NEW SOUTH WALES
BAR ASSOCIATION

GUIDANCE FOR NSW BARRISTERS IN THE WAKE OF THE MATTER OF LAWYER X

BACKGROUND

1. In its November 2018 judgment *AB (a pseudonym) v CD (a pseudonym) and Ors; EF (a pseudonym v CD (a pseudonym) and Ors*,[1] 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.[2] 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.

2. The Royal Commission into the Management of Police Informants (**"the Royal Commission"**), as part of its inquiry, is currently considering the legal obligations of human sources who may be under duties of confidentiality and privilege.[3] However, the Royal Commission's report will not be finalised until 1 July 2020.[4]

3. In the interim, there is a pressing need for the New South Wales Bar Association to issue clear guidance to its members on 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.

4. 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? However, 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.

5. This paper will cover:

[1] [2018] HCA 58 ("***AB v CD***").
[2] *Ibid.*, [10].
[3] See item 4 of the Royal Commission's Terms of Reference: https://www.rcmpi.vic.gov.au/MediaLibraries/RCManagementOfPoliceInformants/keydocuments/Letters-Patent,-Royal-Commission-into-the-Management-of-Informants.pdf. See also the Royal Commission's *Progress Report* (July 2019), pp48-51.
[4] The original reporting date of 1 July 2019 was extended on 25 May 2019: see https://www.rcmpi.vic.gov.au/media/extension-granted.

(i) the ethical and legal implications of New South Wales (**NSW**) 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.

INFORMANTS

Informant: Definition

6. There is no statutory definition of "informant" or its synonym "human source". For the purposes of this paper, an **"informant"** is defined as an individual who enters into an agreement to provide information covertly to law enforcement or regulatory agencies to assist in the investigation, apprehension or prosecution of suspected offenders. That is, a registered source or a person operating in circumstances akin to a registered source.

7. An informant is, therefore, to be distinguished from an individual who openly reports a suspected crime to police. For completeness, however, this paper will, when addressing the broader questions raised by the Lawyer X scandal, discuss whether there may be circumstances in which barristers who are not informants (as defined above) could be said to be required to report information relating to crimes to law enforcement agencies – and, if so, whether this information includes confidential information – or may, on a discretionary basis, take steps, including reporting matters to police, to prevent the threatened future commission of serious offences by their clients.

The Use of Informants

8. While it is beyond the scope of this paper to comment on the propriety of the use of informants generally, it is acknowledged that from the perspective of law enforcement, it has been said that:

> [i]*t is extremely difficult for law enforcement to infiltrate organised crime groups as they conduct their operations according to a strict code of secrecy. Members of these groups who breach this code may be exposed to severe punishment…If people who provide information confidentially to the police feel inhibited in assisting police by providing information about serious criminal allegations, it would seriously hamper* [law enforcement agencies] *in* [their] *work*.[5]

[5] From the affidavit of Assistant Commissioner Zuccato, described as "posit[ing] a powerful case" for protecting the identity of an informant in *R v Eastman* [2015] ACTSC 97, [12], *per* Whealy AJ.

9. The common law has long recognised the importance of informants on the basis that police "can function effectively only if they receive a flow of intelligence about planned crime or its perpetrators" and that "[s]uch intelligence will not be forthcoming unless informants are assured that their identity will not be divulged".[6]

10. "Human sources" are used by state, territory and federal law enforcement and security agencies ranging from the Australian Criminal Intelligence Commission (**ACIC**) and the Australian Security Intelligence Organisation (**ASIO**) to the NSW Crime Commission and the NSW Police Force. Informers are additionally utilised in civil law proceedings brought by the Australian Securities Investments Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**).[7]

11. In May 1997, in the *Final Report of the Royal Commission into the New South Wales Police Service (Volume 1: Corruption)*, the Hon. Justice James Wood commented that a serious aspect of improper conduct involved the use of informants:

> *outside the Informant Management Plan, particularly where they are spared prosecution for offences they are known to have committed, or are given favourable treatment in relation to custodial arrangements or sentencing in return for giving evidence against others, without sufficient disclosure of their true position to senior officers, the DPP and the courts.*[8]

At that time the Commission noted that, despite comprehensive safeguards, there was significant non-compliance, with many officers regarding safeguards as "an unworkable interference with their investigative work" and with informant registration lacking critical details. As a result, NSW police undertook a review of its use of informants and, on 14 April 1997, the Informant Management Manual came into effect. There were, nevertheless, extensive recommendations made by the Commissioner in relation to the future management of informants.[9]

12. The question now arises, over twenty years later, as to whether, accepting that such agencies will continue to utilise informants, NSW Barristers can ever be registered sources for such bodies. This is particularly so given the independent obligations that legal practitioners have to the court and the code of behaviour and professional discipline that legal practitioners are subject to as members of the legal profession.

Current Regulation of the Use of Informants

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[6] *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589, 607, *per* Lord Simon ("***D v NSPCC***").
[7] See the Judicial College of Victoria, *Open Courts Bench Book: Informers, Undercover Police Operatives and Police Methods* (2019), [27] to [30].
[8] The Hon. Justice James Wood, Royal Commission into the New South Wales Police Service, Final Report Volume I, p.113 [4.108]
[9] The Hon. Justice James Wood, Royal Commission into the New South Wales Police Service, Final Report Volume II, pp.440-441, Recommendations.

13. The Crown's disclosure obligations (subject to public interest immunity) and the courts' mandatory and discretionary powers to exclude improperly-obtained or otherwise unfairly prejudicial evidence and to give judicial warnings on the quality of informant evidence all serve to discipline indirectly the use of informants in a curial context. Additionally, in this State, the Law Enforcement Conduct Commission has an object of promoting integrity of law enforcement agencies and preventing misconduct in those agencies.[10]

14. The only statutory limitation in this State that directly relates to the use of informants, however, is contained within s 7 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW) (**"the LECO Act"**),[11] which prohibits a " law enforcement agency"[12] from authorising a "controlled operation" that is likely, *inter alia*, to endanger seriously the health or safety of persons. The LECO Act serves to remind law enforcement agencies that not all means are justified by the legitimate aim of bringing to justice those suspected of serious crimes. For instance, in its unanimous decision in *Gedeon and Dowe v Commissioner of the New South Wales Crime Commission*,[13] the High Court held that a controlled operation involving the sale of cocaine (which was never recovered) to the appellants by a co-operating informant introduced dangerous narcotics onto the streets, and thereby endangered the health of end users. As *Gedeon* demonstrates, breach of s 7 of the LECO Act may lead to the inadmissibility of any evidence produced by an improperly authorised operation.

15. The operational use of informants – their selection, registration and handling – is, however, largely a matter for agencies' internal policies and protocols and any disciplinary proceedings that could flow from their breach.[14]

16. The NSW Crime Commission's Code of Conduct, for instance, lays out the approach to be taken during "human source handling" in the following terms:

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[10] *Law Enforcement Conduct Commission Act 2016* (NSW), s 3.

[11] The LECO Act and parallel legislation in other Australian jurisdiction was enacted in response to the High Court's decision in *Ridgeway v The Queen* (1995) 184 CLR 19 ("*Ridgeway*"). *Ridgeway* settled that a substantive defence of entrapment by government officers or agents, as applied in criminal trials in the United States' federal courts had no application in Australia and confirmed that judges' discretionary power at common law (now codified under the Uniform *Evidence Act* 1995) to exclude evidence on the grounds of public policy extended to the exclusion of evidence of an offence procured by unlawful conduct by law enforcement officers.

[12] Defined under s 3 of the LECO Act and cl 4 of the Law Enforcement (Controlled Operations) Regulation 2017 (NSW) as: the NSW Police Force; the Independent Commission Against Corruption; the New South Wales Crime Commission; the Law Enforcement Conduct Commission, the Australian Federal Police, the Australian Crime Commission, the Commonwealth Department of Immigration and Border Protection.

[13] [2008] HCA 43 (**"*Gedeon*"**).

[14] Methven, E, "The controversial case of Lawyer X: Should Lawyers be prevented from acting as human sources?, (2019) 0(0) *Alternative Law Journal* 1, 7.

> *The Commission obtains information through human sources in order to further its objectives. To minimise the perception that Commission staff may have inappropriate relationships with criminals, it is essential that we follow the principles and guidelines set out in the Human Source Management Policy. We must maintain appropriate professional relationships with human sources and act in a manner that will not reflect negatively on ourselves or the Commission. We will accept responsibility for the ethical management of the human source and in all other respects uphold the principles of the Human Source Management Policy. Related documents: Human Source Management Policy, Human Source Management Standard Operating Procedures* [15]

Neither the Human Source Management Policy nor the Human Source Management Standard Operating Procedures appears, however, to be available to the public. Guidelines on the use of informants by NSW Police Force are similarly not in the public domain.

17. It appears that no law enforcement agency has published or internally circulated guidelines on the use of lawyers as informants.

18. In response to concerns raised by the deployment of Lawyer X in Victoria, following an internal audit, the NSW Police Force issued a statement in February this year confirming that:

> *no evidence of alleged breaches of legal professional privilege has been identified nor has any conduct similar to that alleged in the Victorian 'Lawyer X' matter become apparent.*[16]

19. This statement is somewhat Delphic. The Lawyer X matter is *sui generis* and, as such, it is to be expected that "conduct similar to" her deployment as an informant would not be replicated elsewhere in Australia. It should not, therefore, be thought that the NSW Police Force or the NSW Crime Commission has never used a lawyer as an informant. This gives rise to a further question as to whether "breaches of legal professional privilege" have been identified by a NSW law enforcement agency in circumstances where a lawyer has acted as a registered source.

BARRISTERS AS INFORMANTS DURING THE COURSE OF PROFESSIONAL PRACTICE

Acting as an Informant against a Client

20. 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.[17]

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[15] NSW Crime Commission, *Code of Conduct* (2019), [4.5].
[16] "Police and lawyers talk often': force denies use of criminal solicitors as informants", *Sydney Morning Herald*, February 7, 2019 (https://www.smh.com.au/national/nsw/police-and-lawyers-talk-often-force-denies-use-of-criminal-solicitors-as-informants-20190207-p50wap.html).
[17] At [10].

21. 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.[18] By acting as an informant against one's client, counsel:

(i) breaches the paramount duty owed to the court[19] 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;[20] and,
   (b) certainly risk undermining the integrity of the court and public confidence in the criminal justice system;[21]

(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" [22] by engaging in conduct that will result in proceedings being "corrupted in a manner which debase[s] fundamental premises of the criminal justice system";[23]

(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;[24]

(iv) violates to the point of negating client confidentiality and (if applicable) legal professional privilege;[25]

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[18] See *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186, 199 ("***Clyne***")
[19] Rule 23 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 ("**the Bar Rules**"); *Rondel v Worsley* [1969] 1 AC 191, 227-228, *per* Lord Reid ("***Rondel***").
[20] The disclosures relating to Lawyer X have, to date, resulted in the quashing of the Victorian Court of Appeal's quashing of the conviction of Faruk Orman; no retrial was ordered: Orman v The Queen, July 26, 2019; see https://www.theage.com.au/national/victoria/there-was-a-substantial-miscarriage-of-justice-the-judgment-in-full-20190726-p52b1d.html.
[21] See *Moti v The Queen* (2011) 245 CLR 456 and *JB v The Queen* (No 2) [2016] NSWCCA 67; see also *Warren v Attorney-General for Jersey* [2011] 1 AC 22, 32, and *R v Maxwell* [2010] 1 WLR 1837.
[22] Division 1 of pt 65C of, and Sch F to, the *Supreme Court Rules 1970* (NSW).
[23] *AB*, [10].
[24] Rule 8 of the Bar Rules.
[25] Rule 114 of the Bar Rules. See below for an extended discussion of confidentiality and legal professional privilege.

(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;[26]

(vi) wrongfully acts for a client notwithstanding the existence of a grave conflict of interest manufactured by counsel himself or herself;[27]

(vii) abuses the privileged position of a barrister to advance his or her own interests, whether they be civic-minded interests or mercenary;[28] 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.[29]

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

BARRISTERS AS INFORMANTS OTHER THAN IN RELATION TO CLIENTS

23. 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.[30]

24. 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.[31] 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.[32]

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[26] Rule 35 of the Bar Rules; *Rondel*.
[27] Rule 101(b) of the Bar Rules.
[28] Rule 10 of the Bar Rules.
[29] *Spector v Ageda* (1973) Ch 30, 48, *per* Megarry J, approved in, eg, *O'Reilly v Law Society of NSW* (1988) 24 NSWLR 204, 213-215; *Marriage of Thevenaz* (1986) 84 FLR 10, at 12; *Marriage of A and B* (1989) 99 FLR 171, at 175; *Fruehauf Finance Corporation v Feez Ruthning (a firm)* [1991)1 Qd R 558, at 566. With regard to points (i) to (vii) above, see also the overall "duty of loyalty" discussed in Baron, P, and Corbin, L, *Ethics and Legal Professionalism in Australia*, 2nd ed., (2017) Oxford University Press: Sydney.
[30] See Grabosky, P N, "Prosecutors, Informants, and the Integrity of the Criminal Justice System", (1992) 4(1) *Current Issues in Criminal Justice* 47, 48 to 49.
[31] Rule 8 of the Bar Rules.
[32] Rule 10 of the Bar Rules.

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

26. 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"[33] 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.

27. In *R v Szabo*,[34] it was held that the failure of defence counsel to disclose to his client that he had formerly been in a de facto relationship with the barrister acting for the Crown "would [have] engender[ed] reasonable suspicion or apprehension in a fair-minded informed observer as to whether defence counsel necessarily acted with […] fearless independence".[35] *Szabo* would apply *a fortiori* to situations where counsel has acted as an informant in matters such as those outlined above, based on the relationship that has pertained between counsel and a party to the litigation. A barrister also 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.

28. 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.

29. 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

[33] *NSW Bar Association v Livesey* [1982] 2 NSWLR 231, 233.
[34] (2001) 112 A Crim R 215 ("***Szabo***")
[35] Ibid., 216, *per* Thomas JA (De Jersey CJ agreeing).

bring the profession into disrepute.[36] 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.[37] 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.

30. 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.

31. 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.

IS FURTHER REGULATION REQUIRED TO ENSURE THAT BARRISTERS DO NOT ACT AS INFORMANTS?

32. As set out above, existing rules of professional conduct already ensure that no barrister can ethically act as an informant against his or her client. However, in order to make clear that barristers should not act as informants at all, there could be an amendment of the Bar Rules and Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) ("**the NSW Solicitors' Rules**") to prohibit lawyers from acting as informants.

33. Other legislative changes that might be considered include:

    (i) inserting in the LECO Act, the *Crime Commission Act 2012* (NSW) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) a prohibition on the use of barristers as informants in the nature of a registered source/informant;
    (ii) inserting into the Bar Rules a prohibition on a barrister being an informant in the nature of a registered source/informant; and,

[36] Rule 12 (c) of the Bar Rules. See also Rule 14.
[37] Bar Rules, Rule 101 (m).

(iii) in the alternative, inserting in s 138 of the *Evidence Act 1995* (NSW) a presumption that evidence has been improperly obtained (and, therefore, potentially inadmissible) if it has been gathered from, or in consequence of, a barrister acting as a registered source/informant.

34. Consideration should also be given to the development of joint protocols between law enforcement agencies, the Director of Public Prosecutions and the profession to regulate the use of informants to exclude expressly the deployment of any barrister as an informant against current or former clients and to prohibit any proposed use of a barrister as a registered source.

CONCEALMENT OFFENCES AND BARRISTERS

35. Barristers may be compelled, or be said to be compelled, by law to report certain matters. As such, it is necessary to consider the scope of some such obligations and their interaction with legal professional privilege, particularly where law enforcement may be involved, in order that barristers understand their obligations. Informers are usually persons of particular vulnerability and often become informers as the price of obtaining some concession from police in respect of their own criminal misconduct or as a result of the company they keep. Informants' vulnerability is increased because their conduct as intelligence sources is on a covert basis, concealed even from those who may be able to give them independent advice.

36. Barristers in the course of their professional practice may come into possession of information regarding serious offences committed by clients and those connected to clients (including corporate entities). Exposure to such information is not limited to counsel working in criminal law. Barristers advising corporate entities and their boards may stumble upon evidence of insider trading, larceny, embezzlement, fraudulent misappropriation of property, tax evasion and the like; a practitioner in family law may be informed of sexual offences against children or may be told by clients of their estranged spouse's criminal activities. Irrespective of area of practice, barristers, by the nature of the client-lawyer relationship, may become privy to information that directly implicates clients or others in grave offences.

37. It is important for barristers to be fully cognisant of the provisions of Part 7 of the *Crimes Act* 1900 (NSW) (**"the *Crimes Act*"**), which contain many public justice offences, including the offence of perverting the course of justice. This guidance paper will focus on the scope of the offences of concealing a serious indictable offence or concealing a child abuse offence contrary to s 316 and s 316A of the *Crimes Act*, respectively, to ensure that barristers do not inadvertently disclose privileged communications or unnecessarily reveal otherwise confidential material to police or enter into an agreement to provide information to police or become a registered

informant under the misapprehension that they may otherwise be prosecuted for failing to divulge incriminating evidence regarding their clients.

38. It is especially important for barristers to understand that concealment offences do not concern information that is subject to legal professional privilege and to understand the scope of the reasonable-excuse defence to an alleged concealment of a crime, in particular in relation to confidential information that is not privileged.

Concealment of a Serious Indictable Offence: s 316 of the Crimes Act

39. Under s 316(1) of the *Crimes Act*, it is an indictable offence for an adult, knowing or believing that a "serious indictable offence"[38] has been committed by another (legal or natural) person, to fail without reasonable excuse to give information (**"material information"**) that might be of material assistance to the NSW Police Force or another appropriate authority. The offence consists of the following elements:

    (i) A "serious indictable offence" ("the predicate offence") must have been committed by the other person.[39] That is, s 316 relates to a predicate offence that has already been committed. It is not, however, necessary for the principal offender to have been convicted of the predicate offence, allowing for prosecutions for offences contrary to s 316(1) of the *Crimes Act* to occur concurrently with prosecutions for predicate offences or in situations where the principal offender has since died or is a fugitive.

    (ii) The defendant must have subjectively known or believed that the predicate offence had been committed. It is not, however, necessary for the defendant to have known or believed the predicate offence was categorised as a serious indictable offence.[40] Mere "suspicion"[41] does not equate to knowledge or belief.[42] However, it need not be shown that the defendant witnessed the offence.[43] In *Wilson*, for instance, the recollection of receiving an earlier allegation of sexual assault against the principal offender combined with an awareness of later

[38] "Serious indictable offence" is defined under s 4 of the *Crimes Act* as "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more" and, as such, encompasses offences ranging from theft through to murder.

[39] *Wilson v DPP (NSW)* (2017) 95 NSWLR 450, [41] (***"Wilson"***).

[40] Section 313 of the *Crimes* Act.

[41] Suspicion being an epistemic condition that is less than belief but requires more than a possibility: see *George v Rockett* (1990) 170 CLR 104 at 115 and *Regina v Rondo* (2001) 126 A Crim R 552. Lord Devlin pithily deemed suspicion "a state of conjecture or surmise where proof is lacking": *Hussein v Chong Fook Kam* [1970] AC 942 at 948.

[42] See *R v Wozniak* (1989) 16 NSWLR 185.

[43] *Wozniak* at 193.

allegations against the same individual was held to be evidence capable of establishing the appellant's knowledge of the predicate offence's commission.[44]

(iii) Whether information might be of "material assistance" to the police depends greatly upon the circumstances of the predicate offence. "Material assistance" is undefined in the *Crimes Act*. The information need not amount to evidence that could be used to prosecute an offender: material that might assist "in securing the *apprehension* [emphasis added]" of the principal offender would suffice. And while the threshold for information to be of material assistance would appear to be low ("*might* be of material assistance [emphasis added]"), an individual must know or believe that the information is "worth telling".[45]

(iv) The prosecution must also prove a failure to bring to the attention of the NSW police force or other appropriate authority the material information. "Appropriate authority" is undefined in the *Crimes Act*. The NSW Crime Commission would likely be considered such an appropriate authority, especially in the context of serious organised crime. It is conceivable that, where relevant, the passing of information regarding offences relating to a child to the Director-General of the Department of Family and Community Services would be to disclose material information to an "appropriate authority".[46] However, it is most unlikely that relaying material information to the Bar Association, for instance, as part of an ethical guidance query would amount to contact with an "appropriate authority".

The onus on the prosecution to negative, if raised as a real possibility by the defence, the existence of a reasonable excuse for refusing to divulge material information is dealt with below.

40. A person who solicits or agrees to accept a benefit in consideration for doing anything that would be an offence under s 316(1) is guilty of a graver offence contrary to s 316(2) of the *Crimes Act*.[47]

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[44] *Per* Schimdt J at [80].

[45] *The Queen v Lovegrove & Kennedy* (1983) 33 SASR 332 at 336, *per* Cox J(**"Lovegrove"**). It should be noted that *Lovegrove* concerned the common law predecessor to s 316 of the *Crimes Act,* namely misprision of felony.

[46] Pt 2 of chpt 3 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). See also the discussion of s 316A of the *Crimes Act* below.

[47] It should be noted that, offences contrary to s 316(1) and (2) of the *Crimes Act* are punishable by staggered penalties depending on the gravity of the predicate offence (see the amendments to s 316 of the *Crimes Act* ushered in by sch 2.2 [1] of the *Community Protection Legislation Amendment Act 2018* (NSW)). Offences contrary to s 316(1) involving predicate offences that themselves carry more than 20 years' imprisonment are punishable by up to five years' imprisonment. Offences contrary to s 316(2) are punishable by up to five years' imprisonment for the lowest category of offence (the highest category being punishable by up to seven years' imprisonment). As such, some offences under s 316(1) and all offences under s 316(2) of the *Crimes Act* are themselves "*serious indictable offences*" and are, consequently, mandatorily reportable. It should be noted that only those offences under s 316A of the *Crimes Act* involving a predicate offence carrying less than five years' imprisonment would themselves not constitute a "serious indictable offence".

"Benefit" is defined under s 311(1) of the *Crimes Act* as "any benefit or advantage whether or not in money or money's worth". While the acceptance of fees would clearly amount to a "benefit", those fees would not – if lawfully provided for legal services – be "in consideration for" the concealment of an offence. The NSW Law Reform Commission (**NSWLRC**), when reviewing the operation of s 316 of the *Crimes Act* in 1999, expressed the view that:

> *professionals are paid and receive promotions in return for the performance of professional services rather than for the concealment of offences. The courts would be unlikely to interpret "benefit" in any other way.*[48]

It should be noted that "the word 'advantage' is more general than 'benefit' and encompasses any financial advantage to which the offender was not entitled, including one gained by the negative of not having to pay something".[49]

Concealment of Child Abuse Offences: s 316A of the Crimes Act

41. On 31 August 2018, in response to the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse,[50] s 316A was inserted into the *Crimes Act*.[51]

42. As with s 316, s 316A creates two offences:

    (i) an offence simpliciter (s 316A(1)); and,
    (ii) an aggravated offence involving soliciting, accepting or agreeing to accept a benefit to conceal an offence (s 316A(4)), to which the comments at paragraph 27 above also apply).

    Both offences under s 316A are subject to a "reasonable excuse" defence.

43. Section 316A applies, however, only to the concealment of predicate offences listed in subs 9, with prescribed offences ranging from the murder of a child and sexual offences involving children to assaults on children occurring at school and the failure of a person with parental responsibility to care for a child. Any "child abuse offence" listed in s 316A(9) is expressly excluded from the definition of "serious indictable offence" for the purposes of the s 316 concealment offence.[52] As

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[48] *Review of Section 316 of the Crimes Act 1900 (NSW)* (Report 93; December 1999), [3.55] ("**the NSWLR Review**").
[49] *Yates v Wilson* (1989) 40 A Crim R 113, 119–121 *per* Einfeld J (diss.).
[50] See the second reading speech, Criminal Legislation Amendment (Child Sex Abuse) Bill 2018, NSW, Legislative Assembly, 6 June 2018, Mr Mark Speakman SC MP (Attorney General)
[51] Schedule 1 [58] of the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW); see also subsequent amendments to s 316A of the Act made by sch 2.2 [1] to [5] of the *Community Protection Legislation Amendment Act 2018* (NSW) (commencing on 28 November 2018).
[52] See s 316(6).

such, the concealment of child-abuse offences must be prosecuted under s 316A rather than s 316.

44. The main differences between offences under s 316 and s 316A are laid out below:

(i) An offence under s 316A can be made out if one merely has constructive knowledge ("reasonably ought to know") that another has committed a predicate offence, unlike s 316, which requires proof of actual knowledge or belief that another has committed an offence.

(ii) A report of material information must be made to the NSW Police Force under s 316A(1)(c); reports to an "appropriate authority" are omitted from the new offence.

(iii) However, s 316A(2) contains a non-exhaustive[53] definition of "reasonable excuse", which includes situations where:

> *(a) the person believes on reasonable grounds that the information is already known to police, or*
> *(b) the person has reported the information in accordance with the applicable requirements under Part 2 of Chapter 3 of the Children and Young Persons (Care and Protection) Act 1998 or believes on reasonable grounds that another person has done so, or*
> *(c) the person has reported the information to the Ombudsman under Part 3A of the Ombudsman Act 1974 or believes on reasonable grounds that another person has done so, or*
> *(d) the person has reasonable grounds to fear for the safety of the person or any other person (other than the offender) if the information were to be reported to police, or*
> *(e) the information was obtained by the person when the person was under the age of 18 years, or*
> *(f) the alleged victim was an adult at the time that the information was obtained by the person and the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to police* [.]
> […]

A report to the Director-General of the Department of Family and Community Services under s 24 of the *Children and Young Persons (Care and Protection) Act 1988* would, therefore, afford a practitioner the defence of "reasonable excuse".

[53] See s 316A(3).

(iv) The consent of the Director of Public Prosecutions (**DPP**), rather than the Attorney General, is required for prosecutions against legal practitioners who obtain material information in the course of their practice.[54]

45. There appears, to date, to have been no curial consideration of s 316A. It is unclear how the judiciary will respond to the new offence or how prosecutorial discretion will be exercised in respect of the alleged concealment of child-abuse offences.

Material Information and Legal Professional Privilege

46. The High Court of Australia recently confirmed in its decision of *Glencore International AG and Ors v Commissioner of Taxation of the Commonwealth of Australia and Ors* that legal professional privilege (**LPP**) represents a centuries-old response to the exercise of powers by the State to compel disclosure of confidential communications between a lawyer and client.[55] Historically, at common law, the privilege:

> *was granted by the law to render a person immune from powers of compulsion. When it applied, laws or rules which contained such powers might not be effective. That is to say, the client or lawyer was immunised from such powers.*[56]

The "right" given by the privilege:

> *could be stated as "a right to resist the compulsory disclosure of information" or "the right to decline to disclose or allow to be disclosed the confidential communication or document in question".*[57]

LPP is, therefore, a "freedom from the exercise of legal power or control" and an important common-law immunity.[58]

47. The privilege operates to protect confidential communications made:

(i) between a lawyer and client for the dominant purpose of the client seeking or receiving legal advice from that lawyer ("advice privilege"); or,

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[54] See s 316A(6) of the *Crimes Act* and cl 4 of the *Crimes Regulations 2015* (NSW) ("**the Crimes Regulations**") (as amended by sch 5.5 [1] and [2] of the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW)).
[55] *Glencore International AG & Ors v Commissioner of Taxation of the Commonwealth of Australia & Ors* [2019] HCA 26 ("***Glencore***"), at [15].
[56] *Ibid.*, at [16].
[57] *Ibid.*, at [22].
[58] *Ibid.*, at [22]-[23]

(ii) between a lawyer and client (or between either person and a third party) for the dominant purpose of the communication being used in existing or reasonably anticipated judicial or quasi-judicial proceedings ("litigation privilege").[59]

The (non-actionable [60] right not to disclose LPP communications to others is the client's privilege. In practice it is the legal practitioner who will generally assert the privilege on behalf of a client, with lawyers duty-bound to ensure that such LPP material is not revealed.[61] A valid claim of LPP, consequently, immunises both a lawyer and his/her client from a compulsion to provide information brought into existence for the purposes of advice or litigation.[62]

48. It is trite law that LPP is the *sine qua non* of the lawyer-client relationship.[63] The privilege:

> *assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.*[64]

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[59] See Desiatnik, R J, *Legal Professional Privilege in Australia*, 3rd Ed., (2017) LexisNexis Butterworths: Sydney, 28-29. The privilege is partially codified under the heading "client legal privilege" (**CLP**) under div. 1 of pt 3.10 of the *Evidence Act 1995* (NSW). The statutory privilege primarily concerns the adduction of evidence in court proceedings, though by s 131A of the *Evidence Act 1995* (NSW) CLP extends to preliminary proceedings of courts, including disclosure requirements under summonses or subpoenas, pre-trial discovery, interrogatories and notices to produce. The focus of this paper will, however, be on LPP at common law.

[60] *Glencore*, [16].

[61] *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, 414-415, *per* Bowen CJ; *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 589, *per* Kirby J.

[62] *Glencore*, [16].

[63] The privilege "promote[s] trust and candour between the client and the legal adviser and…assist[s] the legal adviser to advise with confidence whether legal action should be initiated, defended or compromised": *Carter v Northmore Hale Devy & Leake* (1995) 183 CLR 121 at 161, *per* McHugh J ("***Carter***"). The restriction of the privilege to the legal profession "serves to emphasize that the relationship between a client and his [or her] legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships": *Baker v Campbell* (1983) 153 CLR 52, 128, *per* Dawson J ("***Baker***").

[64] *Grant v Downs* (1976) 135 C.L.R. 674 at 685 *per* Stephen, Mason and Murphy JJ.

49. The need to preserve LPP was considered by Lord Denning in *Sykes v DPP* to give rise to a defence to the former common law charge of misprision of felony, the common law predecessor to the statutory concealment offences:

> [n]*on-disclosure may sometimes be justified or excused on the ground of privilege. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential.* [65]

The NSWLRC, while noting the absence of case authorities directly pertaining to the issue of legal practitioners and the concealment of serious indictable offences under s 316 of the *Crimes Act*, similarly concluded that:

> ***communications protected by legal professional privilege would not expose a legal practitioner to prosecution under s 316*** [emphasis added]. *It is a well-established principle of statutory interpretation that fundamental common law privileges will not be taken to have been removed by statute unless the intention to do so is expressly manifest.*[66]

50. The NSWLRC accurately describes the scope of s 316 (and s 316A). LPP represents a fundamental common law principle not simply a rule of evidence.[67] As such it is "in the last degree improbable that the legislature would overthrow" such a fundamental principle "without expressing its intention with irresistible clearness".[68] As was noted by the majority in *Coco v The Queen*:

> *The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or*

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[65] [1962] AC 528 ("*Sykes*"). at 564; see also *R v Wozniak* (1989) 16 NSWLR 185 at 187 ("***Wozniak***"). It should also be noted that: "in 1967 the Chief Justice's Law Reform Committee in Victoria, in a report Misprision of Felony, recommended that no change should be sought in the law of misprision of felony as to the duty of members of the legal profession. The ground for this conclusion was the committee's view that in most situations which were likely to arise, the lawyer would be under no obligation to disclose a felony, being excused by the existence of a relevant privilege": *Wozniak* at 188-189. However, as Cox J noted in *Lovegrove* (at 339), "there [was] nothing [in *Sykes*] to indicate that any of the other Law Lords countenanced any excuse [for non-disclosure of a felony] at all".

[66] [3.33] of the NSWLR Review.

[67] *Baker*; see also *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, 552-553. where the majority held that LPP is both a "rule of substantive law" and "an important common law right".

[68] *Potter v Minahan* (1908) 7 CLR 277, 304, *per* O'Connor J (quoting from the 4th edition of *Maxwell on Statutes*). An example of such "irresistible clearness" of statutory wording is provided by the unequivocal abrogation of LPP in s 4 of the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), which provides that the privilege does not render non-disclosable or inadmissible prescribed "James Hardie material" in strictly defined "James Hardie investigations" and "James Hardie proceedings".

> *indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.*[69]

Applying that "principle of legality",[70] the High Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* held that s 155 of the *Trade Practices Act 1974* (Cth), which permitted members of the Australian Consumer and Competition Commission to issue notices to produce documents to individuals, could not be interpreted as abrogating LPP because nothing within the legislation indicated that Parliament had intended the common-law immunity to be displaced.[71]

51. Similarly, as s 316 and s 316A are silent as to the effect their provisions have on LPP, it is to be presumed that the privilege is unaffected.[72]

52. Information protected by LPP could, therefore, not be said to amount to "information" for the purposes of either s 316 or s 316A. A barrister receiving privileged communications would, consequently, fall outside the ambit of the concealment offences. In short, privileged information simply cannot be considered material information.

53. LPP will, of course, not operate at all where a client seeks advice from a lawyer for "the sake of appearance, as by cloaking an illegal step with the appearance that things are being done properly" because the client's dominant purpose would not be the obtaining legal advice.[73] Furthermore, and leaving aside express or implied/imputed waiver of privilege,[74] LPP will be lost through

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[69] (1994) 179 CLR 427, 437 ("***Coco***").
[70] See *Attorney General for New South Wales v XX* [2018] NSWCCA 198 at [137] ("***XX***").
[71] (2002) 213 CLR 543.
[72] See *Coco*, 437; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329. *X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29, [86]- [87], [158]; *Lee v The Queen* (2014) 253 CLR 455; [2014] HCA 20 at [46]- [47]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39, [313]-[314]; See also *XX*, [137]-[148].
[73] See, in the context of CLP under the *Evidence Act 1995* (NSW) but applicable to LPP, *Kang v Kwan* [2001] NSWSC 698 at [37.2] ("*Kang*") and *Idoport Pty. Ltd. & Anor. v. National Australia Bank Ltd. & Ors.* [2001] NSWSC 222 at [60].
[74] *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 481 *per* Gibbs CJ, 487–8, *per* Mason and Brennan JJ, 492–3, *per* Deane J, 497–8, *per* Dawson J; *Goldberg v Ng* (1995) 185 CLR 83, 96, *per* Deane, Dawson and Gaudron JJ. See s 122 of the *Evidence Act 1995* (NSW) for express and implied waiver of CLP.

misconduct if a communication was, for instance, made or prepared by a client, lawyer or party in furtherance of the commission of a crime, fraud or other improper conduct.[75]

54. The protection afforded by LPP is absolute and is not subject to a balancing exercise between competing interests.[76] The preservation of LPP, takes paramountcy over any public policy rationale behind s 316 and s 316A of the *Crimes Act*.[77] LPP prevails even where the protected communication might establish the innocence of a person charged with a criminal offence.[78] The privilege would *a fortiori* apply where the information might lead to the apprehension of an offender.

The Attorney General's Consent: s 316 and s 316A and Non-LPP Material

55. Barristers and other legal professionals are not, however, by their status, exempt from liability under either s 316 or s 316A of the *Crimes Act* if they come into possession of non-privileged material.

56. However, a prosecution against a barrister for an offence contrary to s 316 or s 316A of the *Crimes Act* could only be commenced with the approval of the Attorney General (acting on the advice of the Office of the DPP, the Justice Department and/or the Crown Advocate) or DPP, respectively.[79]

57. Beyond pragmatic considerations such as the strength of evidence and the prospect of securing a conviction, the Attorney General and DPP would be required to consider the public interest in

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[75] *Attorney-General (NT) v Kearney* (1985) 158 CLR 500. The privilege would be lost regardless of whether the lawyer himself/herself was aware that the communication was prepared in furtherance of a fraud or offence: see *R v Cox & Railton* (1884) 14 QBD 153, 171, *per* Stephens J ("***Cox & Railton***"); see also *Bullivant v Attorney-General (Vic)* [1901] AC 196 at 201, *per* Halsbury LC; *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382, 386, *per* O'Connor J, and 390, *per* Issacs J; *Carter* at 151, *per* Toohey J, and 160, *per* McHugh J. A distinction, of course, exists between communications that are not privileged because they were made for the purpose of achieving an illegal or improper end and communications that may be privileged because they were made for the purpose of seeking advice about *past* illegal or improper conduct: *Cox & Railton*, 175-6, *per* Grove J; *P & V Industries Pty Ltd v Porto (No 3)* [2007] VSC 113, [27], *per* Hollingworth J. For the loss of CLP through misconduct, see s 125 of the *Evidence Act 1995* (NSW) and *Kang* at [45], *per* Santow J.

[76] *Carter*, 133.

[77] "The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available": *Grant v Downs* (1976) 135 CLR 674, 685, *per* Stephen, Mason and Murphy JJ.

[78] See *Carter*, 128, 133-134, 166-167.

[79] See cl 4 of the Crimes Regulations (as amended by sch 5.5 [1] and [2] of the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW)). It should be noted that the prosecution of an arbitrator or mediator must similarly be approved by the Attorney General (for alleged offences under s 316) or the DPP (for alleged offences under s 316A): see cl 4(i) and (j) of the Crimes Regulations.

prosecuting a barrister for such an offence.[80] A factor militating against the prosecution of counsel would be that such proceedings might "be perceived as counter-productive […] by bringing the law into disrepute" through the undermining of the socially valuable client-lawyer relationship.[81]

58. The Bar Association is not aware of an Attorney General consenting to the prosecution of a barrister for an offence under s 316 of the *Crimes Act*. Nevertheless, it cannot be ruled out that, where a particularly grave predicate offence is involved, and the material information is not a privileged communication, prosecutorial discretion may be exercised in favour of charging counsel with a failure to divulge material information to police.

59. With the above remarks regarding LPP in mind, it should be noted that, in the second reading of the Crimes Legislation Amendment Bill in 1997, then Minister of Agriculture Mr Amery (on behalf of the then Minister for Police and Emergency Services) stated that:

> *The requirement for the Attorney General's approval for prosecution is not to be interpreted as limiting in any way existing protections and privileges that may apply to particular professional or other groups.*[82]

Those "existing protections" come to the fore when considering, quite apart from LPP, the likely reasonable excuses barristers may have not to report material information to the police.

Reasonable Excuse: s 316 and s 316A

60. The evidential burden to raise a "reasonable excuse" falls on the defence.[83] That burden, however, "requires only that the accused…adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case"[84] and can – in certain circumstances – be discharged by the defendant merely pointing to prosecution evidence capable of generating a reasonable doubt.[85] As soon as a "reasonable excuse" is put in issue, the burden shifts to the prosecution to establish beyond reasonable doubt that the defendant's grounds for not disclosing material information to the police (or an "appropriate authority" under s 316 of the *Crimes Act*) did not amount to a reasonable excuse.[86]

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[80] NSW DPP Prosecution Guidelines, Guideline 4 "The Decision to Prosecute" (amended 1 June 2007).
[81] *Ibid*., [3.3].
[82] Second reading speech, Criminal Legislation Amendment Bill 1997, NSW, Legislative Assembly, 7 May 1997, Mr Richard Amery MP (Mount Druitt - Minister for Agriculture).
[83] See ***R v Imo Sagoa*** [2014] NSWDC 44 at [36], [54] to [57] and [77] ("***Sagoa***"), *per* Haesler J, citing *He Kaw The* (1985) 157 CLR 523 and *CTM v The Queen* (2008) 236 CLR 440 ("***CTM***").
[84] *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 378–79.
[85] *Momcilovic v R* (2011) 245 CLR 1 at [665].
[86] See *Sagoa* at [77]. It should be noted that the approach of the District Court in *Sagoa* is at odds with the commentary on "reasonable excuse" by the authors of *Criminal Law NSW* where it was said that "proof of 'reasonable excuse' rests upon the

61. The scope of what may constitute a "reasonable excuse" is to be given a wide construction or import,[87] which befits a defence that is:

> *of indeterminate reference that* [has] *no content until a court makes its decision.* [The defence] *effectively require*[s] *the courts to prescribe the relevant rule of conduct after the fact of its occurrence.*[88]

62. The limits beyond which a "reasonable excuse" would not be made out are, for instance:

> *imaginary and insubstantial fears or those which, in the practical world, are so remote as to be safely ignored or overruled as unreasonable.*[89]

63. "Reasonable excuse" is left undefined for the purposes of s 316 of the *Crimes Act* but is given a non-exhaustive definition in s 316A of the *Crimes Act*. Section 316A(2)'s definition of "reasonable excuse", where relevant, may operate as an aid to the interpretation of the phrase in the context of s 316 of the *Crimes Act*.[90]

64. It is not possible to discern every permutation of what is a context-dependent, highly fact-sensitive defence. The focus of this guidance note will instead be on whether a barrister's protection of non-LPP client confidentiality may afford a defence of "reasonable excuse".

Reasonable Excuse: Confidentiality

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accused relying upon it on the balance of probabilities [citing *R v Chairman of Parole Board (NT); Ex parte Patterson* (1986) 32 A Crim R 266; *R v Edwards* [1975] QB 27; [1974] 3 WLR 285; [1974] 2 All ER 1085]". In this paper, it will be assumed that the *Sagoa* was not decided *per incuriam* and is in accordance with *CTM*.

[87] *Ganin v NSW Crime Commission* (1993) 32 NSWLR 423; 70 A Crim R 417 at 437, *per* Kirby P ("***Ganin***").

[88] *Taikato v The Queen* (1996) 186 CLR 454 at 466, *per* Brennan CJ, Toohey, McHugh, and Gummow JJ.

[89] *Ganin* at 439.

[90] See *K & S Lake City Freighters Pty Ltd v Gordon & Gotch* [1985] HCA 48; (1985 157 CLR 309 at 315.

65. Barristers' contractual,[91] equitable[92] and professional duties[93] of confidentiality to clients extend beyond the duty to preserve LPP. All legally privileged material will be confidential, but confidentiality itself extends to cover a wider range of communications than those that are privileged.[94] However, unlike communications shielded by LPP, which are protected absolutely, mere confidences may be subject to compulsory disclosure.[95]

66. Rule 114 of the Bar Rules prohibits the "disclosure (*except as compelled by law*) [emphasis added]" of confidential information "obtained by the barrister in the course of practice concerning any person to whom" a duty of confidence is owed. Disclosures under s 316 of the *Crimes Act* are "compelled by law" and, as such, provide an exception to barristers' overarching duties of confidentiality to clients in circumstances where LPP does not apply.

67. The value of even informal confidential relationships together with formalised confidential lawyer-client and doctor-patient relationships was "an additional reason for repealing s 316(1)" according to the NSWLR in 1999.[96] Lord Denning in *Sykes* deemed the preservation of doctor-patient confidentiality to excuse what would otherwise be an offence of misprision of felony.[97]

68. Confidential relationships were also recognised by the introduction of s 126B of the *Evidence Act 1995* (NSW) when in his Second Reading Speech, the NSW Attorney General stated that the protections afforded by s 126B of the *Evidence Act 1995* (NSW) would:

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[91] An implied term in each retainer agreement is an agreement that the legal practitioner will keep the client's affairs secret: see *Parry-Jones v Law Society* [1969] 1 Ch 1, at 7 *per* Lord Denning, at 9 *per* Diplock CJ; *Unioil International Pty Ltd v Deloitte Touche Tohmatsu* (1997) 17 WAR 98 at 108, *per* Ipp J; *Westgold Resources NL v St Barbara Mines Ltd* [2002] WASC 264 at [17] *per* E M Heenan J; *Ismail-Zai v State of Western Australia* [2007] WASCA 150; BC200705622 at [66] *per* EM Heenan AJA.

[92] Equitable duties of confidentiality can arise currently with, and outside of, a formal retainer under both the doctrine of confidential information (see, eg, *Johns v Australian Securities Commission* (1993) 178 CLR 408, 459–460; *Attorney-General (UK) v Heinemann Publishers Pty Ltd* (1987) 10 NSWLR 86, 191 (McHugh JA)) and under fiduciary obligations (see, eg, *Marriage of Griffis* (1991) 14 Fam LR 782 at 785, *per* Mullane J; *Westgold Resources NL v St Barbara Mines Ltd* [2002] WASC 264 at [20], *per* E M Heenan J).

[93] See, eg, r 114 of the Bar Rules.

[94] *Minter v Priest* [1930] AC 558, 568 *per* Lord Buckmaster; *D v NSPCC*, 218 *per* Lord Diplock; *Baker*, 68, *per* Gibbs CJ; *Marriage of Griffis* (1991) 14 Fam Lr 782, 785 *per* Mullane J. "Confidential information" is left undefined in r 114 of the Bar Rules, but it should be noted that the forebear to the current rule – r 2.2 of the Professional Conduct and Practice Rules 1995 (NSW) – stipulated that "to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege". See also the rules governing the legal profession prior to Victoria's adoption of the Uniform Law: r 62 Professional Conduct and Practice Rules 2005 (Vic).

[95] *Parry-Jones v Law Society* [1969] 1 Ch 1 at 9, per Diplock LJ; *Brayley v Wilton* [1976] 2 NSWLR 495 at 496-7, per Bowen CJ in Eq.

[96] [3.48] of the NSWLR Review.

[97] At 564.

extend to a wide range of confidential communications and may include confidences imparted to doctors and other health professionals, journalists, social workers and in other relationships where confidentiality is an integral element.[98]

While the "precise scope of the term 'acting in a professional capacity' is uncertain",[99] professional confidential relationship privilege has been recognised as applying to lawyer-client communications in *Urquhart v Lanham* and *Director-General Department of Community Services v D*.[100] However, unlike LPP, which once invoked acts as an impenetrable shield against the disclosure of a communication, privileged professional confidences are protected only if the nature and extent of the direct or indirect harm to the confider caused by disclosure outweighs the desirability of the evidence being given.[101]

69. Depending on the circumstances, barristers who receive confidences in the course of their professional practice that fall outside LPP may be able to rely on the "defence" of reasonable excuse to an offence under s 316 or s 316A of the *Crimes Act* for failing to report material information to police. Barristers should, therefore, be aware of both provisions and, if they find themselves in possession of confidential information that is not subject to LPP, should themselves seek legal advice as to whether they are under a reporting obligation.

70. Duties of privacy under the *Privacy Act 1988* (Cth) are beyond the scope of this paper and are unlikely to, but may, depending on the circumstances, be relevant to whether a 'reasonable excuse' exists.

71. A proper understanding of the above should assist NSW barristers to understand the scope of s 316 and s 316A of the *Crimes Act* and to appreciate that a threat of their application alone should never encourage a barrister to become a registered source.

Professional Conduct Issues Arising from Mandatory Disclosures under the Crimes Act

72. Section 316A(8) of the *Crimes Act* ensures that good faith disclosures by barristers of non-privileged confidences (presumably even if mistakenly or unreasonably made do not amount to unprofessional conduct or a breach of professional ethics and do not make the informant subject to any civil liability (including for defamation .

[98] Hon J W Shaw QC MLC, NSW Legislative Council, *Debates* (22 October 1997), p 1121.
[99] Odgers, S, *Uniform Evidence Law*, 13th Ed, Thompson Reuters (2018), [EA.126A.30].
[100] [2003] NSWSC 109, [15], and (2006) 66 NSWLR 582, [17], respectively. See also Desiatnik, R J, *Legal Professional Privilege in Australia*, 3rd Ed., (2017) LexisNexis Butterworths: Sydney, 317-319.
[101] Section 126B (3) of the *Evidence Act 1995* (NSW). It should be noted that the definition of "harm" for the purpose of s 126B of the *Evidence Act 1995* (NSW) covers, *inter alia*, "financial loss" and "damage to reputation".

73. Inconsistently, s 316 contains no such good-faith protection. However, it is unlikely that *bona fide* disclosures of non-privileged confidential or private information would amount to professional misconduct.

Conclusion: Concealment Offences and Barristers

74. There is a dearth of case law on the interaction between barristers' various duties relating to privileged material and confidences and offences under ss 316 and 316A of the *Crimes Act*, largely because the prosecution in NSW of a barrister for such an offence appears to be without precedent.[102]

75. The following propositions represent reasonable inferences as to the law in this area:

    (i) Communications protected by LPP do not amount to "information" that would need to be disclosed to police or other authorities under s 316 or s 316A. A failure to divulge privileged material concerning even the gravest offences could not, therefore, amount to an offence under the *Crimes Act*.
    (ii) The preservation of lawfully received but non-privileged client confidences (and, to a lesser extent, the confidences of third parties) may operate as a "reasonable excuse" for non-reporting.
    (iii) Confidentiality attaches to where a barrister discusses with another barrister any detail (even on an informal basis)[103] of a case in which the first barrister is appearing.
    (iv) Counsel would be required to divulge material information to police that is neither privileged (and, therefore, falls outside the scope of s 316 and s 316A) nor received as a confidential communication (and, therefore, may fall within the "reasonable excuse" defence) unless a factor justifying non-disclosure such as those listed in s 316A(2) or other reasonable excuse existed.

Mandatory Reporting

76. Section 465 of the *Legal Profession Uniform Law* (NSW) ("**the Uniform Law**") imposes an obligation on a "relevant person" to report suspected offences. The Bar Council is one such "relevant person". Section 465 does not apply to an individual barrister unless he or she is acting

[102] The dearth of authorities is a reflection, perhaps, of the number of prosecutions under s 316 of the *Crimes Act*. The Judicial Information Research System's (**JIRS's**) sentencing statistics for the Local Court and Supreme Court indicate that there were a mere 173 cases concerning s 316(1) of the *Crimes Act* in the Local Court and Supreme Court between October 2014 and 23 September 2018 (102 and 71 cases, respectively). There are no statistics for sentencing matters involving s 316(2) of the *Crimes Act*.
[103] Rule 101(m) and rr 114-118 of the Bar Rules.

as a delegate of the Bar Council. If after an investigation or otherwise, the Bar Council has reason to suspect that a person (not limited to practitioners) has committed a "serious offence", the Bar Council has an obligation to report the suspected offence and provide any relevant information held to the police or other law enforcement agency.

77. A "serious offence" is defined in s 6 of the Uniform Law, which reads as follows:

> *(a) an indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily);*
> *(b) or an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia).*

The mandatory reporting provision applicable to Bar Council thereby captures a broad range of suspected criminal offences.

DISCRETIONARY REPORTING: EXCEPTIONS TO CONFIDENTIALITY

Confidentiality: The Bar Rules

78. Rule 114 of the Bar Rules provides as follows:

> *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.*

79. Leaving aside issues of waiver and related exceptions to confidentiality, a key question arises from r 114 of the Bar Rules: save for where disclosure is compelled by law, in what circumstances can confidences be voluntarily disclosed by counsel without the confider's express or implied consent?

Voluntary Reporting of Criminality for Preventative Purposes: Professional Ethics

80. Sections 316 and 316A of the *Crimes Act* are concerned with the past offending of the principal offender, as the use of "has been committed" to describe the predicate offence indicates. The concealment offences would not, therefore, apply to a confider's expressed intention to commit an offence.

81. Whether to disclose threatened criminality for preventative purposes is largely a matter of professional conduct and ethics.

82. A permissive approach is taken in NSW in relation to client disclosures of threatened criminality. While not under a duty to reveal his or her client's intention to commit an offence, a NSW barrister would be permitted to report their concerns under r 82 of the Bar Rules, which reads as follows:

> *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.*

Similarly, in accordance with r 81 of the Bar Rules, counsel whose client informs him of an intention to disobey a court's order may report the matter to the court or the opponent if he or she:

> *believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.*[104]

83. The definition of "any person" for the purposes of rr 81 and 82 of the Bar Rules would include the client himself/herself and would, therefore, cover threatened suicidal and parasuicidal acts. The meaning of "safety" is vague and is left undefined in the Bar Rules. The term "safety" is broad and would encompass a range of risks of injury or harm of widely varying degrees of severity.[105]

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[104] Rules 81 and r 82 mirror their pre-Uniform Law predecessors, r 80 and r 81 of the Barristers Conduct Rules (6 January 2014) (NSW). The source for r 82 of the Bar Rules is r 81 of the Australian Bar Association's Barristers Conduct Rules (1 February 2010), which was first incorporated into the rules regulating NSW barristers in 2011 (see r 81 of the Barristers Conduct Rules (8 August 2011) (NSW). The source for current r 81 appears to be r 34 of the Barristers Code of Conduct 2008 (NSW), which, in turn, repeated earlier versions of the NSW regulations.

[105] The *Macquarie Dictionary* defines "safety" as "the state of being safe; freedom from injury or danger", with "safe" being defined as "secure from liability to harm, injury, danger or risk: *to arrive safe and sound*". The *Oxford English Dictionary* defines "safety" as: "the state of being protected from or guarded against hurt or injury; freedom from danger". "Safe" itself is primarily defined as: "free from hurt or damage; unharmed".

[105] Dal Pont, G E, (2015), [12.8].

84. To assist in the understanding of the subject matter of this rule, regard could be had to the following analogous rules:

(i) The NSW Solicitors Rules permit disclosure of confidential information as follows:

> *Rule 9.2 A solicitor may disclose information which is confidential to a client if:*
>
> […]
>
> *9.2.4 the solicitor discloses the information for the **sole** purpose of avoiding the **probable** commission of a serious criminal offence,*
> *9.2.5 the solicitor discloses the information for the purpose of **preventing imminent serious physical harm** to the client or to another person* [emphasis added] [.][106]

It has been said that the language used by r 9.2.5 of the NSW Solicitors' Rules is "clearly intended to confine discretionary disclosures to instances of some seriousness where the conscience of a reasonable (and ethical) person may presumably feel piqued to respond[;] [l]esser concerns will not suffice".[107] Moreover, any disclosure ought not to be:

> *to all and sundry (or the media), but only to an authority (namely, law enforcement authorities)* […] [or] [i]*n exceptional circumstances, where time is of the essence* […] *to a person who is clearly in danger of being a victim.*[108]

The wording of r 9.2.5 of the NSW Solicitors Rules replicates r 9.2.5 of the Australian Solicitors Conduct Rules (Law Council of Australia, 24 August 2015 (**"the Law Council's Rules"** .[109] "Serious" harm is to be treated as distinct from "really serious"

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[106] Under the Uniform Law system, Victorian solicitors are bound by the same rule.
[107] Dal Pont, G E (2015), [12.8].
[108] Dal Pont G E, *Riley Solicitors Manual*, (2005) Law Society of New South Wales: Sydney, [8070.5]
[109] The same wording is used in the Australian Solicitors Conduct Rules (1 June 2012) (Qld), r 9.2.4-5; Australian Solicitors' Conduct Rules (1 June 2015) (SA), r 9.2.4-5; the Legal Profession Conduct Rules 2010 (WA), r 9(3)(d) and (e); the ACT Legal Profession (Solicitors) Conduct Rules 2015 (ACT), r 9.2. Rule 2.1.3 of the Rules of Professional Conduct and Practice 2005 (NT) permit disclosure where: "the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony". Rule 11(1) of the Rules of Practice 1994 (Tas) stipulates that: "[a] practitioner must not disclose any information obtained in the course of handling a client's matter without the consent of the client other than to the administrator of a scheme relating to legal assistance in accordance with rule 16 [which relates to the provision of information regarding prospects of success and financial means to Legal Aid Tasmania]".

harm, the latter being synonymous with grievous bodily harm.[110] "Serious" harm would appear to fall between "more than merely transient and trifling"[111] harm (which suffices to make out actual bodily harm (**ABH** and "really serious harm" (which constitutes grievous bodily harm . Regard should also be had to the definition of "serious harm" in s 146.1 of the *Criminal Code Act 1995* (Cth:

> *serious harm means any harm (including the cumulative effect of more than one harm that:*
>
> *(a endangers, or is likely to endanger, a person 's life; or*
>
> *(b is, or is likely to be, significant and longstanding.*

It is likely that threats to cause harm at the upper end of the ABH spectrum would suffice for a discretionary disclosure to be permitted under r 9.2.5 of the NSW Solicitors' Rules.

(ii) The American Bar Association's Model Code (**"the ABA Code"**) permits disclosure of confidential information in the following circumstances:

> *Rule 1.6 (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:*
>
> *(1) to prevent reasonably certain death or substantial bodily harm;*
> *(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;* [or,]
> *(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services* [.] […]

Most jurisdictions within America have adopted in some form or other r 1.6(b) of the ABA Code; others have promulgated codes that mandate disclosures of confidences relating to planned offences.[112]

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[110] *R v Perks* (1986) 41 SASR 335, 337, *per* King CJ, applied in *Swan v The Queen* [2016] NSWCCA 79, [57], *per* Garling J; see also *Director of Public Prosecutions v Smith* [1961] AC 290, 3334, *per* Viscount Kilmuir LC; cf *R v Doyle* [2004] EWCA Crim 2714.
[111] *R v Donovan* [1934] 2 KB 498, 509.
[112] *Annotated Model Rules of Professional Conduct*, Sixth Edition (2007), American Bar Association: Chicago, p 101.

Within the American system, breaches of confidence involving the risk of serious harm to others have been deemed professionally justified in the following circumstances:

(a) where a lawyer alerted authorities to his client's stated intention to set fire to a building from which he had been evicted;[113]
(b) where a prospective client threatened to kill a judge and two lawyers in a case during a telephone call to retain counsel;[114]
(c) where a lawyer notified authorities of the location of the bodies of two murder victims because he reasonably believed that both victims were still alive and that disclosure was necessary to prevent either their imminent deaths or substantial harm befalling them.[115]

(iii) The Solicitors' Regulation Authority's (**SRA's**) Solicitors' Code of Conduct 2007 (England and Wales) ("**the English Rules"**) permitted disclosure of confidential information in the following situations:

> *Rule 13. You may reveal confidential information to the extent that you believe necessary to prevent the client or a third party committing a criminal act that you reasonably believe is likely to result in serious bodily harm.*
>
> *Rule 14. There may be exceptional circumstances involving children where you should consider revealing confidential information to an appropriate authority. This may be where the child is the client and the child reveals information which indicates continuing sexual or other physical abuse but refuses to allow disclosure of such information. Similarly, there may be situations where an adult discloses abuse either by himself or herself or by another adult against a child but refuses to allow any disclosure. You must consider whether the threat to the child's life or health, both mental and physical, is sufficiently serious to justify a breach of the duty of confidentiality.*

The definition of "serious bodily harm" would likely accord with the definition given in paragraph 75(i) above.[116]

It should be noted that rr 13 and 14 of the English Rules are not replicated in the current "outcomes-focused" SRA Code of Conduct (2011).

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[113] *Purcell v Dist. Attorney*, 676 N.E.2d 436 (Mass. 1997).
[114] *State v Hansen*, 862 P.2d 117 (Wash. 1993).
[115] *McClure v Thompson*, 323 F.3d 1233 (9th Cir. 2003); cf *People v Belge* 83 Misc.2d 186 (1975).
[116] See *R v Chan Fook* [1994] 1 WLR 689; *DPP v Smith* [1960] 3 WLR 546; and *R v Donovan* [1934] 2 KB 498.

(iv) Rule 8.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (NZ) (**"the New Zealand Rules"**) mandates that lawyers must disclose confidential information where:

> […]
>
> *(a) the information relates to the anticipated or proposed commission of a crime that is punishable by imprisonment for 3 years or more; or*
>
> *(b) the lawyer reasonably believes that disclosure is necessary to prevent a serious risk to the health or safety of any person* [.] […]

The New Zealand Rules go on to permit lawyers to disclose client confidences in the following circumstances:

> *Rule 8.4 A lawyer may disclose confidential information relating to the business or affairs of a client to a third party where—*
>
> *(b) the information relates to the anticipated commission of a crime or fraud; or*
>
> […]
>
> *(d the lawyer reasonably believes that the lawyer's services have been used by the client to perpetrate or conceal a crime or fraud and disclosure is required to prevent, mitigate, or rectify substantial injury to the interests, property, or reputation of another person that is reasonably likely to result or has resulted from the client's commission of the crime or fraud* [.] […]

(v) The Canadian Bar Association's (**CBA's**) Code of Professional Conduct (**"the CBA Code"**) mandates breaches of client confidentiality in certain situations, chapter IV, [2] stipulating that a lawyer must reveal otherwise confidential information concerning his/her client where he/she:

> *believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm.*

Most Canadian law societies have, however, either now adopted the Federation of Law Societies of Canada's Model Code of Professional Conduct (as amended 14 March 2017)

(**"the Canadian Model Code"**) or plan to do so.[117] Rule 3.3-3 of the Canadian Model Code is entitled "Future Harm / Public Safety Exception" and provides that:

> *A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.*

The Canadian Model Code usefully provides the following guidance to rule 3.3-3 that lays out when disclosure can be considered and the factors to be taken into account when contemplating a breach of client confidentiality:

> *Commentary*
> *[1] Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this rule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.*
>
> *[2] The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In* Smith v. Jones*, [1999] 1 S.C.R. 455 at paragraph 83, the Court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.*
>
> *[3] In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, a lawyer should consider a number of factors, including:*
> *(a) the likelihood that the potential injury will occur and its imminence;*
> *(b) the apparent absence of any other feasible way to prevent the potential injury; and*
> *(c) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.*
>
> *[4] How and when disclosure should be made under this rule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact*

[117] The CBA Council has resolved to discontinue the CBA Code once no Canadian law society uses it or incorporates it.

the local law society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.
[…]

85. As is clear from an analysis of the NSW Solicitors Rules and the rules of comparable jurisdictions, the Bar Rules appear to recognise that a level of judgment and discretion is available to barristers in NSW when considering whether to breach confidentiality to report threats to the safety of others. The scope of "safety" encompasses both mental and physical health and, on a literal reading of the term, would appear to envisage a lower threshold of severity of harm than is envisaged by the NSW Solicitors Rules, ABA Code, the English Rules, the New Zealand Rules, **the CBA Code** and the Canadian Model Code.

86. It is suggested that, where a barrister is of the opinion that there is such a real risk and it is safe and practicable to do so, members of the profession ought:

    (a) to attempt to dissuade or to advise against the threatened course of conduct;
    (b) in the event that there is no satisfactory reassurance forthcoming, to raise the matter with the Bar Association's ethical guidance panel;
    (c) where, having sought advice, disclosure is proposed, to discuss, first, any proposed disclosure to a third party with the client (if safe to do so) and, second, to explain the conflict of interest that has thereby arisen and the consequent need to withdraw from representing the client;
    (d) to assist, where possible, the client to access alternative legal representation; and,
    (e) to cease acting for the client.

87. It is acknowledged that, *in extremis*, it may be neither safe nor practicable to take the above steps before reporting a threat to the police or another appropriate authority, in which case such steps ought to be taken as soon it is safe and practicable to do so.

88. Counsel ought also to ensure that, as soon as it is safe and practicable to do so, a clear record of any communication of confidential material is made. The guidance on the r 3.3-3 of the Canadian Model Code provides a useful summary of the information that ought, at a minimum, to appear in any file note concerning a disclosure:

> *[5] If confidential information is disclosed under rule 3.3-3, the lawyer should prepare a written note as soon as possible, which should include:*
>
> *(a) the date and time of the communication in which the disclosure is made;*
> *(b) the grounds in support of the lawyer's decision to communicate the information, including the harm intended to be prevented, the identity of the person who*

prompted communication of the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

89. *Legal Profession Complaints Committee v Johnston* provides an illustrative example of the risks associated with an over-zealous revelation of confidentiality material.[118] *Johnston* concerned an independent children's lawyer's disclosure of information concerning the psychiatric condition of a father to the child's school. The medical data had been obtained as a result of the lawyer's retainer and was, as such, confidential material. While undoubtedly motivated by a concern for the child's welfare, the lawyer was nonetheless reprimanded for the disclosure.[119]

90. In addition to being a disciplinary matter, an unwarranted disclosure of confidences might also give rise to liability for breach of confidence,[120] breach of contract[121] or under the *Privacy Act 1988* (Cth).

91. There is very little empirical evidence regarding lawyers' protective breaches of confidentiality.[122] If any change were to be made to the Bar Rules regarding permissive disclosure of otherwise confidential client information, it would be advisable for anonymised surveys of practitioners to be conducted to ascertain:

(i) the prevalence of the issue;
(ii) whether practitioners have been able to dissuade clients from embarking on planned crimes; and,
(iii) what, if any, disclosures practitioners have felt themselves morally obliged to make in response to clients' threats to harm others.

Whistleblowing

92. By their training, barristers are apt to identify illegality and abuses of the justice system. By their privileged position, barristers are also privy to information about wrongdoing unavailable to those

[118] [2013] WASAT 159; BC201316921 (**"*Johnston*"**).
[119] See also *Legal Services Commissioner v Tampoe* (2009) LPT 14 and *Legal Practitioners Complaints Committee and Trowell* [2009] WASAT 42, both of which arose from breaches of confidentiality during the representation of Schapelle Corby.
[120] *Taylor v Blacklow* (1836) 3 Bing NC 235; 132 ER 401. It should be noted that the iniquity exception applies to breaches of confidence.
[121] It should be noted that breaches of confidentiality clauses in contracts may be justified in the public interest.
[122] An exception is the Levin's 1994 study, an anonymised survey of 1950 practising members of the New Jersey Bar on the prevalence of clients' disclosure of planned serious crimes and lawyers' responses to such disclosures.

outside the lawyer-client relationship. The paramountcy of their duty to the administration of justice,[123] means that barristers may be ethically obliged to prevent and perhaps expose misconduct that affects the administration of justice.

93. There are few examples of lawyers acting as whistleblowers.[124] It is beyond the scope of this guidance paper to detail when and how barristers may act as whistleblowers. Counsel providing legal services to public authorities and corporate bodies ought to be aware of the provisions of the *Public Interest Disclosure Act 2013* (Cth), s 6(c) of the *Corporations Act 2001* (Cth) and the *Independent Commission Against Corruption Act 1988* (NSW).

[123] Rule 4(a) of the Bar Rules.

[124] An example of the lawyer-whistleblower is provided by practitioner Christopher Dale who in 2006 leaked information regarding Clayton Utz's internal investigation into the events surrounding the destruction of documents damaging to the law firm's client, British American Tobacco. See Parker C, Le Mire, S, Mackay, A, "Lawyers, Confidentiality and Whistleblowing: Lessons from the *McCabe* Tobacco Litigation", (2017) 40(3) *Melbourne Law Review* 999.