

Protocol for engagement and resolution of complex issues arising from disclosure obligations and public interest immunity claims



VICTORIA POLICE

1. Purpose

The purpose of the protocol is to clearly set out the processes and procedures to be followed by Victoria Police when engaging with the Victorian Government Solicitor's Office (**VGSO**) and the Director of Public Prosecutions (**DPP**) to navigate and make decisions about complex issues of relevance, disclosure and public interest immunity (**PII**).

This protocol is to be read in conjunction with the [Policy of the Director for Public Prosecutions \(Policy\)](#), in particular Chapters 1, 2 and 10.

2. Background

The Royal Commission into the Management of Police Informants (the Commission) inquired into the recruitment and use by Victoria Police of defence barrister Ms Nicola Gobbo as a human source and the failure to disclose her conduct. The Commission examined the adequacy of current processes for the management of human sources with legal obligations of confidentiality or privilege and the use and disclosure of information from such human sources in the criminal justice system.

The Commission made 111 recommendations which include the implementation of reforms to strengthen human source management processes, establish independent oversight and reinforce police disclosure obligations.

Recommendation 68 is the genesis for this protocol and provides:

That the Victorian Director of Public Prosecutions, Victoria Police, the Victorian Government Solicitor's Office and any other relevant stakeholders work together to establish clear protocols and procedures, within 12 months, to facilitate effective engagement with, and resolution of, complex issues arising from disclosure obligations and public interest immunity claims.

These protocols and procedures should:

- a. ensure Victoria Police has adequate and early support, including legal advice, when making complex decisions about relevant and disclosable information that may be subject to public interest immunity;*
- b. tailor the level of support provided to Victoria Police, to enable greater support in cases involving complex public interest immunity and disclosure issues;*
- c. ensure the Director's independence is maintained and potential conflicts of interest are avoided.*

3. Scope

The protocol relates to complex issues arising from disclosure obligations ¹and PII claims.

4. Complex issues relating to disclosure

Complex issues relating to disclosure are to be assessed on a case by case basis and may include matters where:

- the prosecution involves the intersection of more than one large or otherwise complicated investigation which may involve other investigative agencies;
- there are complex considerations of relevance or possible relevance in the context of highly sensitive material;
- a substantial amount of material exists, either electronically or in hardcopy, such as data extracted or downloaded from an electronic device; or
- material exists belonging to an accused or a third party which is the subject of client legal privilege.

4.1 Process for seeking advice on complex disclosure issues when PII is not involved

4.1.1 Pre-charge process

Where disclosure-related questions arise prior to charges being filed, please refer to Chapter 10 of the Policy for guidance on requesting advice.

4.1.2 Post charge process

In matters being prosecuted by the OPP, following the filing of charges and the allocation of a solicitor to conduct the prosecution, Informants can seek assistance from that solicitor in relation to relevance and complex disclosure issues, other than those involving PII.

Informants will engage with the OPP solicitor with a view to seeking assistance in relation to a specific issue and will not provide voluminous material to undertake determinations of relevance or apply appropriate redactions.

If the OPP solicitor considers it appropriate, the Informant may be directed back to seek further advice or assistance from Victoria Police Disclosure Management Unit (VPDMU) and/or the VGSO. In these circumstances, if necessary, VPDMU and/or the VGSO may request the OPP solicitor to assist in identification of:

- a. the likely facts in issue;
- b. any defences likely to be available to the accused; and
- c. any lines of inquiry likely to be opened by the material in question.

¹ Pursuant to both the *Criminal Procedure Act 2009 (Vic)* and Common Law.

5. Process involving potential claims of PII

- 5.1 Where material may be the subject of PII the Informant will:
 - 5.1.1 discuss the material with their Work Unit Manager;
 - 5.1.2 consult the Victoria Police Disclosure Manual (prepared by the VGSO) and/or Chief Commissioner's Instruction – Disclosure;
 - 5.1.3 obtain assistance from the VPDMU; and/or
 - 5.1.4 seek independent legal advice and representation from the VGSO.
- 5.2 If the material in question is ultimately considered relevant but not subject to PII, it will be disclosed in accordance with usual practice.
- 5.3 If it is determined that the material in question ought be the subject of a claim for PII, the VGSO will:
 - 5.3.1 inform the OPP solicitor with conduct of the file of the existence and nature of the PII material and the basis of the claim to the extent possible without prejudicing the claim itself;
 - 5.3.2 inform the OPP solicitor of its opinion whether, on a sensible appraisal, the material substantially weakens the case for the prosecution or substantially strengthens that of the defendant;
 - 5.3.3 advise whether an application for a PII hearing will be made to the court on an *ex parte* basis or alternatively, notify the court and all parties of the claim being made;
 - 5.3.4 not provide any material subject to a claim of PII to the OPP solicitor;
 - 5.3.5 seek a ruling from the court; and
 - 5.3.6 inform the OPP solicitor of the court's determination.
- 5.4 Upon request, the OPP solicitor with conduct of the file will:
 - 5.4.1 advise the VGSO of impending court dates/listings; and
 - 5.4.2 advise of any developments in the prosecution or accused case which may have a bearing on a PII claim (e.g. Notice of Alibi or identification issues), including any plea offers.

6. Requests to consult the DPP on PII issues

6.1 Requests to consult the DPP prior to a PII ruling

If Victoria Police or the VGSO determine that material the subject of a PII claim:

- a. will inevitably lead to an unfair trial if not disclosed; and/or
- b. undermines the case for the prosecution to such a degree as to require discontinuance

a request to consult the DPP may be made.

6.2 Requests to consult the DPP after a PII ruling

6.2.1 Where PII claim rejected

Where a court has ruled against a PII claim the material may be provided to the DPP for review to determine whether the matter ought be discontinued. Victoria Police or VGSO may wish to seek a temporary stay of the court's order to enable this review prior to disclosure to the accused.

6.2.2 Where PII claim upheld

The DPP may be consulted in circumstances where a PII claim has been upheld but it appears to Victoria Police or the VGSO that an unfair trial will result if the material is not disclosed.

6.3 Process for making a request to consult the DPP

6.3.1 A request to consult is to be in writing, addressed to the OPP solicitor with conduct of the matter and:

- a. state the nature of the issue requiring assistance;
- b. include the reason that DPP advice is required; and
- c. may be accompanied by information on the nature of the relevant material but not information about the content of it.

6.3.2 No material subject to, or likely to be subject to a PII claim is to be provided with the request.

6.3.3 The VGSO will provide any further information if requested by the DPP.

7. DPP Consultation

7.1 It is a matter for the DPP to determine whether a request to consult on PII issues will be accepted.

7.2 It is also a matter for the DPP to determine whether the circumstances of the matter warrant disclosure to the DPP of details of the content of PII material or the material itself. Only in the most exceptional cases will the DPP request this information unless a PII claim has been rejected by a court.

7.3 Where the DPP requests details of the content of PII material or the material itself in circumstances where a PII claim has not been made, that material or information derived therefrom will not be disclosed to defence prior to providing the Chief Commissioner with opportunity to make an application for PII before the court.

Update history

DATE UPDATED	SUMMARY OF CHANGE	VERSION
20/01/22	Protocol settled by DPP, Victoria Police and VGSO	1.0