



# **Submission to the Royal Commission into Management of Police Informants**

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## Organisational Context

1. The International Commission of Jurists Victoria ("ICJV") is a volunteer organisation of lawyers, Judges and academics. It is committed to the primacy, coherence and implementation of international legal principles that advance human rights. ICJV promotes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law.
  
2. ICJV strives to:
  - a) promote adherence to, and observance of, the *Universal Declaration of Human Rights*<sup>1</sup> and other similar international instruments;
  
  - b) promote the conclusion, ratification and implementation of conventions, covenants and protocols protecting human rights, especially in Australia, Southeast Asia and the Pacific;
  
  - c) provide an organisation through which the legal profession and others interested in human rights can protect and sustain the rule of law and promote the observance of human rights and fundamental freedoms;
  
  - d) help, advise and encourage all who seek to achieve, by means of the rule of law, universal respect for the observance of human rights and fundamental freedoms;
  
  - e) co-operate with similar organisations in Australia and other countries through the channels provided by ICJ Geneva and other available means; and

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<sup>1</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1938).

- f) examine new proposals that affect the administration of justice, both domestic and abroad.

## **Focus of Submission**

3. This submission is designed to assist the Royal Commission into the Management of Police Informants ("RCMPI") in relation to some international principles and comparative domestic approaches regarding the use of human sources who are subject to legal obligations of confidentiality or privilege, including informants (privileged human sources, or "PHS"). Accordingly, this submission probably sits most neatly into term of reference ("TOR") 6: "*Any other matters necessary to satisfactorily resolve the matters set out in paragraphs 1-5*". We also suggest some areas that may need further research.

### **This submission takes three parts:**

- **Section 1: international standards regarding PHS;**
- **Section 2: suggested areas for further research: children, women, fair trial rights and institutional integrity; and**
- **Section 3: bibliography of useful sources.**

## **Section 1: International Standards Regarding "Privileged" Human Sources ("PHS")**

### **A. Background**

4. There is almost nothing by way of law specifically regulating police use of PHS in Victoria. Combined with the covert context in which PHS are used, police in Victoria have long exercised what amounts to broad

discretionary powers without external oversight, with a consequent breach of the separation of powers in the manner warned against by CJ Gleeson: *“to guard against vesting in the police discretionary powers which, for practical purposes, may amount to powers to make law, or to dispense with the compliance with the law”, and “it is not the function of the police to make the law, or to decide by whom, and to what extent, the law is to be obeyed”*.<sup>2</sup>

5. RCMPI TORs 3 and 4 require an outline of the current state of practices relating to PHS by police, and by prosecuting authorities. Although a full understanding of those practices will not be clear until the outcome of the RCMPI, the following concerns are noted:
  - a. policy/practice around the authorisation and use of PHS in Victoria is opaque, and the circumstances that led to the Informant 3838 matter indicate either a systemic failing within the context of an opaque framework, and/or the lack of an adequate framework.
  - b. no broad-based inquiry has been conducted in Victoria in almost four decades, despite such inquiries having been conducted in other Australian jurisdictions.<sup>3</sup>
  - c. IBAC and the High Court have, in 2015 and 2018 respectively, strongly criticised Victoria Police’s conduct in managing human sources.<sup>4</sup>

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<sup>2</sup> Hon Murray Gleeson, ‘Keeping the Peace – Police Accountability and Oversight’ (Conference Paper, Police and Accountability and Oversight: A National Conference, 1993).

<sup>3</sup>The Neesham Inquiry was conducted in 1982-84 in Victoria. Since then, major inquiries have occurred in Queensland (Fitzgerald Inquiry, 1987-89) and New South Wales (Wood Royal Commission 1995-97).

<sup>4</sup> IBAC, ‘Inquiry into Victoria Police Human Source Management Concludes’ (Media Release, 10 February 2015) < <https://www.ibac.vic.gov.au/media-releases/article/inquiry-into-victoria-police-human-source-management-concludes>>: “An independent inquiry has found negligence of a high order in the management of human source information by Victoria Police. In examining certain police conduct in managing

6. This submission does not necessarily accept that the use of PHS is appropriate. However, to the extent that it is proposed that a limited use of PHS be permitted under specific circumstances, a clear and robust framework for the use of PHS is necessary. To this end, examples of principles relevant to the treatment of PHS in an international context, as well as under the comprehensive framework of the United Kingdom, are outlined in this submission. The documents referred to are footnoted and in the bibliography (section 3).

## **B. International**

7. The following international sources show the requirement that law enforcement be conducted in accordance with human rights, including the right to a fair trial and the right to privacy. Broadly, these sources outline principles and minimum standards to protect privileged communications between a client and a lawyer, as part of international human rights law (IHRL), and note that respect for the rule of law requires adequate policies and procedures to protect individuals' rights.

i. UN General Assembly: Code of Conduct for Law Enforcement Officials

8. In A/Res/34/169, adopted by the General Assembly on 17 December 1979, the Assembly noted that "*[i]n the performance of their duty, law enforcement officials shall respect and protect human dignity and*

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*information from human sources, The Hon Murray Kellam AO QC concluded that Victoria Police had failed to act in accordance with appropriate policies and guidelines".*

*AB (a pseudonym) v CD (a pseudonym) [2018] HCA 58, 10 "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".*

*maintain and uphold the human rights of all persons”* (article 2).<sup>5</sup> The commentary to this article notes that these human rights are identified and protected by national and international law, including through their inclusion in relevant international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Standard Minimum Rules for the Treatment of Prisoners, etc.

ii. USIP Model Code

9. The United States Institute of Peace (USIP), in collaboration with the Irish Centre for Human Rights, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Office on Drugs and Crime (UNODC), has published Model Codes for Post-Conflict Criminal Justice (USIP Model Codes)<sup>6</sup> for use by international and national actors engaged in criminal law reform processes. While contemplated for deployment in settings where the rule of law is not well established, such as in post-conflict states, the model codes set out principles that apply in both developed or developing rule of law environments. The model codes were drafted in consultation with over 300 leading experts and assessed for compatibility with legal systems worldwide, with substantive and procedural provisions that are based on practices in various cultural settings.

10. The USIP Model Codes contain a model code of criminal procedure, which provides that privileged written or other records must be excluded from evidence at trial, unless: the accused consents in writing to their

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<sup>5</sup> GA Res 34/169, UN GAOR, 106<sup>th</sup> plen mtg, UN Doc A/RES/34/169 (17 December 1979) art 2.

<sup>6</sup> United States Institute of Peace, *Model Codes for Post-Conflict Criminal Justice* (Endowment of the United States Institute of Peace, 2008) (“USIP Model Codes”).

admission; or the privilege has otherwise effectively been waived (Articles 230(2)(d), 233).<sup>7</sup> Similarly, counsel for an accused is not required to testify at trial about communications with the accused, and may not do so without the consent of the accused (Article 244).<sup>8</sup> The basis of these Articles is IHRL, which provides that privileged communications between a client and a lawyer may not be the subject of a warrant for covert or other technical measures of surveillance (Article 136, commentary).<sup>9</sup>

iii. ICRC International Rules and Standards for Policing (2015) (ICRC Rules)

11. The International Committee of the Red Cross (ICRC) has prepared Rules and Standards for Policing<sup>10</sup> to assist stakeholders to understand the international legal framework applicable to the law enforcement task, with the objective of promoting respect for the law and the protection of individuals. In this regard, the ICRC Rules state that law enforcement officials must respect human rights when exercising powers by observing four fundamental principles:<sup>11</sup>

- a. principle of legality: that all action should be based on provisions of the law;
- b. principle of necessity: action should not affect or restrict human rights more than is necessary;
- c. principle of proportionality: action should not affect human rights in a way that is disproportionate to the aim;

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<sup>7</sup> Ibid art 230(2)(d) and art 233.

<sup>8</sup> Ibid art 244.

<sup>9</sup> Ibid art 136; Ibid commentary.

<sup>10</sup> International Committee of the Red Cross, *International Rules and Standards for Policing* (Report, June 2015).

<sup>11</sup> Ibid 18.



- d. principle of accountability: those carrying out the action should be fully accountable to all relevant levels (the judiciary, the public, the government and the internal chain of command).

12. The ICRC Rules note that *"it is all too easy for 'the end justifies the means' attitudes to be adopted in an environment in which serious crimes have been committed and where the difficulties of working in such an environment contribute to the development of group ethics and individual sets of standards. The leadership of law enforcement agencies therefore needs to be aware of the inherent risk of such group ethics fostering 'grey policing' that may not always comply fully with the law"*. Therefore, clear written rules are required to establish what is expected of individual law enforcement officials, as *"to foster a culture of respect for the rule of law requires a set of measures to be taken at all levels – policies and procedures, education, training and equipment – as well as an effective system of sanctions to enforce respect for the rules and regulations"*.<sup>12</sup>

13. Respect for human rights requires balancing the rights of victims and society in general with the rights of those who may be affected by law enforcement work. IHRL provides the legal framework by setting out guarantees and rights to be respected throughout the entire process from the initial stages of the investigation. The right to a fair trial is a fundamental such right, and includes the right to effective defence, legal counsel and unimpeded communication with the legal counsel. In particular, *"proactive information gathered through the use of informants needs to be particularly controlled, preventing any tampering with the process"*.<sup>13</sup> Further, law enforcement agencies are required to respect privileged communications, and the right to effective defence requires that an accused is able to communicate freely and openly with

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<sup>12</sup> Ibid 19.

<sup>13</sup> Ibid 21.

legal representatives without fear that the content of the communication might be used against them, for which reason "*this communication must therefore take place in a protected, confidential environment that is not exposed to surveillance or control by law enforcement agencies*".<sup>14</sup>

iv. UNODC

*"The Integrity and Accountability of the Police" 2006, Criminal Justice Assessment Toolkit (UNODC Code)*<sup>15</sup>

14. The UNODC Code provides standards for key drivers in the institutionalisation of police integrity, and is intended to be introduced into national legislation and practice. It states that: there should be adequate systems for using, managing and supervising informants; staff recruiting and meeting with informants should be properly trained and close personal relationships between handlers and informants should be discouraged; risk assessments should be made before deployment; and adequate records should be kept.

*Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice (UN CJ Standards)*<sup>16</sup>

15. Under Article 18 of the UN CJ Standards, a detained or imprisoned person shall be entitled to communicate and consult with his legal counsel, and shall have the right to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel. This right may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful

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<sup>14</sup> Ibid 46.

<sup>15</sup> United Nations Office on Drugs and Crime, *Handbook on Police Accountability, Oversight and Integrity* (Report, July 2011).

<sup>16</sup> United Nations Office on Drugs and Crime, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (Report, 2006) art 18.

regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. As a corollary to this right, interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official, and communications between a detained or imprisoned person and his legal counsel shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

16. Further, under the UN CJ Standards' "Basic Principles on the Role of Lawyers",<sup>17</sup> the Standard Minimum Rules for the Treatment of Prisoners provides that legal assistance and confidential communication with counsel should be ensured to untried prisoners, and that Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

v. European Convention on Human Rights (ECHR)<sup>18</sup>

17. "ECHR and Policing – A handbook for police officers and other law enforcement officials" provides that the use of human sources should be limited, with reference to the potential for depriving an accused of the right to a fair trial. It notes that the European Court of Human Rights (ECtHR) has observed that adequate and sufficient safeguards against abuse of investigative measures must exist, in particular a clear and foreseeable procedure for authorising, implementing and supervising

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<sup>17</sup> Ibid 42.

<sup>18</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR').

the measures in question (see e.g. *Ramanauskas v Lithuania*, judgment of 5 February 2008).<sup>19</sup>

### C. United Kingdom

18. The Covert Human Intelligence Sources Revised Code of Practice (“UK Code of Practice”)<sup>20</sup> was issued in August 2018 under the Regulation of Investigatory Powers Act 2000 (“the UK RIPA”),<sup>21</sup> which Act provides for the authorisation of the use or conduct of human sources (HS).<sup>22</sup> The UK Code of Practice provides guidance on the requirements of the Act and of the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order of 2010 (“the 2010 UK Order”).<sup>23</sup> In this way, it provides an explanation of the relationship of HS (including PHS) and public authorities, including use of HS and of information obtained from them. The use of PHS is unsurprisingly subject to greater restrictions and requirements for authorisation. The UK Code of Practice itself is admissible as evidence in both civil and criminal proceedings, and public authorities are required to justify their actions with regard to the UK Code of Practice, given that it reflects requirements of its parent legislation.

19. Observers have noted that the primary function of the UK RIPA with respect to PHS is to ensure an investigative authority’s actions are compatible with Article 8 of the European Convention on Human Rights

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<sup>19</sup> *Ramanauskas v Lithuania* (2008) Eur Court HR. Although *Ramanauskas* was based on facts in which a covert (non-privileged) source was utilised, it discusses principles relevant to the right to a fair trial, which may assist the RCMPI.

<sup>20</sup> United Kingdom Home Office, *Covert Human Intelligence Revised Code of Practice* (at August 2018) (‘UK Code of Conduct’).

<sup>21</sup> *Regulation of Investigatory Powers Act 2000* (UK) (‘RIPA’).

<sup>22</sup> (References in this subsection to clauses are to the UK Code of Conduct).

<sup>23</sup> See UK Code of Conduct part 1, and 2010 UK Order, p.5, ‘Explanatory Note’.

(the right to respect for private and family life, including the right to establish and develop relationships).<sup>24</sup> When HS are used in police investigations, a judge will be required to analyse them like any other source of evidence, balancing the probative value vs the prejudicial effect of the evidence, and the resulting effect on the fairness of the proceedings (see eg s78 Police and Criminal Evidence Act 1984).<sup>25</sup> Certain examples show a conflict that exists between evidence and human rights law, however, where evidence has been admitted under the law of evidence, with it nonetheless being determined that the subject's human rights have been violated.<sup>26</sup> Further, there is a general risk of unfair process in circumstances where a prosecutor has competing interests to balance; for example public interest immunity in the case of a HS. This is because the prosecution may seek to withhold the identity of the informer on public interest grounds (both in respect of the risk to that specific informer, and to preserve faith in the system for future informers), or fail to disclose any agreements made with them. In the absence of these disclosures, it makes it more difficult for an accused to defend themselves on the basis of all relevant information.

20. As part of the relevant statutory framework, the Investigatory Powers Act<sup>27</sup> provides for an Investigatory Powers Commissioner ("the Commissioner"), whose remit includes providing comprehensive oversight of the use of the powers to which the UK Code of Practice applies. The Commissioner will be, or will have been, a member of the senior judiciary and will be entirely independent of the Government or any of the public authorities authorised to use investigatory powers (cl.

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<sup>24</sup> See Corker Binning, 'Human Intelligence and Police Informers – Separating Law from Operational Strategy', *Lexology* (online, 6 November 2017) <<https://www.lexology.com/library/detail.aspx?g=1efe029f-9907-4566-9cb6-b1bc17cc19fe>>.

<sup>25</sup> See, eg, *Police and Criminal Evidence Act 1984* (UK) s 78.

<sup>26</sup> See *R v Allan* [2004] EWCA Crim 2236, where a breach of Article 6 ECHR was found by a violation of the right to silence and to avoid self-incrimination.

<sup>27</sup> *The Investigatory Powers Act 2016* (UK).

9.2).<sup>28</sup> The Commissioner must report annually to Parliament and the public (subject to any necessary redactions) on the findings of their audits, inspections and investigations (cl. 9.8).<sup>29</sup> An Investigatory Powers Tribunal (IPT) is also a part of the relevant framework, and is set up as an independent tribunal that has jurisdiction to investigate and determine complaints against public authority use of investigatory powers, including those covered by the UK Code of Practice (cl. 10.1).<sup>30</sup> Following receipt of a complaint or claim from a person (individual or juridical), the IPT can undertake its own enquiries and investigations and can demand access to all information necessary to establish the facts of a claim and to reach a determination (s 81(1) of UK RIPA).<sup>31</sup>

21. The acquisition of material through use or conduct of a HS will be a justifiable interference with an individual's human rights under the ECHR only if the conduct being authorised is necessary, proportionate and in accordance with law (cl. 8.45).<sup>32</sup> Authorisation for the use of a HS must be on the basis that it is necessary in the circumstances of a particular case for statutory grounds listed in section 29(3) of the UK RIPA.<sup>33</sup> Authorisation must also be based on a belief that it is proportionate to the specific aim sought to be achieved by carrying it out. This involves balancing the seriousness of the intrusion into the private or family life of the HS (or any other person who may be affected) against the need for the activity in investigative and operational terms, and no activity

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<sup>28</sup> UK Code of Conduct cl 9.2.

<sup>29</sup> Ibid cl 9.8.

<sup>30</sup> Ibid cl 10.1.

<sup>31</sup> RIPA s 81(1).

<sup>32</sup> UK Code of Conduct cl 8.45; See also, ECHR art 8 (right to respect for private and family life and art 10 (freedom of expression).

<sup>33</sup>This includes, generally: in the interests of national security; for the purpose of preventing or detecting crime or of preventing disorder; in the interests of the economic well-being of the UK; in the interests of public safety; for the purpose of protecting public health; for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; or for any other purpose prescribed in an order made by the Secretary of State.

should be considered proportionate if the information that is sought could reasonably be obtained by other less intrusive means.

22. Other relevant guidance common to the use of both HS and PHS is included in a footnote herein, and is in the documents indexed and appended to this submission.<sup>34</sup>

23. As noted above, the 2010 UK Order provides that authorisation of PHS (as opposed to HS generally) is subject to an enhanced authorisation process, requiring prior notification to and approval from the Secretary of State or Judicial Commissioner (as applicable; other authorisers apply to intelligence, defence, and corrections)(cl. 8.54).<sup>35</sup>

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<sup>34</sup> Before authorising action regarding a HS, the authorising officer should take into account and include an assessment of the risk of interference with the private or family life of persons who are not the intended subjects of the HS activity (collateral intrusion), with particular care being taken in respect of PHS (cl. 3.9, 3.11). To ensure that the use of the HS remains within the parameters of an authorisation, formal reviews and audits are required (cl. 3.14), and proposed changes to the operation should immediately be brought to the attention of the authorising officer for assessment of proportionality with regard to the scope of the existing authorisation (cl. 3.17). Authorising officers should not be responsible for authorising their own activities (e.g. those in which they themselves are to act as the handler of the HS) and should, where possible, be independent of the investigation (cl. 5.8). Regular reviews of authorisations should be undertaken by the authorising officer to assess whether it remains necessary and proportionate to use a HS and whether the authorisation remains justified (cl. 5.20), and should be cancelled if not (cl. 5.32).

The safety and welfare of the HS should be taken into account during the operation of the authorisation and after it has been cancelled, and risk assessments maintained (cl. 5.33, 6.13). Consideration should be given to the management of any requirement to disclose information that could risk revealing the existence or identity of a HS. For example this could be by means of disclosure to a court or tribunal, or any other circumstances where disclosure of information may be required, and strategies for minimising the risks to the HS or others should be put in place.

A centrally retrievable record of all authorisations should be held by each public authority using HS, and there must be at all times a person with the responsibility for maintaining a record of the use made of the HS (cl. 7.1, 7.4, with reference to RIPA Section 29(5)). Material that tends to indicate the presence, activity or identity of a specific HS should be classified and handled as highly sensitive material (cl. 8.16). Organisations using HS should attempt to protect the identities of HS by all reasonable and lawful means possible (cl. 8.22).

When a "relevant error" has occurred (such as a failure of safeguards, or the unauthorised use of a HS), the public authority that made the error must notify the Investigatory Powers Commissioner as soon as reasonably practicable, and no later than ten working days (cl. 7.12).

<sup>35</sup> UK Code of Conduct cl 8.54.

The approving officer must be satisfied that the authorisation is necessary on grounds that it is in the interests of national security, for the purpose of preventing or detecting serious crime, or in the interests of the economic well-being of the United Kingdom (para. 6 of the 2010 Order; cl. 8.55).<sup>36</sup>

24. An application for an authorisation regarding a PHS should only be sought where there are exceptional and compelling circumstances that make the authorisation necessary, and the approving officer approves that decision specifically. The exceptional and compelling test can only be met when the public interest in obtaining the information sought outweighs the public interest in maintaining the confidentiality of legally privileged material, and when there are no other reasonable means of obtaining the required information. The authorised use or conduct of the PHS must be reasonably regarded as likely to yield the intelligence necessary to counter the threat (cl. 8.56),<sup>37</sup> and must be proportionate (cl. 8.57).<sup>38</sup> The approving officer will take into account both the public interest in preserving the confidentiality of those particular items and the broader public interest in maintaining the confidentiality of items subject to legal privilege more generally (cl. 8.58).<sup>39</sup> Further, the approving officer must be satisfied that there are appropriate arrangements in place for the handling, retention, use and destruction of privileged items. In such circumstances, the approving officer will be able to impose additional requirements such as regular reporting arrangements. The duration for which an authorisation in respect of a PHS may be granted is reduced from 12 to six months (in the case of an intelligence service authorisation) or three months (any other authorisation)(cl. 8.59).<sup>40</sup>

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<sup>36</sup> 2010 UK Order [6]; UK Code of Conduct 8.55.

<sup>37</sup> UK Code of Conduct cl 8.56.

<sup>38</sup> Ibid cl 8.57.

<sup>39</sup> Ibid cl 8.58.

<sup>40</sup> Ibid cl 8.59.



25. A legal adviser to the public authority must be consulted when it is believed that material that attracts privilege is obtained. The legal adviser is responsible for determining that material is privileged, rather than an officer who is involved in an investigation. In cases where there is doubt as to whether material is privileged or not, the Investigatory Powers Commissioner may be informed, who will be able to give a view (cl. 8.70).<sup>41</sup>
26. Material that has been identified as legally privileged should be clearly marked as subject to legal privilege and the Investigatory Powers Commissioner must be notified of the retention of the items as soon as reasonably practicable (cl. 8.71).<sup>42</sup> Privileged items must be securely destroyed when their retention is no longer needed. If such material is retained, there must be adequate information management systems in place to ensure that continued retention, for purposes other than their destruction, remains necessary and proportionate for the authorised statutory purposes.
27. In the course of an investigation, a public authority must not act on or further disseminate legally privileged items unless it has first informed the Investigatory Powers Commissioner that the items have been obtained, except in urgent circumstances (cl. 8.76).<sup>43</sup>
28. Neither the Crown Prosecution Service lawyer nor any other prosecuting authority lawyer with conduct of a prosecution should have sight of any legally privileged material, held by the relevant public authority, with any possible connection to the proceedings. In respect of civil proceedings, there can be no circumstances under which it is

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<sup>41</sup> Ibid cl 8.70.

<sup>42</sup> Ibid cl 8.71.

<sup>43</sup> Ibid cl. 8.76.

proper for any public authority to have sight of or seek to rely on legally privileged material in order to gain a litigation advantage over another party in legal proceedings (cl. 9.1).<sup>44</sup>

29. Remedies are similar to those available in Australia and include exclusion of improperly obtained evidence and abuse of process such as may lead to a prosecution being stayed.<sup>45</sup> The application of abuse of process has been applied in the context of both executive state entrapment<sup>46</sup> and private informant entrapment.<sup>47</sup>

## **Section 2: Suggested Areas for Further Research: Children, Women, Fair Trial Rights and Institutional Integrity**

### *Child Sources*

30. This submission uses the term *human sources* and focusses on human sources who are subject to legal obligations of confidentiality or privilege, including informants (privileged human sources, or PHS). As such, it necessarily relates to adults. Nonetheless ICJV raises concerns about the use of children as human sources and particularly the risks of physical and emotional harm. ICJV therefore submit that the RCMPI should examine any violations of the human rights of children as human sources in Victoria. The High Court of England and Wales has granted permission for proceedings against the UK Home Office concerning the

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<sup>44</sup> Ibid cl 9.1

<sup>45</sup> *Warren v Attorney General of Jersey* [2012] 1 AC 22.

<sup>46</sup> *Looseley and Attorney General's Reference No 3 of 2000* [2001] UKHL 53

<sup>47</sup> *TL* [2018] EWCA Crim 1821; see also *R v Shannon* [2001] 1 WLR 51 which concerned an appellant who sought to rely on abuse of process in circumstances where he said he was induced to commit an offence by an undercover journalist.

use of children as covert human intelligence sources by the police and other investigative agencies. The first full hearing in the case is scheduled for 11 June. The ongoing litigation in the UK in this context may be of assistance to the RCMPI.<sup>48</sup>

### *Female Sources and female handlers*

31. Structural exploitation of women sources and the absence of female handlers have been considered in criminological writing and research, although data is limited.<sup>49</sup> The UK Inquiry into Undercover policing (UPI) opened on 28 July 2015 is relevant to these issues: Its purpose is to “investigate and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968”. The Inquiry is examining “the contribution undercover policing has made to tackling crime, how it was and is supervised and regulated, and its effect on individuals involved – both police officers and others who came into contact with them”.<sup>50</sup> The UPI core participants have included women affected by undercover police operations and families of deceased children whose identities were assumed by undercover officers. ICJV submit that the RCMPI consider and draw on the experiences and available evidence from UPI in the context of the human rights of human sources, particularly women and girls.

### *Fair trial rights and institutional integrity*

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<sup>48</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 16 October 2018, col 435. See also Judicial Review Application by Just For Kids Law <<http://justforkidslaw.org/news/permission-granted-in-challenge-to-home-office-use-of-children-as-spies/>>

<sup>49</sup> Teresa Nemitz, ‘Gender Issues in Informer Handling’ in Roger Billingsley, Teresa Nemitz and Philip Bean (eds), *Informers: Policing, Policy and Practice* (Willan Publishing, 2001) 98.

<sup>50</sup> Undercover Policing Inquiry < <https://www.ucpi.org.uk/>>

32. The use and management of PHS may only be capable of integrity in a legal framework that allows for suitable sanction otherwise there is a significant risk that state and non-state actors will act with impunity in this context. ICJV submits that areas of law reform may be suitable for consideration by the RCMPI, particularly in the context of fair trial rights and institutional integrity. This might include the following (this list is not exhaustive – and assumes the context includes domestic proceedings, cross border investigations and extradition):
- a. the need for a judicially led oversight commission for the use and management of human sources;
  - b. the need for a statutory framework for the use and management of human sources;
  - c. whether the current framework for disclosure / public interest immunity is sufficiently robust;
  - d. whether the current framework for sanctions for unlawful / improper conduct by state and non -state actors in this context is sufficiently robust; and
  - e. whether the current framework for sanctions for exclusion of unlawfully or improperly obtained evidence is sufficiently robust.

## **Section 3: Bibliography of Useful Sources**

### **Articles/Books:**

Binning, Corker 'Human Intelligence and Police Informers – Separating Law from Operational Strategy', *Lexology* (online, 6 November 2017) <<https://www.lexology.com/library/detail.aspx?q=1efe029f-9907-4566-9cb6-b1bc17cc19fe>>

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## **Conclusion**

33. ICJV would be happy to assist the RCMPI in any further consultation.