

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

SUPPLEMENTARY SUBMISSION ON BEHALF OF MR SIMON OVERLAND APM

- 1 This supplementary submission is made on behalf of Mr Simon Overland APM, in response to the Solicitors Assisting the Royal Commission providing to Mr Overland, only three days ago, the supplementary statement of Ms Christine Nixon dated 21 February 2020 (**Ms Nixon's Supplementary Statement**).
- 2 It is alarming that Mr Overland was provided Ms Nixon's Supplementary Statement *only once* his submissions were filed. The concerns are twofold.
- 3 First, Mr Overland had repeatedly requested all relevant documents from the Solicitors Assisting the Royal Commission, and received numerous responses, on behalf of this Royal Commission:
 - a) asserting – as is now apparent, incorrectly – that “[i]f potentially inculpatory or exculpatory material was identified, it was referred to and referenced” in Counsel Assisting's submissions;¹
 - b) refusing to provide Mr Overland with documents produced to the Royal Commission which refer to Mr Overland, which were not referred to in Counsel Assisting's submissions;² and
 - c) even then, refusing to provide Mr Overland with all documents referred to in Counsel Assisting's submissions relevant to findings sought against Mr Overland.³
- 4 Secondly, the relevance of this statement to Mr Overland and to the issues being discussed in the submissions of Counsel Assisting could not have been more apparent. Mr Overland is the only other person referred to in Ms Nixon's Supplementary Statement and the Royal Commission requested the supplementary statement specifically in response to Mr

¹ Letter from Solicitors Assisting the Royal Commission dated 27 July 2020.

² Letters from Solicitors Assisting the Royal Commission dated 27 July 2020, 3 August 2020, 5 August 2020.

³ See submissions of Mr Simon Overland dated 18 August 2020 at [53].

Overland's evidence.⁴ Yet Mr Overland was not notified of the Royal Commission's intention to receive the statement into evidence (nor provided the exhibit once it was received into evidence, nor was the exhibit made publicly available). It was, inexplicably, not referred to at all by Counsel Assisting in their submissions, despite the fact that those submissions purported to address the very matters discussed in the statement in detail. Mr Overland has been deprived an opportunity to seek leave to cross-examine Ms Nixon on its contents (as set out further below).

5 This development underscores, in a rather startling manner, the point made in Mr Overland's primary submissions – the Royal Commissioner can have no confidence that all relevant evidence has been identified by Counsel Assisting in their submissions, nor that parties have been provided with access to such evidence to refer to it themselves (given Mr Overland made a number of attempts to access such evidence and received blanket, clearly unjustified, refusals). It means that the Royal Commissioner must give meticulous consideration to every submission and every footnote reference in Counsel Assisting's submissions, and a detailed review of responsive submissions and all documents and other evidence referred to therein (as noted in Mr Overland's primary submissions⁵).

6 Mr Overland remains concerned that there is considerable uncertainty as to whether all relevant evidence collated by the Royal Commission has been considered by Counsel Assisting as part of the findings of fact sought. The only reason that Ms Nixon's Supplementary Statement was belatedly provided to Mr Overland is because his submissions drew attention to the fact he did not have it and the noteworthy absence, in Counsel Assisting's submissions, to any supplementary evidence from Ms Nixon on the issue. What other relevant documents have not been provided to Mr Overland? We cannot overstate the doubt that these events have compounded, in light of the repeated attempts by us in correspondence to ensure that we had all relevant material and reassurances from Counsel Assisting in that regard. It is respectfully submitted that the Royal Commissioner can have no confidence that Mr Overland has had a fair opportunity to present his case, by reference to all relevant documents.

⁴ Ms Nixon's Supplementary Statement at [3]-[4]: *"I make this statement in response to a further request from the Royal Commission dated 5 February 2020... The request from the Royal Commission dated 5 February 2020 refers to evidence given by Mr Simon Overland in relation to an entry in his diary on 29 September 2005."*

⁵ At [3].

7 As to the content of the supplementary statement, it is of considerable concern that Ms Nixon's evidence set out in her supplementary statement was not tested. The supplementary statement should not have been received into evidence in circumstances where it was neither provided to Mr Overland nor made publicly available, and where Mr Overland was deprived the opportunity to cross examine on the contents. Obviously no criticism is made of Ms Nixon for the fact that the supplementary statement was not provided by Counsel Assisting to Mr Overland and there is nothing in the supplementary statement that would have resulted in cross-examination of Ms Nixon as to her honesty or credit. The supplementary statement contains Ms Nixon's recollections about events that happened approximately 15 years ago, and it would have been necessary and appropriate to test the reliability of those honest, but possibly flawed, recollections. For example, Ms Nixon would have been asked some questions about the following matters:

- a) that she would have remembered being told Ms Gobbo was a source because she "*knew of Ms Gobbo through media reporting*" – even though the relevant time (September 2005) was before the crescendo of media reporting relating to Ms Gobbo;
- b) her confidence that she did not know, because of the steps she would have taken had she been told. As the High Court has warned, a witness's evidence of what she or he considers she or he would have done "involves the danger of the 'malleability of the recollection' even of an upright witness";⁶ and
- c) given that Ms Nixon's position that she was not told that Ms Gobbo was a human source is said by her to be informed by the fact that she did not take the steps that she would have taken, whether not having taken those steps supports or detracts from her view that she was not told. That is, whether it is possible Ms Nixon acted, on being informed about Ms Gobbo, consistently with the way she had when she was informed about Mr Milte (in which case she would not have taken the steps which she asserts in her supplementary statement that she would have taken). Counsel Assisting make an assumption, not supported by any evidence, that Ms Nixon was "*chastened*" by her experience with Mr Milte and so:

⁶ *Chappel v Hart* (1998) 195 CLR 232, 272.

- (i) “*would not have permitted it [the registration of Ms Gobbo]*” – even though the failure to register Mr Milte as an informer was an issue before the OPI ;
- (ii) “*or at the very least would have taken steps to determine whether or not it was appropriate, such as obtaining legal advice*”⁷ – when it is at least equally open to consider that perhaps the Milte case study gives an insight into what Ms Nixon would have done upon being told Ms Gobbo was acting as a human source, instead of benevolently assuming she had been so “*chastened*” that she would have changed tack from that which she had taken with respect to Mr Milte.

8 Further, Mr Overland would have wanted to explore Ms Nixon’s evidence that it was “*rare*” for her to be briefed about human sources. As set out in Mr Overland’s primary submissions, Mr Overland has no independent recollection of the meeting with Ms Nixon on 29 September 2005, the extent to which he discussed Ms Gobbo’s registration with Ms Nixon, nor Ms Nixon’s response to this briefing.⁸ However, it is “*significant*”, in Mr Overland’s view, that his diary entry records that he told the Chief Commissioner about “3838”, because “*it’s not the sort of operational information you would normally tell a Chief Commissioner*” and so “*it’s not the sort of operational information you would normally tell a Chief Commissioner – I don’t know that I went into the nature of the information that she was able to provide in detail, I just don’t recall, but it just seems logical to me, based on the note, based on the exceptional circumstances in telling the Chief Commissioner something like this, that I made her aware that Ms Gobbo, a barrister, was registered as a human source by that number*”.⁹

9 The finding sought by Counsel Assisting (that Mr Overland did not inform Ms Nixon of the identity of informer 3838) cannot safely be made. It would be contrary to Mr Overland’s fundamental right to procedural fairness, and is not consistent with the evidence as a whole, for the reasons set out in Mr Overland’s primary submission.¹⁰ It is submitted that the only finding open on the evidence is that there was a discussion between Ms Nixon and Mr Overland about informer 3838 on 29 September 2005, that it is likely that it was a

⁷ CAS2, [200.3].

⁸ Submissions of Mr Simon Overland dated 18 August 2020 at [76].

⁹ *Ibid.*

¹⁰ At [86]-[90].

discussion of some substance, but it is not possible to determine from the evidence precisely what was said.

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