31 January 2020

The Honourable Margaret McMurdo AC
Commissioner
Royal Commission into the
Management of Police informers (Victoria)

Dear Commissioner,

Submissions of the Criminal Bar Association

The Criminal Bar Association (CBA) is grateful for the opportunity to make a written submission on matters relevant to the Commission's consultation paper headed 'The current use of specified human source information in the criminal justice system.'

The consultation paper had a number of questions at the end of the paper, seeking a response from interested parties. The CBA has responded to each of the questions posed in the paper.

Question 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 that information is relevant to the case of the accused? Why or why not?

The CBA strongly supports a requirement, placed on police, to disclose to the DPP the use of any human source relevant to the case of an accused person. Again, training of police is important in this respect such that they recognise when this information is relevant in any give case.

The requirement is needed so that police, alone and unassisted, do not make the sole decision whether or not such information should be disclosed to defence. As police have a vested interested in maintaining such sources of information and may not want to risk an end to such a source of information by having to disclose its existence.

The obligation to disclose the existence of a human source to the DPP means that an independent body has some input in what to do with that information.

Question 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?

For similar reasons as the answer to question one, the answer is yes.

Police should be required to disclose all potentially disclosable material to the DPP. This is needed so that there is some oversight over police views as to:

a. What is relevant or irrelevant to an accused person?
b. What material ought be disclosed to an accused person?
c. Whether police are validly making a claim of public interest immunity (PII)?
d. Whether other considerations, in any given case, override concerns based on PII?

Question 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? (E.g. can such disclosure be appropriately made through the use of the Form 30 or the Form 11 or are other means more appropriate?) Why or why not?

The existing mechanisms by which an accused person is notified of the existence of such material are appropriate if the forms are properly completed with due consideration to all the material in possession of the police which is, or may be, relevant.

Appropriate disclosure of the existence of relevant material, which may be subject to a claim of public interest immunity, could be done using the Form 30 or Form 11. This is on the proviso that such forms are filled in fully, accurately and correctly.

These forms often appear to be filled in as an afterthought, once the brief has been compiled, by investigating police. On occasions it appears that little thought has gone into completing such forms.

Ideally, these forms should be progressively prepared while a brief is being compiled so that all relevant and disclosable materials, that do not end up in the brief, are properly listed in these forms.

As an example, the Form 30 on a hand up brief is often prepared based on a pro forma list of material police would 'usually' have in their possession. Material not in the possession of the police, in any given case, is crossed off. The remaining documents, from the pro forma list, are the documents that are in possession of the police but are not being relied on by the

prosecution. This means police don't have to sit down, with every case, and actually consider what they have.

This is the main avenue by which the defence are advised of disclosable material in the possession of police.

Question 4 - Would the introduction of a disclosure certificate along the lines of the disclosure certificate provided for in Schedule 1 of the Director of Public Prosecutions Regulation 2015 (NSW) help facilitate the provision of relevant material from investigating police to the DPP?

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?

Yes, the introduction of such a disclosure certificate has considerable merit.

The explanation of how that disclosure certificate works in NSW, as outlined in the consultation paper, would address a number of concerns about the current disclosure practices in Victoria. It would also place a requirement on police to be fully transparent with the DPP about all the material in its possession.

The main advantage is the requirement on the police to list all material in their possession which is potentially disclosable subject to valid claims to resist production to defence.

It would also be of assistance in summary matters and the requirement for it to be done in both indicatable and summary prosecutions would mean police have to deal with these matters consistently.

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

Yes. There should be such a statutory requirement as exists in NSW. This requirement would mean any police decision to claim PII is susceptible to independent review from the DPP.

Police would know they cannot simply claim PII, or refuse to give the DPP material if requested, and be immune from oversight from the DPP. It would be a necessary check and balance to be used at the discretion of the DPP.

It would create a two step-procedure – which appears to have been adopted in NSW – in that:

1. Police have to disclose the existence of all relevant material to the DPP: s.15A of the *Director of Public Prosecutions Act* 1986 (NSW). At first instance police do not have to provide any material subject to a claim of PII to the DPP;
2. The police only have to provide that material if so requested by the DPP.

This would allow the DPP to consider the list of potentially disclosable material and in any given case, where there may be concerns, ask to see the material.

Question 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?

We have no experience with this situation arising given the unique factual circumstances surrounding the use of Lawyer X. A person who had legal obligations of privilege.

There are not adequate safeguards in place in this scenario – based on what happened with Lawyer X primarily (if not exclusively) concerning indictable matters. Such a situation could arise again in the future concerning summary prosecutions and adequate safeguards (or checks and balances) are not put in place based on what happened in connection with Lawyer X.

Question 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?

The key benefits and challenges are properly and fairly addressed in the Consultation Paper. This document highlights the system in Victoria and contrasts it with other systems.

From the CBA's perspective the key issue in improving the current system is properly training all police who investigate and compile briefs of evidence about:

1. Relevance – ie relevant to the prosecution case and for an accused meeting that case;
2. When a claim of PII or Legal Professional Privilege ('LPP') can appropriately and legitimately be made;
3. The duty of disclosure;

4. Ethical approaches to investigating criminal conduct – in other words the end result does not always justify the means used to get there.

Question 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?

Yes – the involvement of the DPP can only assist police in grappling with what are often difficult considerations surrounding the application of PII.

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

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 concerns the CBA have, about police understanding these matters, is addressed in our answer to question 7.

The use of trained and dedicated disclosure officers, such as those utilized in the United Kingdom, could improve the way the system currently works.

Question 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? (e.g. does the volume of material obtained in some investigations present any challenges?)

There is little doubt that due to the complexity and size of modern criminal investigations, along with advancements in technology, it is more challenging for police and prosecutors to discharge their obligations where PII issues arise.

As a general proposition, the size of briefs of evidence have increased markedly over the last 20 years. In addition the size of material that is disclosable, but not relied on by the prosecution has also grown exponentially. This is certainly the position in the following types of cases:

- Drug importations;
- Drug Trafficking;
- White collar fraud;

- Foreign bribery;
- Terrorism.

To name but a few examples.

As a direct result, the obligation on police and prosecutors to properly identify material that is, or may be, subject to PII has increased significantly. The sheer volume of material held by police / prosecutors in certain investigations may mean that the time they have to decide whether or not to claim PII is very limited.

Question 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?**

In this respect, we rely on the answers provided to question 1 – 10 above.

The CBA would welcome the opportunity to contribute further to the work of the Commission. Please contact me, or our Secretary, Simon Moglia in the first instance.

Yours faithfully,

Daniel Gurvich QC
Chair
Criminal Bar Association of Victoria