

The Hon. Margaret McMurdo AC
Commissioner
Royal Commission into the Management of Police Informants

Sent via submission portal

Dear Commissioner

Royal Commission into the Management of Police Informants

The Law Institute of Victoria (“LIV”) welcomes the opportunity to contribute to the Royal Commission into the Management of Police Informants.

The LIV acknowledges that the terms of reference seek to specifically address Victoria Police conduct and management of police informants, in particular, Informer 3838. The LIV submits that those issues are best addressed by Victoria Police. The scope of this submission will be limited to the rules relating to the processes for legal admission, and the responsibility for lawyers to meet continuing professional development and legal practice obligations to maintain a practising certificate. It should be noted that the responsibility for the regulation of lawyers falls to the Victorian Legal Services Board (VLSB).

We will outline the requirements for being admitted and for being issued a practising certificate for legal practice, including the requirements at the time Informer 3838 was admitted by the Victorian Legal Admission Board’s (“VLAB”) predecessor, the Board of Examiners. We will broadly outline legal professional privilege obligations. We will also detail the high levels of regulation, compliance and ethical values which presently govern the legal profession and provide insights into the role of the LIV in providing ongoing education and support services.

It is the view of the LIV that further regulation of the legal profession is not required. Recently released data confirms that there were 19,460 practising solicitors in Victoria in 2018. Rogue conduct by a legal practitioner will not be deterred by further codification aimed at the entire legal profession. Increased regulatory or legislative requirements are not a surety to safeguarding the community or consumers, as the vast majority of legal practitioners already abide by high standards of ethically and diligently acting in the best interests of their clients. The LIV continues to support rigorous risk management practices, and submits that the current regulatory framework for consumer and community protection is adequate in addressing this.

Law Institute of Victoria

The LIV, founded in 1859, is the peak membership body for the Victorian legal profession, representing more than 19,000 lawyers and people working in the law in Victoria, interstate and overseas.

On 1 July 2015, the *Legal Profession Uniform Law (Victoria)* (“Uniform Law”) became the governing legislation for all lawyers in Victoria and New South Wales, with Western Australia to formally join the

scheme on 1 July 2020. The *Uniform Law* harmonises regulation of the legal profession to create a single system governing legal practice in participating jurisdictions.

The *Uniform Law* provides that the Victorian Legal Services Board (“VLSB”) and the Victorian Legal Services Commissioner (“Commissioner”) are responsible for regulating lawyers in Victoria. The VLSB and Commissioner work closely with the Legal Services Council, the Commissioner for Uniform Legal Services Regulation, the New South Wales legal profession regulators and Victorian professional associations, such as the LIV, in carrying out their functions of regulating lawyers under the *Uniform Law*.

Until 2014, the LIV performed delegated functions on behalf of the VLSB, which included the issuing of practising certificates. Our records indicate that Ms Nicola Gobbo applied for a practising certificate as an employee solicitor in May 2013; and a practicing certificate was issued for Ms Gobbo to practice as an employee solicitor for the period 1 July 2013 to 30 June 2014. The LIV’s delegated authority to issue practising certificates ceased in mid 2014, and the responsibility for issuing practising certificates was transferred to the VLSB in mid 2014.

Currently, the LIV performs the following functions under delegations from, and contracts with, the VLSB in:

- carrying out trust account investigations (until 30 June 2019)
- assessment of the approved trust account course
- auditing legal practices
- administering Continuing Professional Development (“CPD”) requirements.

There are various departments and services within the LIV that support these functions. These include the Ethics and Professional Practice Department, which provides ethics guidance to legal practitioners seeking answers to pressing ethical dilemmas; develops and delivers ethics education including customised in-house ethics seminars; manages the Ethics Committee; issues Ethics Guidelines and manages the Ethics Liaison Group. Recently, the LIV released a series of Ethics Education videos, one of which specifically addresses issues raised regarding the conduct of Informer 3838.

The LIV Legal Policy team initiates programs to support the needs of a changing profession and promotes an active law reform advocacy agenda via its 11 practice sections and 80 committees in which legal practitioners regularly participate. The LIV Legal Policy team responds publicly to issues affecting the profession and broader community.

The LIV Professional Development program offers a variety of conferences, seminars, workshops and education products to meet the diverse CPD requirements of the legal profession. These CPD events draw on the expertise of leaders in the profession to provide practising lawyers with practical knowledge and skills that meet day-to-day practice needs, including awareness of legislative changes and any changes in professional obligations brought about by legislative changes. The LIV also provides an Accredited Specialisation program which assists lawyers who obtain specialist accreditation to substantiate their expertise in the particular field in which they have been accredited.

Admission to legal practice and evolving regulatory framework

The formal requirements for legal practice admission were regulated by the *Legal Practice Act 1996* (Vic) and the *Rules of the Council of Legal Education 1993* (Vic). To be admitted to practice, the applicant had to meet the requirements of the admission rules.¹ These rules required the applicant to have completed an approved degree in law,² complied with the practical requirements for admission,³ be of good fame and character, and a fit and proper person.⁴

The *Legal Practice (Admission) Rules 1999* (Vic) introduced a requirement to sign an affidavit in support of an application for admission, expressly stating all relevant information was disclosed in the application process.⁵

The *Legal Practice Act 1996* was repealed in 2005 and replaced by the *Legal Profession Act 2004* (Vic).

In 2015 the *Legal Profession Act 2004* (Vic) was replaced by a framework that brought uniformity of regulation of the legal professions, and which was adopted in Victoria and NSW. The framework includes the *Legal Profession Uniform Admission Rules 2015* (NSW), the *Legal Profession Uniform General Rules 2015* (NSW) (*Uniform Rules*), the *Legal Profession Uniform Law Application Act 2014* (Vic), the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (*ASCR*), the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (NSW) and the *Legal Profession Uniform Law 2015* (*Uniform Law*).

We anticipate that in 2020, there will be additional legislative amendments made as Western Australia adopts the *Uniform Law*.

For an applicant to be admitted under the current *Uniform Law* and *Rules*, they must:

- (i) be aged 18 years or over;
- (ii) not already admitted to the Australian legal profession;
- (iii) have attained the specified academic qualifications prerequisite;
- (iv) have satisfactorily completed the specified practical legal training prerequisite;
- (v) be a fit and proper person to be admitted to the Australian legal profession; and
- (vi) take an oath of office, or make an affirmation of office, in the form required by the Supreme Court.

Section 17(1)(c) of the *Uniform Law* requires the VLAB to determine whether an applicant is a fit and proper person to be admitted having regard to Rule 10 of the *Legal Profession Uniform Admission Rules 2015* and any other matter the VLAB considers relevant. An applicant must provide a statutory declaration disclosing details of any matters which may have bearing on his or her fitness and propriety. The disclosure is reviewed by the Victorian Legal Admissions Committee with the following possible outcomes:

¹ Legal Practice Act 1996 s6(1)(a)

² Rules of the Council of Legal Education 1993 s9(b),(c)

³ Ibid 9(d)

⁴ Ibid 9(a)

⁵ Legal Practice (Admission) Rules 1999 Schedule 8(7)

- no further consideration is required;
- further and better particulars are required;
- the applicant is invited to attend a meeting with the Chairman and CEO (of the VLAB) who will ask questions about the matters that have been disclosed to clarify them and examine the applicant's insight into why the Board may have concerns about anything disclosed. The discussion is intended to be frank and honest, though informal;
- the application will be referred to a full meeting of the Committee; or
- the application will be referred to a special hearing.

At the meeting with the Chairman and CEO, the applicant will be advised:

- a) no further consideration is required; or
- b) what further material should be provided by the applicant, having regard to the discussions at the meeting. In this case, a decision cannot be made until after the further material is provided;
- c) the application will be referred to a full meeting of the Committee; or
- d) the application will be referred to a special hearing.

Full meetings of the Committee are held approximately two weeks prior to each admission date. From time to time additional meetings may be held as the need arises. Applicants appearing before the Committee often attend with counsel and/or with their employer, supervisor or support person. The Committee engages counsel to assist in questioning the applicant and to make submissions to the Committee. Special hearings are transcribed and held in the Supreme Court and witnesses are required to give sworn evidence.

Issuing of Practising Certificates

An individual is prohibited from engaging in legal practice in Victoria unless they are qualified to do so by way of holding a practising certificate.⁶ Once admitted, an individual can apply through the VLSB for a practising certificate in accordance with the *Uniform Law*.⁷ VLSB must not grant a practising certificate if it considers that the applicant is not a fit and proper person to hold the certificate.⁸ In considering whether an applicant is a fit and proper person to hold a practising certificate, the VLSB may have regard to the matters specified in the *Legal Profession Uniform General Rules 2015 (Uniform Rules)*.⁹

Fit and Proper Person

Being a fit and proper person is a requirement for both admission and re-admission to legal practice, as well as the granting or renewing of a practising certificate. The common law has defined

⁶ Legal Profession Uniform Law s 10(1)(a)

⁷ Ibid s 44(1)

⁸ Ibid section 45(2); Legal Profession Uniform General Rules 2015 (Uniform Rules) r 13(1)

⁹ Legal Profession Uniform Law s 45(3)

a 'fit and proper person' flexibly, with the definition varying depending on context.¹⁰ The decision in *Frugtniet v Board of Examiners*¹¹ provides an often cited comprehensive and useful definition and description of the reason for the test:

'The requirement for admission to practice (sic) law that the applicant be a fit and proper person, means that the applicant must have the personal qualities of character which are necessary to discharge the important and grave responsibilities of being a barrister and solicitor. A legal practitioner, upon being admitted to practice, assumes duties to the courts, to fellow practitioners as well as to clients. At the heart of all of those duties is a commitment to honesty and, in those circumstances when it is required, to open candour and frankness, irrespective of self-interest or embarrassment. The entire administration of justice in any community which is governed by law depends upon the honest working of legal practitioners who can be relied upon to meet high standards of honesty and ethical behaviour. It is the legal practitioner who is effectively the daily minister and executor in the administration of justice when advising clients, acting for clients, certifying documents, and making presentations to courts, governments, other professionals, and so on. The level and extent of trust placed in what legal practitioners say or do is necessarily high and the need for honesty is self-evident and essential.'

There is no strict rule of law that a person who has been found guilty of a crime can never be admitted to legal practice.¹² There is a disinclination to admit such an individual, which is founded in the need for strictness in maintaining the standards of the profession.¹³ However, it has long been held that the false steps of youth are not always final proof of defective character and unfitness.¹⁴

Current rules for admission to legal practice require the mandatory submission of a police report,¹⁵ student conduct report,¹⁶ two references for evidence of good character,¹⁷ and the express requirement to disclose any matter that 'a reasonable applicant' would consider might be regarded as not being favourable to an applicant's good fame, character and fitness to practice.¹⁸ Further, there was a well-established common law requirement for disclosure which includes disclosing offences

¹⁰ As per Victorian Legal Admissions Board, *Disclosure Guidelines for Applicants for Admission to the Legal Profession*, 2015 - *Frugtniet v Board of Examiners* [2002] VSC 140; *Frugtniet v Board of Examiners* [2005] VSC 332; *XY v Board of Examiners* [2005] VSC 250; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; *Re Legal Profession Act 2004; re OG, a lawyer* [2007] VSC 520; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279; *Incorporated Law Institute of NSW v Meagher* (1909) 9 CLR 655; *Re Lenehan* [1948] HCA 45; *Re Evatt; Ex Parte NSW Bar Association* (1967) 67 SR (NSW) 236; *In the matter of an application for admission as a legal practitioner* [2004] SASC 426; *In re Davis* [1947] 75 CLR 409; *New South Wales Bar v Murphy* (2002) 55 NSWLR 23; *New South Wales Bar Association v Cummins* (2001) NSWLR 279; *New South Wales Bar Association v Hamman* [1999] NSWCA 404; *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320; *Prothonotary of the Supreme Court v Alcorn* [2007] NSWCA 288; *New South Wales Bar Association v Einfeld* (2009) 259 ALR 278; *In the matter of the Legal Practitioners Act 1970 and in the matter of an application by Hinds* [2003] ACTSC 11; *In the matter of an application for admission as a practitioner* [1997] SASC 6487; *Jackson (previously known as Subramaniam) v Legal Practitioners Admission Board* [2006] NSWSC 1338; *Legal Services Board v McGrath* [2010] VSC 266

¹¹ *Frugtniet v Board of Examiners* [2002] VSC 140 per Pagone, J

¹² Kenneth H. Gifford and Arthur Heymans, *The Victorian Solicitor*, The Law Book Company Ltd, 1974, 239; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279

¹³ *Ibid*

¹⁴ *Ex p Lenehan* (1948) 77 CLR 403 at 424 per Latham CJ, Dixon and Williams JJ

¹⁵ Legal Profession Uniform Admission Rules 2015 r 18

¹⁶ *Ibid* r 19

¹⁷ *Ibid* r 16

¹⁸ *Ibid* r 17

which did not result in a conviction.¹⁹ An applicant's failure to disclose excludes any possibility the applicant has been rehabilitated into a person of good character.²⁰

For the purposes of section 45 of the *Uniform Law*, which specifies the prerequisites for granting or renewing practising certificates, the VLSB takes into consideration Rule 13 of the *Legal Profession Uniform General Rules 2015*.²¹ Rule 13 prescribes an extensive, non-exhaustive list of matters the VLSB can take into account when considering if an applicant is a fit and proper person for the purposes of granting or renewing a practising certificate. The VLSB can also consider the practitioner's disclosure obligations outlined in the VLSB's *Fit and Proper Person Policy*, available on the VLSB's website.

Once a practising certificate is issued, the VLSB retains the regulatory responsibility for overseeing the ongoing obligation of legal practitioners to satisfy the requirement of being a fit and proper person. The VLSB may vary, suspend or cancel a practising or registration certificate if a person is found to not be a fit and proper person.²² This includes if a person is charged with a serious offence (i.e. an indictable crime) which has not yet been determined,²³ or the person has been convicted of the offence but proceedings taken or likely to be taken in relation to the offence have not been concluded.²⁴ Similarly, once proceedings have concluded and the person is convicted of a serious offence, known as an 'automatic show cause event', the VLSB may vary, suspend or cancel that person's practising or registration certificate.²⁵

Show cause or notifiable events

The requirements are the same for *applicants* for a practising certificate as they are for *holders* of a practising certificate. If an automatic show cause event has occurred at any time, the person must provide the VLSB with a statement disclosing details of the show cause event.²⁶ The person must also explain why, despite this event, they consider themselves to be a fit and proper person to hold a practising certificate.²⁷ Failure to provide such a statement,²⁸ or if the VLSB considers that the statement does not support the conclusion that the person is a fit and proper person,²⁹ an application to grant or renew a practising certificate may be refused.

Continuing Professional Development

Legal practitioners who hold a practising certificate must complete a minimum of 10 Continuing Professional Development (CPD) units each CPD year (1 April to 31 March), including at least 1 CPD unit in each of the following four compulsory fields, in accordance with rule 6 of the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*:

¹⁹ Re the Application of Del Castillo [1999] FCA 626; 89 FCR 120

²⁰ In re Davis [1947] 75 CLR 409

²¹ Legal Profession Uniform Law s 45(3)

²² Legal Profession Uniform Law 2015 s 76

²³ Ibid s 82(2)(a)

²⁴ Ibid s 82(2)(b)

²⁵ Ibid s 76, 86, 90

²⁶ Ibid s 87(2)(a), 88(2)(a)

²⁷ Ibid s 87(2)(b), 88(2)(b)

²⁸ Ibid 89(2)(a)

²⁹ Ibid 89(2)(b)

1. Ethics and Professional Responsibility
2. Practice Management and Business Skills
3. Professional Skills
4. Substantive Law

The LIV is a leading provider of CPD for Victorian legal practitioners, providing CPD courses in all of the above prescribed fields.

Legal Professional Privilege

‘Legal professional privilege’ or ‘client legal privilege’ is a common law protection that aims to protect the administration of justice and the right of individuals and entities/organisations to obtain confidential legal advice. It allows a lawyer to resist demands to disclose information or produce documents which would reveal communications between a client and their lawyer, where those communications were made for the dominant purpose of giving or obtaining legal advice or services.

Privilege ‘exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers’.³⁰ This in turn assists lawyers to provide competent and independent legal advice. It is also an important check in the balance of power between the individual and the state. It has also been said that this privilege helps to protect the right to privacy, the dignity of the individual, access to justice and equality before the law.

His Honour Allsop J commented in *Kennedy v Wallace*³¹:

The privilege is to be seen as a fundamental common law right in relation to legal advice and litigation. The purpose and rationale of the privilege is to enable persons in a civilised complex modern society to be able to conduct their affairs with the assistance of legal advice. Expressed thus, it is a fundamental right conforming to and underpinning the rule of law.

The common law privilege can be claimed in both judicial and non-judicial proceedings.

The Commonwealth, Victoria, New South Wales, Tasmania, the ACT and the Northern Territory have enacted legislation for client legal privilege (the *Evidence Act* of the respective state or territory). The relevant Commonwealth statute is the *Evidence Act 1995 (Cth)*.

There are a number of exceptions to legal professional privilege, even when the dominant purpose test is satisfied. These exceptions apply in circumstances where:

- The privilege has been waived
- It is in the public interest

³⁰ *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson C J, Gaudron and Gummow JJ)
³¹ *Kennedy v Wallace* [2004] FCAFC 337; 142 FCR 185; 213 ALR 108

- A statute modifies or removes the privilege where the legislature affords a competing public interest a higher priority
- The communication is for the purpose of facilitating a fraud or crime.³²

Conclusion

As outlined above, regulation of the legal profession is a complex and multi-faceted task, appropriately managed by the VLSB under the *Uniform Law*. In addition, the VLAB follows rigid criteria for admitting new lawyers in Victoria.

The LIV maintains the view that additional regulatory requirements for legal practitioners are unnecessary unless there are significant and demonstrable risk-related reasons to justify their imposition on all legal practitioners.

As a co-regulatory body, the LIV has always advocated that it is critical to maintain the highest standards of professional responsibility and accountability in order to promote, uphold and enhance the reputation of the legal profession. The LIV is committed to continuing to provide the profession with extensive ethical education and guidance, and professional development; and to continue to support legal practitioners in order to reassure and strengthen community confidence and preserve integrity in the administration of justice.

As a leader of the legal community, the LIV requires the highest ethical standards of its members and the legal profession in general. It is our primary interest to ensure that the public confidence in the law remains strong, and we will continue to work closely with the VLSB and Commissioner to ensure that the rules that unite our profession are strictly adhered to. This includes maintaining the obligations of confidentiality and respecting legal professional privilege, protections that allow lawyers to continue their providing services for their clients and the community.

If you wish to discuss any aspect of this submission, or seek further information, please do not hesitate to contact me or Gemma Hazmi, General Manager Policy, Advocacy & Professional Standards (ghazmi@liv.asn.au).

Yours sincerely



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³² Understanding Legal Professional Privilege, VGSO, (June 2017)