

**ROYAL COMMISSION
INTO THE MANAGEMENT OF POLICE INFORMANTS**

**SUBMISSIONS OF THE STATE OF VICTORIA
CROSS-EXAMINATION OF WITNESSES BY AFFECTED PERSONS**

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A. Introduction

- 1 As foreshadowed in an email to the Commission dated 5 June 2019, this is the State of Victoria's submission about the cross-examination of witnesses by persons potentially affected by Nicola Gobbo's conduct or the conduct of other human sources subject to confidentiality or legal privilege obligations (**affected persons**).
- 2 The State submits that leave should not be granted for affected persons to cross-examine witnesses for the following reasons:
 - (a) First, it is not necessary to afford procedural fairness to the affected persons;
 - (b) Second, it is not necessary the Commission to meet its terms of reference;
 - (c) Third, cross-examination of Commission witnesses by affected persons is likely to cause significant delay;
 - (d) Fourth, cross-examination by affected persons has the potential to prejudice ongoing proceedings;
 - (e) Fifth, granting leave may result in affected individuals using the Commission's unique powers for a collateral purpose.
- 3 Each of the above matters is dealt with in turn below.

B. Discussion

(a) *Procedural fairness does not require a right of cross-examination*

- 4 Counsel Assisting the Commission has referred to the obligation on the Commission to afford procedural fairness, as reflected in s 12(a) of the *Inquiries Act 2014* (Vic) (**Inquiries Act**).

- 5 Procedural fairness does not require that any and every affected person has a right to cross-examine a witness.¹ The particular content of procedural fairness takes account of the statutory context. Here, a Royal Commission is not bound by the rules of evidence or any practices or procedures applicable to courts of record, and may inform itself in any manner it sees fit.²
- 6 In addition, procedural fairness obligations only arise when a decision-maker makes a decision that adversely affects a person's right or interest.³ Although the affected persons are acutely interested in whether the involvement of Ms Gobbo has affected their past convictions and whether Victoria Police have failed to comply with their disclosure obligations, the Commission's findings on Terms of Reference 1 and 2 do not affect a "right or interest" of an affected person. The Commission does not have power to quash convictions, change sentences or order re-trials.
- 7 In other words, the relevant right or interest of the affected persons is to have received a fair trial, to have been convicted (or pleaded guilty) in circumstances where the prosecution's obligations of disclosure have been observed, and to access such avenues as may be available to them in the future to challenge their convictions if information emerges that suggests the original conviction was tainted. However, the affected persons have no freestanding right or interest to use the Commission's processes to gather information to determine whether a conviction was so tainted, or assist in a future challenge. It is the Commission's task, assisted by Counsel Assisting, to uncover that very information (as is further addressed below).
- 8 It has been recognised that a Royal Commission can legitimately impose limits on the ability of interested persons to cross-examine witnesses.⁴ Indeed the Practice Direction in the Commonwealth Royal Commission into Trade Union Governance provided that "Persons other than Counsel Assisting will not be permitted to cross-examine such witness unless and until they have provided to Counsel Assisting a signed statement of evidence advancing material contrary to the evidence of that witness", which was an approach ultimately deemed appropriate by the Federal Court.⁵
- 9 Without cross-examination, affected persons will still have a reasonable opportunity⁶ to put their case. They will have access to relevant information elucidated during open Commission hearings or closed hearings in which they are granted leave to appeal, and will be able to make full submissions on that information.
- 10 Further, pursuant to s 26 of the Inquiries Act, in the event that the Commission proposes to make an adverse finding in respect of an affected person, that person must be given an opportunity to respond to any matters upon which the proposed finding is based. That requirement ensures that affected persons will be afforded procedural fairness.

¹ See eg *O'Rourke v Miller* (1985) 156 CLR 342 at 353-354 (Gibbs CJ, with Mason and Dawson JJ agreeing), 360 (Wilson J); *Stewart v Shuey* [1999] VSC 114 at [61] (Ashley J).

² Inquiries Act s 14.

³ See eg *Annetts v McCann* (1990) 170 CLR 596 at 598, 600-601 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576-577 (Mason CJ, Dawson, Toohey and Gaudron JJ); see also Inquiries Act s 15(2)(b).

⁴ See eg *Kingham v Cole* (2002) 118 FCR 289 at [15]-[16] (Heerey J).

⁵ *Ibid.*

⁶ Procedural fairness requires only a reasonable opportunity of presenting the person's case: see eg *Chief Commissioner of Police v Nikolic* [2016] VSCA 248 at [57] (the Court); *Roberts v Harkness* [2018] VSCA 215 at [48]-[49] (the Court).

(b) Leave is not necessary to acquit the Commission's terms of reference

- 11 The Commission's terms of reference (as amended) relevantly include the following:
 1. The number of, and extent to which, cases may have been affected by the conduct of EF as a human source;
 2. The conduct of current and former members of Victoria Police in their disclosures about and recruitment, handling and management of EF as a human source.⁷
- 12 In acquitting these Terms of Reference, the Commission has available to it the wide powers set out in the Inquiries Act, including the power to compel production of documents and attendance of witnesses.⁸
- 13 The Commission has access to the entire Victoria Police Loricated database. It has the power to call, and has called, evidence, from members of Victoria Police. The Commission has also heard evidence from a potentially affected person, Person 12, and is able to call evidence from others complaining that their case has, or may have, been affected by Ms Gobbo.
- 14 In light of the role of Counsel Assisting the Commission and the extensive compulsive powers open to the Commission, it is not necessary for affected persons to cross-examine witnesses in order for the Commission to acquit its Terms of Reference. Cross-examination by the Counsel Assisting the Commission, as informed and assisted by submissions from the affected persons and the source material produced by Victoria Police, will be sufficient to draw out the information required to acquit the Commission's terms of reference.
- 15 Affected persons are also able to advise Counsel Assisting if there are topics they consider ought to be explored with a particular witness. If such topics are relevant to the acquittal of the Terms of Reference, Counsel Assisting may then incorporate them in the course of their cross-examination of the witness. This approach ensures that Counsel Assisting maintains control over the cross-examination process and avoids the likely negative consequences of granting affected persons leave to cross-examine, as set out elsewhere in these submissions.

(c) Granting leave will cause significant delay

- 16 Extensive cross-examination by affected persons has the obvious potential to undermine the Commission's ability to report on its Terms of Reference in a timely way.
- 17 There are at least 9 affected persons who have sought leave to appear,⁹ and there is real potential for this number to increase given the number of people represented by Ms Gobbo. To the extent the Commission proposes to take consistent approach to all affected persons: there is the potential for a significant number of people to seek to cross-examine witnesses.

⁷ It is noted that Terms of Reference 1 and 2 relate only to Ms Gobbo, and not to any other human sources subject to confidentiality or legal privilege obligations. However, Term of Reference 5a requires the Commission to recommend measures that may be taken to address the use of other human sources with such obligations.

⁸ s 17.

⁹ At the 5 June 2019 hearing, applications were made on behalf of Mr Francesco Madafferi, Mr Tony Mokbel, Mr Rob Karam and Mr David Illic, Mr Pasquale Barbaro, Mr Pasquale Sergi, Mr Severino Zirilli, Mr Salvatore Agresta, Mr Faruk Orman, and for the children of the Hodsons and Mr Leonard.

- 18 Allowing affected persons to cross examine witnesses has an immediate potential to expand the hearing time beyond any reasonable measure. The Commission's terms of reference are detailed, and its task in acquitting those terms is significant. Any delay which may prejudice the extended reporting deadline should be avoided.

(d) Leave has the potential to prejudice ongoing proceedings

- 19 Terms of Reference 1 and 2 plainly intersect with matters that are already, or may become, the subject of further judicial proceedings.
- 20 The Commission must ensure that its proceedings do not prejudice ongoing investigations or judicial proceedings. The Commission does not exercise judicial power, and therefore is not empowered to quash convictions, change sentences or order retrials. Any challenge to a conviction or sentence would require a further proceeding in the courts.¹⁰ Further, the establishment of the Commission is premised on (as set out in Recitals A and D to the Letters Patent) the need not to prejudice any ongoing investigations or judicial proceedings.
- 21 Importantly, the Commission is not bound by the rules or principles of evidence, and its inquiries can be far more wide-ranging than that of a court of law. The Commission also has powers under the Inquiries Act that are not available elsewhere – for example, a witness cannot claim legal professional privilege or the privilege against self-incrimination (ss 32-33). A witness before the Commission can therefore be compelled to give a written statement, or oral evidence that would, in a court of law, be protected by (for example) legal professional privilege or the privilege against self-incrimination.
- 22 Unlike Counsel Assisting, affected persons are likely to be involved in ongoing judicial proceedings. There is likely to be significant overlap between those proceedings and lines of desired cross-examination, making the risk of prejudicing an ongoing or future proceeding acute.

(e) Use of the Commission's unique powers for a collateral purpose

- 23 Relatedly, the Commission's proceedings cannot be used for the collateral purpose of obtaining information for other, different proceedings.¹¹ For example, an affected person may ask questions which, although framed around Ms Gobbo's involvement in their conviction, actually seek to elicit information as to whether Victoria Police's handling of their case was adequate (regardless of whether or not Ms Gobbo had provided information to the Police in relation to that person in breach of her obligations). Although interference with the administration of justice usually arises when it is the person charged who is examined (which is not this case), interference with judicial proceedings is not confined to that situation.¹² The restriction on using the Commission for a collateral purpose clearly encompasses cross-examination of witnesses: it has been held that there is a general duty on courts to prevent cross-examinations that are for a collateral purpose,¹³ and the same restriction, by analogy, should apply to cross-examination before the Commission.

¹⁰ Transcript of hearing 15 February 2019 p 12 (32-37).

¹¹ Use of compulsive powers collaterally and for some other purpose will constitute an abuse of power and, to the extent the improper exercise of power affects litigation, may constitute a contempt of court: *Victoria v Day Nielson Jenkins* [1993] 2 VR 545 at 560 (JD Phillips J, with Fullagar J agreeing); see also *Hammond v The Commonwealth* 152 CLR 188 at 198 (Gibbs CJ).

¹² See *Helicopter Resources Pty Ltd v The Commonwealth* [2019] FCAFC 25 at [173], [189] (the Court): limiting the compulsory examination of an officer of a company, who himself was not charged.

¹³ see eg *B v R* [2015] NSWCCA 103 at [205] (Ward JA with Wilson J agreeing).

- 24 The Inquiries Act limits the direct use that can be made of answers given to the Commission (s 40(1)). The State submits that it is necessary also to safeguard against the processes of the Commission being misused to obtain information for other proceedings derivatively.¹⁴ As set out above, there is the clear potential and incentive for persons who have challenged or who wish to challenge existing convictions to use the Commission for the purpose of obtaining information that will assist in those other proceedings. A similar incentive would arise for persons intending to bring civil proceedings on the basis of the subject matter of the Commission.

Conclusion

- 25 For the reasons set out above, the State of Victoria submits that affected persons should not be granted leave to cross examine witnesses. The Commission might instead be minded to invite counsel for the affected persons to advise Counsel Assisting the Commission of the matters they consider should be the subject of examination of a particular witness, on the basis that Counsel Assisting would conduct the cross-examination to the extent Counsel Assisting considers it will advance the work of the Commission.

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¹⁴ By analogy, the prohibition against using information obtained pursuant to compulsory process for any other purpose (without clear statutory authority) extends to derivative use of that information: see *Australian Securities and Investments Commission v Rich* [2005] NSWSC 62 at [264] (Austin J).