

Royal Commission into the Management of Police Informants

Victoria Police response to Consultation Paper

- 1 Victoria Police welcomes the opportunity to respond to the questions outlined in the Royal Commission's Consultation Paper concerning 'the current use of specified human source information in the criminal justice system' (**Consultation Paper**).
- 2 The Consultation Paper calls for Victoria Police's responses to 11 specified questions concerning disclosure of information relating to human sources. Before providing Victoria Police's responses to these questions, we set out some general covering observations in relation to the matters raised for consultation. These observations relate to:
 - a. the interaction between historic and existing human source management policies and disclosure requirements;
 - b. the need for any reformed disclosure framework to provide clarity as to the roles and occupations to which legal obligations of confidentiality or privilege apply;
 - c. the importance of a systemic solution encompassing Victoria Police and prosecutorial agencies to ensure that there is appropriate disclosure to accused persons while achieving the efficient administration of justice; and
 - d. potential models for reforming the framework for disclosure in Victoria.
- 3 Victoria Police offers these observations and its responses to the questions posed in the Consultation Paper in the spirit of consultation. Victoria Police will not be in a position to provide final submissions in relation to these important matters until the hearings and evidence gathering phase of the Royal Commission has concluded. As such, Victoria Police reserves its right to clarify, modify and elaborate on these discussion points in its submissions.
- 4 While Victoria Police recognises that the Royal Commission's inquiry is ongoing, Victoria Police is nevertheless taking proactive steps to identify opportunities for improvement in its policies, procedures and document management systems. Victoria Police anticipates that improvement in these areas will enhance Victoria Police's practices in human source management and disclosure (among other areas). Some of these proactive measures are referred to in this document, and will be detailed in evidence before the Royal Commission and Victoria Police's final submissions.

The interaction between disclosure and human source management frameworks

- 5 Questions about Victoria Police's disclosure obligations in the context of prosecutions involving human source information or human sources as witnesses are intimately related to the policy framework which governs Victoria Police's use of human sources. This is because questions about disclosure of human source information will only arise if Victoria Police obtains information from a human source to begin with.

- 6 The policies which applied to Victoria Police's management of human sources during the period in which Ms Gobbo was a registered human source no longer apply. The policies which now apply are considerably more sophisticated.
- 7 The evolution of Victoria Police's human source management policies is described by Assistant Commissioner Paterson in his statement to the Royal Commission dated 22 March 2019.¹ The development of the human source management policies has been guided by Victoria Police's ongoing commitment to proactive policy review and improvement, and the recommendations of the Comrie Review and the Kellam Report. This has involved imposing additional safeguards in relation to the registration of potential human sources with obligations of confidentiality or privilege. Importantly, these have included:
- a. imposing requirements to obtain independent legal advice in the context of registration of human sources involving complex legal or ethical considerations;
 - b. the introduction of mandatory completion of risk assessments for all human source registration applications, including specific requirements in the context of managing high risk human sources;
 - c. the inclusion of an express acknowledgement that one of the purposes of the human source policy is to ensure the management of human sources is within legal and ethical boundaries; and
 - d. establishing and setting out the role of the Central Source Registrar and the Human Source Ethics Committee in approving registration of certain human sources including individuals with a "positive obligation".²
- 8 Victoria Police is also considering options to enable external oversight of registration of human sources with legal obligations of privilege or confidentiality.
- 9 Central to any discussion regarding the interaction between disclosure and human source management frameworks is the significance that must be placed on acknowledging that human source management is a specialised capability.
- 10 In the context of disclosure, the creation of a structure with dedicated human source resources to service the entire State, will create the ability to train and manage the dedicated members in relation to disclosure and Public Interest Immunity (PII) issues surrounding human sources. Such a structure will likely have funding and resourcing implications.
- 11 Any model, framework or recommendation of the Royal Commission should acknowledge that central to this issue are the unique skills that are required for the management of human sources.
- 12 As a result of the improvements to Victoria Police's human source management policies, it has become substantially less likely that people with obligations of confidentiality or privilege will become registered as human sources. In the rare event that it is considered appropriate for a person with obligations of confidentiality or privilege to become a human source, the current policy imposes conditions on

¹ Exhibit RC08.

² Further to these measures, Victoria Police, as part of its commitment to continual process and policy improvement, is in advanced stages of reviewing and re-drafting an updated human source management policy which may impose further conditions in relation to the registration and management of human sources. Further details of the updated policy will be provided to the Royal Commission in due course when the policy is completed.

how they are to be managed, including requirements as to appropriate oversight, to ensure they do not breach those obligations.³

- 13 Victoria Police embraces the opportunity to contribute to the development of a robust and effective disclosure framework. This work is already under way at Victoria Police. In conjunction with the Victorian Government Solicitor's Office, Victoria Police has finalised and is currently rolling out an organisation-wide Disclosure Handbook. Furthermore, Victoria Police is also reforming its training models to ensure that members understand their disclosure obligations, and consistently apply the Victoria Police policies regarding disclosure. Changes are also being planned for human source management training to specifically cover issues of human source information used in prosecutions and where human sources become witnesses.
- 14 The issues which have arisen as a consequence of the registration of Nicola Gobbo as a human source are unique; with the current human source management framework in place they simply could not be repeated. As a result, it must be noted from the outset that the premises underlying many of the questions posed in the Consultation Paper are not likely to arise in practice.
- 15 Finally, it is important not to lose sight of the vital role that human sources play in the detection and prevention of criminal enterprises, and the criticality of ensuring the safety of human sources. It is internationally recognised that development of human source intelligence is critical to law enforcement and protecting the community from serious crime.⁴ A central feature of any effective human source management regime is ensuring the safety of the human source. As Brooking J observed in *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84 at 88:
- There is a public interest in preserving the anonymity of informers, since otherwise these wells of information will dry up and the police will be hindered in preventing and detecting crime; moreover, the public interest on which the need to protect informers rests is based in part on a regard for their personal safety, considered, not as a matter of expediency, but as an object in itself: R v Hennessey (1978) 68 Cr App R 419 at 425; Cain v Glass (No 2) (1985) 3 NSWLR 230 at 233-234 per Kirby P. The personal safety of the informer is both a means to an end and an end in itself.*
- 16 Further to this, it must be noted that in addition to maintaining the safety of a human source, a further imperative is the preservation of the safety of all police members and all other people that may be associated with a human source. Victoria Police seeks to minimise the potential risks to all these individuals.
- 17 Any reform to the disclosure regime must retain an appropriate balance between the public interest in protecting the safety of human sources and the public interest in protecting the right to a fair trial by ensuring an accused person receives information that would provide substantial assistance to their defence.

³ For example, the current human source policy imposes a number of requirements with respect to regular monitoring of the purpose for which a source may be registered, in addition to regular auditing of human source risk assessments and registration files; see Exhibit RC08.

⁴ Australian Institute of Criminology 2017, Future of Investigations Capability, AIC reports, p 12

The need for clarity as to the roles and occupations to which obligations of confidentiality and privilege apply

- 18 Victoria Police recognises that the questions in the Consultation Paper have been framed to accord with the Royal Commission's Terms of Reference, which require the Royal Commission to inquire into the use of human sources with "obligations of confidentiality or privilege". However, Victoria Police considers that a reformed disclosure framework should not necessarily place determinative weight on the occupation, role or profession of the human source. Rather, it should focus on whether the information obtained from a human source is likely to be confidential or privileged.
- 19 The occupation, role or profession of a human source is likely to have an important bearing on the assessment of whether information imparted to Victoria Police is likely to be confidential or privileged. However, the occupation will not by itself be determinative. There will be many circumstances where a human source in an occupation with legal obligations of confidentiality or privilege can provide information unrelated to that occupation which is plainly not subject to such obligations. Take the example of a doctor who becomes a registered human source and provides information to Victoria Police about a neighbour's illegal drug operations. While it may readily be accepted that a doctor has legal obligations of confidentiality, it would also be readily accepted that those obligations are not engaged in these circumstances. A disclosure regime that would require disclosure of information that may identify the doctor in this example by reason of their profession would create an unnecessary risk to his or her safety. This would deter them and others from assisting police.
- 20 Conversely, there will also be circumstances where a human source who is not personally in an occupation subject to recognised legal obligations of confidentiality or privilege might receive confidential or privileged information. Take the example of a human source who is a cleaner who obtains privileged information while cleaning the chambers of a criminal defence barrister. A disclosure regime which placed determinative weight on the occupation, role or profession of the human source would fail to identify that the human source had provided police with privileged information.
- 21 A difficulty also arises because there is a substantial degree of uncertainty as to the meaning of the term "*human source with legal obligations of confidentiality or privilege*". In the Comrie Review and Kellam Report, this degree of uncertainty is indicated by the use of signals "e.g." and "etc" in listing the occupations or professions subject to such obligations. While it may readily be accepted that a lawyer or doctor is an individual with legal obligations of confidentiality or privilege, it is more difficult to identify other professions with coextensive obligations, and how these obligations might impact upon the appropriateness of the receipt and/or use of information obtained by Victoria Police in those circumstances.
- 22 For example, while it is accepted that a priest may have an obligation of confidentiality (arising out of the confessional sacrament in the Christian religion), it is not clear whether there is an equivalent obligation for religious officials in other, non-confessional faiths. In this respect, Victoria Police anticipates that the use of the word 'priest' may evince an intention that the term also extends to other members of the clergy of any church or other religious domination that is entitled to refuse to

divulge the contents of a religious confession.⁵ Similarly, in respect of a doctor's legal obligations of confidentiality or privilege, it is not clear whether such obligations also arise in respect of all other members of allied medical professions.

- 23 Notwithstanding Victoria Police's view that the critical focus ought to be whether information itself may be privileged or confidential, rather than the occupation of the source, in view of the uncertainty that surrounds the meaning of the term "*human source with legal obligations of confidentiality or privilege*" Victoria Police would encourage clear express guidance regarding:
- a. the meaning of "legal obligations of confidentiality or privilege" for example by providing definitive guidance as to:
 - i. the specific occupations that are subject to such legal obligations; and
 - ii. the legal source of such obligations; and
 - b. the types of circumstances in which individuals who, while not personally subject to legal obligations of confidentiality or privilege, are nonetheless likely to receive such information.
- 24 Victoria Police would welcome all further opportunities to contribute to the formulation of such guidance.

The need for a systemic solution involving Victoria Police and prosecutorial agencies

- 25 As noted in the Consultation Paper, the duty of disclosure in criminal prosecutions applies to 'the prosecution' in a broad sense, including the prosecutorial agency such as the Office of Public Prosecutions (OPP) or the Office of the Commonwealth Director of Public Prosecutors (CDPP) and law enforcement agencies such as Victoria Police. Given the concurrent responsibilities of disclosure, Victoria Police considers that any reform to the system of disclosure in Victoria must encompass all respective components of 'the prosecution'.
- 26 Victoria Police considers that an effective way in which the system of disclosure in Victoria may be improved would be to enhance the degree of consultation between investigators and prosecutors. Victoria Police considers that early engagement between its members and the OPP/CDPP in relation to complex legal issues concerning questions of disclosure, relevance and PII would strengthen the overall systemic approach to disclosure. It is anticipated that the early involvement of prosecutors would include the opportunity for Victoria Police members to consult and seek advice from prosecutors in relation to these matters.
- 27 However, Victoria Police does not propose that it is necessary to consult with or seek advice from the prosecutorial agencies in relation to *all* disclosure or PII issues. Further, it is not proposed that the Chief Commissioner would cease his or her role in independently making claims of PII. Rather, it is suggested that where Victoria Police identifies especially complex disclosure issues which might impact on the fairness of the prosecution, there be a clear and consistent process enabling Victoria Police to engage with the prosecutorial agency at the earliest possible time.
- 28 As matters currently stand, there is inconsistency between the approaches taken by the OPP and the CDPP on early engagement with investigators on questions of disclosure. It is important that any proposed reforms should make clear the proper

⁵ See, eg, *Evidence Act 2008 (Vic)* s 127.

respective roles of police and prosecutors in the disclosure regime, and facilitate a greater degree of consultation between agencies.

Potential models for reform

- 29 Victoria Police considers that an improved disclosure regime may include (but not be limited to) the following characteristics:
- a. a mechanism to enable prosecutorial agencies to have greater involvement in the disclosure process while safeguarding procedural fairness and the perception of procedural fairness;⁶
 - b. a mechanism by which Victoria Police and/or prosecutorial agencies may proactively bring matters concerning PII claims before the court for timely determinations;⁷
 - c. dedicated disclosure officers within Victoria Police, including within investigative teams, as well as within the Human Source Management Unit (HSMU) and other dedicated source units, that is, dedicated disclosure officers at both ends of the sterile corridor;⁸ and
 - d. implementation of an electronic document management system, with sufficient capability to handle sensitive information, by which Victoria Police could electronically collect, categorise and disclose materials.⁹
- 30 With regard to the implementation of an electronic document management system, the importance underpinning this required improvement is that presently, Victoria Police does not have a single repository for all information that may form part of a criminal investigation. Accordingly, information and documents created during the course of an investigation may be located in different locations, making it difficult for an informant or other Victoria Police members to identify all relevant information.
- 31 Noting that modern reporting and data recording means that investigations tend to produce large volumes of material, which forms part of the challenge for members in complying with disclosure obligations, Victoria Police considers that technology should be a major part of any reform considered to strengthen the Victorian disclosure regime.
- 32 In considering potential models for reform, Victoria Police welcomes the Royal Commission's willingness to consider the frameworks in other jurisdictions, specifically the United Kingdom and New South Wales. Victoria Police considers that aspects of the disclosure regimes in these jurisdictions, appropriately adapted, may be helpful in guiding reform of the Victorian disclosure regime.
- 33 Notably, in the UK, the *Criminal Procedure and Investigations Act 1996 (CPIA)* provides for a disclosure regime which involves the following series of clear steps:
- a. police investigators carry out all reasonable lines of enquiry;
 - b. all material generated by the investigation is recorded and retained by a disclosure officer;
 - c. material relevant to that investigation is identified;

⁶ See further the responses to questions, 1, 2, 4, 5 and 8.

⁷ See further the response to question 7.

⁸ See further the responses to questions 3 and 4.

⁹ See further the responses to questions 1, 2, 4, 5, 6 and 10.

- d. any sensitive material is highlighted;
 - e. police provide the Crown Prosecution Service with schedules of all relevant material;
 - f. any material which might undermine the prosecution case or assist the defence is identified;
 - g. if such material is non-sensitive—the defence is provided with copies or access; and
 - h. if such material is sensitive—the Crown Prosecution Service may apply for orders protecting the material from disclosure to the defence on the basis of PII. Whether to make an application asserting PII is a decision made following consultation with police.
- 34 One benefit of the approach in the UK is that it makes clear that the Crown Prosecution Service may be consulted on questions of disclosure. Another feature of the UK regime that should be noted is the prosecution’s obligation to disclose unused material arises only where the defence has indicated that it will contest the charges, or the matter has otherwise been remitted to trial.¹⁰ This contrasts with the regime in Victoria in which the prosecution’s full disclosure obligations arise earlier, prior to a committal hearing. It should be observed that the approach in the UK may enable the prosecution to more efficiently allocate resources to determining the sometimes complex PII and relevance questions which can arise in relation to unused material.
- 35 When investigators identify complex and controversial PII issues, Victoria Police considers it would be desirable for there to be a clear mechanism to have them determined by a court at an early stage. In appropriate cases, such applications should be able to be made in the absence of the accused person and defence lawyers, and/or with an affected person such as a human source being able to appear. This would enable the prosecution to proceed on a sure footing that PII does apply. Alternatively, an early determination that material is not immune from disclosure on the basis of PII may result in the prosecution abandoning a criminal case at an early stage. Either way, a mechanism allowing for early judicial oversight of particularly complex issues would foster confidence in the administration of criminal justice.
- 36 Victoria Police also considers that in cases involving human sources, including those with obligations of confidentiality or privilege, the use of disclosure officers embedded in investigation teams, the HSMU and other dedicated source units is important. This may overcome the challenge to effective disclosure that can result from the implementation of a “sterile corridor”: where police investigators are not aware of the source of information let alone whether the source has legal obligations of confidentiality or privilege and the circumstances in which those obligations may be engaged.
- 37 In this context, Victoria Police has commenced taking proactive measures to enhance its practices with respect to disclosure. For example:
- a. piloting the introduction of disclosure officers by creating positions for two new disclosure officers, who will be embedded on both sides of the sterile corridor and be responsible for compiling documents and conducting assessments of

¹⁰ Crown Prosecution Service, *Disclosure Manual* (2018) 5.

relevance, including seeking legal advice and liaising with the informant and/or the OPP where appropriate. Recruitment is underway for the first two positions (Senior Sergeants), which will be embedded in Crime Command and the HSMU;

- b. development and implementation of a training video on the Victoria Police internal video portal, 'Bluetube', highlighting the importance of disclosure and designed to increase the understanding of, and compliance with, disclosure obligations and the processes involved in making PII claims. At the time of writing this is in the final stages of development;
- c. implementation of a standard disclosure process in matters relating to sexual offences where the complainant is a child or cognitively impaired;
- d. finalisation of the Victoria Police Disclosure Handbook;
- e. review of the adequacy of the Victoria Police human source management policy, including disclosure obligations;
- f. review of existing training materials and compliance with organisational policy requirements;
- g. piloting electronic brief disclosure in certain summary matters involving Victoria Legal Aid; and
- h. considering options for external oversight of compliance with disclosure requirements.

38 With these models for reform being considered, Victoria Police believes that changing one part of the system will consequentially affect other parts and that any recommendations for reform need a whole of system approach. It is the sum of these elements rather than a single characteristic, that will lead to a robust disclosure regime. In turn, Victoria Police acknowledges that any such recommendations are likely to have funding and resourcing implications for Victoria Police and other stakeholders in the criminal justice system. It is anticipated that at a minimum, effective systemic reform to the disclosure regime will likely necessitate changes to Victoria Police and/or prosecutorial agencies' funding and resourcing requirements.

39 Victoria Police is committed to continuing to inform and to respond to matters raised by the Royal Commission. Victoria Police recognises that the Royal Commission's inquiry is ongoing, and that the Royal Commission may make recommendations relevant to Victoria Police's human source management and disclosure frameworks.

Responses to specified questions

40 Noting these observations, and noting again that Victoria Police reserves its right to clarify, modify and elaborate on these matters in its final submissions, Victoria Police responds to each of the questions in the Consultation Paper as set out below.

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?

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?

- 41 Given the degree of overlap between the matters canvassed in questions 1, 2 and 5 of the Consultation Paper, Victoria Police considers that it is expedient to provide responses to these matters together. By way of summary, subject to the matters outlined in further detail in this document, Victoria Police considers that:
- a. In relation to questions 1 and 2, Victoria Police broadly supports a disclosure regime in which it would disclose to the OPP:
 - i. the existence of all information or documents that are relevant to the case of the accused (including, where relevant, information relating to use of a human source and information subject to a claim for PII); and
 - ii. when requested by the OPP, or upon the request of Victoria Police (for example, for the purpose of obtaining advice in relation to the disclosure of certain information or documents), copies of the relevant documents.
 - b. In relation to question 5, noting Victoria Police's response to questions 1 and 2, Victoria Police considers that the existing statutory framework adequately provides for appropriate disclosure from Victoria Police to the OPP. Notwithstanding this, Victoria Police would welcome the OPP prosecutors' early involvement in relation to complex disclosure issues and where appropriate, assistance with making any subsequent applications.
- 42 In considering these matters, Victoria Police considers that regard should be had to:
- a. the inherent uncertainty which can be involved in identifying information or documents that are 'relevant to the case of the accused';
 - b. the effectiveness of Victoria Police's document management systems in identifying information Victoria Police holds and which is relevant; and
 - c. as outlined in the preface, the importance of a systemic solution which facilitates a greater degree of consultation between investigators and prosecutorial agencies.
- 43 These matters are considered in turn below.
- Complexities in relevance assessment*
- 44 Victoria Police considers that a critical assessment underlying questions 1, 2 and 5 of the Consultation Paper is the assessment of whether a document or information is in fact 'relevant to the case of the accused'. In this context it is noted that consideration of whether material is 'relevant' often involves a complex and time-consuming analysis of the factual and legal elements of a criminal prosecution.¹¹

¹¹ See David Plater and Lucy de Vreeze, 'Is the "Golden Rule" of Full Prosecution Disclosure a Modern "Mission Impossible"?' (2012) 14 *Flinders Law Journal* 133, 158.

These complexities are typically compounded in the case of human source information.

- 45 Victoria Police appreciates the importance of applying a broad test for relevance in the context of criminal prosecutions — Victoria Police considers that the test for relevance articulated in the *Policy of the Director of Public Prosecutions for Victoria (DPP Policy (Vic))* is an example of such a broad test.¹² In many instances, the DPP Policy (Vic) test for relevance is applied by Victoria Police without issue. However, there are instances, particularly in the context of human source information, in which the analysis of ‘relevance’ involves a number of complex considerations related to the conduct of the prosecution.¹³ In these circumstances, Victoria Police anticipates that OPP prosecutors may be in a position to usefully assist Victoria Police members to make appropriate assessments as to the relevance of materials for potential disclosure.
- 46 It must be noted that in certain circumstances, given the importance of ensuring the safety of human sources, Victoria Police considers that it may be appropriate for Victoria Police to provide OPP prosecutors with relevant extracts of human source files only.

Document management

- 47 As noted above, Victoria Police considers that any proposed reforms to the Victorian disclosure regime must adequately take into account the current effectiveness of Victoria Police’s IT capability, including document management systems. Presently, Victoria Police does not have a single repository for all information that may form part of a criminal investigation. This is in part because Victoria Police’s information technology systems are not able to support an organisation-wide document management system. As a result, in many instances, information and documents created during the course of an investigation may be located in a number of different locations, such as on local and shared drives. In these circumstances, it may be difficult for an informant or other Victoria Police members to comprehensively catalogue and identify *all* information held by Victoria Police that may be relevant to the case against an accused person.
- 48 Increasingly, the scope of modern reporting and data recording means that investigations tend to produce large volumes of material. New forms of data and documentation (such as mobile phone application data and police body-worn video) are now created in the course of an investigation, that were typically not created in investigations as recently as a decade ago. Victoria Police anticipates that this trend will continue in the future, leading to larger volumes of material required to be assessed for disclosure. Some of the challenges of police and prosecutors complying with disclosure obligations in the digital age have been expressly recognised in the UK.¹⁴
- 49 While the voluminous data created through modern technology is part of the challenge for members in complying with disclosure obligations, Victoria Police considers that technology should be a major part of any reform considered to strengthen the Victorian disclosure regime. A useful starting point would be the

¹² Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 6 [15]–[16].

¹³ The peculiar difficulties of assessing relevance in the context of human source information have been identified in UK jurisprudence. See, eg, *R v H & C* [2004] UKHL 3.

¹⁴ United Kingdom Attorney General’s Office, *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (November 2018) 36–43.

implementation of a central, organisation-wide electronic document management system, with sufficient capability to handle sensitive information, and allow Victoria Police to electronically collect, categorise and share materials including briefs of evidence and disclosure documents.

50 Victoria Police would welcome the opportunity to provide further information about document management requirements at a later point and notes that any such recommendation for reform is likely to have funding and resource implications.

The need for early engagement on relevance and PII considerations

51 As noted in the preface to this document, Victoria Police supports a disclosure regime which fosters early consultative engagement between investigators and prosecutorial agencies on questions of disclosure. Victoria Police anticipates that OPP prosecutors will be able to provide expert assistance in determining complex questions of relevance and PII. However, the DPP Policy (Vic) does not generally provide for Victoria Police to consult with prosecutors in relation to making assessments of PII claims. Victoria Police welcomes the Royal Commission's willingness to enquire into the disclosure regimes in place in New South Wales and the United Kingdom, both of which provide for consultation to take place at an early stage between prosecutors and investigators in relation to matters of disclosure.

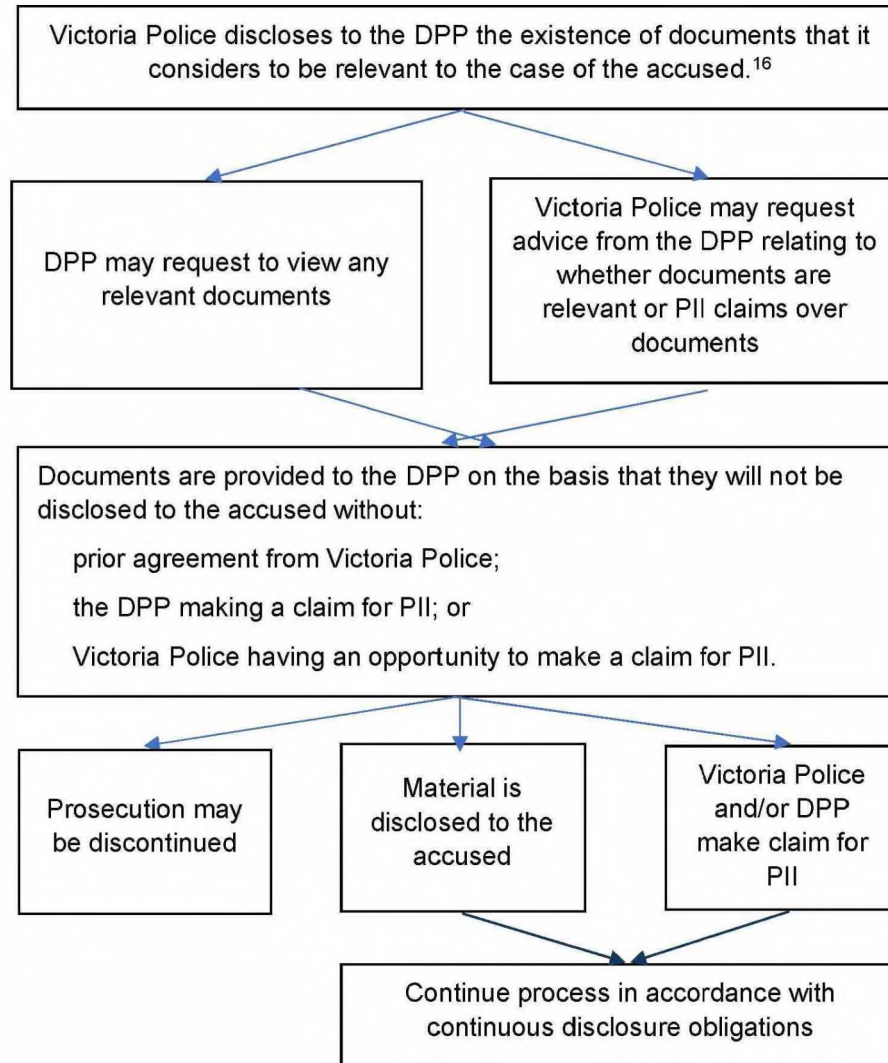
52 Victoria Police considers that greater degree of consultative engagement can be achieved between investigators and prosecutors within the existing legislative framework. As such, it is unnecessary to impose any statutory requirement that Victoria Police provide PII materials to the DPP/OPP on the DPP/OPP's request.

53 In this regard, it is noted that under the current legislative framework in Victoria, section 27 of the *Public Prosecutions Act 1994* (Vic) provides that where a prosecution is referred or directed to the DPP, Victoria Police (by way of the police informant) must provide:

- a. a full report of the circumstances of the offence;
- b. copies of the statements of any witnesses;
- c. copies of all relevant documents; and
- d. any other information and material that the Director may require.

54 Victoria Police and the OPP share the same position with respect to disclosure of material to the accused. That is, both Victoria Police and the OPP consider that subject to any claim of PII or legal professional privilege or other statutory provisions to the contrary, materials that are relevant to the case of the accused should be disclosed.

55 In essence, Victoria Police supports a disclosure regime broadly consistent with the below flowchart:



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?

- 56 Victoria Police considers that the Form 30 and the Form 11 are useful parts of the disclosure process. However, they should not be considered as the only means through which disclosure can or should occur, particularly given the continuing nature of the prosecution's duty of disclosure as reflected in s 111 of the *Criminal Procedure Act 2009* (Vic).
- 57 Victoria Police considers that improvements to the existing mechanisms can be made through implementation of the measures identified in the preface to this response, namely:

¹⁵ The disclosure of the existence of relevant documents would be subject to any relevant statutory prohibitions on disclosure, such as any prohibitions under Commonwealth or other laws relating to matters concerning national security.

- a. improved training and support for Victoria Police members to highlight the importance of disclosure and increase understanding of, and compliance with, existing disclosure obligations;
- b. a mechanism to enable prosecutorial agencies to have greater involvement in the disclosure process while safeguarding procedural fairness and the perception of procedural fairness;
- c. a mechanism by which Victoria Police and/or prosecutorial agencies may proactively bring matters concerning PII claims before the court for timely determinations in the absence of the accused;
- d. dedicated disclosure officers within Victoria Police, including within investigative teams, as well as within the HSMU and other dedicated source units, that is, dedicated disclosure officers at both ends of the sterile corridor; and
- e. an upgraded document management system, with sufficient capacity to handle sensitive information, by which Victoria Police could electronically collect, categorise and disclose materials.

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?

- 58 Victoria Police considers that the use of a disclosure certificate could be considered in Victoria to facilitate the disclosure process in matters which proceed indictably. Victoria Police does not consider a disclosure certificate necessary for summary matters noting, amongst other things, the sheer volume of matters, as discussed below, would place considerable strain on both the resources of Victoria Police and the criminal justice system should certification be required in every matter and given there already exists progressive disclosure obligations in summary matters.
- 59 Victoria Police has acknowledged its openness to consider the implementation of a disclosure certificate in Victoria in recent submissions to the Victorian Law Reform Commission.¹⁶ Victoria Police is currently considering and has not yet formed a final view as to an appropriate form of members' certification, and an appropriate manner by which a form of certification could be imposed within Victoria Police.
- 60 As noted above, Victoria Police broadly supports the form of the NSW disclosure certificate, subject to appropriate amendments being made in order to more accurately reflect the Victorian disclosure regime. For example the certification in the NSW disclosure certificate provides that members must certify that:
- I acknowledge that if I object to the disclosure of relevant protected material to the DPP, I can request a conference with the responsible solicitor in the Office of the Director of Public Prosecutions to discuss reasons for this.*
- 61 Further, in completing the disclosure certificate, members must tick 'yes' or 'no' to the question of whether they have requested a meeting with a solicitor from the NSW Office of the Director of Public Prosecutions.

¹⁶ Victoria Police, *Submission to the Victorian Law Reform Commission Committals Issues Paper*, <https://www.lawreform.vic.gov.au/sites/default/files/Sub_25_VictoriaPolice_4Oct2019.pdf> .

- 62 Presently, Victoria Police does not routinely hold conferences with OPP prosecutors to discuss assessments relating to the potential disclosure of materials. Unlike the position in NSW, there is no provision in the DPP Policy (Vic) which provide for conferences to take place between prosecutors and police members to consider PII claims.¹⁷ However, as discussed above, Victoria Police would welcome the early involvement of the OPP.
- 63 Moreover, whilst Victoria Police supports the imposition of a mechanism for certification of members' compliance with their disclosure obligations, Victoria Police considers that the introduction of a disclosure certificate will not by itself resolve all issues relating to disclosure. The introduction of a disclosure certificate regime must also be accompanied by other measures such as dedicated disclosure officers, improved document management technology and dedicated source management teams.
- 64 The introduction of a disclosure certificate regime will not necessarily lead to the capture of *all* sensitive or protected material that may be relevant to the case of an accused. For example, without the use of dedicated disclosure officers there may be difficulties for an investigating officer in certifying his or her compliance with their disclosure obligations in the context of a prosecution involving a human source managed through a sterile corridor.
- 65 Further, Victoria Police considers that the introduction of a disclosure certificate would more effectively enhance the Victorian disclosure regime if it were coupled with the introduction of a document management system in which Victoria Police members could catalogue and identify all relevant materials to the investigation and prosecution of an accused person. In this context it is noted that, by way of the disclosure certificate, an informant may only certify that they have disclosed materials that they are actually aware of — the disclosure certificate itself is unlikely to assist members in cataloguing and identifying all relevant materials.

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?

- 66 Although summary matters make up the vast bulk of prosecutions in Victoria, use of human sources in the context of summary matters is rare. As noted earlier, the current use of a human source with legal obligations of confidentiality or privilege in any prosecution (summary or indictable) is even more rare. It follows that the use of a human source with legal obligations of confidentiality or privilege in a summary matter is exceptionally unlikely (albeit not impossible). Notwithstanding this, Victoria Police recognises that the duty to disclose relevant information applies to the same extent in both summary and indictable matters.
- 67 Prosecution of summary matters in Victoria is typically managed by the Victoria Police prosecutions service, called the Prosecutions Court Unit. The Prosecutions Court Unit is headed by a Superintendent as Officer in Charge, reporting to the Executive Director of the Legal Services Department within Victoria Police. The Prosecutions Court Unit operates independently of police investigators, and in many

¹⁷ See DPP Policy (Vic) [15]–[19] of New South Wales Office of the Director of Public Prosecutions, *Prosecutions Guidelines* (1 June 2007) 30–2.

respects, it operates in summary proceedings in a similar manner to the OPP/DPP and CDPP in indictable proceedings.

- 68 According to statistics provided in the 2018-19 Report on Government Services, in the financial year 2018-19, Victoria Police managed around 250,000 cases across the State, comprising:
- a. around 150,000 summary prosecution briefs;
 - b. about 50,000 applications for family violence orders; and
 - c. around 50,000 other matters such as bail hearings, licence restoration, interlock applications and ancillary applications.
- 69 By comparison, Victoria Police understands that during the same time period, the OPP managed 3,129 indictable offence matters.¹⁸
- 70 To manage the significant workload of summary matters, the Prosecutions Court Unit must operate efficiently with a focus on early resolution of matters. Much of this work is done before the matter enters the courtroom, with significant effort on summary case conferencing to negotiate pleas. Victoria Police estimates that more than 98% of summary matters are resolved through this open process of negotiation, with only around 1.5% of matters being ultimately listed as contested matters. As a result, in the context of summary proceedings there is a focus on disclosure of information to the accused at an early stage largely by way of the preliminary brief.
- 71 Without early resolution of summary matters, the courts and associated legal support services such as Victoria Legal Aid could become swamped by contested hearings.
- 72 A major challenge that Victoria Police members face in relation to disclosure in summary matters arises from the sheer volume of summary matters. There is a substantial amount of material required to be collated and assessed for disclosure for the preliminary brief and full brief (if required), and otherwise in accordance with Victoria Police's continuous disclosure obligations. In the absence of an appropriate document management system capable of linking all relevant investigation material to a brief, effective disclosure will remain an inefficient and time consuming process.
- 73 In this context it is noted that any adjustments made to intensify or introduce more onerous disclosure obligations, particularly in relation to summary matters, without appropriate systematic support, may make management of voluminous material even more challenging for Victoria Police. This may result in significant delay in the finalisation of summary matters, particularly in uncontested cases.
- 74 Victoria Police considers that the disclosure regime in relation to summary matters may be enhanced by increased resourcing for Victoria Police's information and document management systems. Specifically, it is anticipated that Victoria Police may benefit from resourcing targeted towards:
- a. an effective method of creating and disclosing electronic preliminary briefs in summary matters; and
 - b. a centralised document management system with sufficient capacity to handle sensitive information, by which Victoria Police could electronically collect, categorise and disclose materials.

¹⁸ Office of the Director of Public Prosecutions, *Annual Report 2018-19*, 11.

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?

75 In the preface to these responses, and the response to questions 1, 2 and 5, Victoria Police has outlined a number of challenges in relation to the approach taken in Victoria to disclosure where public interest immunity issues are involved. In responding to this question, Victoria Police repeats those matters, and also raises further observations in relation to two challenges which relate to:

- a. the lack of a mechanism by which Victoria Police and/or prosecutorial agencies can proactively approach the Court for determinations regarding PII; and
- b. specifically in the context of matters involving disclosure of human source information, protection of the identity of the human source.

Mechanism to seek early determination of PII claims

76 First, Victoria Police considers that a further substantial challenge to the approach taken in Victoria to disclosure where public interest immunity is involved is the lack of a mechanism by which Victoria Police and/or prosecutorial agencies may proactively seek a determination from the Court with respect to PII claims over materials. In his context, Victoria Police is mindful that the Court must play a central role in assessing and authorising the disclosure of any information that would tend to reveal the identity of a human source. In *AB & EF v CD*, Justice Ginnane noted that:¹⁹

[w]here assurances are given to registered informants, to others or to the public in general . . . that their identity will be protected, those assurances should not be broken by the state without a judicial decision where the interests of the informant, the Crown, the defendant to a trial and the public interest can be carefully and impartially considered.

77 According to Justice Ginnane, where a human source would oppose the release of information that would tend to disclose his or her identity, “the prosecutor should leave the issue of the applicability of PII for the Court to decide”.²⁰

78 Justice Ginnane found that the Court has jurisdiction to make declarations as to its assessment of the competing public interests in disclosure, and that there does not have to be a criminal proceeding on foot to consider the application for declarations.²¹ In doing so, Justice Ginnane also referred to the position in the English line of case authority that the Court has the ability to deal with PII claims by way of ex parte applications without giving notice to the accused in “highly exceptional cases”.²² Victoria Police considers that the ability of the Court to deal with PII claims on an ex parte basis recognises the possibility that in certain circumstances, disclosure to the defence of PII material may put at risk the safety of a human source or other individuals.

79 Notwithstanding Justice Ginnane’s findings as to the jurisdiction of the Court to make declarations regarding the disclosability of human source information, Victoria Police is not aware of any express mechanism by which it can bring such matters before

¹⁹ *AB & EF v CD* [2017] VSC 350, 36 [95]; *The Queen on the application of WV v Crown Prosecution Service* [2011] EWHC 2480.

²⁰ *AB & EF v CD* [2017] VSC 350, 34 [89].

²¹ *AB & EF v CD* [2017] VSC 350, 36 [96].

²² *AB & EF v CD* [2017] VSC 350, 34 [90]; *R v Ward* [1993] 1 WLR 613.

the Court. In these circumstances Victoria Police considers that it may be assisted by the introduction of a statutory mechanism under which Victoria Police and/or prosecutorial agencies could, in a timely and efficient manner, seek the Court's determination as to the competing public interests for and against disclosure of human source information or PII claims more broadly.²³ It may also be appropriate in such matters for the human source to be notified and represented in any proceedings.

80 Presently, the most common mechanism by which Victoria Police brings these matters before the Court is by way of objection to the disclosure of materials in response to a subpoena served on the Chief Commissioner by an accused. Victoria Police considers that the interest of justice in making timely and efficient disclosures may be assisted by the introduction of a mechanism providing for applications to the Court in relation to PII claims to be made by Victoria Police and/or prosecutorial agencies.

81 For example, in Western Australia section 138 of the *Criminal Procedure Act 2004* (WA) provides that the Court may, in respect of a disclosure requirement, make an order that dispenses with all or part of the prosecution's statutory disclosure requirements if it is satisfied that:

- a. there is a good reason to do so; and
- b. no miscarriage of justice will result.²⁴

82 Importantly, an application for an order under section 138 "may be made by a prosecutor without notice to the accused and may be dealt with in the absence of the accused".²⁵ Victoria Police considers that section 138 of the *Criminal Procedure Act 2004* (WA) is an example of an express statutory mechanism by which the prosecution may proactively bring to the attention of the Court the existence of human source information properly the subject of the Court's power to order disclosure, which could be considered appropriate for the Victorian jurisdiction.

Protection of human sources

83 Secondly, the protection of human sources from the risks to their safety which may arise from disclosing their identities is a perennial challenge for Victoria Police. Victoria Police treats the protection of the anonymity of human sources with the utmost importance, and considers that any reformed disclosure regime must retain sufficiently robust PII safeguards to ensure the protection of human sources. As noted in the preface to this document, the public interest in protecting the identity of a human source has been recognised in various jurisdictions.²⁶ The human rights of a human source, particularly the rights to life, security and family life have been similarly recognised in the context of disclosure of their identity.²⁷

84 There is a risk that sophisticated criminal organisations will seek to use the disclosure regime as a means to uncover the identity of human sources. Particular

²³ *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84.

²⁴ *Criminal Procedure Act 2004* (WA) s 138(3).

²⁵ *Criminal Procedure Act 2004* (WA) s 138(4).

²⁶ *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84, 88.

²⁷ See, eg, proceedings in relation to AB, EF & CD; *The Queen on the application of WV v Crown Prosecution Service* [2011] EWHC 613.

risks arise in the context of disclosure of 'single source information', that is, information which is known only to an accused and one other person.

- 85 In these circumstances, Victoria Police considers that any reforms proposed to the disclosure regime in Victoria must be designed to ensure that the appropriate balance is maintained between the need to provide appropriate disclosure to accused persons and the public interest in protecting the safety of human sources.

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?

- 86 As stated in the preface to these responses, and the response to questions 1, 2 and 5, Victoria Police would welcome the OPP prosecutors' early involvement in relation to some particularly complex circumstances in which assessing a PII claim raises difficult legal issues impacting on the overall prosecution. These complex issues are not limited to concerns regarding human source management. Where appropriate, Victoria Police would welcome assistance from OPP prosecutors in making those applications.
- 87 Victoria Police considers that, further to the matters previously articulated in this document, early consultation between police and prosecutors may in certain circumstances have the advantage of assisting prosecutors to manage trials in a manner minimising the potential for miscarriages of justice. For example, if prosecutors have a more intimate knowledge of PII materials by way of their engagement with police, they may be better equipped to run a trial without directing the Court to matters the subject of PII claims. This may promote the more efficient conduct of a trial and reduce the likelihood of a party seeking to adduce evidence that may risk a miscarriage of justice.²⁸
- 88 Victoria Police considers that any reforms intended to promote the early involvement of the OPP in assessing PII claims should be coupled with appropriate safeguards to ensure the right of the accused to a fair trial. For example, there may be a risk relating to perceptions of unfairness if the same individuals at the OPP are involved in running both a PII application and a substantive prosecution. In these circumstances a perception of unfairness to the accused may arise if prosecutors are able to have access to materials that are not available to the accused or to the court hearing the matter, notwithstanding the fact that the PII material cannot be adduced as evidence in the prosecution. Victoria Police considers that the risks to such a perception of unfairness may be mitigated by measures designed to restrict derivative use of PII materials within the OPP. Such measures could include limited use of barriers between prosecutors involved in PII applications and prosecutors involved in substantive prosecutions.

²⁸ See, eg, *R v Solomon* (2005) 92 SASR 331, 358–9 [104]–[116].

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?)

- 89 Victoria Police has provided to the Royal Commission a number of documents outlining Victoria Police's policies, procedures and training materials in relation to disclosure obligations, public interest immunity and legal professional privilege and confidentiality in response to NTP-002, NTP-004 and NTP-296. A table outlining these materials was produced to the Royal Commission on 26 November 2019.
- 90 Victoria Police acknowledges that some evidence before the Royal Commission suggests that in the past there may have been inconsistent practices and methods relating to disclosure matters. Victoria Police is making further inquiries about how this historic training has been delivered and understood by members, and will provide further information to the Royal Commission on these matters. Victoria Police's inquiries in this respect will also inform the ongoing development and implementation of policies and training throughout the organisation aimed at improving disclosure and human source management practices.
- 91 In the disclosure space, Victoria Police is already taking steps to ensure that members understand their obligations. In conjunction with the Victorian Government Solicitor's Office, Victoria Police has finalised the Victoria Police Disclosure Handbook and is currently in the process of incorporating the Disclosure Handbook into training materials. The Disclosure Handbook comprehensively outlines members' disclosure obligations, providing detailed information in relation to matters including:
- a. members' ongoing obligations of disclosure and obligations of disclosure in providing briefs of evidence;
 - b. how to compile a brief of evidence in proceedings for summary and indictable offences;
 - c. checklists in relation to disclosure of particular kinds of information (such as notes of civilian witnesses, LEAP and Interpose database entries, statements (including draft statements), controlled operations, and surveillance and telephone intercept material; and
 - d. material subject to statutory prohibitions on disclosure, legal professional privilege and PII.
- 92 Victoria Police is currently in the process of implementing new training courses and materials to accompany the Disclosure Handbook. Victoria Police will provide further information in relation to the Disclosure Handbook and accompanying training materials as they are completed. Additionally, as part of its regular process of policy improvement, Victoria Police is also reviewing the adequacy of other Victoria Police policies that relate to or concern members' disclosure obligations.
- 93 Further, Victoria Police is piloting the introduction of disclosure officers by creating positions for two new disclosure officers, one within the HSMU and one within Crime Command. Victoria Police is undertaking this pilot program to ascertain further information about whether disclosure officers may play a useful role in overcoming some of the difficulties that arise in the context of disclosure of human source

information, and what further requirements may be needed to assist members in complying with their disclosure obligations.

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?)

- 94 Victoria Police considers that the volume of potentially disclosable material is a key challenge experienced by police officers in discharging their disclosure obligations, particularly in cases where PII arises. As stated above, Victoria Police anticipates that this challenge will increase given the increasing amounts of potentially relevant documentation and data storage. This will likely be compounded in the absence of enhanced resourcing investment in Victoria Police's information management systems.
- 95 As noted in the response to questions 1, 2, 5 and 6, the absence of an adequate document management system presents a challenge to Victoria Police in discharging its disclosure obligations. Victoria Police therefore considers that measures designed to improve the disclosure regime in Victoria should adequately provide for necessary enhancements of Victoria Police's information management systems. These enhancements could include:
- a. an effective method of creating and disclosing electronic preliminary briefs in summary matters; and
 - b. implementation of an electronic document management system, with sufficient capability to handle sensitive information, by which Victoria Police could electronically collect, categorise and disclose materials.
- 96 Victoria Police acknowledges that whilst an enhanced document management system will better enable it to acquit its disclosure obligations and facilitate the efficient administration of justice, any such recommendation for reform will have funding and resource implications.
- 97 Victoria Police considers that some other key challenges include:
- a. a potential lack of understanding among some investigators about disclosure obligations in cases involving PII, specifically in relation to human source information due to its specialist nature;²⁹ and
 - b. as noted above, the lack of a mechanism by which Victoria Police and/or prosecutorial agencies can proactively make applications to the Court for a determination of PII claims.³⁰

²⁹ Some measures taken by Victoria Police to address this challenge are outlined at paragraph 37 and the response to question 9.

³⁰ See further the response to question 9.

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?

- 98 Victoria Police will provide complete submissions to the Royal Commission at the conclusion of evidence.