Law Institute of Victoria Ltd (in respect of persons engaged as solicitors only),</p> <p>(b) the Victorian Bar Incorporated (in respect of persons engaged as barristers only), and</p> <p>(c) the Legal Services Commissioner (in respect of persons engaged either as barristers or solicitors).</p>	<p>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.</p> <p>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.</p> <p>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.</p>

	The Board revoked delegations to the LIV to grant practising certificates on 1 July 2014.	
Legal Profession Uniform Law* Commenced 1 July 2015 *Established by Schedule 1 to the <i>Legal Profession Uniform Law Application Act 2014</i> (the Application Act)		
Admissions authority	Responsibility for practising certificates	Ability to investigate and/ or bring disciplinary proceedings
<p>Pursuant to section 16, the Supreme Court of Victoria.</p> <p>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.</p>	<p>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.</p> <p>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:</p> <p>(a) the Victorian Legal Services Commissioner, and (b) the Victorian Bar.</p>	<p>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.</p> <p>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.</p> <p>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.</p>

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 duties¹⁵, 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 barristers¹⁶. 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.

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 J in *Frugniet v Board of Examiners* [2005] VSC 332 per Gillard J, [27] – [31].

¹⁸ *Legal Profession Complaints Committee v Brickhill* [2013] WASC 369, [23].

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 law²¹ 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 clients²⁴, with similar duties arising in contract²⁵ 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.

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).

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 immunity²⁷ 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.

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.'

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

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.

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.

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

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].

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

Victorian Legal Services COMMISSIONER

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

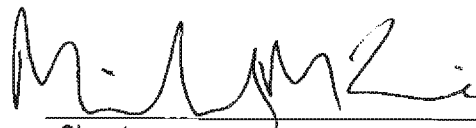
- Section 297(2)

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

- Section 307(4)

Michael K McGarvie

Victorian Legal Services Commissioner



Signature

28.8.2015

Dated

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

Victorian Legal Services BOARD

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 or 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 Name

FR Bennett

Signature

Catherine Deakin

Board Member Name

Catherine Deakin

Signature

29 May 2018

Dated