



**VICTORIAN GOVERNMENT  
SOLICITOR'S OFFICE**

Your reference:

Our reference: 1230176

Contact details: David Ryan  
[REDACTED] (direct line)  
[REDACTED]

All correspondence to:

[REDACTED]  
Melbourne 3001 Australia  
DX 300077 Melbourne

6 June 2012

Superintendent Steve Gleeson  
Legal Services Department  
Victoria Police Centre  
DX 210096  
MELBOURNE

By email: [REDACTED]

Dear Superintendent Gleeson

**Human Source Case Review**

**Purpose**

1. To advise you about the legal risks to Victoria Police which may arise in relation to the utilisation of human sources.

**Background**

2. We are instructed that former Chief Commissioner of Police Neil Comrie has been engaged by Victoria Police to conduct an independent case review of the dealings by Victoria Police with a particular human source (3838).

**Request for Advice**

3. You have requested advice in relation to the following questions:
  - 3.1 What duties are recognised as existing in regards to police utilising human sources?
  - 3.2 What additional duties may extend to the utilisation of a human source who may, by profession, be bound by other duties?
  - 3.3 What additional duties may extend to the utilisation of a human source who becomes a protected witness?
  - 3.4 What reasonable means (from both a policy and operational sense) could police utilise to safeguard against potential breaches of the duties imposed upon police in relation to human sources?

Southern Cross: Level 25, 121 Exhibition Street Melbourne VIC 3000

Nauru House: Level 33, 80 Collins Street Melbourne VIC 3000

Tel: +61 3 [REDACTED]

Fax: +61 3 [REDACTED]

Tel: +61 3 [REDACTED]

Fax: +61 3 [REDACTED]

[www.vgso.vic.gov.au](http://www.vgso.vic.gov.au)



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- 3.5 Assuming a handler upon engaging with a human source be alerted to suspected corruption or criminality of other police, what obligations does the handler have in regard to such information, particularly if disclosure could compromise the identity of the source?
- 3.6 Assuming a source alerts a handler that the source has been called to attend a coercive hearing conducted by the Office of Police Integrity (OPI) or the Australian Crime Commission, what capacity exists for handlers to discuss such matters with the source in the absence of formal authority?

**What duties are recognised as existing in regards to police utilising human sources?**

4. Victoria Police utilise human sources to obtain confidential information and intelligence to assist them to fight crime. We understand that human sources are often recruited from within the criminal community.
5. Clearly, the disclosure of the identity of a human source to the public would be likely to expose the human source to a serious risk of harm in the form of retribution from the criminal community.
6. Below is a passage from the judgment Lord Justice Toulson of the English Court of Appeal in *An Informer v A Chief Constable (An Informer)* which we consider provides a useful description of the nature of the relationship between a human source (referred to in this case as a CHIS) and police:

The starting point for considering the relationship between the police and a CHIS is its purpose. The principal duties of the police are the prevention and detection of crime. For many years the use of informers has been one of the means used by the police for this purpose... The purpose is not to provide the CHIS with an escape route from the legal consequences of any past offence which he may have committed or from the investigation of criminality of which there may be grounds for suspicion. That would be contrary to the public interest in the detection and, where appropriate, prosecution of crime.

In the nature of things the use of a CHIS carries possible risks. There may be risks to the CHIS or his family from third parties if his identity becomes known. There may also be risks to police operations depending on the motives and reliability of the CHIS. Many informers have criminal backgrounds and belong to a criminal social environment. Their motives for giving information to the police may be ambiguous or mixed. Their role may turn out to be less innocent than they would have the police believe. In the present case a senior officer provided some general evidence about such matters from his own experience.

The relationship between the police and a CHIS is a confidential relationship. The confidentiality serves two main purposes. The first is the safety and peace of mind of the CHIS. Acting as a CHIS may be risky and stressful. If the person's identity became known, he or his family might in some cases be exposed to serious injury or death and in less extreme cases to other disturbing forms of harassment. The second purpose is the encouragement of the supply of information to the police

by people who are unlikely to come forward unless they can be confident that their confidentiality will be protected.<sup>1</sup>

***Duty to protect identity of a human source***

7. In our view, Victoria Police owe a common law duty of care to a human source to take reasonable steps to protect the confidentiality of their identity. This duty is supported by the decision of the Court of Appeal for England and Wales in *Swinney v Chief Constable of Northumbria Police Force (Swinney)*. In that case, the plaintiff supplied information to police as to the identity of a suspect. The information was supplied in confidence. Information identifying the plaintiff and setting out the extent of her cooperation with police was stolen from a police vehicle and made its way into the hands of the suspect. Following the theft, the plaintiff and her husband were subjected to repeated threats of personal violence and property damage. The Court of Appeal held that it was arguable that the plaintiff had causes of action arising in negligence and in breach of confidence.<sup>2</sup> *Swinney* was recently given consideration in *An Informer*. In that case the Court held that whatever duties a police officer might owe to a confidential human source, those duties did not extend to protecting the source from purely economic harm, nor did they extend to protecting the source from the consequences of a police investigation into his own activities. The decision did not, however, cast any doubt on the correctness of *Swinney* on its facts.<sup>3</sup>
8. Further, section 127A of the *Police Regulation Act 1958 (PR Act)* provides that it is a criminal offence for a member to publish or communicate without authorisation information which is obtained by virtue of their office and of which they have a duty not to disclose. In *D'Alo v Nolan*<sup>4</sup>, the plaintiff, a police member, published a book (*One Down, One Missing*) which disclosed without authorisation from the then Chief Commissioner the identities of a number of human sources who had provided information in the course of the investigation into the deaths of Sergeant Gary Silk and Senior Constable Rodney Miller. Justice Osborn dismissed the plaintiff's appeal against his conviction in the County Court for an offence against s127 of the *Police Regulation Act 1958*.
9. Also, in our view, the expectation of a human source that information identifying them will be kept secret appears to be one which equity would enforce through an action for breach of confidence. This view is reinforced by the decision of Ashley J of the Supreme Court of Victoria in *Falconer v Australian Broadcasting Corporation*. In that case a police officer sought an injunction restraining a media organisation from publishing information which might have the effect of identifying a confidential human source. Ashley J held that it was arguable that a permanent injunction would lie in equity to restrain a breach of confidence in the form of publication of information identifying a confidential human source. His Honour therefore granted an interlocutory injunction restraining the threatened publication pending final resolution.<sup>5</sup> It does not appear that the matter proceeded to a final judgment.
10. In our view, the duty of care imposed upon police to take reasonable steps to maintain the confidentiality of a human source would require police in certain

<sup>1</sup> [2012] EWCA Civ 197, [60]-[62]

[1997] QB 464.

<sup>2</sup> [2012] EWCA Civ 197.

<sup>4</sup> [2006] VSC 362

<sup>5</sup> [1992] 1 VR 662.

circumstances to apply to the Supreme Court for an injunction to restrain a pending publication which would be likely to disclose the identity of that human source.

11. One of the human sources whose identity was disclosed in *One Down, One Missing* instituted proceedings in the County Court of Victoria against a number of members of Victoria Police (including former Chief Commissioner Simon Overland) claiming that Victoria Police did not take reasonable steps to protect his identity. We acted for the defendants in this proceeding which was settled taking into account a number of considerations including our view and the view of counsel that the defendants were seriously exposed on liability given that Victoria Police failed to apply for an injunction to restrain publication of the book.
12. In our view, the duty of care imposed upon police to take reasonable steps to maintain the confidentiality of a human source would require police in appropriate cases to apply for suppression orders in legal proceedings. Consistent with this view, we are aware that on occasions the Chief Commissioner applied to the Courts for suppression orders to protect the identity of 3838.

***Duty to ensure the safety of a human source***

13. In our view, it is likely that Victoria Police owes a duty of care to human sources to take reasonable care to ensure their safety. We consider that the scope of this duty would be limited to circumstances in which Victoria Police had tasked a human source to obtain specific information in circumstances that exposed them to risk of harm.<sup>6</sup>
14. We are aware that 3838 has written to Deputy Commissioner Kieran Walshe on a number of occasions claiming that Victoria Police owes them a duty to take reasonable care for their safety.
15. In our opinion, Victoria Police would not generally owe members of the public who provide information relating to criminal investigations or prosecution witnesses a duty to take reasonable care for their safety as such a duty would be inconsistent with their other general duties to the public.<sup>7</sup> However, we consider that the long and complex relationship that existed between Victoria Police and 3838 created an exception to this general position. 3838 was in a vulnerable position and it could be argued that Victoria Police had created some of the risk to them by requesting that they surreptitiously record a conversation with a suspect who was to be later charged with murdering a prosecution witness. Victoria Police was aware of the risk and arguably had the means to reduce the risk by providing 3838 with protection in or outside the Victorian witness protection program (**the Program**).
16. We refer to the Canadian case of *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*<sup>8</sup> to support the proposition that a duty of care may be found to exist in the circumstances. In that case, a rape victim sued Canadian police for failing to protect her in circumstances where the police knew that the victim was within a reasonably small category of potential victims targeted by the rapist but failed to warn her on the basis that it would have caused hysteria and impeded the

<sup>6</sup> *An Informer v A Chief Constable* [2012] EWCA Civ 197, [64]

<sup>7</sup> *Sullivan v Moody* (2001) 207 CLR 562; *Tame v New South Wales* (2002) 211 CLR 317; *Slaveski v State of Victoria* [2010] VSC 441 [345]; *Hill v Chief Constable of West Yorkshire* [1993] 4 All ER 328; *Brooks v Chief Commissioner of Police of the Metropolis* [2005] 1 WLR 1495; *Smith v Chief Constable of Sussex Police* [2009] 1 AC 225

<sup>8</sup> (1991) 72 DLR (4<sup>th</sup>) 580

apprehension of the offender. The Canadian Court refused an application by the police to summarily dismiss the proceeding and found that it was arguable that a special relationship existed between the police and the victim to give rise to a duty of care.

17. We have previously provided advice to Victoria Police expressing the opinion that Victoria Police does owe a duty to take reasonable care for 3838's safety. Notwithstanding the potential existence of a duty of care owed by Victoria Police to 3838, we consider that any harm that may have come to them while a witness would be unlikely to be found by a Court to be a result of a breach of that duty by Victoria Police. 3838 has been encouraged by Victoria Police to enter the Program for their own safety but has refused to do so claiming that the associated restrictions would compromise their health and lifestyle.
18. In our view, any duty of care owed by Victoria Police to 3838 would only become relevant if they were injured or killed as a result of their status as a human source or witness. We understand that the 3838 is no longer a witness in any extant criminal prosecutions but they may be called as a witness in possible coronial proceedings.

**What additional duties may extend to the utilisation of a human source who may, by profession, be bound by other duties?**

19. The utilisation of human sources by Victoria Police will attract additional complexity in circumstances where the human source is a member of a profession which imposes specific and independent duties on its members.

***Lawyers***

20. The occupation of a human source which in our view would attract the most complexity for Victoria Police would be that of a lawyer. A lawyer admitted to practice is bound by a duty to the Court and a duty to their clients. These duties of a lawyer are likely to impose significant limitations on the use that could be made by Victoria Police of a human source who is a member of the legal profession.
21. A fundamental part of a lawyer's duty to a client involves the maintenance of Legal Professional Privilege (LPP).<sup>9</sup> LPP protects confidential communications between a lawyer and their client made for the dominant purpose of providing legal advice or legal services in court proceedings. Information subject to LPP cannot be admitted into evidence in Court proceedings over the objection of the client. There is a limited exception to this prohibition in circumstances where the relevant communication is made in the furtherance of the commission of a fraud or offence or the commission of an act that renders a person liable to a civil penalty.<sup>10</sup>
22. A lawyer who has been recruited as a human source would be under a duty not to disclose to Victoria Police information that is subject to LPP (subject to the limited exception identified in the above paragraph).
23. For example, it would be ethically repugnant for:
  - a human source who was a lawyer to provide to Victoria Police confidential information they had obtained from a client in the course of providing legal

<sup>9</sup> Now referred to as Client Legal Privilege in the *Evidence Act 2008*.

<sup>10</sup> *Evidence Act 2008*, s125

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advice related to criminal charges to assist Victoria Police in securing a conviction;

- the lawyer to critically review a police brief of evidence prepared to support criminal charges against their client for the forensic benefit of Victoria Police; and
- Victoria Police to receive any information from a human source which they were aware was subject to LPP.

24. In our view, the exchange of information known to be subject to LPP between a lawyer who is a human source and Victoria Police to assist in the prosecution of the lawyer's client (subject to the limited exception identified in paragraph 21 and perhaps other exceptional and compelling circumstances such as where there is threat to life or limb, or to national security) amounts to a conspiracy which undermines the criminal justice system.
25. In *R v Robinson* [2002] EWCA CRIM 2489, the English Court of Appeal expressed grave concern about the use by police of a human source who worked a clerk in a solicitors' office, including the following comment from Lord Justice Pill in the context of a discussion about the right of an accused to access to the Court, legal advice and LPP:

Those rights are enjoyed equally by a person under investigation for or charged with a criminal offence. The right is severely curtailed if the solicitor, or solicitors' clerk from whom he seeks legal advice, is telling the police what passes between them. 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.<sup>11</sup>

26. Further, it arguably interferes with the right of an accused to a fair trial which would constitute a breach of the rights of an accused in criminal proceedings provided for in ss24 and 25 of the *Charter of Human Rights and Responsibilities Act 2006*. The consequences of such conduct, depending on the seriousness of the circumstances, would have the potential to be significant and may include:
- 26.1 Disciplinary action by the Legal Services Commissioner against the lawyer which may result in them being removed from the roll of practitioners.
  - 26.2 Disciplinary action by the Chief Commissioner against relevant members of Victoria Police under Part IV of the PR Act.
  - 26.3 The setting aside of a conviction by the Court of Appeal on the ground that there had been a miscarriage of justice.<sup>12</sup>

<sup>11</sup> [2002] EWCA CRIM 2489[61]

<sup>12</sup> *Wilde v R* (1988) 164 CLR 365, 373

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- 26.4 Charges against the lawyer and/or Victoria Police for the common law offence of attempting to pervert the course of justice.<sup>13</sup>
- 26.5 Civil damages claims against the police officers for misfeasance in public office.
27. Were the conduct identified in paragraph 23 to occur; the reputational damage for Victoria Police could be disastrous. Public confidence in the integrity of Victoria Police's role in criminal prosecutions could be deeply undermined. We anticipate that senior judges would be absolutely scathing of Victoria Police and the relevant lawyer and would be likely to overturn any convictions and order re-trials. We also anticipate widespread judicial horror in the event that Victoria Police had knowingly allowed convictions to be secured in the knowledge of such ethically egregious and disgraceful behaviour.
28. The utilisation of human sources from other professions may give rise to conflicting duties however in our view they would not expose Victoria Police to the same level of risk as they do not have the same potential to interfere with the administration of justice.

#### ***Members of Parliament***

29. We anticipate that it would be unlikely that a Member of Parliament would be recruited by Victoria Police to become a human source. However, in the event that it did occur, Victoria Police would need to be mindful that it would be inappropriate for the human source to provide, and for Victoria Police to receive, information known to contain disclosures relating to the deliberations of Cabinet. The deliberations of Cabinet are highly confidential and are protected from disclosure by Public Interest Immunity (PII).
30. Further, if a Member of Parliament were to provide information to Victoria Police that disclosed confidential information concerning the parliamentary process then their conduct could amount to a contempt of Parliament. For example, it may be a contempt of Parliament for a Member of Parliament to provide a submission to Victoria Police which had been made to a Parliamentary Committee prior to it being considered or made public by that committee. It would not be appropriate for Victoria Police to actively seek information from a human source which they are aware is being provided contrary to the human source's professional obligations.

#### ***Medical Practitioners***

31. A medical practitioner who is a human source would need to be cognisant of their legal and ethical duty not to use or disclose personal health information to Victoria Police without their client's consent. A breach by a medical professional of this duty may lead to disciplinary proceedings for alleged unprofessional conduct or professional misconduct. Once again, in our view, it would not be appropriate for Victoria Police to actively seek information from a human source which they are aware is being provided contrary to the human source's professional and ethical obligations.

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<sup>13</sup> See, *R v Rogerson* (1992) 174 CLR 268, 280 (Brennan & Toohey JJ),

**Priests**

32. In Victoria, a member of the clergy of any church or religious denomination is entitled to refuse to divulge the contents of any confession made to them without the consent of the penitent.<sup>14</sup> Accordingly, in our view, there is no legal impediment to Victoria Police receiving from a priest who is a human source information disclosed in the course of a confession provided that information is given voluntarily.

**What additional duties may extend to the utilisation of a human source who becomes a protected witness?**

33. We understand that there are circumstances where a person utilised as a human source may become a witness in criminal proceedings. Such a change in status is likely to expose the human source to an increased risk of harm. In those circumstances, it may be appropriate for the human source to join the Program and receive protection and assistance from the Chief Commissioner under the *Witness Protection Act 1991 (the WP Act)*.
34. Any common law duty imposed upon Victoria Police to protect the identity of a witness on the Program is reinforced by statutory provisions in the WP Act which create offences for the disclosure of the identity of persons on the Program.<sup>15</sup> These prohibitions have been held to apply to deceased witnesses who were formerly on the Program.<sup>16</sup>
35. In our view, the scope of the duty of care imposed upon Victoria Police to take reasonable care for the safety of human sources is increased in circumstances where the human source becomes a protected witness on the Program. We consider that the scope is increased because the human source is likely to be exposed to a greater risk of harm and Victoria Police have greater ability to control that risk.<sup>17</sup>
36. We acted for the Chief Commissioner some years ago in Supreme Court proceedings involving a witness on the Program. The witness came from a criminal background and his behaviour tended to undermine the integrity of the Program. As a result, the Chief Commissioner sought to have him terminated from the Program under the WP Act. The drafting of the Act together with the attitude of the Courts made it almost impossible for the Chief Commissioner to have the witness successfully terminated without their consent. At the conclusion of those proceedings, we identified the following issues relating to the operation of the WP Act which could be the subject of amendment:
- 36.1 In our view, the 72 hour time limit for an appeal from the decision of the Chief Commissioner to the Director of OPI provided by s17(6) of the WP Act is unreasonable given that the Court of Appeal in *Applicants a1 & Anor v Brouwer & Anor*<sup>18</sup> determined that on such an appeal the Director must conduct a hearing de novo and consider all the material afresh and make his own decision as to whether protection and assistance ought to be terminated. We consider that a 7-14 day time limit is more appropriate and would provide the Director with enough time to properly consider all the material

<sup>14</sup> *Evidence Act 2008*, s127

<sup>15</sup> *Witness Protection Act 1991*, s10

<sup>16</sup> *Chief Commissioner of Police & Anor v Herald & Weekly Times Limited & Ors* [2010] VSC 164

<sup>17</sup> *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1

<sup>18</sup> [2007] VSCA 139



and make a decision supported by reasons. However, it would still be a very difficult task for the Director and no doubt he would advocate for a longer period (ie 28 days). In our view, a longer period would not necessarily be in the interests of Victoria Police as the longer the appeal period the greater the potential for the evidence relied upon by the Chief Commissioner to be branded by the applicants as "out of date". This would require further evidence to be put before the Director and increase the difficulties in affording procedural fairness to the parties.

- 36.2 In our view, a time limit should be provided within which the Chief Commissioner is to determine a review under s17(3) of the WP Act. We would suggest 7-14 days. This would reduce the potential for an applicant to create delays by manufacturing spurious procedural fairness objections. A short time limit would also inform and limit the content of procedural fairness required to be afforded to an applicant. It would also reduce the potential for evidence relied upon in an original termination decision under s16(2) to be considered "out of date" as occurred in our experience in an appeal to the Director.
- 36.3 The changes suggested in the above two paragraphs would also apply to restoring a person's former identity under s19 of the WP Act.
- 36.4 The immunity in s12(3) could be strengthened to specifically provide that the Chief Commissioner and members of Victoria Police are immune from civil proceedings brought by a witness in an attempt to enforce the terms of a Memorandum of Understanding.
- 36.5 The prohibitions on disclosure in s10(4) and (5) of the WP Act could be amended to make it clear that the "lawful authority" exception includes complying with a Supreme Court order.
37. A further issue we have identified that could appropriately be the subject of legislative amendment as the scope of the prohibition contained in s10(5) & (6) of the WPA concerning disclosure of information about the identity and location of a person who is or has been on the Program. It is an exception to the prohibition contained in s10(5) & (6) if the disclosure is made with "lawful authority". In our view, the WP Act ought to be amended to provide a definition of "lawful authority" which includes:
- 37.1 An order of the Supreme Court which authorises the disclosure; and
- 37.2 A disclosure by the Chief Commissioner which the Chief Commissioner considers appropriate in the circumstances.<sup>19</sup>
38. Another risk to Victoria Police arises where a human source who is to be called as a witness refuses an invitation to enter the Program notwithstanding that they are assessed by Victoria Police to be exposed to a significant risk of harm.<sup>20</sup> Entry to the Program is voluntary and the Witness Security Unit (**Witsec**) are not in a position to provide appropriate protection and assistance to an uncooperative witness. This

<sup>19</sup> Such an amendment would be helpful in circumstances, for example where a former participant in the Program applied for a firearms licence and would avoid the necessity of the Chief Commissioner applying to the Supreme Court to obtain authority to disclose relevant information to the Firearm Appeals Committee: See, *Chief Commissioner of Police v ABC* [2010] 582

<sup>20</sup> *Review of the Victoria Police Witness protection Program*, Office of Police Integrity, 2005

situation occurred with 3838. As a result, Victoria Police are not currently providing 3838 with protection and assistance notwithstanding that she is assessed to be at a significant risk of harm. We understand that one of the principal reasons for this is that providing protection and assistance in such circumstances would expose Witsec members to an unacceptable risk of harm.

***Financial assistance***

39. Handlers ought to take great care that appropriate authority is obtained prior to making any representations to human sources relating to the provision of financial compensation in return for them agreeing to give evidence in criminal proceedings.
40. We have acted for Victoria Police in a number of claims where human sources (some who have subsequently joined the Program) allege that they have been told by members of Victoria Police during negotiations designed to persuade them to give evidence in criminal proceedings that they "will be looked after" and that "they will be no worse off financially". Such representations have been held to give rise to a cause of action in equitable estoppel requiring police to compensate a human source for the economic loss they have suffered as a result of agreeing to give evidence.<sup>21</sup> The compensation can be significant in the context of a human source who is a professional with a high income potential particularly in circumstances where they will be unable to resume employment in their existing profession. This was certainly the case in relation to the claim brought by 3838 against Victoria Police and which settled at mediation.

**What reasonable means (from both a policy and operational sense), could police utilise to safeguard against potential breaches of the duties cast on police in relation to human sources?**

41. In our view, it would be prudent for Victoria Police to formulate and adopt a policy in relation to the use of human sources which would be consistently applied across the organisation. We consider that such a policy should provide guidance to members to assist them to manage the risks that may arise when dealing with human sources. The policy could include provision for the following:
- 41.1 Emphasising the critical importance of protecting the identity of a human source and identifying that circumstances may require certain positive steps to be taken to prevent a disclosure through an application to a Court for an injunction or a suppression order.
- 41.2 Emphasising the obligation of Victoria Police to take reasonable steps to ensure the safety of a human source and providing a process for the completion of a detailed risk assessment dealing with the potential risk of harm to the human source. This risk assessment may need to be updated over time to take into account new operations and fresh tasking.
- 41.3 Prior to a human source becoming registered by Victoria Police, an assessment ought to be undertaken to consider the candidate's suitability for the role. This assessment could include the candidate's background, profession and any perceived psychological vulnerabilities.

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<sup>21</sup> *Australian Crime Commission v Gray* [2003] NSWCA 318

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- 41.4 Emphasising that caution ought to be exercised before engaging a human source who may have conflicting professional duties (eg lawyers, doctors, parliamentarians and priests). It ought to provide that members should not actively seek information from these human sources which would knowingly cause them to breach their professional obligations.
- 41.5 Emphasising that extreme caution ought to be exercised before engaging a lawyer as a human source given the potential for their role as a human source to conflict with their professional duties to the Court and their clients. In particular, it ought to provide that information that is known to be subject to LPP should not be sought or utilised (unless it is subject to the exception identified in paragraph 21 and perhaps in other exceptional and compelling circumstances such as where there is threat to life or limb, or to national security).<sup>22</sup>
- 41.6 Representations should not be made to human sources by handlers without authority in relation to financial compensation in return for providing information or agreeing to give evidence.
42. As you are aware, in England the use of human sources by police is regulated by the *Regulation of Investigatory Powers Act 2000*. It is understood that Victoria Police may consider the level of public scrutiny and regulation that exists in the United Kingdom would undermine the quality of intelligence and the forensic benefit obtained from human sources given the critical importance of confidentiality in their relationship with Victoria Police. However, in our view, an internal Victoria Police policy dealing with human sources which could be uniformly applied would reduce the risks presented by their use while maintaining confidentiality concerning police processes and methodology.

**Should a handler upon engaging with a human source be alerted to suspected corruption or criminality of other police then what obligations does the handler have in regard to such information, particularly if disclosure could compromise the identity of the source?**

43. All members of Victoria Police owe a general duty to the public to enforce the criminal law.<sup>23</sup> In our view, a handler who became aware of police corruption through a human source would have an obligation to report that corruption to their superiors notwithstanding that the disclosure of that information could have the potential to compromise the identity of the source. Obviously, if a handler suspected that their superior may be involved in the corruption that had been uncovered by the human source then they would not be obliged to inform that person. Rather, it would be expected that they would use their judgment to inform a superior who was not subject to such suspicion.
44. In our opinion, it would be expected that Victoria Police would have appropriate processes in place which would be capable of quarantining such sensitive information to avoid the identity of the human source being compromised while allowing the information concerning police corruption to be investigated and addressed. These processes would be expected to take into account the possibility of corrupt sources within Victoria Police.

<sup>22</sup> See, Covert Human Intelligence Sources, Code of Practice (UK), 4.6

<sup>23</sup> This general duty is supported by the Oath of Office in Schedule 3 to the *Police Regulation Act 1958*

45. It may be that, after the handler had informed their superiors of the police corruption, Victoria Police would decide not to address the corruption immediately for various reasons including to protect the human source. In our view, operational decisions relating to how police conduct their investigations and when they decide to prosecute individuals is a matter entirely within their discretion. As discussed previously, police do not owe individuals a duty of care in relation to the way in which they conduct investigations as it would be incompatible with their general duty to the public to enforce the criminal law.<sup>24</sup>
46. Our view is reinforced by s86L(2A) of the PR Act which requires that a member of Victoria Police must make a complaint to a member of a more senior rank, or to the Director of OPI, about the conduct of any member who they believe is guilty of serious misconduct.

**Should a source alert a handler that the source has been called to attend a coercive hearing conducted by the Office of Police Integrity or the Australian Crime Commission then what capacity exists for handlers to discuss such matters with the source in the absence of formal authority?**

47. Section 53 of the *Police Integrity Act 2008 (PI Act)* provides that the Director of the OPI may issue a witness summons requiring them to attend to give evidence before the Director. Section 58 provides that the Director may issue a confidentiality notice with a witness summons which provides that it is an offence for the witness to disclose to anyone else, except in the circumstances, if any, specified in the notice, the existence of the summons or the subject-matter of the investigation in relation to which the summons was issued, unless the person has a reasonable excuse.
48. Section 59 of the PI Act provides that it is a reasonable excuse to disclose the existence of a witness summons or the subject-matter of the investigation in the following limited circumstances:
- For the purposes of obtaining legal advice in relation to the witness summons;
  - Obtaining information in order to comply with the summons;
  - Complying with, or disclosing information permitted by, the PI Act, the PR Act or the *Whistleblowers Protection Act 2001*;
  - For the purposes of an Ombudsman's investigation.
49. Section 59(2)(b) of the PI Act provides that if a person does disclose the existence of a witness summons or the subject-matter of the investigation in circumstances where there is a reasonable excuse then they must inform the person to whom the disclosure is made that it is an offence to disclose to anyone else the existence of a witness summons or the subject-matter of the investigation.
50. It follows from the provisions of the PI Act that a human source who has been issued with a witness summons by the Director together with a confidentiality notice should not disclose its existence or the subject matter of the Director's investigation to a handler unless it can be classified as " a reasonable excuse". It does not appear that any of the examples provided in s59 would apply to such a disclosure but there may

<sup>24</sup> *Sullivan v Moody* (2001) 207 CLR 562

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be other circumstances which may amount to "a reasonable excuse". A handler would also need to be aware that they may also be committing an offence under the IP Act if they disclosed information received from a human source relating to a witness summons issued to the human source.

51. We note that similar prohibitions exists in the legislation that governs witness summonses issued in the Australian Crime Commission,<sup>25</sup> the Office of the Chief Examiner,<sup>26</sup> and by the Ombudsmen.<sup>27</sup>
52. If you have any queries, please contact David Ryan on [REDACTED]

Yours faithfully  
Victorian Government Solicitor's Office

Stephen Lee  
Assistant Victorian Government Solicitor

David Ryan  
Managing Principal Solicitor

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<sup>25</sup> *Australian Crime Commission Act 2002* (Cth), ss29A, 29B; *Whistleblowers Protection Act 2001*, s22

<sup>26</sup> *Major Crime (Investigative Powers) Act 2004*, s20

<sup>27</sup> *Whistleblowers Protection Act 2001*, s22

