VICTORIAN BAR

Owen Dixon Chambers East
Level 5, 205 William Street
Melbourne Victoria 3000

T: 03 9225 7111
F: 03 9225 6068
E: vicbar@vicbar.com.au
www.vicbar.com.au
ABN 42 079 229 591

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The Honourable Margaret McMurdo AC

Commissioner

Royal Commission into the Management of Police Informants

By email: contact@rcmpi.vic.gov.au

Dear Commissioner,

1. The Victorian Bar refers to the letter from the Commissioner for the Royal Commission into the Management of Police Informants (**Commission**) dated 28 February 2019, inviting submissions in respect of the Terms of Reference.
2. The Victorian Bar welcomes the opportunity to make this submission, which is in respect of the Terms of Reference of the Commission, other than term 1 (which concerns the number of and extent to which cases may have been affected by the conduct of "EF" as a human source).
3. For the most part, terms 2 to 5 of the Terms of Reference raise issues concerning the conduct, practices and procedures of Victoria Police in respect of the recruitment, handling and management of human sources, and the use of information provided by human sources to Victoria Police. Those matters are not within the knowledge of the Victorian Bar. As a result, at this stage of the Commission's process, it is not possible for the Victorian Bar to make submissions about those matters.
4. The Victorian Bar wishes, however, to make submissions under term 6 of the Terms of Reference (being any other matters necessary to satisfactorily resolve the matters set out in terms 1 to 5) about two critical issues that underpin the Terms of Reference: namely, the role of legal professional privilege in the Victorian legal system, and the potential for harm that arises in the context of the use of practising legal practitioners as police informers.

The importance of legal professional privilege

5. Legal professional privilege is a fundamental tenet of the Australian justice system. The Victorian Bar considers that its sanctity is of the utmost significance. Having regard to the importance of the right, as set out below, it opposes any weakening of or qualification to the privilege.
6. 'Legal professional privilege' refers to the right that protects confidential communications made between (principally) a client and their lawyer for either the dominant purpose of the lawyer providing

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legal advice, or the dominant purpose of the client being provided with professional legal services relating to anticipated, pending or actual legal proceedings to which the client is or may be party.[1] It is an answer to the production of documents or disclosure of information in both civil and criminal proceedings.[2]

7. The purpose of this submission is not to examine the tests that govern when privilege attaches to communications. Rather, its purpose is to articulate the nature and importance of this right in the Victorian legal system, as this must frame the Commission's consideration of any proposals to diminish or qualify that right.
8. The doctrine of legal professional privilege has been recognised since the reign of Elizabeth I.[3] The privilege arises out of, and is a necessary corollary of, the right of any person to obtain skilled advice about the law, "secure in the knowledge that, in the absence of a statutory command to the contrary, what passes between them is confidential and forever safeguarded from disclosure unless the communication is made to facilitate the commission of a crime or a fraud or the abuse of an exercise of a public power or the frustration of the order of a court".[4]
9. Legal professional privilege is an absolute privilege. It is not required to be balanced against other competing rights that are also grounded in public interest.[5] For example, not even the public interest in courts having all relevant evidence before them to determine a case, or the possibility that privileged documents might contain information that could exonerate an accused, has been considered sufficient to override the public interest in maintaining the unqualified operation of the privilege.[6] The High Court of Australia has opined that it ought not be narrowly construed or artificially confined.[7] To undermine the doctrine of privilege is to subvert the court's procedure for conducting adversarial litigation.[8]
10. This principle is fundamental to the interests and administration of justice in our common law legal system. It is more than a 'mere' rule of evidence: it is a substantive rule of law.[9] In this regard, legal professional privilege has been described as "a practical guarantee of fundamental, constitutional or human rights".[10] It is "a natural, if not necessary, corollary of the rule of law and a potent force for

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[1] The doctrine has been codified (in part) as 'client legal privilege' in ss 118-119, *Evidence Act 2008* (Vic).

[2] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 160 (McHugh J).

[3] Ibid 162.

[4] Ibid 162.

[5] Ibid 161.

[6] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at [6]; see also *R v Derby Magistrates' Court* [1995] UKHL 18.

[7] *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 491 (Deane J).

[8] *Baker v Campbell* (1983) 153 CLR 52 at 109 (Brennan J), cited in *Mann v Carnell* (1999) 201 CLR 1 at 36 [114].

[9] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 160 (McHugh J); *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 (Deane J).

[10] Ibid.

ensuring that the equal protection of the law is a reality",[11] and a "precondition of the informed and competent representation of the interests of the ordinary person before the courts and tribunals of the land".[12]

11. Courts have recognised the public policy considerations that underpin legal professional privilege since at least the 19th century. In 1833, the House of Lords observed that the privilege is maintained:[13]

> *out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.*

12. Another early statement of the common law rationale for privilege was made by Knight Bruce V-C in 1846:[14]

> *The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects ... not every channel is or ought to be open to them ... Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.*

13. In the context of litigation, therefore, the privilege can be said to "promote trust and candour between the client and the legal adviser and to assist the legal adviser to advise with confidence whether legal action should be initiated, defended or compromised".[15]
14. Without such a doctrine, or with a substantially weakened doctrine, the administration of justice in an adversarial legal system would be impeded.[16] This risk is particularly acute in the context of the criminal justice system, where there is (typically) already a disparity in the respective resources of accused and State.

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[11] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 161 (McHugh J).

[12] *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 (Deane J).

[13] *Greenough v. Gaskell* (1833) 1 My. and K., 98, cited in *R v Derby Magistrates' Court* [1995] UKHL 18 at [49]; see also *Bolton v. Corporation of Liverpool* (1833) 1 My. and K. 88, cited in *R v Derby Magistrates' Court* [1995] UKHL 18 at [50]

[14] *Pearse v Pearse* (1846) 1 De G & Sm 12, cited in *Mann v Carnell* (1999) 201 CLR 1 at 35 [111].

[15] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 160 (McHugh J).

[16] Ibid.

15. It is important to observe that administration of justice is not the function of the courts alone.[17] As Brennan J observed in *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121, "[t]he law is administered more frequently and more directly by legal advisers than it is by judges". In this context, legal professional privilege ensures that "the law's writ can run effectively whenever a legal problem arises or a person seeks to chart a course of conduct in conformity with the law".[18]
16. There are, of course, "exceptions" to the operation of privilege. As codified in Victoria, privilege does not protect, for example, communications made or documents prepared in furtherance of the commission of a fraud, an offence or an act that renders a person liable to a civil penalty.[19] Communications or documents that are designed to facilitate future wrongdoing are excluded from the protection of the privilege.[20] Privilege may also be lost or waived in other contexts, which are not the subject of further consideration in this submission.[21]

The use of practising legal practitioners as police informers

17. For policing authorities, the receipt of intelligence about planned crime and its perpetrators is material to effective policing.[22] Courts have recognised the role played by confidential police informers in this context.[23] In particular, courts have been cognisant of the balancing act involved in determining whether the identity of an informer ought to be disclosed to an accused in a particular case.[24]
18. Whilst there are doubtless different and sometimes overlapping motivations for becoming a police informer (such as a sense of duty), informers are usually persons in positions of particular vulnerability. Often, they become informers as the price of obtaining some concession from police in respect of their own criminal misconduct. In other circumstances, they may become informers because they are vulnerable as a result of the company they keep. "EF" was particularly vulnerable because she appears to have had these characteristics.
19. Police informers are also vulnerable because they engage in conduct that is, by its nature, kept covert from everyone other than the police, and concealed especially from those who might otherwise be sources of independent advice to them.
20. This last characteristic of vulnerability is heightened in the case of an informer, like "EF", who was also a practising legal practitioner. In circumstances of confidential informing, the informer is unlikely to

[17] Ibid 127 (Brennan J).

[18] Ibid.

[19] Section 125, Evidence Act 2008 (Vic).

[20] *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 163 (McHugh J).

[21] See ss 121-126, *Evidence Act 2008* (Vic).

[22] *AB v CD* [2017] VSCA 338 at [51], citing *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171.

[23] Ibid.

[24] Ibid at [45] ff.

confide in any of the persons or bodies which might otherwise advise them on the discharge of their professional obligations. In the case of practising counsel, this includes formal sources of independent advice, such as professional associations, the Victorian Bar's Ethics Committee, the Victorian Bar Council (which is the subject of delegation of authority from the Victorian Legal Services Commissioner) or the Victorian Legal Services Board. It also includes important informal sources of independent advice, such as, in the case of a practising barrister, the barrister's chambers colleagues, their particular Bar association/s (for example, the Criminal Bar Association) and their clerk. All of these persons and bodies would ordinarily operate as 'checks and balances' on the conduct of a practitioner, to promote the high standards of professional conduct expected of an officer of the court. In circumstances where a practitioner has deliberately removed themselves from these positive spheres of influence, the risk of behaviour which transgresses professional standards and goes undetected is heightened.

21. In these circumstances, the Victorian Bar considers that a very significant burden is imposed upon the policing authority responsible for informers to ensure that professional standards are not compromised by virtue of that person's status as an informer. In particular, a policing authority should not use the significant power that they inevitably have with respect to an informer to encourage, induce, support or procure that person to breach their professional obligations (or otherwise be wilfully blind or reckless as to the potential for this to occur). Those obligations include not just the preservation of a client's legal professional privilege, but also equitable obligations of confidence which can arise both as an incident of, and independently from, the relationship between counsel and their clients.

22. The Victorian Bar believes that, at least as a practical matter, this burden will in most cases be impossible to discharge satisfactorily in respect of informers who are practising legal practitioners.

23. Most obviously, in cases where information is sought from an informer about an accused in respect of charges or proceedings in which the informer appears for the defence, the provision of the information will involve a clear and egregious breach of legal professional privilege and the practitioner's duties. As the High Court put it, police officers who knowingly encourage the provision of information from an informer in such circumstances are "guilty of reprehensible conduct" and "involved in sanctioning atrocious breaches of [their] sworn duty ... to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will."[25]

24. However, the risks posed by the use by police of informers who are practising lawyers are not limited to such cases.

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[25] *AB v CD* (2018) 362 ALR 1 at [10].

25. The line between information provided in a privileged, and a non-privileged, context can often be difficult to discern. The privilege is that of the client, not the practitioner. It cannot be waived without the authority of the client. Practitioners who are in a vulnerable position by reason of their status as informers may be disposed to waive their clients' privilege without authority, and in any event are in an inherent position of conflict such that there can be no confidence in their capacity to protect adequately the interests of their clients. All of these risks are hostile to, and inconsistent with, the rationale for legal professional privilege, and the integrity and administration of the justice system.

26. Further, barristers practise in a highly collegiate environment in which an 'open door' policy is deliberately fostered amongst counsel. Barristers are encouraged to, and do, routinely discuss their cases with disinterested colleagues, who are subject to strict obligations of confidentiality in respect of such matters.[26] This collegiality, and the maintenance of strict confidentiality in communications of that kind, serve the public interest generally, and the interests of clients in particular cases, by encouraging the highest standards of ethical and professional conduct. These interests will be wholly undermined where a member of counsel discloses information to a colleague who, unbeknownst to the former, is a police informer and passes the information on to police.

27. In the Victorian Bar's view, these risks tell against the use of legal practitioners as informers in any circumstances in which there is a risk of a breach of professional obligations. This risk is a general one, although it might be said to be particularly acute in the criminal law context. In this regard, Brennan J made the following observations about the operation of legal professional privilege in the context of a criminal law trial:[27]

> *If the prosecution, authorized to search for privileged documents, were able to open up the accused's brief while its own stayed tightly tied, a fair trial could hardly be obtained; in a criminal trial, to give the prosecution such a right would virtually eliminate the right to silence. It would deprive an accused of such right to an acquittal as he has by reason of a weakness in the Crown case which could be, but must not be, remedied by disclosure of the accused's instructions to his legal advisers [...]*

28. It cannot be a permissible response to point to the 'ends' (namely, the incarceration of accused who are believed to be guilty of their charges) that may be achieved via the 'means' of utilising a practising legal practitioner in the manner that is the subject of the Commission's enquiry.[28]

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[26] A barrister must not accept or a brief if "the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises": Legal Profession Uniform Conduct (Barristers) Rules 2015, rule 101(m).

[27] *Baker v Campbell* (1983) 153 CLR 52 at 108.

[28] Being circumstances where the agency of police informer has been so abused as to corrupt the criminal justice system: *AB v CD* (2018) 362 ALR 1 at [12].

29. The efficacy of legal professional privilege "as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced".[29] The doctrine is "not to be sacrificed even to promote the search for justice or truth in the individual case or matter".[30]

Yours sincerely,

Dr Matt Collins QC
President
Victorian Bar

[29] *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490, cited in *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 161 (McHugh J).

[30] Ibid.