

In the matter of an Application for Review pursuant to section 146(1)(m) of the Victoria Police Act 2013 against a decision to dismiss ABC from Victoria Police (A72/15)

Submission of the Victorian Equal Opportunity and Human Rights Commission on issues related to the application of sections 154A and 157 of the *Victoria Police Act 2013* and the publication of witness details in decisions

I INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission ('the Commission') makes this submission pursuant to the procedural directions of the Police Registration and Services Board ('the Board') in this matter pursuant to section 156(3) of the *Victoria Police Act 2013* ('the Act') dated 18 November 2015.¹
2. The Board has invited the Commission to provide evidence or submissions to assist the Board in considering its approach to the identification of witnesses in its statement of reasons for decision.
3. The Board has identified that there are persons referred to in evidence in this matter "who are not formally represented before the Board and whose interests are affected. ... Some of those persons may not be aware of this proceeding. ...". It says it would be assisted by submissions on issues it has identified in relation to section 154A (which requires the Board to publish a statement of reasons for a decision on a review unless it is satisfied that to do so would not be in the public interest) and section 157 (which provides that review and appeal hearings are held in public, subject to the power of the Board to direct a hearing or part of it be held in private, if that would facilitate the appeal or review or it is in the public interest).

¹ The Applicant seeks a review of the decision of a delegate of the Chief Commissioner to dismiss him (pursuant to section 132(1)(h) of the *Victoria Police Act 2013*) after the delegate found that a discipline charge of 'conduct likely to bring the force into disrepute' was proved against the Applicant.

4. The Board has stated it is “mindful that the Board’s reasoning in this matter may guide its approach in future proceedings.”

II OVERVIEW OF SUBMISSION

5. The Commission is an independent statutory authority with responsibilities under three laws that protect and promote the rights of people in Victoria: the *Charter of Human Rights and Responsibilities Act 2006* (‘the Charter’), the *Equal Opportunity Act 2010* (‘the EO Act’) and the *Racial and Religious Tolerance Act 2001*. The Commission recently conducted an *Independent Review into Sex Discrimination and Sexual Harassment, including Predatory Behaviour, in Victoria Police* (‘the Review’).² The Review is relevant in this context in its findings regarding Victoria Police employees experiencing, witnessing and reporting sex discrimination and sexual harassment. This includes the impact on victim/targets of reporting these harmful workplace behaviours and the detrimental impact identification can have on victim/targets and by deterring future complaints.
6. This submission addresses the issues identified by the Board with a focus on the rights of victims and witnesses with reference to the laws in respect of which the Commission has responsibilities (in particular, the Charter) and with reference to relevant findings from the Commission’s research and findings in the Review.
7. It outlines the research undertaken in the Review (paras 11-14) and the application of the Charter, including relevant human rights (paras 0-41) and how the Charter applies to the Board: to require interpretation of legislation compatibly with human rights (paras 20-23); to ensure a fair hearing in its functions as a tribunal (para 24); and to require it act compatibly with, and properly consider, human rights when it exercises administrative functions (paras 25-26).

² A copy of the Review Report, published on 9 December 2015, is attached.

III SUMMARY

8. We submit that:

- 8.1. In accordance with section 155 of the Act and the fair hearing right in section 24(1) of the Charter, where the publication of a review decision in the absence of de-identification would adversely affect the rights or interests of a person the Board must inform them and afford them an opportunity to respond (paras 55-59).
- 8.2. The Board should develop a process to inform affected persons identified in evidence and provide them with a reasonable opportunity to respond or be heard. Regard should be had to the *Victims Charter Act 2006* and the Charter in developing new practices and procedures. We highlight the Review's recommendation for human rights training for the Board (paras 58-61).
- 8.3. The Board must consider the human rights of individuals affected by a decision that identifies them, In having regard to the public interest pursuant to section 151(1)(a) of the Act (paras 62-66).
- 8.4. The Board could consider creating a practice note or guidelines of factors to consider in identifying 'the public interest' and specifying the need to consult victim/targets regarding identification and to ensure they have been adequately de-identified in any published decision (para 67).
- 8.5. In construing whether it is in the public interest to make a decision under sections 154A and 157, the Board is required to take into account all matters relevant to the decision including: protecting the human rights of victims and witnesses; maintaining the integrity of, and public confidence in, Victoria Police; protecting victims and witnesses of sexual harassment, sex discrimination and other predatory behaviour or gender-based harm from victimisation and detrimental action and encouraging future complaints; open justice; the right of the media and public to access and impart information in

these proceedings; and the Applicant's right to a fair hearing (paras 68-69).

- 8.6. Subject to the views of the affected person, balancing relevant public interest considerations it is open for the Board in this matter to be satisfied, based on evidence of general application, that it is in the public interest to exclude identifying information from a public decision (para 80).
- 8.7. The Board's power to make a decision under sections 154A and 157 is not conditioned on an application or evidence from the parties or the affected person (para 80).
- 8.8. Taking a purposive approach to interpretation, the public interest in de-identifying personal information can be informed by related protections in the Victoria Police Act, and the related *Protected Disclosure Act 2012*, that provide for the confidentiality of people who make disclosures in order to protect them from detriment and encourage disclosures (paras 83-84).
9. In response to issues identified by the Board, we set out relevant findings in the Review, as evidence which may be of general application to the Board's approach (paras 42-52).
10. The Commission does not seek the opportunity to make oral submissions to the Board in addition to this written submission. However, on request from the Board the Commission could make a representative available to attend before the Board if this would be of assistance.

IV INDEPENDENT REVIEW

11. Victoria Police commissioned the Victorian Equal Opportunity and Human Rights Commission to undertake an *Independent Review into Sex Discrimination and Sexual Harassment, including Predatory Behaviour in Victoria Police* ('the Review'). The Review was launched in February 2015 and reported publicly on 9 December 2015.

12. The Review examined the nature, prevalence, drivers and impacts of sex discrimination and sexual harassment in Victoria Police.³ Based on these findings, the Review developed an evidence-based Action Plan, comprising twenty recommendations, which will drive organisational and practice change to respond to and prevent sex discrimination and sexual harassment in Victoria Police.
13. The Commission will audit Victoria Police's implementation of the Action Plan and make any further recommendations, eighteen months after the release of the Review and then again twelve months later.
14. The Board has invited the Commission to provide its considered view and evidence on the issue of victimisation and reprisal, and the impact of making complaints. The Review did examine these issues in the course of its research. These findings will be discussed throughout this submission.

V THE CHARTER

15. Key ways the Charter protects and promotes the human rights in sections 8-27 of the Charter is by directing that all statutory provisions be interpreted so far as is possible in a way that is compatible with human rights (section 32), by imposing an obligation on public authorities to act in a way that is compatible with human rights (section 38), and by placing a direct obligation on courts and tribunals to comply with certain Charter rights (section 6(2)(b)).

Application of the Charter to the Board

16. The Board is a public authority for the purposes of the Charter under section 4(1)(b) as 'an entity established by a statutory provision that has functions of a public nature'. However, the Board is also a tribunal and under section 4(1)(j) a court or tribunal is not a public authority 'except when it is acting in an administrative capacity.' Acting in an 'administrative

³ The Review's scope was limited to the prevalence, nature, drivers and impacts of sex discrimination and sexual harassment including predatory behaviour among Victoria Police personnel.

capacity' means the exercise of 'administrative power' in a public law or common law sense, as against 'judicial' power.⁴

17. The Commission does not contend that the Board is acting in an administrative capacity so as to be bound by section 38 of the Charter in making orders or decisions under sections 154A or 157 of the Act. However the Board will be a public authority bound by section 38 in adopting any practices or procedures relating to how these provisions are applied.⁵
18. When the Board is not acting in an administrative capacity, the Charter applies to the Board by requiring it to interpret laws in a way that is compatible with human rights (section 32) and giving it direct obligations to act compatibly with certain rights (section 6(2)(b)).
19. In practice, this means that the Charter applies to the Board in the following ways:

Section 32: interpretation of laws

20. The Board must interpret sections 154A and 157 so far as is possible to do so consistently with their purpose, in a way that is compatible with human rights (section 32(1)).
21. In *Nigro v Secretary, Department of Justice*,⁶ the Court of Appeal explained that section 32 does not establish a new paradigm of interpretation:

[A]s was observed in *Slaveski v Smith*, the court must discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky*. The statute is to be construed against the background of human rights and freedoms set out in the Charter in the same way

⁴ See *R v Williams* [2007] VSC 7 (15 January 2007); *Sabet v Medical Practitioners Board f Victoria* (2008) 20 VR 414, [111]-[127]; *Kracke v MHRB* (2009) 29 VAR 1; *PJB v Melbourne Health* [2011] VSC 327.

⁵ The note to section 4(1)(j) of the Charter states 'A court or tribunal is acting in an administrative capacity when, for example, listing cases or adopting practices and procedures.'

⁶ [2013] VSCA 213.

as the principle of legality is applied. The human rights and freedoms set out in the Charter incorporate or enhance rights and freedoms at common law. Section 32(1) thus applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.⁷

22. The principle of legality requires that a legislative intention to infringe rights must be expressed with “irresistible clearness”.⁸ Further, where the words of a statute are ambiguous, the principle of legality requires a construction that least infringes rights ought to be adopted.⁹
23. Section 32 of the Charter operates in broadly the same way: “irresistible clearness” is required before legislation is construed so as to limit or interfere with Charter rights. Just as “ordinary principles of construction indicate that ‘an interpretation should be favoured that “produces the least infringement of common law rights”’,¹⁰ section 32 requires legislation to be construed in a manner that least interferes with the human rights protected by the Charter.¹¹

Section 6(2)(b): direct functions

24. Section 6(2)(b) requires courts and tribunals to enforce any of the rights in Part 2 that relate to court and tribunal proceedings.¹² In this context, the right to a fair hearing in section 24 of the Charter is related to a core function that the Board performs, and requires the Board to ensure a fair hearing as specified in section 24.¹³

Section 38: obligations as a public authority

⁷ Ibid at [85] (footnotes omitted).

⁸ *Lee v New South Wales Crime Commission* [2013] HCA 39 at [308] (Gageler and Keane JJ), quoting *Maxwell on the Interpretation of Statutes*, 4th ed (1905) at 122.

⁹ Ibid at [29] (French CJ).

¹⁰ *WBM v Chief Commissioner of Police* [2012] VSCA 159.

¹¹ Ibid at [94]. See also *Slaveski v Smith* (2012) 34 VR 206 at [24]: “If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question.”

¹² *Kracke v MHRB* (2009) 29 VAR 1 at [250].

¹³ See *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [246]-[247] (Tate JA). The direct application of s 24 to tribunals is supported in comments of Crennan and Kiefel JJ in *Momcilovic v The Queen* (2011) 245 CLR 1: “Some of the rights identified and described in Pt 2 may require courts or tribunals to ensure that processes are complied with, for example to ensure a fair hearing...”.

25. When acting in an administrative capacity, the Board is a public authority bound by section 38(1) to act compatibly with, and give proper consideration to, human rights.
26. An act is incompatible with a human right if it limits a right in a way that is not a reasonable limit as can be demonstrably justified in accordance with section 7(2) of the Charter.
27. Proper consideration of rights in decision-making requires the decision-maker to understand which rights may be relevant; understand whether those rights will be interfered with by the decision, and if so, how; seriously think about the possible impact on human rights; identify other interests or obligations; and balance competing interests.¹⁴

Relevant human rights in this matter

28. The application of sections 154A and 157 by the Board engage human rights of the parties to the proceeding and non-parties. The Board should first identify relevant rights and their scope so that it can interpret sections 154A and 157 in a way that is compatible with human rights.
29. Charter rights are to be interpreted ‘in the broadest possible way’¹⁵ with a focus on the purpose of the right and the underlying values and interests which it is designed to protect.¹⁶

The right not to have privacy unlawfully or arbitrarily interfered with (section 13(a)) or have reputation unlawfully attacked (section 13(b))

30. An arbitrary interference is one that is not proportionate to the legitimate aim sought.¹⁷ The purpose of the privacy right is to protect people from unjustified interference with their ‘personal and social individuality’ and their capacity for ‘effective participation in democratic society.’¹⁸ The right ‘protects the individual’s interest in the freedom of their personal and

¹⁴ *Bare v Small* [2015] VSCA 197 at [288] (Tate JA).

¹⁵ *DAS v Victorian Equal Opportunity and Human Rights Commission* (2009) 24 VR 415 at [80] (Warren CJ).

¹⁶ *DPP v Kaba* [2014] VSC 52 at [108] (Bell J).

¹⁷ *Ibid.* See also *Patrick’s Case* [2011] VSC 327 and *WBM v Chief Commissioner of Police* [2012] VSCA 159 at [117].

¹⁸ *DPP v Kaba* [2014] VSC 52 at [125].

social sphere in the broad sense.¹⁹ This includes a right to individual identity,²⁰ personal development and physical and psychological integrity (including personal security and mental stability) and a right to establish and develop meaningful social relations.²¹

31. Regarding its protection of information privacy, section 13(a) is intended to be interpreted consistently with the Victorian information privacy and health records framework to the extent it protects against arbitrary interferences.²² This relevantly includes the *Victims' Charter Act 2006*, which sets out principles relating to persons adversely affected by crime. It provides that a victim's personal information is not to be disclosed except in accordance with the *Privacy and Data Protection Act 2014*, which requires individuals to consent to the use and disclosure of their personal information.

The right to security (section 21(1))

32. Although this right is protected in the Charter together with the right to liberty in section 21, the concept of security is not limited to persons arrested or detained. The concept refers to a person's physical and mental health and its positive protection from interference by other persons where that security is threatened.²³

The right to a fair hearing (section 24(1))

33. Section 24(1) of the Charter protects the right of the parties to have the review proceeding decided by 'a competent, independent and impartial court or tribunal' after a 'fair' and 'public' hearing.
34. The requirement that the hearing be 'public' reflects the common law principle of open justice, that justice should not only be done but seen to be done, and also contributes to a fair hearing through public scrutiny of

¹⁹ *Kracke v Mental Health Review Board* [2009] 29 VAR 1 at [619]-[620].

²⁰ Note a person's name is an aspect of their right to privacy: *DPP v Kaba* [2014] VSC 52.

²¹ *Kracke v Mental Health Review Board* [2009] 29 VAR 1 [619]-[620].

²² Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill, p 13.

²³ See further Pound and Evans, *Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008), p 149 at [2300].

the application of the law.²⁴ It requires hearings and decisions to be public subject to the exceptions in section 24(2) and (3).

35. Section 24(2) allows courts and tribunals to exclude the media or public from all or part of a hearing if permitted to do so by a law other than this Charter (for example in this instance in accordance with section 157 of the Act: discussed below). Section 24(3) provides that all decisions made by a tribunal in a civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than the Charter otherwise permits. These exceptions recognise that the fairness of a hearing will not necessarily be jeopardised by restrictions on the public nature of a hearing or decision.
36. The Board's obligation to accord fairness is not limited to the parties. The Board is bound by the rules of natural justice in all appeals and reviews before it (section 155). In our submission, this obliges the Board to inform a person who is going to be adversely affected by a decision and give them an opportunity to be heard.
37. Where publication of a review decision in the absence of de-identification would adversely affect the rights or interests of a person (such as a victim, witness or other non-party to the proceeding) the Board should inform the affected person, provide a reasonable opportunity to respond and consider their response.
38. For example, an adverse effect would include, but is not limited to, revealing personal information about a person (which limits their privacy) and potential affects this could have on their rights to reputation or security.

The right to freedom of expression (section 15)

39. This includes the right of the media and the public to seek, receive and impart information about a proceeding, mindful that this right can be

²⁴ For further discussion of the open justice principle, see Second Reading Speech to the Open Courts Bill 2013, Legislative Assembly, 27 June 2013, p 2418. See also Pound and Evans, *Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008), pp 169 and 174.

subject to lawful restrictions “reasonably necessary” to respect the rights and reputation of other persons (section 15(3)).

Reasonable limits on rights (section 7(2))

40. Human rights protected in the Charter are not absolute and may be limited, however under section 7(2) of the Charter a right ‘may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’. Any other limit will be incompatible with a human right.
41. Section 7(2) provides factors to be considered when assessing if a limit on rights is reasonable, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

VI ISSUES IDENTIFIED BY THE BOARD

- (e) **Is there any evidence which may be of general application to the Board’s approach to identifying informants and witnesses to alleged police misconduct in review matters?**
42. Of relevance to the Board are the Review’s findings in relation to the impact of being a victim/target or witness of sex discrimination and sexual harassment and the experience of and barriers to reporting sex discrimination and sexual harassment. While the Review did not examine the impact on victim/targets of being identified in Police Registration and Services Board decisions, the Commission considers the Review’s findings in relation to being identified in internal Victoria Police reporting processes, may have a similar impacts on victim/targets.
43. The Review found that targets and witnesses of sex discrimination and sexual harassment experience significant detriments and harm. This includes psychological harm, social isolation, exclusion and withdrawal,

economic loss, health-related issues and extreme physical harm, miscarriage and thoughts of suicide.²⁵

44. There is a strong perception in Victoria Police that being a victim/target of sex discrimination and sexual harassment is inconsistent with the expectation that Victoria Police employees, particularly sworn employees, must be resilient, strong and 'be able to handle it.'²⁶

*I was ashamed that I was a victim, I was afraid of everything, I had so much self-doubt. I felt I had no one to turn to (female interviewee).*²⁷

45. Many Review participants described never having disclosed their experiences previously due to fear for personal safety and that of their family, fear of victimisation, and feelings of embarrassment and shame.²⁸ One former employee who had experienced multiple sexual assaults by a number of colleagues told the Review:

*...I am really fearful about coming forward and speaking out about it. I know what can happen...It's one the reasons I have nightmares. You know what's going to happen if you cross them (female interviewee).*²⁹

46. The Review found there are significant barriers to reporting sex discrimination and sexual harassment including a strong reporting stigma, perceived negative consequences for reputation and career, the emotional toll of reporting and the fear of being blamed or not believed.³⁰ The strong reporting stigma is largely due to the fear of victimisation.

That is why I didn't complain. If I say he came on to me in the van you have to think 'What is going to happen to me in that station?'

²⁵ Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, including Predatory Behaviour, in Victoria Police* (2015) 104. See Chapter Four of the Review for a detailed discussion of the various harm and impact, including participants' direct experiences and observations.

²⁶ Ibid 52–69, 113.

²⁷ Ibid 113.

²⁸ Ibid 118–119, 294–301.

²⁹ Ibid 119.

³⁰ Ibid 282–307.

My 'work family' would most likely turn against me. You would get reprisal through social isolation from the group (female interviewee).³¹

They don't want to be fingered as the person who blew the whistle... They fear the repercussions of having other people know what happened to them; like they might be judged. They just want it to go away (female interviewee).³²

47. The Review conducted a survey, comprising close to thirty per cent of the workforce, which found that only eleven per cent of targets made a formal complaint or report about their experience of sexual harassment in the Victoria Police workplace.³³ In addition, Victoria Police Human Resource Department data sources from 2006–2014, show there were only around one hundred complaints of sexual harassment.³⁴ This is further evidence of significant under-reporting given the rates of sexual harassment reported by Review participants.³⁵
48. Many victim/targets felt that reporting had created a 'juggernaut' effect that they had little control over. For many participants, there were concerns regarding potential breaches of confidentiality, which was exacerbated by the lack of awareness about the progress of their complaint.³⁶
49. The Review found evidence that many participants were victimised, ostracised or experienced negative consequences as a result of reporting sex discrimination and sexual harassment.³⁷ Participants told the Review:

*A lot of people who I thought were my friends dropped off.
When I got to my new station as the result of me choosing to*

³¹ Ibid 299.

³² Ibid.

³³ Ibid 292.

³⁴ Ibid 293.

³⁵ For more detail, see Ibid 70–103.

³⁶ Ibid 331.

³⁷ The survey found that participants experienced victimisation in the form of being ostracised or ignored by colleagues (18 per cent), being labelled a troublemaker (18 per cent), other negative outcomes such as being denied training or promotion (18 per cent), and being bullied or victimised by colleagues (13 per cent). Further, just over 10 per cent of participants reported having their duties, roster or location changed in a way that was detrimental to them.

*transfer ... I felt that my old boss had smeared my reputation.
(female survey respondent).*

*They made no attempts to have it stopped, only to move the victim.
I made a complaint to the local Inspector, who said “what do you
expect after you made a complaint against a whole station?
(female interviewee).*

50. The Review also found that the identification of victims, particularly after having reported their experience, can have an adverse impact on whether future victims will report.

*People in my PSA won't make a complaint. They say 'we have
seen what happened with you.' It's an environment that leaves
people vulnerable (female interviewee).³⁸*

*I was encouraged by colleagues to make a complaint. It was an
awful experience. I wish I hadn't made a complaint...The
supervisor was upgraded. I was moved to a different workplace.
Everyone knew why even though I didn't tell anyone. ...I reported
for an outcome. In the end, he was upgraded and my career has
been destroyed (female interviewee).³⁹*

51. The Review considered the consequences of bystander intervention, and found that many bystanders and witnesses reported being victimised and ostracised when they intervened or reported for the victim/target.⁴⁰

*If you take that person's side, or are known to be friends with them,
you will be lumped together, whether the matter was reported or
not. I've been ostracised simply for being friends with a person who
was sexually harassed ... (female survey respondent).⁴¹*

*I helped a person who was harassed and as a result I was the
subject of detrimental behaviours for ... years ... [I] would think*

³⁸ Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, including Predatory Behaviour in Victoria Police* (2015) 299.

³⁹ Ibid 300.

⁴⁰ Ibid 290–1.

⁴¹ Ibid 291.

*twice about assisting someone in the future (female survey respondent).*⁴²

52. Based on the evidence, the Review developed a set of critical victim safety principles to ensure a safe and supported reporting experience. These included:

Principle 1: *Victim/target is safe and supported to report.*

Principle 2: *Let the victim/target talk openly, express emotion and take them seriously.*

Principle 3: *Confidentiality and choice of victim/target is fundamental.*⁴³

This may be of value to the Board in developing a practice note or guidelines of factors to consider in identifying the public interest factors relevant to non-publication orders or decisions to exclude identifying information (referred to above at para 8.4).

53. Based on these Review findings, the Commission is of the view that identifying victims without having consulted them and obtained their consent, has the potential to cause them further harm and detriment, and deter future victims from reporting.

(a) Ensuring the interests of persons other than the Applicant and Chief Commissioner are identified and considered

54. In a review the Board must have regard to the interests of persons other than the parties, due to the obligations: (a) to accord procedural fairness; and (b) to have regard to the public interest.

Fair hearing for persons adversely affected by decision

55. The requirement for the Board to accord procedural fairness (section 155) is not limited to the parties and requires it to inform other persons who would be adversely affected by the Board's decision to be informed and

⁴² Ibid.

⁴³ Ibid 302.

given an opportunity to be heard (see above para 36). The notification provided by the Board should include clear details of all relevant and significant information that will affect the Board's decision on this issue under section 154A.

56. As a requirement of procedural fairness, this is also obliged by the right to a fair hearing in section 24(1) of the Charter, which the Board is directly bound to apply (see above para 24).
57. In this matter, the Board should inform the victim, and other non-parties who may be identified in a statement of reasons, of the matter and provide the opportunity to be heard on the question of whether identifying details should be excluded from a public statement of reasons, on the basis that the exclusion is in the public interest.
58. While the Commission submits it is open for the Board to be satisfied it is in the public interest to make this determination under 154A in the absence of an application or response from the victim,⁴⁴ the Board should nevertheless develop a process to give persons identified in evidence an opportunity to be heard on whether their identity is published, and to ensure they are confident their information has been adequately de-identified. This would encourage consistency in the way affected persons' rights are taken into account in the review process.
59. Because the Board acts in an administrative capacity when it adopts practices and procedures,⁴⁵ it is a public authority when it does so required to give proper consideration to, and act compatibly with, human rights.
60. The Board should have regard to the principles in Part 2 of the *Victims' Charter Act 2006*, which govern responses to victims, and consider relevant human rights of any person affected by its practices including parties, victims, complainants, informers and witnesses, the family, friends and associates of these persons and the public. Any information should explain that de-identification in a published decision does not restrict an

⁴⁴ See this submission below at para 80.

⁴⁵ See above para 25.

individual's right to control and discuss their own information nor interfere with any rights they may have under the protected disclosure framework.

61. The creation of processes could be supported by human rights training for the Board and the development of guidelines to consider the human rights of victims, as recommended in the Review Report (Recommendation 19):

Police Registration and Services Board members should be provided with contemporary training in equal opportunity and human rights law, as well as the impact of sexual harassment and discrimination on victims. This should occur at induction for new members, immediately for current member, and then every two years. PRSB should work with specialist partners to develop guidelines on equal opportunity and human rights and victim impact in decision-making.⁴⁶

Consideration of the public interest

62. In a review, section 151(1) requires the Board to have regard to (a) the public interest; and (b) the interests of the applicant for review.
63. This requires the Board to identify and consider the human rights of individuals and the community generally affected by the review.
64. Section 151(3) provides that 'public interest' in section 151 'includes the interest of maintaining the integrity of, and community confidence in, Victoria Police.' This obliges the Board in all matters to consider the integrity of Victoria Police and community confidence in that organisation. This definition of the 'public interest' is non-exhaustive. The term 'public interest' does not have a fixed meaning and matters that inform it will depend on the statutory and factual context in which it is used.⁴⁷

⁴⁶ Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, including Predatory Behaviour in Victoria Police* (2015) 340–1.

⁴⁷ *Bare v IBAC* [2015] VSCA 197, [229] (Warren CJ), [313] (Tate JA), and [548] (Santamaria JA). See also *O'Sullivan v Farrer* (1989) 168 CLR 210 Mason CJ, Brennan, Dawson and Gaudron JJ, [216].

65. The Charter's influence on the scope of the concept of 'public interest' was accepted by the High Court in *Hogan v Hinch*.⁴⁸ That case concerned the *Serious Sex Offenders Monitoring Act 2005*, which empowered Victorian Courts to make extended supervision orders by which people convicted of certain sexual offences could be subject to post-custodial supervision. Section 42(1) provided that the Court 'if satisfied that it is in the public interest to do so' may order that any information that might enable the identification of an offender or another person who had appeared or given evidence in the proceeding must not be published except in the manner and extent specified. The Court stated:⁴⁹

The expression 'that it is in the public interest' imports a judgment to be made by reference to the subject, scope and purpose of the Act. The main purpose of the Act disclosed by s 1(1) is enhancement of community protection by supervision of certain offenders who have served custodial sentences. But, as will now appear, the question of what is in the public interest has more than one dimension.

That additional dimension is supplied by the requirement that the Act, '[s]o far as it is possible to do so consistently with [its] purpose', must be interpreted in a way that is compatible with the civil and political rights set out in Pt 2 (ss 7–27) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Human Rights Act*). This method of interpretation is enjoined by s 32(1) of the *Human Rights Act*.

66. The effect of the Charter on the interpretation of 'public interest' was also recently considered in *Bare v IBAC*.⁵⁰ The Court of Appeal accepted that the public interest requirement requires a decision maker to take into account all matters relevant to the decision at hand including relevant rights in the Charter.⁵¹ Justice Santamaria considered that following

⁴⁸ (2011) 243 CLR 506.

⁴⁹ *Ibid* at [69]–[70] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also at [32] (French CJ).

⁵⁰ [2015] VSCA 197.

⁵¹ *Ibid* at [231] (Warren CJ), [552] (Santamaria JA), and [317] Tate JA. *Bare v IBAC* considered the content of the public interest test in section 40(1)(b)(i) of the *Police Integrity*

ordinary principles of statutory construction ‘even in the absence of the Charter, a statutory requirement that the public interest be considered will require consideration of the human rights of members of the community as a whole and of particular individuals.’⁵²

67. The Commission considers that the Board should create a practice note or guidelines of factors to consider in identifying ‘the public interest’ and specifying the need to consult victim/targets regarding identification and to ensure they have been adequately de-identified in any published decision.

(b) Interpretation of the *Victoria Police Act 2013* (sections 154A and 157)

68. It is common for statutory powers, such as those conferred on the Board in sections 157(2), 157(3), 154A(1) and 154A(2),⁵³ to be conditioned upon the decision maker concluding that it is in the public interest to exercise that power. Applying the approach to interpretation outlined at paras 65-66, the Board is required to take into account all matters relevant in the factual circumstances, including relevant Charter rights, in construing what is ‘in the public interest’.⁵⁴

Identifying the relevant public interest considerations which may apply

69. In our submission, relevant public interest considerations in this matter include:

- 69.1. Protecting the human rights of affected persons. This includes the rights under the Charter of the victim to privacy, reputation, security

Act (since replaced by the IBAC Act) to be exercised by the Director, Police Integrity. An additional element in that case was that the Director was a public authority bound by section 38: see at [320]-[322] (Tate JA). The Court of Appeal held that the Director had to have regard to *both* the directive in section 32 to interpret the public interest compatibly with human rights and was additionally constrained in the exercise of power by section 38.

⁵² [2015] VSCA 197 at [554] (Santamaria JA). See also Santamaria JA at [552] that an express reference to the public interest in statutory powers ‘may be designed to do little more than to remind the decision maker that there are interests that need to be considered in the making of the decision other than those of the persons immediately affected by it.’

⁵³ See also sections 119(3), 120(3), 120(4), 124A(2) and 124A(3).

⁵⁴ See further *Bare v IBAC* [2015] VSCA 197, Tate JA that ‘the broad category of public interest considerations can extend to human rights when human rights are, as here, engaged.’ See also *Inquest into the Death of Tyler Cassidy: Ruling on a suppression application by the Chief Commissioner of Police pursuant to s 73(2)(b) of the Coroners Act 2008* (8 November 2010) in which the Coroners Court accepted that Charter rights informed its interpretation of ‘public interest’ in determining whether the publication of a report would be contrary to the public interest.

and a fair hearing. The Commission considers that the Board was incorrect to conclude in the matter of *Perna* that the right to privacy and reputation of victims and witnesses was irrelevant in that matter.⁵⁵ It also includes the right of victims and witnesses of sex discrimination, sexual harassment, including predatory behaviour, and other gender-based harm to protection from victimisation and detrimental action (section 104 of the *Equal Opportunity Act 2010* prohibits subjecting or threatening a person to a detriment because they have asserted their rights under the Equal Opportunity Act).

69.2. Maintaining the integrity of, and public confidence in, the Victoria Police. This is the purpose of the discipline provisions in the Act⁵⁶ and is reflected in the non-exhaustive definition of public interest in section 151.

69.3. Protecting the identity of persons who have made a disclosure relating to a breach of discipline to protect them from detrimental conduct and encourage future persons to make disclosures. The Full Federal Court decision referred to by the Board, *ASIC v Dawson Nominees Pty Ltd*,⁵⁷ considered '[t]here is an undeniable public interest in the protection of the particular informer in question and the encouragement of potential future informers.'

69.4. Open justice. The presumptions in favour of public review hearings in section 157 and published statements of reasons in section 154A promote the principles of open justice.⁵⁸ In *Hogan v Hinch* French CJ explained that the principle: 'is a means to an end, not an end in itself. Its rationale is the benefit that flows from subjecting

⁵⁵ In the matter of *Perna* (A207/2014) dated 28 September 2015, at p 17.

⁵⁶ See *Police Services Board v Morris* (1985) 156 CLR 397, 412 where Brennan J said 'The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force... The purpose of police discipline is the maintenance of public confidence in the police force...'.
⁵⁷ [2008] FCAFC 123 at [28].

⁵⁸ See Statement of Compatibility to the Victorian Police Amendment (Consequential and other matters) Bill 2014, Legislative Assembly, 12 March 2014, p 666.

court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts.’⁵⁹

69.5. The right to freedom of expression, which includes the right of the media and public to seek, receive and impart information (outlined at para 39).

69.6. The Applicant’s right to a fair hearing (outlined at paras 33-34).

Weighing and comparing public interest considerations

70. The Board must then weigh competing elements in a balancing exercise, which will “be very much a question of fact and degree.”⁶⁰

71. Identifying the victim may limit their right to privacy both by revealing their name to the public and having a potential adverse impact on their identity in their personal sphere (on their psychological and mental health and security) and social sphere (in developing social relationships). Whether an affected person’s right to privacy is limited of course depends on whether or not they consent to being identified.

72. Arbitrary limits will be incompatible with the right. A real risk of adverse impact on the victim’s privacy is evidenced in the Review’s findings on the significant psychological, social and emotional impact and harm experienced by victim/targets of sex discrimination and sexual harassment, both as a result of the harmful behaviour and as a consequence of reporting.⁶¹ See further discussion in paras 43, 45, 49.

73. Identification in reasons may limit a victim’s right to security, by failing to take a positive step to protect them from potential psychological harm. Limits that cannot be justified as reasonable and proportionate will be incompatible with the right. The real risk of adverse impact on a victim’s security is evidenced in the Review’s findings on the significant physical and mental health impacts of victim/targets who experience sex

⁵⁹ See [20-[27], (citations omitted).

⁶⁰ *Hogan v Hinch* (2011) 243 CLR 506 at [32] (French CJ), applying *Re Qld Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) ALJR 393, 395. See also *Bare v IBAC* [2015] VSCA 197 at [551] (Santamaria JA).

⁶¹ See *Independent Review into Sex Discrimination and Sexual Harassment, including Predatory Behaviour, in Victoria Police* (2015) Chapters 3–4, 12.

discrimination and sexual harassment, both as a result of the harmful behaviour and as a consequence of reporting. The Review spoke with numerous Victoria Police employees who had reasonable fears for their safety and the safety of their families. See further discussion in paras 45, 49, 50.

74. Identification may risk victimisation of victim/targets and witnesses of sexual harassment, sex discrimination and other gender-based harms. . See further discussion in paras 49, 51, 53.
75. Identification may also adversely impact on the administration of police discipline by discouraging persons coming forward to make complaints. Evidence that this is a real risk is evidenced in the Review's findings discussed in para 50.⁶²
76. While excluding identifying information does limit the full publication of the decision, it does not impact the fairness of the hearing afforded to the Applicant. The discretion of the Board to exclude information from published reasons if satisfied it is in the public interest is consistent with the qualification in section 24(3) of the Charter which permits a tribunal not to publish decisions where permitted by law.⁶³
77. A provision which has the potential to affect the open justice principle by restricting the publication of names of parties or witnesses 'should generally be construed, where constructional choices are open, so as to minimise its intrusion on that principle.'⁶⁴ In this matter, only removing identifying details of the victim (or similarly a complainant, informer or witness) from a decision, for example through pseudonym orders, does not intrude on the rationale of the principle to subject proceedings to public and professional scrutiny to maintain public confidence in the Board. It is

⁶² See also Ibid 282–307.

⁶³ See further Statement of Compatibility to Victoria Police Amendment (Consequential and other Matters) Bill 2014, 666.

⁶⁴ *Hogan v Hinch* (2011) 243 CLR 506 at [27] (French CJ).

not the publishing of the victim's details but the publishing of the reasons for decision that satisfies this feature of the public interest.⁶⁵

78. While excluding identifying information limits the right of people in the community in section 15 of the Charter to seek, receive and impart certain information, the provision in section 15(3) that the right may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of others allows information to be excluded in these circumstances (as there would otherwise be an interference with the rights to privacy and security of the victim).

The degree of satisfaction required before the board makes any such order

79. In *ABC v D1 & Ors*,⁶⁶ Forrest J usefully summarises the principles for determining whether to make a pseudonym order, stating in respect of the basis that 'usually the proofs must be cogent and will not be satisfied by mere belief on the part of a party that the order is necessary. However, in certain cases a court can, in a practical sense, act on its own experience and draw appropriate inferences.'⁶⁷
80. The Commission submits that after balancing relevant public interest considerations, subject to the views of the affected persons, it is open for the Board to draw appropriate inferences from the available evidence of a general application to be satisfied it is in the public interest to exclude identifying information from a public decision. The Board may determine this on its own volition.⁶⁸ The power in sections 154A and 157 of the Act are not conditioned on an application or evidence from the parties or the affected person.

⁶⁵ Submission of the Police Association in this matter dated 7 December 2015, p 3. See further Judicial College of Victoria Bench Book, 6.3.5 *Impact on open justice*: Because restrictions on how a party or witness may be referred to in a proceeding or reasons has no effect on the public nature of proceedings nor the ability of the press to report on proceedings, it has been said that 'pseudonym orders interfere with open justice only minimally': *X v Sydney Children's Hospitals Specialty Network* [2011] NSWSC 1272.

⁶⁶ [2007] VSC 480.

⁶⁷ *ABC v D1 & Ors* [2007] VSC 480 at [71].

⁶⁸ Contrary to the approach of the Board in the matter of *Perna* (A207/2014) dated 28 September 2015 at p 5 (see also p 15): 'The Board agrees that the adverse effect of the disclosure of personal information relating to witnesses or victims or any other adverse effect on the public interest (i.e. jeopardising existing investigations or prosecutions or deterring witnesses) would justify the exclusion of the information from the published decisions. The Board requires evidence of these matters before it, however, to fulfill its function.'

Identification of the Applicant

81. We do not make a submission on the application of the public interest test on the question of whether the Board should de-identify the Applicant or Applicant's family members in the decision, however we note that it may need to be considered in the circumstances to protect the victim's or witnesses' identity.
82. We highlight that the impact on the Applicant's rights and people related to or associated with the Applicant (compared with the impact on the rights of victims, witnesses and informants) will weigh differently against the public interests in open justice and right to seek, receive and impart information, in considering what amounts to a disproportionate impact on relevant rights in the circumstances.⁶⁹

(d) Protected disclosures and similar protections

83. The Commission agrees with the submission of the Police Association that Division 3 of Part 10 (which provides for the confidentiality of those who make protected disclosure complaints by proscribing the direct or indirect disclosure of information that could enable a person to be identified) and Division 3 of Part 9 (which protect complainants of police misconduct against victimisation by proscribing detrimental action against a complainant) of the Victoria Police Act are 'instructive for the purpose of identifying and weighing public interest considerations'.⁷⁰
84. A purposive approach to the construction of sections 154A and 157 is one that promotes the purposes of Division 3 of Part 10, Division 3 of Part 9 and the associated protective scheme in the *Protected Disclosure Act 2012*, to provide confidentiality to people who disclose improper conduct by police where necessary for their protection and for the encouragement and facilitation of disclosures of improper conduct.

⁶⁹ See, eg, *R (on the application of Fagan) v Secretary of State for Justice and Times Newspapers Ltd & Ors* [2013] EWCA Civ 1275 (21 October 2013), where open justice prevailed over interests right to privacy of the family and child of the offender in that case.

⁷⁰ Submission of the Police Association in this matter dated 7 December 2015 at p 6.