12 April 2019

Deakin
Law Clinic

The Honourable Margaret McMurdo AC
Commissioner
Royal Commission into the Management of Police Informants
PO Box 18028
Melbourne VIC 3001

Dear Commissioner

Submission to the Royal Commission into the Management of Police Informants

Please find enclosed our submission in relation to the Royal Commission's examination of the adequacy and effectiveness of Victoria Police's current processes for recruiting, handling and managing human sources who are subject to legal obligations of confidentiality or privilege and the use of such information in the broader criminal justice system.

Please feel free to contact us if you have questions regarding this submission or desire further information.

Yours sincerely

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Submission to the Royal Commission into the Management of Police Informants

Contents

1. Terms of Reference addressed in submission

This submission focuses on the following aspects of the Commission's Terms of Reference:

> 4. The current use of human source information in the criminal justice system who are subject to legal obligations of confidentiality or privilege, subject to section 123 of the Inquiries Act 2014, including:
>
> ...
>
> b. whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the Office of Public Prosecutions prosecutes matters on behalf of the Director of Public Prosecutions, when the investigation has involved human source material.
>
> 5. Recommended measures that may be taken to address any systemic or other failures in Victoria Police's processes from the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, and in the use of such human source information in the broader criminal justice system, including how these failures may be avoided in future.

2. Introduction

The fact that Victoria Police utilised EF,[1] a legal practitioner, as a human source for the purpose of criminal investigations, including investigations into her own clients, is a significant issue for the Victorian criminal justice system. This issue is exacerbated by information given to this Commission that the use of EF as a human source by Victoria Police was not an isolated incident.[2]

Obviously, there is a possibility that information supplied by EF has impacted on the outcomes of prosecutions involving her clients. As is well known to the Commission, this possibility is the predominant reason that the existence of EF has come to light.[3]

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[1] While the identity of EF/Informer 3838 has been made public, for the purpose of this submission, we will continue to refer to Ms Gobbo as EF.

[2] Transcript of Proceedings, *Royal Commission into the Management of Police Informers* (Hon M McMurdo AC, 15 February 2019) 25 (C Winneke QC).

[3] See *AB & EF v CD* [2017] VSC 350 (19 June 2017).

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No doubt, whether Victoria Police's actions have led to miscarriages of justice will be the subject of litigation before the Victorian Court of Appeal and, possibly, the High Court of Australia.

More crucially in our view, Victoria Police's practice of using human sources who are subject to legal obligations of confidentiality or privilege has broad and serious ramifications for public confidence in the justice system. This has been acknowledged at various stages throughout the litigation in relation to EF and the commencement of this Royal Commission. In particular, we draw the Commission's attention to the following comments which highlight the concerns of various stakeholders regarding the undermining of trust in the criminal justice system:

> The police use of lawyers to inform on their own clients has the obvious potential to undermine the criminal justice system and the public's confidence in it... The criminal justice system would regress into a dysfunctional, far more costly, clogged quagmire of universal distrust.[4]

> The justice system would not be able to operate effectively if clients could not trust their lawyers... It is not permitted, nor is it ethical, for legal representatives to act as informers against their clients. This raises the potential of tainted justice. These are very serious issues that go to the heart of the criminal justice system. The community deserves to have faith that everyone has equal access to confidential and independent legal advice.[5]

> As a result [of EF's conduct], the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.[6]

In our view, it is vital that any recommendations made by this Commission are informed by this overarching concern.

2.1. Recruitment, investigation and evidence – aspects of the use of human source material

We note that there are at least three key aspects relevant to the use of human source material that could be the subject of review and recommendations by this Royal Commission:

A. *The recruitment stage*
   The decision making processes engaged in by Victoria Police when determining whether the recruitment of a particular human source should be pursued and the ongoing management of that source. This includes the internal guidelines utilised by Victoria Police and the decision whether to seek legal advice or guidance from the relevant prosecuting authority as to the appropriateness of a particular human source.

B. *The investigation stage*
   The use of human source material in the investigation of crime, including for the purpose of obtaining warrants and other investigative measures.

C. *The evidentiary stage*
   The reliance on evidence given by human sources in criminal prosecutions, including determinations by the court as to whether that evidence is admissible and whether the

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[4] Transcript of Proceedings, *Royal Commission into the Management of Police Informers* (Hon M McMurdo AC, 15 February 2019) 8-9.

[5] Law Institute of Victoria, 'Law Institute of Victoria responds to informer disclosures' (Media Release, 3 December 2018) <https://www.liv.asn.au/Staying-Informed/Media-Releases/Media-Releases/December-2018/Law-Institute-of-Victoria-responds-to-informer-dis>.

[6] *AB (a pseudonym) v CD (a pseudonym)* [2018] HCA 58, [10].

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evidence can be given without the identity of the human source being revealed to the accused.

2.2. *Scope of submission*

For the purpose of this submission, we will focus on issues relating to the evidentiary stage. In particular, we will discuss:

- the adequacy of the current test for public interest immunity regarding the disclosure of informer identities; and
- the admission of improperly obtained evidence section 138 of the *Evidence Act 2008* (Vic).

In this regard, we will highlight how the current safeguards found in the test for public interest immunity are sufficient and why the *Evidence Act 2008* (Vic) must be strengthened to dissuade the gathering of evidence from human sources who are subject to legal obligations of confidentiality or privilege.

3. Recruitment and investigation stages – the need for protections

Before delving into issues arising when confidential human sources give evidence before a court, we will briefly make some comments in relation to the recruitment and investigation stages identified above. We submit that these stages require close consideration by this Commission because not all human sources become witnesses in court and, the protections discussed below only apply in formal court settings.

As the present circumstances surrounding EF demonstrate, the appropriate recruitment of human sources and use of information they supply in the investigative stages of a criminal matter, is largely constrained only by the integrity of Victoria Police (and in some instances, individual officers). The relevance of integrity in respect of police informers was acknowledged by the NSW Independent Commission Against Corruption in the following way:

> What it all this comes down to is that wrongful means must not be used to achieve noble ends. There is no point trying to enshrine that proposition in rule or regulation. It is simply a question of integrity and that depends upon organisations being imbued with an ethical sense, and the ultimate moral responsibility of individual officers.[7]

What is clear from the use of EF as a human source by Victoria Police is that this system of self-regulation through individual and collective integrity is fallible, even where those utilising EF were aware of the risks. This is shown in information provided in public hearings to this Commission by Assistant Commissioner of Victoria Police, Neil Patterson, who gave evidence agreeing with the proposition that:

> ... was there also a concern about the possibility that it may leave convictions, previous convictions, open to being unsafe because of her involvement and because of the issue of legal professional privilege being breached or confidential obligations being breached?[8]

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[7] *AB & EF v CD* [2017] VSC 350, [34] (citation omitted).

[8] Transcript of Proceedings, *Royal Commission into the Management of Police Informers* (Hon M McMurdo AC, 28 March 2019) 386.

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There is other information in the public realm which supports the notion that concerns regarding the propriety of using EF as a human source existed within Victoria Police but were ignored,[9] and that no legal advice was sought by Victoria Police as to the appropriateness of the arrangement.[10]

Further, the ability to conceal misconduct during the investigative stage was identified by EF herself during her evidence before Ginnane J in the Supreme Court of Victoria. At [117] of Ginnane J's judgment, EF is recorded as giving the following evidence to the Court regarding possible roles of human sources in investigations:

> ... you can't subpoena something that you don't know exists, and if... informers that are providing intelligence as opposed to becoming a witness, being used as a witness... that is information that will never see the light of day[11]

In our view, the handling of EF by Victoria Police demonstrates a need for further safeguards to ensure that there is oversight in the human source recruitment stage, as well as in the reliance on human source material in investigations.

Recommendation 1

The Commission make recommendations in relation to further procedural safeguards that can be implemented in the recruitment and investigation stages when dealing with human sources who are subject to legal obligations of confidentiality or privilege.

4. Evidentiary stage – is the public interest immunity test adequate?

It is a longstanding principle that public interest immunity applies to the protection of the identity of confidential human sources.[12] However, the immunity is not absolute. Rather, it requires the weighing of various factors by the court to determine whether the public interest in any case lies with the protection of the identity of the human source or disclosure to the accused.[13]

On the one hand, the court is required to consider the likely harm to the human source[14] (and, where relevant, their family members)[15] and the effect that disclosure would have on the flow of information from other human sources.[16] These factors weigh in favour of concealment.

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[9] Simone Fox Koob, Sumeyya Ilanbey and Adam Cooper, '"It was always going to come out": Iddles expected informer scandal', *The Age* (online, 4 December 2018) <https://www.theage.com.au/national/victoria/it-was-always-going-to-come-out-iddles-expected-informer-scandal-20181204-p50k04.html>

[10] Transcript of Proceedings, *Royal Commission into the Management of Police Informers* (Hon M McMurdo AC, 28 March 2019) 387; Sarah Farnsworth, 'Police failed to get legal advice on Lawyer X arrangement until years after it ended', *ABC News* (online, 29 March 2019) <https://www.abc.net.au/news/2019-03-28/lawyer-x-lack-of-legal-advice-place-convictions-in-doubt/10948606>.

[11] *AB & EF v CD* [2017] VSC 350, [117].

[12] Judicial College of Victoria, 'Category 3: Informers, undercover police operatives and police methods', (Open Courts Bench Book, 6 February 2019) [4.4.3] <http://www.judicialcollege.vic.edu.au/eManuals/OCBB/67727.htm>

[13] *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84.

[14] *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84, 88.

[15] *AB & EF v CD* [2017] VSC 350, [244].

[16] *R v Smith* (1996) A Crim R 308, 311 (per Gleeson CJ, Clarke and Sheller JJA).

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On the other hand, the right of the accused person to a fair trial and the public interest in open justice must be considered. In some circumstances, such as in the case of EF, these interests can weigh in favour of disclosure.[17]

The courts have discussed the concept of the right to a fair trial in the context of the public interest in protecting the identity of confidential human sources. In this regard, in the case of *Jarvie v Magistrates' Court of Victoria* (***Jarvie***), Brooking J described this is a public interest in the defendant being able to '... elicit (directly or indirectly) and to establish all such facts and matters, including those going to credit, as may assist in securing a favourable outcome to the proceedings.'[18]

However, it is important to note that the level of assistance that knowledge of the identity of the human source would provide to the accused is relevant in the weighing of interests by the court. So, where the identity of the informer would offer only slight assistance to the defence, this is not sufficient to outweigh the public interest in non-disclosure on the grounds identified above.[19] The relevant level of assistance which may shift the balance in favour of disclosure was addressed by Brooking J in *Jarvie* as being where '... there is a good reason to think that disclosure of the informer's identity may be of substantial assistance to the defendant in answering the case against him.'[20]

On this point, there are identified circumstances where the requisite level of "substantial assistance" is likely to be established, including if:

- mere disclosure of the identity of the witness will help to show that the accused is innocent;
- disclosure is necessary to adduce evidence which will help to show that the accused is innocent; or
- disclosure will lead to the production of other evidence which will have the consequences described above.[21]

More broadly in the context of the right to a fair trial, the Court of Appeal discussed the concerns of the court, citing the English case of *R v Patel*, which adopted the following statement of Roch LJ in *R v Hickey:*

> This court is not concerned with the guilt or innocence of the appellants, but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distracted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.[22]

The Court of Appeal then went on to discuss briefly the concept of abuse of process in criminal proceedings and in particular, the fair use of court processes by the State to ensure the administration of justice and public confidence in the court system.[23] These considerations were said

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[17] *AB v CD & EF* [2017] VSCA 338, [200].
[18] *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84, 88.
[19] *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84, 90.
[20] *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84, 90.
[21] *Derbas v R* [2012] NSWCCA 14, [28], citing *Cain v Glass (No. 2)* (1985) 3 NSWLR 230, 250-251; *R v Mason* [2000] SASC 161; (2000) 77 SASR 105, [38]-[44].
[22] *AB v CD & EF* [2017] VSCA 338, [198], citing *R v Patel* [2001] EWCA Crim 2505 [53].
[23] *AB v CD & EF* [2017] VSCA 338, [199].

by the Court of Appeal to underlie the balancing of public interests in disclosing the identity of a human source.[24]

Further, in the context of EF, and disclosure of her identity to her former clients), Ginnane J noted that a relevant aspect of the accused's rights to be balanced is the right to independent legal representation. In this regard, Ginnane J stated:

> The only answer to that question is that a fundamental feature of our community is that all persons, whatever crime they have committed, are entitled to independent legal advice and counsel and an opportunity for a fair trial if they contest the charges or to be properly represented if they plead guilty. There is a strong public interest in ensuring that a lawyer's breach of duty and obligations do not undermine the fairness of a trial, or the negotiation of a plea of guilty. The knowledge of EF's role might have assisted the seven persons in a criminal trial if they had pleaded not guilty or in a guilty plea.[25]

The reasoning of Ginnane J and the Court of Appeal in respect of the disclosure of EF's identity demonstrate that the procedural rights of the defence (such as the right to challenge the inadmissibility of evidence as discussed in detail in section 5 of this submission) are relevant to the right to a fair trial. As such, these rights are weighed as part of the consideration of the public interest in disclosing the identity of a confidential human source.

We also note that, often when the disclosure of a human source's identity is ordered, it is quite proper for the prosecution to withdraw the charges against the accused rather than proceed with the prosecution.[26] This process would be an indirect remedy of any breach of the accused's procedural rights without the need for disclosure.

5. Evidentiary stage – the admission of improperly obtained evidence

There are a number of reasons to think that the consideration of the application of Part 3.11 of the *Evidence Act 2008* (Vic) would not be required to determine the admissibility of evidence where a human source is informing against a person to whom they owe a legal duty of confidentiality or privilege. These include:

- the fact that the use of EF as a human source, and others in similar positions to her, appears to be an abhorration (although, as we have expressed above, it is concerning that this does not appear to be an isolated incident);
- the application of the public interest test in relation to protecting the human source's identity is unlikely to result in their identity being protected. As noted above, that would often lead to a withdrawal of charges; and
- the possibility that a court, regardless of the disclosure/non-disclosure of the human source's identity, could stay proceedings on the basis that they are an abuse of process.

Despite this, it is necessary to consider how the *Evidence Act 2008* (Vic) would apply to circumstances where evidence is given by a human source who is subject to legal obligations of confidentiality or privilege against a person to whom these obligations are owed. We have undertaken this exercise in the context of section 138 of the *Evidence Act 2008* (Vic).

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[24] *AB v CD & EF* [2017] VSCA 338, [200].
[25] *AB & EF v CD* [2017] VSC 350, [418].
[26] *AB & EF v CD* [2017] VSC 350, [75].

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Part 3.11 of the *Evidence Act 2008* (Vic) empowers courts to exclude evidence in various circumstances. These sections are codified in sections 135-138. Some of the provisions are discretionary and others oblige the court to act. While an accused often relies on more than one of these provisions when asking the court to exclude evidence, this submission's singular focus is the operation of section 138 - a provision addressing the exclusion of improperly or illegally obtained evidence. Section 138 stems from the common law discretion found in *Bunning v Cross* (1978) 141 CLR 54. Whereas the common law doctrine applies in relation to evidence procured by unlawful conduct on the part of police or other investigative officers, section 138 applies also to evidence that has been illegally or improperly obtained by anyone.[27]

Section 138 is distinguishable from the exclusions and limitations contained in sections 135–137 because it encompasses broader public policy considerations whereas the other provisions primarily focus on issues of fairness to the accused at trial.[28] Just as in the common law, section 138 recognises that courts possess inherent powers to safeguard the integrity of the criminal justice system.[29] In order to perform this function, the court is permitted to exclude evidence from a criminal trial when such evidence was obtained under circumstances that frustrate the administration of criminal justice.[30] Specifically, this provision reads as follows:

> 138 Exclusion of improperly or illegally obtained evidence
>
> (1) Evidence that was obtained—
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law—
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
>
> (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—
>
> (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
>
> (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

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[27] *R v Malloy* [1999] ACTSC 118, [10]. Section 138 differs from the common law in four additional ways: (1) where the onus is placed in proving misconduct and justifying the exclusion; (2) s 138 applies to both derivative and admission evidence; (3) s 138 contained a non-exhaustive list of the factors which must be taken into account in the exercise of the discretion; and (4) s 138 applies to civil and criminal proceedings.

[28] Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 8 February 2006).

[29] *Ridgeway v R* (1995) 129 ALR 41.

[30] *Ridgeway v R* (1995) 129 ALR 41, 48: 'In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of "high public policy" relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty.'

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note The International Covenant on Civil and Political Rights is set out in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 of the Commonwealth.

In order to understand how this provision operates, it is important to understand the purpose of each paragraph.

Section 138(1) codifies the rule of evidence authorising exclusion under circumstances of improperly or illegally obtained evidence. The rule is comprised of two parts. First, the evidence intended to be adduced at trial must have been obtained in circumstances identified in paragraph (1)(a) or (b): improperly, illegally, or as a consequence of an impropriety or of a contravention of Australian law.[31] Evidence obtained directly or in consequence will substantiate the first prong.[32] Additionally, there must be a causal connection between the alleged impropriety and the manner in which the evidence was obtained.[33]

As far as what can be considered as 'improperly' or 'in contravention' warranting the application of section 138, no clear test or standard exists and the terms are not defined in the *Evidence Act*. Section 138(2) lists circumstances in which an admission will be considered to have been improperly obtained.[34] Otherwise, the statutory provisions are silent.

Courts have engaged with this provision, interpreting the terms in section 138(1). In *Parker*, French CJ averred to the relevant ordinary meanings of "improper" to deduce meaning which include "not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong".[35] In *Williamson*, Branson J explained that the words "improper" and "impropriety" in this

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[31] See also, the remarks of Basten JA in *Parker v Comptroller-General of Customs* [2007] NSWCA 348, [55] in which the Court discusses that distinctions between evidence obtained 'in contravention of an Australian law' and evidence obtained 'in consequence of' such a contravention as well as 'impropriety' and 'in consequence of an impropriety' are insignificant and should be approached similarly.

[32] *R v Dalley* [2002] NSWCCA 284, [86]; *R v Cornwell* (2003) 57 NSWLR 82; [2003] NSWSC 97, [25]. See also, *R (Cth) v Petroulias (No 8)* [2007] NSWSC 82. Although indirect, Johnson J discussed that misstatements in an application for a search warrant could trigger this prong.

[33] *R v Dalley* [2002] NSWCCA 284.

[34] Additionally, section 139 of the *Evidence Act 2008* (Vic) provides that the failure of an investigating official to caution a suspect prior to questioning will render the statement 'improperly obtained'.

[35] *Parker v Comptroller-General of Customs* (2009) 252 ALR 619; [2009] HCA 7, [29].

context can be understood as Mason CJ, Deane and Dawson JJ explained the terms to mean in *Ridgeway*:

> [T]he *Bunning v Cross* discretion to exclude illegally procured evidence provides, by analogy, support for the conclusion that the discretion to exclude evidence of an offence or an element of an offence procured by unlawful conduct on the part of law enforcement authorities extends to evidence of an offence or an element of an offence procured by conduct which, while not unlawful, is improper. Thus, in *R v Ireland*, Barwick CJ made clear that the discretion to exclude evidence on public policy grounds extended to evidence obtained by "unfair" as well as "unlawful" conduct on the part of law enforcement officers. In their judgment in *Bunning v Cross*, Stephen and Aickin JJ did not qualify their acceptance of Barwick CJ's judgment in *Ireland* by confining the discretion to a case of unlawful conduct. To the contrary, their Honours plainly accepted that the discretion extended to "unfair ... conduct on the part of the authorities". Their Honours did, however, indicate a preference for the phrase "improper conduct" pointing out that "unfair" is largely meaningless when considering certain types of evidence (eg improperly obtained finger print evidence). In subsequent cases, the words "improper" and "impropriety" have been generally preferred to the words "unfair" and "unfairness" and it has been accepted as established that the *Bunning v Cross* discretion extends to cases of either unlawful or improper conduct on the part of the authorities.[36]

In the present case of EF, impropriety manifests in the ethical duty owed to EF's clients which was blatantly breached in contravention of Australian law. As Ginnane J explained in the trial judgment, '[e]thical duties owed by a lawyer to their client are sourced in contract, equity, fiduciary law and the professional rules of conduct. Whereas the character of legal professional privilege may only attach to particular parts of a conversation or document, duties of loyalty and confidentiality survive beyond the contractual relationship joining lawyer and client.'[37]

While not obligatory, it is, however, usually the conduct of law enforcement which is at the heart of determining an impropriety or contravention of law pursuant to section 138(1). In *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612; [2005] NSWCCA 426, Basten JA explained that establishing an "impropriety" requires one to first identify what may be viewed as 'the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement' and in comparing those standards with the conduct in question, ascertain whether it is 'quite inconsistent with' or 'clearly inconsistent with' those standards.[38]

Where a human source who is subject to legal obligations of confidentiality or privilege acts as an informer to police, this should be classified as conduct falling below minimum standards of law enforcement. The trial judgment makes it clear in quoting Pill LJ on the matter:

> It is not only a serious breach of duty by the solicitor, or clerk, to the client but, on the face of it, and if encouraged by the police, an infringement by the police of those rights. The police would be inducing or encouraging breaches of the right to legal professional privilege. The mischief may be on a considerable scale in the case of a solicitors' firm with a large criminal practice which inevitably has considerable contact with criminals, those associating with them and those accused of crime.[39]

The Commissioner to this very Inquiry has articulated similar sentiments:

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[36] *AB & EF v CD* [2017] VSC 350 (19 June 2017), [36]-[37].

[37] *AB & EF v CD* [2017] VSC 350 (19 June 2017), [109]. These duties are specified in the Victorian Bar Rules (Barristers) and within the Australian Solicitors Conduct Rules. For more on the duty of loyalty, see *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248; (2001) 4 VR 501 [53].

[38] *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612; [2005] NSWCCA 426, [23].

[39] *AB & EF v CD* [2017] VSC 350 (19 June 2017), [102] citing *R v Robinson* [2002] EWCA CRIM 2489, [61].

> ... particular problems arise where informants provide information in breach of their legal obligations of confidentiality or privilege. Those obligations prohibit informers from lawfully providing that category of information to police, and police officers, who are by their oath or affirmation of office bound to 'discharge all duties legally imposed ... faithfully and according to law', from lawfully receiving it. In any case, unlawfully obtained evidence of this kind is unlikely to be admissible at trial if the court is aware of the true circumstances surrounding its receipt. The whole costly, clandestine and unlawful exercise cannot legitimately achieve its original goal. All it achieves is to undermine the very criminal justice system legal practitioners and police officers are duty-bound to uphold and serve.[40]

Accordingly, it seems to be a well-founded conclusion that the acquisition of this type of evidence from a human source who is subject to legal obligations of confidentiality or privilege by the Victorian Police would be deemed illegal, improper or in contravention of Australian law.

The consequence of establishing the first prong of section 138(1) is that the evidence is inadmissible at trial. However, the evidence at issue will nevertheless be admitted if 'the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.'[41] It is our opinion that this second prong of section 138(1) is perhaps the reason why the Commissioner concluded the kind of evidence generated by EF is only 'unlikely to be admissible at trial if the court is aware of the true circumstances surrounding its receipt'.[42]

The test the court must engage in requires it to weigh desirability against undesirability factors of evidence admission. In contextualising the concept of 'undesirability' in this context, the ALRC's Report 26 identified accurate fact determination and crime control as considerations in support of admission.[43] In support of exclusion, the ALRC identified the following considerations: disciplining police for illegality or impropriety, deterring future illegality, protecting individual rights, fairness at trial, executive and judicial legitimacy, and encouraging other methods of police investigation.[44] Section 138(3) provides statutory guidance in the form of a list of factors that a court may take into account in conducting the un/desirability balancing exercise specified in s 138(1). These include:

(a) the probative value of the evidence; and
(b) the importance of the evidence in the proceeding; and
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
(d) the gravity of the impropriety or contravention; and
(e) whether the impropriety or contravention was deliberate or reckless; and
(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

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[40] Transcript of Proceedings, *Royal Commission into the Management of Police Informers* (Hon M McMurdo AC, 15 February 2019) 25 (C Winneke QC) 9.
[41] *Evidence Act 2008* (Vic) at s 138(1).
[42] Transcript of Proceedings, *Royal Commission into the Management of Police Informers* (Hon M McMurdo AC, 15 February 2019) 25 (C Winneke QC) 9.
[43] Australian Law Reform Commission, *Evidence* (Report 26), 21 August 1985, [958].
[44] Australian Law Reform Commission, *Evidence* (Report 26), 21 August 1985, [959]. Many of these were also discussed in *Ridgeway v R* (1995) 129 ALR 41, [49]-[50].

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This list is non-exhaustive and no one factor is determinative.[45] In Report 102, the ALRC explained that this was intentionally done as 'the particular weight to be given to any particular factors listed in s 138(3) will vary depending on which of the other factors in that subsection arise in the context of a particular case.'[46]

It is this approach which causes concern when considering the evidence garnered by police from a human source subject to legal obligations of confidentiality or privilege. Of the identified factors a court is to weigh against one another as articulated in s 138(3), in a case such as EF, several would appear to run in favour of admission of the evidence. As no one factor is conclusive, and a court may consider which factors to examine; evidence obtained from, or as a result of information from a human source who is subject to legal obligations of confidentiality or privilege, may then be used to secure a conviction. This is a grave concern. It is the purpose of this submission to flag this issue. Accordingly, this submission will only touch on factors most likely to be viewed as favourable to the admission of the type of evidence provided by human sources who are subject to legal obligations of confidentiality or privilege. These factors are as follows:

5.1. s138(3)(a): The probative value of the evidence.

The ALRC has described this factor as, '[e]xclusion of an item of evidence is more likely to endanger accurate fact finding if the evidence is highly probative then if it is of minimal relevance.'[47] In assessing the probative value of the evidence, Forrest J has explained that:

> it is not enough for a court merely to form an impression of the probative value ... there must be a systematic analysis of the impugned body of evidence sufficient to reach at least a preliminary view as to its "quality and frailties". However, this assessment must necessarily take place within the limits imposed by the nature of the evidence and the time at which the application is made.[48]

It has been uncontested that evidence given by EF was of a very high probative value. As EF explained:

> There were a total of 386 people arrested and charged that I am specifically aware of based upon information I provided to Victoria Police but there are probably more because as you would know, I did not always know the value or use of some of the intelligence that I was providing. There was over $60 million in property and assets seized/restrained based upon my assistance and intelligence (a fact reported in the Age in an article about the results obtained by Purana in decimating the gangland criminals in 2009).[49]

As held in both *Camilleri* as well as in *Helmhout*, when evidence is assessed as probative, the rule is that the greater the probative value of evidence, the greater the interest in its admission.[50] Intel from a human source who is subject to legal obligations of confidentiality or privilege about their client's criminal activities and associates in crime is highly probative. It should be given this highly

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[45] Judicial College of Victoria, 's 138 Exclusion of improperly or illegally obtained evidence', (Uniform Evidence Manual, 4 July 2017) [48]. <http://www.judicialcollege.vic.edu.au/eManuals/UEM/index.htm#28738.htm>.

[46] Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 8 February 2006) [16.93]. See also, *Papakosmas v R* (1999) 196 CLR 297; [1999] HCA 37, [97].

[47] Australian Law Reform Commission, *Evidence* (Report 26), 21 August 1985 [964].

[48] *Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 31)* (2013) 42 VR 513; [2013] VSC 575, [162].

[49] *AB & EF v CD* [2017] VSC 350, [19].

[50] *R v Camilleri* (2007) 68 NSWLR 720; [2007] NSWCCA 36, [35]; *R v Helmhout* [2001] NSWCCA 372, [52].

probative classification given its veracity.[51] Without interviewing the accused, acquiring information from an accused's attorney is as close to garnering an accused's confession as law enforcement can get. In the words of Mullaly J, 'to have an accurate, permanent, translated and essentially incontrovertible record of the conversation adds very substantially to the probative value of the impugned evidence.'[52] While Mullaly J was speaking in reference to a recording of the accused, it is not far-fetched to consider this description relatively poignant as is concerns the recitation an accused's actions by his own legal representative. Specifically, the accused has little to gain by making false representations and is discussing criminal activities with counsel under the belief that such discussions are confidential. The significant probative value of such evidence is likely to be observed by the court.

5.2. s138(3)(b): The importance of the evidence in the proceeding.

The importance of the evidence in the proceeding is almost always discussion by a court weighing the 138(3) factors. Justice Forrest J explained that many of the matters discussed when assessing the probative value of the evidence will also be relevant to assessing the importance of the evidence.[53] The ALRC explains that: '[w]hatever the probative value of the evidence, equally cogent evidence, untainted by any impropriety, may be available to the prosecution at trial. If so, the public interest in admitting the evidence is reduced.'[54]

As discussed by the Court in the trial judgment, the importance of EF's information was unmatched and integral to the police's investigation of several suspects. For example, Ginnane J explains,

> She did not know the value of the information that she gave to the police, but sometimes it proved to be very valuable. In late 2005, she provided police with information about [redacted] manufacture of drugs and about his movements. For example, on 26 September 2005, [redacted] told EF that 'cooking' of drugs was occurring at an address in Coburg and possibly at another address and that he was involved. She told the police of this information. In September 2005, EF told police that [redacted] was a good candidate to 'roll' Milad Mokbel. On 1 October 2005, EF told police that she believed that [redacted] respected Detective Sergeant Flynn of the Purana Taskforce and would speak to him in the right environment.[55]

In a letter to Assistant Commissioner Fontana dated 30 June 2015, which was reproduced in full in the trial judgment, EF recounted the importance of her role in many police investigations:

> To try to encompass my actual value, reliability and work for Victoria Police in any summary is immensely difficult because from 16 September 2005, I spoke to my handlers on a daily basis, often 7 days a week for a couple of years. Again, the media has informed me, that there are approximately 5500 Information Reports generated from information I provided to Police. There was no topic, criminal, organised crime group or underworld crime that was "off limits" during the many debriefing sessions that occurred or during the years that followed until Overland decided to utilise me as a witness in 2009 when everything fell apart.[56]

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[51] Australian Law Reform Commission, *Evidence* (Report 26), 21 August 1985 [964]. The ALRC explains this is because: [e]xclusion of an item of evidence is more likely to endanger accurate fact finding if the evidence is highly probative than if it is of minimal relevance.

[52] *DPP v KW* [2011] VCC (unreported) [191].

[53] *Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 31)* (2013) 42 VR 513; [2013] VSC 575 [188].

[54] Australian Law Reform Commission, *Evidence* (Report 26), 21 August 1985 [964].

[55] *AB & EF v CD* [2017] VSC 350, [274] (citations omitted).

[56] *AB & EF v CD* [2017] VSC 350, [19].

Considering the importance of the information which was vital to the prosecutions of a long list of offenders, it would be hard to imagine that given the circumstances, this factor would not weigh in favour of admission of the evidence.

5.3. s138(3)(c): The nature of the relevant offence.

This factor permits the court to consider the seriousness of the offence charged as a factor in favour of admitting improperly obtained evidence. As explained by the ALRC, '[t]here is, for example, a greater public interest that a murderer be convicted and dealt with under the law than someone guilty of a victimless crime'.[57] The leading case on point is *R v Dalley* [2002] NSWCCA 284. Spigelman CJ (Blanch AJ in agreement) discussed that the public interest in convicting and punishing offenders may be given greater weight in respect of crimes of greater gravity, both at common law and pursuant to s138(3)(c).[58] Spigelman's CJ discussion of this factor in *Dalley* has received positive attention.[59] Criminal investigations which employ the use of confidential informers usually relate to serious offences. The cases to which EF provided valuable information all involved serious criminal charges.[60] Upon an evaluation by the court, this factor would weigh in favour of admission.

5.4. s138(3)(h): The difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

In their report, the ALRC identified and described relevant considerations for this factor including: circumstances of urgency and ease of compliance.[61] The ALRC described 'circumstances of urgency' as, '[t]he fact that, for example, the evidence would have ceased to exist if there had been any delay in securing it'.[62] 'Ease of Compliance' was described in the same ALRC Report to mean that in obtaining the evidence, it 'would have been easy to comply with legal requirements or other standards of behaviour'.[63] The latter consideration is particularly in the context of the present discussion.

In the case of EF, it appears that the Victorian Police could not have acquired the information and collected the necessary evidence save for her cooperation and disclosure. EF detailed that the police were unable to obtain much of the information she provided prior to her cooperation. At one point in the letter she writes:

> During 2005 I became aware of high-level drug trafficking, money laundering, witness tampering, firearm offences and a variety of other serious criminal activity by virtue of the contact I had with certain clients and their "crews" and "supporters". I also watched as Police either totally failed to investigate much of this offending or, failed in being able to obtain evidence to be able to arrest and charge offenders.[64]

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[57] Australian Law Reform Commission, *Evidence* (Report 26), 21 August 1985 [964].
[58] *R v Dalley* [2002] NSWCCA 284 [1]-[7]. In the dissenting opinion, Simpson J argued that it is wrong to accept the general proposition because there may be cases where the fact that the charge is a serious one will result in a more rigorous insistence on compliance with statutory provisions about obtaining evidence ([96]-[97]).
[59] For example, see *R v Camilleri* [2007] NSWCCA 36; 68 NSWLR 720 [35] (McClellan CJ); *Gedon v R* (2013) 208 FLR 275 [180]; *R v Simmons* (2015) 249 A Crim R 82 [137]: The serious nature of the offence militates in favour of its admission (Hamill J); *R v FE* [2013] NSWSC 1692 [110], [131] (Adamson J).
[60] *AB & EF v CD* [2017] VSC 350, [2].
[61] Australian Law Reform Commission, *Evidence* (Report 26), 21 August 1985 [964].
[62] Australian Law Reform Commission, *Evidence* (Report 26), 21 August 1985 [964] (citations omitted).
[63] Australian Law Reform Commission, *Evidence* (Report 26), 21 August 1985 [964] (citations omitted).
[64] *AB & EF v CD* [2017] VSC 350, [19].

Later on in the letter, EF discusses her motivation in assisting police which also touches on Victoria Police's inability to obtain the requisite evidence without her assistance:

> My motivation in assisting Police was not for self-gain but was rather borne from the frustration of being aware of prolific large commercial drug trafficking, importations of massive quantities of drugs, murders, bashings, perverting the course of justice, huge money laundering and other serious offences all being committed without any serious inroads being made by Police.[65]

Considering the information flagged by Ginnane J in the Trial Judgment, it is evident that it would have been immensely difficult, if not impossible, to obtain the evidence provided by EF without impropriety. More broadly, it is hard to conceive of circumstances in which police could obtain such information from human sources who are subject to legal obligations of confidentiality or privilege without impropriety. As such, a court considering this issue may weigh this as a significant factor in favour of admissibility.

Section 138(3) also identifies several factors which, given a scenario like EF, would weigh in favour of inadmissibility. Most notably, the gravity of the impropriety or contravention.[66] While the weighing of section 138(3) factors should lead the court to conclude that the evidence from human sources who are subject to legal obligations of confidentiality or privilege undesirable and inadmissible, it was the purpose of this section to demonstrate that this is not a foregone conclusion given the current legal test. Further, it our contention that given an impropriety of this magnitude section 138 may need amending to ensure that this type of evidence is not admitted at trial.

Recommendation 2

That this Commission consider amendments to section 138 of the *Evidence Act 2008* (Vic) to ensure the inadmissibility of evidence obtained from human sources who are subject to legal obligations of confidentiality or privilege.

6. Concluding remarks and recommendations

As is evident from the public's response to the revelations regarding EF's role as a human source, the integrity of the criminal justice system requires action to deal with the use of human sources who are subject to legal obligations of confidentiality or privilege. In our view, the safeguarding of public confidence in the criminal justice system must be a guiding light for the Commission in making any recommendations for reform.

We have identified the need for this Commission to consider the recruitment and investigation stages as areas for reform to safeguard the rights of the accused in circumstances where an informer does not ultimately give evidence before a court. Effective reforms in this area can, and should, prevent the need for the determination of the admissibility of evidence obtained from a human source who is subject to legal obligations of confidentiality or privilege at trial.

Despite this, it is clear from our analysis in section 5 above that the current provision of section 138 of the *Evidence Act* does not guarantee inadmissibly of evidence such as that provided by EF against her clients. Given the gross impropriety with which police garnered evidence from EF, a police

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[65] *AB & EF v CD* [2017] VSC 350, [19].
[66] *Evidence Act 2008* (Vic), s 138(3)(d).

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informer who was also bound by legal privilege, it is the contention of this submission that such evidence (whether used directly or indirectly) should be ruled inadmissible pursuant to section 138 of the *Evidence Act*. It is our contention that the law would need amending to ensure that the injustice caused by EF and select members of Victorian Police is not to be repeated.

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