



PROTOCOL

In relation to claims of public interest immunity over documents required to be produced to the Royal Commission into the Management of Police Informants

Background

1. The Royal Commission into the Management of Police Informants (“Commission”) was established by letters patent issued under the *Inquiries Act 2014* (“Act”) on 13 December 2018.
2. On 7 February 2019, Her Excellency the Honourable Linda Dessau AC issued amendments to the letters patent to reflect the resignation of Commissioner Hyde and changes to the scope of the Commission’s inquiry.
3. Under the Commission’s Terms of Reference (“Terms of Reference”), the Royal Commission will inquire into the number of, and extent to which, cases may have been affected by the conduct of Ms Nicola Gobbo, a criminal defence barrister who was at various times between 1 January 1995 and 13 January 2009, acting as a police informant with Victoria Police.
4. In addition, the Commission will examine the adequacy and effectiveness of Victoria Police’s current processes for disclosures about recruiting, handling and managing human sources who are subject to legal obligations of confidentiality or privilege, including any informants who come to the Commission’s attention during its inquiry. The Commission will also examine 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.
5. The Commission is due to report on the number of, and extent to which, cases may have been affected by Ms Gobbo’s conduct by 1 July 2019, or such other date as may be agreed between the Commission and the Government and on all remaining matters under its Terms of Reference by 1 December 2019, or such other date as may be agreed between the Commission and the Government.
6. The Commission’s remit requires, among other things, appropriate access to data and documents created or held by government agencies which contain information relevant to its Terms of Reference.

Purpose

7. The purpose of this protocol is to establish a process for Victoria Police or any other State or Commonwealth party claiming public interest immunity (“PII”) over the whole or a part of a document that it is required to produce or give to the Commission which takes into account the need for personal safety of individuals and the desirability of conducting Commission hearings in public and without unnecessary cost or delay.
8. The Commission may at any time, depart from this Protocol if it considers it appropriate to do so, for example, where the Commission or a party claiming PII becomes aware of a document or evidence outside the time frames specified below.

PUBLIC INTEREST IMMUNITY

General principles

9. PII is a common law doctrine replicated in the Uniform Evidence Acts. It allows the State to withhold information from production in legal proceedings, or to executive inquiries, if production of the information would be contrary to the public interest.
10. PII involves a balancing of competing interests, namely, the public interest that requires certain types of material and information to remain confidential, and the public interest in inquiries such as the Commission being able to access documents relevant to its terms of reference.
11. Under common law, PII claims are divided into claims based upon the 'class' of document (e.g. Cabinet documents) and claims based upon the 'content' of the document. This distinction has been adopted under the statutory regime.¹

PROCESS FOR PII CLAIMS

Applicable legislation

12. Section 18(1)(a) of the Act provides that a person on whom a notice to produce or notice to attend in relation to a Royal Commission is served may make a claim to the Royal Commission that the person has or will have a reasonable excuse for failing to comply with the notice.
13. Without limiting what may be a reasonable excuse for the purposes of section 18(1)(a) of the Act, it is a reasonable excuse for a person to fail to comply with a notice by refusing to give information to a Royal Commission if the information is the subject of PII.²
14. This protocol sets out the procedure to be followed if Victoria Police or any other State or Commonwealth party is required to produce documents or provide evidence which it considers is subject to a claim of PII and which the Commission intends to make public.

Procedure to be followed for all claims of PII over documents

Provision of documents subject to a notice to produce

15. The Commission will inform Victoria Police of those persons whom it intends to call as witnesses and a notice to produce relevant to their evidence, insofar as the Commission is then aware, four (4) weeks before the witness is to give evidence.

¹ *Evidence Act 2008* (Vic) s 130; see *Murphy v State of Victoria* (No 3) [2014] VSC 624; *Ryan v State of Victoria* [2015] VSCA 353; *R v Yucel* [2017] VSC 807; *DPP v Asling* (Ruling No 1) [2017] VSC 37.

² Section 18(2)(c) of the Act.

16. If Victoria Police considers any of those documents or the evidence of the witnesses are properly subject to PII, Victoria Police will:
 - a. provide the Commission with all documents in unredacted form except for information which might identify human sources, persons subject to the *Witness Protection Act*, and for relevance two (2) weeks before the witness is to give evidence, subject to undertakings of confidentiality; and
 - b. advise the Commission as to what documents or parts of documents among those produced, and/or what evidence of the witnesses, are said to be subject to a PII claim.
17. If Victoria Police take issue with documents or evidence being produced to the Commission for publication because of PII claims, Counsel Assisting the Commission will attempt to resolve any PII issues concerning the document or evidence in question.
18. If Victoria Police and Counsel Assisting the Commission cannot resolve the PII issues, access to the documents and the basis for the PII issues will be provided, to the State of Victoria (represented by the Department of Justice and Community Safety) for the purposes of attempts to resolve all outstanding PII issues. If no agreement is reached the Commission will determine any PII claims at a hearing as soon as possible.
19. Claims for PII should be articulated with precision and supported by the evidence and succinct submissions said to justify the claims.
20. If the Commission requires further evidence or assistance to determine the claims, the Commission will advise the party claiming PII and provide a reasonable opportunity for the party to provide such further evidence or assistance.
21. If the Commission determines the PII claims are not a reasonable excuse within the meaning of the Act and the party claiming PII informs the Commission that it disputes that determination, the Commission will not publish the documents or evidence for five (5) working days to enable the party claiming PII to make urgent application to the Supreme Court of Victoria.