



The Supreme Court provides the following information to the Commission to assist in its consideration of potential reforms in relation to disclosure and claims of public interest immunity (PII). The information is confined to the processes and procedures of the Court, noting that this is only one part of a larger process which the Commission is considering.

The information draws on the cases before the Court concerning PII which in recent times are largely related to factual matters also being considered by the Commission. The intention is not to comment in any way on those cases, but draw to the Commission's attention procedures which have been used within them and how that might inform the development of new procedures.

1. Determining PII claims – the Supreme Court's experience

1.1. Ensuring fair process

In *AB & EF v CD*,¹ the Court considered applications for declarations that:

- certain information was subject to PII; and
- the Director of Public Prosecutions (Director) was not permitted to disclose the information to seven persons who had been convicted of serious criminal offences.

The Director had at that point formed the opinion that he should disclose that information.

The seven persons were not notified of the applications. As the reasons of Ginnane J record:

¹ [2017] VSC 350. This decision, the related decision in *EF v CD* [2017] VSC 351 and the Court of Appeal decision in *AB v CD & EF* [2017] VSCA 338 will collectively be referred to as the AB proceedings.

the Director submitted to the Court that it was necessary that an amicus curiae or special counsel be appointed to advance propositions that the Director felt it was constrained from making...

The Director wished to maintain a neutral position with respect to the particular interests of the named persons to prevent any possible future conflict in the event that he would participate in future proceedings related to their convictions. The Director submitted that though counsel acting as Amici would in a broad sense be advancing arguments that were in the interest of the named individuals, they would not be acting *for* those persons and would have no contact with them.²

The Court also had the benefit of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) intervening and making submissions. VEOHRC submitted that under s 6(2)(b) of the Charter, the Court had to ensure its procedures were consistent with relevant Charter rights, such as the right in s 24 to a fair trial and the right in s 25(2)(b) to have adequate time and facilities to prepare a defence and to communicate with a lawyer. VEOHRC submitted that the seven persons had those rights in respect of the proceedings despite not being party to the proceedings, and that the Court was required to ensure that any limitations on those rights were justified under s 7(2) of the Charter.

Ginnane J ordered that counsel be appointed as amici curiae (amici). In his reasons Ginnane J noted that the amici 'played an important role in the proceeding both cross-examining witnesses and making detailed submissions'.³ Further, in relation to the Charter question his Honour stated:

In my opinion, the appointment of counsel as Amici in the circumstances of this proceeding was the most appropriate means available to protect the interests of the seven named persons to a fair trial, while protecting the interests of EF. Taking into account the matters referred to in s 7(2)(a)-(e) of the *Charter*, I do

² *AB & EF v CD* [2017] VSC 350, [64]-[65].

³ *AB & EF v CD* [2017] VSC 350, [68].

not consider that there were any less restrictive means reasonably available to achieve the purposes of protecting EF's and her children's security.⁴

After Ginnane J refused to grant the declarations, Victoria Police⁵ and EF sought leave to appeal. The seven persons were not notified of the appeal proceedings and did not appear before the Court of Appeal. The amici also appeared before the Court of Appeal.

The Court of Appeal agreed that the Charter required the Court to be satisfied that the proceedings were conducted in accordance with the seven persons' applicable Charter rights.⁶ Further the Court stated:

We agree that the applications for leave to appeal needed to be decided without notice to the Convicted Individuals. Such a course is not lightly undertaken but the courts are regularly faced with the need to decide cases having regard to issues of confidentiality.

Unusually, in this case it was plain that no alternative course was open other than to proceed without notice to the Convicted Individuals, while seeking to ensure that arguments in their interest were advanced, as far as possible, by the amici curiae. Weighing up the considerations set out above, we conclude that the conduct of the appeal proceeding was compatible with the Convicted Individuals' assumed rights under ss 24(1) and 25(2)(b) of the Charter, because the limitations on those rights were demonstrably justified under s 7(2).⁷

1.2. *Dealing with PII claims where large volumes of material are involved*

Following the Court of Appeal's decision, EF, the Director and Victoria Police each made applications for redactions to be made to documents in the Court's files in the AB proceedings, on PII grounds. These related not to the principal issue which had

⁴ *AB & EF v CD* [2017] VSC 350, [80].

⁵ The party to the proceedings was the Chief Commissioner of Victoria Police.

⁶ *AB v CD & EF* [2017] VSCA 338, [168].

⁷ *AB v CD & EF* [2017] VSCA 338, [176].

been determined regarding disclosure that EF had acted as a police informant, but other information. The Court's files comprised over 10,000 pages. Hearing and determining whether each redaction was justified on the basis of PII would have taken many days.

The Court of Appeal therefore developed the following process:

1. The person objecting to disclosure of documents or parts of documents on the basis of PII was required to make an application, supported by an affidavit and submissions. Those applications identified specific redactions sought by reference to proposed categories of information said to be covered by PII.
2. The Court then considered and ruled on the appropriate PII categories, setting those out in an annexure to an order. For example, one of the categories was 'any material that would identify, or tend to identify a person as a police informer, other than EF'.
3. The Court made orders establishing a process for the further hearing and determination of specific redactions falling within the categories now ruled upon, and for the redactions to be made. That process required:
 - a. Victoria Police and EF to file and serve amended indices of proposed redactions and copies of the documents containing the proposed redactions. The redactions were made in different colours, with each colour corresponding to a PII category. The Director was only required to file and serve copies of the documents containing the proposed redactions.
 - b. Victoria Police to file and serve a summary document identifying the basis for any proposed redactions by reference to the permitted categories.
 - c. Any party, including the amici, that wished to object to any of the redactions sought by Victoria Police, EF or the Director, to file a notice of objection. The notice of objection had to identify the redactions opposed, the basis of the objection, and any material in support of the objection.

- d. Victoria Police, EF and the Director to file and serve a notice listing any redactions not pressed and any evidence in reply to the amici (or other objecting party).
 - e. Victoria Police, EF and the Director's applications for redactions to be listed for further hearing before a Judicial Registrar for the purpose of the Court ruling on the specific redactions sought and any objections. In that hearing the Court would assume that the parties agree that the proposed redactions fall within the permitted categories, unless the amici or another intervening party objects.
 - f. As soon as possible following the rulings, Victoria Police was to provide to the Court, the parties and the amici, copies of the redacted documents and an index identifying each redacted document.
 - g. A copy of the redacted documents was to be placed on the Court's files and available for inspection from a specified date.
4. Consistent with the process established, further hearings were held before a Judicial Registrar who ruled on the specific redactions sought. The rulings were reflected in Court orders, Victoria Police provided copies of the redacted documents, and those documents were made available for inspection.

1.3. *Dealing with PII claims in conviction appeal proceedings*

A number of conviction appeal proceedings were commenced following the AB proceedings. In the conviction appeal proceedings documents have been produced pursuant to orders made under s 317 of the *Criminal Procedure Act 2009* and, in one case, voluntarily without the need for such an order. Some of those documents have been redacted prior to production on the basis of PII claims or relevance.

The conviction appeal proceedings differ from the AB proceedings in a key respect: the convicted individuals are parties to the proceedings. This means that they have:

- known that PII claims are being made;
- been able to object to PII categories; and
- been able to object to redactions sought to be made pursuant to those categories.

It remains the case however that:

- in most instances, Victoria Police is the only party that has seen the unredacted documents; and
- confidential affidavits in support of the PII redactions have been filed.

Another key difference is that in the conviction appeal proceedings redactions have been made to documents prior to their production by the person producing them, whereas in the AB proceedings parties applied to the Court for documents already on the Court's files to be redacted.

In the conviction appeal proceedings there has been no formal challenge to any of the PII categories relied upon which has required a ruling from the Court. Any dispute has been resolved between the parties.

Most redactions have also gone unchallenged. Again, disputes have been resolved between the parties without the need for a ruling by the Court. That has occurred without the applicant having seen the unredacted documents or confidential affidavit. Some exceptions to this general position are discussed below.

Court sampling - in four proceedings, the Court was provided with a representative sample of unredacted and redacted documents by Victoria Police. These samples were substantial and in at least one proceeding the Court reviewed the sample and indicated to the parties that the redactions appeared to have been made appropriately pursuant to the PII categories. It is noted that the Court's review did not amount to a ruling on PII claims, the samples were selected by Victoria Police, and it was still open to the applicant to challenge redactions on the basis that the information was not subject to PII.

Applicant's counsel accessing PII information - in one of the above proceedings, the applicant's counsel were given access to the information argued to be subject to PII, after giving undertakings that they would not disclose the information to the applicant. The applicant's counsel were given access to the information for the purposes of the conviction appeal proceeding more generally, not for the purposes of arguing that the information was not subject to PII.

PII claim over material filed by applicant – in another proceeding Victoria Police made an ex parte application concerning PII, via confidential letter to the Court attaching proposed orders. Victoria Police claimed PII over certain documents that the applicant had filed. The applicant's counsel, but not the applicant, had seen the proposed orders and the confidential letter supporting Victoria Police's claim. The applicant and the Commonwealth Director of Public Prosecutions (CDPP) consented to the orders, which the Court then made, accepting the irregular process that had been adopted by Victoria Police in terms of sending a letter rather than filing an affidavit.

Third party objection to redactions – in yet another proceeding, the applicant was self-represented. Victoria Police had produced documents with redactions, without having been ordered to do so under s 317. The CDPP had seen unredacted versions of some of the documents, and objected to some of the redactions. The CDPP provided redacted and unredacted versions of its objections, serving the redacted version on the applicant. Victoria Police then agreed to remove the challenged redactions.

Appointment of amici – in the above proceeding the Court appointed amici to assist the Court in relation to the remaining redactions, given the applicant did not have legal representation. The amici sought unredacted versions of the documents, but Victoria Police preferred to provide an unredacted sample of about 10 per cent of the documents upon the amici providing confidentiality undertakings. Victoria Police said it would also allow the amici to perform spot checks by asking for a number of pages from a particular document or category of documents, and to request unredacted versions of specific documents that the amici considered to be important. The amici sought the Court's intervention to access the unredacted versions of all documents, but because the documents had not been produced under an order, the Court encouraged the amici and Victoria Police to resolve the issue between themselves.

2. Clarifying the statutory provisions for resolution of PII claims by a court – factors to consider

The Court understands that the Commission is considering the merits of a statutory scheme for the prosecution to seek a court ruling on PII issues, as an alternative to the existing avenues of seeking a declaration as to PII or raising PII in response to a request by the accused. The Court also understands that the Commission is looking at the schemes in:

- s 138 of the *Criminal Procedure Act 2004* (WA) and r 22 of the *Criminal Procedure Rules 2005* (WA); and
- ss 3(6) and 14–16 of the *Criminal Procedure and Investigations Act 1996* (UK) together with r 15.3 of *The Criminal Procedure Rules 2015* (UK) and a number of other instruments, including the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases.

Set out below are a number of factors that should be considered in the design of such a scheme.

2.1. *Preserving the Court's ability to ensure a fair process*

Currently when declaratory relief in relation to a PII claim is sought, the Court may make orders that it considers necessary to ensure that the process is fair to the accused and compatible with their applicable Charter rights. The options open to the Court include:

- requiring that the accused be joined in the proceedings and that:
 - their legal representatives be given access to the material subject to the PII claim, after giving non-disclosure undertakings; or
 - their legal representatives be provided with the material supporting the PII claim, with redactions where necessary, but not the material subject to the PII claim;
- requiring that a special advocate or special counsel be appointed to represent the accused in the PII proceedings only, with non-disclosure undertakings given; and

- allowing the proceedings to continue ex parte, but appointing a contradictor or amicus curiae.

The Court may also make closed court orders and suppression orders in appropriate circumstances.

In terms of the outcome of PII claims, the Court may make orders that meet the needs of the particular case in light of the extent of any PII. For instance, the Court might order that only part of a document is subject to PII, or that the accused be provided with a summary or edited version of the information subject to PII.

The Court would suggest that the Commission consider how any statutory scheme that provides for court rulings on PII issues preserves the Court's ability to:

- regulate its own procedures to ensure fairness and that the proceedings are compatible with the accused's applicable Charter rights; and
- make orders that meet the needs of different cases.

Another important question is how the law is able to address changing circumstances. There may be circumstances where facts emerge after an initial ruling is made that would justify that determination being reopened. The prosecutor's obligation to disclose is ongoing, and where new material facts come to light, that obligation may require that they raise with the Court (which may not be the court where the original PII determination was made) the need to revisit the issue.

2.2. *Providing a coherent regime for dealing with PII issues*

If a statutory scheme for court rulings on PII issues is introduced, there would be multiple statutory avenues for dealing with PII issues. The avenues would include the prosecutor or law enforcement agency making an application to the court for a ruling on PII, and noting in the hand-up brief under s 107 of the *Criminal Procedure Act 2009* that information has been withheld from the accused on the basis of PII.

The Court would suggest that consideration be given to ensuring that any statutory scheme, together with existing provisions of the *Criminal Procedure Act 2009*, form a

coherent regime for dealing with PII issues. In particular, consideration could be given to:

- how the statutory scheme will relate to ss 41, 45, 110, 122 and 416 of the *Criminal Procedure Act 2009*; and
- whether the statutory scheme is in all cases optional for the prosecutor or law enforcement agency, or if it becomes mandatory when another avenue of dealing with PII is not used.

A coherent regime for dealing with PII issues is more likely to reduce the risk of a trial proceeding without critical PII issues having been determined by the court. The AB proceedings demonstrate that where disclosure issues are not brought before the courts for resolution before or during trial, the options of the prosecution being withdrawn or the trial being stayed, are taken away.⁸

The Commission's recommendation in relation to the determination of PII issues may impact on the number and type of PII applications made to the courts. The resourcing of the courts and others to deal with those applications, including counsel who may be appointed as *amicus curiae*, will be important to the successful operation of any reforms that are put into effect.

⁸ *AB v CD & EF* [2017] VSCA 338, [66].