LAW INSTITUTE VICTORIA

20 January 2020

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

Sent by email only to: [redacted]

Dear Commissioner

Royal Commission into the Management of Police Informants: Term of reference 4

The Law Institute of Victoria (**'LIV'**) welcomes the opportunity to provide further contribution to the Royal Commission into the Management of Police Informants.

It is the view of the LIV that under no circumstances should a lawyer be used as an informant, regardless of whether the person they are informing on is their client or the client of another lawyer. Such behaviour erodes the rule of law, brings the legal industry into disrepute and has the potential to create a hostile and dangerous environment for lawyers whose clients have no guarantee their lawyer is not working as a human source for the police.

As held by the High Court of Australia (**'HCA'**) in *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)*, lawyers are officers of the court and have a paramount duty to the court and the administration of justice. A lawyer informing on their clients were 'fundamental and appalling breaches' of a lawyer's obligations as counsel, which 'debased [the] fundamental premises of the criminal justice system'[1]

The LIV in supporting this view of the HCA, has therefore answered the following questions with the assumption that all proposed legislative and procedural amendments are with the fundamental intent of deterring future breaches of lawyer/client confidentiality and privilege obligations.

1. In your view, should police be required to disclose to the DPP the use of a human source with legal obligations of confidentiality or privilege (or other categories of human sources) in an investigation, where that information is relevant to the case of the accused? Why or why not?

The LIV believes the police should indeed be required to disclose to the DPP their use of a human source with legal obligations of confidentiality or privilege (or other categories of human sources). Presently, the DPP can operate with wilful or actual blindness by opting not to enquire where evidence has come from, even in circumstances where it is possible, or even likely, that it has come from a lawyer breaching their legal obligations. By remaining blind to a lawyer violating their duties, the lawyer who has violated their legal obligations avoids being revealed. In addition to police protocols barring the use of human sources with legal obligations of confidentiality or privilege, it would be a strong deterrent for a lawyer to wish to violate these obligations when there is a genuine risk of being exposed during the subsequent disclosure process. It would also be expected that if the DPP were to learn of a lawyer violating their duties, they would report this to the Victorian Legal Services Board + Commissioner, as it is understood occurred after the DPP learned of Nicola Gobbo being used as a human source.

[1] AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58 (5 November 2018) at 10 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon AND Edelman JJ)

The LIV does not believe public interest immunity (PII) should be extended to legal professionals knowingly violating their confidentiality in providing evidence to the DPP.

2. More broadly, should investigating police be required to disclose to the DPP the existence of all potentially disclosable material, even if the material is subject to a claim of public interest immunity? Why or why not?

The LIV Criminal Law Section consists of practitioners from both defence and prosecution. As such, the response to this question from our membership differed between defence and prosecution.

Defence response

There is undoubtedly a difference between 'discovery' in the sense applicable in civil proceedings and the rights of an accused to 'disclosure' of the prosecution case in criminal proceedings.[2] The issuing of a subpoena or witness summons is commonly the only method by which an accused can obtain material from a non-party and indeed entitled to compel a person or organisation to produce material which has evidentiary value.

However, a document may have evidentiary value even if it is of itself inadmissible in evidence in a proceeding, and the evidentiary value may be derived by giving rise to material which is of value for cross-examination or because it gives a basis for establishing information in some other admissible form.[3] Whilst material sought may not be of itself admissible in a proceeding, it would yield evidentiary value on either of the above bases.

Special weight is to be given to the fact that documents may assist the defence of the accused and the underlying rationale giving rise to this precept is to be found in its 'fundamental necessity', as expressed by Gillard J in *R v Mokbel (Ruling No 1):*

> 'The obligation that rests upon the prosecutor ensures that all relevant material is made available to the accused which is in the possession, power or control of the prosecution. However, there is no obligation resting upon any other person or organisation which may be in possession of relevant material. This is a criminal proceeding, and it is necessary that the accused person has every opportunity to properly defend himself. He must be given every opportunity to examine and test the Crown case... [and that an accused] is entitled as of right to file a subpoena requiring any non-party to produce documents or things which may be relevant to any issues in the trial including issues of credibility.'[4]

In *Ragg v Magistrates' Court of Victoria & anor*,[5] Bell J notes that:

> '[a] legitimate purpose is demonstrated where the court considers, *having regard to its fundamental duty to ensure a fair trial*, that there is a reasonable possibility the documents will materially assist the defence. That is a *low threshold*, but it is a threshold.'

Fundamentally, the 'reasonable possibility' test will turn on the circumstances of each case. Justice Bell goes on to summarise the relevant authorities in support of this proposition as follows:

> The 'reasonable possibility' test does not apply in all cases in a fixed manner as if the relevant considerations always have the same value. It is necessary to consider 'the importance of the issue to which it is said that the subpoena relates and the importance of the document in question in the determination of that issue'[6] and, more generally, 'the circumstances as a whole'.[7] In doing so, it is necessary to give a *'broad interpretation'* to

[2] R v Saleam (1989) 16 NSWLR 14, 19 (Hunt J); see further Alister v the Queen (1984) 154 CLR 404, 414 (Gibbs CJ), 438 (Wilson & Dawson JJ) & Brennan J (456).
[3] Carter v Hayes (1994) 72 A Crim R 387, 389 (King CJ); R v Mokbel (Ruling No 1) [2005] VSC 410, [71]–[76] (Gillard J).
[4] R v Mokbel (Ruling No 1) [2005] VSC 410, [41].
[5] (2008) 18 VR 300, [96].
[6] ACC v Brereton (2007) 173 A Crim R 572, [16] (Smith J).
[7] Felice v County Court of Victoria [2006] VSC 12, [52] (Osborn J).

the issues in the case,[8] or to put it another way, the 'parties' respective cases *should not be restrictively analysed*'.[9,10]

Where disclosure is objected to, it is the experience of practitioners for the courts to be urged to apply a particular application of the doctrine of legitimate forensic purpose which can become a superficial and restrictive analysis of the issues before the court and potential depravation of documents, which may be of assistance to an accused.[11,12]

All of the above considerations are particular to criminal proceedings and are guided by the overriding principle of the accused's right to a fair trial being a paramount consideration and an avoidance of an unacceptable inequality of arms between the state and the accused. PII claims must be balanced against the public interest to ensure the proper administration of justice, an accused's right to a fair trial and preserve the integrity of the criminal justice system.

Where PII is claimed, the scope and the basis of the claim should be claimed in an affidavit and should not, as it often does in current proceedings, contain confidential material that cannot be disclosed to the parties. Otherwise, the parties will not be able to present relevant arguments on whether the court should uphold the immunity. It should only be in rare cases that it will be appropriate that a court rely on a confidential affidavit,[13] but is now often the practice in complex and more recently, historical cold case investigations.

The current position is that a prosecutor does not have a duty to ensure that a claim of PII is ventilated before the court. While a prosecutor may seek assistance from the police in gathering information and contacting witnesses, the police may refuse such requests. The police do not need to provide the basis of the immunity to the prosecutor and the prosecutor is not required to assess the merits of the claim in order to decide what witnesses to call at the trial.[14]

This places an accused, and an arguably a tethered prosecutor, in a position where it is clear that material is wilfully being withheld and an assessment of its 'evidentiary value', is being determined by police who are not privy to instructions or case concept intended to be ventilated at trial. In the absence of legal expertise and input from a prosecutor, who has an ongoing obligation of disclosure, the evidence to be put before a jury is being determined by investigators whose primary duty is to investigate and provide material to the prosecution to enable a presentation to a jury who are then best place to make a determination of guilt or otherwise. It is in essence an interference by investigators of the proper administration of justice when a principle tenement of our system is to permit an accused to answer the case against them and to be in a position to challenge all relevant evidence. The issue of relevance should not remain with investigators alone.

An appropriate solution would be a statutory requirement for police to provide the DPP with material the police have withheld from the DPP on the grounds of PII when requested by the DPP to provide that material (as is provided for in New South Wales). The Disclosure Certificate required to be produced by investigating officer in NSW acknowledges the duties to disclose to the DPP all relevant material if the DPP is involved in the prosecution of an indictable or summary offence.[15] This duty continues until one of the following happens:

a) The Director decides that the accused person will not be prosecuted for the alleged offence;
b) The prosecution is terminated;
c) The accused person is convicted or acquitted.[16]

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[8] R v Brown [1998] AC 367, 377 (Lord Hope of Craighead).
[9] R v H [2004] 2 AC 134, 155 (Lord Bingham of Cornhill).
[10] Ragg v Magistrates' Court of Victoria & anor (2008) 18 VR 300, [97] (emphasis added).
[11] [2001] 2 Qd R 686, [24].
[12] Ragg v Magistrates' Court of Victoria & anor (2008) 18 VR 300, [97].
[13] *Banks v Reading*, Unreported, VSC, 23 March 1995; *R v Keane* [1994] 1 WLR 746; *R v Mokbel (Ruling No 1)* [2005] VSC 410).
[14] Judicial College of Victoria – Victorian Criminal Proceedings Manual; DPP v County Court of Victoria (1997) 98 A Crim R 270; c.f. R v Soloman (2005) 92 SASR 331; [2005] SASC 265.
[15] Director of Public Prosecutions Regulation 2015 [NSW] – Schedule 1 Certificate.
[16] Director of Public Prosecutions Act 1986 [NSW] s15A.

It is proposed that this in part would address the challenges currently experienced by defence in the adequate disclosure of material and the delays caused currently by the lengthy and costly litigation that is required to argue PII claims before a court.

This requirement would serve to fulfil the Crown's enduring obligation of disclosure and remove any impediment or frustration to this obligation. The view expressed is that early intervention and assessment by the DPP of material said to attract PII claims. Currently any litigation to pursue a claim is undertaken by Victorian Government Solicitors Office (VGSO) on behalf of the Chief Commissioner's Office, which some LIV members view as an improper disconnect between the prosecuting agency and investigators. Should the DPP be involved at an earlier stage, it is proposed that this would assist to expedite disputes as to relevance and forensic purpose, as it is the prosecuting agency who will have a comprehensive knowledge of the case being prosecuted.

Prosecution response[17]

There were some concerns raised about the proposal that all potentially disclosable material be disclosed by police to the DPP, as there are circumstances in which PII is a serious concern, such as in matters in which evidence was procured through the use of appropriate human sources i.e. undercover police or persons with intimate knowledge of criminal behaviour. It is the practice of the OPP/DPP that information disclosed by the police is then to be disclosed to the defence. If human sources were to become aware that revealing their identity would be exposed to the DPP/OPP and could be challenged to be revealed by the defence in court, the heightened risk of being exposed would likely impact on their willingness to cooperate. Similarly, police often claim PII as to not reveal their lawful tactics for obtaining evidence. Future police investigations would be interrupted or disadvantaged by these tactics being known by the very people they are being used on.

There are however potential issues where police claim PII, when in fact the issue is relevance. The issue of relevance is one which the LIV believes the judicial system is a more effective, rigorous and impartial mechanism for determining than the police.

Presently, in matters where the police wish to claim PII, typically only for high profile matters are the police advised by the DPP/OPP to receive independent legal advice from the VGSO as to whether PII is being properly applied. If indeed PII is being claimed purely for concerns of relevance, the VGSO are expected to advise the police to disclose these materials to the DPP/OPP and it will be for the courts to determine relevance. It was suggested that the police should be referred to the DPP/OPP in all matters where PII is claimed.

There was divergence of views on this issue amongst LIV members. Referring to the VGSO does not alleviate the concerns of wilful blindness by the DPP/OPP that extend beyond the specific use of lawyers being used as informants. Delays and confusion arise in matters where the DPP/OPP are unaware of where their own evidence and materials have come from. It would be more efficient and result in better practice if the DPP and police had a more functional level of trust in regards to disclosure.

3. Are the existing mechanisms by which an accused person is notified of the existence of relevant material that may be subject to a claim of public interest immunity adequate? (E.g. can such disclosure be appropriately made through the use of the Form 30 or the Form 11 or are other means more appropriate?) Why or why not?

LIV members report that disclosure made through the use of Form 30 or Form 11 is currently inadequate. It is rare for police to indicate whether material subject to PII claims exists. Instead it is usually in response to a Case Direction Notice that defence are advised that if the material requested exists and is not subject to PII claims then it will be disclosed. There is therefore no pre-emptive, full and transparent disclosure of materials subject to PII claims that is sufficient for defence to be placed on notice that material exists or that a claim can be made against that material.

[17] Please note this is the independent view of LIV members and not necessarily the view of the OPP or DPP.

4. Would the introduction of a disclosure certificate along the lines of the disclosure certificate provided for in Schedule 1 of the Director of Public Prosecutions Regulation 2015 (NSW) help facilitate the provision of relevant material from investigating police to the DPP?

a. Would the introduction of such a disclosure certificate help facilitate the provision of relevant material from investigating police to Victoria Police prosecutors in summary matters?

The LIV would agree that the introduction of such a disclosure certificate would help facilitate the provision of relevant material from investigating police to Victoria Police prosecutors in summary matters. The difficulty in summary jurisdiction prosecutions lays in the strict reading by investigators of the requirement to provide all disclosable materials and what content is required to be disclosed on a preliminary brief. The LIV submits that in part, a solution to this is via legislative amendment to the *Criminal Procedure Act*.[18]

LIV members report that anecdotally on a daily basis the contents of a preliminary brief do not often contain all disclosable evidence apart from the informant's summary of the evidence, a witness list, exhibit list and any prior convictions of the accused person. There are rarely the witness statements they obtained or provided in a preliminary brief. This practice frustrates proceedings as Case Conferencing, which is required to be conducted prior to the matter proceeding to a contested hearing, is often utilised to invoke prosecutorial or court directions for materials to be disclosed, rather than being utilised as a meaningful conference relating to the issues in dispute.

The proposed amendments to the *Criminal Procedure Act* would be to mirror the amendments that currently only apply to matters involving sexual offences, child complainants and complainants with a cognitive impairment.[19] Section 123 contains disclosure obligations at the time of the hand-up brief which are prescribed in Form 32A[23] The new requirements under s198A are for the prosecution to file the indictment, prosecution opening, depositions, family violence checklist, witness information sheet, *Jury Directions Act* notices and *Evidence Act* notices (including tendency and coincidence evidence notices), no later than 14 days after the date of committal.

The LIV recommends that these detailed disclosure obligations should be made standard procedure for all indictable matters to improve consistency and reduce disclosure indiscretions. The LIV would also support a disclosure certificate condition, akin to that introduced in NSW. This would require the investigating agency to confirm that all relevant information has been provided to the prosecution and the provision of a disclosure certificate signed by a senior officer. Such a certificate should then be required as part of the hand-up brief. It is the LIV's view that these requirements will result in better adherence to disclosure requirements beyond the current practice of just the hand up brief of evidence that is incriminating. At present, the cross-examination of both police and civilian witnesses remains essential to ensure proper and prompt disclosure.

5. Is there a need for a statutory requirement for police to provide the DPP with material police have withheld from the DPP on the grounds of public interest immunity when requested by the DPP to provide that material (as is provided for in New South Wales)? Why or why not?

Anecdotally, LIV members report that disclosure obligations, issues relating to legal professional privilege and PII are consistently misunderstood by investigating police and there is often a misinterpretation of obligations of ongoing disclosure. All of the suggested reforms being the use of dedicated disclosure officers in complex investigations, targeted training, additional support and/or guidance materials together with a disclosure certificate and the assistance and involvement of the DPP at an early stage in proceedings would better serve the administration of a prosecution and better assist an accused to answer the case against them. It would also further serve to reduce or avoid the need to litigate claims which have no substance and provide a more rigorous oversight.

6. Do you have any experience or views regarding the approach that should be taken in relation to summary matters where the investigation has involved the use of a human source with legal obligations of confidentiality or privilege? Are there adequate safeguards currently in place? Why/why not?

Whilst it would be impractical to have a similar broader requirement for disclosure in summary matters as proposed for indictable matters, the use of human sources with legal obligations of confidentiality or privilege during an investigation should be statutorily required to be disclosed. The issue of legal practitioners violating their

[18] Criminal Procedure Act s 123, s 198A.
[19] Ibid.

confidentiality or privilege duties is irrelevant to whether the matter is summary or indictable. In making the police disclose to the DPP that the human source had legal obligations of confidentiality or privilege, it would foreseeably deter such behaviour from occurring.

7. What in your experience are the key benefits and challenges of the approach taken in Victoria to disclosure where public interest immunity issues are involved? What measures might be needed to address any challenges?

This question has largely been answered above. Inresponse, one LIV member has provided the following case study to better highlight the issues with police failing to disclose as a result of conflating relevance and PII.

Case study

In an armed robbery matter, it was apparent that the OPP was unwillingto actively seek out disclosable material. After what was, in essence, a two and a half years process of discovery, including extensive subpoenas and arguments before a court over PII, the initial hand-up brief of four folders grew to encompass fifty-six folders including CCTV, telephone intercepts and CCR material. Throughout this process, it also became apparent that there were about twenty other potential persons of interest who had not been thoroughly investigated by police. This additional informationwas critical, and it can only be inferred that it had not been provided because the police did not think it was relevant and made the assessment that it was outside the scope of the requested disclosure and that PII applied, when time and again it did not.

8. Should the DPP be more involved at an early stage in assessing material over which police may wish to make a claim of public interest immunity and assisting police with any applications to a court to determine that claim? If so, what measures might be needed to achieve this?

The answer to this question is similar to that in question two. Defence lawyers indeed believe that early intervention from the DPP is crucial. However, prosecution believe it would be inappropriate for the Crown and that it should be either determined by the VGSO or potentially internal lawyers at Victoria Police.

9. In your view, how well are disclosure obligations, issues relating to legal professional privilege and public interest immunity understood by investigating police?

a. Do you have any views about how this could be improved (if needed)? (for example, the use of dedicated disclosure officers in complex investigations, targeted training, additional support and/or guidance materials?)

Refer above to the response to Question 5.

10. What, if any, challenges or barriers are experienced by police and the prosecution in discharging disclosure obligations in cases where public interest immunity issues arise? (e.g. does the volume of material obtained in some investigations present any challenges?)

LIV members took alternative views in responding to this question.

Prosecution response

The volume and nature of material can be an issue. Current operating systems are quite antiquated which makes editing difficult. Once a hand up brief is served, the OPP being a paperless office, has to either email material to add on to the disclosure material or print and send it.

A proposed solution could be a system of disclosed material being uploaded onto an accessible portal for court, prosecution and defence, to avoid ending up with excessive USBs and paper. As the disclosure obligation is ongoing, the current system makes it difficult not to trickle in information as the matter proceeds, without giving the perception that it is tactically being withheld. Police for example do not always have access to their files and their shift patterns regularly change, therefore if they are on leave or not at work until the committal, the OPP may not get materials until that day.

It is the OPP's practice to encourage disclosure of everything in the police handup brief. However anecdotally, given the sheer volume of matters, the timeline to put together a brief, manage witnesses, comply with other matters and attend court for bail, it is particularly difficult to extensively disclose all materials in the first instance. In additionto

the workload of the informant, waiting to receive advice after consulting with lawyers and getting advice on any PII issues, can further slow the process.

Some LIV members raised concerns that the burden being shifted to have complete disclosure of any material relating to the complainant's personal life, when it is clearly irrelevant. There is also a necessity for PII for certain police operational tactics and human sources. The issues of concern are a lack of police understanding of 'relevance' and the aforementioned pressures on being able to get material together and effectively served in a timely manner.

Defence response

Whilst defence do not require every single conceivable item of potentially disclosable material at first instance, the defence should at least be told of the existence of a document or thing or line of enquiry that was made by police, so that it can be subject to a subpoena if the defence sees fit. At that stage, the police can then object on the basis that the document or thing might be privileged under PII. That discussion should happen in a more transparent manner before the courts. The police should not be their own assessor of both relevance and PII. Further, when it comes to human sources, there needs to be a degree of transparency so that integrity of the system and confidence can be maintained.

11. Do you have any other views or comments to make in relation to:

· the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of human sources who are subject to legal obligations of confidentiality or privilege to prosecuting authorities?

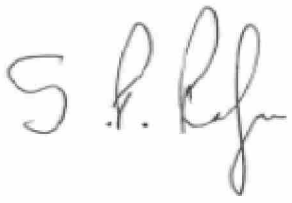
· whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the OPP prosecutes indictable matters on behalf of the DPP, when the investigation has involved human source material?

The LIV wishes to take this opportunity to restate our objection to the use of human sources who are subject to legal obligations of confidentiality or privilege. Where such a human source is used by police, the disclosure of the involvement of that category of source must be disclosed to prosecuting authorities at the commencement of a prosecution. Where any information that has informed, influenced, directed or assisted an investigator, the DPP must be advised, be given any material relating to such information and must be in a position to disclose such material, even if a claim of PII is to be made against that material.

Whilst our comments reflect a divergence of views due to our broad membership, there is unanimous objection to the use of legal practitioners as human sources.

If you wish to discuss any aspect of this submission, or seek further information, please do not hesitate to contact LIV President Sam Pandya or Policy Lawyer Maurice Stuckey [redacted]

Yours sincerely



Sam Pandya
President
Law Institute of Victoria