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The Honourable Margaret McMurdo AC
 Chair
 Royal Commission into the Management of Police Informants
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Dear Commissioner

The current use of specified human source information in the criminal justice system

I refer to your correspondence dated 28 November 2019 and the enclosed consultation paper. Victoria Legal Aid (VLA) thanks the Commission for the ongoing opportunity to contribute to the various terms of references.

VLA appears in or funds approximately 80% of criminal trials in Victoria.¹ In the 2017/18 financial year VLA funded 3706 grants of aid for indictable cases; the overall expenditure on grants of aid for indictable matters was \$31.8 million. VLA has a significant interest in ensuring that people's rights in criminal proceedings are upheld and criminal matters are not compromised.

Specific responses to each question from the Consultation Paper is provided in an appendix. Our key recommendations are outlined below.

The police officer's duty of disclosure

VLA supports a requirement for police to disclose to the prosecuting authorities the existence of all potentially disclosable material, even if it attracts claims of public interest immunity. This includes evidence derived from human source(s) with legal obligations of confidentiality or privilege. We endorse the DPP's early involvement in assessing and advising police about making a claim of public interest immunity. The prosecutorial body that ultimately conducts the litigation has the prosecutorial burden of establishing the charges and ensuring procedural fairness. If the police seek to protect the information from being disclosed to the defence on grounds of public interest immunity, it is for a judicial officer to determine whether such information should be protected.

VLA endorses the United Kingdom's procedures where sensitive material, which may attract public interest immunity claims, is identified to the prosecution. The prosecution decides whether to seek public interest immunity in the court, disclose the material or discontinue the prosecution. In keeping with this view, VLA endorses any recommendations that provide for

¹ Victoria Legal Aid, *Delivering High Quality Criminal Trials: Consultation and Options Paper*, January 2014, p4.

the DPP being involved at an early stage in assessing material and advising the police about any public interest immunity.

Summary prosecutions where the investigation has involved the use of a human source with legal obligations of confidentiality or privilege

We endorse mechanisms that assist in ensuring the timely disclosure of all evidence in summary prosecutions. This includes the Commission's proposal that the DPP should have carriage of summary prosecutions which seek to use evidence derived from a human source with legal obligations of confidentiality or privilege in an investigation.

As the vast majority of criminal matters are heard summarily, it is essential that any oversight and monitoring systems are also effective in respect of summary investigations and prosecutions, as well as indictable trials.

Oversight of police practices around disclosure of human sources with legal obligations or confidentiality and adequacy of existing safeguards

We support external oversight and monitoring of the use of human sources, particularly human sources with legal obligations of confidentiality. In our submission to the second term of reference, in April 2019, we submitted the Commission should make recommendations for external, independent monitoring of Victoria Police's use and management of human source information.

We submit that there should be also be Parliamentary oversight of Victoria Police's use and management of human source information. This could be achieved with annual reporting obligations, similar to the Chief Commissioner's existing annual reporting obligations with respect to sensitive material, such as under the *Terrorism (Community Protection) Act 2003*.

Please do not hesitate to contact me if you wish to discuss this letter.

Yours sincerely,



LOUISE GLANVILLE
Chief Executive Officer

Annexure

Terms of Reference 4 Consultation Questions

1. *In your view, should police be required to disclose to the DPP the use of a human source with legal obligations of confidentiality or privilege (or other categories of human sources) in an investigation, where the information is relevant to the case of the accused? Why or why not?*

VLA supports the need for police to disclose to the DPP the existence of all potentially disclosable material even it attracts public interest immunity. The prosecuting body must be apprised of the existence of all the available evidence and how it was obtained, even if that evidence will not ultimately form part of the evidence adduced in proceedings.

The prosecutorial body that ultimately conducts the litigation has an obligation to ensure the accused is fully aware of all the information and evidence that is available. Given the DPP/OPP obligations of ongoing disclosure and its independence from the investigating office, VLA supports a requirement for police to disclose to the prosecution the use of human sources with legal obligations of confidentiality or privilege.

2. *More broadly, should investigating police be required to disclose to the DPP the existence of all potentially disclosable material, even if the material is subject to a claim of public interest immunity? Why or why not?*

The comprehensive disclosure of all evidence, whether it attracts public interest immunity or not, between the investigator and the prosecutor will have flow on effects to the accused. For this reason, VLA endorses a requirement for the police to disclose to the DPP the existence of all evidence, even where it may attract a claim of public interest immunity.

In circumstances where there is evidence which may be sensitive because the disclosure of such evidence would be likely to cause danger to life or personal safety, or likely to lead to a threat to national security then the existence of such evidence should be conveyed to the DPP. The prosecution can then make an application to the court to determine whether such information should be disclosed or withheld.

We endorse the disclosure model of the United Kingdom. When the DPP is apprised of the existence of evidence that may attract public interest immunity it may determine whether to:

- disclose the material in a way that does not compromise public interest or safety;
- obtain a court order to withhold the material;
- discontinue the case; and
- disclose the material because the overall public interest in pursuing the prosecution is greater than abandoning it.

The UK model appropriately balances the protection of sensitive information, disclosure obligations and ensuring the integrity and transparency of the criminal justice system.

Prosecutors are well placed to recognise when sensitive evidence should be protected or disclosed and bear the prosecutorial burden of establishing the charges and ensuring procedural fairness.

In our submission to the Victorian Law Reform Commission's review of Committals in Victoria, we submitted that several mechanisms should be introduced to improve early and appropriate disclosure, including:

- standardised obligations for all matters;
- mandatory early disclosure conferencing to improve communication and early engagement;
- prosecutorial review and certification of disclosure; and
- enforceable mechanisms to address failures to comply with disclosure obligations.

Presently there are no safeguards in the way in which the relevant bodies prosecute their respective cases when the investigation has involved human source material, as has been highlighted through the case of *DPP v Faruk Orman*. It has been recognised that there is limited communication by the police to the prosecution authorities about the existence of evidence which may attract claims of public interest immunity. This lack of disclosure and safeguards surrounding the disclosure has had and will continue to have detrimental consequences to the justice system if legislative changes are not introduced.

These proposed mechanisms, coupled with comprehensive and timely disclosure of all evidence between police and the prosecution, will assist in maintaining the integrity and fairness of criminal proceedings.

3. *Are the existing mechanisms by which an accused person is notified of the existence of relevant material that may be subject to a claim of public interest immunity adequate? Can such information be properly made through Form 30 or Form 11? Why or why not?*

Form 30 and 11 are insufficient mechanisms for alerting an accused to the existence of relevant material subject to public interest immunity. This is for several reasons:

The existing Forms 30 and 11 do not notify parties of the existence of material which may be the subject of a claim of public interest immunity. Often defence lawyers request additional material not listed or specifically relied on in the brief of evidence, but nevertheless materially relevant. In response to this disclosure request the OPP (instructed by the police), decline to disclose the material on the grounds of public interest immunity. Once claims of privilege are raised, the police rarely provide reasons justifying the claim. When the Victorian Government Solicitor becomes engaged, the material is often disclosed, or the objections are narrowed in scope, leading to the disclosure of evidence in a different format.

Form 30 and 11 are rarely utilised to their full extent and do not adequately draw police informants' attention to what their disclosure obligations are. This may be linked to the present culture of what weight police give to their obligations of disclosure. Often police believe that disclosure only extends to the witness statements which lead to establishing the charges of the offending. They give limited weight to the need to disclose all evidence

in their possession and even less weight to evidence that may mitigate the accused involvement in the offending or assist the accused to defend the charges.

4. *Would the introduction of a disclosure certificate along the lines of the disclosure certificate provided for in Schedule 1 of the DPP Regs (NSW) help facilitate the provision of relevant material from investigating police to the DPP?*

VLA does not oppose a requirement for the prosecution to certify that all disclosure requirements have been satisfied. A disclosure certificate would be an amalgamation of the existing disclosure provisions provided for in Forms 30 and 11 under the *Criminal Procedure Act 2009*. However, we note the success of a certificate process would be dependent on complete disclosure by the police in a timely manner.

In the preparation of our submission to the VLRC Committals Review, we learnt from our NSW counterparts that the disclosure certificate, in and of itself, has not led to meaningful change in the practice of disclosure by the NSW investigating police to the NSW DPP. The NSW DPP are still served with material by the police in close proximity to court hearings and parties still experience delays in obtaining disclosure material that has been requested. Similarly, it has been our practice experience in Victoria, given the introduction of the standard disclosure requirements in offences involving child sexual assault offences, that disclosure standards require further improvement. The practice in NSW and currently in Victoria demonstrates that there needs to be a cultural shift within the police force to give importance to the obligations of disclosure and to adopt a consistent best practice of timely and full disclosure of all evidence in their possession.

- a) *Would the introduction of such a disclosure certificate help facilitate the provision of relevant material from investigating police to Victoria Police prosecutors in summary matters?*

Please see the response above. We note that delays associated with timely disclosure of evidence in the summary jurisdiction have a more profound impact on accused who are in custody. Where an accused person has limited prospects of successfully applying for bail and chooses to challenge the prosecution case, it is foreseeable that the delays associated with disclosure could result in the accused remaining on remand for a period greater than the ultimate sentence that may be imposed if the accused is convicted. We highlight that disclosure needs to occur in a timely manner and particularly in the summary jurisdiction, delays will have detrimental effects on clients in custody.

5. *Is there a need for a statutory requirement for police to provide the DPP with material police have withheld from the DPP on grounds of public interest immunity when requested by the DPP to provide that material (as is provided in NSW)? Why or why not?*

VLA supports the introduction of a statutory requirement for police to provide to the DPP a list of material outlining the contents and existence of material the police seek to exercise their claims of public interest immunity over. The introduction of a statutory requirement would be consistent with s 27(2) *Public Prosecutions Act 1994*, which states the informant must provide to the Director copies of all relevant documents and any other information and material that the Director may require. A statutory requirement may contribute to fostering a change in police culture, which gives importance to their disclosure obligations and where disclosure is viewed as a core duty of policing.

It is noted that the DPP and investigating police could at times have differences of opinion in relation to what evidence can attract public interest immunity and when such evidence should be withheld. Nevertheless, the DPP in our view should always be apprised of the existence of all relevant evidence in the possession of the police even if the evidence attracts public interest immunity. Adopting the UK method of disclosure relating to evidence that attracts public interest immunity will ensure that the existence of such evidence comes to light, allows parties to challenge its disclosure, and ensures safeguards are provided when balancing disclosure obligations with the safety of the public.

6. *Do you have any experience or views regarding the approach that should be taken in relation to summary matters where the investigation has involved the use of a human source with legal obligations of confidentiality or privilege? Are there adequate safeguards currently in place? Why/why not?*

Although VLA runs the biggest summary crime practice in Victoria, we are currently not aware of, and do not have any experience regarding, the use of human sources with legal obligations of confidentiality or privilege being utilised in summary matters. Currently there are no safeguards in place to ensure the disclosure obligations are met by Victoria Police where a human source with legal obligations of confidentiality or privilege is used.

We endorse mechanisms that assist in ensuring the timely disclosure of all evidence in summary prosecutions. This includes the Commission's proposal that the DPP should have carriage of summary prosecutions which include evidence derived from a human source with legal obligations of confidentiality or privilege in an investigation. As the vast majority of criminal matters are heard summarily, it is essential that any oversight and monitoring systems are also effective in respect of summary investigation and prosecution, as well as indictable trials.

7. *What in your experience are the key benefits and challenges of the approach taken in Victoria to disclosure where public interest immunity issues are involved? What measures might be needed to address any challenges?*

Presently when police seek to exercise a claim of public interest immunity over evidence they enlist the services of the Victorian Government Solicitor's Office (VGSO). In our practice experience, we observe that VGSO are engaged at a late stage, often just prior to significant hearings. Frequently, once VGSO are engaged to consider the evidence, the information is disclosed because public interest immunity does not apply, or the information is released in a way that mitigates any public interest immunity risks.

The VGSO should be engaged at an early stage, prior to the initial directions hearing, to enable discussion of the matter at a special pre-trial hearing. Timely ventilation of whether evidence should be disclosed and a court ruling on the admissibility of the evidence, provides parties with sufficient time to consider the evidence and seek instructions.

The early communication between police and prosecuting authorities, about the existence of evidence that may attract public interest immunity, would be beneficial. This would allow for early consideration of whether the evidence does attract a claim of public interest immunity and, if privilege is to be exercised, this could be raised promptly with the court.

8. *Should the DPP be more involved at an early stage in assessing material over which police may wish to make a claim of public interest immunity and assisting police with any applications to a court to determine that claim? If so, what measures might be needed to achieve this?*

The DPP should be more involved at an early stage in assessing material over which police may wish to make a claim of public interest immunity. The DPP is best placed to provide advice to the investigating officer about what information attracts claims of privilege and how the risks may be mitigated, or represent the police if privilege is sought to be exercised. We refer to our response above noting that the DPP already have a Director's Policy that highlights the importance of obligations of disclosure, and the DPP can make a timely application for the court to rule on any restrictions on disclosure.

If the Commission were to recommend the introduction of a disclosure certificate similar to that in NSW, the DPP will need to be appraised of all the available evidence if they are to certify disclosure has been met. This could be meaningfully achieved if the DPP are involved at an early stage in assessing material which police may seek to claim public interest immunity over.

9. *In your view, how well are disclosure obligations, issues relating to legal professional privilege and public interest immunity understood by investigating police?*

In our experience there is scope for improving police understanding of their disclosure obligations, the importance of disclosure in ensuring the right to a fair trial, and the detriment that flows from the late disclosure of evidence. There is also limited

understanding of what privilege means in the context of public interest immunity, what evidence can attract a claim of privilege, and how the risks of disclosure can be mitigated.

There is limited understanding that disclosure goes beyond statements that assist the prosecution case. Disclosure extends to statements and evidence that may mitigate the accused involvement in the offending, may materially assist in defending the charges and disclosure extends to all information in the possession of the police, absent that which legitimately attracts public interest immunity claims. Our advocates report that they are frequently served with copious amounts of new evidence at the bar table prior to the commencement of a hearing. Often the only remedy available to advocates is to seek time to take instructions while the bench stands down. This is particularly detrimental when a client has been diagnosed with an intellectual disability or has other limited cognitive functioning capacity to understand new evidence and give meaningful instructions in a limited time frame.

- a) *Do you have any views about how this could be improved (if needed)? (for example, the use of dedicated disclosure officers in complex investigations, targeted training, additional support and/or guidance materials?)*

The low appreciation by investigating police of the importance of disclosure to the efficient and fair running of a matter, may be a contributing factor to late or insufficient disclosure. We support the key recommendations arising from the report by the UK House of Commons Justice Committee in July 2018 and the Mouchier Investigations Report,² for a “shift in culture towards viewing disclosure as a core duty of policing and the administration of justice”³. In our view the need for internal guidance and a cultural approach that supports the fulfillment of disclosure are necessary in Victoria.

10. *What, if any, challenges or barriers are experienced by police and the prosecution in discharging disclosure obligations in cases where public interest immunity issues arise?*

We do not have any comments.

11. *Do you have any other views or comments to make in relation to:*

The appropriateness of Victoria Police’s practices around the disclosure or non-disclosure of the use of human sources who are subject to legal obligations of confidentiality or privilege to prosecuting authorities?

Whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the OPP prosecutes indictable matters on behalf of the DPP, when the investigation has involved human source material?

We strongly support external oversight and monitoring of the use of human sources, particularly human sources with legal obligations of confidentiality. The Commission should

² Richard Horwell QC, Mouchier Investigation Report, July 2017.

³ House of Commons Justice Committee, Disclosure of evidence in criminal cases, 20 July 2018, page 3.

make recommendations for external, independent monitoring of Victoria Police's use and management of human source information. This would promote accountability and transparency over these covert intelligence practices. VLA is not making a recommendation about which body should fulfil the role, however we note that monitoring and inspection responsibilities are provided to existing integrity bodies to provide safeguards over other similarly sensitive intelligence practices, including witness protection, covert surveillance, and terrorism powers.

We further submit that there should be Parliamentary oversight of Victoria Police's use and management of human source information. This could be achieved with annual reporting obligations, similar to the Chief Commissioner's existing annual reporting obligations with respect to sensitive material, such as under the *Terrorism (Community Protection) Act 2003*. Published annual reports provide relevant information about the use and management of powers, enable the reader to ask further questions or refer to a committee. Parliament is the jurisdiction's apex of accountability, and Parliamentary scrutiny promotes transparency and integrity.

We acknowledge the challenge of protecting sensitive intelligence material and identifying information. We note there are existing example of reporting obligations with respect to similarly sensitive material. As an example, the *Terrorism (Community Protection) Act 2003* provides a process for the redaction of information which could endanger a person's safety; prejudice an investigation or prosecution; or compromise operational activities or methodologies of Victoria Police.