SUBMISSIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS
Response to Extract of Commission's Draft Final Report

INTRODUCTION

1. These submissions respond to the extract of the Commission's draft final report (**Draft Extract**) that addresses the use and disclosure of information from human sources in the criminal justice system.

2. I am concerned by a number of factual inaccuracies in the Draft Extract, as well as an apparent misunderstanding of my concerns in relation to public interest immunity (**PII**) claims.

CURRENT ENGAGEMENT BETWEEN OPP AND VICTORIA POLICE

3. I agree that early engagement between Victoria Police and the OPP on disclosure is desirable. The Draft Extract, however, proceeds on the incorrect assumption that this does not already occur. In reality, OPP solicitors and police informants work together closely on indictable matters. After the filing hearing in a matter in the committal stream, police informants are expressly invited to contact the OPP solicitor with carriage of the matter in relation to any doubts or concerns about disclosure.[1] From this early point in the proceedings, the OPP solicitor is available to assist the informant with disclosure queries. This includes, where PII is in issue, assistance in understanding the way in which the prosecution case is put and the issues raised by the defence. As Deputy Commissioner Steendam acknowledged in evidence: "[OPP solicitors] work with us, yes".[2]

4. The Draft Extract misinterprets my concerns regarding the confined issue of PII claims as indicative of an absence of engagement on disclosure generally. This is contrary to the evidence and is simply not the case. OPP solicitors can and do provide appropriate and useful assistance to police on disclosure without, in the usual case, having to review for themselves material over which PII is claimed and which defence may never see.

5. My position on the issue of PII material is discussed in detail below. For present purposes, it is necessary to note that under Victoria Police's proposal, "early engagement" involves the DPP providing advice to and litigating PII claims on behalf of Victoria Police.[3] This does not presently occur in *any* Australian jurisdiction. The Draft Extract refers to

[1] Statement of Abbey Hogan dated 11 September 2020 at [3]-[4] and Annexure B. See also Evidence of Wendy Steendam, T:14938.21-36.

[2] Evidence of Wendy Steendam, T:14938.17-19.

[3] Submission 144a (Victoria Police), [51], [55].

conferences in New South Wales "between prosecutors and police officers to consider PII claims".[4] To the extent that this is intended to suggest that the NSW ODPP provides advice to NSW Police on PII claims, it is incorrect.[5] The conferences provide an opportunity for informants to raise disclosure issues[6] but advice about whether a PII claim should be made, and the litigation of such a claim, is the province of the NSW Crown Solicitor's Office. As the CDPP point out, the invariable practice throughout Australia in Commonwealth prosecutions is for PII claims to be made and argued by the investigative agency, and there are very good reasons for this practice.[7]

6. The suggestion in the Draft Extract that there is a material difference between the levels of engagement between the OPP and Victoria Police on the one hand, and between the New South Wales ODPP and NSW Police on the other hand, is incorrect. The differences in engagement in Victoria and NSW are a matter of form rather than substance. The statement in the Draft Extract that "[u]nlike in New South Wales, the policy of the Victorian DPP does not provide for conferences to take place between prosecutors and police officers to consider PII claims"[8] is inaccurate in a number of ways. First, it incorrectly[9] suggests that the NSW DPP's Prosecution Guidelines includes provision for conferences to consider PII claims; the reference to conferences comes not from the DPP's Prosecution Guidelines but from the disclosure certificate in Schedule 1 to the *Director of Public Prosecutions Regulation 2020* (NSW).[10] Second, the statement in the Draft Extract incorrectly suggests that there is no corresponding mechanism for Victoria Police informants to engage with OPP solicitors; but as set out at paragraph 3 above and in the Statement of Abbey Hogan dated 11 September 2020, informants are expressly encouraged, from the outset of an indictable matter, to contact the allocated OPP solicitor with any disclosure concerns or queries. Third, and as already discussed in the previous paragraph, to the extent that the

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[4] Draft Extract, [164], [170].

[5] See Guideline 14 of the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, which sets out the matters on which the NSW DPP can provide advice to NSW Police.

[6] The OPP has been informed by the NSW ODPP that a typical example would be where the informant wishes to tell the ODPP solicitor that they have omitted an item from the disclosure certificate.

[7] Submission 143 (Commonwealth Director of Public Prosecutions), [56]-[62].

[8] Draft Extract, [164].

[9] The Victoria Police submission on which this proposition appears to be based refers to pages 30 to 32 of the NSW DPP's Prosecution Guidelines: Submission 144a (Victoria Police), [62]. Those pages make no mention of conferences to discuss PII claims.

[10] The form of the disclosure certificate includes an acknowledgement by the police informant of, among other things, the following:

> "I acknowledge that if I object to the disclosure of relevant protected material to the DPP, I can request a conference with the responsible solicitor in the Office of the Director of Public Prosecutions to discuss reasons for this."

statement in the Draft Extract suggests that the NSW ODPP advises NSW Police on PII claims, it is incorrect.

7. It is clearly contemplated under ss 15A(6)-(7) of the *Director of Public Prosecutions Act 1986* (NSW) and page 30 of the NSW DPP's Prosecution Guidelines that, in the usual course of events, NSW police are expected to disclose the *existence* and *nature* of any material believed to be subject to PII, with disclosure of the actual material only occurring where requested by the DPP.[11] The OPP has confirmed with the NSW ODPP that this is what occurs in practice. This is entirely consistent with the practice in Victoria as described in the DPP's Policy at [18]-[19].

8. Similarly, the CDPP has made clear that it will not usually be provided with documents said to be immune from disclosure unless the CDPP asks to see them.[12] The CDPP will ask to see material subject to PII in "necessary and appropriate" cases only.[13] It is in those cases that the CDPP will discuss matters such as the basis for the PII claim, the significance of the material for the case, and appropriate procedures for resolving the PII claim.[14] Again, this is consistent with the DPP's Policy in Victoria.

THE DPP/OPP AND PUBLIC INTEREST IMMUNITY CLAIMS

9. As set out in the previous submissions to the Commission, it is important that the DPP maintain independence from the PII process. Of course, there may arise cases where it is necessary and appropriate for the DPP to call for PII material from Victoria Police, and the DPP Policy provides for this to occur on a case-by-case basis. As a general proposition, however, there are many reasons why it is undesirable for the DPP to be provided with PII material and to be involved in the process of assessing and claiming PII.

10. First, it is an essential feature of the DPP's role that the DPP maintain a high degree of independence in making prosecution decisions and exercising prosecution discretions.[15] That independence must not only be maintained but must also be seen to be maintained.

[11] Page 30 of the NSW DPP's Prosecution Guidelines provides: "In all matters prosecuted by the Director, police, in addition to providing the brief of evidence, must notify the Director of *the existence of*, and *where requested* disclose, all other documentation, material and other information …, which documentation, material or other information might be of relevance to either the prosecution or the defence".

[12] Submission 143 (Commonwealth Director of Public Prosecutions) [40].

[13] Submission 143 (Commonwealth Director of Public Prosecutions) [55].

[14] Ibid. Cf paragraph 313 of the Draft Extract, where it appears to be suggested that this occurs as a matter of course at the Commonwealth level.

[15] *Price v Ferris* (1994) 34 NSWLR 704, 707.

For the DPP to act on behalf of Victoria Police in advising on or litigating PII claims would undermine that independence.

11. Second, contrary to the submission of Victoria Police cited at paragraph 190 of the Draft Extract, it is *not* the case that the "common law requires police to provide prosecutors with material subject to a claim of PII". As made clear in the recent decision of the Supreme Court of Victoria in *Director of Public Prosecutions v Westbrook (a pseudonym)*,[16] the approach to PII material under the DPP's Policy accords with common law obligations of disclosure.[17]

12. Third, prosecution knowledge of PII material that is not disclosed to the accused may cause actual unfairness or the appearance of unfairness. This was discussed at length in the DPP's submissions in response to the submissions of counsel assisting, and that analysis is not repeated here. But it is an issue that has been acknowledged as a real concern in the case law,[18] and is a concern also raised by the CDPP.[19]

13. Fourth, the suggestion at paragraph 317 of the Draft Extract that the DPP's independence could be managed by "limiting the dissemination of information within the DPP to particular teams that can engage with the police … separate from the prosecutors who conduct these trials or appeals" is problematic both as a matter of principle and practice. There is a single DPP. The OPP is established to prepare and conduct proceedings or matters on behalf of the DPP.[20] The idea that information can be "quarantined" in separate teams at the OPP, when the OPP's function is to assist the DPP in the discharge of her indivisible functions and responsibilities, misunderstands the nature of the prosecution service. Further, even if the suggestion of information barriers were permissible having regard to the DPP's and OPP's roles and functions, it is unclear what practical benefit would be gained from such an arrangement. The envisaged regime would require PII issues to be considered by OPP solicitors with no knowledge of the prosecution in question. That being so, the OPP solicitors advising on PII would be in no better position to assist Victoria Police than independent solicitors outside of the OPP. Indeed, if strict information barriers are maintained such that the OPP solicitors do not have any discussions with the prosecution team, the OPP solicitors would be in a worse position to assist than independent

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[16] [2020] VSC 290.

[17] See also *Gould v Director of Public Prosecutions (Cth)* (2018) 359 ALR 142, [16] (***Gould***).

[18] Ibid. See also *Lee v The Queen* (2014) 253 CLR 455; *Strickland v Commonwealth Director of Public Prosecutions* (2018) 361 ALR 23.

[19] Submission 143 (Commonwealth Director of Public Prosecutions) [60].

[20] *Public Prosecutions Act 1994* (Vic) s 41.

solicitors, who would be able to approach the prosecution team for input on matters such as the issues in the proceeding.

14. Fifth, the suggestion made by Victoria Police that it may not be capable of assessing the relevance of material subject to PII (and thus that it is necessary for the DPP to consider that material)[21] should be rejected. As pointed out by the CDPP, the law regards investigative agencies as primarily responsible for assessing relevance.[22] Police informants typically have a detailed knowledge of the evidentiary material relevant to the offending and, importantly, are singularly placed to have access to the full range of information holdings relating to the accused and the offence. Further, as already made clear, the OPP is available to Victoria Police to provide information about the prosecution and defence cases that would assist in Victoria Police making assessments of relevance.

15. Finally, and importantly, co-opting the DPP into Victoria Police's PII claims does not go to the root of the disclosure problems under consideration in this Commission: namely, misguided and/or improper decisions by police not to disclose the existence of relevant material to the DPP or the accused. The disclosure failures identified in this Commission often occurred in the context of regular and high-level engagement between Victoria Police and the DPP/OPP. The problem was not the absence of engagement, but rather a police culture that led to decisions to withhold crucial information from the DPP. As paragraph 260 of the Draft Extract states, what was needed was "timely and frank disclosure [by Victoria Police] to the DPP of Ms Gobbo's role as a human source". It is abundantly clear from the actions of Victoria Police at the time, and the evidence given to this Commission by its members, that that information and the existence of it was deliberately concealed.

16. This Commission has exposed the direct influence Ms Gobbo had on the evidence of one of her clients, Mr McGrath, and the efforts of police to conceal it. As the Commission has heard, communication between investigators and prosecutors began at a very early stage following the arrests of Mr McGrath and Mr Andrews for the murder of Michael Marshall. Meetings were held regularly and prosecutors assisted police with matters such as the procedures required for grants of indemnity and acceptable plea resolutions. Notwithstanding the open lines of communication and close working relationship, the fact that Ms Gobbo queried certain matters in her client's statement and discussed them with officers before the statement was changed accordingly was hidden from the prosecution. In the face of requests and/or subpoenas requiring disclosure, relevant police notes were withheld from the scrutiny of judicial officers in PII hearings and it was claimed that draft

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[21] Submission 144a (Victoria Police) [44]-[45].

[22] Submission 143 (Commonwealth Director of Public Prosecutions) [60]; *Gould* (2018) 359 ALR 142.

statements did not exist. Until recently the prosecution were completely unaware of Ms Gobbo's influence on the evidence of this witness.

17. A similar pattern can be observed in respect of subsequent events examined by the Commission. For example, in the case of Mr Thomas, the Commission has heard evidence of a number of meetings between Purana investigators and the then DPP Mr Coghlan QC and Crown Prosecutor Mr Horgan SC. Some of those meetings were attended by Mr Overland. As previously submitted,[23] at no point did anyone at Victoria Police inform the then DPP of Ms Gobbo's involvement with Purana. The submissions of counsel assisting aptly summarised the situation:[24]

> "It may be that there was a great deal of communication with Mr Coghlan and more particularly Mr Horgan, about the securing of evidence from these individuals, but the most critical item of information that was kept from both of them, was that Mr Thomas' barrister was a human source, who had been engaged by Purana to assist them to convict Mr Mokbel and his associates …"

18. As the case studies before the Commission amply demonstrate, the "[g]reater early oversight by the DPP" proposed in paragraph 259 of the Draft Extract can extend only so far as the information which Victoria Police chooses to provide to the DPP. To rely on the DPP to become a gatekeeper of Victoria Police's PII claims therefore carries the danger of encouraging a perception of propriety when, in fact, the underlying disclosure problems remain unknown and unaddressed. As previously submitted, the cultural problems surrounding disclosure exposed by the circumstances of this Commission would be best met by external oversight by a body, independent of the prosecution, and with full access to Victoria Police files and with the ability to identify systemic issues in disclosure across the organisation.[25]

CONCLUSION

19. In summary, early engagement between Victoria Police and the OPP on disclosure is encouraged and occurs in practice. The ability of police informants to seek OPP assistance on disclosure is clearly set out in an information document that is sent out to police informants at the outset of each proceeding in the committal stream. The engagement between Victoria Police and the OPP on disclosure is consistent with the practice in NSW and at the federal level.

[23] DPP submissions in response to the submissions of counsel assisting, [5], [8]-[9].
[24] Counsel Assisting Submissions – Volume 2, [1055.5].
[25] Submission 142 (Director of Public Prosecutions) ch 7.

20. The suggestions made by Victoria Police and in the Draft Extract for greater involvement by the DPP and the OPP in Victoria Police's claims for PII, however, must be rejected for reasons of both principle and practice. They are contrary to recent decisions by the courts, risk jeopardising the DPP's independence, raise the prospect of unfairness to accused persons, and will create problems in relation to efficiency and resourcing. More fundamentally, the suggestions do not strike at the heart of the disclosure problems identified in this Commission: the deliberate withholding of disclosable information due to organisational culture.

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