

# High Court makes children pawns in police-justice tug of war

By Bill Rowlings\*, CEO of Civil Liberties Australia

The High Court has officially ‘threatened’ the lawyer-turned-informer (known in court and to police as EF and as 3838) that her children may be taken from her by the state if she does not enter a Victoria Police witness protection program.

The lawyer-informer was responsible for secretly reporting to police on the activity of criminals, many of them her clients, for about seven years from 2003.

VicPol officers (particularly senior officers up to Chief Commissioner level) were irresponsible, the High Court has ruled, for allowing such lawyer snitching to “poison” the cases brought against alleged major criminals. The High Court says the criminals must receive new trials.

But what was most surprising about the judgment was how the court came down hard on the lawyer-informer, EF-3838

The High Court of Australia – all seven judges, sitting together – on 5 Dec 2018 said:

“If EF chooses to expose herself to consequent risk by declining to enter into the witness protection program, she will be bound by the consequences. If she chooses to expose her children to similar risks, the State is empowered to take action to protect them from harm.”

The dramatic warning – many people would call it a threat – was delivered at the end of the High Court’s judgment, and has been overlook in reporting on this complicated case.

At issue is a battle between Victorian Police, defending the actions of former rogue police bosses in enlisting a lawyer as an informer, possibly illegally, and the Director of Public Prosecutions.

The police and the prosecutors in Victoria have been battling in the courts for more than five years about whether details of the police transgressions should be made public. The court cases have probably cost millions...but the suppression orders around them, recently lifted, have at last thrown sunlight on to a police cesspit that of a rogue culture at the highest levels of the force.

## **DPP wants criminals to get a new, fair trial**

The DPP wants at least seven dangerous criminals to get a new, fair day in court, something they didn’t have when their own lawyer was actually on the side of the police. But there may have to be many more new trials: the informer-lawyer has admitted to being involved in nearly 400 cases.

A royal commission (RC), announced in early December 2018, will decide the fate of several well known and very senior former and current VicPol officers. The RC may lead to

a system-wide examination and then recommend a major overhaul of the entire Victorian police and justice system.

The lawyer EF has claimed she was involved with VicPol in at least 386 cases involving people from Melbourne's underground. Presumably, VicPol officers were involved in the same number. And the office of the DPP, in most of them.

#### **What will the Royal Commission be about?**

- The lawyer-informer broke the most basic legal fraternity' (court and law society) rules'. Did she break the law? Should she be charged? Are new legal rules needed?
- The police should not use a lawyer-for-criminals as an informer against those same criminals in legal cases. Did police break the law? What could they be charged with? Should they be charged?
- The office of the Director of Public Prosecutions was either duped by VicPol, or was a willing participant, in the police behavior. Did it break the law? Should anyone be charged?
- Did some courts/judges know what the lawyer-informer and police-DPP were doing? What should happened if that proves to be the case?
- The entire justice system in Victoria has been rendered murky and questionable by VicPol's behavior. How should the entire system be changed for the better?
- VicPol appear need a Royal Commission or a public inquiry into their behavior about once every decade? Should there be a regular 10-yearly public inquiry into how VicPol is operating to prevent abuses by police in advance rather than dealing with them after the event?
- Should there be a rolling, once-every-10-years inquiry into ALL police forces and justice systems in Australia, for similar reasons that there are always hidden problems? Some 400 South Australian convictions over a 30-year-period are in doubt due to an unqualified forensic scientist. WA has an ongoing history of convicting the wrong people, consistently. In Tasmania, TasPol behaviour in many cases, including that of Sue Neill-Fraser – jailed for murdering her husband with no body, no weapon, no eyewitness and no believable motive and based on a circumstantial theory concocted by a police officer – has never been investigated.

#### **From top cop to bureaucracy CEO**

One of those whose actions before and after he was Chief Commissioner of Victoria Police will be examined is Simon Overland. For some years before taking the top job in 2009 he was the public, as-seen-on-TV face of the police fight against criminal gangs in Melbourne. He left VicPol suddenly in 2011 under somewhat of a cloud: six people were shot dead because the force's computer system failed to alert officers that dangerous criminals had

been freed from jail on parole; there were claims – never proven – that he fudged statistics to help the Labor Party; and the top echelons of the force and police power groups were engaged in internecine battles that lasted for years.



Almost immediately on leaving, and in a shock move, Overland (photo) became secretary of the Department of Justice in Tasmania, where he remained for about five years. He is now back in Victoria as CEO of the City of Whittlesea local government organisation, a job he took up in August 2017.

Current Victorian Police Commissioner Graham Ashton is also possibly involved in the lawyer-informer issue. He is likely to be called to give evidence at the very least. Former senior detective Ron Iddles claims up to 15 senior police officers turned a blind eye to what was going on to thwart justice and the courts.

The latest stunning revelations stem from a long-running battle between EF (also known as 3838 in some court documents) against Victoria Police in particular, and the DPP in more recent times, for not protecting her identity.

Her complicated legal claim was refereed firstly by the Supreme Court of Victoria but then decided by the ultimate Australian tribunal, the High Court.

The High Court agreed in December 2018 with the Supreme Court of Victoria that the issue of justice in Victoria is much more important than protecting her identity. But everyone realises she is at risk of criminal retribution, and more importantly so are her three children.

Until now, she has refused to enter a VictPol witness protection program: she says they couldn't protect her identity, so how could they protect her person.

### **Cops thought they were super-smart**

Senior Victorian police figures thought they were being super-smart in using a criminal lawyer who appeared regularly in court to defend major crime figures as a secret snitch.

Even as she stood before judges on behalf of the crims and pleaded: "Not guilty, your honour" she was behind their backs telling top cops just how guilty they were in chapter and verse revelations of drug sales, crime family connections and who was murdering whom during the dramatic street wars in Melbourne in recent decades.

She says she was promised many times by police that she would never be revealed as an informer, that her role would never be made public, and she would not be called as a witness. But then VicPol Commissioner Simon Overland wanted to call her as a witness against a former police officer accused of murdering two other informers.

The informer-lawyer subsequently claimed in a writ against Mr Overland and his predecessor, Christine Nixon, that police induced her to make a statement. Her cover was blown, she said, and her life, and those of her children, was in danger.

### **Paid nearly \$3m already**

She won a settlement of \$2.88 million, paid by the state of Victoria.

In 2015, EF wrote a letter to VicPol Assistant Commissioner Steve Fontana seeking payment for her services as an informer. "There are approximately 5500 Information Reports generated from information I provided to police. There was no topic, criminal, organised crime group or underworld crime that was 'off limits' during the many debriefing sessions that occurred or during the years that followed," Informer 3838 wrote.

*The Age* has reported that EF-3838 claims her co-operation with police left her out of pocket, but documents obtained by *The Age* show that, between March and December in 2009, more than \$300,000 was spent on her. Police paid for overseas travel, accommodation, body corporate fees, toll fees, hire cars, fuel, mobile phone bills and a weekly stipend of \$1000. There were even claims for cigarettes and "refreshments".

### **Who is EF-3838?**

Who is EF-3838? We the public don't know. But Melbourne's lawyers know. And, more importantly, so do those criminals still alive sitting in jail, serving long sentences and with henchmen and women on the outside who might be persuaded to deliver rough 'justice' to the informant.

The sentences of the top seven criminals, including notorious Tony Mokbel, are now at risk of being overturned by the justice system precisely because the lawyer agreed to turn informer at the urging of police. In doing so she tainted their court cases and their convictions. They didn't get a fair trial, the Victorian Supreme Court has ruled, and the High Court agrees.

Both the lawyer and the police are themselves at risk of being punished by the legal profession and by the justice system. Both the lawyer and former senior police may run the risk of being charged and doing their own time in jail when the royal commission hands down its findings.

### **Judiciary scathing about actions of both lawyer and police**

The judiciary has been scathing about lawyer EF-3838 and VictPol bosses.

"I do consider that the proposed disclosures would reveal 'reasonable grounds to believe' EF and members of Victoria Police are 'implicated in' a serious misdeed of public importance," said judge Timothy Ginnane on 19 June 2017 in the Supreme Court of Victoria.

The High Court of Australia in early December 2018 ruled that:

“Relevantly, his Honour (Ginnane) dismissed the claim for public interest immunity on the basis that, although there was a clear public interest in preserving the anonymity of EF as a police informer, and thus in keeping her and her children safe from the harm likely to result from disclosure of the information, there was a competing and more powerful public interest in favour of disclosure because of the assistance that the information might afford the Convicted Persons in having their convictions overturned and, more fundamentally, in order to maintain public confidence in the integrity of the criminal justice system.

“As Ginnane J and the (Victorian) Court of Appeal held, there is a clear public interest in maintaining the anonymity of a police informer, and so, where a question of disclosure of a police informer's identity arises before the trial of an accused, and the Crown is not prepared to disclose the identity of the informer, as is sometimes the case, the Crown may choose not to proceed with the prosecution or the trial may be stayed.”

### **Never to be repeated, High Court says**

“Here the situation is very different, if not unique, and it is greatly to be hoped that it will never be repeated,” the High Court said.

“EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court.

“Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will.

“As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.

“It follows, as Ginnane J and the Court of Appeal held, that the public interest favouring disclosure is compelling: the maintenance of the integrity of the criminal justice system demands that the information be disclosed and that the propriety of each Convicted Person's conviction be re-examined in light of the information.

“The public interest in preserving EF's anonymity must be subordinated to the integrity of the criminal justice system.

“Generally speaking, it is of the utmost importance that assurances of anonymity of the kind that were given to EF are honoured. If they were not, informers could not be protected and persons would be unwilling to provide information to the police which may assist in the prosecution of offenders. That is why police informer anonymity is ordinarily protected by public interest immunity.

### **Criminal justice system corrupted**

“But where, as here, the agency of police informer has been so abused as to corrupt the criminal justice system, there arises a greater public interest in disclosure to which the public interest in informer anonymity must yield.

“If EF chooses to expose herself to consequent risk by declining to enter into the witness protection program, she will be bound by the consequences. If she chooses to expose her children to similar risks, the State is empowered to take action to protect them from harm,” the High Court said.

Informer EF-3838 has repeatedly rejected offers to enter the witness protection program. In October 2014, in a letter to then chief commissioner of VicPol, Ken Lay, she said why. "I am not prepared to entrust everything personal to me and my children as well as our privacy, safety and wellbeing to the very organisation that promised and assured me that my assistance ... would always remain confidential, yet failed so appallingly."

If the lawyer-informer maintains that stance, the High Court's 'threat' may well become a reality, and she will lose her children to the State of Victoria.

<http://tinyurl.com/ycglbtao> <http://tinyurl.com/ycmz3cj5> and other sources

ENDS

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Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies, forces and the corporate sector to ensure they match the high standards Australia has traditionally enjoyed, and continues to aspire to.

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