

Guidance for NSW Barristers

In the Wake of the Matter of Lawyer X

In a judgment delivered in November 2018, the High Court unanimously condemned a Victorian barrister (Lawyer X) for 'appalling breaches of [her] obligations as counsel to her clients and of [her] duties to the Court' when acting as an informant against her own clients: *AB (a pseudonym) v CD (a pseudonym) and Ors; EF (a pseudonym) v CD (a pseudonym) and Ors* [2018] HCA 58 (*AB v CD*). So egregious were those breaches that the High Court did not consider it necessary to further elaborate on what specific obligations and duties Lawyer X had violated.

Following the High Court's judgment, the Victorian Government established a Royal Commission into the Management of Police Informants. As part of its inquiry, the Commission is currently considering the legal obligations of human sources who may be under duties of confidentiality and privilege. However, the Royal Commission's report will not be finalised until 1 July 2020.

In the interim, there is a pressing need for barristers to understand the legal and ethical issues raised by the seemingly unprecedented deployment by law enforcement agencies of a barrister informant against her own clients in Victoria.

In particular, a narrow question is raised for the New South Wales Bar: is it ever appropriate for a barrister to act as a registered informant against a client? Broader questions are also raised, including whether there are any circumstances in which a barrister can act as an informant and in what circumstances counsel may be required to breach, or be justified in breaching, client confidences.

On 18 September 2019, the NSW Bar Association published a paper that provides guidance for NSW Barristers following the decision in *AB v CD*. The paper was published in *Inbrief* and is available at <https://nswbar.asn.au/docs/webdocs/informants1.pdf>.

The paper is comprehensive. The issues addressed in the paper include:

- (i) the ethical and legal implications of New South Wales barristers acting as informants;

- (ii) what obligations, if any, NSW barristers may be under to provide information to law enforcement agencies during the course of their legal practice; and,
- (iii) whether NSW barristers can voluntarily report matters to law enforcement agencies where, in the course of their practice, a confider threatens the future safety of an individual.

All barristers, particularly those practising criminal law or on behalf of or against law enforcement in non-criminal law matters, should carefully read the whole paper.

An extract of the portions of the paper dealing with the issue of barristers acting as informants during the course of professional practice and barristers acting as informers other than in relation to clients follows (footnotes omitted).

Barristers as Informants during the Course of Professional Practice

Acting as an Informant against a Client

Acting as an informant against a client involves, as the High Court stated in *AB*, 'fundamental and appalling breaches of' the obligations of a barrister: *AB v CD* at [10].

There can be no room for exception: a barrister acting as an informant against a client cannot be countenanced in any circumstances. To do so involves a breach of fundamental – as opposed to merely conventional – rules of professional conduct. By acting as an informant against one's client, counsel:

- (i) breaches the paramount duty owed to the Court by conniving in an abuse of process through executive misconduct that would:
 - (a) likely give rise to a stay of proceedings or the quashing of a conviction; and,
 - (b) certainly risk undermining the integrity of the Court and public confidence in the criminal justice system;

[Rule 23 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (the *Bar Rules*)];

- (ii) breaks the oath made on admission as a legal practitioner 'truly and honestly [to] conduct [him/her]self in the practice of a legal practitioner of the Supreme Court of New South Wales and ... faithfully [to] serve as such in the administration of the laws and the usages of that State' by engaging in conduct that will result in proceedings being 'corrupted in a manner which debase[s] fundamental premises of the criminal justice system' [*AB v CD* at [10]];
 - (iii) violates the general prohibition on engaging in conduct that is:
 - (a) dishonest or 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 [Rule 8 of the *Bar Rules*];

- (iv) violates to the point of negating client confidentiality and (if applicable) legal professional privilege [Rule 114 of the *Bar Rules*];
- (v) abandons the duty to promote and to protect fearlessly a client's interests in favour of the barrister's own interests, whether they be civic minded or mercenary [Rule 35 of the *Bar Rules*];
- (vi) wrongfully acts for a client notwithstanding the existence of a grave conflict of interest manufactured by counsel himself or herself [Rule 101(b) of the *Bar Rules*];
- (vii) abuses the privileged position of a barrister to advance his or her own interests, whether they be civic-minded interests or mercenary [Rule 10 of the *Bar Rules*]; and,
- (viii) breaches the fiduciary duty to disclose a fact to a client that would undoubtedly be material and relevant to his/her case and the safety of any conviction.

A barrister must never act as an informant against a current or former client.

Barristers as Informants other than in Relation to Clients

While individuals may volunteer to act as 'human sources' for civic reasons, a self-interested desire to avoid prosecution or to obtain a lesser sentence upon conviction or favourable treatment by law enforcement agencies undoubtedly lies behind many informants' decisions to relay information covertly to police or other investigative bodies.

Barristers who act as informants other than in relation to their own clients may have been investigated for conduct unbecoming of counsel or have engaged in dishonest or otherwise discreditable behaviour that would likely diminish public confidence in the legal profession. Counsel's reasons for acting as an informant may consequently themselves amount to a breach of the Bar Rules. Moreover, a barrister utilising his or her status as counsel when acting as an informant for private advantage (immunity, prosecution for a lesser offence, a sentence reduction or other favourable treatment) would be grossly misusing his or her professional qualification.

Even barristers acting for purely altruistic reasons when covertly cooperating with police outside of their professional practice may risk compromising their independence when later acting as counsel in unrelated matters.

It would be difficult to conceive of methods to ensure that a barrister-informant could remain 'independent of extraneous influence', preserve the 'benefits of objective detachment' and comply with necessary ethical disclosures when acting, for instance, in criminal proceedings (whether for the Crown or the defence), inquests (whether representing state bodies or families) or claims against the police (whether for plaintiffs or defendants). A barrister who was acting or had acted as an informant for regulatory authorities may be similarly compromised in current and future matters involving such agencies.

A failure to disclose a relationship between a barrister-informant and the Crown may engender in a fair-minded observer an apprehension that the barrister has not acted with independence in cases where the Crown or law enforcement is engaged in some capacity. A barrister has duties of candour, independence and confidentiality, all of which would be compromised by agreeing to become a covert source of intelligence. Acting as an informant demands secrecy (in many cases without legislative force) and, consequently, conflicts of interest cannot be remedied by disclosure and informed consent. The ethical obligations of counsel are paramount to the Court and the



administration of justice and may be at risk of compromise even where a barrister is an informant other than in relation to his or her own client.

While it might be possible for some members of the profession to preserve their independence during and after a period of acting as an informant, it is unlikely that practitioners accepting briefs in criminal, extradition and inquest matters or those working in areas that might touch upon the operation of law enforcement agencies or their staff would be immune from influences that would risk diminishing their independence. The potential for conflict here is plain.

It is also difficult to imagine circumstances in which a barrister could be a registered source and still maintain ethical standards, including not engaging in conduct that would likely diminish public confidence in either the legal profession or the administration of justice or would otherwise bring the profession into disrepute. Furthermore, barristers practise in a highly collegiate environment where cases are frequently discussed with disinterested colleagues, including juniors discussing matters with more experienced senior counsel, who are subject to strict obligations

of confidentiality. Such communications are in the interests of clients and serve the public interest by encouraging the highest standards of professional and ethical conduct which would be wholly undermined if the 'disinterested' barrister was acting covertly as an informer.

Law enforcement authorities should never use the significant power that they will inevitably be able to bring to bear over an informer to encourage, assist or procure a person to breach their professional obligations. These obligations are not only those demanded by legal professional privilege but extend to equitable and statutory obligations of confidence that arise independently from the relationship between a barrister and a client.

The independence of the bar is such an integral aspect of a barrister's professional obligations and the rule of law itself, that a barrister should not be subservient to the Executive. Acting as a registered source to a law enforcement agency carries with it so serious a risk to a barrister's independence that counsel is likely to be confronted with major ethical difficulties should he or she become an informant even against individuals who are not clients. **BN**