The Hon Margaret McMurdo AC
Royal Commissioner
Victorian Royal Commission into the Management of Police Informants
contact@rcmpi.vic.gov.au

5 March 2019

SUBMISSION

The adequacy of legal ethics education in Victoria and elsewhere in Australia

Dear Commissioner,

This submission follows on your email to us dated 12 February 2019, accepting our submission to address you on the above topic. We thank you for this opportunity.

We have suggested that this issue is important to your investigation because of the possibility that legal ethics education in Victoria and beyond has been and is inadequate to the task of forestalling significant breaches of professional obligations.

To put the point succinctly, legal ethics' educators are formally very clear with both law and practical legal training (PLT) students that the duty of confidentiality to a client proceeds from the notion of loyalty and trust and is a fundamental baseline of legal practice. Even the paramount duties to the court and the administration of justice do not require, let alone contemplate, a lawyer actively subverting their own client's defence in the manner allegedly undertaken by Nicola Gobbo.[1] Criminal law practice is a field which arguably contains the sharpest of ethical dilemmas. Each of these are typically discussed in great detail in legal ethics classes. If lawyers in criminal practice have missed this, then the community in general and the profession in particular, cannot be sanguine about ethical practice in *any* area of law.[2]

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[1] We note the possibility of a suggestion by police that while Nicola Gobbo might have provided relevant confidential information to police about her own clients, that information was not used and that police only relied on information which came from '...intimate and non-professional relationships with gangsters.' See John Silvester, Naked City, *The Age*, March 2 2019, 42. The Commission will be aware of the exceptions to the relevant *Australian Solicitors' Conduct Rule,* Rule 9, which do not allow beaches of confidentiality in relation to past events, but permit a lawyer to do so only in these narrow circumstances; namely when [inter alia]

- 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
- 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person.

[2] This report offers just one example of this assertion: Josh Robertson, 'Adani's new law firm put forward 'trained attack dog' strategy for waging legal 'war'', ABC News, 19 February 2019 at https://www.abc.net.au/news/2019-02-19/adani-law-firm-put-forward-trained-attack-dog-strategy/10821470.

Our second point is that the gravity of the allegations about lawyers' behaviours have such severe implications for justice that it would be naïve to assume, as professional leaders apparently do,[3] that these breaches are aberrations only. As a matter of empirical reality, no one can know what it is safe to assume. Nor do we think that a call to disclose the names of the lawyers alleged to be involved will be productive, even if the apparent objective is to release from suspicion all other lawyers.[4] Such disclosure may well put many more lives at risk because of interlocking networks of deceit; and will not in any event prove that all other lawyers are ethically pure.

We do not in this submission focus on individual providers of legal ethics education because to be candid, there is no data linking individual providers to particular lawyers. We do not know the backgrounds of the individual lawyers and para-legal staff covered by your Terms of Reference, but it is probable that there are a variety of law schools and PLT providers' experiences among them. Likewise, if their breaches of confidence occurred after the introduction of mandatory annual 1 hour continuing professional development (CPD) in ethics, then there could have been numerous different sources and providers involved.

We also suggest that (even if your Terms of Reference allowed), any attempt to draw conclusions from any correlations between the source of legal education and individual lawyers covered by your Commission would be empirically flawed, considering the tiny sample. And as far as we are aware, there are no contemporary empirical studies which attempt to map professional disciplinary findings against particular lawyers with their law school, PLT or CPD providers. So in this submission we do not point to particular law schools' and PLT providers' approaches to legal ethics education as more or less likely to limit the sort of professional breaches which you are about to delve into.

However, and at the risk of asserting what you may well know, we do think it helpful for you to consider the following observations. They are offered in summary form for the purposes of assisting the Commission:

1. As a very general historical proposition, legal ethics education in Australia has tended to focus on case law and the rules of professional conduct - that is, the *Australian Solicitors' Conduct Rules* 2015 (*ASCR*) and their many non-uniform forbears across multiple jurisdictions. Again, this focus has been consistent with the emphases of traditional substantive case law teaching on finding a principle and then enumerating its exceptions and limitations; so that law students in ethics' classes have been and in some cases still are educated to look for exceptions, rather than to innately value adherence to a particular ethical principle.

2. The *ASCR* 'values statement' is contained in Rules 3 And 4 as follows:

[3] ABC 774, Jon Faine with the President of the Law Institute of Victoria, 14 February 2019.
[4] See n1.

3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.
4.1.1 A solicitor must act in the best interests of a client in any matter in which the solicitor represents the client;
4.1.2 be honest and courteous in all dealings in the course of legal practice;
4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
4.1.4 avoid any compromise to their integrity and professional independence.

This statement is concise and commendable, but the remaining rules from 5 to 43, are essentially negative in tone and go to some length in defining what cannot be done, even within the positive overarching Vic-NSW *Uniform Law* framework. We do not say that case law and the *ASCR* are dispensable; clearly they are as important to a rounded legal ethics education as is a strong values base, and they are indispensable to proper control of misconduct. But we suggest that their negative emphasis is conducive to avoidance of obligation, and this is the reality of overly rules-based analyses. To be blunt, if we have a predominantly rules-based code, we should not be surprised if we get 'overly rules-based analyses'. Accordingly, we do not think we can expect legal education by itself to achieve miracles in the context of the existing conduct rules. We also need better rules.[5]

3. Rule-based 'avoidance' philosophies of learning ethics, where they still operate, create dissonance in law students, including among those who cannot articulate that dissonance. That is, students are internally conflicted by the dominant law school emphasis on substantive law exceptionalism competing (in their minds) with effective legal ethics' teaching of core positive values of rational analysis of ethical options, courage, integrity and consistency. Because the former is dominant and apparently encouraged by modern legal practice, legal ethics is seen as secondary and if necessary subservient; that is in our view, unconsciously capable of being ignored if needs must.

   To be precise, the dominant (amoral) approach to questions of rule interpretation and application the students are trained in in most doctrinal subjects, becomes in legal ethics a mindset of 'creative compliance' that tends to limit the impact of ethical rules where principled, as opposed to a technical application of those rules would act as a constraint on doing business.[6]

[5] One attempt to address this deficiency involves a more detailed contextual approach. We could begin with high level aspirational principles followed by more situational guidance, and finally develop more specific rules where needed for more narrow regulatory and enforcement purposes. See in particular Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations*, Oxford University Press, 1999.
[6] Perhaps the best example here is the finessing of conflict of interest rules in the *ASCR* – see Rules 10 and 11 - in ways which have, at least arguably, undermined the principle of loyalty.

4. A part of the antidote to much of this regressive approach to teaching legal ethics is provided by innovative approaches which emphasise values awareness[7] and ethical framework development[8] for law students, ideally at an early stage of their law degrees. Many teachers embrace these approaches. They are considerably better than nothing, though even these consciousness-raising strategies have their limitations. Legal education cannot easily address the difficulties of value pluralism and incommensurability, and the instability of value positions as predictors of behaviour – not least because of the psychological processes individuals use to justify and protect their ethical self-image.[9] Continuing research and teaching innovation, and space in the curriculum, are desirable if we are to find ways to provide students with a situationally richer experience of ethical problem-solving.

   At present, even basic values identification methodologies are not required by the Law Admissions Consultative Committee (LACC),[10] which has a powerful influence on law school curricula. Some law schools embrace these approaches, but some do not. Some law schools give lip service to them but do not in practice resource the necessary student learning adequately. Some law schools teach these approaches in first year, where they have a chance of being taken seriously, and some leave it until the end (that is, three to five years later), and treat it as a capping process preparatory to entry to legal practice.

5. Some law schools allocate skilled teachers to legal ethics who are committed to fundamentals of values development and some allocate new sessional teachers who are more readily available, relatively cheap to employ and need not have any necessary commitment to the topic.

   Teaching legal ethics (as we suggest it ought to be) is not like teaching doctrinal law; it requires some different skillsets and approaches. These require proper training and law school investment in staff if values' development is to have any hope of making a difference. Teachers need to understand how to nurture in a classroom or a clinic the ability to identify and act on those values in the rich, ethically charged situational contexts and pressures that exist in practice, as is perhaps obvious from the Gobbo case.

[7] For example, see Vivien Holmes, 'Giving Voice to Values: Enhancing Students' Capacity to cope with Ethical Challenges in Legal Practice' (2015)18 *Legal Ethics* 2.
[8] For example, see Christine Parker, "A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics" (2004) 30(1) *Monash University Law Review* 49.
[9] The uses and abuses of the virtue of loyalty are a case in point. See Brooke Harrington, 'Turning vice into virtue: Institutional work and professional misconduct', *Human Relations,* OnlineFirst, 2018, at https://doi.org/10.1177/0018726718793930.
[10] Though we note that the "Priestley 11" subject specifications, including legal ethics, are currently under review by LACC, so that this discussion is, in that context, timely.

6. Few law schools have been willing to address the resourcing and doctrinal implications of the so-called pervasive approach to legal ethics, which requires all law school subjects to be imbued with an ethical consciousness, and which many ethics teachers consider to be the only truly effective method.

7. Clinical legal education offers a compromise and situationally rich approach to delivering a pervasive legal ethics curricula, but is considered by many law deans to be relatively expensive in a climate of reducing Commonwealth and University expenditure on legal education.

8. Recently, the nationally applicable *Threshold Learning Outcomes* (TLOs) in law school legal ethics education[11] have attempted to encapsulate a developmental approach to teaching the discipline, and they emphasise that this education must be grounded in values formation and proceed pervasively throughout the law degree. But the TLOs are only an educational objective and in practice, their enforcement through periodic audits remains piecemeal and episodic.

9. In the PLT environment, there is also much diversity of approach to teaching legal ethics, with perhaps a greater emphasis even than law school on the many immediate operational risks concerning trust accounts and other perceived danger zones.

10. Within the various State and Territory CPD schemes, legal ethics education is unregulated and arguably, of minimal benefit. Generally, it is considered sufficient if a practitioner spends just 1 hour pa on the topic and none of the learning need be assessed. Typically, CPD is still non-assessable. CPD can be taught by unaccredited providers or even 'acquired' by a practitioner sitting in front of a terminal for that hour. An attendance record is not always required, even when the provider is reputable. It is accordingly not possible to say that CPD offers anything like a values development orientation to practitioners, even among those who might still be receptive.

11. There is no lack of law teachers and researchers who are concerned by these issues. Rather the lack is in the political influence of the law schools in the wider educational environment and also, a general view that legal ethics must be taught for regulatory reasons, rather than ought to be taught for its potential to form and re-form students' values. In this climate, law

[11] See http://lawteachnetwork.org/tlo.html.

deans do not as a rule feel they have sufficient discretionary funding to push legal ethics to the top of their list of problem areas, at least while there are no powerful public calls to do so.

We understand that much depends on what you discover about the motives of the affected lawyers and law-related staff during the course of your Commission. However, if you were inclined to make any passing reference to these matters in your reports, or even to hazard some collateral recommendations, we would suggest that they be along the lines of

a. accepting that the fact that a number of defence lawyers became informants on their own clients in respect of past events, and that lawyers on the police and prosecution side allowed this to happen without raising alarm bells suggests a failure of ethical education and culture somewhere. At the very least it means that the profession broadly speaking is now in a position where it must do something very tangible to rebuild trust in the ethics of the profession and of the criminal prosecution and defence system. This breach is so serious that it must raise questions about the whole culture of legal ethics inculcation and maintenance, and it is possible that the problems are not confined to Victoria. Hence our submission.
b. encouraging the profession to meet collectively with our law deans and enable them to embrace the challenges of pervasive legal ethics education.
c. identifying possible funding sources (for example, a levy on the largest firms, because they appear to be only ones who can afford it!) to finance research into these issues, in the interests of securing and limiting future general professional reputational decline.

We would be pleased to expand on any of the above matters if the Commission considers it useful.

Yours faithfully

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