# Royal Commission into the Management of Police Informants

# Disclosure Issues

# Submission by the Director of Public Prosecutions (Victoria)

**19 December 2019**

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## Contents

# 1 Introduction

## 1.1 The relevant terms of reference

1. This submission is addressed to the following of the Royal Commission 's terms of reference, as they relate to disclosure in criminal proceedings:

> *4. The current use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege, subject to section 123 of* the *Inquiries Act 2014, including:*
>
> *a. the appropriateness of Victoria Police 's practices around the disclosure or non-disclosure of the use of such human sources to prosecuting authorities; and*
>
> *b. whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the Office of Public Prosecutions prosecutes indictable matters on behalf of the Director of Public Prosecutions, when the investigation has involved human source material.*
>
> *5. Recommended measures that may be taken to address:*
>
> *a. the use of any other human sources who are, or have been, subject to legal obligations of confidentiality or privilege and who come to your attention during the course of your inquiry; and*
>
> *b. any systemic or other failures in Victoria Police's processes for its disclosures about and recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, and in the use of such human source information in the broader criminal justice system, including how those failures may be avoided in future.*
>
> *6. Any other matters necessary to satisfactorily resolve the matters set out in paragraphs 1-5.*

2. As they relate to disclosure in criminal proceedings, the major focus of these terms of reference is disclosure by Victoria Police, both to prosecuting authorities and generally, in relation to the use of human sources who are subject to legal obligations of confidentiality or privilege. In summary, the Commission is required to consider:

   the appropriateness of Victoria Police practices around the disclosure or non-disclosure of the use of such human sources;

   the adequacy of safeguards in the way in matters are prosecuted, when the investigation has involved such human source material; and

   any systemic or other failures in Victoria Police's processes for disclosure about the use of such human source information.

## 1.2 How disclosure has become an issue for the Royal Commission

3. Although it is well known to the Commission, it is worth recounting for the public record how disclosure came to be an issue for the Royal Commission, and to explain the context underlying this submission.

4. The sequence of relevant events was as follows:

For a number of years (the precise period is a matter to be determined by the Commission), Victoria Police used Ms Nicola Gobbo, a barrister practising in criminal law, as a human source. For at least part of that period, Ms Gobbo was referred to by the code 3838. Amongst other things, Ms Gobbo provided information to Victoria Police about her current or former clients, at least some of it in breach of her ethical obligations to those clients.

The police use of Ms Gobbo as a source was a closely-guarded secret. Neither the Director of Public Prosecutions (**DPP**) nor the Office of Public Prosecutions (**OPP**) was informed.

In 2012, Mr Neil Comrie AO, APM conducted a confidential case review of Victoria Police's general handling of Ms Gobbo as a human source. Mr Comrie's report, which was provided on 30 July 2012, was critical of a number of aspects of the police use and handling of Ms Gobbo.

On 6 February 2015, the Honourable Murray Kellam QC, acting as delegate of the Independent Broad-based Anti-corruption Commission (**IBAC**), provided a report entitled 'Report concerning Victoria Police handling of Human Source code name 3838' (**Kellam Report**);

On 23 February 2015, and in accordance with recommendation 12 of the Kellam Report, the then DPP, Mr John Champion SC, commenced a review of the prosecutions of seven of Ms Gobbo's former clients, being the seven clients who Mr Kellam had used as examples in the Kellam Report. Each of the seven had been convicted in proceedings on indictment. (In subsequent litigation they were referred to as "the convicted persons".)

In a letter dated 10 March 2016, Mr Champion informed the Chief Commissioner of Police that he was "*firmly of the opinion that I have an obligation to disclose at least some of the contents of the Kellam Report to those that may be affected by the matters discussed therein.*"

By an originating motion filed in the Supreme Court of Victoria on 10 June 2016, the Chief Commissioner commenced proceedings against the DPP seeking declaratory relief to prevent the DPP from making any disclosure.

By a writ and statement of claim dated 15 November 2016, Ms Gobbo commenced proceedings against the DPP seeking declarations to prevent the DPP from making any disclosure to the convicted persons.

By orders dated 21 June 2017, Ginnane J dismissed both proceedings.[1]

1 *AB and EF v CD* [2017] VSC 350; *EF v CD* [2017] VSC 351.

On 21 November 2017, in a unanimous judgment, the Court of Appeal (Ferguson CJ, Osborn and McLeish JJA) granted the Chief Commissioner of Police and Ms Gobbo leave to appeal against the decision of Ginnane J, but dismissed the appeal in each proceeding.[2]

On 9 May 2018, the High Court granted the Chief Commissioner of Police and Ms Gobbo special leave to appeal from the decision of the Court of Appeal in each proceeding.

On 5 November 2018, in a unanimous decision, the full bench of the High Court (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) revoked special leave to appeal in respect of each proceeding.[3] In its judgment, the Court described the conduct of Ms Gobbo in purporting to act as counsel for the convicted persons while covertly informing against them as "*fundamental and appalling breaches of [her] obligations as counsel to her clients and of [her] duties to the court*".[4] The Court also said, "*Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging [Ms Gobbo] to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will*".[5]

On 3 December 2018, the Premier of Victoria announced the establishment of the Royal Commission.

5. Some of Ms Gobbo's former clients have sought (by way of appeals or petitions of mercy) to have convictions set aside on the basis of the conduct of Ms Gobbo and Victoria Police. In one such proceeding, the Court of Appeal has set aside a conviction.[6]

6. Disclosure emerges as an issue for the Royal Commission in two ways. First, the decision of Victoria Police to keep secret the use of Ms Gobbo as an informer may have resulted in non-compliance with disclosure obligations on police under the *Criminal Procedure Act 2009* (**CPA**).[7] If there was any such non-compliance, it both created a risk of miscarriages of justice in individual cases and allowed her improper conduct to continue. Second, as the history shows, it was only the DPP's ultimate fulfilment of obligations of disclosure which led to the public exposure of the use of Ms Gobbo by Victoria Police and ultimately to the establishment of the Royal Commission. This highlights the importance of disclosure.

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2 *AB v CD and EF* [2017] VSCA 338.
3 *AB v CD* [2018] HCA 58.
4 *AB v CD* [2018] HCA 58, [10].
5 *AB v CD* [2018] HCA 58, [10].
6 *Orman v R* [2019] VSCA 163.
7 The DPP makes no comment on whether there was any such non-compliance in particular cases, and if so its extent, nature and consequences. These are questions which remain to be determined, on the evidence, by the Royal Commission or in litigation.

## 1.3 Perspectives on disclosure in Victoria

7. To set the disclosure issues in context, it must be remembered that:

   human source material generally is only a small component of disclosure in criminal proceedings; and

   material from human sources who are subject to legal obligations of confidentiality or privilege is only a tiny proportion of even that material.

8. Therefore to address the disclosure issues raised by the terms of reference it will be necessary first to step back and refer more broadly to questions of disclosure and to other underlying issues.

9. The focus of this submission is on disclosure for the purposes of committal proceedings and trials on indictment, as these are the DPP's primary areas of responsibility.

10. Care must be taken in extrapolating from any police failures of disclosure revealed in this Royal Commission to the Victorian criminal justice system as a whole. The problems created by the use of informers with an obligation of confidence or privilege are exceptional, not typical. While it is not suggested that Victoria has been immune from disclosure issues in other cases, in only a small number of cases have failures of disclosure led to convictions being overturned in Victoria. This State does not appear to have been beset by the kinds of widespread and systemic failures that have been exposed in other jurisdictions. It is important to maintain that perspective in considering any changes to the disclosure regime.

11. A disclosure regime needs to provide an effective means of ensuring fair trials. But it also needs to be workable and efficient. It is in no-one's interest that the limited time and resources available to the prosecution and defence for the essential task of preparing for a criminal trial (or plea hearing) be diverted into minute reviews of vast quantities of material of peripheral or no relevance. Nor should witnesses or victims of crime risk their private or business affairs being inappropriately exposed as a result of pressure to comply with disclosure requirements. Nor should disclosure become a maze of bureaucratic requirements of impenetrable and unnecessary complexity, as it has become in England and Wales, for example.[8] Over-disclosure, or the introduction of onerous and unrealistic requirements,

8 In fulfilling disclosure obligations, police and prosecutors in England and Wales are required to assimilate and apply each of the following: *Criminal Procedure and Investigations Act 1996* (CPIA); CPIA codes of practice; *Criminal Procedure Rules 2015*, Part 15; regulations under the CPIA; rules applicable in the Magistrates Court; *Attorney-General's Guidelines on Disclosure* (2013); *Judicial Protocol on Disclosure of Unused Material in Criminal Cases* (2013); *Protocol and Good Practice Model on Disclosure of Information in Cases of Alleged Child Abuse* (2013); CPS *Disclosure Manual* (2018) (consisting of 38 chapters and five annexures).

would be as contrary to the interests of justice as under-disclosure. The difficult task is to achieve an appropriate balance.

12. In a nutshell, the DPP does not consider that the law on disclosure in criminal proceedings in Victoria, which has evolved rapidly over the last three decades, is fundamentally flawed. This submission proposes some incremental changes to build on the strengths of the existing regime and to reinforce established requirements. But real advances in the effective functioning of the disclosure regime in Victoria must come from improvements in training, guidance, technology and (above all) culture in Victoria Police.

### 1.4 The anterior question: controls on the use of human sources with an obligation of confidence

13. In preparing this submission, the DPP does not have the advantage of knowing what measures might be recommended by the Commission to regulate or prohibit the future use by Victoria Police of human sources who are subject to obligations of confidentiality or privilege.

14. This is a critical issue for the Royal Commission. This submission proceeds on the assumption that this issue will be the subject of specific submissions after the conclusion of evidence.

15. Questions of disclosure policy and practice, as they relate to the use of such human sources, are inextricably linked to questions of policy about whether such sources should continue to be used and, if so, what safeguards should be put in place. Effective controls upstream on the use of such sources would reduce the prospect of disclosure problems downstream. In particular, if a system of independent vetting of the proposed use of such a source were to be put in place, it could also be designed to take into account the need for timely disclosure of the use of the source, where required. An effective independent system for regulating or monitoring the use of such a source could also be designed so as to ensure that appropriate and timely disclosure is in fact made whenever necessary. Such systems, rather than disclosure requirements, should be the primary means of preventing abuses of the kinds exposed here from occurring again.

16. The DPP makes this submission about disclosure now because it has been asked to do so. But it must be recognised that consideration of disclosure ahead of consideration of these threshold issues does involve putting the cart before the horse.

## 1.5 One "upstream" issue

17. At the end of this submission, reference is made to one important "upstream" issue: dealing with conflicts of interest and other ethical breaches by defence lawyers. It is referred to in this submission because it falls within paragraph 6 of the terms of reference and is liable to be overlooked in the course of considering aspects of the use by Victoria Police of human sources subject to legal obligations of confidentiality or privilege.

# 2 The disclosure context

## 2.1 The development of disclosure procedures in Victoria

18. The current disclosure regime is described in more detail below. But to understand that regime, it is necessary first to refer to how it evolved.

19. For many years, in Victoria (as in other common law jurisdictions) disclosure practices were the product of ethical obligations and common law rules.[9] The law and practice relating to disclosure was not governed generally by statute.

20. The position has changed significantly since the 1980s. It has not been sufficiently understood or appreciated that Victoria has, over that period, been a pioneer in disclosure in criminal proceedings and in a number of other relevant developments in the law. They include the following:

    In 1982, Victoria became the first jurisdiction in Australia to introduce a Freedom of Information Act. The Act came to be used by defendants in criminal proceedings as a means of obtaining disclosure of the evidence against them.[10]

    Also in 1982, Victoria was amongst the first jurisdictions in Australia to establish an independent office of DPP. The creation of the office has encouraged greater professionalism and a more systematic approach in the conduct of prosecutions of indictable matters. Amongst other things, the DPP has long provided guidelines on disclosure and training to prosecution lawyers on the Crown's disclosure obligations.

    In the 1980s, Victoria pioneered the use of a system of "hand-up briefs" in committal proceedings, by which evidence to be relied upon by the prosecution in a committal hearing was required to be served on the defendant in documentary form. The procedure has been refined over a period of time by a series of incremental reforms (notably in the *Magistrates Court Act 1989*, the *Magistrates Court Amendment Act 1999* and the *Criminal Procedure Act 2009*).

    In 1999, the list of required contents of a hand-up brief was amended to include, amongst other things, "*a list of any other admissible statements or other documents relevant to the charge* [that is, other than those relied on to establish guilt] *that are available to the informant but on which the informant does not intend to rely*".[11] The legislation made it

9 See D Plater, "The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?" (2006) 25 *University of Tasmania Law Review* 111.

10 See *Sobh v Police Force of Victoria* [1994] 1 VR 41.

11 *Magistrates' Court Act 1989*, new Schedule 5, cl.6(1)(k)), inserted by *Magistrates Court Amendment Act 1999*, s.4.

clear that this requirement did not detract from any duty otherwise imposed on the prosecution to disclose to the defence material relevant to a charge.[12]

Important reforms to criminal procedure were made by the *Crimes (Criminal Trials) Act 1993* and its successor, the *Crimes (Criminal Trials) Act 1999*. In particular those Acts provided for greater case management, including a procedure by which the prosecution was required to file a summary of prosecution opening and the defence a defence response, and other measures to identify and streamline the resolution of pre-trial issues (including disclosure).

The enactment of the CPA in 2009 consolidated, rationalised and further reformed the law governing criminal procedure. Amongst other things, the Act clarified and further expanded disclosure obligations in criminal proceedings. The matters required to be included in a hand-up brief were expanded to include any other information, document or thing in the prosecution's possession (i.e. on which the prosecution does not intend to rely) that is relevant to the offence.[13] Similar obligations applied to a full brief to be served in summary proceedings,[14] subject to specified circumstances where the prosecution may refuse to disclose certain information (e.g. where disclosure would prejudice the effectiveness of investigation methods or endanger the life or physical safety of a person).[15] The Act makes clear that the disclosure requirements under the Act did not require the prosecution to disclose to the accused material which the prosecution is "*required or permitted to withhold under this or any other Act or any rule of law*."[16]

21. It is not suggested that this statutory reform process is complete; indeed this submission proposes further refinements. But the point needs to be made that a significant effect of these changes has been that disclosure requirements have become embedded in the consciousness and the work of a generation of police officers and lawyers in a way and to an extent that was not previously the case and is not necessarily the case in other jurisdictions.

## 2.2 Disclosure obligations under Victorian law

22. Disclosure obligations under Victorian law are a mixture of statutory provisions (principally in the CPA) and common law duties. Common law duties are expressly preserved by s.416(1) of the CPA.

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12 *Magistrates' Court Act 1989*, new Schedule 5, cl.6(3), inserted by *Magistrates Court Amendment Act 1999*, s.4.
13 CPA, s.110.
14 CPA, s.41.
15 CPA, s.45.
16 CPA, s.416.

23. As will be seen, the core concept underlying both the statutory and common law obligations of disclosure is relevance. The CPA imposes obligations in relation to material that is relevant to the charge. Relevance is not defined, but common law authorities provide guidance on how relevance is to be determined.

24. Obligations of disclosure are subject to statutory or common law exceptions: for example, where a statute precludes disclosure of a particular class of information or document, or where public interest immunity (**PII**) applies.[17]

25. In addition, legal practitioners are subject to ethical obligations that require either disclosure or non-disclosure in particular circumstances.

### 2.2.1 Disclosure requirements under the CPA

26. The CPA contains separate regimes governing disclosure:

    in summary hearings; and

    in committal proceedings and proceedings on indictment.

27. The disclosure obligations relating to **summary hearings** can be found in Division 2 of Part 3.2 of the CPA.

28. In respect of **committal proceedings**, the informant is required to serve a hand-up brief. Section 110 of the CPA prescribes what must be included in the hand-up brief. In addition to a prescribed notice, a copy of the charge sheet(s), and a statement of the material facts relevant to the charge(s), the hand-up brief must contain:

    *(d) any information, document or thing on which the prosecution intends to rely in the committal proceeding ...*

    *(e) any other information, document or thing in the possession of the prosecution that is relevant to the alleged offence ...*

29. The material in paragraph (d) can loosely be described as "evidence", while the evidence in paragraph (e) can be described as "relevant unused material". Typically, it is the latter kind of material which gives rise to issues in disclosure. Relevance, for the purposes of disclosure obligations, is not defined or explained in the CPA.

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17 The common law doctrine of PII has been codified in relation to the admission of evidence: *Evidence Act 2008* (Vic), s.130. The principles under s.130 also apply to a process or order of a court that requires the disclosure of information or a document: s.131A. In *DPP v Asling (Ruling No. 1)* [2017] VSC 37, Kaye JA proceeded on the basis that by reason of s.131A, s.130 (rather than the common law of PII) applied on the return of a subpoena directed to the Chief Commissioner of Police. The distinction between s.130 and the common law is of little or no practical significance: *Ryan v Victoria* [2015] VSCA 353, [58]-[67]. References in this submission to PII principles should be taken to include references to the principles in s.130 where applicable.

30. Section 110(e) gives some (non-exhaustive) examples of the kind of material falling within the description in that paragraph:

> *(i) a list of the persons (including experts) who have made statements relevant to the alleged offence which the prosecution does not intend to tender at the committal hearing; and*
>
> *(ii) a copy of every statement referred to in subparagraph (i) made by each of those persons or, if the person has not made a statement, a written summary of the substance of any evidence likely to be given by that person or a list of those statements or written summaries; and*
>
> *(iii) a copy of every document relevant to the alleged offence that the prosecution does not intend to tender as an exhibit or a list of those documents; and*
>
> *(iv) a list containing descriptions of any things relevant to the alleged offence that the prosecution does not intend to tender as exhibits; and*
>
> *(v) a clear photograph, or a clear copy of such a photograph, of any thing relevant to the alleged offence that cannot be described in detail in the list; and*
>
> *(vi) a copy of—*
>
> > *(A) records of any medical examination of the accused; and*
> >
> > *(B) reports of any forensic procedure or forensic examination conducted on the accused; and*
> >
> > *(C) the results of any tests—*
> >
> > *carried out on behalf of the prosecution and relevant to the alleged offence but on which the prosecution does not intend to rely ...*

31. The hand-up brief must also be accompanied by a **Form 30** — that is, a list of information or other documents included in the hand-up brief, in the form prescribed by the *Magistrates' Court Criminal Procedure Rules 2009* (Vic).

32. The current prescribed Form 30 lists the following categories of documents as potentially disclosable; the informant strikes out categories that are not applicable in the particular case:

> **4. The following is a list of other statements that are capable of being admitted in evidence relevant to the charge available to the informant but on which the informant does not intend to rely.*
> *[list statement(s) here]*
> *OR*
>
> **4. There is no other statement that is capable of being admitted in evidence relevant to the charge available to the informant but on which the informant does not intend to rely.*
>
> ---
>
> *5. The following information, document or thing on which the prosecution intends to rely in the committal proceeding are—*
> **copy of any statement relevant to the charge signed by the accused, or a record of interview of the accused, that is in the possession of the informant*

**a copy or statement of any other evidentiary material that is in the possession of the informant relating to a confession or admission made by the accused relevant to the charge*

**a list of the persons who have made statements that the informant intends to tender at the committal hearing, together with copies of those statements*

**a legible copy of any document which the prosecution intends to produce as evidence*

**a list of any things the prosecution intends to tender as exhibits*

**a clear photograph, or a clear copy of such a photograph, of any proposed exhibit that cannot be described in detail in the list*

**copy, or a transcript, of any audio-recording or audiovisual recording required under Subdivision (30A) of Division 1 of Part III of the Crimes Act 1958*

**a transcript of any audio or audiovisual recording for the purposes of section 368 of the Criminal Procedure Act 2009*

**list of any things the prosecution intends to tender as exhibits*

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*6. Any other information, document or thing in the possession of the prosecution that is capable of being admitted in evidence relevant to the charge but on which the prosecutor does not intend to rely are—*

**a list of the persons (including experts) who have made statements relevant to the alleged offence and a copy of the statement made by each person or written summary of any evidence likely to be given by that person*

**a copy of records of any medical examination of the accused*

**a copy of reports of any forensic procedure or forensic examination conducted on the accused*

**a copy of the results of any tests carried out on behalf of the prosecution and relevant to the alleged offence*

**if the committal proceeding relates to a charge for a sexual offence, a copy of every statement made by the complainant to any member of the police force that relates to the alleged offence and contains an acknowledgement of its truthfulness*

**running sheets*

**prisoner's register*

**attendance register*

**expert witness notes*

**witnesses' prior convictions*

**notes (prosecution witness)*

**photos or photocopies where it is impractical to produce extra sets*

**video files or video recordings*

**audio files or audio recordings*

**notes (e.g.) surveillance logs, crime scene notes, exhibit logs, diaries (official or otherwise)*

**other documents (provide details).*

33. The accused may file a **Form 32** requiring specified items listed in the hand-up brief to be produced for inspection, or requiring a copy of any information, document or thing that the accused considers ought to have been included in the hand-up brief.[18]

34. Section 122 of the CPA provides that an informant must comply with a reasonable request for documents in a Form 32, or at least allow the defence to inspect the documents, unless the informant objects on the grounds of s.45 (grounds akin to PII) or s.114 (prohibition on disclosing addresses and telephone numbers).

35. The statutory disclosure obligations for indictable offences are continuing obligations.[19] If relevant documents come into the informant's possession after the hand-up brief has been served (or after a direct indictment), the informant is required to ensure that the documents, or a list of the documents, is provided to the accused.

36. Once an accused is committed for trial, **the pre-trial procedural obligations** in Part 5.5 of the CPA become applicable. The DPP is required under s 182 to file and serve a summary of the prosecution opening and a notice of pre-trial admissions. The accused is then required under s 183 to serve a response to the summary of the prosecution opening and the notice of pre-trial admissions. The response to the summary of the prosecution opening must identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken.

37. The prosecution at trial is subject to a continuing obligation of disclosure in relation to material that would have been required to be listed or included in the hand-up brief.[20]

38. Section 416 of the CPA provides that nothing in the Act derogates from a duty otherwise imposed on the prosecution to disclose to the accused material relevant to a charge, or requires the prosecution to disclose to the accused material which the prosecution is required or permitted to withhold under the Act or any other Act or any rule of law.

### 2.2.2 Common law obligations

39. The common law duties of disclosure have been the subject of extensive consideration by appellate courts in Australia and other common law jurisdictions.

40. The prosecution has a common law duty to disclose all relevant evidence to an accused (subject to statutory or common law exceptions, such as PII).

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18 CPA s 119(e).
19 CPA ss 111.
20 CPA s 185.

41. In *Mallard*,[21] the High Court stated:

> *At this point it is relevant to note that the recent case of Grey v R in this Court stands as authority for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty.*

42. The House of Lords in *R v H*[22] described the duty of disclosure as follows:

> *Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. The golden rule is that full disclosure of such material should be made.*

43. Courts in England and Wales have endorsed the following approach to determining relevance, for the purposes of the common law duty of disclosure:[23]

> *I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).*

44. The reference to "an issue in the case" is to be given a broad interpretation; it includes, for example, material which may affect the credibility of Crown witnesses[24] and material which would tend to support an application founded on an alleged abuse of process.[25]

45. Appellate courts in Australia have adopted and applied the same test in a number of cases.[26] The Victorian Court of Appeal has recently confirmed the application of that test in Victoria.[27]

46. The approach to the question of relevance for the purposes of the disclosure obligation is similar to the approach applied by courts with respect to the issue of subpoenas on behalf of an accused person.[28]

47. The duty of disclosure does not extend to disclosure of material which is relevant only to the credibility of the accused or of a defence witness.[29]

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21 *Mallard v R* (2005) 223 CLR 125, 133 [17], citing *Grey v R* (2001) 75 ALJR 1708.
22 *R v H* [2004] 2 AC 134, [14].
23 *R. v Melvin* (unreported), 20 December 1993, which was adopted and applied in *R v Keane* [1994] 1 WLR 746; *R v Brown (Winston)* [1998] AC 367, 376-7.
24 *R v Brown (Winston)* [1998] AC 367, 376-7. Cf. *Grey v R* (2001) 75 ALJR 1708, [15]-[18], [21]-[22].
25 E.g. *R v Early* [2002] EWCA Crim 1904; *R v Barkshire* [2011] EWCA Crim 1885.
26 E.g. *Easterday v R* [2003] WASCA 69, [147], [194]-[199]; *R v Reardon (No 2)* (2004) 60 NSWLR 454; *R v Spiteri* (2004) 61 NSWLR 369; *R v Livingstone* (2004) 150 A Crim R 117; *Cooley v Western Australia* [2005] WASCA 160; *R v Lipton* (2011) 82 NSWLR 123.
27 *Gild v R* [2018] VSCA 317, [49].
28 *Gould v DPP (Cth)* [2018] NSWCCA 109, [19], [65]-[68].
29 See, for example, *R v Spiteri* (2004) 61 NSWLR 369.

48. The duty of disclosure extends to material in the possession of the prosecution. In proceedings on indictment in Victoria, this has been taken to include material in the hands of investigators, even if the DPP has no knowledge of it.[30] A corollary is that it falls to investigators to assess whether material in their possession may be required to be disclosed; there is no duty for prosecutors to assess material which is not in their possession.[31]

49. Although in limited circumstances the duty may require the prosecution to obtain a particular class of material from a third party (such as the criminal history of a prosecution witness),[32] the duty does not generally require the making of inquiries with a view to obtaining information not presently in the prosecutor's possession.[33]

50. The prosecution duty of disclosure is not owed directly to an accused; an accused person cannot ordinarily obtain an order that the prosecution disclose documents which have been withheld. Rather, the accused is entitled to a fair trial, and can insist that the trial be stayed, permanently or temporarily, if it can be established that that will not occur, absent adherence by the prosecution to that duty.[34] If a trial proceeds without required disclosure, an appellate court may overturn a conviction if it finds that a miscarriage of justice resulted.[35]

51. Common law obligations of disclosure are ongoing. They continue even after a trial and after appeal rights have been exhausted.[36] The decision of the DPP to disclose to certain convicted persons material relating to the Victoria Police use of Nicola Gobbo is an example of the fulfilment of those continuing obligations of disclosure.

### 2.2.3 DPP's policy on disclosure

52. The Director's Policy includes the following passage relating to disclosure obligations:[37]

> *15. Subject to any claim of public interest immunity or legal professional privilege or any statutory provisions to the contrary, prosecutors must disclose to the accused any material which is known to them which, on their sensible appraisal:*
>
> *i. is relevant or possibly relevant to an issue in the case; or*

30 *R v Farquharson* (2009) 26 VR 410, 464 [212]; *DPP v Galloway (a pseudonym)* (2014) 46 VR 809, [89]; cf. *R v Forrest* (2016) 125 SASR 319, [60]-[65].

31 *Gould v DPP (Cth)* [2018] NSWCCA 109, [16]. Basten JA there observed that there were good reasons not to formulate a duty in terms that it was for the prosecutor, not the police, to assess whether documents were disclosable, given the importance, in some circumstances, of quarantining particular material from the prosecution. See also the obligations imposed on the informant by the CPA, which are discussed above.

32 E.g. *R v Garofalo* [1999] 2 VR 625.

33 *Marwan v DPP* [2019] NSWCCA 161, [27]-[39].

34 See the comprehensive review of the Australian authorities and relevant principles in *Marwan v DPP* [2019] NSWCCA 161, [38]-[59].

35 E.g. *Mallard v R* (2005) 223 CLR 125, 133 [17].

36 *R (Nunn) v Chief Constable of Suffolk Police* [2015] AC 225, [35].

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

*ii. raises or possibly raises a new issue that is not apparent from the evidence the prosecution proposes to use; or*

*iii. holds out a real as opposed to fanciful prospect of providing a line of inquiry which goes to (i) or (ii) above.*

*16. The prosecution duty of disclosure does not extend to disclosing material:*

*i. relevant only to the credibility of defence (as distinct from prosecution) witnesses*

*ii. relevant only to the credibility of the accused*

*iii. relevant only because it might deter an accused from giving false evidence or raising an issue of fact which might be shown to be false*

*iv. for the purpose of preventing an accused from creating a trap for themselves, if at the time the prosecution became aware of the material it was not a relevant issue at trial.*

53. As is apparent, the Director's Policy reflects the scope of the duty at common law.

54. Following recent amendments, the Policy also provides:

*17. If material is not disclosed under paragraph 15 above on the basis of a claim of public interest immunity or legal professional privilege or a statutory prohibition, any application or submission to a court in support of that claim should be made by the person or body which holds the material or the privilege, as the case may be. A prosecutor should not represent that person or body, except in relation to a privilege held by the DPP or OPP.*

*18. Subject to paragraph 19 below, if an investigative agency has not disclosed to the accused relevant material on the basis that it is subject to a claim of public interest immunity or legal professional privilege or a statutory prohibition, the agency should inform the prosecutor:*

*i. of the nature of the material and the basis of the claim;*

*ii. whether a ruling has been made by a court on the claim and, if so, provide to the prosecutor a copy of the ruling and the reasons given by the court (unless the prosecutor was present in court or a non-publication order prevents the information being provided); and*

*iii. whether, in the opinion of the agency, the material, on a sensible appraisal, substantially weakens the case for the prosecution or substantially strengthens that of the defendant.*

*19. So far as practicable, the prosecutor should not be provided with, or informed of the content of, any material to the extent that it is subject to a claim of public interest immunity, unless the prosecutor so requests.*

## 2.3 Prohibitions on disclosure

55. Disclosure requirements are subject to exceptions, either pursuant to statute or common law.

56. As noted above, s.416 of the CPA provides that nothing in the Act requires the prosecution to disclose to the accused material which the prosecution is required or permitted to withhold under the Act or any other Act or any rule of law.

### 2.3.1 Statutory exceptions

57. Some statutory exceptions have already been mentioned. An example is the prohibition in s.114 of the CPA on disclosure to the accused of the address or telephone number of any person. Another example is the prohibition on disclosure of any information which is likely to lead to the identification of a person who made a report to the relevant authority about the wellbeing of a child or unborn child.[38] Such a statutory prohibition, if expressed in clear terms, will override any prosecution obligation of disclosure.[39]

### 2.3.2 Common law exceptions

58. The most significant common law exception to disclosure obligations concerns material which is subject to PII.

59. PII will usually preclude the disclosure to an accused person of certain kinds of sensitive material, such as the identity of an informer.[40]

60. However even in relation to such sensitive matters, the public interest in disclosure will sometimes outweigh the public interest in non-disclosure. In *AB v CD*, the High Court endorsed the decisions of Ginnane J and the Court of Appeal below that, in the unique circumstances of that case, the public interest in preserving Ms Gobbo's anonymity was required to be subordinated to the public interest in preserving the integrity of the criminal justice system.[41]

61. In the rare case in which the requirements of fairness to an accused person would require the disclosure of information, but such disclosure would be damaging to the public interest in other ways (for example by exposing an informer to a serious risk of harm), the prosecution may find itself in an invidious position. In *AB v CD*,[42] the High Court observed,

> *where a question of disclosure of a police informer's identity arises before the trial of an accused, and the Crown is not prepared to disclose the identity of the informer, as is sometimes the case, the Crown may choose not to proceed with the prosecution or the trial may be stayed.*

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38 *Children, Youth and Families Act 2005* (Vic), s.41.
39 Cf. *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599.
40 *AB v CD* [2018] HCA 58, [9], [12]. See also *R v Andrews* (2010) 107 SASR 471, [26]-[28].
41 *AB v CD* [2018] HCA 58, [9]-[12].
42 *AB v CD* [2018] HCA 58, [9].

# 3 Some common problems in disclosure

## 3.1 Prosecution reliance on compliance by investigators

62. The police use of Ms Gobbo as an informer highlights an inherent difficulty in the operation of the disclosure regime. The prosecution's obligation of disclosure has been treated as extending to material in the possession of police investigators. Prosecutors are reliant on compliance by investigators with their obligations under the CPA to ensure either that all relevant information is provided or at least that its existence is disclosed.

63. If police, either inadvertently or intentionally, fail to disclose and fail to reveal the existence of disclosable or potentially-disclosable material, prosecutors may become unwitting parties to the conduct of an unfair trial. Serious breaches can compromise the integrity of the criminal justice system.

64. This is not to say that a radical overhaul of the relationship between investigators and prosecutors is required. The division of functions is inherent in our criminal justice system. Indeed it is one of its features, as it allows both investigators and prosecutors to perform their respective roles more effectively. But the risks that flow from that division of functions must be recognised and addressed.

## 3.2 Common causes of non-compliance

65. The experience of the DPP, coupled with examination of reported instances of non-disclosure in other Australian jurisdictions, suggests four common causes of non-compliance by investigators with disclosure obligations:

    1. Investigators sometimes struggle to determine whether material satisfies the broad test of relevance. It is inherently challenging for investigators to look critically at information obtained during an investigation and identify material that may tend to undermine the prosecution case or strengthen the defence case.[43] This may lead investigators to fail to disclose, and to fail to reveal the existence of, material that, on objective appraisal, satisfies the test of relevance.

    2. An individual informant may not be aware of all relevant information held by the investigating agency. For example, hearings in this Commission have shown that those who had information or material relating to certain prosecutions of those connected to Ms

43 See D Plater and L De Vreeze, "Is the 'Golden Rule' of Full Prosecution Disclosure a Modern 'Mission Impossible'?" (2012) 14 *Flinders Law Journal* 134, 141-142 146-153.

Gobbo were not the same people as the informants or those assisting in putting together the brief to the OPP.

3. Investigators sometimes inappropriately withhold otherwise relevant material on the basis of PII. This is particularly problematic where the *existence* of such material is not disclosed to the prosecutor or the defence, as it means that the asserted claim of PII cannot be tested by the defence. Underlying this problem is a common misconception (despite clear authority to the contrary[44]) that an investigative agency may judge for itself whether relevant material is subject to such immunity. That misconception flows from another: a failure to understand the balancing exercise which is involved in determining whether material is immune from disclosure, leading to an exclusive focus on factors which would favour non-disclosure (such as the need to protect confidential sources and the flow of information) and failure to appreciate the weight which must be given to factors that would favour disclosure. Both misconceptions have been clearly displayed in relation to the Victoria Police use of Ms Gobbo as an informer.

4. Investigators may be overwhelmed by the volume of material obtained in the course of an investigation (for example, data downloaded from mobile phones, or telephone intercept recordings). Voluminous material may not be adequately assessed for relevance, with the result that relevant material is not provided with a hand-up brief, or subsequently, as required by the CPA. This is an increasing problem as the volume of electronic data obtained in the course of an investigation, even in relatively uncomplicated cases, grows exponentially.

66. Examples of these issues may be found in the evidence before this Royal Commission, but each of these problems of non-disclosure may also arise in more conventional circumstances than those being examined by the Royal Commission.

### 3.3 Common risk areas for non-compliance

67. The most common risk areas for non-disclosure or late disclosure in Australia have related to material of the following kinds:

relevant unused statements of, or interviews with, eye-witnesses;[45]

relevant previous statements or victim impact statements of complainants or other prosecution witnesses whose evidence was contested;[46]

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44 E.g. *R v Solomon* (2005) 92 SASR 331, [116]; *R v Andrews* (2010) 107 SASR 471; *R v Lipton* (2011) 82 NSWLR 123, [110]-[111].

45 E.g. *TWL v R* [2012] NSWCCA 57; *Eastough v Barry* [2013] WASC 144.

withdrawal of a complaint by a complainant;[47]

forensic tests;[48]

relevant unused telephone intercept or listening device recordings;[49]

relevant criminal history of a prosecution witness;[50]

letters of assistance which police have provided in sentencing hearings regarding a Crown witness or letters of comfort given to such a witness;[51]

other information that is relevant to the credibility of an important prosecution witness.[52]

68. The subjective perception of experienced prosecutors in Victoria is that instances of failure to disclose the existence of relevant unused witness statements, unused telephone or listening device recordings or unused forensic tests have become less common over time, as a result of developments in criminal procedure and increasing awareness on the part of investigators of their obligations in this regard. Such problems may arise, but they do not appear to be widespread or systemic issues in Victoria.

69. The more intractable problems have tended to concern material that may be relevant to the credibility of a prosecution witness, such as relevant criminal history (including outstanding charges), or the provision of letters of assistance, charge reductions or other favourable treatment in criminal proceedings as a result of relevant co-operation with investigators.

### 3.4 Measures to improve compliance with disclosure obligations

70. It is the Director's view that these problems can be ameliorated by legislative amendments that:

provide more guidance to investigators on what needs to be disclosed by giving concrete examples of classes of documents that will ordinarily satisfy the relevance test;

make clear that the assessment of the relevance of material is distinct from the question whether the material is subject to a PII claim; and

provide a better procedure by which a PII claim in respect of relevant material can be determined by a court.

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46 E.g. *R v Lewis-Hamilton* [1998] 1 VR 630; *R v Livingstone* [2004] NSWCCA 407; *D v Western Australia* [2007] WASCA 272; *R v HAU* [2009] QCA 165.

47 E.g. *PAH v Western Australia* [2015] WASCA 159; *R v Cologrande* [2019] 1 Qd R 241.

48 E.g. *Mallard v R* (2005) 223 CLR 125.

49 E.g. *R v Gillard* (1999) 76 SASR 76; *R v Ulman-Naruniec* [2003] SASC 437; *Hughes v Western Australia* [2015] WASCA 164.

50 E.g. *R v K* (1991) 161 LSJS 135; *R v Garofalo* [1999] 2 VR 625; *R v Forrest* (2016) 125 SASR 319.

51 E.g. *Grey v R* (2001) 75 ALJR 1708; *R v Farquharson* (2009) 26 VR 410.

52 E.g. *Easterday v R* [2003] WASCA 69; *Western Australia v JWRL* [2010] WASCA 179; *AJ v R* (2011) 32 VR 614.

71. In the view of the DPP, the most effective way to improve compliance by investigators with disclosure obligations is by:

    ensuring that legal obligations are clear (without being unduly burdensome);

    providing investigators with necessary training, guidance, advice and appropriate technology to enable them to understand and carry out their obligations; and

    having an effective quality assurance system, including certification to courts of full disclosure and independent monitoring of compliance.

72. All of these measures must be directed towards the most important goal, improving the culture of compliance with disclosure obligations within Victoria Police.

73. Before addressing these matters, this submission refers to the experience of some other jurisdictions which have grappled with similar problems. These experiences provide important lessons on what will and will not work in improving the operation of the disclosure regime.

74. The proposals in this submission should be seen in the wider context of continuing reforms to criminal procedure. A particular objective of such reforms should be to encourage earlier resolution of proceedings, particularly on indictment, and earlier and more comprehensive identification and narrowing of issues in matters which proceed to trial. The DPP has argued elsewhere[53] for the reform of pre-trial criminal proceedings, including the replacement of committal hearings with issues hearings and case management hearings. These hearings would be aimed at ensuring that the prosecution case is properly disclosed, that the parties engage in resolution discussions at an early stage, that guilty pleas be fast-tracked and, in matters proceeding to trial, that issues be identified and narrowed earlier and more effectively. This process would involve more judicial case management, including management of disclosure by the prosecution and of defence responses. Implementation of the proposals in this submission could be dovetailed with these reforms, as each would improve the effectiveness of the other. In particular, early identification and narrowing of issues in criminal proceedings is closely bound up with the more effective and efficient operation of disclosure regimes.

75. This submission does not call for a narrowing of the scope of disclosable material or information, despite the uncertainty which results from the absence of any definition of

53 Director of Public Prosecutions (Vic), *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) (published at http://www.opp.vic.gov.au/Home/Resources/1-October-2018-Director-s-Policy-Paper). The Director's proposals to replace committals with case management hearings includes suggestions that defence be required to provide a list of issues early in the criminal proceedings.

relevance (for the purposes of disclosure obligations) in the CPA or any statutory criteria by which relevance may be assessed. The absence of such a definition or criteria means that whether particular material or information is relevant depends on all the circumstances. It needs to be recognised, however, that the price of the resultant flexibility is uncertainty. That uncertainty has a cost: sometimes the cost is that investigators will fail to perceive the relevance of particular material or information in a timely way; far more often the cost is that large volumes of material or information of little or no relevance will be disclosed to avoid the risk that a court might, in hindsight, regard it as having been in some way relevant to some issue (even if that issue had not then been identified). That is one reason why it is critical, in the view of the DPP, that reforms be undertaken to ensure earlier and better identification and narrowing of the issues in a criminal proceeding.

# 4 Lessons from other jurisdictions

## 4.1 United Kingdom

76. The UK (and in particular England and Wales) has experienced a number of high-profile disclosure failures in recent years. Its disclosure regime has been repeatedly examined in high-level reviews, including:

    a 2011 review by Lord Justice Gross at the request of the Lord Chief Justice;[54]

    a 2011 report by Sir Christopher Rose (a retired Lord Justice of Appeal) on disclosure failings in relation to the Ratcliffe-on-Soar power station protest case;[55]

    a 2014 review of Magistrates' Court disclosure at the request of the Lord Chief Justice;[56]

    a 2017 joint review by HM Crown Prosecution Service Inspectorate (**HMCPSI**) and HM Inspectorate of Constabulary (**HMIC**);[57]

    a 2017 report on the prosecution of the Cardiff Five, which was beset by disclosure problems;[58]

    a 2018 joint review by the Metropolitan Police Service and the Crown Prosecution Service (**CPS**) of the disclosure process in the case of *R v Allan*;[59]

    a 2018 report of the House of Commons Justice Committee into disclosure;[60] and

    a 2018 review by the Attorney-General's office of the efficiency and effectiveness of disclosure.[61]

77. The UK experience, and the analyses of that experience, therefore provide a fertile information base regarding what works and what does not in the disclosure context. This section briefly summarises the way disclosure in the UK works, and then considers the key lessons from the UK experience.

### 4.1.1 The UK System

78. In the UK, disclosure obligations are primarily captured in the *Criminal Procedure and Investigations Act 1996* (UK) (**CPIA**) and the CPIA Code of Practice.[62] The practical

54 Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (September 2011).
55 Sir Christopher Rose, *Ratcliffe-on-Soar Power Station Protest: Inquiry into Disclosure* (December 2011).
56 Judiciary of England and Wales, *Magistrates' Court Disclosure Review* (May 2014).
57 HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017).
58 Richard Horwell QC, *Mouncher Investigation Report* (July 2017).
59 Metropolitan Police Service and CPS, *A Joint Review of the Disclosure Process in the Case of R v Allan* (January 2018).
60 House of Commons Justice Committee, *Disclosure of Evidence in Criminal Cases* (17 July 2018).
61 Attorney-General's Office, *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (November 2018).

application of those obligations is elaborated upon by a variety of documents including the Attorney-General's Guidelines on Disclosure and the CPS Disclosure Manual.

79. The guiding test for disclosure under the CPIA is whether material "*might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused*".[63]

80. In broad brush, the disclosure process is as follows:

1. From the outset of an investigation, the investigator has a duty to record, retain and review material collected during the investigation. Investigators have a duty to conduct a thorough investigation, manage all material appropriately and follow all reasonable lines of inquiry, whether they point towards or away from any suspect.

2. If a person is charged with an offence the investigator will review all material gathered during the investigation.

3. Some evidence will be used in the prosecution and will be part of the case. Some material will be irrelevant. The remainder – that is, evidence that is relevant but is not used as part of the prosecution case – is referred to as "unused material". The investigator creates a schedule of the unused material to aid the disclosure process (known as the **MG6C schedule**). A separate schedule is created for sensitive material the disclosure of which the investigator believes will prejudice an important public interest (known as the **MG6D schedule**).

4. The investigator provides the schedules to the prosecutor, together with material satisfying the legislative test of relevance. The prosecutor reviews the schedules and uses them to determine if she or he needs to inspect any further material to determine if that material should be disclosed to defence.

5. The prosecutor provides the defence with a schedule of all the non-sensitive unused material and with copies of all the material that satisfies the legislative test of relevance.

6. The accused must serve a defence statement on the prosecution in Crown Court cases and may do so in magistrates' court cases. The defence statement sets out the accused's defence to the allegations and can point the investigator to other lines of inquiry. The

62 Separate, broadly similar, legislation applies in Scotland: see *Criminal Justice and Licensing (Scotland) Act 2010*, Part 6. For a summary of the law in Scotland, see Chapter 1 of the *Disclosure Manual* published by the Crown Office and Procurator Fiscal Service (www.copfs.gov.uk).

63 CPIA s 3(1).

investigator will review all their material again and decide whether, in the light of the defence statement, additional material is now relevant or meets the test for disclosure.

7. The investigator produces a further report to the prosecutor who makes the final decision on whether further material should be disclosed. The accused has a right to challenge that decision by making an application to the court.

### 4.1.2 Problems with scheduling

81. While the scheduling process in theory provides a structured approach to disclosure that reduces non-disclosure risks, a number of problems have been encountered in its practical implementation.

82. ***First,*** the effectiveness of scheduling in minimising disclosure failures is limited by how well schedules are completed.

83. The 2017 HMCPSI and HMIC review found that police scheduling "is routinely poor".[64] In a significant proportion of the non-sensitive material schedules that were examined, the schedules were judged to be inadequate, with 22.2% judged to be "wholly inadequate". Some 21.9% of schedules had missing items of unused material which should have been scheduled. In some police forces, officers were simply listing items required for routine revelation and nothing else. In 67.1% of cases, scheduled items were poorly described, making it difficult for the prosecutor to know whether or not she or he needed to view the material before deciding whether or not it should be disclosed to the defence.[65]

84. Similarly, 40% of sensitive material schedules were non-compliant. Problems included incorrectly listing materials on the sensitive schedule when the material was not sensitive or could have been easily redacted of sensitive details; poor explanations as to why the material was asserted to be sensitive; and failure to disclose the existence of potentially undermining sensitive material in circumstances where a miscarriage of justice was only narrowly avoided.[66]

85. The causes for these deficiencies in scheduling were identified to be:

    a basic lack of knowledge by police of the disclosure and scheduling process;

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64 HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017), 3 [1.3].

65 HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017), 11 [4.3].

66 HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017), 13 [4.9].

confusion amongst officers as to what constituted relevant unused material;[67] and a general lack of understanding by officers of the meaning of sensitive material.[68]

86. Failure to provide timely disclosure has significant adverse consequences, as the UK Attorney-General's 2018 review of disclosure observed:[69]

> *[T]here are certain items of material that almost always assist the defence and therefore meet the test for disclosure. However, they are frequently not disclosed until there has been significant correspondence and challenge from the defence. This wastes time and resources that could be better spent by both sides.*

87. ***Secondly,*** scheduling can be a burdensome process in prosecutions with large volumes of material. Lord Justice Gross's 2011 review gave the example of a cartel case in which the schedule was 10,877 pages long, and which had taken an estimated 18,214 hours to create.[70]

### 4.1.3 Voluminous material

88. A consistent theme in the recent UK reviews is that the rise of electronic material poses significant challenges in terms of disclosure, particularly when coupled with resource constraints. In a 2018 speech,[71] Lord Justice Gross noted:

> *the Metropolitan Police recently explained that in one complicated rape case, involving multiple complainants, it took 630 hours for the police disclosure team to review the content of the 3 complainants' mobile phones and their Facebook accounts. That figure does not include the time taken to actually download the phones at the lab, or the time taken to collate, review and schedule the products of the various reviews.*
>
> *In another and more straightforward rape case, where complainant and defendant met on Tinder and there were only 2 mobile phones to consider, 150 officer hours were required to examine 20,000 items of data.*

89. The Court of Appeal of England and Wales has addressed the issue of the proper approach to disclosure where large quantities of documents and electronic data are involved. In *R v R*,[72] the Court of Appeal stated:

> *In our judgment, it has been clear for some time that the prosecution is not required to do the impossible, nor should the duty of giving initial disclosure be rendered incapable of fulfillment through the physical impossibility of reading (and scheduling) each and every item of material seized; common sense must be applied. In such circumstances, the prosecution is entitled to use appropriate sampling and search terms and its recordkeeping and scheduling obligations are modified accordingly.*

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67 HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017), 12 [4.6].

68 HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017), 13 [4.10].

69 Attorney-General's Office, *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (November 2018), 16-17.

70 Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (September 2011), 38 [58].

71 Lord Justice Gross, *Disclosure – Again* (Speech at CBA Disclosure Event, June 2018), [37]-[38].

72 *R v R* [2016] 1 WLR 1872, 1880 [36].

### 4.1.4 The problematic nature of the UK disclosure system

90. The UK system illustrates a number of pitfalls in reforming the disclosure system.

91. Despite repeated attempts at reform, the UK disclosure regime is "*widely regarded as unworkable and unduly bureaucratic*".[73] Even after decades of inquiries, reviews and revisions, the rules remain unnecessarily complex and poorly understood. They have proven difficult for investigators and prosecutors to apply in practice. The problems are magnified by other strains on the criminal justice system, include those resulting from substantial funding cuts to the CPS, police forces and legal aid.[74]

92. Moreover reforms to the disclosure regime have not proven conspicuously successful in ensuring fair trials. Even though the current regime arose in response to a series of notorious miscarriages of justice (including egregious suppression of potentially exculpatory evidence) from the 1970s onwards, serious failures of disclosure continue, as demonstrated in the stream of inquiries and reports referred to above. Those reports have revealed continuing widespread and systemic failures in disclosure and numerous miscarriages of justice or other serious errors.

93. The most recent reports have emphasised the need for changes in culture as the essential means for "*resolving issues in the disclosure process and rebuilding public confidence in the justice system*".[75] The new DPP, Max Hill QC, has acknowledged "*the long and sometimes fraught history of disclosure*" and that "*systemic problems cannot be solved overnight*"; he has emphasised the importance of "*shifting the whole culture within investigations and prosecutions*".[76]

## 4.2 Canada

94. The most recent in-depth analysis of prosecution disclosure in Canada is a 2011 report on disclosure in criminal cases produced by the Canadian Department of Justice's Steering Committee on Justice Efficiencies and Access to the Justice System (**the Steering Committee Report**).[77] Prior to that report, disclosure had been discussed in a 1984 Law Reform Commission Report;[78] a 1989 Royal Commission report;[79] a 2003 report into police

73 See D Plater, "The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?" (2006) 25 University of Tasmania Law Review 111, 138.
74 House of Commons Justice Committee, *Disclosure of Evidence in Criminal Cases* (17 July 2018), [28]-[51].
75 House of Commons Justice Committee, *Disclosure of Evidence in Criminal Cases* (17 July 2018), [27]. See I Dennis, "Prosecution Disclosure: Are the problems insoluble?" [2018] Criminal Law Review 829.
76 M Hill, "Disclosure – a response from the CPS" [2019] *Criminal Law Review* 611, 612.
77 Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Disclosure in Criminal Cases* (June 2011).
78 Law Reform Commission of Canada, *Disclosure by the Prosecution* (1984).

misconduct commissioned by the Toronto Police Service[80] and in a 2008 report into large and complex criminal case procedures commissioned by the Attorney-General of Ontario.[81]

95. The Steering Committee Report begins by observing that disclosure problems continue to plague Canada's criminal justice system, some twenty years after the landmark decision of the Supreme Court of Canada in *Stinchcombe*.[82] Like the UK reports, the Steering Committee Report ultimately concludes that the problem with disclosure is not the law of disclosure itself, but the practical implementation of disclosure:

> *The report does not conclude, as some argue, that the biggest cause of disclosure problems is the law of disclosure itself. We believe the system is still encountering disclosure problems primarily because all the professional participants in the criminal justice system, in one way or another, have not effectively responded to the information management challenges posed by constitutionally mandated disclosure.*[83]

96. This section briefly summarises the way disclosure in Canada works and then considers the key lessons from the Canadian experience.

### 4.2.1 The Canadian system

97. In Canada, Crown disclosure in criminal proceedings is a constitutionally-protected right governed by common law. In *Stinchcombe*,[84] the Supreme Court of Canada recognised an obligation on the part of the Crown to disclose the fruits of the investigation against an accused. That obligation was based on an accused's common law right to make full answer and defence, which was said to have "*acquired new vigour*" by reason of s 7 of the *Canadian Charter of Rights and Freedoms*.[85] The Crown's obligation to disclose gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the *Stinchcombe* threshold.[86]

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79 Royal Commission on the Donald Marshall Jr. Prosecution, *Report* (1989), Volume 1, Findings and Recommendations.

80 George Ferguson, *Review and Recommendations Concerning Various Aspects of Police Misconduct* (January 2003).

81 Patrick J LeSage, *Report of the Review of Large and Complex Criminal Case Procedures* (November 2008).

82 Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Disclosure in Criminal Cases* (June 2011), 3, referring to *R v Stinchcombe* [1991] 3 SCR 326.

83 Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Disclosure in Criminal Cases* (June 2011), 3.

84 *R v Stinchcombe* [1991] 3 SCR 326.

85 *R v Stinchcombe* [1991] 3 SCR 326, 336. Section 7 provides that "*everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*"

86 *R v Dixon* [1998] 1 SCR 244, 257 [22].

98. The threshold requirement for disclosure is "quite low" and the duty of disclosure is triggered "*whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence*".[87]

99. The *Stinchcombe* obligations apply only to material in the possession or control of the prosecuting entity. In *McNeil*,[88] the Supreme Court of Canada held that although authorities of the state are not to be treated as a single indivisible Crown entity for the purposes of disclosure, the necessary corollary to the Crown's disclosure duty under *Stinchcombe* is the obligation of police (or other investigating state authority) to disclose to the Crown all material pertaining to its investigation of the accused.[89] For the purposes of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party, but acts on the same first party footing as the Crown.[90]

100. As for relevant material held by a third party, while the Crown does not have a general duty to make inquiries, Crown counsel who is put on notice of the existence of relevant information, including potentially relevant evidence pertaining to the credibility or reliability of the witnesses in a case, is under an obligation to make reasonable inquiries of other Crown agencies or departments.[91] As has been observed,[92] precisely what must be shown before this duty to inquire is activated is not entirely clear. The duty must rest on something more than speculative theories that inquiries may produce something helpful for defence; the Ontario Court of Appeal has suggested that it is "*triggered by material and potentially meritorious allegations of state misconduct*".[93]

101. The Crown's duty of disclosure has been held to give rise to an obligation to preserve relevant evidence. The Crown fails to meet its disclosure obligations where it loses relevant evidence due to unacceptable negligence.[94]

102. It has also been suggested that the duty of disclosure may import an element of transparency. While generally speaking the Crown has no duty to explain disclosed documents to defence, in some circumstances there may be an obligation on the Crown to draw the attention of the

87 *R v Dixon* [1998] 1 SCR 244, 257 [21].
88 *R v McNeil* [2009] 1 SCR 66.
89 *R v McNeil* [2009] 1 SCR 66, 76-77 [13]-[14], 81-83 [22]-[24]. This was held (at 98-102 [52]-[60]) to include records of disciplinary proceedings against a police officer who was an important witness in the case against the accused, where the disciplinary proceedings arose from the officer's conduct in the same investigation.
90 *R v McNeil* [2009] 1 SCR 66, 77 [14]. See also *R v Quesnelle* [2014] 2 SCR 390, [11].
91 *R v McNeil* [2009] 1 SCR 66, 96-98 [48]-[51]. No such general duty has been recognised in Australia: see *Marwan v DPP* [2019] NSWCCA 161, [38]-[59], where the Australian authorities and relevant principles are carefully reviewed.
92 Robert J Frater, *Prosecutorial Misconduct* (Thomson Reuters, 2nd ed, 2017), 87.
93 *R v Darwish* [2010] ONCA 124, [38].
94 *R v La* [1997] 2 SCR 680.

defence to particular features of the disclosed information. In *R v Alcantara*, where the Crown had information indicating that the police may have violated the terms of a wiretap authorisation, but that information was found in reports that formed part of thousands of pages of disclosure, the Alberta Court of Appeal said:

> *[W]here, as here, the police and through them by imputation, the Crown, had actual knowledge of a potential breach of the terms of the wiretap authorization, the obligation to disclose that information in a meaningful way went beyond mere professional courtesy. The disclosure obligation is not a game where a forest can be hidden simply by placing it in the midst of a large collection of trees.*[95]

103. The Supreme Court has recognised that the actions of defence are also relevant to prompt and effective disclosure. Where defence seeks further disclosure from the Crown, the Supreme Court has said that such requests must be focused;[96] they must not involve "*trolling peripheral waters*".[97] Moreover, defence requests for further disclosure must be diligently made and pursued; the diligence of defence counsel has been recognised as essential to "*[t]he fair and efficient functioning of the criminal justice system*".[98]

### 4.2.2 Disclosure challenges

104. The Steering Committee Report identified a number of disclosure challenges confronting police, prosecutors, defence counsel, judges and other participants in the criminal justice process in Canada.

105. Challenges faced by police included:[99]

(a) The cost of disclosure – the human, material and financial cost of discharging disclosure obligations, particularly in large complex cases.

(b) Technical issues – the lack of infrastructure required to support the disclosure process, e.g. to process large volumes of electronic material.

(c) Security and legal issues – complexities associated with handling sensitive relevant information, and the lack of clear guidance on what should and should not be disclosed.

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95 *R v Alcantara* [2013] ABCA 163, [36].
96 *R v Chaplin* [1995] 2 SCR 727, [30]-[32].
97 *R v Anderson* [2013] SKCA 92, [73].
98 *R v Dixon* [1998] 1 SCR 244, [37].
99 Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Disclosure in Criminal Cases* (June 2011), 6-11.

106. The primary challenge faced by prosecutors was the extensive amount of review time required for reviewing and vetting material for ultimate disclosure to defence. As an example, the Committee referred to one case in which there were 13,000 task reports, each of which had to be edited by police and then reviewed by the prosecution before they were disclosed to defence.[100]

107. To address these challenges, the Steering Committee made a number of recommendations, including:

(a) clear standardized agreements in each jurisdiction setting out the division and nature of the respective disclosure responsibilities of police and prosecution services;

(b) development of quality control for the briefs provided by police to prosecutors;

(c) development of standardized disclosure checklists and templates to establish disclosure expectations in the criminal justice system;

(d) development of educational programmes to educate justice professionals on their respective disclosure roles and responsibilities;

(e) consideration of a staged disclosure approach, where defence is initially provided with sufficient information to make an assessment of whether a plea should be entered, with additional disclosure to be provided if the accused decides to proceed to trial; and

(f) ultimately, consideration of codification of the law of disclosure.

### 4.2.3 Commentary

108. Disclosure obligations in Canada have evolved from a series of court decisions heavily influenced by constitutional requirements. A key theme from the Canadian commentary on disclosure is that the absence of a legislative framework for disclosure has been considered problematic. As early as 1984, the Law Reform Commission of Canada called for a statutory disclosure regime.[101] That call was repeated by the Steering Committee Report in 2011.

109. By contrast, Victoria has an established and practical legislative regime for disclosure which generally works effectively, although as the Canadian experience shows, it is necessary to

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100 Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Disclosure in Criminal Cases* (June 2011), 13.

101 Law Reform Commission of Canada, *Report on Disclosure by the Prosecution* (1984), 3.

ensure that the effective working of the disclosure regime is kept under review. This supports the strengthening of the Victorian system in the ways discussed below.

110. In Canada, as in Australia, courts have recognised as a corollary of the prosecution duty of disclosure a duty on the part of investigators to provide appropriate disclosure to the prosecution. In Canada, the scope of the latter duty emerges from decisions of the Supreme Court. In Australia, in some jurisdictions it has instead been fixed by statute.[102] Statutory provisions may allow for a more nuanced approach, to ensure that disclosure is provided in an efficient and workable way, to avoid prosecuting authorities from being swamped by irrelevant material or unnecessarily provided with sensitive material.

111. The jurisprudence in Canada has at times tended to interpret the prosecution's duty of disclosure in broad terms. Such tendencies have created some uncertainties in the law; for example, it is unclear when the Crown's obligation to make reasonable inquiries or to draw defence's attention to certain documents arises, and what those obligations might entail in a particular case.

112. As is the case with the UK, Canada has struggled to cope with the burdens imposed by its disclosure regime. The Canadian experience is again a reminder that disclosure reforms must bear in mind the practical workability of disclosure obligations.

## 4.3 New Zealand

### 4.3.1 Criminal disclosure procedures

113. New Zealand has a codified disclosure regime, found in the *Criminal Disclosure Act 2008* (NZ). The Act provides for staged disclosure:

(a) Within 15 working days after the commencement of criminal proceedings, the prosecutor (typically at this stage a police officer) must provide **limited initial disclosure** to the accused, consisting of: the charges; a summary of the facts alleged; a summary of the accused's right to apply for further information; the maximum and minimum penalties applicable for the offences with which the accused has been charged; and the accused's previous convictions.

(b) The defence can then make a request in writing for further disclosure of certain categories of material, such as: the names of witnesses whom the prosecutor intends to call; a list of exhibits; copies of records of interviews with the accused, prosecution witnesses and any co-accused; copies of job sheets or other police officer notes; and a list

102 See the discussion in "6.3 Duty to disclose to the Director the existence of relevant material" below.

of information that the prosecution refuses to disclose to the accused together with reasons for the refusal.

(c) It is only once an accused has pleaded not guilty that the prosecutor is required to make **full disclosure** of all relevant information. At this time, the accused will also be provided with an updated list of information that the prosecution refuses to disclose to the accused. Full disclosure is required to occur as soon as is reasonably practicable after the accused pleads guilty.

(d) Defence have a further opportunity to request further disclosure after full disclosure has been made.

114. Section 30 of the *Criminal Disclosure Act* provides that an accused can apply to the court for an order that a particular item or information withheld by the prosecution be disclosed. Upon such an application, the court can order that any particular item of information or type of information be disclosed, including on the ground that the interests protected by the withholding of the information are outweighed by other considerations that make it desirable, in the public interest, to disclose the information.

115. To assist with managing the disclosure process, the officer in charge of a police investigation creates a Disclosure Index when a case file is opened. The Index is populated with the description and disclosure status (e.g. provided to accused, or withheld) of relevant material. Material determined not to be relevant is not included in the Index. The Index is updated during the life of the case file. While it is not provided to the accused at the initial disclosure stage, it is provided at all subsequent stages of disclosure, including in response to defence requests for further disclosure and at the full disclosure stage. Where the Index has been updated, a new version of the Index will be provided to the accused with the next delivery of disclosure materials.

### 4.3.2 Disclosure challenges

116. As has been the experience in other jurisdictions, certain kinds of investigations — for example, organised crime or fraud — tend to produce case files of considerable size and, consequently, a large number of potentially disclosable documents. These kinds of matters have been identified by NZ Police as posing the greatest challenge from a disclosure perspective,[103] no doubt because of the sheer amount of resources required to comply with disclosure requirements.

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103 NZ Police Manual, *Criminal Disclosure* (Version 14.0), 23.

117. To date, the *Criminal Disclosure Act* has not been the subject of any wide-ranging review, and the decided cases on disclosure[104] do not point to any systemic disclosure issues.

### 4.3.3 Commentary

118. One of the advantages of the staged disclosure process is that it provides a clear and finite list of materials to be disclosed at the initial stage of criminal proceedings. This avoids the problem, identified in the Steering Committee Report in Canada, of investigators investing considerable time in assessing material for disclosure only to have the matter resolve by plea.

119. Another advantage of the *Criminal Disclosure Act* is that it expressly provides for a statutory mechanism (s.30) by which disclosure disputes can be brought before a court. A significant limitation of this procedure, however, is that it only provides for an *accused* to bring an *application for disclosure* to the court. There is no provision for a prosecuting agency, such as the police, to bring an application for *non-disclosure* to the court. The procedure therefore assumes that an accused will be aware of the existence of all material that might be sought to be withheld by the prosecution. As has been discussed above, and will be discussed further below, the background to this Royal Commission demonstrates that there are circumstances in which the disclosure of the existence of sensitive material may be prejudicial to the public interest. The s.30 procedure in the *Criminal Disclosure Act* is unable to assist in these kinds of cases.

## 4.4 Other Australian jurisdictions

120. The Australian States and Territories have taken varied approaches to disclosure. This paper does not seek to summarise all of those approaches. Instead, this section briefly highlights aspects of the disclosure regime in New South Wales and Western Australia that are relevant to the recommendations made in this paper.

### 4.4.1 New South Wales

121. Like Victoria, disclosure obligations in NSW are found in both statute (especially the *Criminal Procedure Act 1986* (NSW), Chapter 3 Part 3 Division 3) and the common law.[105]

122. One aspect of the NSW legislative regime which has no counterpart in the Victorian legislation is s 15A of the *Director of Public Prosecutions Act 1986* (NSW). This creates a duty on the part of law enforcement officers to disclose to the Director all relevant

104 See, e.g., *Hutton v The Queen* [2018] NZHC 662; *R v Bublitz* [2017] NZHC 159; *Liev v The Queen* [2017] NZHC 1352; *Ministry of Business, Innovation and Employment v Centreport Ltd* [2014] NZHC 2751.

105 Section 149F(5) of the *Criminal Procedure Act 1986* (NSW) expressly states that ch 3 pt 3 div 3 does *not* preclude the application of common law obligations of disclosure, but the Division prevails to the extent of any inconsistency.

information obtained during the course of an investigation "*that might reasonably be expected to assist the case for the prosecution or the case for the accused*". In the event that relevant information is subject to a claim of privilege, public interest immunity or statutory immunity, the law enforcement officer's duty is to inform the Director of the existence of that information and the reasons why it cannot be disclosed. Under s 15A(7), the Director is given the power to request such material, in which case the law enforcement officer must provide it.

123. This duty upon law enforcement officers is reinforced by a certification process, by which officers:

1. provide to the Director schedules listing any relevant material that has not been disclosed to the Director and the reasons for the withholding of that material; and
2. sign a certificate acknowledging that they are aware of their duty of disclosure, certifying that the information and lists they have provided to the Director are true to the best of their knowledge, and undertaking to advise the Director as soon as practicable after they become aware of additional relevant information.[106]

124. The certificate signed by the law enforcement officer, together with the schedules of withheld material, are provided to defence. Where the DPP considers that the schedules provided by a law enforcement officer are inadequate, the officer will be asked to provide an updated disclosure certificate with more fulsome descriptions of the withheld material.

125. In Supreme Court matters, the officer in charge of an investigation is required to swear an affidavit regarding disclosure obligations. This is a matter of Supreme Court practice,[107] as opposed to a legislative requirement.

126. Section 15A is discussed further below ("6.3 Duty to disclose to the Director the existence of relevant material").

### 4.4.2 Western Australia

127. The *Criminal Procedure Act 2004* (WA), like the *Criminal Disclosure Act 2008* (NZ), provides for a detailed disclosure procedure.[108] Like the NZ regime, the Western Australian legislation provides for staged disclosure: initial disclosure of limited material by the prosecutor (typically the police informant), followed by full disclosure after the accused has

106 *Director of Public Prosecutions Regulation 2015* (NSW). sch 1.
107 Supreme Court of New South Wales, Practice Note SC CL 2, [9].
108 It remains an open question whether the provisions of the CPA relating to disclosure comprise an exhaustive code: see *Bozzer v Western Australia* [2017] WASCA 226, [84].

pleaded not guilty, and then disclosure by the relevant authorised officer (usually the DPP) after the accused has been committed for trial.

128. Two features of the Western Australian disclosure regime are worth highlighting here. The first is that, like NSW, it provides for certification by police investigators to the DPP. Section 45 of the *Criminal Procedure Act* provides that after an accused is committed for trial on a charge, the prosecutor (typically the police informant) must give the relevant authorised officer (typically the DPP) copies of disclosure material already provided to the accused and a signed certificate stating that the prosecutor's disclosure obligations to date have been complied with. It is an offence to knowingly or without reasonable diligence sign a certificate that is false in a material particular. The s.45 certificate must be provided to the accused.[109]

129. The second is that, like NZ, the Western Australian legislation provides for an express statutory mechanism for resolving disclosure disputes. Unlike the NZ provision, however, s 138 of the *Criminal Procedure Act* allows prosecutors to apply for a *dispensation* from all or part of a disclosure requirement, and such applications can be made *ex parte*. The court can make such orders if satisfied that there is good reason to do so and no miscarriage of justice will result. Section 138 is discussed further below ("8 Resolving PII and non-disclosure obligations").

109 *Criminal Procedure Act 2004* (WA) s 95(6).

# 5 Improving police capacity to comply with disclosure obligations

## 5.1 Training and guidance

130. Lord Justice Gross said in his 2011 review of disclosure in England:[110]

> *Disclosure is only as good as the person doing it. In the typical English prosecution, the "person doing it" will most likely be a police officer. We recommend that proper training in issues of disclosure, extending to an appropriate "mindset", should be part and parcel of the professional development of a police investigator.*

131. The 2017 HMCPSI and HMCI review[111] observed:

> *This inspection has identified a number of reasons for this significant failure in the process of disclosure and they form the basis of our recommendations. There needs to be improvement in the training provided to police and in the supervision provided to both police and prosecutors.*

132. The DPP shares the view that substantial improvements are necessary in the training and in the guidance available for Victoria Police members in relation to disclosure obligations. Efforts of senior officers to introduce improvements in these areas should be supported. Much remains to be done.

## 5.2 Access to legal advice

133. Many of the problems which emerged from the recruitment and use of Ms Gobbo as a human source, and the failure to disclose her conduct, could have been avoided had the police obtained timely legal advice from the Victorian Government Solicitor or from experienced counsel.

134. Even in more routine types of investigations, officers may benefit from obtaining early independent legal advice about disclosure obligations in the course of an investigation. An advantage of doing so is that police will then be better prepared to take promptly any necessary steps to protect information which is subject to PII.

135. Victoria Police should encourage members to obtain such independent advice and increase the opportunities to do so.

136. While OPP solicitors are able to respond to certain police queries about prosecutions, the importance of maintaining the independence of the OPP and the Victoria Police means that legal advice about complex disclosure issues, including PII, should be sought from Victoria Police's own independent legal advisers, such as the Victorian Government Solicitor.

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110 Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (September 2011) 7.

111 HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017) 3 [1.4].

## 5.3 Upgrade of information systems

137. A major theme from reviews of disclosure problems in the UK is that better use of technology is a major tool in achieving improvements in disclosure.[112]

138. Developing more efficient, effective, stable and secure information systems across Victoria Police poses major challenges and may involve substantial investment, but it is a matter of very considerable importance.

112 See, for example, Attorney-General's Office, *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (November 2018), Chapter 6.

# 6 Encouraging greater police compliance with disclosure obligations

139. In the Director's submission, there are a number of legislative improvements that can be made to encourage and facilitate more effective working of the disclosure regime in Victoria.

140. These changes can be made without any radical change to the essential features of the disclosure regime. A number of the suggested changes involve putting into statute requirements which already exist at common law. Others involve tweaking and reinforcing existing legislative requirements. The changes envisaged would strengthen the existing regime, increase the likelihood of compliance, ensure greater accountability and allow for expeditious resolution of issues, without being unduly burdensome or undermining the workability of the disclosure regime.

141. Although these changes are predicated on existing criminal procedure, as noted earlier (at [74]), adoption of them could be dovetailed with, and would complement, other reforms of the criminal justice process advocated by the DPP.

## 6.1 Explicit requirement to disclose the existence of PII material

142. In the experience of the OPP, a recurring issue is that investigators sometimes do not disclose the existence of relevant material to the prosecutor or to the defence because the view is taken that the material is subject to PII. This approach is fundamentally contrary to law. Moreover, as the circumstances leading to this Royal Commission demonstrate, it is highly problematic: it prevents claims of PII from being tested by the defence, and results in the police, rather than a court, effectively being the final arbiter on PII.

143. The persistence of this misconception requires that legislation reinforce the principle that it is not open to an investigator or investigative agency to conceal the existence of relevant material merely on the basis that the investigator or agency believes that its disclosure to an accused person is prohibited by statute or by a common law privilege or immunity.

144. In particular, it is the Director's view that the disclosure framework must provide for investigators to disclose, so far as possible, the *existence* of relevant material that may be subject to PII. Relevance and PII are distinct enquiries, and the legislative framework needs to make this explicit.

145. One method of achieving this would be to insert the following into the list of material satisfying the definition of material "relevant to the alleged offence" under s 110(e) of the CPA:

*a list containing descriptions of any things relevant to the alleged offence which has not been included in the hand-up brief because of:*

*a claim of privilege or immunity; or*

*a statutory prohibition.*

146. This would be supported by the prescribing of a new Form required to be included with the hand-up brief that contains the following:[113]

***Schedule 1: relevant material that is subject of claim of privilege or immunity***

*There is relevant material, not contained in the hand-up brief, that is the subject of a claim of privilege, public interest immunity or statutory immunity. That material is described in the following table:*

| ***Description of item*** | ***Nature of privilege/immunity claim*** |
|---|---|
| *[Example 1]* | *[Legal professional privilege]* |
| *[Example 2]* | *[Public interest immunity – investigative methodology]* |

***Schedule 2: relevant material that is subject of statutory prohibition***

*There is relevant material, not contained in the hand-up brief, that is the subject of a statutory prohibition on publication and the existence of which I can disclose without contravening the statutory prohibition. That material is described in the following table [Describe the material only to the extent not prohibited by the statutory publication restriction]:*

| ***Description of item*** |
|---|
| *[Example 1]* |
| *[Example 2]* |

147. The aim is to ensure that defence are alerted to the existence of relevant material over which the privilege or immunity is claimed, or which is withheld because of a statutory prohibition. The defence would then have an opportunity to test the claim of privilege, immunity or statutory prohibition in accordance with a defined process, such as the Form 32 procedure and the procedure under s.122 of the CPA or the issue of a subpoena.

148. Such a requirement would be comparable to the practices in other jurisdictions, such as Western Australia and New South Wales. Anecdotal information from prosecution authorities in those jurisdictions is that the analogous requirements to provide lists of withheld material have been beneficial in improving disclosure, without proving unduly burdensome.

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113 The form of these Schedules is based on those in the NSW Disclosure Certificate: see *Director of Public Prosecutions Regulation 2015* (NSW) Sch 1.

149. The legislative introduction of this list or schedule of withheld material should be accompanied by appropriate Victoria Police internal policies or procedures that provide guidance to investigators on how to describe withheld material and the corresponding claims of privilege, immunity or statutory prohibition.

150. In some circumstances, revelation of the existence of the material may create a risk of disclosure of its content. To deal with such circumstances, it is envisaged that there be a statutory mechanism by which the claim of privilege or immunity can be determined upon an *ex parte* application to a court. The proposed procedure is discussed below: see "8 Resolving PII and non-disclosure obligations". Under that procedure, if the court upholds the claim it could also, if appropriate, dispense with the requirement to disclose the existence of the material.

## 6.2 Legislative guidance on disclosable material

### 6.2.1 Specifying commonly-overlooked categories of material to be disclosed

151. In the submission of the DPP, it would be desirable to amend requirements in or under the CPA to specify certain types of material that under the existing law must be disclosed with a hand-up brief, but which are liable to be overlooked. Listing such matters would tend to focus the minds of investigators on compliance with disclosure obligations (especially if coupled with a requirement for the informant to certify such compliance, as discussed below : see "6.4 Certifying compliance with disclosure obligations").

152. It is stressed that it is neither necessary nor desirable to attempt to make a comprehensive legislative list of classes of material which ought to be disclosed. Attempts to do so in other jurisdictions have not been conspicuously successful, as they tend to harden into arbitrary and artificial rules. The aim should be to specify in the Act only matters which are clearly required to be disclosed in most cases, but have tended to be commonly overlooked.

153. The most important such category is material which is relevant to assessing the credibility of a prosecution witness.[114] The CPA makes no specific provision about such material, except in relation to a witness's previous convictions.

### 6.2.2 Other charges against a prosecution witness

154. The CPA makes special provision in relation to disclosure of the particulars of previous convictions of a prosecution witness.[115] There is no requirement to disclose such convictions

114 As to the admissibility of credibility evidence see Part 3.7 of the *Evidence Act 2008* (Vic). Evidence as to the credibility of a witness (as defined in s.101A of the Act and in the Dictionary to the Act) includes evidence as to reliability as well as truthfulness: *Dupas v R* (2012) 40 VR 182, [265].

in a hand-up brief, but they may be requested by the defence in a case direction notice.[116] If they are so requested, the informant may object to the disclosure of any such particulars if the previous conviction is, because of its character, irrelevant to the proceeding, but the informant must advise the accused of the existence of any undisclosed previous convictions.[117] A similar requirement applies in proceedings on indictment.[118]

155. In the submission of the DPP, these procedures and requirements should be extended to include:

> particulars of any outstanding charge against a person on whose evidence the prosecution intends to rely in the committal proceeding; and
>
> particulars of any charge which has been withdrawn or discontinued against such a person—

if the person is alleged to be a co-offender of the accused, or if the charge, or its withdrawal or discontinuation, is relevant to assessing the credibility of the person or is otherwise relevant to the proceeding.

### 6.2.3 Sentence reductions or other benefits for assistance to authorities

156. Disclosure issues may arise where a prosecution witness against an accused person or a co-offender of an accused person has been sentenced for an offence and the sentencing court has reduced the sentence because of that person's assistance to authorities or undertaking to assist in future.

157. The existence of the sentence reduction may be relevant in proceedings against the accused in various ways. For example:

> the sentence reduction (and the surrounding circumstances) may be relevant to the assessment of the person's credibility or reliability if the person is a prosecution witness;[119] or
>
> the existence of the sentence reduction may be relevant to the sentencing of the accused, in applying the principles of parity or equal justice.[120]

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115 CPA, ss.43(1)(e), 45(3), 119(e), 122, 187. See also *Magistrates' Court Criminal Procedure Rules 2009* (Vic), Forms 30 and 32. The CPA does not require disclosure of the particulars of any previous conviction which is, "*because of its character, irrelevant to the proceeding*" (see ss.45(3), 122(3), 187(2)).

116 CPA, s.119(e)(iii).

117 CPA, s.122(3).

118 CPA, s.187.

119 E.g. *Grey v R* (2001) 75 ALJR 1708.

158. Other benefits, such as charge reductions or indemnities, provided to a prosecution witness in connection with their assistance will also often be relevant to assessing the witness's credibility.

159. The prosecution duty of disclosure will apply whenever the sentence reduction (or other benefit) is relevant to the proceedings against the accused, in accordance with the disclosure principles described in the DPP's policy. A common example is where a sentence reduction has been given to a prosecution witness because that person has undertaken to give evidence against the accused if called upon to do so.

160. The need for disclosure of such material is sometimes misunderstood or overlooked by investigators, particularly where it is relevant to the credibility of a prosecution witness.

161. It is therefore suggested that the following types of material be specifically listed as disclosable, preferably by inclusion in the list in s.110(e) of the CPA:

> if a person referred to in s.110(d)(iv) has been sentenced by a court and the court has taken into account information, co-operation or assistance that the person has provided, or has undertaken to provide, to a law enforcement agency–
>
> - a copy or other record of the sentencing remarks;
> - a copy of any document tendered or submitted to the court or any record of evidence to the court which specified the information or assistance provided or the undertaking given;
>
> a record of any undertaking, indemnity, letter of comfort or other benefit provided to a person referred to in s.110(d)(iv) by or on behalf of the prosecution in connection with the provision of a statement or of information or assistance relevant to the proceedings; and
>
> any other record which is relevant to the assessment of the credibility of a person referred to in s.110(d)(iv).

162. If the informant believes that disclosure of any such information would be contrary to a statute, or to a privilege or immunity, the information would not itself be disclosable, but its

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120 The relevant principles are set out in *Lowe v R* (1984) 154 CLR 606; *Green v R* (2011) 244 CLR 462. In Victoria, parity or equal justice principles have been applied not only in the sentencing of co-offenders or other parties to the same criminal enterprise, but also to offenders with a more tenuous connection, such as a common victim: *Farrugia v R* (2011) 32 VR 140. Courts in New South Wales (see *Baladjam* v *R* [2018] NSWCCA 304, [146]-[149]) and Queensland (*R v Leathers* [2014] QCA 327; *R v Hughes* [2018] 2 Qd R 134) have declined to extend the application of the relevant principles so far.

existence must be disclosed and the basis for its non-disclosure must be set out (for example, in the new Form proposed at [146] above).

163. It is envisaged that a court would be empowered to waive any of these requirements if it were necessary to do so (for example, where disclosure would tend to create an undue risk of harm to the person). A proposed procedure by which this could be done is discussed below (see "8 Resolving PII and non-disclosure obligations").

164. The disclosure of material relating to sentencing reductions given to prosecution witnesses for assistance provided poses particular procedural problems because:

    it is not always the case that the sentencing remarks, or at least the sentencing remarks that are publicly available, will disclose the fact and nature of the assistance provided; and

    sentencing remarks that are publicly available and do disclose the fact of assistance may be published using a pseudonym for the offender (and sometimes other persons) and subject to court orders that prohibit the identification of a person who is referred to by a pseudonym.

165. These procedural problems, and possible solutions, are discussed below ("9 Sentencing of co-offender or prosecution witness where relevant assistance provided").

### 6.2.4 Material relevant to the credibility of a complainant

166. A related category of material that has caused disclosure issues in a number of Australian cases is evidence affecting the credibility of the complainant. For example, in *Colagrande*,[121] there had been a failure to disclose that the complainant had sought to withdraw her complaint of the accused's sexual offending prior to trial and had provided a written statement setting out the reasons why she wished to withdraw her complaint. In *HAU*,[122] *D v Western Australia*,[123] and *Lewis-Hamilton*,[124] there had been failures to disclose victim impact statements by the complainants. In *D*, the Western Australian Court of Appeal observed that as a general rule, the prosecution bears a positive obligation to disclose any victim impact statement containing relevant information that is in the hands of the prosecution prior to or during the trial.

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121 *R v Colagrande* [2019] 1 Qd R 241. See also *PAH v Western Australia* [2015] WASCA 159, where the prosecutor's failure to disclose the complainant's oral statements that she wanted to discontinue her complaint of child sexual offences was held to constitute a material irregularity in the statutory pre-trial procedures mandated by the *Criminal Procedure Act 2004* (WA), but which caused no substantial miscarriage of justice.

122 *R v HAU* [2009] QCA 165.

123 *D v Western Australia* [2007] WASCA 272.

124 *R v Lewis-Hamilton* [1998] 1 VR 630.

167. This category of material would be caught by the residual category of disclosable material suggested above (at [161]): "*any other record which is relevant to the assessment of the credibility of a person referred to in s.110(d)(iv)*". However, it may be desirable to provide for express reference in s.110(e) to this kind of material, to ensure that investigators turn their mind to whether such material is available. The additional categories could be described along similar lines to what currently appears in the Form 30:

> *a copy of –*
>
> *any victim impact statement made by a complainant that relates to the alleged offence;*
>
> *any other statement made by a complainant to any member of the police force or to a prosecutor that relates to the alleged offence and contains an acknowledgement of its truthfulness.*

## 6.3 Duty to disclose to the Director the existence of relevant material

### 6.3.1 Need for the prosecutor to be informed of the existence of relevant unused material

168. For the purpose of conducting proceedings on indictment and the performance by the DPP of its other functions, it is essential that investigators disclose to the prosecution the existence of all information that is relevant to an alleged offence, so that the prosecutor can then make the requisite disclosure to the defence (if it has not already been made).

169. The DPP should generally be informed of the existence of relevant information even if investigators believe that it cannot be disclosed (whether because of PII, privilege, an applicable statutory prohibition or for some other reason). As courts have repeatedly emphasised,[125] it is not for investigators to make a unilateral decision to conceal the existence of relevant information.

170. The DPP submits that a statutory provision should be enacted to give effect to this requirement and to provide for an appropriate procedure for investigators to disclose to the prosecution the existence and nature of sensitive material.

### 6.3.2 NSW requirement for investigators to disclose the existence of material to the DPP

171. To ensure investigators make appropriate disclosure to the prosecution, in 2001 the New South Wales Parliament amended the *Director of Public Prosecutions Act 1986* (NSW) by inserting s 15A. In its current form, that section relevantly provides:

> *Duty to provide relevant information to Director*
>
> *(1) Law enforcement officers investigating alleged offences have a duty to disclose to the Director all relevant information, documents or other things obtained during*

125 See the authorities cited in footnote 44.

*the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person.*

*(1A) The duty of disclosure arises only if the Director exercises any function under this Act or Part 2 of Chapter 3 of the Criminal Procedure Act 1986 with respect to the prosecution of the offence (including in connection with a law enforcement officer seeking advice from the Director under section 14A of the Criminal Procedure Act 1986 about the commencement of proceedings for an offence).*

*(2) The duty of disclosure continues until one of the following happens:*

*(a) the Director decides that the accused person will not be prosecuted for the alleged offence,*

*(b) the prosecution is terminated,*

*(c) the accused person is convicted or acquitted.*

*(3) Law enforcement officers investigating alleged offences also have a duty to retain any such documents or other things for so long as the duty to disclose them continues under this section. This subsection does not affect any other legal obligation with respect to the possession of the documents or other things.*

*(4) The regulations may make provision for or with respect to the duties of law enforcement officers under this section, including for or with respect to:*

*(a) the recording of any such information, documents or other things, and*

*(b) verification of compliance with any such duty.*

*(5) The duty imposed by this section is in addition to any other duties of law enforcement officers in connection with the investigation and prosecution of offences.*

*(6) The duty imposed by this section does not require law enforcement officers to provide to the Director any information, documents or other things:*

*(a) that are the subject of a claim of privilege, public interest immunity or statutory immunity, or*

*(b) that would contravene a statutory publication restriction if so provided.*

*(7) The duty of a law enforcement officer in such a case is to inform the Director of:*

*(a) the existence of any information, document or other thing of that kind, and*

*(b) the nature of that information, document or other thing and the claim or publication restriction relating to it.*

*However, a law enforcement officer must provide to the Director any information, document or other thing of that kind if the Director requests it to be provided.*

172. "Law enforcement officer" is defined in s.15A(9) to include a police officer or certain staff of other specified NSW agencies (including the NSW Crime Commission and the Independent Commission Against Corruption). "Statutory publication restriction" is defined in s.15A(9) to mean a prohibition or restriction on publication imposed by or under particular NSW Acts.

173. As originally enacted, the requirement in s.15A(1) was unqualified. In *Lipton*,[126] the NSW Court of Appeal held that it was not sufficient for the police merely to advise the Director that the police held relevant material without disclosing its content; the provision required police to physically produce such material to the Director, even if the police took the view that the material was subject to a bona fide claim of PII. So construed, the provision was unnecessarily burdensome and risked compromising the security of sensitive material.

174. In response to the decision in *Lipton*, s.15A was amended by adding sub-sections (6) and (7).[127] The effect of the amendments was to make clear that a law enforcement officer is not required to provide to the DPP any original material that is the subject of a claim of privilege, public interest immunity or statutory immunity, or the provision of which would contravene a statutory restriction. Instead the officer must inform the DPP of the existence and nature of any such material. The law enforcement officer must also inform the DPP of the nature of the claim or publication restriction relating to it. The material itself need only be provided to the DPP if the DPP so requests.

### 6.3.3 Adapting the NSW requirement for Victoria

175. In order to adapt the NSW requirement for Victoria, two modifications should be made.

176. The first modification which is proposed concerns the reference in s.15A(1) to "relevant information". The duty of disclosure under that provision applies to "*all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person.*" It would be preferable to align the requirement with the disclosure requirements in the CPA. Those requirements, in relation to unused material, refer to material that is "*relevant to the alleged offence*" (ss.41(1), 110; cf. ss.48(1), 114(1), 186(1)) or "*relevant to the charge*" (s.416). "Relevant" is not defined for the CPA, but has been understood as being informed by the scope of the common law obligations of disclosure (see "2.2.2 Common law obligations" above). That is, material would be relevant if it "*can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful)*

126 *R v Lipton* (2011) 82 NSWLR 123.

127 *Director of Public Prosecutions Amendment (Disclosures) Act 2011* (NSW); *Director of Public Prosecutions Amendment (Disclosures) Act 2012* (NSW).

*prospect of providing a lead on evidence which goes to (1) or (2).*"[128] The formulation in s.15A of the NSW Act may be construed as not fully or precisely capturing the notion of relevance which underlies the CPA and the common law. Therefore it would be preferable for sub-section (1) instead to provide as follows:

> *(1) Law enforcement officers investigating alleged offences have a duty to disclose to the Director all ~~relevant~~ information, documents or other things obtained during the investigation that ~~might reasonably be expected to assist the case for the prosecution or the case for the accused person~~ is relevant to an alleged offence.*

177. The second proposed modification relates to the information which should be provided to the DPP about material or information which is subject to a claim of privilege, PII or statutory immunity or where a statutory publication restriction is said to apply.

178. As described below ("8 Resolving PII and non-disclosure obligations"), the prosecution usually plays no role in pursuing such a claim. The practice is that the claim is argued by the investigative agency or other responsible agency, not the prosecutor. The purpose of this practice is to avoid conflicts of interest and to ensure that the independence of the prosecutor is maintained. It is usually preferable that the DPP is not informed of the content of the material or information, unless and until it is necessary for the proper performance of the prosecutor's functions.

179. In most cases, whether particular material or information is required to be withheld from the accused on the grounds of PII, privilege or a statutory prohibition will have no effect on the conduct of the prosecution.

180. In practice, material or information which is held to be subject to PII, privilege or a statutory prohibition is very often such that, on reasonable appraisal, it would not be capable of weakening the prosecution case or strengthening that of the defendant. The material or information is more often such as would tend to incriminate the accused or is entirely neutral. Only in a small minority of cases does a serious question arise about whether it would be fair to an accused to continue the proceedings or the particular charge because material or information cannot be disclosed.

181. It is generally undesirable that sensitive information be disseminated unnecessarily. There is usually no need for the prosecution to consider the content of the sensitive material unless there is some basis for considering whether its non-disclosure could have an effect on fairness of the trial. To do so unnecessarily is also a waste of prosecutors' time.

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128 *R. v Melvin* (unreported), 20 December 1993, which was adopted and applied in *R v Keane* [1994] 1 WLR 746; *R v Brown (Winston)* [1998] AC 367, 376-7. See also *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019), [15]-[16].

182. To this end, the procedure in relation to such material should be clarified. It is proposed that the relevant provisions be amended to read as follows:

> *(6) The duty imposed by this section does not require law enforcement officers to provide to the Director any information, documents or other things:*
> *(a) that are the subject of a claim of privilege, public interest immunity or statutory immunity, or*
> *(b) that would contravene a statutory publication restriction if so provided.*
>
> *(7) The duty of a law enforcement officer in such a case is to inform the Director of:*
> *(a) the existence of any information, document or other thing of that kind, and*
> *(b) the nature of that information, document or other thing and the claim or publication restriction relating to it; and*
> *(c) whether the information, document or other thing might reasonably be expected to substantially weaken the case for the prosecution or substantially strengthen that of the defendant.*
> ~~*However, a law enforcement officer must provide to the Director any information, document or other thing of that kind if the Director requests it to be provided.*~~
>
> *(8) A law enforcement officer must provide to the Director any information, document or other thing of that kind if the Director requests it to be provided, but not otherwise.*

183. Proposed sub-section (7)(c) reflects a requirement under a recent amendment to the Director's Policy (set out at [54] above).

### 6.3.4 Victoria should enact a provision based on s.15A of the *Director of Public Prosecutions Act 1986* (NSW)

184. The DPP submits that, to avoid potential disclosure failures arising from information not being provided to prosecutors, a provision should be inserted into the *Public Prosecutions Act 1994* (Vic) along the lines of s.15A of the *Director of Public Prosecutions Act 1986* (NSW). With the modifications described above, that section provides a suitable precedent for a provision which sets out the requirement for investigators to make disclosure to the DPP.

185. The enactment and proper use of such a provision should not create undue burdens for either the police or the DPP. In most cases, the DPP only becomes involved in a prosecution at the committal or post-committal stage. The proposed duty would cut in at that stage. In most cases, a hand-up brief either will then be in preparation or will have been served. If the requirements of the CPA are being or have been complied with, relevant unused material would have already been identified (especially if the Act is amended as proposed elsewhere in this submission). If relevant material is subject to a claim of privilege, PII or a statutory prohibition on disclosure, in general either its existence should have been notified to the defence or steps should have been taken to obtain a court ruling on the claim.

186. It must be emphasised that, under the NSW provision, a law enforcement officer is not generally required to provide to the DPP originals or copies of sensitive material – that is, material which is subject to a claim of PII, privilege or statutory immunity or which is subject to a statutory prohibition on disclosure. The obligation is to inform the DPP of *the existence and nature* of such material and the nature of the claim or restriction. This minimises the risk of compromising the security of sensitive material and avoids the requirement from being overly burdensome. The same obligation would apply under the proposed provision.

187. However, as in NSW, a law enforcement officer would be required to provide to the Director any such information, document or thing if the DPP requests it to be provided. This would enable the DPP to call for and examine any such material when it is necessary to do so, even if a court has determined that the document is subject to a privilege or immunity. That power provides a necessary and appropriate safeguard. For example, the DPP may need to examine such material to determine:

whether disclosure to the defence of the existence of the material is required; or

whether an *ex parte* ruling should be obtained from a court about the claim of privilege or immunity; or

if a court has determined that the material is privileged or immune from disclosure, whether its non-disclosure would be likely to cause an unfair trial and if so whether any remedial steps can be taken; or

if a trial has been completed, whether non-disclosure of the material may have caused an unfair trial.

188. Enactment of a provision similar to s.15A would encourage better decision-making about relevant material which is subject to a claim of privilege or immunity or a relevant statutory publication restriction. The need to identify such material, and the basis of the claim, would serve as a reminder of the legal principles – in particular that investigators have no right to make unilateral decisions to conceal the existence of relevant material, and that even material which is found by a court to be privileged or immune from disclosure may affect prosecution decisions.

189. Although the question has not been authoritatively determined in Victoria, appellate courts in other States have recognised that police have a duty at common law to inform the prosecuting authority adequately of all material that might have to be disclosed to an accused

(even if the police consider the material to be subject to PII).[129] In *Lipton*, the NSW Court of Criminal Appeal noted that s15A of the *Director of Public Prosecutions Act 1986* (NSW) "*was intended to reflect the common law obligation of police disclosure*".[130]

190. Accordingly, the enactment of a statutory duty should not impose significant additional burdens on Victoria Police beyond those which the law already requires.

## 6.4 Certifying compliance with disclosure obligations

### 6.4.1 No current requirement for informant to certify

191. The current Form 30 is required to be signed by the informant. However, there is no requirement for the informant to certify that, to the best of his or her knowledge or belief, the informant's disclosure obligations have been complied with.

192. On the basis of the experience of other jurisdictions, the DPP considers that the addition of a requirement to certify to a court that there has been full disclosure would usefully focus the minds of informants on the need for full compliance with their disclosure obligations.

### 6.4.2 Examples of requirements to certify disclosure

193. As discussed above, in New South Wales and Western Australia, an investigator must provide certification in relation to disclosure.

194. In New South Wales (where committal hearings have been abolished), a law enforcement officer is required to certify that full disclosure has been made to the DPP in accordance with s.15A of the *Director of Public Prosecutions Act 1986* (NSW).[131] The prescribed form of disclosure certificate is set out in regulations under that Act.[132]

195. In trials in the Supreme Court of NSW in State matters, the prosecution has been required since 2015 to file an affidavit by the law enforcement officer in charge of the case confirming the compliance by the relevant investigating agency as at arraignment with its duty of disclosure as set out in s 15A.[133]

196. In Western Australia, after committal, the committal prosecutor (that is, usually, the police informant) must give the relevant prosecution authority (usually the State DPP) a certificate

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129 *R v Solomon* (2005) 92 SASR 331, [116] (Doyle CJ, with whom Duggan and Sulan JJ agreed); cf. *R v Lipton* (2011) 82 NSWLR 123, [92]-[102]. South Australia has since enshrined the duty referred to by Doyle CJ, as it relates to documentary material, in statute: see now *Director of Public Prosecutions Act 1991* (SA), s.10A.

130 *R v Lipton* (2011) 82 NSWLR 123, [107].

131 *Director of Public Prosecutions Act 1986* (NSW), s.15A(4); *Director of Public Prosecutions Regulation 2015* (NSW), reg. 5 and Schedule 1.

132 *Director of Public Prosecutions Regulation 2015* (NSW), reg. 5 and Schedule 1.

133 Supreme Court of NSW, Practice Note SC CL 2, [9].

by an investigator certifying that all relevant evidentiary material has been served or made available to the accused and provided to the prosecution authority.[134] The certifying officer must state their grounds for so certifying and any inquiries made by the person before so certifying, where inquiry has been necessary.[135] The prosecution authority is required to serve the certificate on the accused, together with any relevant material which has not already been served.[136]

197. The DPP has been told that the introduction of these requirements has markedly improved police compliance with disclosure obligations.

### 6.4.3 Timing of certification

198. The greatest benefits from the introduction of a certification requirement are likely to come in cases which are being prepared for trial on indictment. At least initially, certification should be required only in those cases and only after committal or direct indictment.

199. Disclosure requirements in criminal proceedings are ongoing. At the time of initial disclosure (for example, with a hand-up brief), there may be little indication of what the real issues in the proceeding are likely to be (e.g. where the accused has declined to answer questions in a record of interview). Prosecution disclosure requires a sensible appraisal of relevance, not speculation as to issues or defences which are then no more than fanciful possibilities.

200. The issues in a criminal proceeding often evolve over a period of time. It is common for an issue to be raised by the defence which is not apparent from perusal of the prosecution brief. The raising of such an issue may require assessment of material held by the investigative agency which was not previously considered relevant (such as seized material which appeared to be irrelevant or material obtained in the course of a different investigation).

201. Unfortunately, despite all the steps that have been taken in recent years to identify and narrow issues in trials and to improve case management, it is still common for such issues to emerge only late in the course of the proceedings: after committal, after the filing of the indictment, after the filing of the summary of the prosecution opening, after the commencement of the trial or even after the closure of the prosecution case. Managing compliance with disclosure obligations is just one of the problems this creates.

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134 *Criminal Procedure Act 2004* (WA) ss 45(2)(d), (3)(f), (5). Disclosure obligations are subject to, amongst other things, privilege and PII: s.137A.

135 *Criminal Procedure Act 2004* (WA) ss 45(5)(c).

136 *Criminal Procedure Act 2004* (WA) s 95.

202. In the view of the DPP, the most appropriate time for certification of disclosure requirements in a proceeding on indictment is after the defence is first required to identify the issues in the trial. At present this occurs upon filing of the defence response to the prosecution opening.[137]

203. The defence response to the prosecution opening may require further consideration of whether additional material must be disclosed. Therefore a reasonable period (e.g. 14 days) should be allowed after the defence response for the filing of a certificate. The period should be subject to variation by the trial court.

204. The requirement for certification of disclosure could be included by way of inserting after s.185 of the CPA a provision along the following lines:

> ***185AA Certification of disclosure***
>
> *After being served with a copy of the documents referred to in section 183, the prosecution must within 14 days (or such other time as the court directs) serve on the accused and file in court a certificate by the law enforcement officer in charge of the case confirming the compliance by the relevant investigating agency with its duties of disclosure under this Act and section *** of the Public Prosecutions Act 1994 (Vic).*

205. It may also be desirable to include an obligation to provide the accused with an updated list of material withheld on privilege/immunity or statutory prohibition grounds, if that list has changed since the time of the hand-up brief (see discussion above at paragraph[146]). This could be incorporated into the above legislative provision, or into the relevant regulations.

206. The allowance for a reasonable period for the prosecution to file a disclosure certificate may necessitate amendments to the timeframes currently contemplated by ss 182 and 183 of the CPA for the filing and service of the prosecution opening and defence response. Those timeframes are predicated on all relevant documents being filed and served by 14 days prior to the trial commencement date.

207. If in future the CPA were to be amended to require defence identification of issues at an earlier stage of criminal proceedings (a change which the DPP has advocated[138]), the time for certification of full disclosure could also be brought forward.

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137 *Criminal Procedure Act 2004* (Vic) s 183.

138 See, e.g., Director of Public Prosecutions (Vic), *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) (published at http://www.opp.vic.gov.au/Home/Resources/1-October-2018-Director-s-Policy-Paper). The Director's proposals to replace committals with case management hearings includes suggestions that defence be required to provide a list of issues early in the criminal proceedings.

### 6.4.4 Content of certificate

208. The form of the disclosure certificate would be prescribed by regulations and can be adapted from the requirements in NSW and WA. The certificate should attest that, to the best of the officer's knowledge and belief, all applicable disclosure requirements under the CPA (including ongoing requirements) and the requirements under the proposed provision in the *Public Prosecutions Act* (see "6.3 Duty to disclose to the Director the existence of relevant material") have been complied with by the relevant investigating agency.

# 7 Monitoring of police compliance

## 7.1 The need for monitoring of compliance

209. At present, compliance by Victoria Police with their disclosure obligations is not subject to any system of auditing or monitoring. The lack of independent monitoring of the disclosure process has contributed to the compliance failures that have been highlighted by this Royal Commission.

210. In the submission of the DPP, an effective system for independent auditing and review of compliance by Victoria Police with disclosure obligations is an essential part of any systemic response to the failures disclosed by this Royal Commission. Without such auditing and review, it can never be known whether other measures to change police culture and to improve compliance with disclosure obligations are working.

211. Monitoring would complement other measures proposed in this submission, such as additional specification of material to be served with a hand-up brief, requirements to inform the DPP of relevant unserved material and requirements for police to certify full disclosure. The prospect of monitoring will increase the effectiveness of these requirements. It will encourage police to obtain independent legal advice if in doubt and to follow such advice. It will also allow any systemic non-compliance issues to be addressed so as to prevent future disclosure failures. Conversely, clearer disclosure requirements will provide a better standard against which to assess disclosure performance.

212. The concept of reviewing and reporting on police activity and compliance is not new to Victoria Police. For example, under the *Audit Act 1994*, the Victorian Auditor General recently provided a report auditing the management of Registered Sex Offenders.[139] That report provided an assessment of how Victoria Police complied with the relevant procedures and guidelines as well as setting out recommendations for improvement of the management of certain offenders.

## 7.2 A Disclosure Monitor

213. In light of the issues outlined elsewhere in this submission regarding disclosure, the DPP submits that the Commission should recommend vesting in an independent body the function of monitoring and reporting on the disclosure by Victoria Police of disclosable material to accused persons and of the existence of potentially-disclosable unused material to the OPP.

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139 Victorian Auditor-General, *Managing Sex Offenders* (28 August 2019).

214. For the purposes of this submission, the relevant body will be referred to as the Disclosure Monitor (**DM**). Whether the function should be vested in an existing body (such as IBAC) or a new body established for the purpose would be a matter for consideration by Government.

## 7.3 The aims and functions of a monitoring regime

### 7.3.1 Improving systemic compliance with disclosure obligations

215. The main aim of a DM regime should be to improve overall compliance by Victoria Police with its disclosure obligations. The objective should be systemic: that is, reviews should be directed at identifying general shortcomings in disclosure practices, in order to improve guidance to police for future cases.

216. For this purpose, it would not be necessary for the DM to review disclosure in every case. Cases for review could be chosen at random or by class. For example, a review could be undertaken in cases (or a representative sample of cases) in which a prosecution witness had previously provided assistance to police; or cases involving the seizure of large volumes of electronic material. Or a review might focus on disclosure in cases for a particular offence type, or cases investigated by a particular unit or area of Victoria Police.

217. Significantly for this Royal Commission, the DM could be tasked with reviewing cases in which evidence was derived from an informer with an obligation of confidentiality.

218. There is something to be learnt from the procedure adopted by the 2017 joint review conducted in the UK by HMCPSI and HMIC.[140] The report noted,[141]

> *In deciding what form the inspection should take, consideration was given to those recommendations which were most likely to have the greatest impact and improve performance across the criminal justice system.*

219. That is, the reviewers made a strategic decision with a view to achieving the greatest systemic benefits, in light of previous reviews and emerging problem areas.

220. The report of that review presented aggregated data, with particular cases de-identified. To proceed in that way is more likely to encourage co-operation and openness by participants. It is also more conducive to identifying systemic issues.

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140 HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017).

141 HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017), [2.7].

### 7.3.2 Focus on police practices not individual decisions

221. The focus of reviews by the DM would be on *the practices of Victoria Police* in relation to disclosure to the DPP and to the defence across a range of cases. That would include such matters as:

the extent to which hand-up briefs complied with the requirements of the CPA;

the extent to which relevant unused material was adequately and appropriately described in lists provided with hand-up briefs or lists provided to the DPP;

the extent to which appropriate steps had been taken to ascertain whether Victoria Police held any other potentially-disclosable material; and

the extent to which police had properly identified material that may be non-disclosable because of a statutory prohibition, privilege or immunity.

222. It is envisaged that the DM's review of the above matters in relation to a particular file would not require the DM to examine all of the material on the file. Many of the above matters would be ascertainable by the DM from reviewing a core set of documents. For example, by reviewing the hand-up brief that was filed and served in a matter, the DM would readily be able to ascertain whether the requisite forms required to be included with the hand-up brief had, in fact, been included and had been completed in a manner that provided relevant information to defence. Similarly, it will often be apparent on the face of a list or schedule of relevant material completed by an investigator whether the descriptions of that material provide sufficient information for defence to determine whether they wish to request or subpoena the material. Whether appropriate inquiries had been made by the investigator could be ascertained by speaking to the investigator and asking the investigator to provide documentary evidence of those inquiries. Consequently, the proposed reviews by the DM would not be excessively resource-intensive.

223. The aim of reviews would not be to identify materials that the DM considered to have been wrongly disclosed or wrongly omitted from disclosure in a particular case. That is, the DM's function would not be to second-guess or overturn police disclosure decisions. Rather, the aim would be to consider police practices and procedures, with a view to ensuring systemic improvements.

224. In the submission of the DPP, this systemic focus would be the most effective use of the resources of a DM, as it would be more likely to produce system-wide improvements. For example, the identification of systemic shortcomings in the descriptions of relevant but

undisclosed material would enable specific training measures to be put in place to address this issue.

225. To develop this point, it is necessary to consider the implications of the alternative approach of reviewing the merits of individual police disclosure decisions. Three implications of adopting such an approach highlight its undesirability.

226. First, to engage in in-depth reviews of individual cases would be a far more time-consuming and resource-intensive task, because the DM would need to acquire very detailed knowledge about every aspect of the particular case under review. The DM would, in effect, not only need to master the final brief (as counsel briefed in the case might do), but would also need to cast a wide net over the whole of the investigation. To conduct an effective case review, the DM may need to examine every item of material and every piece of information obtained in the course of the investigation, and possibly other holdings by Victoria Police. The monitor would need a detailed knowledge of police procedures. To identify the issues in the case, the review would need to consider not only the filed documents such as the prosecution opening and defence response filed in accordance with the CPA but also the whole record of the committal hearing and trial to see whether any further issues emerged. The task would be so large that very few reviews could be conducted. If errors were found in those few cases, it would be impossible to determine whether they were isolated or systemic problems. For the deployment of the same resources, far more useful outcomes could instead be achieved from effective systemic reviews of a much larger number of cases.

227. Second, and even more fundamentally, reviewing the outcomes of police actions in relation to disclosure in individual cases would have far less utility than conducting systemic reviews. Consideration of whether material is potentially disclosable, or is potentially subject to PII, privilege or a statutory prohibition on disclosure, requires a detailed understanding of the material under consideration (including its provenance) and the issues to which it may give rise. Even if a reviewer has the skills, knowledge, experience and time to master the material, the reviewer can never have the same grip on that material as the investigators. Yet the conduct of a review which involved judging the merits of police conduct in relation to disclosure (as distinct from reviewing the processes and procedures followed in relation to disclosure) would necessarily involve the reviewer second-guessing the actions of police officers who would almost always know more about the subject-matter than the reviewer.

228. Third, there is a real danger that reviews of the outcomes of police actions in relation to disclosure in individual cases would lead to inappropriate intrusions into prosecutorial independence.

229. Once the DPP is aware of the existence of material that has been considered potentially-disclosable, a decision must be made about whether it is required to be disclosed, wholly or in part. A prosecution decision whether material is or is not disclosable is often complex and nuanced. That is particularly so when the material may be subject to PII, privilege or a statutory prohibition on disclosure. Decisions about these matters require an appreciation of the issues in the case, a detailed grasp of the evidence generally and a comprehensive understanding of the applicable law. The answer may require fine judgments, especially when competing interests are at stake (such as the complainant's right to privacy). Decisions about disclosure may also be bound up with decisions about charges, decisions about how a case should be put and decisions about what evidence should or should not be relied upon. These are all decisions about which the prosecutor bears a heavy and a lonely responsibility.[142]

230. Because of the nature of these responsibilities, it is vital to recognise and protect the independence of the prosecuting authority in making such decisions. That independence would be undermined if the DM were to inquire into, or express opinions about, whether particular material ought to be, or ought to have been, disclosed to a particular accused by the prosecution in a trial on indictment.

231. Nor should it form part of the functions of the DM to express an opinion on the anterior question of whether, in relation to a particular prosecution on indictment, material which was not disclosed to a particular accused was potentially-disclosable. It requires a subtle mind and a detailed understanding of disclosure obligations to appreciate the difference between material which is potentially-disclosable and material which ought to be disclosed. If the DM were to engage in reviewing whether particular material in a particular case was potentially-disclosable, its conclusion would inevitably be misconstrued as a conclusion that the material ought to have been disclosed. Indeed, if the DM were to express an opinion in a report that particular material in a particular case which was potentially-disclosable had not been disclosed, it is likely that it would be taken as suggesting that there was reason to doubt that the accused had received a fair trial.

142 Cf. *R v Apostolides* (1984) 154 CLR 563, 575-6.

232. To do so would go far beyond the proper purpose of a DM: to improve police practices in relation to disclosure and to help restore public confidence in the integrity of those processes.

233. For these reasons, in any legislation to establish the DM, it should be made clear the role of the DM does not extend to forming or expressing a view about whether particular material in a particular case was disclosable or potentially-disclosable.

234. To preserve the independence of prosecution decision-making, it should also be made clear that it is not within the remit of the DM to review or express a view about the correctness of DPP disclosure decisions.

## 7.4 Components of DM regime

### 7.4.1 Organisational structure

235. Like the Public Interest Monitor (**PIM**) that was set up to oversee the *Major Crimes Investigative Powers Act 2006* (Vic), the DM should be a body created by statute with the necessary powers to conduct its own affairs. To ensure its independence, it should not be part of, or report to, the DPP or Victoria Police. Nor should the DM, or its staff, hold positions with the OPP or Victoria Police.[143]

236. The DM should have all necessary powers to conduct its reviews. This means that it should have access to all police records and should be given necessary powers to interview relevant members of Victoria Police, as well as summon all material it wishes to review. In cases involving human sources, this would include full access to relevant information relating to those sources. The DM and Victoria Police will need to enter into requisite arrangements or agreements to ensure the security of such information disclosed to the DM.

### 7.4.2 Conduct of reviews

237. The DM's reviews should occur on an ongoing basis.

238. The identification of matters for review and the appropriate methodology for reviews should be generally be a matter for the discretion of the DM. It would be proper for the DM to consult with interested persons or bodies in making these decisions. Such persons or bodies might include courts, the DPP, the Chief Commissioner of Police, IBAC, the Victorian Bar, the Law Institute and Victoria Legal Aid.

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143 This rule is consistent with the requirements that set up the PIM, see s 8 of the *Public Interest Monitor Act 2011* (Vic).

239. Given that the focus of the DM's consideration would be systemic review rather than case-specific review, it is envisaged that cases would be included in a review only once they had been completed: by that stage, all the issues have emerged and the DM would have the benefit of some hindsight.

240. It should be stressed that the DM's role would not affect the decision-making power of Victoria Police. A review would not affect a disclosure decision made in a particular case.

241. If the conduct of a review led police to believe that the existence of potentially-disclosable material had been overlooked, they would need to take appropriate action in accordance with their ongoing obligations of disclosure, just as they would if relevant information came to light in the course of another investigation or in some other way.

### 7.4.3 Reporting

242. It is envisaged that the DM would report publicly on the outcomes of its reviews. The DPP submits that the DM should report to Parliament, as do the PIM and the Auditor-General. Reports should be provided at least annually.

243. A public report would promote greater accountability and transparency in an otherwise opaque area of police practice. It would also allow the community to assess whether police are giving effect to reforms of disclosure requirements, including any which are recommended by this Royal Commission.

244. The DM could also report on progress by Victoria Police in addressing any issues raised by the DM.

245. Consistently with the objective of improving systemic compliance, it is envisaged that in a report by the DM, any references to disclosure practices in particular cases would be de-identified and data would be presented in aggregate form.[144]

246. Reports by the DM would be expected to address overall compliance by police with disclosure requirements, identify specific areas for improvement and suggest changes to police practices, procedures and guidelines as appropriate. Individual police members would not be named or referred to in an identifiable way in relation to disclosure practices, nor would identifying information be published about particular cases.

144 Compare HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017).

247. Consistently with the provisions for other audit and review bodies, a document that formed part of a review by the DM would be an exempt document under Part IV of the *Freedom of Information Act 1982.*

### 7.4.4 Training role

248. In addition to its auditing role, the Director submits that the DM should be involved in the training of Victoria Police in properly identifying PII claims and in complying with the certification process outlined in these submissions. The provision of training to Victoria Police complements the auditing role of the DM, and ensures that Victoria Police understand what is required by the certification process. Moreover, it provides important information to the DM about how Victoria Police goes about its role in identifying and disclosing material.

# 8 Resolving PII and non-disclosure obligations

## 8.1 The current process

249. As has been noted above, it is well-established that it is not open to investigators to make a unilateral decision to withhold relevant material, or to fail to disclose its existence, merely because the investigator considers it to be privileged or immune from disclosure.[145]

250. If a claim of PII is asserted it remains the duty of the court, not the privilege of the executive, to determine whether evidential material should be produced or may be withheld in the public interest.[146]

251. Where it is considered that relevant material is privileged or subject to PII, or where its disclosure is considered to be prohibited by statute, the usual practice in Victoria in trials on indictment is to disclose to the defence the existence of the material (if this can be done without revealing its confidential content), while making clear that it is considered that the material is not to be disclosed because it is privileged or subject to PII or for some other reason. The claim may then be tested by the defence, if they choose to do so, by issuing a subpoena for the production of the material,[147] directed to the police or other investigative agency which holds the material.

252. On the return of the subpoena the basis for the privilege or immunity is almost always put by the relevant investigative agency.[148] A confidential affidavit may be submitted by the agency making the claim.[149] Oral evidence may be given, in camera if necessary. The court may examine the material for itself in determining the claim. The DPP usually plays no part in the determination of the claim for privilege or immunity (although it might be involved to the extent that it is necessary for the court to understand how the prosecution case is put).[150] The detachment of the DPP is desirable because the interests of the DPP and of the agency making the claim may conflict,[151] and in order to ensure that the independence of the DPP as prosecutor is properly maintained. To this end, it is often preferable that the DPP not be made aware of the content of the material or information which is the subject of the claim.[152]

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145 See *R v Solomon* (2005) 92 SASR 331, [116]; *R v Andrews* (2010) 107 SASR 471; *R v Lipton* (2011) 82 NSWLR 123, [110]-[111].

146 *Sankey v Whitlam* (1978) 142 CLR 1, 38, 58-9, 95-6.

147 In relation to committal proceedings, subpoenas are normally issued by and returnable in the Magistrates' Court. Post-committal, they are normally issued by and returnable in the trial court.

148 An exception might arise if a third party claims privilege, such as client legal privilege, over the material. In that case, that party may have the carriage of the privilege claim.

149 See *R v Mokbel (Ruling No.1)* [2005] VSC 410, [19]-[29] and the authorities cited there.

150 See the Director's Policy, set out at [54] above.

151 *R v Salmat Document Solutions Pty Ltd* [2005] WASC 232, [26].

152 Indeed some information must be quarantined from a prosecutor: *Gould v DPP (Cth)* [2018] NSWCCA 109, [16]; *Strickland (a pseudonym) v DPP (Cth)* [2018] HCA 53.

253. The CPA provides a statutory basis for a similar procedure in summary hearings[153] and in committal proceedings,[154] by which the accused may seek to test a claim that material is subject to privilege or immunity from disclosure (without issuing a subpoena).

254. In England it has been accepted that, if necessary, an *ex parte* application may be made to a court by the Crown to determine a claim of privilege or immunity, if advising the defence of the existence and general nature of the material and of the asserted right to withhold the material would reveal its confidential contents.[155] Dicta in some Australian authorities countenance the possibility that an *ex parte* application may be made in similar circumstances in Australia,[156] but it cannot be said that there is any clear authority for the practice.[157] The CPA makes no provision for any such application.

## 8.2 The need for a statutory procedure for resolving issues of immunity and privilege

255. The current position in Victoria in relation to procedures for resolving disclosure issues is unsatisfactory for a number of reasons.

256. First, there should be a clear process for investigating agencies or the prosecution to initiate a court determination of PII, privilege and disclosure issues. The statutory processes under the CPA and the subpoena process are initiated as defence challenges to a claim for immunity. It should be possible for the prosecution or an investigating agency to initiate the determination of a question whether material is subject to PII, privilege or some statutory prohibition on disclosure. Material relating to human sources is a prime example of a situation where it is important for an investigating agency to be able to actively obtain early guidance from the courts.

257. Second, there should be a clear power for the prosecution to make an *ex parte* application for the resolution of disclosure issues, where giving notice of the application would create a risk of disclosing the material in question. Sometimes revelation of the mere fact that information is held would allow an accused person to infer what that information is or where it came from. For example, even an apparently bland reference to a diary entry made by a

153 CPA, ss.43-46.
154 CPA, ss.119(e), 122.
155 *R v Davis* [1993] 2 All ER 643, 647.
156 *R v Andrews* (2010) 107 SASR 471, [25]; *R v Reardon (No 2)* (2004) 60 NSWLR 454, [47]; *R v Lipton* (2011) 82 NSWLR 123, [89]-[91]; *AB v CD and EF* [2017] VSCA 338, [65].
157 It should be noted that the proceedings before Ginnane J in the Supreme Court were *inter partes* actions (albeit without notice to the convicted persons). In *AB and EF v CD* [2017] VSC 350, the Chief Commissioner of Victoria Police and Ms Gobbo brought proceedings against the DPP seeking declarations. In *EF v CD* [2017] VSC 351, Ms Gobbo brought an action to restrain what was claimed to be a breach of an equitable duty of confidence. Neither is authority for the availability of an *ex parte* application by the DPP.

particular police officer on a particular day could, in conjunction with other matters that the accused knows, tend to confirm a suspicion by the accused that a particular associate has provided information to police.

258. These shortcomings are significant. The existence of a flexible and effective procedure by which disclosure issues can be resolved, *ex parte* if necessary, would provide a valuable safeguard in relation to the disclosure of sensitive material generally, and of human source material in particular.

## 8.3 The Western Australian model

259. Western Australia's *Criminal Procedure Act 2004* (WA) contains a statutory procedure for the resolution of disclosure issues by the courts. As will be seen, the Western Australian provision is a useful base from which to build a Victorian statutory procedure, although in the DPP's submission some aspects of the Western Australian model need to be modified to suit the Victorian context.

260. This section summarises how the Western Australian procedure works in practice and describes its advantages. The next section discusses additional or amended features that would be beneficial in Victoria.

### 8.3.1 Criminal Procedure Act 2004 (WA), s.138

261. The disclosure regime under the *Criminal Procedure Act 2004* (WA) is described above (see "4.4.2 Western Australia"). In summary, s.138 of the Act permits a court, either on its own initiative or on the application of a party, to dispense with all or part of a disclosure requirement under the Act, to shorten or extend the time for obeying the requirement, to amend or cancel a previous order, or to make an order as to any other matter that the court considers is just.

262. Section 138 is in the following terms:

> *138. Disclosure requirements, orders as to*
>
> *(1) In this section, unless the contrary intention appears —*
>
> **disclosure requirement** *means a requirement under section 35, 42, 61, 62, 95 or 96 to disclose material, other than a requirement under section 62(4)(a) or 96(3)(a).*
>
> *(2) The powers in this section may be exercised by a court on its own initiative or on an application by a party to a case.*
>
> *(3) A court may, in respect of a disclosure requirement, make an order —*
>
> *(a) that dispenses with all or part of the requirement, if it is satisfied —*

*(i) there is a good reason to do so; and*

*(ii) no miscarriage of justice will result;*

*or*

*(b) that shortens or extends the time for obeying the requirement; or*

*(c) that amends or cancels an order made previously under this section, whether by the court or some other court; or*

*(d) as to any other matter that the court considers is just.*

*(4) An application for an order under this section may be made by a prosecutor without notice to the accused and may be dealt with in the absence of the accused.*

*(4a) Despite section 171, an application by a prosecutor for an order under this section that is made without notice to the accused must not be dealt with in open court and the only people who may be present when it is dealt with are the applicant and those permitted by the court.*

*(5) If an order is made under this section in the absence of an accused, the order must not be given or disclosed to the accused without the permission of the court that made it or, if it was made by a court of summary jurisdiction and the accused is committed for trial or sentence to a superior court, of the superior court.*

263. Section 138 contemplates that an application is made to the court in which the proceeding is on foot. At committal stage, the relevant prosecutor (usually the police informant) makes an application to the Magistrates' Court. Non-disclosure orders made by the Magistrates' Court contain a 'sunset clause' that provide that the order will expire 42 days after the committal. Once the accused has been committed for trial in a superior court, the Magistrates' Court is required to provide the superior court and the ODPP with a copy of any s.138 order it has made.[158] The ODPP then considers whether to apply for a fresh non-disclosure order in the superior court.

### 8.3.2 Advantages of the WA procedure

264. The Western Australian provision has a number of advantages:

It allows for an application to be made by a party to a proceeding at any time. So, for example, an application could be made before service of a hand-up brief.

It allows for the court to make orders on its own initiative. This could occur if, for example, the court considered it desirable for more effective case management.

It allows for an application to be made by the prosecutor without notice to the accused and to be dealt with in the absence of the accused and in closed court. These provisions would allow for a determination where notice to the accused would risk exposure of the contents of sensitive material.

158 *Criminal Procedure Act 2004* (WA) s.44(2).

It allows for a wide range of orders in relation to disclosure requirements: for example, the court may dispense with or defer an obligation or make any other order that it considers just.

The power to make any other order allows a court to tailor the disclosure obligation to the particular circumstances of the case. For example, disclosure could be made with appropriate redaction, or by way of a summary.

## 8.4 A Victorian statutory procedure

265. In the DPP's submission, there are a number of features of the Western Australian provision that need to be adapted for the Victorian context. This section discusses those features before concluding with a model legislative provision for Victoria.

### 8.4.1 Which court?

266. In Western Australia the application is made to the court in which the proceeding is on foot. If this were to be applied in Victoria, it would mean that up to the point of committal, applications would need to be made to the Magistrates' Court. This has some advantages. It avoids the unnecessary fragmentation of the proceeding and the running of parallel hearings relating to the same prosecution in different courts. However, the determination of claims of PII, privilege and statutory prohibitions on disclosure can involve complex factual and legal questions. The determination of PII claims requires the court to engage in a nuanced balancing exercise and, often, the examination of the documents in question.[159] The determination of whether a statutory provision prohibits disclosure may require the court to consider novel questions of statutory interpretation. There will therefore be cases where, in the DPP's view, it would not be appropriate for the Magistrates' Court to be determining applications for dispensation from disclosure requirements.

267. Consequently, the DPP submits that a Victorian statutory procedure should make provision for applications to be made to the Supreme Court or the County Court while a matter is before a court of summary jurisdiction (whether for summary hearing or in a committal proceeding).[160]

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159 *Ahmet v Chief Commissioner of Police* [2014] VSCA 265, [32].

160 The discussion in this section is based on the current committal procedure in Victoria. Under the DPP's proposed committal reforms, cases in which charges are in dispute and where complicated issues of public interest immunity arise will be placed on a 'fast track' pathway, resulting in the charges being transferred directly to a trial court: see Director of Public Prosecutions (Vic), *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) (published at http://www.opp.vic.gov.au/Home/Resources/1-October-2018-Director-s-Policy-Paper) 3.

268. Examples of where an application to the Supreme Court or the County Court would be more appropriate are:

> where the question could have a significant bearing not only in relation to the instant case but also in relation to other cases;
>
> where (as in the proceedings before Ginnane J) complex balancing of large questions of public policy may be involved or where lives may be at risk if material is disclosed; or
>
> where the disclosure question relates to a matter that could only be determined by, or would be more appropriate for determination by, the trial court rather than in a committal hearing (e.g. disclosure which is relevant to a collateral challenge to the validity of a warrant,[161] to an application for the discretionary exclusion of evidence or to an application for a permanent stay).

269. An application to the County Court should not be available if it relates to a charge which would not be triable on indictment in that Court.

### 8.4.2 Duration of Magistrates' Court orders

270. Because of the complexity of disclosure issues and the potentially significant consequences of a non-disclosure order, it would be undesirable for the Magistrates' Court to make indefinite non-disclosure orders. In Western Australia, this concern is addressed by the practice of including a 'sunset clause' in all non-disclosure orders made by the Magistrates' Court, so that the orders expire 42 days after the committal. In the DPP's submission, a similar practice in Victoria would be problematic. A rigid time frame for the expiry of Magistrates' Court non-disclosure orders would not be workable. It would mean that an application to the trial court for an ongoing non-disclosure order would need to be made and determined fairly urgently after committal, at a time when neither the prosecution nor the trial court may have had time to fully consider the issues raised by the application. This would result in significant and unwarranted pressures on both the prosecution and the courts. It could lead to inefficient practices, such as the making of interim non-disclosure orders while the application is adjourned to give the applicant time to adequately prepare — adding an extra process or hearing to an already busy procedural timetable.

271. At the same time, it is important that any legislative provision includes a mechanism for a trial court to actively review a non-disclosure order made by the Magistrates' Court. In the DPP's submission, the preferable way of achieving this is by:

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161 Cf. *Gould v DPP (Cth)* [2018] NSWCCA 109.

providing that upon an accused's committal for trial, a non-disclosure order made by the Magistrates' Court is deemed to have been made by the trial court, after which no further applications regarding the order can be made to the Magistrates' Court; and

requiring the trial court to either vary, confirm or set aside an existing non-disclosure order prior to the commencement of the trial.

272. The above procedure ensures that any ongoing non-disclosure order is one that has been made by a trial court fully apprised of the relevant issues, while avoiding the procedural and practical burdens associated with imposing rigid deadlines for the trial court's consideration of the need for an ongoing non-disclosure order.

### 8.4.3 Parties to an application

273. Under s.138 of the WA Act, an application may be made by "a party to a case". If the proceedings are in the Magistrates' Court (whether a summary hearing or a committal proceeding), that would ordinarily mean the informant and not the DPP.[162] This aspect of the WA Act should be replicated in Victoria; that includes the requirement in WA for the police and the Magistrates' Court to provide the DPP with a copy of any non-disclosure order upon committal, so that the DPP is fully apprised of the relevant issues when taking over the prosecution.

274. In proceedings on indictment, the DPP would be regarded as the relevant party. However, in most cases the DPP will not be best placed to argue PII or other privilege/immunity claims in respect of relevant material held by an investigating agency. The Victorian regime for non-disclosure orders should therefore provide that in proceedings on indictment, the relevant investigating agency, such as Victoria Police, is also able to bring an application for relevant orders. As would be the case for orders made in the summary jurisdiction, if an application is made *ex parte* by the investigating agency, there should be provision for the DPP to be provided with a copy of any order made so that the DPP can independently assess the impact of the order on the prosecution.

162 If the DPP were conducting the case under s.22 of the *Public Prosecutions Act 1994*, it could conduct the application on behalf of the informant.

### 8.4.4 Relevant disclosure obligations

275. In s.138(1) of the WA Act, "disclosure requirement" is defined by reference to specified provisions of that Act. No reference is made to common law disclosure obligations, possibly because the Act was intended to codify the relevant obligations.[163]

276. An equivalent provision in Victoria should allow for orders to be made not only in relation to relevant requirements under the CPA, but also in relation to common law requirements. If the procedure were confined to statutory obligations, it would lose much of its effectiveness, especially as disclosure obligations in trials on indictment are substantially left by the CPA to the common law. There is no reason to distinguish between obligations arising under the CPA and obligations arising under common law principles.

### 8.4.5 Applicable test for making non-disclosure orders

277. Under the Western Australian provision, the court in determining whether to dispense with a disclosure requirement must consider whether "there is a good reason to do so" and whether "no miscarriage of justice will result".

278. In the DPP's submission, the "no miscarriage of justice" criterion is problematic and should not be replicated in Victorian legislation. Non-disclosure orders will typically be made at an early stage of criminal proceedings, prior to the commencement of the trial. At that stage, it may not be possible for a court to assess whether a miscarriage of justice will result from the non-disclosure of certain relevant material. The notion of miscarriage of justice is more apposite at the appellate level. Further, if a court is confined to dispensing with disclosure requirements on the specified grounds of PII, privilege or statutory prohibition, it is not necessary to apply a miscarriage of justice test. An assessment of whether material is protected by PII itself incorporates a balancing exercise between the public interest in non-disclosure and the public interest in disclosure. Where the claim is made on the basis of another kind of privilege or a statutory prohibition, it is open to a court to stay the prosecution if non-disclosure would mean the accused is unable to obtain a fair trial.

279. Consequently, it is the DPP's submission that the general Western Australian criteria for dispensing with disclosure requirements should be replaced with the specific grounds on the basis of which the court may order non-disclosure.

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163 The question whether the Act abrogated common law obligations remains to be determined: *Carney v Western Australia* [2010] WASCA 90, [4]; *PAH v Western Australia* [2015] WASCA 159, [142]; *Bozzer v Western Australia* [2017] WASCA 226, [84].

### 8.4.6 Types of orders that can be made

280. As already noted, s.138 allows for a court to make a wide range of orders, including *"as to any other matter that the court considers is just"*. One kind of order which may be covered by this catch-all, but which it would be desirable to expressly list in the Victorian equivalent of the s 138 procedure, is an order for material to be disclosed subject to publication or dissemination restrictions. For example, the court may wish to order that material be made available for inspection by the accused's lawyers only.[164] Such orders can in certain proceedings be the most effective way to balance, on the one hand, the public interest concerns militating against disclosure, and, on the other hand, the accused's right to a fair trial.

281. It is therefore proposed that the Victorian procedure for the determination of disclosure issues should expressly allow the court to make an order "*that makes disclosure subject to such conditions that the court thinks fit*".

### 8.4.7 A contradictor in an *ex parte* application

282. Consideration should also be given to authorising the PIM to act as contradictor in an *ex parte* application made by a law enforcement agency. Such a role would be analogous to its functions in relation to warrants under the *Major Crimes (Investigative Powers) Act 2004* (Vic) and the *Surveillance Devices Act 1999* (Vic). Its powers and functions could reflect those set out in s 3D of the *Major Crimes (Investigative Powers) Act 2004*. These include the right to:

be informed of any *ex parte* application by a law enforcement agency;

be provided with all relevant material regarding the claim;

appear at any hearing on the application to test the content and sufficiency of the information relied upon by the law enforcement agency;

ask questions of any person giving information in relation to the application;

make submissions to the Court as to the appropriateness of granting the orders sought by the law enforcement agency.

### 8.4.8 Proposed provision

283. In view of the matters raised above, it is the DPP's submission that a Victorian statutory procedure for the determination of disclosure issues should take the form of a provision along the following lines, to be inserted in the CPA:

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164 See, e.g., *R v Mokbel* [2005] VSC 410.

*Orders as to disclosure requirements*

*In this section, unless the contrary intention appears —*

**disclosure requirement** *means a requirement —*

*(a) under section 37, 41, 42, 44, 110, 111 or 185; or*

*(b) under the common law,*

*to disclose material or the existence of material.*

*(2) The powers in this section may be exercised by a court on its own initiative or on an application by —*

*(a) a party to a case; or*

*(b) a law enforcement authority in possession of material that is subject to a disclosure requirement.*

*(3) An application under subsection (2) can be made to —*

*(a) the court in which the proceeding is being heard; or*

*(b) the County Court, if the proceeding relates to a charge triable in the County Court; or*

*(c) the Supreme Court.*

*(4) A court may, in respect of a disclosure requirement, make an order —*

*(a) that dispenses with all or part of the requirement, if it is satisfied that —*

*(i) the requirement relates to material or information that is subject to public interest immunity or common law privilege; or*

*(ii) disclosure is prohibited by statute; or*

*(iii) disclosure is prohibited by an existing court order; or*

*(b) that shortens or extends the time for obeying the requirement; or*

*(c) that makes disclosure subject to such conditions that the court thinks fit; or*

*(d) that confirms, varies or sets aside an order made previously under this section by —*

*(i) that court; or*

*(ii) in the case of the County Court, the Magistrates' Court; or*

*(iii) in the case of the Supreme Court, the County Court or the Magistrates' Court; or*

*(e) as to any other matter that the court considers is just.*

*(5) An application for an order under this section may be made by the DPP or by a law enforcement authority referred to in paragraph (b) of subsection (2) without notice to the accused and may be dealt with in the absence of the accused.*

*(6) If an application for an order under this section is made without notice to the accused, the only persons who may be present when the application is dealt with are the applicant and those permitted by the court.*

*(7) If an order is made under this section in the absence of an accused, the order must not be given or disclosed to the accused without the permission of the court that made it or, if it was made by the Magistrates' Court and the accused is committed for trial or sentence to the County Court or Supreme Court, of the County Court or Supreme Court, as the case may be.*

*(8) If an order is made under this section in the absence of the DPP, the court that made the order must provide a copy of the order to the DPP as soon as reasonably practicable after the making of the order.*

*(9) If an order is made under this section by the Magistrates' Court and the accused is committed for trial or sentence to the County Court or Supreme Court —*

*(a) the order made by the Magistrates' Court is deemed to be an order of the County Court or Supreme Court, as the case may be; and*

*(b) no further applications in relation to the order can be made in the Magistrates' Court; and*

*(c) the County Court or Supreme Court, as the case may be, must confirm, vary or set aside the order at least 14 days prior to the commencement of the trial.*

284. This draft provision (in particular subsection (6)) would need to be amended if the PIM were to be empowered to act as a contradictor in *ex parte* applications made by law enforcement agencies under this section (see "8.4.7 A contradictor in an *ex parte* application").

285. In addition to the insertion of a provision in the above form, s.146 of the CPA should be amended to include in the list of documents to be provided to the DPP upon committal any non-disclosure order made by the Magistrates' Court.

# 9 Sentencing of co-offender or prosecution witness where relevant assistance provided

286. Earlier in this paper ("6.2.3 Sentence reductions or other benefits for assistance to authorities"), it was observed that if a person has been given a sentence reduction for assistance to authorities, that may be a matter subject to disclosure obligations, for example because that person will be a prosecution witness in another matter and the fact of assistance/sentence reduction is relevant to the assessment of the person's credibility or reliability.

287. Complying with those disclosure obligations can, however, be complicated. In particular, reasons for sentence may not refer to the fact of assistance. Reasons for sentence that do refer to assistance may be restricted and not publicly available. Such matters mean that a police informant or the prosecution may not readily be able to discharge their disclosure obligations by, for example, providing an accused with the sentencing reasons relating to the relevant prosecution witness.

288. This section of the paper proposes a legislative amendment to assist with these difficulties: the introduction of a provision requiring a court that reduces an offender's sentence because of assistance to authorities to state that fact in publicly-available sentencing reasons.

289. In overview, this section:

1. considers the current position on this issue in Victoria, and some of the difficulties it causes;
2. outlines the position taken in some other Australian jurisdictions;
3. proposes a new legislative provision to ensure that Victorian courts refer to the fact of assistance in publicly available sentencing reasons (subject to certain exceptions);
4. addresses concerns that may be raised about such a provision; and
5. makes some observations about residual issues regarding disclosure.

## 9.1 The law in Victoria

290. Section 5(2AB) of the *Sentencing Act* provides that if a court imposes a less severe sentence on an offender because of an undertaking given by the offender to provide assistance, after sentencing, to law enforcement authorities, the court "*must announce that it is doing so and cause to be noted in the records of the court the fact that the undertaking was given and its*

*details*". The court is not required to state the sentence that it would have imposed but for the undertaking: s 5(2AC).

291. There is no equivalent provision for other situations where the court imposes a less severe sentence because of assistance provided by the offender to law enforcement authorities — for example, where the offender has already provided assistance to authorities and has received a "letter of comfort" or "letter of assistance" from authorities.

292. Although there is no statutory requirement in Victoria for a sentencing court to state that it has taken into account such assistance as a mitigating factor, a failure to include such a statement in the reasons for sentence may lead an appellate court to infer that the assistance was overlooked or given insufficient weight.

293. In *Haamid*,[165] the Court of Appeal considered how sentencing courts should balance "*the need to be transparent and accountable by publishing sentencing remarks that accurately explain how the judge arrived at the sentence, and the need to avoid compromising the offender's safety and the efficacy of ongoing criminal investigations.*"[166] The Court noted three ways in which sentencing courts in Victoria have sought to do so:

1. Sentencing remarks that fully explain how the cooperation informed the exercise of the sentencing discretion, but are restricted and not published beyond the parties.
2. Sentencing remarks that are silent in relation to cooperation and made publicly available.
3. Sentencing remarks that make a veiled reference to cooperation and are made publicly available.

The Court observed that the interests of justice will often be best served by the adoption of a fourth option: the preparation of two versions of the sentencing remarks. One version would take the first form and the other may take the second or third form or a variation of them, such as an edited version of the first form. The existence of the restricted version would mean that the parties and, on appeal, the Court of Appeal, are able to assess the appropriateness of the consideration that the sentencing judge gave to the offender's cooperation.

294. Accordingly, the Court considered, "*unless there are particular features in a given case which necessitate the adoption of a different course, sentencing judges should adopt the fourth option where a discount on sentence is sought on a plea due to the offender's*

165 *Haamid (a pseudonym) v R* [2018] VSCA 330, [34]-[40].
166 *Haamid (a pseudonym) v R* [2018] VSCA 330, [34].

*cooperation. Where appropriate, a pseudonym may be used for both versions of the sentencing remarks.*"[167]

295. The Court in *Haamid* did not refer to the implications of adopting the various courses where the details of the sentencing judge's reasoning may be relevant to an accused person in another case (for example, where the sentenced person is a witness in a related case or where the sentence may be relevant to questions of parity). Nor did the Court refer to the way restrictions on publication may affect the ability of the prosecution to explain to victims and their families the basis for a particular sentence.

296. The current position in Victoria is problematic. The decision in *Haamid*, while ensuring that a *restricted* version of sentencing remarks will discuss an offender's cooperation and its role in sentencing, countenances the continued practice of not referring to, or only making a cryptic reference to, the fact of cooperation in the publicly-available sentencing reasons. A police informant or prosecutor in another criminal matter where the offender's cooperation might be relevant and therefore disclosable is not able to provide the restricted version of the sentencing remarks to the accused in that other matter without the original sentencing court's imprimatur. If the public version of the sentencing remarks does not refer to the fact of cooperation, then provision of those public sentencing remarks to the accused in the other prosecution may not be sufficient to fulfil the prosecution's disclosure obligations. Indeed, they may be misleading.

297. In the absence of public sentencing remarks that refer to the fact of cooperation or assistance, there may be nothing to lead an accused to a line of inquiry which is relevant to the proceeding. In contrast, if the informant or prosecutor is able to provide to the accused unrestricted sentencing remarks that refer to the fact of cooperation or assistance, the accused will be alerted to that issue. This would enable the accused to apply (on notice to the DPP) to the original sentencing court for access to the restricted version of the sentencing remarks.[168]

## 9.2 The law in other Australian jurisdictions

298. Some Australian jurisdictions have legislative provisions that require courts to state that they are reducing an offender's sentence for past as well as future cooperation.

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167 *Haamid (a pseudonym) v R* [2018] VSCA 330, [39].
168 *AB v R* [2013] VSCA 8, [12].

### 9.2.1 New South Wales

299. In New South Wales, s 23(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides:

> *A court that imposes a lesser penalty under this section on an offender because the offender has assisted, or undertaken to assist, law enforcement authorities must:*
>
> *(a) indicate to the offender, and make a record of the fact, that the lesser penalty is being imposed for either or both of those reasons, and*
>
> *(b) state the penalty that it would otherwise have imposed, and*
>
> *(c) where the lesser penalty is being imposed for both reasons—state the amount by which the penalty has been reduced for each reason.*

300. The failure of a sentencing judge to refer to any discount for assistance or to s.23, may constitute either of two (related) errors: (a) it may be a breach of the sentencing judge's obligation to give proper reasons;[169] and (b) it might be inferred that no discount was provided for the assistance.[170]

301. The requirement in s.23(4)(a) to record that a lesser penalty has been imposed because the offender has assisted, or undertaken to assist, law enforcement authorities does not require a detailed evaluation of the assistance or of the weight to be given to it in sentencing.[171] For example, in *Greentree,*[172] the sentencing judge had referred to the offender's assistance in the following manner:

> *Exhibit 3* [a confidential exhibit] *is a document containing material that falls within s 23 of the Crimes (Sentencing Procedure) Act. That document records that he has provided certain information which has led to certain actions with success occurring. I do not propose to discuss the document in any detail given its nature but it is a document that I have taken fully into consideration in the [applicant's] favour.*
>
> *Exhibit 4* [also a confidential exhibit], *in my view, contains some information of actions by the [applicant] which also fall within s 23 of the Crimes (Sentence Procedure) Act. I have had regard to the Crown's submissions in relation to that document and the lack of evidence as to where the items referred to in it were obtained from in assessing what weight I give to it. In light of the timing of the plea of guilty and the matters that fall within s 23 of the Crimes (Sentencing Procedure) Act, I propose to allow a combined discount of 30%.*

169 *Greentree v R* [2018] NSWCCA 227, [54].
170 *Hughes v R* [2013] NSWCCA 129.
171 *Greentree v R* [2018] NSWCCA 227, [55]-[57].
172 *Greentree v R* [2018] NSWCCA 227.

On an appeal against sentence, the NSW Court of Criminal Appeal held that the judge had sufficiently complied with the requirements of s.23 and had given proper reasons for sentence. Beech-Jones J (with whom Hoeben CJ at CL and McCallum J agreed) said:[173]

> *[T]he purpose and object of the statutory provision governs what is required of the sentencing judge. Section 23 is addressed to assistance provided by offenders to law enforcement authorities ... In some, perhaps many, cases if knowledge of the fact or detail of that assistance is revealed then the offender or his family may be put at risk and the benefits that the law enforcement authorities might otherwise obtain from that assistance may be undermined or even destroyed.*
>
> *Thus, in some cases for the sentencing judge to embark upon a detailed exposition in a sentencing judgment of the factors in s 23(2) may defeat the very purpose of the statutory provision. In such cases as this there is an obvious tension between the achievement of the objectives of s 23 and the sentencing judge's obligation to provide reasons in open court. In this case, the sentencing judge was clearly conscious of this tension. ... Any further discussion would have defeated the very point of keeping the material confidential.*
>
> *... Generally, where confidential material of this kind is tendered before a sentencing judge, very careful consideration will need to be given before it can be concluded that a sentencing judge either failed to address the factors in s 23(2) or failed to provide proper reasons.*

302. As the decision in *Greentree* shows, the requirements of s.23 are not inconsistent with the long-standing practice by which sentencing courts receive confidential documents setting out the assistance provided.[174]

303. The general practice in New South Wales is that if a sentencing court imposes a lesser penalty because the offender has assisted, or undertaken to assist, authorities, that fact is referred to in publicly available sentencing reasons (although more detail may be provided in additional confidential reasons if necessary).

304. Under s.6 of the *Court Suppression and Non-publication Orders Act 2010* (NSW), in deciding whether to make a suppression order or non-publication order (including an order for the use of a pseudonym), the court must take into account that "a primary objective of the administration of justice is to safeguard the public interest in open justice". The legislative intention is that such an order should only be made in exceptional circumstances.[175]

305. The grounds upon which such an order may be made are set out in s.8 of the Act. One ground is that the order is necessary to protect the safety of a person. If an order is sought on

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173 *Greentree v R* [2018] NSWCCA 227, [55]-[57].

174 See also *Brown (a pseudonym) v R* [2019] NSWCCA 69, [32].

175 *Rinehart v Welker* (2011) 93 NSWLR 311, [27]. As to the applicable principles governing the making of such orders, see *Brown (a pseudonym) v R* [2019] NSWCCA 69.

this basis, a "calculus of risk" must be undertaken.[176] That is, the court must consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility.

306. In *Brown*,[177] the Court referred to *Greentree* as an illustration of how the issue of assistance may be addressed without the use of a pseudonym or other redactions.

### 9.2.2 Western Australia

307. Section 8 of the *Sentencing Act 1995* (WA), relevantly provides:

> *(1) Mitigating factors are factors which, in the court's opinion, decrease the culpability of the offender or decrease the extent to which the offender should be punished.*
>
> ...
>
> *(4) If because of a mitigating factor a court reduces the sentence it would otherwise have imposed on an offender, the court must state that fact in open court.*
>
> *(5) If because an offender undertakes to assist law enforcement authorities a court reduces the sentence it would otherwise have imposed on the offender, the court must state that fact and the extent of the reduction in open court.*

308. Section 8(3) expressly requires a court to state the fact of future cooperation in open court. While there is no equivalent express provision for past cooperation, past cooperation is a mitigating factor under s 8(1).[178] Therefore, a sentencing court taking past cooperation into account is required by s 8(4) to state that fact in open court.

## 9.3 Proposed amendments

309. The DPP submits that the *Sentencing Act 1991* should be amended to require a sentencing court to state in public, unrestricted reasons that it has taken into account an offender's past or future assistance. The requirement would be to refer to the *mere fact* of assistance, and not the details of that assistance, which can be left to the restricted version of the sentencing reasons.

310. Such an amendment could be made subject to a specific exception, where the court is satisfied that even a mere reference to the fact of assistance would seriously endanger the safety of the offender or their family and that risk could not be sufficiently ameliorated by

176 *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46, [56]-[60].
177 *Brown (a pseudonym) v R* [2019] NSWCCA 69, [34].
178 *Nannup v State of Western Australia* [2011] WASCA 257, [60]-[64].

the making of an order under the *Open Courts Act 2013*, an order under any other statute restricting the disclosure of information, or a pseudonym or broad suppression order in the exercise of the court's inherent jurisdiction.[179]

311. For example, section 5 of the *Sentencing Act 1991* could be amended to include the following additions (underlined):

> *(2AB) If, in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because of an undertaking given by the offender to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence, the court must announce that it is doing so and cause to be noted in the records of the court the fact that the undertaking was given and its details.*
>
> *(2AC) If, in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because of assistance provided by the offender to law enforcement authorities in the investigation or prosecution of an offence, the court must announce that it is doing so and cause to be noted in the records of the court the fact that assistance was provided and its details.*
>
> *(2AD) If subsection (2AB) or (2AC) applies, the court must refer to the applicable provision in the unrestricted version of the sentencing reasons, unless the court is satisfied that—*
>
> *(a) to do so would seriously endanger the safety of the offender or another person; and*
>
> *(b) the risk to safety could not be sufficiently ameliorated by the making of—*
>
> *(i) an order under the Open Courts Act 2013;*
>
> *(ii) an order under any other statute that confers power on the court to prohibit or restrict the publication or other disclosure of information; or*
>
> *(iii) a pseudonym order; or*

[179] See *Open Courts Act 2013* ss 5(1), 7(1)(d).

*(iv) an order made in the exercise of the court's inherent jurisdiction that prohibits or restricts the publication or other disclosure of information in connection with any proceeding.*

*(2AE) Nothing in subsection (2AB) or (2AC) requires a court to state the sentence that it would have imposed but for the undertaking that was given or the assistance that was provided, as the case may be.*

312. The specific exception in proposed s.5(2AD) would be in addition to the powers of the court to restrict publication, such as the powers of the Supreme Court in its inherent jurisdiction or powers to make suppression orders and closed court orders under the *Open Courts Act 2013*. These powers could be used where, for example, the court was satisfied that non-publication was necessary for a limited period in order to avoid jeopardising a current investigation by law enforcement authorities.

### 9.4 Why the amendments are necessary

313. The decision of the Court of Appeal in *Haamid* has highlighted the wide variation in the practices adopted by different judges in Victoria in imposing sentences when the offender has provided, or undertaken to provide, assistance to authorities. Some sentencing reasons deal with the issue of assistance comprehensively in publicly available reasons. Others do so in a de-identified way (e.g. by the use of pseudonyms). Others refer only in very cryptic terms, or not at all, to the fact of assistance in unrestricted sentencing reasons. In many cases, it is not apparent why the sentencing judge has deal with the issue in one way rather than another. In the experience of the DPP, the adoption of more restrictive practices is not necessarily commensurate with the degree of risk to the particular offender.

314. Such variation in practice is itself undesirable. It is not apparent that like cases are being treated alike. Courts are not applying a common test in determining whether, and if so in what manner, the fact of assistance should be publicly recorded.

315. The approach of courts in NSW in relation to recording the fact of assistance is more principled. The starting point is that the fact of assistance (including promised future assistance) should be noted in publicly-available reasons in which the identity of the offender is not concealed. Suppression or non-publication of the fact of assistance or the identity of the offender is the exception. A decision to suppress publication of the fact of assistance or to de-identify the offender must be made in accordance with the *Court Suppression and Non-publication Orders Act 2010* (NSW). That Act (like the *Open Courts Act 2013* (Victoria))

reinforces the general principle of open justice and specifies limited exceptions. Such an approach not only produces greater transparency but also greater consistency in practice.

316. There are good reasons why, in the absence of compelling and exceptional circumstances which would justify restriction, the fact of assistance (including promised future assistance) should be noted in publicly-available sentencing reasons, in addition to the general desirability of transparency in sentencing.

317. First, it promotes consistency in sentencing. Consistency is an aspect of the principle of equal justice.[180] The requirement in s.5(2)(b) of the *Sentencing Act 1991* (Vic) for the sentencing court to consider current sentencing practices is "*a statutory expression of the concern that a reasonable consistency in sentencing should be maintained as an aspect of the rule of law*".[181] In order to consider current sentencing practices and to ensure consistency in the application of principles, it is necessary for sentencing courts to consider similarities and differences between the instant case and other comparable cases. This requires consideration of the relevant factors which were taken into account in those other cases. Failure of a court to refer to a significant factor, such as assistance to authorities, distorts such comparisons – particularly if there are relatively few comparable cases. The distorting effect may be considerable, as assistance is often the basis for affording considerable leniency. The distorting effect which results from the absence of reference to assistance in sentencing reasons not only affects courts but also legal practitioners in advising their clients about likely sentences. A general practice of referring to assistance as a factor in sentencing would reduce these distorting effects.

318. Second, references in sentencing reasons to assistance as a mitigating factor assists practitioners and courts in relation to the application of principles of parity and equal justice in the sentencing of co-offenders.

319. Third, references to assistance are often necessary to explain the exercise of a sentencing discretion which is reserved for special or exceptional circumstances. Various provisions of the *Sentencing Act 1991* require a mandatory sentence, mandatory minimum sentence or mandatory cumulation of sentences unless a special reason exists or unless there are exceptional circumstances. For example, if an offender is sentenced for a specified offence against an emergency worker on duty, the court must impose a custodial sentence and must fix a non-parole period of a specified minimum length unless the court finds that a "*special reason*" exists (s.10AA). A special reason may include assistance that the offender has given

180 *Wong v R* (2001) 207 CLR 584, [6]-[7].
181 *DPP v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, [50].

or undertaken to give to law enforcement authorities in the investigation or prosecution of an offence (s.10A(2)(a)). Unless the court refers to such assistance in publicly-available sentencing reasons, there may be no apparent explanation for the exercise of such a discretion. This tends to undermine public confidence in the administration of justice.

320. Fourth, if a sentencing court refers to assistance given by the offender to authorities as a reason for a reduced sentence, it helps victims and their families to understand the reasons for the apparent leniency of a sentence.

321. Fifth, where the fact that a sentence reduction was given for assistance may be relevant in other proceedings, transparent sentencing reasons provide a means by which the prosecution can fulfil disclosure obligations and reduce the risk of a miscarriage of justice.

## 9.5 Likely impact of proposed provision

322. Two concerns commonly expressed about the implications of referring in published sentencing reasons to assistance to authorities should be addressed.

### 9.5.1 Would the changes deter offenders from providing assistance?

323. The first concern is that the requirement to refer to the fact of assistance in public reasons may discourage offenders from providing assistance to law enforcement authorities. Would offenders be fearful of the consequences of public disclosure of their assistance to authorities, and thus decide not to provide assistance or undertake to assist? In other words, would sources dry up?

324. In the DPP's submission, this concern is not borne out by the experience in NSW, where sentencing remarks do refer to the fact of assistance but where investigating agencies have not reported a significant reduction in the amount of assistance provided. Further, it should be noted that the proposal is for the sentencing court to refer publicly only to the *fact* of assistance; there is no requirement to disclose the *details* of that assistance. Finally, this concern would be significantly ameliorated by a provision (as suggested above) allowing the court to depart from the requirement of publicly referring to the fact of assistance in certain circumstances.

### 9.5.2 Would the changes increase risks for the safety of offenders who assist authorities?

325. The second concern which has been expressed about referring publicly to assistance is that it would increase risks for the safety of the offenders concerned.

326. Again, the experience in NSW has not borne out this concern. The risks can be ameliorated by a number of measures which are already in place. Corrections Victoria have established procedures for the protection of prisoners who act as informers, and those procedures can be adapted for prisoners who receive a sentence reduction for providing assistance to authorities. The Witness Protection Program can be utilised in instances of very high risk. If necessary, the court can publish public sentencing reasons using pseudonyms to anonymise the case. If the court is satisfied that even such measures as these would not sufficiently ameliorate the risk, the proposed provision would allow the court to depart from the requirement of publicly referring to the fact of assistance.

327. In the DPP's view, the proposed reform would achieve the best balance between, on the one hand, the need for transparency in sentencing and the need to facilitate the discharge of disclosure obligations in other criminal proceedings where the offender's assistance may be relevant, and, on the other hand, concerns about the safety of the offender or the impact on ongoing investigations.

## 9.6 Residual issues relating to disclosure

328. As noted above, a court may publish public sentencing reasons under a pseudonym. This is not an uncommon practice in Victoria.

329. If the sentencing court has used a pseudonym for the name of the offender, the effect will generally be that the true identity of the offender cannot be revealed. This may create an additional barrier to the fulfilment of disclosure obligations. The use of a pseudonym and any other restrictions on publication will create an expectation that the fact and details of the person's cooperation with authorities will not become publicly known, or known to those who may have been affected by that cooperation. Yet prosecution disclosure obligations may require that the information be provided to an accused person in another criminal proceeding.

330. Under the procedural provision which is proposed above ("8.3 The Western Australian model"), a court (preferably the trial court) could make appropriate rulings or orders in relation to disclosure obligations, on an *ex parte* application if necessary. The court might determine, for example, that:

1. the information relating to a sentence reduction or to assistance provided by a person to police need not be disclosed;

2. disclosure of such information should be deferred to some later time; or

3. disclosure of the fact of cooperation (or some other information), without disclosure of the sentencing remarks or underlying documents, is sufficient to discharge the prosecution's duty of disclosure.

331. If it is determined that the prosecution's duty of disclosure requires the disclosure of pseudonymised or restricted sentencing remarks, it may be necessary to make an application to the sentencing court for the restrictions on publication to be lifted or varied. Such an application may require notice to persons affected.

# 10 Conflicts of interest and other ethical breaches

## 10.1 Conduct of defence lawyers

332. Although the focus of this Royal Commission has been on the conduct of Victoria Police, it should not be forgotten that unethical conduct and other misconduct on the part of defence lawyers has played an equally vital role.

333. In *AB v CD*,[182] the High Court referred to the known conduct of Ms Gobbo (referred to as EF) in relation to Tony Mokbel and six of his criminal associates (referred to there as the "Convicted Persons") in the following terms:

> *EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court.*

334. The full extent of Ms Gobbo's unethical conduct is a matter yet to be determined by the Royal Commission. However the evidence presented to the Royal Commission to date suggests that her conduct went even further than the "fundamental and appalling breaches" referred to by the High Court in relation to the Convicted Persons.

335. In *Orman*,[183] the Court of Appeal found that the conduct of Ms Gobbo caused a substantial miscarriage of justice in the trial of the appellant for murder. (The appellant was not one of the Convicted Persons referred to by the High Court.) Orman's conviction in that trial depended heavily on the evidence of a person known as Witness Q. Prior to and contemporaneously with acting as counsel for Orman in relation to other criminal proceedings against him, Ms Gobbo acted for Witness Q in criminal proceedings. During the period in which she was engaged to act for Orman, Ms Gobbo improperly took active steps to ensure that Witness Q gave evidence against Orman in the murder trial. It was on the basis of that conduct that the Court of Appeal found that a miscarriage of justice had occurred.

336. Ms Gobbo's conduct is not the only unethical conduct which is to be considered by the Royal Commission. In his opening address, Senior Counsel assisting the Royal Commission indicated that the Commission would be investigating seven other persons who may have acted as informers to Victoria Police in breach of obligations of confidentiality or privilege.

182 *AB v CD* [2018] HCA 58, [10].
183 *Orman v R* [2019] VSCA 163.

337. Unethical conduct and misconduct on the part of Ms Gobbo and some other defence lawyers has, unfortunately, damaged public confidence in the profession. This is a matter of concern for the criminal justice system as a whole.

338. Measures to deal with such conduct can and should be addressed under paragraph 6 of the terms of reference.

## 10.2 Reforms to ethical rules

339. Conflicts of interest and other ethical breaches by defence lawyers should be addressed at source. In the submission of the DPP, that begins with clarification of the relevant ethical rules.

340. In light of the issues relating to Ms Gobbo's (and other legal professionals') position of conflict, the Director proposes that there be amendments to the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Barristers Rules) and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Solicitors Rules) to better reflect the issues faced by defence barristers and solicitors.

### 10.2.1 Concerns to be addressed

341. There are three concerns that these proposals seek to address. First, changes meant to clarify and fortify rules relating to conflicts should emphasise the obligation of each individual practitioner.

342. Secondly, the change in the rules seek to undermine the influence of dominant or well-resourced leaders of criminal groups. As was evidenced by the actions of Tony Mokbel, key criminal figures can control those around them by providing funds for, or briefing the same, legal counsel. This level of influence creates a significant difficulty for counsel or instructing solicitors as the ethical rules in relation to conflicts are, at times, vague and do not address specific issues such as when persons other than the client are paying for legal representation.

343. Thirdly, the proposed changes seek to both clarify the existing conflicts rules as well as add specific rules to cover issues faced by criminal solicitors and barristers. For example, the current Barristers Rules address conflicts by differentiating between briefs to appear and other briefs. Counsel must return a brief to appear where they act for a two or more parties in the same proceeding, and there is a real possibility that the clients' interests will be in conflict. In cases other than a brief to appear, a barrister must return a brief where they become aware of information that is relevant to their client's case, but they cannot disclose it

due to their obligations to another client. The issue with this approach is that it may not provide enough guidance in matters where counsel appears for multiple members of the same criminal syndicate in different unrelated trials.

### 10.2.2 Proposed rule changes

344. There are two key changes that the Director submits the Commission should recommend in its final report.

345. First, changes to both the Barristers and Solicitors Rules relating to conflict in circumstances where the person paying the fees is not the client. This is more critical in relation to the Solicitors Rules as counsel's fees are usually paid by instructing solicitors as opposed to directly from the clients. The proposed change would only be applicable to criminal proceedings[184] and would:

clarify that regardless of who pays the fees, instructions should only be obtained from the client (or the client's litigation guardian);

provide that where there is a conflict between the interests of the client and the interests of those paying the fees, the practitioner should only act in the best interests of the client, and should inform both the client and the person paying the fees of this; and

require that the practitioner return the matter or cease acting where there is a real possibility of conflict between the interests of the client and the interests of the person paying the fees.

346. Secondly, there should be an additional rule in both the Barristers and Solicitors Rules regarding acting for an accused or co-accused where the practitioner has previously acted for a witness. The rule would only be applicable in criminal proceedings and would provide that a defence practitioner:

must not act in a matter where they are aware that a witness will give evidence, and they have acted for that witness is previous criminal proceedings;

must, upon becoming aware that they have previously acted for the witness in a criminal trial, cease to act or return the brief as soon as practicable; and

must inform their client of the reason why they must return the brief or cease to act.

### 10.2.3 Training and continuing professional development

347. The proposed rule changes would need to be backed by an effective campaign of training and continuing professional development, by the Legal Services Commissioner and professional

184 The application of ethical rules to certain proceeding is widely recognised, see rules 39 to 41 of the Barristers Rules.

bodies such as the Law Institute of Victoria and the Victorian Bar. The aim should be to instil in every defence lawyer a clear understanding of their professional obligation.

## 10.3 Regulating the unethical conduct of defence lawyers

### 10.3.1 The responsibilities and duties of defence lawyers

348. Defence lawyers are entrusted with substantial responsibilities. They are accorded considerable independence in carrying out those responsibilities. It follows that the primary responsibility for the ethical conduct of defence lawyers rests with the lawyers themselves.

349. The ethical responsibilities of defence lawyers include duties to their (current and former) clients and duties to the court. Lawyers are answerable to their clients and to the courts for the performance of those duties.

350. A current or former client may take action to restrain a lawyer from acting where to do so would be in breach of a duty to that client. A court may, at the instance of a client, restrain a lawyer from acting on various bases. They include:

> where, due to a previous (or even current) professional engagement, the lawyer has confidential information that belongs to the original client;[185] or
>
> on the basis that the lawyer has a continuing fiduciary duty of loyalty to the client (which may continue after the retainer has ended), which precludes the lawyer from acting for a different client against the original client.[186]

351. Although such proceedings typically arise from civil proceedings, there is no reason why they would not also apply in relation to criminal proceedings.

### 10.3.2 Powers and functions of regulators

352. Victoria, like other Australian jurisdictions, has an elaborate system for regulating the conduct of lawyers.

353. The Legal Services Board and Legal Services Commissioner are the primary regulatory bodies. The Board (under s.44 of the *Legal Profession Uniform Law Application Act 2014* (Vic)) and the Commissioner (under s.56 of the Act) may (and do) delegate functions to the Victorian Bar and the Law Institute of Victoria. Those bodies also have a significant role in regulating the conduct of legal practitioners.

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185 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222; *Carindale Country Club Pty Ltd v Astill* (1993) 42 FCR 307.

186 *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501; *Pinnacle Living Pty Ltd v Elusive Image Pty Ltd* [2006] VSC 202;

354. The Board, the Commissioner and their delegates have a range of powers and functions under the Act. Action may be taken against legal practitioners either as a result of a complaint or by the Commissioner on the Commissioner's own motion.

355. Amongst other things, the Board may (under Part 9.6 of the Uniform Law) apply to the Supreme Court for an injunction restraining a person from contravening the Law or the Uniform Rules.

### 10.3.3 The DPP as regulator of unethical defence lawyers?

356. In the course of hearings in this Royal Commission, there have been occasional implications or suggestions by counsel or by witnesses that the DPP should assume responsibility for monitoring and dealing with conflicts of interest or other unethical conduct by defence lawyers in connection with criminal proceedings.

357. Such implications and suggestions are founded on fundamental misconceptions. In our adversary system it is not, and cannot be, the responsibility of the prosecution to monitor or control the conduct of defence lawyers, both for practical reasons and for reasons of principle.

358. In the first place, an accused person in criminal proceedings has a fundamental right to choose their own legal representatives. In Victoria, the right is recognised not only by the common law but also in s.25(2)(d) of the *Charter of Human Right and Responsibilities*, which provides:

> *(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees:*
>
> ...
>
> *(d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the Legal Aid Act 1978; ...*

359. Because of this right, it is "*a serious matter to prevent a party from retaining counsel and solicitor of his choice, particularly where the possibility arises upon the application of an opposite or adverse party*".[187] Indeed, "*the right of choice of counsel and solicitor is so fundamental, especially in criminal proceedings, that it should not be disturbed except in the most unusual and exceptional circumstances and where no other remedy is otherwise available.*" [188]

187 *R v Khazaal* (2006) 167 A Crim R 565, [88] (Whealy J).
188 *R v Khazaal* (2006) 167 A Crim R 565, [90] (Whealy J).

360. Although a court has power to prevent a practitioner from acting or continuing to act in a proceeding in order to ensure the proper administration of justice,[189] the DPP has found only one report of a case in Australia in which a defence lawyer has been restrained from acting for an accused person in criminal proceedings on the application of the prosecution.[190] In that case, the defence lawyer was a recent former employee of the Commonwealth DPP (CDPP). CDPP made the application, not because of a risk to the accused of a miscarriage of justice, but to prevent a breach of confidence and breach of duty of loyalty owed by the lawyer to the CDPP, and on the basis that if the lawyer continued to act for the accused it would undermine the due administration of justice and the integrity of the judicial process.

361. In a case involving an apparent conflict between the interests of the accused and the interests of another present or former client of the lawyer, ordinarily any remedial action would be a matter for the aggrieved current or former client. If, for some reason, the aggrieved client decided to take no action, if intervention by a third party were considered necessary the appropriate party would be the regulator of legal practitioners, not the opposing party in the proceeding.

362. It should not be expected that the prosecution would take action when neither the affected client nor the regulator had done so. If it is always a serious matter to deprive an accused of their choice of legal representative, an application by the prosecution to do so may be particularly problematic, as it could jeopardise the perception of its detachment and objectivity, and could appear to be made for tactical reasons. It would be contrary to the nature of the adversary system and the need for independence of lawyers for the prosecution to be tasked with monitoring the conduct of defence lawyers. That is a role for independent regulators.

363. Moreover, from a practical point of view, the prosecution is ill-equipped to take on a role as a de facto regulator of the conduct of legal practitioners.

364. Conflicts of interest on the part of defence lawyers may not be apparent from information on the public record. An individual prosecutor will commonly be unaware of what other matters a lawyer has been involved in. The OPP is staffed by over 200 solicitors each of whom, at any one time, may have carriage of up to 20 different matters. Despite some

189 *Ismail-Zai v Western Australia* (2007) 34 WAR 379; *Grimwade v Meagher* [1995] 1 VR 446, at 452.

190 *DPP (Cth) v A Legal Practitioner* [2012] WASC 459. In *R v Khazaal* (2006) 167 A Crim R 565, a trial judge refused an application by the Commonwealth of Australia (not the prosecutor) to restrain the accused's counsel and solicitor from continuing to act on the basis they had improperly reviewed classified information in the preparation for the trial. In two Ontario cases, *R v Speid* (1983) 430 OR (2d) 596 and *R v Robillard* (1986) 18 CCC (3d) 22, defence counsel were restrained, on the application of the prosecution, from acting for an accused because of conflicts of interest.

specialist groups within the OPP, different solicitors are tasked with carriage of a range of different matters, meaning that an individual solicitor is unlikely to know all of the relevant information that would allow them to properly assess and police conflict issues by defence counsel or instructing solicitors.

365. The difficulties faced by the OPP would be mirrored by those of the Crown Prosecutors and private counsel briefed to appear on the Director's behalf. A large number of Crown Prosecutors and counsel may be acting for the DPP at any given time.

366. Instructing solicitors or counsel for the OPP will never be appropriately apprised of all the information to properly consider whether a practitioner is in a position of conflict. This is best evidenced by Ms Gobbo's conduct, whereby she often gave advice or acted for a witness whilst not being 'on the record'. Relevantly, prosecutors will not know whether defendants or potential witnesses have consented to their counsel or solicitor being in a position of conflict, or if so whether that consent was fully informed. Nor can the prosecutor know whether the lawyer has obtained an Ethics Committee ruling on the question.

367. It would not assist in maintaining public confidence in the independence and impartiality of the DPP and OPP if the office were to compile and maintain a database on the conduct of defence lawyers. It would arguably be outside its statutory functions, and contrary to privacy laws, for it to do so.

368. Unlike statutory regulators, the DPP has no powers to investigate the conduct of defence lawyers. Nor does it have access to disciplinary records in relation to legal practitioners. Nor should it.

### 10.3.4 Review of the powers and functions of legal practitioner regulators

369. Ms Gobbo's conduct does raise questions about the capacity of the regulatory regime to deal adequately with serious ethical breaches by defence lawyers. The answer to those questions is not to shoehorn the prosecution service into an ill-fitting role. Rather the answer must involve a review of the regulatory system, the laws and procedures governing the Legal Services Commissioner and other regulators, and their capacity to monitor and respond to serious conflicts of interest and other unprofessional or unethical conduct by defence lawyers in criminal proceedings.

370. Particular consideration should be given to whether the functions and powers of the Legal Services Board or Legal Services Commissioner are sufficient to enable the Board or Commissioner to intervene in criminal proceedings and to seek that a practitioner be

restrained from acting in the proceedings or from acting for a particular client. The Board or Commissioner should have clear power to do so and to investigate and report to the court if appropriate. It would be anomalous if the only remedy available to the regulator would be the power to commence separate proceedings in the Supreme Court seeking an injunction under Part 9.6 of the Uniform Law.

## 11 Summary of proposals

371. In summary, the DPP's submission is as follows:

1. Substantial improvements are necessary in the training and in the guidance available for Victoria Police members in relation to disclosure obligations.

2. Victoria Police should encourage members to obtain such independent advice and increase the opportunities to do so.

3. Developing more efficient, effective, stable and secure information systems across Victoria Police is a matter of very considerable importance.

4. Section 110(e) of the CPA should be amended to insert the following into the list of material satisfying the definition of material "relevant to the alleged offence":

   *a list containing descriptions of any things relevant to the alleged offence which has not been included in the hand-up brief because of:*
   *a claim of privilege or immunity; or*
   *a statutory prohibition.*

5. The *Magistrates' Court Criminal Procedure Rules 2009* (Vic) should be amended to include a new Form which would be required to be served with a hand-up brief. The new Form would include two Schedules. Schedule 1 would list relevant material, not contained in the hand-up brief, that is the subject of a claim of privilege, public interest immunity or statutory immunity, and specify the nature of the privilege or immunity claimed for each item listed. Schedule 2 would list relevant material, not contained in the hand-up brief, that is the subject of a statutory prohibition on publication and the existence of which the informant can disclose without contravening the statutory prohibition.

6. Victoria Police internal policies or procedures should be amended to provide guidance to investigators on how to describe withheld material and the corresponding claims of privilege, immunity or statutory prohibition.

7. The regime in the CPA relating to disclosure of the particulars of previous convictions of a prosecution witness (ss.43(1)(e), 45(3), 119(e), 122, 187) should be amended so that it also applies to
   (a) particulars of any outstanding charge against a person on whose evidence the prosecution intends to rely in the committal proceeding; and
   (b) particulars of any charge which has been withdrawn or discontinued against such a person—

if the person is alleged to be a co-offender of the accused, or if the charge, or its withdrawal or discontinuation, is relevant to assessing the credibility of the person or is otherwise relevant to the proceeding.

8. The following types of material should be specifically listed as disclosable with a hand-up brief, preferably by inclusion in the list in s.110(e) of the CPA:

   *(a) if a person referred to in s.110(d)(iv) has been sentenced by a court and the court has taken into account information, co-operation or assistance that the person has provided, or has undertaken to provide, to a law enforcement agency–*

   *i. a copy or other record of the sentencing remarks;*

   *ii. a copy of any document tendered or submitted to the court or any record of evidence to the court which specified the information or assistance provided or the undertaking given;*

   *(b) a record of any undertaking, indemnity, letter of comfort or other benefit provided to a person referred to in s.110(d)(iv) by or on behalf of the prosecution in connection with the provision of a statement or of information or assistance relevant to the proceedings; and*

   *(c) any other record which is relevant to the assessment of the credibility of a person referred to in s.110(d)(iv).*

9. The following types of material should be specifically listed as disclosable with a hand-up brief, preferably by inclusion in the list in s.110(e) of the CPA:

   *a copy of–*

   *(a)any victim impact statement made by the complainant that relates to the alleged offence;*

   *(b)any other statement made by the complainant to any member of the police force or to a prosecutor that relates to the alleged offence and contains an acknowledgement of its truthfulness.*

10. The *Public Prosecutions Act 1994* (Vic) should be amended by inserting a provision based on s 15A of the *Director of Public Prosecutions Act 1986* (NSW), with modifications to:

    (a) define the disclosure obligation in sub-section (1) in a way that is consistent with the obligations in the CPA; and

    (b) clarify the circumstances in which information subject to a claim of privilege, public interest immunity or statutory immunity or to a statutory publication restriction should be provided to the DPP.

11. The CPA should be amended to include a provision along the following lines:

    ***185AA Certification of disclosure***

    *After being served with a copy of the documents referred to in section 183, the prosecution must within 14 days (or such other time as the court directs) serve on the accused and file in court a certificate by the law enforcement officer in charge of the case confirming the compliance by the relevant investigating agency with its duties of disclosure under this Act and section *** of the Public Prosecutions Act 1994 (Vic).*

12. The form of the disclosure certificate should be prescribed by regulations. The certificate should attest that, to the best of the officer's knowledge and belief, all applicable disclosure requirements under the CPA (including ongoing requirements) and the requirements under the proposed provision in the *Public Prosecutions Act* have been complied with by the relevant investigating agency.

13. At the time of serving and filing the certificate, the prosecution should also be required to serve an updated list of material withheld on privilege/immunity or statutory prohibition grounds, if that list has changed since the time of the hand-up brief.

14. A statutory regime should be introduced for the establishment of an independent Disclosure Monitor (DM) to conduct ongoing systemic audits and reviews of Victoria Police's compliance with disclosure obligations (including obligations arising from other amendments proposed in this submission). The regime should have the following features:

    (a) The functions and powers of the DM should be vested in an independent body established by statute. Whether the function should be vested in an existing body (such as IBAC) or a new body established for the purpose would be a matter for consideration by Government.

    (b) To ensure its independence, the DM should not be part of, or report to, the DPP or Victoria Police. Nor should the DM, or its staff, hold positions with the OPP or Victoria Police.

    (c) The main function of the DM should be to monitor and report on the practices and procedures of Victoria Police in relation to the disclosure of disclosable material to accused persons and of the existence of potentially-disclosable unused material to the OPP. The objective should be systemic: that is, reviews should be directed at identifying general shortcomings in disclosure practices, in order to improve guidance to police for future cases.

(d) Reviews would focus on police procedures and practices. The DM's function would not be to second-guess or overturn police disclosure decisions. It should be made clear that the role of the DM does not extend to forming or expressing a view about whether particular material in a particular case was or was not disclosable or potentially-disclosable.

(e) The DM would also have no power to review or express a view about the correctness of DPP disclosure decisions.

(f) The identification of matters for review and the appropriate methodology for reviews should be generally be a matter for the discretion of the DM. The DM should be authorised to consult with interested persons or bodies in making these decisions.

(g) The DM should have all necessary powers to conduct its reviews, including having access to all police records, powers to interview members of Victoria Police, and powers to summon material. In cases involving human sources, this would include full access to relevant information relating to those sources, with appropriate arrangements to ensure security.

(h) The DM should report to Parliament, at least annually, on the results of its reviews and on progress by Victoria Police in addressing any issues raised by the DM. Reports by the DM would address overall compliance by police with disclosure requirements, identify specific areas for improvement and suggest changes to police practices, procedures and guidelines as appropriate.

(i) In the DM's reports, any references to disclosure practices in particular cases would be de-identified and data would be presented in aggregate form. Individual police members would not be named or referred to in an identifiable way in relation to disclosure practices, nor would identifying information be published about particular cases.

(j) The DM should also have a role in training of Victoria Police members in relation to disclosure.

(k) A document that formed part of a review by the DM should be an exempt document under Part IV of the *Freedom of Information Act 1982*.

15. A statutory procedure for the determination of disclosure issues by a court should be introduced into the CPA. Taking s.138 of the *Criminal Procedure Act 2004* (WA) as the starting point, the Victorian provision should have the following features:

(a) it should allow a court to make orders on its own initiative;

(b) it should allow an application for orders to be made by a party to the proceeding or by an investigating agency that holds documents subject to a disclosure requirement;

(c) it should allow an application to be made at any time during a criminal proceeding;

(d) in addition to allowing the application to be made to the court in which the proceeding is being heard, where the proceeding is before the Magistrates' Court it should allow an application to be made to the County Court (where appropriate) or the Supreme Court;

(e) it should allow applications to be made without notice to the accused;

(f) it should give the court the power to make a wide range of orders in relation to disclosure requirements, including powers to: dispense with disclosure requirements; shorten or extend the time for obeying disclosure requirements; make disclosure subject to conditions; and confirm, vary or set aside a previous order relating to disclosure requirements;

(g) it should allow orders to be made in respect of both statutory and common law disclosure requirements;

(h) it should state that a court can dispense with disclosure requirements on specific, recognised grounds, such as PII, privilege, statutory prohibition or a court order;

(i) it should provide that orders made by the Magistrates' Court are deemed to be orders of the County Court or Supreme Court (as applicable) once an accused is committed for trial, and that the County Court or Supreme Court (as the case may be) is required to review and confirm, vary or set aside the order prior to the commencement of the trial; and

(j) consideration should be given to allowing the PIM to act as a contradictor in any application made by a law enforcement agency that is made without notice to the accused.

16. To assist in compliance with disclosure obligations where a prosecution witness has previously provided assistance to authorities and has received a sentencing discount as a result (a matter which may be relevant to that person's credibility or reliability), section 5 of the *Sentencing Act 1991* should be amended to require a sentencing court that has reduced an offender's sentence because of assistance to authorities (either past or future) to expressly state that fact in the unrestricted, publicly available version of the sentencing

reasons. The sentencing court would not be required to set out the details of the assistance in the unrestricted sentencing reasons. The requirement would not apply where to reveal the fact of assistance would seriously endanger the life of the offender or another person, and that risk to safety cannot be ameliorated by the making of an order under the *Open Courts Act 2013*, an order under any other statute restricting the disclosure of information, or a pseudonym or broad suppression order in the exercise of the court's inherent jurisdiction.

17. The Barristers Rules and the Solicitors Rules should be amended, in relation to criminal proceedings:
    (a) to clarify that regardless of who pays the fees, instructions should only be obtained from the client (or the client's litigation guardian);
    (b) to provide that where there is a conflict between the interests of the client and the interests of those paying the fees, the practitioner should only act in the best interests of the client, and should inform both the client and the person paying the fees of this; and
    (c) to require that the practitioner return the matter or cease acting where there is a real possibility of conflict between the interests of the client and the interests of the person paying the fees.

18. The Barristers Rules and the Solicitors Rules should be amended by adding a rule to provide that, in relation to criminal proceedings, a defence practitioner:
    (a) must not act in a matter where they are aware that a witness will give evidence, and they have acted for that witness is previous criminal proceedings;
    (b) must, upon becoming aware that they have previously acted for the witness in a criminal trial, cease to act or return the brief as soon as practicable; and
    (c) must inform their client of the reason why they must return the brief or cease to act.

19. The proposed rule changes should be backed by an effective campaign of training and continuing professional development by the Legal Services Commissioner and professional bodies such as the Law Institute of Victoria and the Victorian Bar.

20. The DPP should not be expected to assume responsibility for monitoring and dealing with conflicts of interest or other unethical conduct by defence lawyers in connection with criminal proceedings.

21. A review should be undertaken of the laws and procedures governing the Legal Services Board, the Legal Services Commissioner and other regulators of the legal profession in

relation to their capacity to monitor and respond to serious conflicts of interest and other unprofessional or unethical conduct by defence lawyers in criminal proceedings. A particular issue in such a review should be the capacity of the Board or the Commissioner to intervene in in criminal proceedings and to seek that a practitioner be restrained from acting in the proceedings or from acting for a particular client and to investigate and report to the court if appropriate.

372. This summary should not be taken out of context or read in isolation from the detailed discussion of the issues in this submission.