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— SUBMISSION —

ROYAL COMMISSION INTO THE "LAWYER X" / INFORMER 3838 SCANDAL

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Shhh. Can You Keep a Secret?

Everything happens for a reason, and we must be on the right side of reason![i]

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Shhh. Can you keep a secret? The concealed weapon in the lawyers' arsenal is as much double-edged sword as it is shield for these defenders of the underclass; proponents of justice and embodiments of truth. If legal practitioners sound like briefcase-toting superheroes, the reality is much more sobering. As members of an ancient and esteemed profession who have responded to the honourable calling to plead at the bar, these advocates have advanced their clients' interests from behind the legal provision known as Legal Professional Privilege. Mired in controversy, the contemporary embodiment of 'privilege' has again come to the fore courtesy of the "Lawyer X" / Informer 3838 Scandal.

LEGAL PRINCIPLE: Legal Professional Privilege

PROPOSED LAW REFORM: To give renewed clarity to the principle of legal professional privilege by reducing and reverting the scope of the rule so only confidential client-counsel communications made for the *express* purpose of 1) giving or receiving legal advice; and/or 2) communications made with a view to actual or pending litigation are covered. Any and all other communications, including, but not limited to, those occurring outside the formal legal setting, are extraneous and not to be covered by the rule.

RE-INTRODUCE: The 'Sole Purpose' Test

FACTUAL SCENARIO: Lawyer X is alleged to have breached legal professional privilege by disclosing confidential client-counsel communications to Victoria Police's Purana taskforce for the purpose of effecting successful, albeit improper, prosecutions and inaccurate legal outcomes. Lawyer X indicated that she 'began to provide intelligence to Victoria Police and … helped because [she] was motivated by altruism rather than for any personal gain'.[ii]

BACKGROUND:

The starting point in assessing how the "Lawyer X" / Informer 3838 travesty came to pass lies not in the immediate controversy in which Lawyer X is embroiled. Rather, the antecedents giving rise to this Royal Commission can be examined through the lens of two entwined High Court cases in which the principle rose to prominence. The 1976 case of *Grant v Downs*[iii] was the leading authority for the principle that the privilege should be **contained within strict limits**. I raise this as a critical point for consideration because – had the criminal clients of X had a bright-line test that clearly identified where the privilege began and ended – there could have been no doubt that many of their communications fell outside the ambit of the rule.

In *Grant,* Barwick CJ commented that the courts in this country were not bound by any statement of authority with respect to the principle. Accordingly, the *Grant* Court was required to determine and state the relevant principle which should operate in Australia.

In a 3:2 decision, the Court formulated the **'sole purpose'** test as the applicable criterion for legal professional privilege. Through confining the application of the rule to communications and/or materials *solely* created for the purpose of legal advice or use in litigation, the High Court restrained the privilege from travelling beyond the underlying rationale to which it is intended to give expression. In simple terms, if **the privilege's sweep was too broad,** the search for the truth would be compromised because a greater number of justifications would exist to shield communications from discovery. The Court went so far as to label the privilege 'an **impediment**, not an inducement, to frank testimony [which] detracted from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise'.[iv]

By contrast, the 1983 case of *Baker v Campbell*[v] broadened the scope of confidential client-counsel communications so that if the *dominant* purpose of communications was legal advice, this sufficed to bring the communication within the ambit of the rule (irrespective of whether or not it was connected to anticipated or actual litigation). The view articulated by Wilson J in *Baker* is particularly significant because, in reaching his decision, he conceded that he had been plagued by 'much anxious thought, in the course of which [his] opinion fluctuated from one conclusion to another'.[vi] Wilson J ultimately distinguished his judgment in *Baker* from an earlier privilege case over which he presided[vii] and acknowledged that he had finally 'arrived at the only result which afford[ed him] lasting satisfaction'.[viii]

This 'conscience' ruling, if you will, was not based on precedent or any other established form of legal authority, yet it provided the impetus for courts to extend the application of the privilege well beyond the limits required for the administration of justice. **How any moral line can be drawn at this boundary,** or how the law can protect a deliberate plan to defy the law and oust another person of his rights, is unfathomable.

HOW TO AVOID FUTURE FAILINGS: Keep legal professional privilege within justifiable bounds.

In the wake of Lawyer X's transgressions, which have caused incalculable injury to the integrity of the legal profession and the justice system (including the perversion of evidence); legal professional privilege should conform to a 'test of necessity' and we should be willing to restrict the concept accordingly. I see no virtue in retaining the 'dominant purpose' test. In my estimation, it is the **'Sole Purpose' test** to which the privilege should now revert. In drawing this conclusion, I have conducted detailed analysis of historical texts, case law and legislation. I put it to the Commission that the clients engaged by Lawyer X believed, in all likelihood, that everything they confidentially revealed to X was protected from disclosure, yet it is difficult to justify why communications between counsel and client should be immune if legal advice and/or litigation is not anticipated.

To extend legal professional privilege without limit to *all* client-counsel communication upon matters within the ordinary business of a barrister/solicitor and referable to that relationship is too wide. Such a 'loophole' effectively enables clients to exploit the rule. Although the conduct of Lawyer X — in showing a flagrant disregard for the privilege — is inverse to the intent and operation of the rule; the adoption of the **'Sole Purpose' test** is significantly easier

to satisfy given that it can easily be understood. By keeping it within a **very narrow compass**, we create a bright-line for determining where the protection commences and concludes.

A narrowing of the scope also deals with the argument of a 'risk' arising whereby legal practitioners are placed on the slippery slope of having to judge which confidences can be revealed and which cannot. Instead of client trust being compromised on the basis of confidential disclosures now being subject to discovery, the client would in fact own the discretion of whether to reveal or withhold information and any such disclosure would be at their own risk and to their own gain.

The conduct of Lawyer X has created an unhealthy moral state and double-minded attitude, with the barrister engaging in dual and inconsistent capacities as both informer and confidante. Given that the privilege has been wielded as both sword and shield, it is my desire to see the **'Sole Purpose' test** become a permanent fixture of the **21st-century** rationale of legal professional privilege. A positive change in the application of, and exception to, legal professional privilege has the potential to produce a recognised and lasting effect.

Legal Professional Privilege: Genuine Endeavour or Clever Marketing Scheme?

> *...Nimble and sinister tricks and shifts, in which they prevented the plain and direct course of the courts and brought justice into obliques and lines and labyrinths.*[ix]

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Practitioners and academics contend that legal professional privilege is one of the most sacred relationships in the law because it is said to promote the necessary confidence between client and legal practitioner. The argument goes that through encouraging clients to communicate information they would otherwise withhold from legal practitioners, confidentiality is deemed to enhance the quality of legal representation by building trust between counsel practitioner and client. A closer look at the history of the rule reveals an altogether different justification. In the late Middle Ages, when the continued existence of the legal profession was in doubt, *attornati* (as they were then termed) utilised, manipulated and moulded legal professional privilege as a tool to justify their usefulness as a profession. The privilege acted as marketing strategy of sorts by ensuring *attornati* were indispensable to the proper functioning of the legal system and the administration of justice.

The integrity of the legal profession has been repeatedly questioned in public discourse. In *Bleak House*, Dickens described the absurdity of the 19th-century legal profession:

> The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense.[x]

Fast-forward two hundred years and legal professional privilege still accords real or fancied protection and prestige to the legal profession which affords them a competitive advantage over other professional groups. I put it to the Commission that the privilege is not merely an ideology, but a marketing strategy in which strong confidentiality rights emerge as a more valuable advantage than legal expertise. According to Fred Rodell, the law's prestige lay in the ability of lawyers to 'blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men ... To guide us, incidentally, through a maze of confusing gestures and formalities that lawyers have created'.[xi]

This, in turn, puts a premium on legal services as exemplified by the fact that many legal practitioners insist it is their duty to exploit loopholes in the interests of their clients. According to Lawyer X, 'solicitors [were] perverting the course of justice and conspiring with criminals to try to ensure a number of gangland murders would remain unsolved or uncharged'.[xii]

The abhorrent actions and conduct of Lawyer X, which are prejudicial to the administration of justice, undoubtedly lead to the implication that 'laws' practically invite legal practitioners to write their own ticket, with the legal trade a high-class racket which favours a narrow cost–benefit analysis when weighing the harm to litigation more heavily than the harm to other values. Legal advice may be framed in such a way that it assists clients bypass a law by casting their affairs in a way that technically conforms to it but ultimately defeats its purpose through skilful evasion. The net effect of confidentiality may therefore be to **reduce compliance with the law.**

The orthodox view holds that non-disclosure, in applying to members of the legal profession, increases the value of services that practitioners are uniquely placed to offer. 'Every lawyer … has the same thing to sell, even though it comes in slightly different models and at varying prices. **The thing he has to sell is The Law'.**[xiii]

Lawyer X, however, sold out everyone, herself included.

Lawyer X – A Wolf in Sheep's Clothing

It would be ironic if [we] punished a lawyer whose only concern was that justice be done.[xiv]

Legal professional privilege has evolved into a code of conduct steeped in hypocrisy, whereby legal practitioners, whose collective reputation as defenders of the underclass, proponents of justice and embodiments of truth are now parodied and relegated to the top of 'least trustworthy profession' lists or shackled together at the bottom of the ocean courtesy of plentiful jokes that parody a once-historically esteemed profession.

The appalling sequence of events, as revealed by Lawyer X, mean that a total of 386 people have been arrested and charged based upon information she covertly supplied to the Purana Taskforce.[xv] This calls into doubt the validity of those prosecutions. Moreover, the unsavoury practices engaged in by Lawyer X are incompatible with elevated integrity or even common honesty. Although X noted that the revelation of her status as informer/human source has had dire consequences on her life,[xvi] she asserts her motives were altruistic:

> [D]uring 2005, I became aware of ...a variety of serious criminal activity by virtue of the contact I had with certain clients...I also watched as Police either totally failed to investigate ... or failed in being able to obtain evidence to ... arrest and charge offenders.[xvii]

To my way of thinking, her motives in misusing the principle represent her sense of 'personal gratification', yet X's attitude, together with the strict confidentiality provisions promote and reinforce the perception of practitioners as **'hired guns'**. When the attack originates from within the legal profession which is responsible for espousing the tenets of legal and ethical advocacy, it is even more baffling. The "Lawyer X" Scandal may be most aptly described as an event which provides an immediacy and humanity to the presentation of ethical issues in the legal setting. It certainly raises the question of whether the regulations and codes of conduct create ethical conflict by assigning legal practitioners a professional duty that conflicts with other ethical values, particularly the good of alleviating needless suffering.

The **vicarious trauma** sustained by Lawyer X in (initially) keeping her client's secrets – and the ripple effect on her family, colleagues and the wider legal profession — would have been mitigated, if not altogether removed, had the ambit of the privilege been constrained within tighter limits. If the rule was narrowed in its ambit, any confidential information revealed to X by her criminal clients would never have come within the rule. While it remains a point of contention as to whether X could have then disclosed information to Victoria Police, she would have at least been relieved from the prospect of breaching legal professional privilege.

It must be borne in mind that the rule is promoted as a safeguard for weighty and legitimate competing interests. For Lawyer X, the burden and intolerable pressure of keeping her clients' secrets combined with the subsequent revelation that she contravened the privilege by

acting as a human source, has resulted in the decline of her 'mental, emotional and physical health … In addition to … anxiety, fear, severe depression, PTSD and paranoia…'[xviii] She remains under the care of a clinical psychologist and a doctor and continues to endure paralysing fears and uncertainty as well as heightened danger.[xix] X acknowledges that 'this nightmare is not simply going to go away'.[xx]

Legal Professional Privilege and the Presumption of Innocence

The problem has been difficult from the beginning.
Better no light from history, however, than false light.[xxi]

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LEGAL PRINCIPLE: Wrongful Conviction and/or Malicious Prosecution

PROPOSED LAW REFORM: While exceptions exist to legal professional privilege in the forms of the 'crime-fraud' and 'future crime' exceptions, no such exemption exists for past crimes.

INTRODUCE: The 'Past Crime' Exception

The "Lawyer X" Scandal illustrates classic examples of difficult and dangerous situations which lead to wrongful convictions including: **vindictive or improper prosecutions**, **incentivised witnesses**, indifferent or **hampered defence counsel** and **tainted police officers.** Each of these scenarios has played a part, to some extent, in attaining the wrongful conviction of 386 imprisoned men.

I put it to the Commission that Victoria Police and Lawyer X violated their professional obligations under the purported pretext of seeking justice. The police were able to perpetrate malicious, or in the alternative, improper, prosecutions by virtue of the fact that their unrestricted access to Lawyer X provided **guilt-to-order**. By gaming the situation as they did, Victoria Police is guilty of a plethora of misconduct and positioned itself to get what it needed without giving up anything; without losing tactical advantage.

The Police bent the truth about evidence tampering and curtailed justice in order to protect their own rates of conviction. They failed to disclose the existence of inducements offered to Lawyer X to obtain said evidence / testimony and misreported the extent of those inducements. In doing so, due process has again be compromised. As a result of police fabrication, whereby they intentionally presented inadmissible and/or manufactured evidence for the purpose of furthering an injustice, they themselves perpetrated a gross injustice; not merely a result of legal error, negligence or mistake, but illegality and significant procedural impropriety. They played fast and loose with the truth.

Lawyer X, for her part, reported privileged communications to police; thereby perpetrating an egregious violation of her duty to uphold legal professional privilege. Lawyer X has emerged as a cog in the wheel of a machine that has sent some these men to prison absent due process. If corrupted evidence and/or testimony enables these men to remain wrongfully imprisoned due to the operation of the privilege, the "Lawyer X" Scandal will stand for something far worse. The question to be answered is which is the greater of two evils?

The golden thread of criminal law is directly tied to the fundamental presumption of innocence. Clearly there is force in the argument that legal professional privilege should, as a matter of policy, give way in any case and particularly a criminal one, where a wrongful or improperly attained conviction may be produced.

Victoria Police, in corroboration with Lawyer X, orchestrated the collection of evidence to fit the argument it sought to advance. This conspiracy to act in furtherance of improper prosecutions could not have been more harmful to the justice system and arguably involved the manipulation of people and the twisting of the truth in which unlawfully-obtained evidence was elicited and admitted in order to establish crucial facts on which the jury found Lawyer X's criminal clients guilty.

The toughest and most perplexing dilemma faced by members of the legal profession is to assess whether the moral and philosophical implications of disclosure outweigh the competing self-interest considerations which include a desire to preserve one's professional integrity by eliminating potential exposure to civil liability and damage to person, reputation and business. It is an undeniable fact that ethical issues abound regarding the limits and application of legal professional privilege and whether or not its existence hinges on a tenuous link. At some point, every defence barrister has to choose between their own need to know the truth versus the best interests of their client/s.

The privilege undoubtedly provides additional incentive for clients with something to hide to hire legal practitioners such as Lawyer X so as retain control over communications and not risk having their secrets compromised or divulged. The effect of legal professional privilege is that **it places clients in the novel position of being beyond the reach of the law.** Deceitful clients with something to hide can confide in legal practitioners, while wrongfully accused defendants are obstructed from accessing information which could help prove their innocence. Lawyer X stated that she acted out of her 'own frustration with the way in which certain criminals were seeking to control what suspects and witnesses could … say to Police via solicitors who were not … acting in the best interests of their clients because of undue influence and control of ''heavies'''.[xxii]

Accordingly, there is little to fear if the privilege is not available in every circumstance and situation; for client–counsel communications are unlikely to be inhibited. This is further reason to invoke the '**Sole Purpose' test.**

I submit that the entrenched views of those who promulgate a 'dominant purpose' test overlook the contention that any fixed or unnecessarily-wide rule devalues the rhetoric that legal professional privilege enhances the administration of justice. The actions of Lawyer X have wrought damage to the integrity of the justice system and simultaneously undermined and impaired the functioning of the broader legal system. As a means of rectifying the damage done, it must clearly be stated that 1) any communication which is not made pursuant to legitimate legal advice and /or litigation is not covered; 2) no client can rely on the privilege to attain immunity if/when confiding to past wrongdoing; and 3) if the client no longer has any grounds upon which to assert a recognisable interest in having communications protected, the privilege must yield to competing interests of equal or greater value.

Competing interests incurred by the application of legal professional privilege are most keenly felt in criminal law. The "Lawyer X" Scandal throws up the dichotomy of opposing

legal entitlements by juxtaposing the public's right to be informed about certain criminal conduct against the right of the client to insist that such revelations remain confidential.

Legal practitioners should be imbued with a positive duty to assist the court to reach the truth. While the precise nature of this duty needs to be carefully defined, I cannot conceive of a law which would actively encourage a legal practitioner to withhold information which, if disclosed, might enable a defendant to establish his innocence; account for a past crime or resist an allegation of guilt. The privilege must yield if one of these factors are on the line.

I further submit that a balancing of interests falls in favour of admitting communications; which is not to say the abhorrent conduct of Lawyer X should in any way be endorsed. If a balancing approach is however applied to the privilege, this produces an attractive proposition which **assigns a priority to one fundamental right over another**; the right that no one should be wrongfully convicted, with its ancillary right of access to evidence establishing innocence, prevailing over the right to invoke a claim of privilege.

It is my view that benefits availed by the privilege are, in a practical sense, doubtful. The principle, by virtue of its existence, has the capacity to produce wrongful convictions. To this end, a distinction should be drawn between the application of legal professional privilege in civil and criminal proceedings because, in the criminal context, a danger exists if communications which may benefit an accused are screened from a jury. The right to counsel in the criminal law context is linked to the notion of autonomy, client dignity and the presumption of innocence. No person should be required to defend a criminal charge, prosecuted by the State, without the assistance of a competent and ethical legal practitioner. It is clear that the procedural limitations of the privilege are conducive to injustice through preventing full disclosure of all relevant facts. Such inaccuracies make possible the conviction of persons whom the criminal law says are innocent. **Livelihoods can be resurrected. Lives cannot.**

From a practical viewpoint, history has witnessed an uprising of sorts from members of the profession, including Lawyer X whose disobedience of the rule has forced an examination of the theoretical justifications for allowing a permissive or mandatory disclosure rule.

Although the actions perpetrated by Lawyer X are inverse to those discussed in this section; that is to say she elected to breach the privilege with the aim of seeing her own clients prosecuted, I submit that under its ordinary operation, legal professional privilege must not stand in the way of the truth. As an extension of this argument, I question how a revocation of the privilege in wrongful conviction cases impairs the provision of services to dishonest clients who have confessed to perpetrating crimes for which another person has been falsely accused, tried or imprisoned.

The codes of professional conduct, as they presently stand, also enable a legal practitioner, when questioned about the propriety of assisting his or her client, to hide behind the nondisclosure rules which enable them to avoid the cost of bad publicity and community disapproval of their conduct. On the other hand, to knowingly have withheld information is to have assisted the conduct of a felon; to have become an active participant in the concealment of a crime; to have engaged in an act of evil and to have hidden a fugitive from the law. Indeed, if 'a stance lacks moral comprehensiveness, coherence or authenticity, then so do the moral imperatives which have been discerned from within the stance'.[xxiii]

A Final Word

A man lives only one lifetime, but in the annals of history, his deeds can live on forever.

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The "Lawyer X" Scandal provides a fascinating glimpse into the legal professions' battle between client and conscience. The convening of this Royal Commission is an acknowledgement that the law with respect to legal professional privilege is in an unsatisfactory state. We have a system of justice which is marred. The implementation of the **'Sole Purpose' test** should be proposed in order to streamline the administration of justice, modernise its procedures and, I reiterate, bring it within justifiable bounds. I strongly urge the Royal Commission to 1) recommend law reform by having further exceptions grafted onto the privilege; and 2) reducing the ambit of legal professional privilege by restoring it to its **original, intended purpose** so clients and legal practitioners will be left in no doubt as to the outer limits of the rule.

The legal profession has a moral voice. If that voice is diminished by the scandals of incompetent counsel and vexatious prosecutions, it presents a serious problem. Surely, the aim of making practitioners accountable in the fact-finding process would go some way to restoring credibility and integrity to a much-maligned profession. Given Lawyer X's startling transgressions, I put it to the Commission that it would be irresponsible to move forward with the current 'dominant purpose' test. The problem with the existing scope of the rule is that it elevates the principle to a realm of untouchable reverence and deprives those who should benefit from it most. Let the "Lawyer X" Scandal mark the end to this era of jurisprudence. In the words of Dr Philip Opas, 'It is a heavy burden when in the last analysis **it may all depend on you**'.[xxiv]

END NOTES

[i] Khalil Rushdan as cited by Weston Phippen, 'After 38 Years Behind Bars, Bill Macumber Joins Those Freed by the Arizona Justice Project'
Phoenix Times (3 October 2013) < http://www.phoenixnewtimes.com/2013-10-03/news/arizona-justice-project-bill-macumber/>.
[ii] '*In her own words: Why a top criminal barrister became Informer 3838'* The Age Newspaper, 3 December 2018.
[iii] [1976] HCA 63
[iv] Ibid 686.
[v] (1983) 153 CLR 52, 75 (Mason J).
[vi] Ibid.
[vii] *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.
[viii] Caron Beaton-Wells, 'Case Note: *Commissioner, Australian Federal Police v Propend*' (1998) 24 *Monash University Law Review* 210, 212.
[ix] Francis Bacon, cited in Edmund Christian, *A Short History of Solicitors: Attorneys under Elizabeth I and James I* (Reeves & Turner, 1896), 47.
[x] Charles Dickens, *Bleak House, Vol II* (Chapman & Hall, 1911) 128.
[xi] Fred Rodell, *Woe Unto You, Lawyers! (*Pageant-Poseidon, 1939*) 3.*
[xii] '*In her own words: Why a top criminal barrister became Informer 3838,* above n ii.
[xiii] Fred Rodell, above n xi, 3.
[xiv] Letter from Richard Rosen to Grievance Commission; North Carolina State Bar (2 April 2007)
[xv] '*In her own words: Why a top criminal barrister became Informer 3838,* above n ii.
[xvi] Ibid.
[xvii] Ibid.
[xviii] Ibid.
[xix] Ibid.
[xx] Ibid.
[xxi] Geoffrey Hazard, 'An Historical Perspective on the Attorney-Client Privilege' (1978) 66 *California Law Review* 1061, 1091.
[xxii] '*In her own words: Why a top criminal barrister became Informer 3838',* above n ii.
[xxiii] Joseph Bernardin and Thomas Fuechtmann, 'Consistent Ethic of Life' (1998, Sheed & Ward) 191.
[xxiv] Australian Coalition Against the Death Penalty, 'Ronald Ryan: Hanged Innocent in Australia <http://www.ronaldryan.info/>.