ASPECTS OF ETHICS: Confidentiality, conflict, and duty to your client

> ***"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 (AB v CD; EF v CD [2018] HCA 58 at [10]."***

On 3 December 2018, the Premier of Victoria announced that the Victorian Government would establish a Royal Commission to independently inquire into Victoria Police's recruitment and management of a class of informants. The scope of that inquiry is summarised at the *Royal Commission into Management of Police Informants* website[1]*:*

As part of its inquiry, the Royal Commission will examine the number of, and extent to which, cases may have been affected by the conduct of Ms Nicola Gobbo, a criminal defence barrister who was, at various times between 1 January 1995 and 13 January 2009, acting as a police informant with Victoria Police. She was referred to as 'EF' in recent court cases, informant '3838' and other informant numbers by Victoria Police, and was often referred to as 'Lawyer X' in the media.

In addition, the Commission will examine the adequacy and effectiveness of Victoria Police's current processes for disclosures about recruiting, handling and managing human sources who are subject to legal obligations of confidentiality or privilege, including any informants who come to the Commission's attention during its inquiry. The Commission will also examine the use of such human source information in the broader criminal justice system, including whether these procedures should be used, and if so, how they can be best implemented in the future.

The terms of reference for the Royal Commission can also be found at https://www.rcmpi.vic.gov.au/the-commission.

The announcement of the Royal Commission followed decisions of the High Court of Australia (*AB v CD; EF v CD* [2018] HCA 58), the Victorian Court of Appeal (*AB v CD & EF* [2017] VSCA 338) and the Supreme Court of Victoria (*AB & EF v CD* [2017] VSC 350; *E F v C D* [2017] VSC 351) regarding a former criminal defence barrister Ms Gobbo recruited by Victoria Police as an informant. In *AB v CD; EF v CD* [2018] HCA 58, the High Court summarised the background of the matter as follows at [1]:

Early in February 2015, the Victorian Independent Broad-based Anti-corruption Commission provided to the Chief Commissioner of Victoria Police (" AB "), and AB in turn provided to the Victorian Director of Public Prosecutions ("CD"), a copy of a report ("the IBAC Report") concerning the way in which Victoria Police had deployed EF, a police informer, in obtaining criminal convictions against Antonios ("Tony") Mokbel and six of his criminal associates ("the Convicted Persons"). ***The Report concluded among other things that EF, while purporting to act as counsel for the Convicted Persons, provided information to Victoria Police that had the potential to undermine the Convicted Persons' defences to criminal charges of which they***

[1] https://www.rcmpi.vic.gov.au/the-commission

were later convicted and that EF also provided information to Victoria Police about other persons for whom EF had acted as counsel and who later made statements against Mokbel and various of the other Convicted Persons. *Following a review of the prosecutions of the Convicted Persons, CD concluded that he was under a duty as Director of Public Prosecutions to disclose some of the information from the IBAC Report ("the information") to the Convicted Persons (emphasis added)."*

The Court went on to state at [7] –[10]:
7. The full written arguments thereafter presented by all parties and interveners made it apparent, as it was not apparent at the time of granting special leave to appeal, that the only arguable issue underpinning the various grounds of appeal was whether it was no longer possible adequately to protect the safety of EF and her children in the event of disclosure. Accordingly, in order to clarify the relevant facts that had been the foundation of the grant of special leave, the Court sought from AB, and was provided with, further detailed evidence as to what can be done to secure the safety of EF and her children in the event of disclosure. The effect of that evidence is that the safety of EF and her children may adequately be protected if EF agrees to enter into the witness protection program.

8.Given that conclusion, the parties were invited to present oral argument as to why special leave to appeal should not now be revoked, and, today, their oral arguments were heard in camera. Having now considered those arguments, the Court is unanimously of the view that special leave to appeal should be revoked.

9. As Ginnane J and the Court of Appeal held, there is a clear public interest in maintaining the anonymity of a police informer, and so, 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.

10. Here the situation is very different, if not unique, ***and it is greatly to be hoped that it will never be repeated. 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. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF 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. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.*** *It follows, as Ginnane J and the Court of Appeal held, that the public interest favouring disclosure is compelling: the maintenance of the integrity of the criminal justice system demands that the information be disclosed and that the propriety of each Convicted Person's conviction be re-examined in light of the information. The public interest in preserving EF's anonymity must be subordinated to the integrity of the criminal justice system (emphasis added)."*

The Age newspaper in Victoria published an article on 3 December 2018 titled*"In her own words: Why a top criminal barrister became Informer 3838*[2]*"* in which an excerpt from a letter written by Ms Gobbo to the Assistant Commissioner of Police in June 2015 seeking additional compensation was published, including the following passage setting out her explanation of how and why she became a registered police informer:

"It has been conveyed to me that it would assist you if I was able to provide details of a "Top 10" kind of list of operations/investigations in which I played a role. It would be unfair and a failure to appreciate the level of my diligence and commitment if that was the only measure by which you assessed my assistance. For that reason, knowing that there are literally thousands of hours of recorded conversations and debriefings as well as many thousands of documents proving without doubt, the immense assistance I provided over a number of years, I am also including some detail as to how and why I began to provide intelligence to Victoria Police and what my assistance included. As I hope you are aware, I helped because I was motivated by altruism rather than for any personal gain.

My actual assistance to Victoria Police began informally via Purana not long after the taskforce was initially formed in 2004. I met as he then was, Detective Sergeant Stuart Bateson on a number of occasions starting in early 2004 which of course was at the height of Melbourne's gangland war and at a time when the refusal to assist police by anyone involved or with any knowledge was frustrating investigators. What led me to do that was my own frustration with the way in which certain criminals (Carl Williams) were seeking to control what suspects and witnesses could and could not do or say to Police via solicitors who were not in my view, acting in the best interests of their clients because of the undue influence and control of "heavies" such as Williams.

*I provided Bateson with information that was of value to investigators in the months prior to suffering a stroke in late July 2004 and again afterwards. In the lead-up to my illness, I played a pivotal role in convincing [*Redacted] to "roll over" on Williams and others and withstanding undue pressure from the Williams' crew (and Tony Mokbel) to try to get him to stay silent. I kept Bateson informed of all of this including solicitors perverting the course of justice and conspiring with criminals to try to ensure a number of gangland murders would remain unsolved or uncharged. As has been documented in the years that followed [*Redacted] deciding to help police, his actions (in becoming a witness for Police) created a precedent for others to follow and was the crack in the damn wall of silence that led to a flood. He laid the foundation for the prosecution of numerous murderers and others followed his example.*

During 2005 I became aware of high-level drug trafficking, money laundering, witness tampering, firearm offences and a variety of other serious criminal activity by virtue of the contact I had with certain clients and their "crews" and "supporters". I also watched as Police either totally failed to investigate much of this offending or, failed in being able to obtain evidence to be able to arrest and charge offenders.

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[2] *https://www.theage.com.au/national/victoria/in-her-own-words-why-a-top-criminal-barrister-became-informer-3838-20181203 p50jug.html?fbclid=IwAR2xYoi1xV1atffnh4jPPK9MY9VMxIHtSh-pyBTX8Y9kJSgkVwJ2vfvUOws)*

By September 2005 certain events and circumstances led to me formally starting work as registered informer 3838 (again as an aside, journalists have used that detail as well as the names of my handlers when informing me of the information police sources have provided to them). My breaking point came when I was threatened by Tony Mokbel to ensure that a first-time offender who was operating pill presses and manufacturing tens of thousands of MDMA pills for him, kept his mouth shut and pleaded guilty after he was arrested by the then MDID.

Although Mokbel did not actually say that his underling was being financed and supplied by him, it became obvious to me when I was provided with a remand summary and later a brief of evidence by Police. This kind of scenario had happened numerous times in circumstances in which I was dealing with high-level drug syndicates, all of whom had individuals who were the targets of police investigations and many of which were involved, directly or indirectly with the gangland murders.

To try to encompass my actual value, reliability and work for Victoria Police in any summary is immensely difficult because from 16 September 2005, I spoke to my handlers on a daily basis, often 7 days a week for a couple of years. Again, the media has informed me, that there are approximately 5500 Information Reports generated from information I provided to Police. There was no topic, criminal, organised crime group or underworld crime that was "off limits" during the many debriefing sessions that occurred or during the years that followed until Overland decided to utilise me as a witness in 2009 when everything fell apart. I didn't appreciate that at the time I made the decision to become a witness for Victoria Police I had been put in a situation in which every assurance given to me was a lie and more importantly, that the investigators who took my statement were not made aware of the very real problems with respect to my safety and status."

It is now apparent that Ms Gobbo's involvement as an informer substantially predated 2004/2005.

On 4 December 2018, the Law Council of Australia issued the following media release stating that Lawyer X's conduct was unethical and clear breach of rules:

"The Law Council of Australia has expressed deep concern about disclosures legal counsel acted as a police informer.

Law Council of Australia President, Morry Bailes, said the disclosures reveal a clear breach of legal professional rules and reinforced the need for properly resourced oversight bodies to supervise the activities of law enforcement.

"A lawyer purporting to act as counsel for the convicted person, while also covertly informing against them, is a fundamental breach of a lawyer's duties to the court," Mr Bailes said.

"As a result, and as noted by the High Court, the prosecution of each convicted person was corrupted in a manner which debased fundamental premises of the criminal justice system.

"Client legal privilege is a fundamental protection and pillar of the Australian legal system. It ensures full and frank discussions between legal advisers and their clients. This promotes the administration of justice and encourages compliance with the law. It must not be abrogated in any circumstance.

"Incursions against privilege have a deleterious impact on the lawyer-client relationship, by impairing the trust and confidence a client would otherwise have. A client should know their legal adviser will not be forced to disclose the information they provide. This confidence is necessary for them to develop a full understanding of their rights and responsibilities under Australia's complex and ever-changing system of laws.

"The rationale for legal professional privilege is to enhance the administration of justice and the proper conduct of litigation by promoting free disclosure between clients and lawyers. It also enables lawyers to give proper advice and representation to their client.

"The High Court case also highlights the need for strong and properly resourced oversight bodies to supervise the activities of law enforcement. Police also need to be educated to ensure they do not seek to interfere with legal professional privilege," Mr Bailes said."

What are the relevant ethical obligations?

The balance of this paper will set out some of the relevant rules applicable to barristers in New South Wales with reference to the *Legal Profession Uniform Conduct (Barristers) Rules 2015* with a view to generating discussion regarding their application to the case discussed above. The Uniform Law and Uniform Rules have been implemented in New South Wales. The professional conduct of barristers the NSW is governed by the *Legal Profession Uniform Conduct (Barristers) Rules 2015 (*'Bar Rules'), which came into operation on 1 July 2015. The Bar Rules are not intended to be a complete code of conduct for barristers or solicitors (See Bar Rule 7), but will be the focus of this paper.

The object of the Bar Rules, and the principles underpinning those Bar Rules are set out at Bar Rule 3 and 4 as follows:

3 Objects
The object of these Rules is to ensure that barristers:
(a) act in accordance with the general principles of professional conduct,
(b) act independently,
(c) recognise and discharge their obligations in relation to the administration of justice, and
(d) provide services of the highest standard unaffected by personal interest.

4 Principles
These Rules are made in the belief that:
(a) barristers owe their paramount duty to the administration of justice,
(b) barristers must maintain high standards of professional conduct,
(c) barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully, bravely and with competence and diligence,

(d) barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues,
(e) barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients, and
(f) the provision of advocates for those who need legal representation is better secured if there is a Bar whose members:
(i) must accept briefs to appear regardless of their personal beliefs,
(ii) must not refuse briefs to appear except on proper professional grounds, and
(iii) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

The specific Bar Rules that bear consideration in the circumstances discussed above include the following:

Advocacy rules

8 General *A barrister must not engage in conduct which is:*

(a) dishonest or otherwise discreditable to a barrister,

(b) prejudicial to the administration of justice, or

(c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

10 Use of professional qualification *A barrister must not use or permit the use of the professional qualification as a barrister for the advancement of any other occupation or activity in which he or she is directly or indirectly engaged, or for private advantage, unless that use is usual or reasonable in the circumstances.*

23 Duty to the court *A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice.*

24 *A barrister must not deceive or knowingly or recklessly mislead the court.*

35 Duty to the client *A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.*

69 Integrity of evidence *A barrister must not:*
(a) advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so, or
(b) coach a witness by advising what answers the witness should give to questions which might be asked.

82 *A barrister whose client threatens the safety of any person may, notwithstanding rule 114, if the barrister believes on reasonable grounds that there is a risk to any person's safety, advise the police or other appropriate authorities.*

101 Briefs which must be refused or must be returned *A barrister must refuse to accept or retain a brief or instructions to appear before a court if:*

(a) the barrister has information which is confidential to any other person in the case other than the prospective client, and:

(i) the information may, as a real possibility, be material to the prospective client's case, and

(ii) the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case,

(b) the client's interest in the matter or otherwise is or would be in conflict with the barrister's own interest or the interest of an associate,

(c) the barrister has a general or special retainer which gives, and gives only, a right of first refusal of the barrister's services to another party in the case and the barrister is offered a brief to appear in the case for the other party within the terms of the retainer,

(d) the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case,

(e) the brief is to appear on an appeal and the barrister was a witness in the case at first instance,

(f) the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case,

(g) the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee,

(h) the brief is on the assessment of costs which include a dispute as to the propriety of the fee paid or payable to the barrister, or is for the recovery from a former client of costs in relation to a case in which the barrister appeared for the client,

(i) the brief is for a party to an arbitration in connection with the arbitration and the barrister has previously advised or appeared for the arbitrator in connection with the arbitration,

(j) the brief is to appear in a contested or ex parte hearing before the barrister's parent, sibling, spouse or child or a member of the barrister's household, or before a bench of which such a person is a member, unless the hearing is before the High Court of Australia sitting all available judges,

(k) there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules,

(l) the barrister has already advised or drawn pleadings for another party to the matter, or

(m) the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises.

114 Confidentiality & conflicts *A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential unless or until:*

(a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister, or

(b) the person has consented to the barrister disclosing or using the information generally or on specific terms.

115 *A barrister must not disclose (except as compelled by law) or use confidential information under rule 114 (b) in any way other than as permitted by the specific terms of the person's consent.*

118 *A barrister must return a brief other than a brief to appear as soon as possible after the barrister becomes aware that the barrister has information confidential to a person other than the client which may, as a real possibility, be material to the client's case or to the advancement of the client's interests, being information which the barrister is prohibited from disclosing or using unless the person entitled to the confidentiality consents to the barrister disclosing or using the information as the barrister thinks fit.*

119 *A barrister who is briefed to appear for two or more parties in any case must determine as soon as possible whether the interests of the clients may, as a real possibility, conflict and, if so, the barrister must then return the brief for:*

(a) all the clients in the case of confidentiality to which rule 114 would apply, or

(b) one or more of the clients so as to remove that possibility of conflict.

A the time of writing this paper, it was yet to be clarified whether any NSW lawyers were, or had been, acting as police informers against their clients in breach of their ethical obligations.

Paper prepared by Winston Terracini SC and Claire Wasley

Terracini will speak to the paper at the conference on March 22.