

Hon Margaret McMurdo AC
Commissioner
Royal Commission into the Management of Police Informants

Dear Ms McMurdo,

Thank you for the invitation to make a submission to the *Royal Commission into the Management of Police Informants*. Should it be the wish of the Commission, I have no objections to it being made public.

Introduction

In making this submission, I readily acknowledge that the period known colloquially as the “Gangland Killings” era placed considerable strain on the Chief Commissioner of Police and members of her senior command. They were being pressured to solve a very grave and somewhat alarming situation, which involved many members of Melbourne’s “underworld” being shot in suburban streets, in a Carlton restaurant and in the front seat of a van while young children were sitting in the back. The “Gangland Killings” also saw the execution style murder of a police informer and his wife in their Melbourne home. Not surprisingly, the government, media and community were demanding that police stop the carnage.

That pressure, however, cannot adequately explain the decision by senior members of Victoria Police to recruit a criminal defence barrister as a police informer. Victoria Police knew, only too well, that the barrister was, at the same time, acting for the clients on whom she was informing. It is not unreasonable to expect that when arriving at their decision, senior police would have considered the array of consequences that could arise from such a potentially dangerous and highly unethical arrangement, and to have done so prior to deciding to go down what was an unprincipled, dishonorable path.

Evidence to date seems to suggest they did not, or if they did they came to the conclusion that risking the credibility of Victoria’s criminal justice system, of which they are the “gatekeepers”, by engaging in what the High Court of Australia unanimously described as “reprehensible conduct” constituted the wisest and most ethical decision they could make under the circumstances.

The decision by very senior police to take such action raises the matter of what needs to change in the police informants policy space to prevent history ever repeating itself. What policies need to be implemented to protect client-lawyer privilege, which was previously thought to be sacrosanct? While this is an important matter that must be addressed, the Royal Commission’s terms of

reference reflect the need to examine issues that address the structures and processes needed to reform, perhaps from first principles, Victoria's broken informant management system.

Revelations from the Victoria Police-Nicola Gobbo situation has, however, influenced the focus of this submission and the suggestions it offers in relation to any reform program. It does so because at a fundamental level the revelations (to date) unequivocally demonstrate that even very senior members of Victoria Police cannot be trusted to recruit and handle police informants, and that no member of Victoria Police should be allowed to do so in the future, without continuous, independent oversight. I make this rather strong statement because the success or otherwise of any model that is ultimately implemented will have as much to do with the police culture as any improved structures and processes.

This submission begins by briefly addressing common factors that arise in an administrative, process-oriented approach to the recruitment and handling of informants. It then moves on to offer evidence to support the view that the police culture influences officers' decisions to ignore internal police rules and regulations, and the law, and that this must be taken into account in the design and implementation of any future police informants management policy for Victoria Police,

Internal process approach

Most police forces adopt a process-oriented approach to the recruitment and handling of police informants. The models are primarily designed to facilitate what is largely an internally operated informant management system, which often involves senior police signing off on arrangements initiated and handled by more junior officers. Senior police are supposedly keeping a watching brief on police informant matters to ensure, among other things: the suitability of the person being recruited; their motivation for wanting to cooperate with police; whether the informant has personal and/or financial problems that could jeopardise the arrangement; any past and present involvement in criminal activity; the possibility that the informant may be a "plant"; whether the informant should be rewarded for assisting police and if so in what manner; protecting the identity of the informant; and ensuring their safety, which sometimes involves an informer entering the witness protection program.

Despite supposed checks in the internal, police administered system, it can and has failed to work in practice. Evidence suggests this has as much (perhaps more) to do with the police culture as it does any ill-designed process.

Police Culture

The police culture explains many of the issues raised in an illuminating and detailed 2016 report by the Acting NSW Ombudsman.¹ It found serious problems with informant management in that state, which involved the actions of some members of the New South Wales Crime Commission (NSWCC) and New South Wales Police Force (NSWPF). The report contains a litany of wrongdoings by officers in both law enforcement organisations that support the proposition that the police culture overrides sound structures and processes.

The Ombudsman's investigation revealed, among other things, that the NSWCC had breached its own informant management guidelines and had "failed to implement its own policies, practices and procedures" while managing an informant and in relation to the Listening Device Act (see for example p. 489, p.504, p. 571).

Members of the NSWPF were said to have engaged in the general offence of perverting the course of justice (p. 489) and the NSWCC had taken part in actions constituting "unreasonable conduct" (see for example p. 489, pp. 541-2) in relation to the Police Act and in conduct that was "otherwise wrong" in relation to the Ombudsman Act (p. 516).

It was also revealed that an officer, who admitted he had not met or engaged with the informant or been involved in making an assessment of him, had signed off on the form used to approve the "application for registration" of the informant.

Wrongdoings in relation to listening devices also occurred despite the NSWCC Listening Device Manual clearly stating, "strict compliance with the Listening Device Act is essential" (p. 545). The manual, which is supposed to act as a guide for ethical and legal conduct by officers, makes it clear that negative consequences would flow from using a listening device "in a manner not authorized by the Act" (p. 546, p. 571, and those consequences include the possibility that the "evidence obtained might be ruled inadmissible" in court. (p. 546). The manual also warned that it was an offence to breach the Act. The Ombudsman's report also noted that the police induction process in relation to listening devices was totally inadequate.

¹ A Special Report to Parliament under S 31 of the Ombudsman Act 1974 & S 161 of the Police Act 1990, Volume 4, Chapters 14 & 15, Mascot Management of Informants Paddle and Salmon. Numerous other examples of the police culture overriding accountability structures and processes can be found in royal commission and commission of inquiry reports such as the Fitzgerald Inquiry (Qld), The Wood Inquiry (NSW) the Kennedy Inquiry (WA) and reports by independent police oversight agencies into police misconduct and corruption.

The police culture best explain the approach adopted by officers in these and other matters and given its pervasive nature in all Australian police forces and beyond, such behaviour cannot be seen as peculiar to New South Wales. Indeed elements of the same culture are evident in IBAC findings and over the years in other inquiries into police misconduct and corruption.²

IBAC findings

In June 2018, Victoria's Independent Broad-based Anti-corruption Commission (IBAC) reported on an audit it had conducted into investigations undertaken by the Police Force's Professional Standards Command (PSC).³ PSC is described in the report as "... the central area within Victoria Police responsible for the organisation's ethical health and integrity" (p. 4). Complaints referred to the PSC for investigation are usually at the more serious end of the complaints spectrum and relate to "allegations of serious criminality, serious corruption, targeted or proactive investigations and serious breaches of Victoria Police discipline". (p. 10).

Given the nature of the complaints it investigates and its role and responsibilities in Victoria Police, it is not unreasonable to assume that PSC's own conduct would provide an integrity exemplar for Victoria Police. It is also not unreasonable to expect that its handling of such complaints would reflect best practice. The IBAC audit shows that neither was the case. If Professional Standards Command cannot be trusted to do the right thing, the community has every right to query what might be occurring inside other departments in Victoria Police, including the way in which all informants are recruited and handled. In other words, can Victoria Police be trusted to administer any sensitive policy area in an ethical and legal manner?

I raise the possibility that they cannot because IBAC found that within PSC there was "poor management of conflicts of interest" matters; a "failure to consistently consult with the Office of Public Prosecutions"; "inadequate recommended actions"; "probity concerns including that "some PSC investigators had complaint histories that raised issues of concern and could adversely affect confidence in the outcome of investigations and PSC's reputation". IBAC also highlighted "inappropriate file classification" and PSC's "failure to recommend

² See for examples the Fitzgerald Commission of Inquiry Report (Qld), The Wood Royal Commission Report (NSW), the Kennedy Royal Commission Report (WA) and the many reports from independent anti-corruption commissions

³ *Audit of complaints investigated by Professional Standards Command, Victoria Police*, Independent Broad-based Anti-corruption Commission, Victoria, June 2018.

broader organizational improvements” (p. 5). The IBAC also make the point that it “continues to liaise with Victoria Police to improve impartiality in its complain handling processes” P. 6).

The crucial question that arises from IBAC’s findings is what caused this type of behaviour from the peak integrity command in Victoria Police. One credible explanation is the police culture, which at its worst overrides rules and regulations and excuses, underplays or covers up the conduct of errant officers. The culture wraps itself around recruits when they enter the police academy and stays wrapped and often tightens around the vast majority of police officers throughout their policing career. This is why the supervision of any new informant management policy must involve independent oversight from those who are not and never have been a member of any police force in Australia and beyond. As stated previously, the police culture is not peculiar to Victoria or Australia. It is present far beyond our shores.

Oversight

In jurisdictions where there is an independent commission overseeing police conduct, the argument could be made that the police informant program is already subjected to a form of independent oversight. While on one level this is correct, it fails to encompass problems associated with timing. To explain further, the current involvement of independent anti-corruption commissions often occurs after something has gone wrong. This is a reactive rather than proactive approach. The management of police informants requires a proactive approach in which a person(s) can independently supervise each stage of the police informant processes and ask for explanations from police before they act. What may have been the outcome if such an arrangement had been in place prior to senior police deciding to engage a criminal defence barrister as an informant to inform on the clients she was representing?

Given the problems associated with police culture, any reform program would benefit greatly from the early involvement of an independent person(s) or an anti-corruption commission. There are various models that the Royal Commission may wish to consider including, a public interest monitor, an independent inspector or the appointment of a person(s) within IBAC dedicated to overseeing the police informant program from beginning to end. If the decision is to go down the IBAC path, it should receive the additional funding needed to cover the cost of hiring additional staff.

Education and Training

Any system of oversight would be enhanced through targeted education and training programs, which are not designed and delivered solely by Victoria Police. Such programs should not be confined to a didactic format in which a lecturer/instructor explains the theory underpinning ethics and why it is of particular importance in police work, including management of the police informants program. From personal experience in teaching police ethics and criminal justice ethics, it is unpacking and debating the ethical dilemmas in policing and exploring the dangers of “noble cause corruption” for individual police officers and the force as a whole that sparks people’s interest. To maintain officers’ interest requires open debate and in an environment where participants feel comfortable about expressing and questioning their views and those of other participants. If possible, conducting education and training sessions for police officers of the same rank would help to facilitate the kind of questioning environment that is conducive to subjects that deal with the ethical dilemmas in the police informants space.

I am not suggesting that police be excluded from education and training programs, but I am suggesting that curriculum design and its delivery should also involve people who are not and have never been police officers, but have some level of expertise in the ethical challenges many police face when arriving at decisions that can constantly arise when managing police informers. It is also important that any non-police person(s) involved in curriculum design and delivery has equal status to police. External, independent input could assist in lessening the likelihood that negative elements of the police culture may contaminate the education and training program.

Conclusion

As a result of the strength of the police culture, which has the ability to prevail over adherence to internal rules and regulations and even the law, any reform of the informants handling program in Victoria cannot be left to police alone to administer. It must be subjected to the supervision of an independent person(s) or organisation. This is necessary as a strong element of the culture suggests police too often choose to ignore the fact that the law they are sworn to uphold also applies to them.

In closing, I wish to raise another matter that could influence any gap between what the Royal Commission recommends and what is ultimately implemented, and that is the political power of the police and police union and the special relationship it affords them with government. This power has been used at times to determine the final shape of the model that is implemented as opposed to that which was recommended. This often occurs in relation to police accountability issues. Whether that is allowed to happen is a matter that only

the government can determine but it is hoped that the public interest will prevail over any pressure that might be brought to bear by the police and/or the police union to weaken the intent of any recommendation. The level of concern expressed, in no uncertain terms, by the legal profession over the manner in which the police informant system was abused in Victoria and the consequences that flow from that for the credibility of the criminal justice system, plus the community's disenchantment with Victoria Police over a criminal defence barrister being used as an informer to inform on her own clients should guide the government's decisions. So too should the likelihood that taxpayers may have to foot the bill for any miscarriage of justice that results from the misuse of the police informant program by Victoria Police. The paramount guiding principle however, should be the way in which the police culture has undermined rules, regulations and the law when the police are permitted to operate without continual, independent oversight in sensitive policy areas.

I hope this submission is of some use to the Royal Commission and I am very happy to provide any further information should the Commission so desire.

Sincerely

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