



CONSULTATION PAPER

The current use of specified human source information in the criminal justice system

Introduction

The Royal Commission into the Management of Police Informants was established on 13 December 2018 by the Governor of Victoria to inquire into and report on Victoria Police's relationship with former criminal barrister, Ms Nicola Gobbo, and matters relating to Victoria Police's use and management of human sources with legal obligations of confidentiality or privilege.

The Commission is required to deliver a final report by 1 July 2020. The Commission's terms of reference can be found at <https://www.rcmpi.vic.gov.au/>.

Term of reference 4 requires the Commission to inquire into and report on the current use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege.¹

Term of reference 4 directs the Commission to examine a very specific aspect of disclosure in criminal cases, namely the appropriateness of Victoria Police practices around the disclosure or non-disclosure of the use of human sources² with legal obligations of confidentiality or privilege³ to prosecuting authorities.

To understand this aspect of disclosure the Commission has had to examine the broader context in which disclosure operates in the criminal justice system; as well as any specific requirements that apply to the disclosure of human source information.

The Commission is also required to inquire into and report on whether there are adequate safeguards in place in the way in which Victoria Police prosecutes summary cases, and the Office of Public Prosecutions (OPP) prosecutes indictable matters on behalf of the Director of Public Prosecutions (DPP) when the investigation has involved human source material.

The Commission is exploring whether there is a need for reform in this area and has been looking at the approach taken in other Australian and international jurisdictions, including New South Wales and the United Kingdom.

The purpose of this consultation paper is to seek stakeholder views and advice to inform the Commission's inquiry into the issues raised in relation to term of reference 4.

The Commission is mindful that two current Victorian reviews are exploring issues related to disclosure obligations and processes more broadly. Disclosure in the context of indictable proceedings is currently being considered by the Victorian Law Reform Commission (VLRC) as part of its Committals Review. The VLRC is due to deliver its report by 31 March 2020.

¹ Human sources can be used in the criminal justice system in a number of different ways, including as sources of intelligence, information or as witnesses. The Commission's inquiry in respect of term of reference 4 focuses on the use of human sources as sources of information. It is not focussed on the use of human sources as witnesses and resulting processes or procedures that can follow (such as letters of assistance).

² The Commission uses the term 'human source', the term most frequently used in its Letters Patent. Crous explains that '[a]s part of modernising the police officer–informer relationship, the term *informer* has been replaced by such terms as Covert Human Intelligence Source, Human Source or human intelligence source.' See Charl Crous, 'Human Intelligence Sources: Challenges in Policy Development' (2009) 5(3) *Security Challenges* 117, 118 (emphasis in original). The Commission uses the term 'informant' where necessary; for example, when quoting documents that use this term.

³ Such as a legal practitioner, doctor or journalist.

The Commission is conscious that some stakeholders have made submissions to the VLRC Committals Review and is mindful that some of the issues being examined by the VLRC raise issues that have some overlap with the Commission's inquiry.

Disclosure in indictable proceedings has also been considered in the context of Independent Broad-based Anti-corruption Commission's inquiry into police conduct in the Victoria Police investigation of the murders of Sergeant Gary Silk and Senior Constable Rodney Miller in 1998, known as Operation Gloucester. A public report on Operation Gloucester is expected to be tabled in Parliament over the coming months.

The prosecutor's duty of disclosure in Victoria

The prosecutor's duty of disclosure is part of the duty to conduct the case fairly and to ensure the accused is aware of the case against them. It is a fundamental principle of criminal procedure that an accused should be informed of, and able to access, all relevant material held by the prosecution relating to any charges against them so that they may properly defend themselves.

Accordingly, the prosecution has a duty to disclose all relevant material to an accused person. The duty of disclosure applies to 'the prosecution' in a broad sense. This includes police prosecutors, the DPP and other lawyers who act on behalf of the DPP to prosecute a criminal offence. For the purposes of the prosecutorial duty of disclosure, law enforcement agencies are part of the prosecution.⁴ This means that there is a duty on the prosecution to disclose relevant material in the possession of the police regardless of whether the individual prosecutor is also aware of the information.

Public interest immunity and the prosecutor's duty of disclosure

Claims of public interest immunity are relevant to the prosecutorial duty of disclosure as they may affect the ability of the prosecution to disclose documents or information to an accused person and fully discharge this obligation.

There is a presumption that public interest immunity applies to protect the disclosure of information identifying a human source. This presumption is based on the need to protect the safety of the human source as well as the community safety benefits to be gained from the continued use of human sources, who require confidence that their identities will be protected.

The common law position is that the identity of a human source must not be disclosed in legal proceedings except where the disclosure of the identity is required for the defence of an accused.⁵

If there is material that would assist an accused person to defend themselves in criminal proceedings, and a public interest immunity claim would result in that material being withheld, the proper course may be for the prosecution to abandon the prosecution or for the court to stay proceedings rather than to risk an unfair trial.⁶

In most criminal proceedings, the OPP and the DPP do not know and are not informed by police of the existence of a human source.⁷

In *AB v CD & EF*, the Victorian Court of Appeal observed that because the matters giving rise to the claim of public interest immunity in relation to Ms Gobbo's role as a human source were not disclosed to the DPP or to the Court before the relevant convictions, the possibility of a prosecution being withdrawn or for a trial being stayed was lost. The Court further stated that the failure of the

⁴ See *Cannon v Tache* (2002) 5 VR 317, 339-41 [56]-[60] and *R v Mallard* (2005) 224 CLR 125, 132-3. See also David Plater and Lucy De Vreeze, 'Is the "Golden Rule" of Full Prosecution Disclosure a Modern "Mission Impossible"?' 14 *Flinders Law Journal* (2012) 133, 141.

⁵ See, eg, *Marks v Beyfus* (1890) 25 QBD 494; *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84; *Signorotto v Nicholson* [1982] VR 413 at 419; *R v XZ* (2000) 116 A Crim R; *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 at 34 [50] (Maxwell P) and 46 [102]-[103] (Charles JA); *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 218 (Diplock LJ), cited by Meagher JA in *Derbas v R* [2012] NSWCCA 14 at [22].

⁶ *Alister v R* (1984) 154 CLR 404 per Murphy J at 431 and Brennan J at 457.

⁷ John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) [124].

Chief Commissioner to disclose the relevant matters to the Director has given rise to a very difficult and unfortunate situation.⁸

Existing obligations and practices

The *Criminal Procedure Act 2009* (Vic) (Criminal Procedure Act) sets out a process for how police should deal with material that is relevant but is not intended to be relied on in the hearing against an accused person. Slightly different processes apply for summary and indictable proceedings.

Summary proceedings

For summary hearings, after the initial brief has been served, the prosecution is required to supplement the brief with any further material it receives where it is relevant, or may be relevant, to the defence's case.⁹ If the prosecution refuses to disclose relevant information, it must supplement the brief with a statement that it has refused to disclose certain additional material and the grounds for refusing to disclose this material.¹⁰ An accused person can also request that additional information is provided.¹¹

The Criminal Procedure Act sets out a number of grounds upon which the informant may refuse to disclose information that is otherwise required to be disclosed, including if the informant considers that disclosure would, or would be reasonably likely to, disclose or enable a person to ascertain the identity of a confidential source of information in relation to the enforcement or administration of the law,¹² or endanger the lives or physical safety of persons engaged in law enforcement or persons who have provided confidential information.¹³ The accused may apply to the Magistrates' Court for an order requiring disclosure if the informant has served on the accused a statement of grounds for refusing disclosure or the informant has failed to give disclosure in accordance with the relevant provisions in the Criminal Procedure Act.¹⁴

Indictable proceedings

For indictable matters, pre-hearing disclosure of the prosecution case requires service of a hand-up brief or if the accused consents, service of a plea brief.¹⁵ An accused may request production of specified items listed in the hand-up brief or particulars of previous convictions of any witnesses.¹⁶ The informant may object to the production of any such items on the same grounds as the informant can refuse disclosure in a summary matter (e.g. on grounds that disclosure would endanger lives or physical safety of persons engaged in law enforcement).¹⁷ At a committal mention hearing, the Magistrates' Court may hear and determine any objection to disclosure of material.¹⁸ Similar powers may be exercised by a court at a directions hearing.¹⁹

New requirements for the service of standard disclosure material have also recently been introduced in sexual offence proceedings where the complainant is a child or is cognitively impaired.²⁰

⁸ [2017] VSCA 338, [66] (Ferguson CJ, Osborn and McLeish JA).

⁹ *Criminal Procedure Act 2009* (Vic) ss 42(1)-(2).

¹⁰ *Criminal Procedure Act 2009* (Vic) s 42(3).

¹¹ *Criminal Procedure Act 2009* (Vic) s 43.

¹² *Criminal Procedure Act 2009* (Vic) s 45(1)(c).

¹³ *Criminal Procedure Act 2009* (Vic) s 45(1)(e).

¹⁴ *Criminal Procedure Act 2009* (Vic) s 46(1).

¹⁵ *Criminal Procedure Act 2009* (Vic) s 107.

¹⁶ *Criminal Procedure Act 2009* (Vic) s 119(e)(i) and (iii).

¹⁷ *Criminal Procedure Act 2009* (Vic) s 122(2).

¹⁸ *Criminal Procedure Act 2009* (Vic) s 125(1)(e).

¹⁹ *Criminal Procedure Act 2009* (Vic) s 181(1).

²⁰ Magistrates' Court of Victoria, *Practice Direction 3 of 2019* introduces a new Form 32A for sexual offence proceedings where the complainant is a child or cognitively impaired. The new Form 32A provides for standard disclosure requirements to be served at the same time as the hand-up brief. These changes address recent amendments to the *Criminal Procedure Act 2009* (Vic) which have the effect of prohibiting cross-examination at a committal hearing in sexual offence proceedings of a complainant who is a child or cognitively impaired and moving committal hearing examination to the trial court for these matters.

Grounds on which disclosure can be refused

For both summary and indictable matters, police must complete a form to accompany either the full brief in the case of a summary hearing (Form 11)²¹ or the hand-up brief in the case of an indictable proceeding (Form 30).²² The form, in either case, should include a list of anything relevant to the alleged offence that the prosecution does not intend to use at hearing. The form is required to be completed and signed by the informant and included in the full brief or hand-up brief, which is served on the accused person and in the case of the hand-up brief provided to the DPP.²³

The Form 11 and the Form 30 can be used for the informant to indicate that relevant information is being withheld from the accused and the grounds for withholding that information. In some cases, simply disclosing the existence of documents of a particular kind could risk undermining the public interest immunity claim. To overcome this risk, it is possible to advise the accused that material, without specification, has been withheld on the basis of a claim of public interest immunity.

In cases where material is withheld on public interest immunity grounds, the accused can seek to have the issue of disclosure determined by a court.

If the DPP has knowledge of the nature of the withheld material and believes that the material should be disclosed to the accused person as a matter of fairness, police can apply to the court to stay the DPP from making such a disclosure.²⁴

If the court upholds the claim of public interest immunity, and the DPP is of the view that non-disclosure of the material could seriously prejudice the defence at trial, the DPP may determine not to continue the case or determine that alternative charges be laid.²⁵

The *Policy of the Director of Public Prosecutions for Victoria* also emphasises that a prosecutor's disclosure obligations to an accused person are subject to any claim of public interest immunity.²⁶ Accordingly, the prosecution may refuse to disclose material on the basis of public interest immunity, where for example, disclosure of the material may place a person in danger or reveal the identity of a human source. Police claims of public interest immunity are litigated by counsel briefed by Victoria Police, not the prosecution.

Possible reforms

The Commission is required to inquire into and report on any recommended measures that may be taken to address systemic or other failures in the use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege.

Term of reference 4 specifically requires the Commission to consider the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of such human sources to prosecuting authorities and whether there are adequate safeguards in the way in which such cases are prosecuted.

The Commission is exploring possible reforms, based on its analysis to date of the approaches and challenges experienced in other jurisdictions, including:

- strengthening and clarifying Victoria Police's disclosure obligations to prosecuting authorities
- the training, support and guidance provided regarding disclosure obligations.

²¹ Rule 19 of the *Magistrates' Court Criminal Procedure Rules 2009* (Vic) provides that for the purpose of section 41(1)(a) of the *Criminal Procedure Act 2009* (Vic) the prescribed form of notice to be included in the full brief is notice in Form 11.

²² Rule 46(2) of the *Magistrates' Court Criminal Procedure Rules 2009* (Vic) provides that a list of information or other documents contained in a hand-up brief under section 110 of the *Criminal Procedure Act 2009* (Vic) must be in Form 30.

²³ *Criminal Procedure Act 2009* (Vic) s 109.

²⁴ See, eg, *AB v CD & EF* [2017] VSCA 338.

²⁵ *Alister v R* (1984) 154 CLR 404 per Murphy J at 431 and Brennan J at 457.

²⁶ Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019) 7 [15].

Strengthen and clarify Victoria Police disclosure obligations to the DPP

Victoria Police could be required to specifically disclose to the DPP (and police prosecutors in summary cases) when an investigation has involved the use of a human source with legal obligations of confidentiality or privilege. This requirement would not necessitate revealing the identity of the source to the DPP.

If police were to disclose to the DPP that an investigation had involved the use of a human source with legal obligations of confidentiality or privilege, the DPP would then need to determine whether that information should be disclosed to the accused person, whether alternative charges should be laid (that do not rely on evidence derived from human source material) or whether the case should proceed. If the DPP considered that the material should be disclosed to the accused person, police would need to decide whether to have their claim of public interest immunity determined by the court.

There are a variety of ways to potentially clarify the operation of disclosure processes, and the Commission has been examining the approach taken in relation to police disclosure to prosecuting authorities in other Australian and international jurisdictions. Features of the approach in New South Wales and the United Kingdom may provide some guidance for Victoria.

New South Wales

Similar to Victoria, the prosecution's disclosure obligations in New South Wales are regulated by several different instruments, including the *Criminal Procedure Act 1986* (NSW), the *Director of Public Prosecutions Act 1986* (NSW), the prosecution policies of the New South Wales DPP and the rules of the law society and bar association.²⁷

As is the case in Victoria, the prosecution in New South Wales is obliged to disclose all relevant material to the defence, subject to any exceptions.²⁸ Unlike Victoria, however, the police in New South Wales also have a specific statutory duty to disclose all relevant material obtained during the investigation to the DPP. This duty is specifically provided for in section 15A of the *Director of Public Prosecutions Act 1986* (NSW).

Police statutory duty to disclose all relevant material to the DPP

In New South Wales, in all matters prosecuted by the DPP, police, in addition to providing the brief of evidence, must notify the DPP of the existence of, and where requested disclose, all other documentation, material and other information, which might be relevant to either the prosecution or the defence and must certify that the Director has been notified of all such documentation, material and other information.²⁹ This statutory obligation applies whenever a brief of evidence is provided to the DPP for advice, whether the matter is summary or indictable.³⁰

This duty would require disclosure of the existence of a human source with legal obligations of confidentiality or privilege by police to the DPP where such information is considered to be relevant to the case of the accused.

Disclosure to the Director is provided in the form of a disclosure certificate, which requires police to describe material that may be immune from disclosure or subject to a statutory publication restriction.³¹ A copy of the disclosure certificate is attached to this consultation paper.

There are two parts to the disclosure certificate. The first part requires the investigating police officer to acknowledge their duty of disclosure, certify the accuracy of what they are disclosing, and undertake to disclose any additional relevant material they become aware of.

²⁷ *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, 30.

²⁸ See for example *Criminal Procedure Act 1986* (NSW) s 141, 147; *Director of Public Prosecutions Act 1986* (NSW) s 15A; *New South Wales Barristers' Rules* rr 66, 66A; *New South Wales Solicitors' Rules* rr A66; A66A; *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*.

²⁹ *Director of Public Prosecutions Act 1986* (NSW) s 15A(1).

³⁰ *New South Wales Police Force Handbook* (October 2019), 61.

³¹ The form of the disclosure certificate is provided for in Schedule 1 of the *Director of Public Prosecutions Regulation 2015* (NSW).

The second part of the disclosure certificate contains three separate schedules, which require the investigating officer to itemise any relevant material not included in the brief of evidence and describe what the material actually is.³² The material must be itemised as follows:

Schedule 1: relevant protected material that is subject to a claim of privilege or immunity – this schedule describes material that has been identified as relevant that is not contained in the brief of evidence because it is subject to a claim of privilege, public immunity or statutory immunity.

Schedule 2: relevant material that is the subject of a statutory publication restriction – this schedule describes material that has been identified as relevant that is not contained in the brief of evidence because it is subject to a statutory publication restriction. The material would only be described to the extent not prohibited by the statutory publication restriction.

Schedule 3: relevant unprotected material that is not subject to claim of privilege or immunity or statutory publication restriction – this schedule relates to relevant unprotected material, not contained in the brief of evidence, that is not the subject of a privilege or an immunity claim or a statutory publication restriction.

The disclosure certificate must be completed, signed and dated by the police officer who is responsible for the investigation.³³ It must also be signed and dated by the police officer's relevant superior officer.³⁴

The *NSW Police Force Handbook* states material that reveals, or may tend to reveal, either directly or indirectly, the identity of an undercover police officer, the existence or identity of a human source, or police methodology may be subject to a claim of public interest immunity.³⁵

The requirement to complete the disclosure certificate requires police to consider the issue of relevance and public interest immunity separately, rather than merging these concepts.

Police do not serve a copy of the disclosure certificate on the accused,³⁶ although the *NSW Police Force Handbook* states that the DPP may reveal the disclosure certificate to the accused.³⁷

Following receipt of the disclosure certificate and associated schedules of materials from police, the DPP will assess the relevance of the material identified and work with police to ensure that all relevant documentation, material and other information that may be of relevance is accurately documented and disclosed to the accused.

Public interest immunity claims

The duty provided in section 15A of the *Director of Public Prosecutions Act 1986* (NSW) does not require police to provide the DPP with any information, document or thing that is subject to a claim of public interest immunity.³⁸ The duty of police in such a case is to inform the DPP of the existence of any information, document or thing of that kind and the nature of that information, document or other thing and the claim or publication restriction relating to it. It is only if the DPP requests that they be provided with the information, document or thing that the police must provide it to the DPP to assess.³⁹

The initial responsibility about whether material should be subject to a public interest immunity claim is therefore made by police. That decision will only be reviewed if the DPP makes a request to review the material itself. The approach in New South Wales is premised on the basis that the Crown Solicitor's Office and not the DPP will assert and argue a claim of public interest immunity.

Where a prosecutor receives information or material that may possibly be subject to a claim of public interest immunity, the prosecutor should not disclose that information or material to the defence without first consulting with the officer-in-charge of the case. The purpose of the

³² *NSW Police Force Handbook* (2 October 2019) 61.

³³ *Director of Public Prosecutions Regulation 2015* (NSW) cl 5(b).

³⁴ *Director of Public Prosecutions Regulation 2015* (NSW) cl 5(c).

³⁵ *NSW Police Force Handbook* (2 October 2019) 61.

³⁶ *NSW Police Force Handbook* (2 October 2019) 62.

³⁷ *NSW Police Force Handbook* (2 October 2019) 63.

³⁸ *Director of Public Prosecutions Act 1986* (NSW) s 15A(6).

³⁹ *Director of Public Prosecutions Act 1986* (NSW) s 15A(7).

consultation is to give that officer the opportunity to raise any concerns as to such disclosure. The officer should be allowed a reasonable opportunity to seek advice if there is any concern or dispute.⁴⁰

If there is a disagreement between a prosecutor and the police as to what, if any, of the sensitive information or material should be disclosed and there is no claim of public interest immunity, then in cases being prosecuted by counsel, the matter is to be referred to the DPP or a Deputy Director and in cases being prosecuted by lawyers, the Solicitor for Public Prosecutions or Deputy Solicitor.⁴¹

In cases where a claim of public interest immunity is to be pursued by police, the question of disclosure will depend on the outcome of that claim.⁴²

The *Prosecution Guidelines of the Office of the Director of Public Prosecutions for NSW* state that rare occasions may arise where the overriding interests of justice – for example, a need to protect the integrity of the administration of justice, the identity of an informer (covered by public interest immunity) or to prevent danger to life or personal safety – require the withholding of disclosable information. Such a course should only be taken with the approval of the Director or a Deputy Director.⁴³

United Kingdom

The framework surrounding the duty of disclosure in the United Kingdom has been the subject of significant change and amendment since the late 1980s and early 1990s, following a series of high-profile cases that involved significant disclosure failings and resulted in several convictions being overturned. A series of reports dating back to 2011 have called for improvements to the practice of disclosure in the United Kingdom. More recent reports in the United Kingdom have continued to focus on the need for improvements to disclosure practices.⁴⁴

The prosecution duty of disclosure in the United Kingdom is set out in the *Criminal Procedure and Investigation Act 1996* (UK). According to the Code of Practice, which supplements the Act, sensitive material that can be covered by public interest immunity includes material that relates to the identity or activities of informants or undercover police officers or witnesses or other persons supplying information to the police who may be in danger if their identities are revealed.⁴⁵

The use of disclosure officers and scheduling

In the United Kingdom a dedicated disclosure officer is appointed in all criminal investigations and in larger cases, one or more deputies can also be appointed. An officer in charge of an investigation, an investigator and a disclosure officer perform different functions. The three roles may be performed by one person.⁴⁶

The disclosure officer is responsible for producing schedules and providing these to the prosecution to facilitate disclosure.

A disclosure officer may be appointed at the outset of an investigation. In determining whether this should occur, the officer in charge of an investigation, should have regard to the nature and seriousness of the case, the volume of material that may be obtained or created and the likely venue for hearing of the case and the likely plea. If a disclosure officer is not appointed at the start of an investigation, a disclosure officer must be appointed in sufficient time to be able to prepare the necessary schedules.⁴⁷

⁴⁰ *Prosecution Guidelines of the Office of the Director of Public Prosecutions for NSW* (1 June 2007) 30.

⁴¹ *Prosecution Guidelines of the Office of the Director of Public Prosecutions for NSW* (1 June 2007) 31.

⁴² *Prosecution Guidelines of the Office of the Director of Public Prosecutions for NSW* (1 June 2007) 31.

⁴³ *Prosecution Guidelines of the Office of the Director of Public Prosecutions for NSW* (1 June 2007) 31.

⁴⁴ See for example, Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary, *Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases* (July 2017); House of Commons Justice Committee, *Disclosure of evidence in criminal cases inquiry* (July 2018), Attorney-General's Office (UK), *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (November 2018).

⁴⁵ *Criminal Procedure and Investigations Act 1996* (UK) (section 23(1)) Code of Practice, Revised in accordance with section 25(4) of the *Criminal Procedure and Investigations Act 1996* (UK).

⁴⁶ Crown Prosecution Service, *Disclosure Manual* (2018) 11.

⁴⁷ Crown Prosecution Service, *Disclosure Manual* (2018) 12.

Firstly, the disclosure officer is responsible for preparing a schedule of non-sensitive unused material that is in existence (the MG6C Schedule). Each item on this schedule is individually described so that it can be easily identified. Secondly, a schedule of sensitive material is prepared to reveal to the prosecution the existence of relevant unused material that the disclosure officer believes should be withheld from the accused and the reason for its sensitivity (the MG6D Schedule).

The disclosure officer is also responsible for drawing the prosecutor's attention to any material that they consider might undermine the prosecution case or assist the defence in a separate schedule (known as the MG6E Schedule).⁴⁸

According to the Code of Practice, which supplements the Act, sensitive material that can be covered by public interest immunity includes material that relates to the identity or activities of human sources, undercover police officers, witnesses or other persons supplying information to the police who may be in danger if their identities are revealed.⁴⁹

In exceptional circumstances, where an investigator considers that material is so sensitive that its revelation to the prosecutor on a schedule is inappropriate, the existence of the material must be revealed to the prosecutor separately. This will only apply where compromising the material would be likely to lead directly to the loss of life, or directly threaten national security.⁵⁰

In such circumstances, the responsibility for informing the prosecutor lies with the investigator who knows the detail of the sensitive material. The investigator is required to act as soon as reasonably practicable after the file containing the prosecution case is sent to the prosecutor. The investigator must also ensure that the prosecution is able to inspect the material so that they can access information that is disclosable and, if so, whether it needs to be brought before the court for a ruling on disclosure.⁵¹

The disclosure officer's duties are ongoing throughout the investigation and prosecution. This means that the disclosure officer is required to conduct an ongoing review of the material throughout the prosecution and, where appropriate, provide the prosecutor with updated disclosure schedules.

The disclosure officer has responsibility for ensuring that the investigating officer complies with their disclosure obligations. The disclosure officer is responsible for a range of duties including.

- examining material retained during the investigation
- 'revealing' material to the prosecutor and certifying that this has been done (the disclosure officer 'reveals' material to the prosecutor by drawing their attention to material that is potentially disclosable and providing copies of certain categories of material; however, it does not mean that the material will necessarily be disclosed to the accused)
- disclosing unused material to the accused, at the request of the prosecutor.⁵²

Public interest immunity claims

Where sensitive material is identified by the prosecutor as requiring disclosure, and the prosecutor is satisfied that disclosure would create a real risk of serious prejudice to an important public interest, the options are to:

- disclose the material in a way that does not compromise the public interest in issue
- obtain a court order to withhold the material

⁴⁸ National Police Chiefs' Council and Crown Prosecution Service, *The National Disclosure Standards* (May 2018) [2.3.16].

⁴⁹ *Criminal Procedure and Investigations Act 1996* (UK) (section 23(1)) *Code of Practice*, Revised in accordance with section 25(4) of the *Criminal Procedure and Investigations Act 1996* (UK).

⁵⁰ *Criminal Procedure and Investigations Act 1996* (UK) (section 23(1)) *Code of Practice*, Revised in accordance with section 25(4) of the *Criminal Procedure and Investigations Act 1996* (UK), 12 [6.16].

⁵¹ *Criminal Procedure and Investigations Act 1996* (UK) (section 23(1)) *Code of Practice*, Revised in accordance with section 25(4) of the *Criminal Procedure and Investigations Act 1996* (UK).

⁵¹ *Criminal Procedure and Investigations Act 1996* (UK) (section 23(1)) *Code of Practice*, Revised in accordance with section 25(4) of the *Criminal Procedure and Investigations Act 1996* (UK), 12 [6.17].

⁵² Crown Prosecution Service, *Disclosure Manual* (2018) 12.

- abandon the case
- disclose the material because the overall public interest in pursuing the prosecution is greater than in abandoning it.⁵³

Before the prosecutor makes any application to the court to withhold material on the basis of public interest immunity, the prosecutor is required to consult the police. Where the prosecutor considers that sensitive material should be disclosed to the defence because it satisfies the disclosure test, the police should also be consulted before any final conclusions are reached.⁵⁴

The approach to public interest immunity applications in the United Kingdom contrasts with the position in Victoria and other Australian jurisdictions, where public interest immunity applications are brought by counsel representing police, rather than the prosecution.

DPP's power to take over summary prosecutions involving the use of human sources

Given the inherent risks involved in using human sources, it is expected that human sources will be used less frequently in summary prosecutions.

If a case before the Magistrates' Court raises complex and contentious public interest immunity issues and the Magistrates' Court has the discretion to send the case to the County Court, the case may not be suitable for summary hearing.

The DPP also has the power to take over and conduct a summary prosecution.⁵⁵ In determining whether to take over and conduct a summary prosecution, consideration must be given to the seriousness of the offence and the complexity of the prosecution.⁵⁶

While this is ultimately a matter for prosecutorial discretion, it is possible in Victoria for summary prosecutions involving the use of human source information from a human source who is subject to legal obligations of confidentiality or privilege to be taken over and conducted by the DPP.

Training, guidance and support to discharge disclosure obligations

Disclosure is a central feature of the administration of justice. There are a number of issues that may affect the ability of police to fulfil their disclosure obligations including:

- the support and training provided to assist police understanding of their disclosure obligations
- the volume and complexity of material collected by police in an investigation and the ability of police to review and disclose material.

Ensuring that police have a proper understanding of their disclosure obligations (including possible exemptions to disclosure such as public interest immunity), as well as the capacity to fulfil these obligations, is one way of safeguarding against the risk of a miscarriage of justice in cases where the investigation has involved human source material.

Inquiries in the United Kingdom have highlighted the need for a comprehensive approach to disclosure that supports the effectiveness of the statutory framework. For example, a report, *Disclosure of evidence in criminal cases*, released by the House of Commons Justice Committee in July 2018, reviewed the operation and effectiveness of the United Kingdom's disclosure regime.⁵⁷ The report did not propose any fundamental changes to the legislation or the principles of disclosure. Instead the report recommended a shift in culture towards viewing disclosure as a core duty of policing and the administration of justice, the right skills and technology to review large volumes of material that are now routinely collected by police and clear guidelines on handling sensitive material.

The importance of training, internal guidance and a cultural approach that supports fulfilment of disclosure obligations in the United Kingdom was also highlighted in by the *Mouncher*

⁵³ Crown Prosecution Service, *Disclosure Manual* (2018) 41.

⁵⁴ Crown Prosecution Service, *Disclosure Manual* (2018) 35.

⁵⁵ *Public Prosecutions Act 1994* (Vic) s 22(1)(b)(ii).

⁵⁶ Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019), [53].

⁵⁷ House of Commons Justice Committee, *Disclosure of evidence in criminal cases*, 20 July 2018.

Investigations Report, which emphasised the importance of proper training, leadership and governance.⁵⁸

As a result, reform to disclosure practices in the United Kingdom has focused on the importance of leadership and cultural change. A National Disclosure Improvement Plan (NDIP) was introduced in January 2018 in the United Kingdom by the Crown Prosecution Service, the National Police Chiefs' Council and the College of Policing.⁵⁹ The NDIP represents a commitment to joint governance between police and the Crown Prosecution Service regarding disclosure in the United Kingdom. The stated purpose of the NDIP is to bring together the shared commitment of police and the Crown Prosecution Service to make sustainable change to the way their duties of disclosure are exercised.⁶⁰

Conclusion

The above highlights the approach taken in New South Wales and the United Kingdom to the disclosure of material to the prosecution and the defence in cases where there is a claim of public interest immunity.

The Commission is interested in hearing from stakeholders with experience and expertise in Victoria about the effectiveness and appropriateness of current Victorian practices, particularly as they relate to the use of human source information in the criminal justice system. The Commission is also interested in any views about how, if necessary, existing practices could be improved.

⁵⁸ Richard Horwell QC, *Mouncher Investigation Report*, July 2017, 81.

⁵⁹ National Police Chiefs' Council, College of Policing and Crown Prosecution Service, *National Disclosure Improvement Plan*, January 2018.

⁶⁰ *National Disclosure Improvement Plan, Progress update*, October 2018, 1.

Consultation questions

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

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

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

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

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

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

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

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

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

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

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

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

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

- the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of human sources who are subject to legal obligations of confidentiality or privilege to prosecuting authorities?
- whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the OPP prosecutes indictable matters on behalf of the DPP, when the investigation has involved human source material?