**Royal Commission**

**into the Management of Police Informants**

# Statement of Assistant Commissioner Kevin Casey

## A. Introduction

1. My name is Kevin Casey. I am an Assistant Commissioner of Victoria Police.

2. I graduated from the Victoria Police Academy in 1978 and have performed duties across a range of work locations since then. A summary of the work locations in the following chronological order and approximate dates includes:

   (a) 1978 - Administrative roles, general duties;

   (b) 1983 - Appointed to Criminal Investigations Branch as an investigator;

   (c) 1985 - Temporary assignment to the Stolen Motor Vehicle Squad;

   (d) 1987 - Appointed to the Homicide Squad;

   (e) 1990 - Promoted to sergeant - general duties;

   (f) 1991 - Temporary assignment to the Spectrum Task Force;

   (g) 1993 - Appointed to the Homicide Squad;

   (h) 1994 - Appointed to the Detective Training School (**DTS**) as an instructor;

   (i) 1996 - Promoted to senior sergeant in charge of Intelligence Analysis Course;

   (j) 1998 - Temporary assignment to a corporate role at Training Department Headquarters;

   (k) 2000 - Promoted to Inspector at the Ethical Standards Department – Staff Officer;

   (l) 2002 - Appointed to Maribyrnong Police Service Area as Local Area Commander;

   (m) 2004 - Promoted to superintendent in charge of the Community and Cultural Division;

   (n) 2007 - Appointed to Road Policing Headquarters;

   (o) 2010 - Appointed to Divisional Commander (Prahran); and

   (p) 2013 - Promoted to Assistant Commissioner.

**Purpose of statement**

3. I make this statement to the Royal Commission into the Management of Police Informants on behalf of Victoria Police.

4. This statement is directed to the training that members of Victoria Police received about:

   (a) the process of taking statements from an accused;

   (b) conflicts of interest;

   (c) legal professional privilege; and

   (d) the obligation of disclosure to the defence, including the process for making claims of public interest immunity (PII).

5. In preparing this statement, I have:

   (a) read the statement of Wendy Steendam dated 16 April 2020; and

   (b) had regard to, and utilised relevant sections of, a statement I made to the Independent Broad-Based Anti-Corruption Commission for the purposes of Operation Gloucester (the **IBAC Statement**).

6. For the purpose of preparing the IBAC Statement, I reviewed:

   (a) six volumes of Detective Training School Course notes from course No. 127 in 1983 (**1983 DTS Notes**);

   (b) several volumes of course notes from 1996 (the **1996 DTS Notes**); and

   (c) course material for police recruits at the Victoria Police Academy as at 30 July 1991 (**1991 Academy Course Material**).

**Current role**

7. I am currently the Assistant Commissioner in charge of the Victoria Police People Development Command (**PDC**) based at the Glen Waverly Police Academy. I have held this position since August 2013.

8. PDC, as it is known today, originated as a formal Department/Command in 1996 and today is structured as a School of Policing with four delivery divisions which comprise a range of centres of learning as follows:

   (a) Foundation Division: Recruit Training, Protective Services Officer Training and Policy Custody Officer Training;

   (b) Specialist Programs Division: Investigation Training, Promotional Programs, Incident & Emergency Management, Family Violence and Intelligence and Road Policing Investigations;

   (c) Operational Safety Division: Operational Safety Training, Physical Training and Driver Training; and

(d) Leadership & Career Development Division: Leadership Development, Career Development Leadership Capability Uplift and Respectful Workplaces Unit (Gender Equality).

9. Victoria Police became a Registered Training Organisation (**RTO**) in July 1997 and all members completing accredited courses have nationally recognised qualifications. Registration under the Victorian Registration and Qualifications Authority requires an RTO to ensure that, amongst other matters, educators are qualified trainers and assessors and that accredited training programs are developed to meet nationally agreed competency standards. Victoria Police is therefore required to have systematic, end to end processes in place to ensure quality training is delivered to all learners and continuously improved.

10. The qualifications that can be awarded through Victoria Police as an RTO include diplomas, advanced diplomas and graduate certificates. A Statement of Attainment can also be awarded for short courses based on units of competency. In June 1998, the first Diploma of Police for recruit training was added to the scope of registration — the Diploma of Public Safety (Policing). Since this time, there have been several versions of the Diploma of Policing. In 2015, Policing attained its own national training package, developed for police by police under the auspices of the Australian & New Zealand Police Advisory Agency.

11. The various courses now offered by PDC are supported by a Quality Education Division comprising Victorian Public Servant Education specialists who support the scoping, design and development of training programs. Generally, all programs delivered by PDC are either initially scoped or redesigned as a result of job role analysis, training needs analysis and training gap analysis.

## B. Training and curricula

***Identifying training curricula for the period from the late 1970s to the late 2000s***

12. On 29 February 2019, I made the IBAC Statement for the purposes of Operation Gloucester. In the course of preparing that statement, I caused inquiries to be undertaken about the curriculum for topics relevant to IBAC's investigation.

13. While my inquiries were directed to three particular topics, on the basis of those inquiries, I make the following observations about access to training material more generally:

(a) The task to locate historical training material prior to 1998 has proven difficult. Until Victoria Police became an RTO in 1997, there was no archive system for curricula. Prior to becoming an RTO, there would have been no external requirement to retain curriculum or training records and enquiries reveal that there was no robust system in place. Since 1997, Victoria Police curricula, and modern teaching practices, identify a range of learning outcomes to be achieved during training, allowing a degree of certainty as to the material covered in training. However, this was not the case prior to Victoria Police becoming a registered training organisation, meaning that even if old curricula

are found, there is no way to determine exactly what was covered and taught in which course.

(b) While all courses had presenter notes, these were not archived by the program owners for each course. The originals would be adjusted for improvements over time, but document dates were not amended, and version control was rarely applied.

(c) Hard copies of previously published study and reference guides have been retained and archived. These guides were provided to members to assist them to study for their promotional exams. The study guides are the most current version of 'curriculum' available for each year. Having located 'old curricula', there is no certainty that the date on the documents reflect the actual period that the training was delivered.

***Recruit training***

14. In the period between the late 1970s and the late 2000s (the **Relevant Period**), the overwhelming majority of police recruits were young men. The number of female recruits increased steadily over time. As at July 2020, 28.75% of Victoria Police employees were female.

15. During the Relevant Period, the vast majority of recruits were young, with many starting at the Academy prior to completing their schooling, immediately after completing school or within several years of doing so.

16. On the basis of my experience, I make the following general observations about the Victoria Police Academy training for recruits in the Relevant Period:

(a) The length of Academy training has varied over time, from about 20 weeks in the 1970s through to the 1990s, to the current 31 weeks;

(b) The Academy is a foundational training program, and its objective is to train competent general duties police officers who are equipped to function as front line police officers;

(c) Academy training included a combination of class-room based theory and practical and physical training;

(d) Academy training covered a large degree of the knowledge needed by junior officers (which I describe here as the “essential knowledge” material) to be able to capably perform operational duties post-graduation — this material covered the common law, and later legislative rights, duties and obligations of general duties police officers (subject to the matters outlined below) and gave recruits an understanding of the breadth of practical policing operations that a newly appointed constable would be expected to deal with; and

(e) Academy training did not focus on specialist areas of policing, such as human source management.

17. To the best of my recollection, the curriculum for Academy training in the Relevant Period did not include any content on:

(a) lawyers' professional obligations;

(b) identifying and responding to lawyers' conflicts of interest;

(c) the management of human sources; and

(d) the obligation of disclosure to the defence (which, prior to 1989 was based on the common law, and, from 1989, was found in Schedule 5 to the *Magistrates' Court Act 1986* (Vic)), or how to make public interest immunity (**PII**) claims.

18. Concepts of this kind were not included in basic recruit training. Frontline officers did not typically deal with situations that required them to have this knowledge.

19. Recruits received training about the right of an accused person to engage a lawyer and the right to engage the lawyer of their choice and, in that context, are likely to have dealt with legal professional privilege briefly and in general terms only (emphasising the right of a suspect to communicate privately with their lawyer).

20. After graduation, probationary constables were deployed, usually to an operational police station, undertaking general duties policing. Some probationary constables were assigned to non-operational roles, such as in the Criminal Records Section. Probation generally was twelve months, following which the probationary constable became a constable and continued with general duties policing. Officers generally remained on general duties for between two and four years.

21. General duties officers:

(a) investigated local crime, including execution of low-level search warrants;

(b) performed watch house duties, managing prisoners and police station reception counter duties;

(c) undertook files and enquiry duties, such as serving subpoenas and executing warrants for outstanding fines;

(d) undertook traffic control or enforcement duties;

(e) prevented anti-social behaviour (by, for example, providing a presence in public spaces and conducting foot and vehicle patrols);

(f) dealt with community safety concerns, such as neighbourhood disputes, domestic violence, missing persons, public drunkenness and community reports of suspicious behaviour;

(g) undertook community engagement work (including by becoming familiar with the local neighbourhood and environment, engaging with schools and community groups, developing relationships with known offenders, persons of interest and local identities);

(h) were first responders to emergency incidents in their area;

(i) attended and investigated vehicle crashes; and

(j) attended court to give evidence.

22. A common task for probationary constables deployed to stations near major metropolitan business centres was to conduct foot patrols. It was commonplace for new constables to undertake solo foot patrols though central business districts.

23. The purpose of this deployment was to build on the foundation training received at the Academy. A significant portion of a probationary constable's training occurred by way of on the job experience, which contextualised the training and refined the police craft the probationary constable had learned at the Academy as a recruit. In this period, while there were policies and procedures in place to which officers could refer, probationary constables principally learned by watching, and taking guidance from, those more senior to them.

24. While probationary constables were under the ultimate supervision of their station sergeant, they could be required to exercise substantial autonomy in decision-making.

25. While probationary constables could act autonomously with some experience, a consequence of this work environment was that probationary constables were nearly always matched in their formative careers with a more senior member who guided their decision making directly. Probationary constables developed their knowledge and skills and refined their approach and practices based on the guidance of their station sergeant and their station colleagues. This form of learning built on the institutional education and training.

***Training after the academy***

26. After the Academy, the most common formal training environments were:

(a) retention; and

(b) Detective Training School (Investigator Training).

***Retention***

27. After 12 months, probationary constables undertook a further 2 weeks of training.

28. This training segment was primarily focussed on law, covering the basic legislation that officers operate under, including:

(a) refresher training in all of the foundational information that had been taught to recruits at the Academy, including to reinforce knowledge of:

(i) powers of arrest; and

(ii) points of proof;

(b) review, for learning purposes, of particular situations, incidents or investigations that probationary constables had been involved in over the previous 12 months; and

(c) an update on legislative and policy changes from the previous 12 months.

29. I am confident that, in the Relevant Period, this training did not include content about:

(a) lawyers' professional obligations;

(b) identifying and responding to lawyers' conflicts of interest;

(c) the management of human sources; and

(d) the obligation of disclosure to the defence or how to make PII claims.

***Detective Training School***

My personal experience of Detective (Investigator) Training as a participant in 1983

30. In this part of my statement, I describe the training I received at DTS and which I later delivered as an instructor at DTS.

31. The 1983 DTS course was 12 weeks in duration, predominately classroom teacher led with some field trips and three outdoor practical exercises. One of those exercises was what I would describe as a 'command and control' exercise, but all involved scenario training for initial action at a crime scene.

32. To my knowledge, there are no course instructor lesson guides, plans, teaching aides or session timetables available. The notes I have accessed have particular sections and paragraphs highlighted which I would describe as the 'essential knowledge' information or in current parlance, 'learning outcomes' that the instructors highlighted as being important.

33. Whilst the notes are prescriptive, as previously stated, the training in 1983 was teacher led. Given that there are no session plans available, the context, clarification, explanation and examples being drawn out in the various lectures between the directing staff and the course participants is not recorded.

My personal experience of DTS as an instructor in 1996

34. The 1996 DTS course was also 12 weeks in duration, predominately classroom teacher led with some field trips. However, there were a number of practical exercises threaded throughout the course linked to initial action at crime scenes, interviewing witnesses, identification parades, nexus evidence, avenues of enquiry and search warrants. My recollection is that the practical exercises involved witness interviews and verbal interview skills.

35. To my knowledge, there are no course instructor lesson guides, plans, teaching aides or session timetables available. At the time, the instructors delivered their respective allocated sessions using the particular course notes personally marked up and teaching aides were developed by each instructor also. Similar to my notes from 1983, in 1996 the instructor marked up their personal copy and focussed on that as the desired learning outcomes for the subject.

**The Victoria Police Manual**

36. The Victoria Police Manual (**VPM**) has existed in various forms since the 1970s.

37. In the 1970s it was principally a human resources manual, addressing items such as dress standards, compensatory incidental entitlements and other employment entitlements and

discipline standards. In the 1980s, it began to include policies and procedures, but it was not until the late 1990s that it came to be a central repository of operational information.

38. In its modern form, the VPM contains the published policies and procedures of Victoria Police. The VPM sets the behavioural, operational and administrative standards and guidelines for the organisation and is divided into Policy Rules, which provide mandatory accountabilities, and supporting Procedures and Guidelines.

39. Annexed hereto and marked **KC-1** is the index to the 1981 version of the VPM, together with the section of that VPM addressing 'Confidentiality of information received'. That section is reproduced here in full:

> **CONFIDENTIALITY OF INFORMATION RECEIVED**
>
> 4.69 A member shall maintain the utmost confidentiality in relation to the identity of his informants in the case of any information he may receive about the identity or location of criminal offenders.
>
> 4.70 A member shall not disclose the names of his informants in written reports, unless especially directed to do so by an Officer.
>
> 4.71 Where it is necessary, a member may verbally inform his superiors of the names of his informants, and he shall disclose the names of his informants to an Officer when directed to do so.
>
> 4.72 If in any criminal proceedings a member is asked questions designed to reveal the identity of an informant, he shall request the Court to direct whether or not the question should be answered on the grounds that it is contrary to public policy and not in the interest of public safety that such a disclosure should be made. A member shall obey the direction of any Court in such a case.

40. I have reviewed the index to the 1981 VPM. It does not include information (and certainly no detailed information) about:

(a) lawyers' professional obligations;

(b) identifying and responding to lawyers' conflicts of interest;

(c) the management of human sources; and

(d) the obligation of disclosure to the defence or how to make PII claims.

41. To the best of my recollection, this was the position throughout the Relevant Period.

## C. The Four Key Areas

42. In this section, I set out what I have been able to identify from the material described above, and my personal experience, in relation to each of the four training areas identified above.

43. This statement does not address training in specialist areas of Victoria Police, such as human source management or the prosecutors' course.

***Conflicts of interest and legal practitioners' ethical obligations***

44. To the best of my knowledge, Victoria Police did not, in the Relevant Period (or indeed thereafter) deliver training at the Academy or Detective Training School about the professional and ethical obligations of legal practitioners.

45. I am not aware that Victoria Police has ever delivered training to its officers about how to identify, and respond to, legal practitioners' conflicts of interest.

46. I have not identified any material that expressly deals with conflicts of interest for the Relevant Period.

47. However, it is likely that conflicts of interests were discussed in the context of a policing role, to provide guidance to officers on matters like investigating friends or family members. It is unlikely that the language "conflict of interest" was used or that the concept itself was taught. My best recollection is that there were rules and standards of behaviour that officers were required to follow that were directed to subject matters that would today be described as a conflict of interest for the police member.

48. During the Relevant Period, Victoria Police began to codify its policies on police member conflicts of interest. One of the early steps in this process was the introduction of a requirement for officers to report disclosable associations. That obligation required officers to disclose any association with a person or persons who had committed or was suspected of committing a serious criminal offence.

49. This process included requirements for officers to report and seek approval to associate with such persons known to them and, a separate policy outlining obligations to seek approval to engage in outside interests or secondary employment or voluntary work.

50. Currently, the VPM contains a detailed description of responsibilities and procedures in relation to conflicts of interest in a policing context. However, during the Relevant Period, there was an expectation that officers would discuss matters such as those identified above with their superior officers and other officers to obtain appropriate guidance.

51. In the mid-1990s, Victoria Police introduced a simple, ethical framework namely: the Scrutiny, Ethical, Lawful, Fair, framework (**SELF Test**). The application of this test was the principal means of addressing police member conflicts of interest.

52. The SELF Test was intended to overlay all police decision-making.

***Legal professional privilege; right to a lawyer of choice***

53. I have not identified any course content from the Academy from the Relevant Period expressly addressing legal professional privilege (**LPP**). It is possible that LPP was mentioned in the Academy training, but it is unlikely to have been covered in any detail. It is possible that specialised courses offered outside of PDC may have touched on this area, but that is not within my knowledge.

54. I understand that LPP was introduced at a basic level at the DTS around 2000. I have identified a module from the 2000 DTS curriculum, headed "Legal Professional Privilege".[1] That module addresses the basic principles of LPP. Annexed hereto and marked **KC-2** is a copy of those notes.

55. At the Academy and in DTS, during the Relevant Period, Victoria Police emphasised the importance of ensuring that suspects were lawfully arrested. This training emphasised:

    (a) the right of an accused person to a lawyer of their choice; and

    (b) the right of an accused person to take advice from their lawyer of choice privately.

56. Subsequently, in 1988, these matters were formalised in legislation with the introduction of section 464 of the *Crimes Act 1958* (Vic) and its related provisions.[2] From that time, the training at the Academy and in DTS related to those specific provisions (and the further introduced provisions).

***Human source management***

57. As with many aspects of policing, the management of human sources has developed over time. Prior to the 1990s, the management of human sources was primarily undertaken at a local level.

58. Human source management did not form part of the Academy curriculum during the Relevant Period.

59. Managing human sources was something learned on the job from an experienced sergeant (usually with a Detective background) or from advice sought from serving Detectives. My recollection was that officers were taught that the 'golden rule' of police informer management (now referred to as source management) is to never reveal their identity. This feature of source management has always been heavily emphasised by Victoria Police.

60. Basic information about the management of police informers was taught at the DTS from at least 1983. Annexed hereto and marked **KC-3** is a copy of an index to a set of 1983 DTS Notes, which includes a reference to 'informers' in Folder Two.

61. I am not aware of any training provided by Victoria Police during the Relevant Period about identifying and responding to conflicts of interest, or LPP, in the context of human sources.

62. Over time, there was a gradual process of formalising and standardising Victoria Police practices for the management of human sources. In its infancy, this involved officers being required to formally record their human source relationships, with such details stored in a secure safe in the office of the relevant superior officer. Police officers were usually required to record all interactions with a police informer in their official police diary and to notify a superior officer of any such contacts. Later, Victoria Police developed the Human Source Management Unit

[1] Victoria Police Crime Courses Unit – Legal Professional Privilege dated 9 October 2000 (VPL.0098.0036.0201).
[2] *Crimes (Custody and Investigation) Act 1988* (Vic).

(initially called the Informer Management Unit) and the SDU. Information about those units is outside my knowledge.

63. I am not able to comment on the specialised training that members of the source development unit and its predecessors received.

***The obligation of disclosure, including claims for PII***

64. Prior to 1986, the disclosure duties and obligations of police officers were governed by the common law.

65. From 1986 until 2009, duties and obligations were also contained in the *Magistrates' Court Act 1986* (Vic), Schedule 5. Since 2009, duties and obligations are also found in the *Criminal Procedure Act 2009* (Vic).

66. To the best of my knowledge, no training on the obligation of disclosure was delivered at either the Academy or DTS prior to 1986.

67. I am not aware that Victoria Police has conducted any specific training in the context of recruit and DTS on how to make a claim for PII. I am not aware of any Victoria Police policy or procedure that prescribes how such claims are to be made, or any process or procedure for the manner and form in which material over which such a claim is to be made is presented to the relevant court in order for a ruling on such a claim to be made.

68. This accords with my personal recollection of my training.

69. For the purpose of preparing my IBAC Statement, I reviewed the 1983 DTS Course Notes and my 1996 DTS Course Notes for material about the obligation to provide the defendant / defence counsel with material obtained during the investigation. Those notes did not contain any material about the obligation of disclosure.

70. The adequacy of Victoria Police's disclosure practices was discussed in the IBAC Operation Gloucester Special Report. I refer the Commissioner to sections 3.6 (pages 59–61) and 4.2 (pages 68–72).

**Taking statements**

71. At both the Academy and in DTS, officers received training about taking witness statements.

72. The purpose of the training was to equip officers with the skills necessary to take a probative, relevant, accurate and detailed statement from a witness. As such, the training was focussed on how to engage with the witness and how to best capture the evidence.

73. I have identified that the 1991 Academy Materials included a module titled "Witness Statements". Annexed to this statement and marked **KC-4** is a copy of that module.

74. That module contains the following material:

    (a) purpose of statements;

    (b) content of statements;

(c) procedure when taking a witness statement;

(d) distribution of copies;

(e) completion of statement;

(f) jurat;

(g) statements from females in respect to sex offences; and

(h) negative statements.

75. The 1983 DTS Notes include a module called “Interviewing Witnesses”. Annexed hereto and marked **KC-5** is a copy of that module.

76. During the Relevant Period, there was not, to my knowledge, a Victoria Police policy or procedure that:

(a) concerned draft statements;

(b) directed members to retain each completed draft statement;

(c) directed members to keep a clear record of what changes were made, when and by whom to each completed draft statement; or

(d) identified the circumstances in which completed draft statements, and any record of changes, were required to be disclosed.

77. To the best of my knowledge there was no training content at the Academy or at DTS about the matters in the preceding paragraph. Victoria Police has taken steps to address this. I understand that these steps are addressed in other evidence before the Commission.

78. To my knowledge, and in my experience, there is no practice across Victoria Police of retaining draft statements (which, in the present environment, are almost always drafted on a computer) with only the final signed document/exhibit, or final unsigned draft, kept. To the best of my knowledge, Victoria Police has never had any policy or procedure governing version control processes.

79. Prior to computer use, when statements were hand-written or prepared on a typewriter, the practice with “drafts” was different depending on whether the statement was of a witness, or an informant.

80. For witnesses, it was usual for amendments to be handwritten on to the statement. As such, the only “draft” was the original typed version – which was usually also the final version, containing any handwritten amendments.

81. The position was slightly different for informant statements prepared by general duties police officers. It was usual for the original draft of the statement to be reviewed by a supervising sub-officer. The superior officer would often mark notes on the original, for example, by directing the informant to expand on detail or on the known available facts, so that the statement could be accurately completed. The officer who drafted the statement would then have to prepare a

new statement, addressing the issues identified by the superior officers. The revised draft, along with the marked up original, was then presented to the supervising officer for review. Thereafter, the draft would be discarded.

82. In both cases, if further detail was required or obtained after a statement was signed, a supplementary statement was expected to be taken.

83. The adequacy of Victoria Police's statement practices was discussed in the IBAC Operation Gloucester Special Report. I refer the Commissioner to sections 3.1–3.2 (pages 27–56).

## D. Aspects of policing

84. In this section of my statement, I address several aspects of policing that I believe are relevant to the terms of reference for the Commission. They applied throughout the Relevant Period.

***Rank Structure***

85. The rank structure of sworn members was and continues to be divided into non-commissioned and commissioned ranks.

86. The non-commissioned ranks from lowest to highest are: Constable, Senior Constable, Leading Senior Constable, Sergeant and Senior Sergeant.

87. An officer moves from the non-commissioned ranks to the commissioned ranks when they are promoted from Senior Sergeant to Inspector. The commissioned ranks from lowest to highest are: Inspector, Superintendent, Commander, Assistant Commissioner, Deputy Commissioner and Chief Commissioner.

88. A member's rank includes the term 'Detective' if they have completed DTS, they have been gazetted as a detective and they are assigned to a role that involves criminal investigation work or overseeing the work of criminal investigators. Ranks of Commander and above did not take the nominal designation of Detective.

89. As part of the promotion process, members were and continue to be required to temporarily act in roles held by those of a higher rank. When a member is acting in a more senior rank, they are referred to as holding that senior rank in an acting capacity.

90. Acting roles were and are part of the rank structure because it is always critical to establish a clear chain of command by putting one person in charge, even if a superior officer is absent for only a short period. With one person identified in that acting role, those below know who is in charge and who has some delegated approval authority.

91. Acting roles are also an important part of the promotion process because they help members to learn and understand what is involved in the more senior rank that they might be promoted into.

***Chain of command***

92. Victoria Police operated, and continues to operate, by a chain of command.

93. Save for the Chief Commissioner, every officer in the chain of command leads and is led.

94. The chain of command balances two central duties:

(a) an officer's duty to carry out their own duties autonomously according to their own education, training and experience; and

(b) an officer's duty to act according to the lawful direction of their superior officer.

95. This can be seen in two key elements of the chain of command within Victoria Police.

96. First, the most senior person in a situation or unit usually takes charge of the situation or unit unless or until someone more senior, or more specialised, takes over responsibility.

97. Unless a matter is reported up to a superior officer, the officer has the autonomy and responsibility to deal with that matter and must exercise their independent decision-making and professional judgment in doing so.

98. "Reporting up" is an important part of the rank structure. Reporting up refers to the process of informing a superior (or specialist) officer of an emergent issue, event or risk. Not every matter can or needs to be reported up.

99. As policing often involves a dynamic environment, there are generally no prescriptive rules around when officers should report matters up, save for matters that must be reported up in accordance with Victoria Police policy. Otherwise, the decision to report up (or not) is one for the individual officer. Sometimes, though not always, supervising officers will give guidance to officers about what matters they expect to be reported up to them.

100. Ultimately, because reporting up is, in most cases, a judgment call which relies on the experience and instinct of individual officers, there will always be circumstances where some officers do not report up a matter that other officers would have reported up, or where the superior officer would have preferred the matter to have been reported up.

101. The rank structure could not operate effectively if officers involved their superior officer in every decision they had to make. One feature of Victoria Police in the Relevant Period was an emphasis on following the chain of command. Traditionally, a member would only raise issues with their direct superior. That superior would either provide direction about the issue or elevate it either further up the chain of command or to another relevant unit. Generally though, the nature of this hierarchy meant that it was rare for a more junior officer to interact with senior officers other than their immediate supervisor.

102. While it was not the case that junior officers would blindly follow orders, communication outside the chain of command was not common. A more junior officer was expected to, and generally did, accept the direction and guidance of their superior officer, except where corruption issues were involved. In such cases, it was acceptable for a more junior officer to step outside the chain of command. In some cases, a more junior officer might have had access to an officer in a specialised area of Victoria Police that they could approach for advice or guidance. However, failing to follow the direction of an officer's immediate superior was generally inappropriate. The practice of seeking advice from another officer at rank (called "sergeant shopping") was

generally discouraged. In the context of junior police officers who were principally investigating summary offending, the general practice was that a junior officer would take the guidance and direction and adopt it accordingly.

103. In modern policing, the chain of command is strictly observed in the execution of operations and in emergency response situations. In a day-to-day operational context, individual officers have more freedom to communicate broadly and outside the chain of command where appropriate.

104. In the 1990s, Chief Commissioner Neil Comrie introduced Local Priority Policing. One feature of this program was that Inspectors were given increased levels of responsibility for police services aligned to Local Government Areas. Under the Local Priority Policing model, Inspectors moved from having administration functions to having management control of frontline policing operations and greater interaction with the local community. This change saw Inspectors take on greater levels of decision-making responsibility for the general duties, crime and road policing operations within their area. As such, Inspectors were expected to be the principal decision-maker for operational matters in their area.

105. From about 2003, while Christine Nixon was Chief Commissioner, communication across the organisation was further encouraged. There was a conscious effort to break down the command structure and provide pathways for communication outside of the chain of command.

***Need to know / confidentiality***

106. A third aspect of policing that is relevant to the terms of the inquiry concerns the practice of observing "need to know" information security and confidentiality.

107. The structure of Victoria Police and the Office of Constable means that officers have a high degree of autonomy and work within tightly defined organisational areas. Traditionally, at station or local detective level, where officers are dealing principally with summary offending or local crime investigations, police officers developed avenues of enquiry and consulted with other areas of Victoria Police when they needed expertise or knowledge in a particular area or sought to make connections to cross-locality offending. However, in the context of more complex, significant and sensitive investigations, which have more dedicated and specialised resources and which are staffed by officers with specialist skills, the "need to know" principle meant there was less sharing of information between work areas and specialist investigative units, particularly covert units.

108. There is a very strong culture within Victoria Police of operating on the "need to know" principle. As a matter of general practice, officers do not discuss their work or operations with other officers unless there is a need to do so. As such, while officers will share information for the purpose of seeking or receiving advice, obtaining access to specialist resources, reporting up to their superiors or directing their subordinates, there is otherwise a strong culture of confidentiality. Further, confidentiality is required by Victoria Police's information management frameworks.

***Availability of legal advice***

109. The fourth aspect of policing in the Relevant Period was access to legal advice.

110. In the Relevant Period, officers had access to legal advice for court based matters, including PII claims and the like. This advice was obtained through the relevant police prosecutor or external legal advisers, depending on the size and complexity of the case.

111. I expect that the most senior members of Victoria Police could also seek access to legal advice on request if it were required.

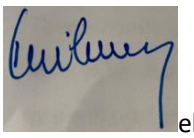
112. However, it was very rare for officers to access legal advice about operational matters. That was because, first, officers used their knowledge, skills and experience to make decisions about operational matters, second, because the practice was to brief problems and issues up to a more senior officer, and, third, because there were formalities attached to seeking advice. It was necessary for a written request for legal advice to be made, a brief prepared and advice formally commissioned. Formal processes of that kind were of little practical utility in the context of the dynamic work environment in which operations took place.

113. When the Victoria Police Legal Services Division (**LSD**) was established, it was not set up, nor utilised, as a resource for operational policing matters. The LSD provided high level formal legal advice about a range of legislative and policy matters. It also provided advice in response to a formal written request. It was not used as a resource for day to day operational policing. I am not aware of any occasion on which an officer telephoned the LSD for urgent advice about a dynamic operational policing matter.

114. Over time, certain complex investigations began to make use of embedded lawyers employed by Victoria Police. An example I am aware of is a complex fraud investigation, involving complex facts. For investigations of this nature, lawyers were sometimes embedded within the investigation team. However, this was unusual and generally reserved for complex operations.

115. It was not common practice throughout the Relevant Period for officers to phone a lawyer internally or externally to obtain legal advice.

Dated: 15 August 2020

 electronic

……
Assistant Commissioner Kevin Casey

KC-1

# VICTORIA POLICE

# MANUAL

**(1981)**

*Issued under*
*the Authority of the Chief Commissioner of Police*

22926/80—PL

## PREFACE

The Victoria Police Manual is principally concerned with permanent administrative instructions and is designed to facilitate the administrative processes of a large and complex organisation.

Together with the Standing Orders, the Police Manual provides guide-lines for attaining the objectives of a police service in contemporary society.

An understanding of the instructions contained in the Police Manual and adherence to the inherent principles are essential to the attainment of individual and organizational aims.

Every member of the police force has a responsibility to be conversant with the contents of this manual, accordingly.

S. I. MILLER
*Chief Commissioner of Police*

MANUAL

# TABLE OF CONTENTS



(Reprinted 30.6.83)

*Paragraph No.*

## CONFIDENTIALITY OF INFORMATION RECEIVED

Identity of informants to be protected

**4.69** A member shall maintain the utmost confidentiality in relation to the identity of his informants in the case of any information he may receive about the identity or location of criminal offenders.

Reports

**4.70** A member shall not disclose the names of his informants in written reports, unless especially directed to do so by an Officer.

Verbal advice

**4.71** Where it is necessary, a member may verbally inform his superiors of the names of his informants, and he shall disclose the names of his informants to an Officer when directed to do so.

Court proceedings

**4.72** If in any criminal proceedings a member is asked questions designed to reveal the identity of an informant, he shall request the Court to direct whether or not the question should be answered on the grounds that it is contrary to public policy and not in the interest of public safety that such a disclosure should be made. A member shall obey the direction of any Court in such a case.

## INFORMATION TO THE MEDIA, &c.

Instructions to be followed

**4.73** A member shall not communicate any information regarding crime to any section of the public communications media, e.g. representatives of newspapers, radio, or television stations, except in accordance with the instructions set out under the heading of "Public Communications Media" Manual, Chapter 36.

## RETURNS OF CRIME

Divisional returns

**4.74** The Officer in Charge of each C.I.B. Division shall furnish as directed a Return of Crime on Form 211, in triplicate, to the D.D.C.I. responsible for the District in which the Division is, or if in the country area, to the Officer in Charge of the District, giving the details required on such form. Where applicable, a copy of such return shall be retained by the D.D.C.I., who shall forward the remaining copies to the Officer in Charge of the District and the Officer in Charge of the C.I. Branch, together with any comments or observations which may be called for.

AM 133

KC-2

# VICTORIA POLICE

# CRIME COURSES UNIT

# LEGAL PROFESSIONAL PRIVILEGE



## COMPILED BY MAJOR FRAUD GROUP

# LEGAL PROFESSIONAL PRIVILEGE

## INTRODUCTION

This Paper deals with the doctrine of legal professional privilege and its relevance to the investigation of criminal offences. It is written from the perspective of an investigator attending at a solicitor's office with a search warrant and a claim for legal professional privilege being made.

Whilst claims for legal professional privilege are not limited to solicitors' offices, in practice, the majority of claims are likely to be made thereat. However, the same principles apply to a claim for privilege being made at any premises.

The Paper is structured in the following manner:-

- The definition and scope of legal professional privilege;
- The constituent elements of legal professional privilege;
- The rationale for the doctrine of legal professional privilege;
- Categories of documents and communications one could expect to find in a solicitor's office and whether they are privileged;
- Procedure upon a claim for privilege being made.

The Annexures to this Paper are as follows:

- Annexure "A" - Waiver of Privilege.
- Annexure "B" - Crimes (Form of Search Warrant) Regulations 1992.
- Annexure "C" - Categories of documents and whether they are privileged.
- Annexure "D" - General Guidelines agreed upon by the Australian Federal Police and the Law Council of Australia.
- Annexure "E" - Chart to be completed in the event privilege is claimed.

The purpose of including the legal authorities in this Paper is that in the event there is an impasse between the investigator and the solicitor during the execution of a search warrant, reference to the appropriate legal authority may facilitate an agreement being reached between the parties.

This Paper should be read in conjunction with the Paper "The Investigation of Solicitors - Crimes and Searches."[1]

## THE DEFINITION AND SCOPE OF LEGAL PROFESSIONAL PRIVILEGE

Legal Professional Privilege is a common law doctrine which applies to both civil and criminal matters. Its effect is to protect from disclosure confidential communications passing between a lawyer and his/her client which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation (see: Esso Australia Resources Ltd. v Federal Commissioner of Taxation (1999) 168 ALR 123).

The rationale for the privilege is that it enhances the administration of justice by encouraging trust and candour in the solicitor-client relationship (see: Grant v Downs (1976) 135 CLR 674 at 685). As Deane J expressed it in Baker v Campbell (1983) 49 ALR 385, a person should be entitled to seek and obtain legal advice in the conduct of his or her affairs, and legal assistance in and for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communication.

The privilege is most often identified in the context of a solicitor/client relationship although it also protects from disclosure those communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation. Accordingly, the privilege may also apply to the following communications involving third parties:-

---

1 For further reading in relation to the subject, legal professional privilege, one of the leading textbooks is "Law of Privilege" S.B. McNicol, (First Edition 1992).

- communications between the client's lawyer and an agent of the client;
- communications between the client and an agent of the solicitor;
- communications between the client's lawyer and third parties;
- communications between the client or the client's agent and third parties.

This Paper concentrates upon the solicitor/client head of legal professional privilege although the third party head of legal professional privilege is discussed at page 7.

The essential features of legal professional privilege are as follows:-

- (i) the client's privilege;
- (ii) protection from disclosure;
- (iii) the privilege extends to any oral or written statement;
- (iv) the dominant purpose test;
- (v) confidential communication;
- (vi) ongoing solicitor/client relationship.

These essential features will now be expanded upon.

## THE CONSTITUENT ELEMENTS OF LEGAL PROFESSIONAL PRIVILEGE:-

### (i) THE CLIENT'S PRIVILEGE-

The term "legal professional privilege" is in some ways a misleading term as it connotes that the privilege reposes in the legal practitioner. This is incorrect. The privilege belongs to the client and therefore, only the client can maintain a claim for or waive legal professional privilege. It is noted that the relevant provisions in the Evidence Act 1995 (Commonwealth) and the Evidence Act 1985 (NSW) fall within Division 1 which is headed "Client Legal Privilege". It is submitted that this expression more precisely describes the privilege.

The role of the legal practitioner is to claim privilege on his/her client's behalf. S/he has a duty to claim privilege at first instance and must then obtain instructions from the client in relation to whether to maintain the claim.

Annexure "A" is an example of a "Waiver of Privilege" document which would be appropriate if the person waiving privilege had received legal advice.

(ii) **PROTECTION FROM DISCLOSURE**

The doctrine of legal professional privilege has far reaching implications. The effect of a document or communication being privileged is that it is protected from disclosure. No other party to the communication is entitled to know the contents of the communication. It is inadmissible in Court, regardless of how relevant or admissible the material would otherwise be.

(iii) **THE PRIVILEGE EXTENDS TO ANY ORAL OR WRITTEN COMMUNICATION-**

Legal professional privilege attaches to any oral or written communication. It extends to any electronic record.

(iv) **THE DOMINANT PURPOSE TEST**

Until recently, in order for a document or communication to be privileged, that document or communication must have come into existence for the sole purpose of giving or obtaining legal advice or for the sole purpose of use in existing or anticipated litigation (see: Grant v Downs (supra)).

In that case, an inmate of a public psychiatric hospital died in circumstances which gave rise to an action by his widow against the NSW Government. In accordance with standard procedure, reports were prepared into the circumstances of the death. In the course of pre-trial discovery, it was claimed that the reports were privileged. The Court found that the reports were prepared for a number of purposes, namely, to assist in determining whether there had been breaches of discipline by the staff; to detect whether there were any security faults at the institution; and for submission to the Department's legal advisers to advise as to its legal position in relation to any court proceedings. In accordance with the law at the time, it was held that because the documents had come into existence for a number of purposes, only one of which was for advice or for use in existing or anticipated litigation, the sole purpose test could not be satisfied and the reports were therefore not privileged.

THAT TEST NO LONGER REPRESENTS THE LAW IN AUSTRALIA!

In the recent case of Esso Australia Resources Ltd. v Federal Commissioner of Taxation (1999) 168 ALR 123, the appellant, Esso Australia, commenced proceedings in the Federal Court challenging income assessments issued by the respondent. During the pre-trial discovery process, Esso filed an affidavit in which it claimed privilege in respect of a number of documents. The respondent disputed the claim as to some of those documents, namely, those in which the appellant's claim of privilege was based on an assertion that disclosure of the documents would result in disclosure of a communication made for the dominant purpose of enabling the appellant to receive legal advice. Foster j. applied the sole purpose test which was upheld on appeal to the Full Court of the Federal Court. Esso then appealed to the High Court.

That Court was invited, amongst other arguments, to reconsider the correctness of the sole purpose test as set out in Grant v Downs. A majority of the Court held that Grant v Downs should not be followed and that the dominant purpose test was the correct test to apply. They shared the view that the sole purpose test was too narrow in that it did not strike the right balance between the two competing public interests; namely, promotion of the administration of justice by encouraging full and frank disclosure by clients to their lawyers and secondly, ensuring that courts, litigants and investigators have unfettered access to all relevant information.

The effect of the Esso case is that a confidential communication made for more than one purpose will attract legal professional privilege provided that the dominant purpose for which it was made is to enable the client to receive legal advice or in connection with anticipated or pending litigation. The same test applies whether the claim is being made at trial or during the pre-trial process.

It should be said that the decision brings Australia into line with other common law jurisdictions (eg. England, Ireland and Canada) and ensures that the test is the same both at common law and under the Evidence Act 1995 (C'th).

(v) **CONFIDENTIAL COMMUNICATION**-

The essence of legal professional privilege is the maintenance of the confidentiality of the communication, written or oral, which has passed between the solicitor/agent and client/agent. If confidentiality does not attach to the communication, then as a general rule, a claim for privilege cannot be sustained. Thus, as not every communication between a solicitor and client is confidential, not all communications will be privileged. For example, in the following situations, neither document would be privileged- a solicitor who writes to his client advising that on a particular date an agreement was executed by the other party; or a receipt from the solicitor's office acknowledging that funds had been received from the client.

A document may contain a combination of confidential and non-confidential information. For example, a solicitor may advise his client in a letter that the conveyance of his property settled on a particular date (not confidential) and advise him as to the taxation implications of adopting various courses of investing the funds from the settlement (may be confidential). In the event that the document is required for an investigation and privilege is claimed in respect of the confidential advice, then the document can be photocopied with that privileged portion deleted or whited out.

A related matter which arises in this context is when a third party becomes involved either in the capacity of preparing a report for a solicitor on behalf of the client or becomes aware of the nature of the confidential communication.

In relation to the first situation, I have noted on page 3 privileged communications in which third parties are involved.

The third party head of privilege has been described in the following terms:-

> "...legal professional privilege protects communications between third parties and the lawyer or the client. The privilege will extend to documents and reports prepared by third parties, but only when they are prepared for, or in contemplation of, existing or anticipated litigation, or for the purpose of giving advice or obtaining evidence with reference to such litigation."[2]

Thus, in these situations the communications of which the third party is a party will be privileged. However, what is the position when the third party becomes aware of the communication and it is not as a result of contemplated or existing litigation? Is the privilege lost? Third parties in this situation fall into two categories:-

(a) Third parties who owe a duty of confidentiality to the client/solicitor;
(b) Third parties who do not owe a duty of confidentiality to the client/solicitor.

---

2 Nickmar P/L v Preservatrice Insurance Limited (1985) 3 NSWLR 44 per Wood J.

(a) Third parties who owe a duty of confidentiality to the client/solicitor:-

Third parties in this category may include such people as an officer of a banking institution, a barrister, a liquidator. Confidential communications passing between a client and a third party who owes a duty of confidentiality to the client, (for example, the client's barrister) remain confidential and are privileged, provided they meet the required test.[3]

(b) Third parties who do not owe a duty of confidentiality to the solicitor/client:

If there is no duty of confidentiality, then the Courts look at the circumstances as to how the third party became aware of the privileged communication and form a conclusion as to whether it would be unfair for the contents to be disclosed. The Courts will invariably only impute that a waiver of legal professional privilege has been made when a party (usually the client) intentionally performs an act which would render it unfair to the other party to maintain the privilege.[4]

A few factual examples may assist in appreciating the balancing process engaged in by the Courts.

- A client spoke to his solicitor in the presence of a police officer - communication not privileged.[5]

- An eavesdropping policeman overheard a communication between a client and his solicitor behind a closed door - communication privileged.[6]

---

3 FCT v Citibank 89 ATC 4268, Pioneer Concrete v Webb (1995) 18 ACSR 418, Thomason v Campbelltown Municipal Council (1939) 39 SRNSW 347.

4 Network Ten v Cap Television [1995] 16 ACSR 138, Goldberg v Ng [1995] 69 ALJR 919.

5 R v Braham and Mason [1976] VR 547.

6 R v Uljee [1982] NZLR 561.

- A person mistakenly believed he was speaking to his solicitor - communication privileged.[7]

It is important to remember that even though a document passing between a solicitor and his client is privileged, in the event that the document is located in another person's possession (for example, the client sends a copy of the legal advice to his co-offender), the contents of the document may no longer be privileged. Whilst it would depend upon the circumstances, prima facie in this situation, privilege would be lost.

(vi) **ONGOING SOLICITOR/CLIENT RELATIONSHIP**

The issue of legal professional privilege generally arises in the context of a solicitor/client relationship in which advice is sought or delivered or a document is created.

It is therefore necessary to know who is recognised by the law as being a member of the legal profession. The following people are so recognised:-

- Barristers
- Solicitors
- Legal executives in private practice (for example, solicitor employed by the NAB)
- Legal advisers in government departments provided
    - the person has been admitted to practise
    - the person is acting independently
    - the person is providing the advice which one would expect to be given by a lawyer in private practice.

7 Fuerhead v London General Omnibus Co. [1918] 2 KB 565.

It was once the case that unless there was an actual solicitor/client relationship on foot at the time of the communication, then the communication could not be privileged. However, the Courts have recently been very generous as to the circumstances in which a solicitor/client relationship can be established. The test applied in a 1994 decision of the Supreme Court of NSW was "Did the client believe on reasonable grounds that the other is his or her solicitor?" If so, communications between them were said to be privileged up to the time that the belief was exploded.[8]

This is a much broader test than whether or not there was in fact a solicitor/client relationship on foot.

**RATIONALE FOR LEGAL PROFESSIONAL PRIVILEGE:-**

Legal professional privilege is a Common Law doctrine. The rationale for its existence is contained in this extract from Chief Justice Gibbs in Baker v Campbell[9]

> "It is necessary for the proper conduct of litigation that the litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves, and it is equally necessary that a lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client. The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist "A man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.""

Whilst there has been criticism of the doctrine, it is apparent that the doctrine is not about to disappear.

---

8 Global Funds Management v Rooney 15 ACSR 368.

9 49 ALR 385 at 393.

Chief Justice Gibbs stated again in Baker v Campbell -

> "Nevertheless confidentiality does tend to promote candour, and it would be a very great change in long established practise, if a party were bound to reveal to the Court such things as an advice on evidence given to him by counsel and statements taken from witnesses for the purpose of a pending action, and such a change could not be made without the fullest examination of its possible consequences."[10]

As it is a Common Law doctrine, it can only be abrogated in legislation by express words or necessary implication that the legislators intend the doctrine of legal professional privilege not to apply.[11]

Section 465 Crimes Act (Vic) search warrants and section 3E Crimes Act (Commonwealth) search warrants do not evince an intention for legal professional privilege not to apply and therefore it does apply in relation to documents, the subject of search warrants.

In order for a search warrant to be valid, it is essential that there is strict compliance with the legislative provisions.

The relevant Regulations for search warrants in Victoria is the Crimes (Form of Search Warrant) Regulations 1992. The Regulations prescribe the form of the search warrant. Investigators must prepare their warrants in the prescribed form and Magistrates must not make deletions or additions thereto, when issuing the warrants. Annexure "B" is a copy of the relevant Regulations. Accordingly, a search warrant must not contain an endorsement which indicates that legal professional privilege applies in relation to the execution of the warrant as the Regulations do not provide for such an endorsement.[12]

---

10 Ibid; at page 393.

11 Corporate Affairs Commission (NSW) v Yuill (1991) 100 ALR 609.

12 Allitt v Sullivan [1988] VR 621.

At the Major Fraud Group, there have been two instances of which I am aware, that Orders have been sought from the Supreme Court compelling Magistrates to cancel the warrants they had issued (to which they had in one case deleted prescribed wording and in the other case inserted an endorsement relating to privilege) and to reissue them in the prescribed form.

In the event members of the Victoria Police require a search warrant to be executed interstate, strict compliance with the relevant interstate legislation is required. The legislation varies between the States, for example, search warrants issued in Queensland for execution upon solicitors' premises are required to include an endorsement in respect of legal professional privilege. It is important to ensure that the search warrants are valid in order to preclude any argument in relation to illegally obtained evidence.

## CATEGORIES OF DOCUMENTS AND COMMUNICATIONS ONE COULD EXPECT TO FIND IN A SOLICITOR'S OFFICE

The following documents/communications are those which one could expect to locate in a solicitor's office:-

- (1) Documents or communications made for or involving the participation in a fraud or illegal purpose;
- (2) Documents evidencing transactions;
- (3) Solicitors' trust account ledgers;
- (4) Documents lodged with a legal adviser for the purpose of obtaining immunity from production;
- (5) Physical objects, for example, cash or bullion in a safety deposit box;
- (6) Copies of documents;
- (7) The identity of the solicitor's client and the client's address;
- (8) Facts independently observed;
- (9) Documents produced and inspected by mistake;
- (10) Documents establishing innocence.

Appendix "C" contains in summary form whether or not these categories of documents/communications have been held by the Courts to be privileged or not privileged.

For the purposes of this Paper, I shall discuss them in greater detail.

- (1) **DOCUMENTS OR COMMUNICATIONS MADE FOR OR INVOLVING THE PARTICIPATION IN A FRAUD OR ILLEGAL PURPOSE-**

The Courts have held that documents or communications made for or involving the participation in a fraud or illegal purpose are not privileged. This is so, regardless of whether or not the legal adviser was aware of the unlawful purpose.

The reason for privilege not applying was detailed in Cox v Railton[13]:-

> "The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object".

For the purpose of criminal investigations, especially in the area of white collar crime, this category of documents excluded from legal professional privilege is potentially of great significance and assistance to investigators. However, it is important to note that there are some restrictions imposed before a Court is prepared to find that an illegal purpose or fraud exists.

The Courts have held that there:-

> "...must be not merely an allegation...(of fraud or illegal purpose)...(it) must be made (in) clear and definite terms...there must further be some prima facie evidence that has some foundation in fact..."[14]

The Courts have also held that the onus shifts to the party alleging the illegality (for example, the police) to displace the privilege. Depending upon the stage the investigation has reached, regardless of how potentially relevant the documentation may be, it may not be appropriate to reveal the nature of the police investigation or the identity of suspects etc and therefore in practice it may be very difficult to discharge the onus.

This issue was recently discussed by the Federal Court in Propend Finance v Commissioner of the AFP.[15] In that case, there was sworn material before the Court but it was hearsay. It was no more than mere assertion. The information came from undisclosed sources and the informant was not available for cross-examination. As there was not any admissible evidence before the Court, it was a mere allegation of an offence only. Whilst the police did not have to prove the

---

13 1881-1885 ALL ER 68 at 72.

14 O'Rourke v Darbishire [1920] AC 581 at 604.

15 128 ALR 657.

charge even on the civil onus, nevertheless there had to be adduced some admissible evidence to show why the Court should not uphold the claim to privilege. The documentation remained privileged.

- (2) **DOCUMENTS EVIDENCING TRANSACTIONS-**

Documents which fall within this category include receipts, contracts, declarations of trust, conveyancing documents. They are not privileged. It was stated in R v Crown Court at Inner London Sessions ex parte Baines and Baines (a firm) and another[16] in relation to a conveyancing matter:-

> "it cannot be called advice, consisting as it does of records of the financing of the purchase of, in this case, a house."

As indicated at page 7, in the event that confidential advice formed part of the documentation/communication then that part of the document would still be privileged.

- (3) **SOLICITORS' TRUST ACCOUNT LEDGERS-**

Solicitor's trust account ledgers are not privileged. They are not made for the purpose of giving/receiving advice or in contemplation of litigation. In the event that there was any annotation on the ledger which contained advice, then that annotation could be excised.[17]

---

16 [1987] 3 ALL ER 1025 at 1031.

17 Allen Allen and Hemsley v Deputy Commissioner of Taxation (NSW) and Others 81 ALR 617 at 626.

- (4) **DOCUMENTS LODGED WITH A LEGAL ADVISER TO OBTAIN IMMUNITY FROM PRODUCTION:-**

A client cannot avoid producing documents by handing them over to his legal adviser. The principle has been that a client cannot enjoy any greater protection than he would have had in the event the documents were in his possession and not his solicitor's. However, there is a gloss on this general principle to the extent that the Courts appear to be extending the doctrine beyond the sole purpose test in relation to why the document was created to include copy documents, for example, which were not originally privileged but were provided to the legal practitioner for the sole purpose of advice or for use in existing or anticipated litigation. If the documents were provided for this purpose, it appears the Courts would find that they are privileged. (Refer to "Copies of documents" on page 18). However, if they were provided to the practitioner in order for the client to avoid producing them, then they would not be privileged.

- (5) **PHYSICAL OBJECTS, FOR EXAMPLE, CASH OR BULLION IN A SAFETY DEPOSIT BOX:-**

Apart from documents, privilege does not attach to physical objects. It is restricted to communications and documents made for the purpose of giving or receiving advice or for use in existing or anticipated litigation. It does not include for example, cash, bullion, a motor vehicle, a brief case, a weapon.

- (6) **COPIES OF DOCUMENTS:-**

There are three categories into which copy documents may fall.

(a) Original document was privileged-

In the event that a privileged document is copied, then the copy retains its privileged status, unless the copy or copies are in general circulation so that there is no confidentiality attaching to the contents of the document.

(b) Original document was not privileged but the copy is made for a privileged purpose- (for example, it is copied for legal advice)

The general rule is that if the original document was not privileged, a copy of it is also not privileged save for one exception. The exception applies in the case where the document is copied for the sole purpose of obtaining legal advice upon matters contained in or concerning the original document and in circumstances where to compel production of the copy would or could operate to reveal the subject matter upon which the advice was sought or would reveal a communication or line of thought whether of the lawyer or the client which is privileged from disclosure.[18]

(c) Copy document is annotated with legal advice-

In the event that the copy document is annotated with legal advice, the annotation would be privileged.[19]

• (7) **THE IDENTITY OF THE SOLICITOR'S CLIENT AND THE CLIENT'S ADDRESS:-**

(a) client's identity-

The name of the client is not privileged even in the case in which a condition of the engagement of the solicitor by the client was the non-disclosure of his/her name.[20]

---

18 Propend Finance P/L and Others v Commissioner Australian Federal Police and Others, High Court 7 February, 1997.

19 Vardas v South British Insurance Co. Ltd [1984] 2 NSWLR 652, Nickmar v Preservatrice Skandia Insurance (1985) 3 NSWLR 44.

20 Southern Cross Commodities P/L (in liquidation) v Crinis and another 1984 VR 697, Cook v Leonard 1954 VLR 591, Bursill v Tanner [1881-1885] ALL ER Rep 1203 and Federal Comm'r. of Taxation v Coombes (1999) 164 ALR 131.

(b) client's address-

The general rule is that a client's address is not privileged because it is "a mere collateral fact which the solicitor knows without anything like a professional confidence".[21] However, if the address has been communicated confidentially to the solicitor, it has been held to be privileged.[22] These authorities must be considered in light of the case R v Bell; ex parte Lees[23] wherein it was stated that a failure by a solicitor to disclose a client's address may frustrate the legal process.

• (8) **FACTS INDEPENDENTLY OBSERVED-**

Facts independently observed are not privileged. The types of matters which can be described as "facts independently observed" are contained within the authority NCA v S[24] In that case, the solicitor argued that such matters as the number of people who attended meetings with him, the identity of those people, the dates on which the meetings took place, dates on which he provided advice to his client and whether he spoke to a particular officer of the client were privileged. The Court rejected his argument. Privilege does not extend to matters of fact which are patent to the senses. It is irrelevant that the solicitor only knew of those facts because he was the person's solicitor. Privilege would however attach to advice from a solicitor which arises as a result of the solicitor's mind working upon and acting as a professional adviser with reference to facts of which he has seen or heard.[25]

---

21 Ex parte Campbell; Re Cathcart (1870) LR 5 Ch. App. 703.

22 Re Arnott; ex parte Chief Officer Receiver 37 WR 223.

23 (1980) 146 CLR 141 at 156.

24 (1991) 54 A. Crim R 307 per Heerey J.

25 Kennedy v Lyell (1883) 23 Ch. D 387 at 407 per Cotton LJ.

- (9) **DOCUMENTS PRODUCED AND INSPECTED BY MISTAKE:-**

It will depend upon the facts of the case as to whether a claim for privilege can be maintained in circumstances in which documents for which privilege has been claimed are produced and inspected by the other side, by mistake.

In one case, a solicitor mistakenly produced documents for which privilege had been claimed and the other solicitor inspected the documents and obtained photocopies of them. It was held in that case that it was futile to maintain the privilege because complete knowledge of the documents had been imparted to the other party.[26] However, in some civil cases the Courts have held that mere inadvertence will not displace the privilege. The Courts will examine the facts and consider whether there has been any deceitful conduct or trickery which has brought about the disclosure of the documents and then rule as to whether the claim for privilege can be upheld.

- (10) **DOCUMENTS ESTABLISHING INNOCENCE-**

The law was that even if a document would otherwise be privileged it is admissible if it would assist in establishing that an accused person was innocent of an alleged criminal offence.

However, on 14 June, 1995, the High Court in Carter v Managing Partner Northmore Hale Davey and Leake[27] held that the Common Law does not recognise an exception to legal professional privilege in favour of an accused in criminal proceedings to compel production and access to documents which may establish an accused's innocence or materially affect his defence.

---

26 Kabwand P/L v National Australia Bank Ltd 81 ALR 721.

27 129 ALR 593.

The rationale behind the Court's ruling was that legal professional privilege recognises that the public interest is paramount. It is not possible for the interest of an individual to destroy the privilege conferred.

**PROCEDURE UPON A CLAIM OF PRIVILEGE BEING MADE**:-

This topic is discussed in the Paper "The Investigation of Solicitors - Crimes and Searches." I have annexed hereto Annexure "D" which are the general guidelines agreed upon between the Australian Federal Police and the Law Council of Australia. They provide a workable framework within which search warrants can be executed on solicitors and Law Societies. In practice, the usual response of solicitors upon the arrival of the police with a search warrant, is to telephone the relevant law society and have the guidelines faxed to them. The search can proceed in an orderly manner in the event both parties are following the same guidelines.

In relation to executing a warrant on a solicitor's office and a claim for privilege being made, it is important to note the following matters:-

- **Provide a copy of the search warrant to the solicitor and show him/her the original if so requested:-**

Ensure upon attending at a solicitor's office that a copy of the search warrant is provided to the solicitor and show him/her the original if so requested.

- **Allow reasonable time for the solicitor to obtain instructions from his/her client:-**

The Courts have held that a solicitor must be given reasonable time to obtain instructions from his/her client in relation to making a claim for privilege. It is the duty of the solicitor to initially make a claim for privilege on his/her client's behalf but it is then necessary for the solicitor to obtain instructions from the client as to whether the claim is to be maintained. It will be a question of fact in every case as to what constitutes reasonable time. In the event that reasonable time is not afforded, the Courts have held that the investigator is acting beyond power and thus, the risk is that relevant evidence obtained may be lost.

- **The onus is on the party asserting that privilege exists**:-

In the event that privilege is claimed, the onus is on the party asserting privilege, to provide the investigator with sufficient information in order for the investigator to make an informed decision as to whether the privilege claim is supportable.[28] The solicitor cannot simply say that the file or document is privileged and that is the end of the matter.

I have prepared Annexure "E" which contains the type of information, an investigator would require before the investigator could be satisfied that privilege could be claimed. In the event the investigator wishes to seize the documents, the completion of the details in this chart or one of a similar nature, will enable the documents in dispute to be identified and the basis of the claim for privilege, to be specified.

Jennifer Bowles
Solicitor
Major Fraud Group
June 1997.

[28] NCA v S (1991) 54 A. Crim R 307 per Heerey J.

KC-3

Attachment 4

VICTORIA POLICE

DETECTIVE TRAINING SCHOOL

MELBOURNE, VICTORIA, AUSTRALIA 3000

# I N D E X  T O

# DETECTIVE TRAINING SCHOOL

# N O T E S

# INDEX TO DETECTIVE TRAINING SCHOOL NOTES

## FOLDER No. 1



**********

## FOLDER No. 2



**********

FOLDER No. 3

A. ARSON - LAW & INVESTIGATION
B. ARSON - THE INVESTIGATION OF FIRES
C. CRIMINAL DAMAGE
D. FIRE
E. BIGAMY
F. BRIBERY & CORRUPTION
G. BREACH OF THE PEACE
H. DEMONSTRATIONS - CROWD CONTROL, AIRCRAFT HIJACKING, BOMB THREATS AND BOMB SITUATIONS
I. POLICE PROSECUTORS
J. CHILDRENS' COURT
K. HAND UP BRIEFS
L. INDICTABLE OFFENCES - TRIABLE SUMMARILY
M. EXTRADITION
N. BAIL

**********

FOLDER No. 4

A. THEFT - STATE & COMMONWEALTH PROPERTY
B. CRIME SCREENING
C. THEFT & ASSOCIATED OFFENCES RE - MOTOR CAR AND AIRCRAFT ILLEGAL USE OF VEHICLES
D. THEFT OF MOTOR CARS - INVESTIGATION
E. ARMED ROBBERY
F. ROBBERY
G. BURGLARY AND RELATED PROVISIONS
H. DECEPTION AND RELATED PROVISIONS
I. LIVESTOCK THEFTS
J. VICTORIAN LIVESTOCK (SHEEP, WOOL & CATTLE PRODUCTION)
K. BLACKMAIL
L. HANDLING STOLEN GOODS
M. UNLAWFUL POSSESSION

**********

FOLDER No. 5

A. HOMICIDE
B. ABORTION, CHILD DESTRUCTION, CONCEALMENT OF BIRTH
C. WOUNDING - ASSAULT & OFFENCES DANGEROUS TO LIFE
D. COUNTERFEIT CURRENCY
E. BUREAU OF CRIMINAL INTELLIGENCE - LINK ANALYSIS
F. CONSPIRACY
G. USE OF MAPS
H. DRUGS - LAW AND INVESTIGATION
I. PHARMACY BOARD LECTURE
J. EXPLOSIVES INVESTIGATION
K. EXPLOSIVES AND EXPLOSIONS
L. FIREARMS OFFENCES
M. FORGERY
N. FRAUD SQUAD
O. SPECIAL BRANCH

**********

FOLDER No. 6

A. ACCOUNTING PRINCIPLES
B. PERJURY
C. THE ROLE OF THE BARRISTER IN CRIMINAL CASES
D. PROSTITUTION
E. SEX OFFENCES
F. THE SEXUAL OFFENDER (ABNORMAL PEOPLE)
G. ABDUCTION
H. CRIME PREVENTION
I. JUVENILE DELINQUENCY - PSYCHIATRIC DISORDERS
HOSPITAL ADMISSIONS OF THE MENTALLY ILL
J. VAGRANCY
K. LOITER WITH INTENT
L. VICTORIA DOCK
M. PROVISION OF THE COMPANIES ACT
N. COMPUTER SYSTEMS DIVISION
O. INFORMATIONS, WARRANTS & SUMMONSES
P. WARRANTS
Q. SEARCHING MEMORY PROMPT
R. THE INVESTIGATOR IN COURT
S. PROPERTY

**********

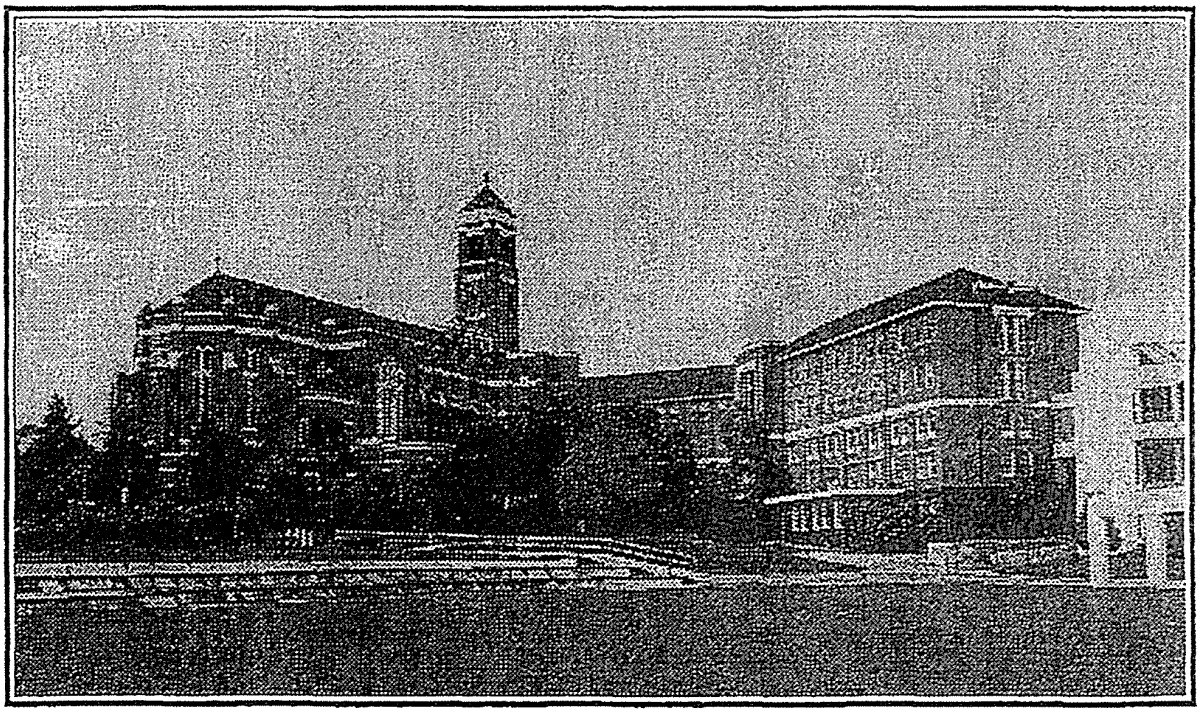
KC-4

Attachment 1

38

# CONSTABLES' COURSE

## JUNIOR PHASE



## WITNESS STATEMENTS

Item 33

# WITNESS STATEMENTS

## INTRODUCTION

1. When we talk about statements made by a witness we usually refer to a written record which describes facts and events witnessed by that person which are relevant to the matter under inquiry.

## PURPOSE OF STATEMENTS

2. A statement has a number of uses:

(a) it provides a simple word picture of a series of events for police, prosecutors, court officials and jurors;

(b) it can be referred to by witnesses to refresh their memory of events and provides a guide for witnesses to base their testimony on;

(c) it restricts prevarication or changes of mind by witnesses, and

(d) it provides a permanent record of events.

## CONTENT OF STATEMENTS

3. (1) A statement should be clear in meaning, concise, relevant, accurate and recorded as soon as possible after the event.

(2) A written statement usually contains the following elements:

(a) witness' name, address and occupation;

(b) time, date and place of occurrence;

(c) descriptions of facts and events witnessed;

(d) witness' signature, and

(e) jurats (memoranda typed at the foot of the page by the member taking the statement).

See Appendix "A" for an example of a statement.

## PROCEDURE WHEN TAKING A WITNESS STATEMENT

4. Adherence to the following rules when taking a statement should ensure a good quality result:

(a) **PUT THE WITNESS AT EASE:** They may be upset, nervous or frightened. Show your interest, attempt to allay their fears; offer them a cup of coffee or a cigarette, sit them down. Where there is more than one witness separate them.

(b) **GET THE OVERALL PICTURE FIRST:** This allows you to have a general idea of what has taken place.

(c) **RECORD THE STATEMENT:** If possible the statement should be taken down on a typewriter at your police station but if this cannot be done, take a handwritten statement.

(d) **USE THE WITNESS' LANGUAGE:** However, it would be ridiculous if it could not be understood.

(e) **REFRAIN FROM SUGGESTING ANSWERS:** You don't want the witness saying in court "the constable told me to say that".

(f) **ENSURE THE STATEMENT IS IN CHRONOLOGICAL ORDER:** If you have obtained the story first it will assist you here.

(g) **USE DIRECT SPEECH:** Do not use - **The man told his mate to get the gun,** but - **The man said to his mate, "Go and get the gun".**

(h) **DON'T ALTER BY OVERTYPING:** Rule a line through the error and have the complainant/witness initial it.

(i) **ENSURE THERE ARE NO OMISSIONS, ERRORS OR AMBIGUITIES:** If there are, draw the witness' attention to them and rectify them.

(j) **EXCLUDE IRRELEVANT MATERIAL AS FAR AS POSSIBLE:** If in doubt include the matter you are unsure of and leave it to the prosecutor to decide.

(k) **WHILST BEING AS CONCISE AS POSSIBLE DO NOT SKIMP ON PAPER OR NECESSARY DETAIL.**

(p) **ALL STATEMENTS ARE TO BE PREPARED IN TRIPLICATE:** Sometimes more copies are required and you will be advised of this in a later lesson.

(m) **STATEMENT OF AGE:** Where the person making the statement is under the age of 18 years and the offence to which the statement relates is an indictable offence, include the age of the witness in the statement.

## DISTRIBUTION OF COPIES

5. The copies are distributed as follows:

| | |
|---|---|
| ORIGINAL | **signed statement to be retained by you for production at court;** |
| DUPLICATE | **to be given to witness, and** |

TRIPLICATE to be attached to the brief.

## COMPLETION OF STATEMENT

6. (1) When you have finished typing the statement hand the ribbon copy to the witness to read. (If the statement has been handwritten have the witness read it and provide either a typed or photostat copy at a later date.)

(2) Make sure the witness reads it out aloud and ask him if the statement is correct. (It could be embarrassing at court if the witness said he couldn't read "but he thought" the statement was correct.)

(3) If he agrees it is correct have him sign the original directly under the last sentence. Do not leave gaps between the sentence and the signature and ensure that the witness signs the bottom of each page and initials any typed or written errors. (It is only necessary to get the original copy signed.)

(4) Where the person supplying the statement cannot read, the member taking the statement shall:-

(a) obtain the assistance of a member, senior in rank and not involved in the inquiry, to read aloud the statement to the person making the statement;

(b) request the person making the statement to sign it on the last page and to sign or initial all other pages, and all alterations or additions, and

(c) set out under the signature of the witness an endorsement which he shall sign and which shall be in the following form:-

(i) "Is what I have read to you from this document a true account of the interview?"

(ii) "Is there anything further you wish to add?"

(iii) "Will you sign it as a true account of this interview on each page, and initial any alterations that have been made to it?"

## JURAT

7. (1) A jurat is a memorandum at the end of a statement stating where and when the statement was taken, followed by the signature and description of the person by whom it was taken:

**Statement taken and signature witnessed by me at 9.00 a.m. this 5th day of December, 1989, at Coburg.**

(J. SMITH)
Constable 24589

NOTE: The jurat is typed across the left half of the statement only.

(2) Give the witness/complainant the duplicate copy.

(3) If the statement relates to an indictable offence add the following acknowledgement:

**I hereby acknowledge that this statement is true and correct and I make it in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury.**

NOTE: The acknowledgement is typed right across the page.

(4) Make sure the witness reads the acknowledgement and signs it. You then complete the acknowledgement jurat directly below acknowledgement, again on the left half of the statement:

**Acknowledgement taken and signature witnessed by me at 9 a.m. this 5th day of December, 1989 at Coburg.**

(J. SMITH)
Constable 24589

(5) Give the witness the duplicate copy. The completed statement should look like this:

. . . . . I then saw the man run away.

(WITNESS)
Signed

**Statement taken and signature witnessed by me at 9.00 a.m. this 5th day of December 1989 at Coburg.**

(POLICE MEMBER)
(J. SMITH)
Constable 24589

**IF THE OFFENCE WAS INDICTABLE ADD:**

I hereby acknowledge that this statement is true and correct and I make it in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury.

(WITNESS)
Signed

**Acknowledgement made and signature witnessed by me at 9.02 a.m. this 5th day of December, 1989 at Coburg.**

(POLICE MEMBER)
(J. SMITH)
Constable 24589

## STATEMENTS FROM FEMALES IN RESPECT TO SEX OFFENCES

8. (1) Where a statement involving a sexual offence is to be obtained from a woman, or where the matters to be covered in the statement are likely to involve questions of a personal and physically intimate nature, the member in charge of the investigation shall ensure that such statement is taken by a policewoman or in the presence of a policewoman unless the person making the statement requests that no woman be present. (**Standing Orders 8.4(3)** refers.)

(2) Where practicable the policewoman taking a statement of the kind referred to in the paragraph above, or who was present when such statement was taken, shall attend court when the person making the statement gives evidence of the events covered in the statement. [**Standings Orders 8.4(4)** refers.]

(3) The member in charge of the case shall notify the policewoman who took such statement, or was present when it was taken, of the time, date and place of the hearing of the matter wherein the person making such statement will be giving such evidence.

(4) The provisions of the paragraph referred to above are not to be taken as prohibiting the questioning of a woman by the investigating member. It may be essential that such investigating member obtain sufficient basic details to enable him to make any enquiries which are of an urgent nature, or which tend to establish the identity of the offender, and the fact that an offence has actually been committed.

## NEGATIVE STATEMENTS

9. (1) You will find that a section of the community (the criminal element) has little interest in the preservation of law and order. After witnessing an incident they will claim to have seen nothing, heard nothing and said nothing. If you can obtain a statement from this type of person along those lines then do so; this will make it awkward for him at some later stage to have a remarkable revival of memory when he decides to give evidence for the defendant (evidence that will generally be entirely false).

(2) By producing his signed statement to the court of him having seen, said and done nothing at the time, this will undoubtedly destroy the credibility of the witness (and of the defence case in general).

(3) In one instance where a man was disposed of at short range with a shotgun, another man standing alongside him was splattered in blood, but still claimed to have seen and heard nothing.

32

APPENDIX "A"

| | VICTORIA POLICE | V.P. Form 287 |
|---|---|---|
| inted 1987 | **STATEMENT** | Date 04 / 01 / 90 |

| | | |
|---|---|---|
| Name | SUTTON (Family Name in Capitals) / Jennifer Ann (Given Names) | |
| Address | 25 Wattle Street, Chadstone | |
| Occupation | Private Secretary | Tel. No. 753 3652 |

STATES— At about 9.00 p.m., on Thursday, the 4th of January, 1990, I was walking in a northerly direction along the western footpath in Springvale Road, Glen Waverley, when I saw approximately six youths standing on the footpath at the corner of High Street Road.

When I was about ten metres away from this group of youths I saw one of them was standing with his trousers down to his knees and was urinating into the gutter. As I passed the group they all looked at me and laughed.

I said, "You should be ashamed of yourselves".

The youth that was urinating said:

"Mind your own fucking business - if you don't like it, piss off."

I continued on until I came to a phone box and contacted the police.

The area where I saw the youth urinating was brightly lit by overhead street lights. There was a large number of motor cars travelling along Springvale Road when I saw the youth urinating in the gutter and the occupants of these cars would have had a clear view of him. I was offended by the behaviour and language of this youth and was concerned for my own safety.

WITNESS SIGNS HERE ON AN ORIGINAL COPY .....

Statement taken and signature witnessed by me this 4th day of January, 1990 at 1045pm., at Mulgrave Police Station.

M. A. GOODALL
Constable 20000

# KC-5

Attachment 8

VICTORIA POLICE

DETECTIVE TRAINING SCHOOL

MELBOURNE. VICTORIA, AUSTRALIA 3000

## INTERVIEWING WITNESSES

# INTERVIEWING WITNESSES

## C O N T E N T S

CONTENTS (Contd.)

VICTORIA POLICE FORCE
DETECTIVE TRAINING SCHOOL

# INTERVIEWING WITNESSES

## BASIC QUESTIONS OF INVESTIGATION

In any investigation, the investigator seeks the answers to questions concerning the matter under inquiry. If all of the right questions are asked, at least some of the right answers will be obtained. If none of the questions are asked, none of the answers will be forthcoming.

The basic questions of investigation are these:-

WHAT?
WHEN?
WHERE?
WHO?
WHY?
HOW?

The following questions are extensions of the six basic questions:-

1. WHAT?

What happened?
What was the motive?
What was the name, alias or nickname of the suspect?
What sex, race, colour or national origin was the suspect?
What age, height, weight, colour of hair and build was the suspect?
What actions were taken by the suspect?
What do the witnesses know?
What evidence was taken from the scene?
What evidence was left at the scene?
What tools or weapons were used?
What means of transportation was used?

2. WHEN?

When was the crime discovered?
When was the crime committed?
When was the suspect last seen?
When were the Police notified?
When did the Police arrive?

When was the victim last seen?

3. WHERE?

Where was the crime discovered?
Where was the crime committed?
Where was the suspect last seen?
Where were the witnesses?
Where was the victim?
Where were the tools or weapons obtained?
Where did the suspect live?
Where did the victim live?
Where did the suspect or victim spend their leisure time?
Where is the suspect likely to go, family, friends, out of town, etc.?
Where might property stolen be disposed of?

4. WHO?

Who is the victim of the crime?
Who reported the crime?
Who discovered the crime?
Who heard anything of importance?
Who had a motive?
Who has the opportunity?
Who helped commit the crime?
Who did the suspect associate with?
Who was the victim last seen with?

5. WHY?

Why was the crime committed?
Why were the particular tools or weapons used?
Why was the witness reluctant to talk?
Why was the crime reported, vengeance, spite or law-abiding citizen?

6. HOW?

How was the crime committed?
How did the suspect get to the scene?
How did the suspect get away?
How much property was taken?
How did the suspect get the necessary information to commit the crime?
How much knowledge, strength or skill was necessary to commit the crime?

These questions form a reliable basis on which to commence an investigation.

INTRODUCTION

Investigation is a search for the truth, in the interests of justice and in accordance with the specifications of the law. The investigator is concerned with establishing the facts of the matter under inquiry and obtaining all of the available evidence to enable the successful prosecution of any criminal offender.

Since much of the evidence in any investigation is available only through the examination of witnesses, the investigator must consider:-

(a) Perception
(b) Who to interview
(c) The time of the interview
(d) Order of interviewing
(e) The place of the interview
(f) The manner of the interview

In other words, the investigator must decide when, where and how the interview will take place in order to obtain the best possible results.

(a) Perception

Perception is the process of receiving knowledge through the sense organs - sight, smell, hearing, taste and touch.

Most human behaviour is in response to impressions received through the sensory organs, and any distortion of those impressions may affect the nature of the behaviour. Defective eyesight, hearing, etc., may result in faulty interception of impressions. Pain, emotion, severe discomfort, exhaustion, etc., may distract the individual so that he becomes preoccupied and inattentive to ordinary impressions received through the eyes, ears, and other senses. Mental impairment may cause the senses to function abnormally and produce delusions or hallucinations.

Perception requires mental interpretation of the knowledge received by the sensory organs. Such interpretations are based on past experiences and reasoning power of the individual. (For example: A person would be unable to identify a type of dog he had never previously heard of, but would recognize the animal as a dog because it bears characteristics similar to other dogs he has seen.) This limitation of individual ability should be kept in mind when evaluating testimoney of witnesses.

Visual limitations: Eye defects may frequently be evaluated by ascertaining the type and strength of glasses worn by a subject. Tests have roughly determined the following limitations on the distance at which persons can be recognized:

a. A well-known person in good illumination can, on the average, be recognized at a distance as far as 150 feet.

b. If a person has some physical, dress or manner peculiarities, it may be possible to recognize him up to about 300 feet.

c. A person who is not well-known could not usually be recognized at more than 100 feet.

d. In bright moonlight, recognition is usually limited to about 30 feet.

It is estimated that approximately three percent of any population is colour-blind.

(b) Who to Interview

In almost every case, it will be desirable to question every person thought to have information before the case is completed, but there will be times during an investigation when such questioning is not advisable. It will be necessary to select a time when the questioning is advisable, and select a time when the questioning of a particular person will be beneficial and not harmful to the investigation. When questioning does appear in order, give careful thought to the alternative investigative procedures and methods.

An attempt must be made to locate and eventually process every witness who may have relevant information. In many cases, there will not be adequate evidence to convict the offenders unless all sources of information have been exhausted. In other cases, the investigator cannot be sure that he has identified all of the associates or conspirators in a crime and can prove the exact participation of each, until all possible information has been obtained and evaluated. Sometimes a single statement from what appeared to be the least important witness will change the entire complexion of a case. There is also the possibility that the unquestioned witness or suspect may unexpectedly appear in court for the defence and testify to matters that are completely inconsistent with the investigators findings. If the investigator has previously taken a statement from him, he will be aware of, and can prepare for, the additional defence testimony; or if he completely changes his statement, it may be possible to destroy his testimony.

Initially, suspects may be developed by ascertaining whose actions, whereabouts, reputation, or motives are questionable in relation to the offence. Similarly, witnesses may be identified by determining who was in a position to have observed worthwhile information through sight, hearing, feel, or smell; and ascertaining who performs services, receives reports, or maintains records of value. Even a person having only hearsay information is worth interviewing for clues to more suitable sources. When known witnesses or suspects are being questioned, they should be queried about others who may be involved or have information.

(c) The Time of the Interview

Witnesses should be interviewed at the first practicable opportunity. The human memory of an event becomes more and more vague with the passage of time until the witness forgets almost everything about the occurrence. Furthermore, there is a natural tendency for a witness to discuss his experience with others. This often results in the witness, consciously or unconsciously, embellishing or modifying his story to agree with the accounts of others, or with what he has read in the newspapers, seen on television or heard on the radio.

Human imagination is such that some witnesses will reason that a particular event must have occurred in a certain way and, by means of auto-suggestion, will induce a belief in their own minds that they observed certain events which they could not possibly have observed. This is due to human frailty rather than deliberate dishonesty, but it must be remembered that human frailty is responsible for the loss of more prosecutions than deliberate dishonesty.

The first opportunity to interview a witness may not necessarily be the earliest practicable opportunity. The emotional or physical condition of a witness may be such that an immediate interview would be pointless. On the other hand, if given time to reflect, a witness may decide to say nothing. Each case must be judged on its individual merits. In any case, obtain the names and addresses of all potential witnesses immediately.

Usually, witnesses should not be interviewed until the investigator has gained an appreciation of the inquiry by visiting the scene and examining physical evidence and exhibits. The investigator is then in possession of facts, without which he would have no alternative but to accept whatever he was told by the witness. Consequently he would be unable to determine whether the witness's account was consistent with the known facts.

Accordingly the investigator should have the best possible understanding of the situation prior to any interview. The investigator must adapt himself to the situation and to the type of person he is interviewing. He should always act naturally and avoid trying to create an impression. Questions should be asked in a conversational tone of voice and expressed in simple terms. Every effort should be made to establish a pleasant relationship with the witness.

The witness should be allowed to tell his story in his own words and in his own way. There is no doubt that this will probably result in the witness introducing much irrelevant detail. However, it will give the investigator an opportunity to determine the witness's value. There is nothing more frustrating for a witness, particularly one who is unaccustomed to the role, than to be constantly interrupted by the interviewer.

Once the witness has exhausted his account of the event, he should then be questioned specifically by the interviewer. At this stage, completely irrelevant details can be excluded and the relevant information assembled to present a coherent account of the event.

The investigator should avoid asking leading questions which might suggest the desired answer to the witness. However, the investigator should be careful to ask the witness specific questions concerning details which are of importance. Witnesses will often answer only the actual questions put to them by the interviewer and will neglect to volunteer any other information.

It is important to ensure that any figures of speech, technical terms or uncommon words used by a witness are defined to ensure that they have the same meaning to both the witness and the interviewer. Use the phraseology of the witness, but where necessary clarify unclear phraseology.

The investigator must be patient but persistent. He must remember that this might be the witness's first experience in an investigation and it may not be his last. The investigator's conduct will leave a lasting impression on the witness and will influence his future attitude.

Record the witness's statement at the first opportunity and if the circumstances are appropriate supply him with a copy. The provision of a copy of the statement will permit the witness to refresh his memory of the facts without distraction from other influences.

The convenience of all witnesses must be considered from the time of the initial contact to their ultimate appearance in court.

Firmness is not arrogance. Most people interviewed are not "on the outs" with society. Several instances have occurred where witnesses stated they would not co-operate further because they felt they were being treated as common criminals. The crown of authority that sometimes rests with an interviewer is close to arrogance. Certainly, the interviewer cannot be defensive at any point, but it should be stressed that being firm, is not arrogance. Firmness is best described as "a sales approach with a definite objective." Never lose sight of the objective of the interview, no matter what the technique used to gain an individual point. Always come back to the necessary approaches that lead to the objective.

An interviewer must discipline himself by adhering to the following guidelines:

(a) Do not prejudge anyone.

(b) Subdue all personal prejudices.

(c) Keep an open mind, receptive to all information regardless of its nature.

(d) Try to evaluate each development on its own merit.

(e) Learn to refrain from trying to impress the subject, unless such action is used as a specific device of questioning. This is a common fault among interviewers. They will conduct themselves and ask questions in a manner designed to impress the witness with their importance. This is often created by the interviewer's exhibiting sarcasm, anger, disgust, and other acts which lessen the interviewer's image to the witness. The interviewer should always suppress his own emotional attitudes and apply all his faculties to the objective of the interview.

(f) There can be no justification for deliberate lies or false promises. Even the implied false promise is unethical and hardly more than a veiled manner of saying that the end justified the means.

(g) Never underestimate the mentality or physical endurance of the witness. On occasion, it may exceed your own. The specialized experience that you receive should enable you to interview almost any individual. Always maintain the supposition that the witness may be highly intelligent, and adjust accordingly.

(h) Do not take on contemptuous attitudes such as:

(i) Never sneer

(ii) Don't ridicule

(iii) Don't bully.

(iv) Do not belittle the witness, his position, or information derived.

(v) During the course of general conversation, avoid such controversial issues as religion, racial matters, and politics, if at all possible.

(vi) Do not make promises that can't be kept

(vii) Be fair.

(viii) Never consider the gaining of information or a confession as a victory. This in itself may be a "stepping stone" toward the total objective.

(i) Try not to show signs of personal nervousness, such as pacing around the room.

(j) The subject must believe that your only motivation is a search for truth. Avoid the impression that your only interest is information.

(k) Never raise your voice. The moment you do, you have endangered the interview.

(l) Try to avoid antagonizing the witness.

(m) Display total confidence in your course of action.

(n) Be a good listener.

(o) Be patient.

(p) Be persistent.

CLASSIFICATION OF WITNESSES

The types of witnesses whom the investigator will be required to interview will vary considerably and it is important to have an understanding of the nature and method of handling the various types. They include the following general categories:

1. Impartial witnesses.

2. Biased witnesses.

## APPRECIATION OF A WITNESS'S EVIDENCE

Memory is based on the ability to:

(a) OBSERVE

(b) RETAIN WHAT IS OBSERVED

(c) RECALL WHAT HAS BEEN RETAINED.

The power of memory varies from person to person and in accordance with the circumstances under which the observation was made. There are occasions when a person makes a conscious effort at controlled visualisation and other occasions when the mind is "free-wheeling" and the observation is not recorded.

Minor discrepancies will usually occur in the reports of truthful witnesses who have observed the same event. These discrepancies may serve to indicate the genuineness of their statements. In concocted accounts, dovetailed precision would be expected.

Never expect the impossible of a witness. The witness may have observed an incident for a few fleeting seconds and his ability to recall the event in accurate detail will depend on a number of factors, including the state of mind of the observer. For example, if the witness heard a disturbance and went to investigate, he would be better equipped to recall what he saw than a witness who is suddenly attacked on the street. In the first case, the witness intends consciously to observe whatever is taking place and is not emotionally involved. In the second case, the witness is taken by surprise and his mental impressions will be distorted as a result of natural fear and the unexpected nature of the occurrence.

## DIFFERENCES AS TO AGE AND SEX

Men and boys usually make better witnesses with respect to mechanical things, such as, vehicles, aeroplanes, etc.

Women and girls frequently are more informed about social matters and the petty intrigues of the neighbourhood. They are interested in people and their surroundings and often are better witnesses than men with regard to the activities, dress characteristics, etc., of persons and with respect to furnishings, furniture arrangements, and similar conditions in the living quarters of homes or other buildings of direct interest to them. Women and girls are sometimes more emotional and less reliable with respect to matters of an emotion-producing nature.