

# Royal Commission into the Management of Police Informants

SUBMISSIONS IN RESPONSE TO THE  
FURTHER SUBMISSIONS OF COUNSEL  
ASSISTING DATED 21 SEPTEMBER 2020

PRODUCED ON BEHALF OF SOME FORMER  
AND CURRENT MEMBERS OF VICTORIA  
POLICE

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## A. Overview

- 1.1 These submissions are provided on behalf of the individual former and current members of Victoria Police who filed the Tranche 1 submissions (save for Jason Kelly) and Inspector Mark Hatt (**members**).
- 1.2 These submissions seek to respond to the 278 page submission received from Counsel Assisting the Royal Commission on Friday, 25 September 2020. Those submissions came as a surprise as the timetabling orders for submissions did not provide for them. As the submissions were not expected and were provided 6 weeks after the members had filed their submissions, it has not been possible for counsel acting for the members to commit all of their time to addressing the latest submissions.
- 1.3 The latest submissions of Counsel Assisting raise many new matters.
- 1.4 The members and their counsel have prepared these submissions in response as quickly as possible because, as they understand it, the Commissioner's final report is soon to be sent for publication.
- 1.5 These submissions are not a comprehensive response to Counsel Assisting's recent submissions. They are the submissions that were able to be prepared by counsel and the members in the two weeks that they have had the submissions. It has not been possible to respond as the members would have wished, including to consider each of the matters set out in the letter from the members' solicitors to the Royal Commission dated 1 October 2020 (**attached**). The members refer to and rely upon the submissions in the table enclosed with that letter.
- 1.6 In the circumstances, the Commissioner should not, with respect, make any adverse finding against a member based on the content of Counsel Assisting's Reply Submissions: s 36(1) of the *Inquiries Act* 2014 (Vic).
- 1.7 We address below some of the general matters raised in Counsel Assisting's Reply Submissions.
- 1.8 First, contrary to the submission at [7], the members submitted error, not bias or apprehended bias. Counsel Assisting identify, at [7], four paragraphs ([13.21], [40.16], [52.57] and [61.20]) in the Tranche 1 submissions that they considered to raise bias. With respect to Counsel Assisting, they do not.
- 1.9 It was submitted in clear terms in both the Tranche 1 submissions and the reply submissions that Counsel Assisting had fallen into error in the approach they had adopted in their written submissions. The fundamental error was that they had only set out in their submissions the evidence that they considered supported their proposed findings. They had not, as the role of Counsel Assisting requires, set out the evidence against the proposed findings. Counsel Assisting have not disputed that they took that approach and they, in fact, adopt the same approach in parts of their latest submissions. That error resulted in the members having to, in less than 8 weeks, identify all of the evidence led over more than 12 months that was not addressed, to set it out and to make submissions about it. The Tranche 1 submissions alone were about 500 pages. If Counsel Assisting had adopted the orthodox approach of setting out both the evidence for and against the proposed findings, analysed it and expressed a conclusion then the members would have made short submissions directed at the conclusions. The submissions of the SDU handlers, Mr Overland and Ms Gobbo are also lengthy because they also set out evidence not set out in Counsel Assisting's primary submissions.

- 1.10 This error is not trivial and has resulted in more submissions being filed. As set out earlier, 6 weeks after receiving the Tranche 1 submissions and only shortly prior to the Commissioner finalising her report, Counsel Assisting have produced another 278 pages of submissions, much of which set out evidence not set out in their primary submissions or in any of the responsive submissions. Those submissions have arrived so late that it has not been possible for the members to consider all of that evidence and the submissions generally and to respond. This not only has consequences under s 36(1) of the *Inquiries Act* but it raises natural justice concerns more broadly.
- 1.11 The other errors that the members raised in the Tranche 1 submissions included: (a) that pejorative language used in Counsel Assisting's primary submissions about certain members was inappropriate because it risked creating a perception that the Commissioner has been inflamed or incited to hold a biased view against the members; and (b) that Counsel Assisting had adopted hindsight reasoning.
- 1.12 Second, Counsel Assisting seek new findings in the latest submissions about legal advice. Their submissions do not address the evidence of Assistant Commissioner Kevin Casey which is directly relevant to that matter. For the assistance of the Commissioner, a copy of his witness statement (without annexures) is **attached** to these submissions. His statement is also relevant to other matters raised in Counsel Assisting's latest submissions, namely disclosure and draft witness statements.
- 1.13 Third, Counsel Assisting's latest submissions adopt the approach of purporting to summarise the members' submissions on an issue. Each summary should not be used as a replacement for reading the members' submissions because the summaries are not always accurate or complete.
- 1.14 Fourth, at [208], Counsel Assisting submit for the first time that "*all too often they (the witness statements filed by former and current police members) were self-serving and did not deal comprehensively, or at all, with matters of significance, did not make concessions, even appropriate ones*". That is not correct. The members cannot otherwise engage with this submission because Counsel Assisting have not identified any witness statements that they say fit that description. It is a bare assertion of no assistance. The members otherwise refer to the recent submissions made by Victoria Police in response to Counsel Assisting's latest submissions on this matter.
- 1.15 Fifth, at [205]-[206], Counsel Assisting characterise the overview to the Tranche 1 submissions as suggesting that they should not have inquired into the conduct of individuals. That is plainly not the submission that was put. The submission was that there was such a disproportionate focus on individual conduct that root causes and organisational failings were lost in Counsel Assisting's primary submissions. Root causes and organisational failings are critical issues to be addressed but they are barely acknowledged or addressed in Counsel Assisting's primary submissions.
- 1.16 The more detailed submissions that now follow this overview represent the members' best efforts to respond to the latest submissions.

## B. Submission of Tony Biggin

### 2 The arrest of Mr Cooper and Mr Biggin's audit

#### Introduction

- 2.1 Counsel Assisting's Reply makes new submissions about Mr Biggin's state of knowledge concerning Ms Gobbo's role with respect to Mr Cooper which are, in many respects, vastly different to Counsel Assisting's primary submissions and not supported by the evidence.
- 2.2 Mr Biggin has already made detailed submissions about his limited knowledge of Ms Gobbo's informing and the information she provided which led to Mr Cooper's arrest.<sup>1</sup> He has also made submissions about his audit,<sup>2</sup> which Counsel Assisting now accept was a "*broad overview audit*".<sup>3</sup>
- 2.3 Mr Biggin maintains that, prior to 1 July 2006, he knew very little about Ms Gobbo's informing and about Operation Posse. In particular, consistently with his sworn evidence and primary submissions, Mr Biggin maintains that he did not know "*until just recently*" that Ms Gobbo had provided Victoria Police with information that led to the location of the Strathmore laboratory and to Mr Cooper's arrest. Due to this lack of knowledge, Mr Biggin did not appreciate (neither at the time of Mr Cooper's arrest nor when conducting his audit) the conflict of interest that crystallised when Ms Gobbo attended to advise Mr Cooper following his arrest. Mr Biggin has never resiled from this position.
- 2.4 His sworn evidence, as set out in Mr Biggin's primary submissions,<sup>4</sup> was not challenged by Counsel Assisting in cross examination and was not referred to in Counsel Assisting's primary submissions. It is again overlooked in Counsel Assisting's Reply, even though it was brought to Counsel Assisting's attention in Mr Biggin's primary submissions, and despite Counsel Assisting maintaining that the contrary finding remains open to the Commissioner.<sup>5</sup>
- 2.5 Mr Biggin was an honest and reliable witness. He made appropriate concessions and accepted responsibility for his mistakes. Mr Biggin's evidence about these matters should be accepted, as should his reassurance that had he known at the time of conducting his audit about the issues that had arisen in relation to Mr Cooper, he would have ensured that they were reported as part of his audit.<sup>6</sup>
- 2.6 If Counsel Assisting wished to submit that Mr Biggin's unchallenged sworn evidence should be rejected, the basis for this submission should have been identified so that, as a matter of fairness, Mr Biggin could respond to it. In the absence of any such submission being made by Counsel Assisting, Counsel Assisting's submissions about Mr Biggin's alleged knowledge of the events surrounding Mr Cooper's arrest should be rejected.

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<sup>1</sup> Tranche 1 Submissions, Submissions of Mr Biggin, Parts 41-43.

<sup>2</sup> Tranche 1 Submissions, Submissions of Mr Biggin, Part 44.

<sup>3</sup> Counsel Assisting Reply Submissions at p 180 [638].

<sup>4</sup> Tranche 1 Submissions, Submissions of Mr Biggin [42.45]-[42.46].

<sup>5</sup> Counsel Assisting Reply Submissions at pp 181-182 [644]-[647].

<sup>6</sup> Tranche 1 Submissions, Submissions of Mr Biggin [40.11]-[40.18], [44.9]. The latter is referred to in Counsel Assisting's Reply Submissions at p 182 [646].

## February 2006 meeting with Mr Overland

- 2.7 Mr Biggin has previously made submissions about this meeting which, Mr Biggin submits, did not advance Mr Biggin's knowledge of Ms Gobbo's informing.<sup>7</sup> Counsel Assisting's Reply refers to various contextual matters which Counsel Assisting now assert are relevant to an assessment of Mr Biggin's submissions about this meeting.
- 2.8 In response to the matters listed at paragraph 634, Mr Biggin submits the following:
- (a) Counsel Assisting do not explain how they seek to rely upon the fact that Mr Biggin had a number of covert units under his command as bearing upon the Commissioner's assessment of Mr Biggin's submissions about meeting with Mr Overland. As Mr Biggin's primary submission states, given Mr Biggin's role involved responsibility for allocating or refusing to allocate covert resources across Victoria Police, this is the most likely explanation for Mr Overland's direction to Mr Biggin that Operation Posse was a priority.<sup>8</sup>
  - (b) There is no evidence to support the assertion at paragraph 643.2 that members from the various units within Mr Biggin's command "*had the potential to compromise Ms Gobbo's role as a human source*". Counsel Assisting do not cite any evidence in support of this assertion. There is ample evidence before the Commission demonstrating that the identity of human sources was strictly protected within Victoria Police and that the "need to know" principle operated to ensure that information about human sources was shared between members only to the extent that there was an operational need to do so.
  - (c) There is no evidence that Mr Biggin was aware of the potential undercover operation referred to at paragraph 634.3, as explained in Mr Biggin's primary submissions.<sup>9</sup> Counsel Assisting's Reply acknowledges that there is no direct evidence that Mr Biggin knew of the potential undercover operation, but suggests that the contrary inference can be drawn from a consideration of the "*context of the meeting with Mr Overland*".<sup>10</sup> There is no sound basis upon which the Commissioner can infer that Mr Biggin knew of this operation.
  - (d) It is unclear what useful context, if any, can be provided by the fact that an ICR records Ms Gobbo expressing concern about the potential for her telephone to have been intercepted. Further, there is no evidence that Mr Biggin was aware of this.
  - (e) There is no evidence that Mr Biggin's discussion with Officer White on 14 February 2006 had anything to do with Ms Gobbo. As explained in Mr Biggin's primary submissions, his diary entry for this date records that he met with Officer White for ten minutes about "*DSU Ops*".<sup>11</sup> Officer White's diary does not contain any record of this meeting.
- 2.9 The assertion made by Counsel Assisting at paragraph 637 is not open on the evidence and is illogical. It should be rejected. There is no evidence that Mr Biggin knew what information Ms Gobbo was providing about Mr Cooper, as explained in Mr Biggin's primary submissions. Further, there was no need for Mr Biggin to know such information in order for him to have discussed with Mr Overland "*possible tactics to*

<sup>7</sup> Tranche 1 Submissions, Submissions of Mr Biggin, Part 42 and especially [42.22]-[42.31].

<sup>8</sup> Tranche 1 Submissions, Submissions of Mr Biggin [42.31].

<sup>9</sup> Tranche 1 Submissions, Submissions of Mr Biggin [42.4]-[42.12].

<sup>10</sup> Counsel Assisting's Reply Submissions at pp 179-180 [636].

<sup>11</sup> Tranche 1 Submissions, Submissions of Mr Biggin [42.11].

*manage*” Ms Gobbo, if the Commissioner accepts that this is what was meant by Mr Biggin’s diary note of the meeting.

**Mr Biggin did not know that Ms Gobbo had provided information which led to Mr Cooper’s arrest**

- 2.10 As indicated at paragraphs 2.3-2.6 above, Mr Biggin maintains that he did not know “*until just recently*” that Ms Gobbo had provided Victoria Police with information that led to the location of the Strathmore laboratory and to Mr Cooper’s arrest.
- 2.11 Mr Biggin submits that he did not know that Ms Gobbo was providing information about Mr Cooper. He conceded in evidence that “*in the back of my mind I had thought that perhaps that could be the case*”.<sup>12</sup>
- 2.12 At paragraph 642, Counsel Assisting’s Reply refers selectively to evidence Mr Biggin gave about the ICRs that were available to him at the time of conducting his audit. In context, Mr Biggin’s evidence about his review of the ICRs was as follows:
- (a) In conducting his audit, Mr Biggin inspected a very small sample of the available records, between 5-10 percent of all of the documents;<sup>13</sup>
  - (b) He “*perused*” or “*scanned through*” these documents,<sup>14</sup> rather than “reading” them as asserted by Counsel Assisting;
  - (c) The last ICR he perused was ICR 21, as acknowledged in his Issue Cover Sheet;<sup>15</sup>
  - (d) Mr Biggin did not recall perusing ICR 21 but conceded in evidence that he “*must have*” perused it and, in doing so, “*must have*” read Mr Cooper’s name throughout the document. When it was put to him that Mr Biggin must therefore have taken from the ICR that Ms Gobbo was providing information to her handler about Mr Cooper, Mr Biggin conceded “*that would appear to be so, yes*”.<sup>16</sup>
- 2.13 Importantly, even if Mr Biggin had read ICR 21 (or any of the earlier ICRs that mentioned Mr Cooper), they would not have revealed to him the most significant information that Ms Gobbo had provided about Mr Cooper, including information as to the location of the laboratory. This information was contained in ICR 27,<sup>17</sup> which was not available to Mr Biggin when conducting his audit. Counsel Assisting’s primary submissions recognise that the provision of information from Ms Gobbo to her handlers regarding the location of the relevant premises in Strathmore “*was particularly significant*”.<sup>18</sup>
- 2.14 At paragraph 644, Counsel Assisting invite the Commissioner to find that a reference to “*successful outcomes*” in Mr Biggin’s audit report must be referring to the arrest and co-operation of Mr Cooper. There is no evidence referred to by Counsel Assisting in support of this submission and, it is submitted, no evidentiary basis for the assertion exists. Mr Biggin was never asked what he meant by this comment. It is submitted that the comment is likely to have been informed by the discussions Mr Biggin had with Officers White, Smith, Green and Black in undertaking his audit.<sup>19</sup> This is the most likely explanation for the comment given Mr Biggin’s unchallenged evidence that he did not

<sup>12</sup> Tranche 1 Submissions, Submissions of Mr Biggin [42.37]-[42.38].

<sup>13</sup> T7548.29-35 (Biggin); Tranche 1 Submissions, Submissions of Mr Biggin [44.13].

<sup>14</sup> See for example T7558.35 (Biggin); T7564.14 (Biggin).

<sup>15</sup> Exhibit RC0277 – Issue Cover Sheet re DSU - audit (VPL.0100.0132.0168).

<sup>16</sup> T7558.15-7559.23 (Biggin).

<sup>17</sup> Counsel Assisting Submissions at p 416 [1801.23], Vol 2.

<sup>18</sup> Counsel Assisting Submissions at p 416 [1802], Vol 2.

<sup>19</sup> Exhibit RC0277 – Issue Cover Sheet re DSU - audit (VPL.0100.0132.0168 at .0169).

know at the time of conducting his audit that Ms Gobbo had provided information which led to Mr Cooper's arrest.

- 2.15 Many of the matters listed in paragraph 645 are not supported by, or misstate, the evidence before the Commission. In response to paragraph 645, Mr Biggin submits as follows:
- (a) In relation to 645.1, Mr Biggin knew Ms Gobbo was a human source. He did not know she was providing information that was being used by Operation Posse although it crossed his mind that she may have been (as noted in 645.4). He was not aware of the details of such information. Nor did he have a detailed knowledge of Operation Posse.<sup>20</sup>
  - (b) In relation to 645.2, Mr Biggin knew Mr Cooper was a target of, and arrested as part of, Operation Posse. He wrongly thought that Operation Posse was only about Mr Cooper.<sup>21</sup>
  - (c) As for 645.3, there is no evidence that Mr Overland instructed Mr Biggin that "*Ms Gobbo was a priority who needed to be protected*". As explained in Mr Biggin's primary submissions, he understood that Mr Overland instructed him that Ms Gobbo had been registered as a human source; that she was going to be utilised in relation to Operation Posse; that her identity was to be protected; and that Operation Posse was a priority in terms of resources.<sup>22</sup>
  - (d) In relation to 645.5, Mr Biggin's attendance at the police station on 22 April 2006 was not connected to the audit he had been asked to undertake. As explained in his primary submissions, Mr Biggin attended the police station for reasons unrelated to Ms Gobbo, namely, to get a "*feel for*" the further covert service requirements for the next phases for the operation.<sup>23</sup>
  - (e) Counsel Assisting do not explain how they allege at 645.6 that Mr Biggin's "*selection as the person appropriate to conduct the audit*" can assist the Commissioner in assessing Mr Biggin's submissions. From Mr Biggin's perspective, he conducted the audit because he was directed by his superior officer, then Commander Danyne Moloney, to do so.<sup>24</sup> Paragraph 645.6 should be disregarded.
  - (f) In relation to 645.7, Mr Biggin refers to his primary submissions and reiterates two matters. First, there is no evidence he received a briefing as to the background information contained in the Operation Order for Phase 5. Secondly, it is unlikely he received a copy of the Order as he is not listed on the distribution list.<sup>25</sup>
  - (g) In relation to 645.8, there is no evidence upon which the Commissioner can find that Mr Biggin's reference in his audit report to having seen Ms Gobbo interacting with handlers indicates "*an attitude that Ms Gobbo's attendance at the police station was part of her human source role*". As explained in Mr Biggin's primary submissions, Mr Biggin understood that Ms Gobbo was present at the police station in her capacity as a barrister and thought her relationship with Mr Cooper was a "*normal lawyer/client relationship*". He also thought Ms Gobbo's

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<sup>20</sup> Tranche 1 Submissions, Submissions of Mr Biggin [44.32] & Part 42.

<sup>21</sup> Tranche 1 Submissions, Submissions of Mr Biggin [42.35].

<sup>22</sup> Tranche 1 Submissions, Submissions of Mr Biggin [42.22]-[42.31] and in particular [42.29].

<sup>23</sup> Tranche 1 Submissions, Submissions of Mr Biggin [43.2]-[43.4].

<sup>24</sup> T7790.14-17 (Biggin).

<sup>25</sup> Tranche 1 Submissions, Submissions of Mr Biggin [43.18]-[43.19].

interactions with the SDU handlers was “*quite normal*” and that the handlers were present to support the investigators in dealing with Mr Cooper.<sup>26</sup>

- (h) In relation to 645.9 and 645.10, Mr Biggin denies that he was aware of these matters by at least 27 April 2006 and there is no evidence capable of establishing the contrary.<sup>27</sup>
- (i) In relation to 645.11, Mr Biggin refers to his primary submissions which explain why these were not referred to in his audit report.<sup>28</sup>

2.16 There remains no evidence which demonstrates that Mr Biggin knew about the issues that had arisen in relation to Mr Cooper either at the time of Mr Cooper’s arrest nor at the time he completed his audit. It is not open to the Commissioner on the evidence to make findings to the contrary.

### 3 Mr Biggin’s knowledge of other key issues post 1 July 2006

#### Introduction

3.1 At paragraph 652, Counsel Assisting’s Reply alleges that Mr Biggin had “*an awareness that the administration of justice might be or had been jeopardised*” which “*demand[ed] action on his part to expose those matters to scrutiny and not to conceal them*”.<sup>29</sup> This is a serious and entirely new proposed adverse finding. It is rejected by Mr Biggin. The allegation is not open on the evidence, has not previously been put to Mr Biggin (either in cross examination nor in Counsel Assisting’s primary submissions) and does not arise from Mr Biggin’s submissions in response. This allegation should not have been made in Reply and the Commissioner should disregard it.

#### Risk assessments

3.2 Under the heading of “Deficient Risk Assessments” Counsel Assisting’s Reply makes further submissions about Mr Biggin’s audit. Mr Biggin refers to his primary submissions regarding the audit.<sup>30</sup>

3.3 Mr Biggin did not play any role in relation to the preparation of the November 2005 and April 2006 risk assessments. Mr Biggin could not recall whether he read or scanned the risk assessments as part of his audit. His final evidence on this topic was,

*Most probably I did read them, or if I read one and then the other was essentially the same I may have scanned it. I just don’t recall at this point in time. We are talking 13 and a half years ago.*<sup>31</sup>

3.4 After 1 July 2006 (when the SDU came within Mr Biggin’s command), Mr Biggin conducted reviews and audits of all human sources being handled by the SDU, as described in his primary submissions. The reviews conducted by Mr Biggin exceeded the requirements of Victoria Police’s Human Source Management Policies which existed at that time. Those Policies also required the Human Source Management Unit (initially known as the Informer Management Unit) to oversee the management of high

<sup>26</sup> Tranche 1 Submissions, Submissions of Mr Biggin [43.11]-[43.12].

<sup>27</sup> Tranche 1 Submissions, Submissions of Mr Biggin, Part 44.

<sup>28</sup> Ibid.

<sup>29</sup> Counsel Assisting’s Reply Submissions at p 183 [652].

<sup>30</sup> Tranche 1 Submissions, Mr Biggin Submissions, Part 44.

<sup>31</sup> T7552.27-30 (Biggin).

risk human sources. Mr Biggin understood that the HSMU was performing this important oversight role in relation to Ms Gobbo.<sup>32</sup>

3.5 Mr Biggin's primary submissions otherwise explain why he missed mistakes that were made by the SDU from 1 July 2006 onwards, some of which are now accepted by Counsel Assisting.<sup>33</sup>

3.6 As noted in the submissions filed on behalf of Victoria Police, there was, at the time of Ms Gobbo's use as a human source,

*[T]he absence of a risk assessment framework that was capable of identifying and compelling the management of the risks associated with Ms Gobbo. While the SDU approach to risk assessment was better than what had been used before, it was inadequate for this purpose.*<sup>34</sup>

3.7 Accordingly, the deficiencies around risk assessment were due to organisational failings, rather than being attributable to Mr Biggin.

#### **Meetings of 24 July 2007 and 6 August 2007**

3.8 Mr Biggin has previously made detailed submissions about the meeting of 24 July 2004,<sup>35</sup> in which he submitted that the meeting concerned Ms Gobbo's potential transition to a witness for the Petra Taskforce, not in relation to her use as a human source. Counsel Assisting now assert, for the first time, that the meeting related to the potential that Ms Gobbo may become a witness against Mr Karam, and that the need for legal advice arose in this context.<sup>36</sup> This allegation has never previously been put to Mr Biggin, either in cross examination or submissions.

3.9 Counsel Assisting's new submissions about the 24 July 2007 meeting must be rejected for the following reasons. First, there is no evidence that Mr Biggin was aware that anyone was contemplating using Ms Gobbo as a witness against Mr Karam. Secondly, as indicated in his primary submissions, Mr Biggin was not aware of the circumstances in which Ms Gobbo had obtained the bill of lading from Mr Karam and provided it to the SDU handlers.<sup>37</sup> Thirdly, the available evidence, as referred to in Mr Biggin's primary submissions, suggests that the meeting was about Ms Gobbo's potential use as a witness for Petra. The attendance of Mr O'Connell at the meeting is consistent with the meeting being relevant to the Petra taskforce.<sup>38</sup>

3.10 Mr Biggin recalls that those present at the meeting on 24 July 2007 agreed that Officer White, Supt Blayney and Mr Biggin would brief Mr Overland about the proposal to transition Ms Gobbo from a human source to a witness.<sup>39</sup> Mr Biggin's diary records that the meeting to brief Mr Overland occurred on 6 August 2007, and that he communicated his opposition to Ms Gobbo becoming a witness to Mr Overland.<sup>40</sup>

3.11 Counsel Assisting accept Mr Biggin's primary submission that the need for legal advice, being predicated upon the possible use of Ms Gobbo as a human source, fell away when those present at the 24 July meeting decided not to use Ms Gobbo as a witness.<sup>41</sup> Nonetheless, Counsel Assisting submit that the concerns raised at the

<sup>32</sup> Tranche 1 Submissions, Submissions of Mr Biggin [46.19]-[46.24].

<sup>33</sup> Counsel Assisting's Reply Submissions at pp 182-183 [650]-[651].

<sup>34</sup> Tranche 2 Submissions [2.23].

<sup>35</sup> Tranche 1 Submissions, Submissions of Mr Biggin [47.1]-[47.30].

<sup>36</sup> Counsel Assisting's Reply Submissions at p 185 [664].

<sup>37</sup> T7571.30-7572.45 (Biggin), as cited in Tranche 1 Submissions, Submissions of Mr Biggin [46.17].

<sup>38</sup> Tranche 1 Submissions, Submissions of Mr Biggin [47.6] & [47.8].

<sup>39</sup> Exhibit RC0577C – Further Statement of Anthony Biggin at [87] (VPL.0014.0041.0008 at .0025).

<sup>40</sup> Exhibit RC0577C – Further Statement of Anthony Biggin at [89] (VPL.0014.0041.0008 at .0025).

<sup>41</sup> Counsel Assisting's Reply Submissions at p 187 [676]; Tranche 1 Submissions, Submissions of Mr Biggin [47.19].

meeting “*should have served as a reason to obtain legal advice to ensure that there had been nothing improper or unlawful about Ms Gobbo’s use, rather than as an excuse to conceal that potential*”. There is no evidentiary basis for this submission, and it should be rejected.

- 3.12 As explained in Mr Biggin’s primary submission, there is no evidence that Mr Biggin appreciated the need for legal advice at or around the time of the 24 July 2007 meeting. To the contrary, Mr Biggin’s evidence was that he did not turn his mind to the possibility of seeking legal advice in relation to the use of Ms Gobbo as a human source. In particular, when it was put to Mr Biggin in cross examination by Counsel Assisting that the participants at the 24 July meeting were discussing the risks to the legal system because of the relationship between Ms Gobbo and the SDU, Mr Biggin said that he did not recall that aspect of the conversation.<sup>42</sup>
- 3.13 Counsel Assisting’s Reply submissions at paragraphs 677.1 and 677.2 are not supported by the evidence. Mr Biggin was against Ms Gobbo becoming a witness for Petra or Briars, primarily due to his concerns about her safety and welfare.<sup>43</sup> His evidence was that he did not, at the time, have any specific information about convictions that may have been unsafe.<sup>44</sup> Nor did he appreciate that there was a real prospect that there were people in custody who might not have received a fair trial because of Ms Gobbo’s role as a human source.<sup>45</sup>

#### **Meeting on 21 September 2007**

- 3.14 Counsel Assisting’s submissions at paragraphs 678 to 680 are not open on the evidence. Mr Biggin’s diary records that he attended a meeting with Officer White and Mr Overland on 21 September 2007 regarding “*HS 3838, Op Briars, tactics & options*”. Mr Biggin’s evidence is that he believed he conveyed to Mr Overland his view that Ms Gobbo should not be used as a witness for the Briars Taskforce and presented alternative options. He cannot now recall what those options were.<sup>46</sup>
- 3.15 The matters Counsel Assisting allege were discussed at the 21 September 2007 meeting (which are based on the diary notes of Officer White) were never put to Mr Biggin by Counsel Assisting in cross examination. To the contrary, Counsel Assisting suggested to Mr Biggin that the ICRs showed that by the time of the 21 September 2007 meeting Ms Gobbo had already been tasked to speak to Mr Waters,<sup>47</sup> seemingly suggesting that White’s diary may not be accurate.
- 3.16 In response to questions asked by Mr Chettle about the 21 September 2007 meeting, Mr Biggin said that he and Officer White both raised or reinforced with Mr Overland their views that they “*didn’t think this was a good idea*”.<sup>48</sup>
- 3.17 Accordingly, Counsel Assisting’s assertion that what occurred on 21 September 2007 “*was consistent with the decision making which had occurred on 24 July 2007 and 6 August 2007*” should be rejected.

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<sup>42</sup> Tranche 1 Submissions, Submissions of Mr Biggin [47.4] & [47.10].

<sup>43</sup> T7636.23 (Biggin).

<sup>44</sup> T7636.27-33 (Biggin).

<sup>45</sup> T7639.1-11 (Biggin).

<sup>46</sup> Exhibit RC0577C – Further Statement of Anthony Biggin at [93] (VPL.0014.0041.0008 at .0026).

<sup>47</sup> T7800.28-34 (Biggin).

<sup>48</sup> T7617.27-36 (Biggin).

**The 1 September 2008 subpoena**

- 3.18 Mr Biggin has already made detailed submissions about this subpoena and why the proposed finding sought by Counsel Assisting should not be made.<sup>49</sup>

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<sup>49</sup> Tranche 1 Submissions, Submissions of Mr Biggin [47.31]-[47.42].

## C. Submission of Paul Rowe

### 4 Introduction

- 4.1 Counsel Assisting's reply submissions about Mr Rowe are relatively brief. However, within a few short pages, they raise a series of new allegations, findings and criticisms, none of which are open on the evidence. Most seriously, the reply submissions assert undeveloped theories that have no basis in the evidence.
- 4.2 It is necessary to address these reply submissions in some detail because, in a number of instances, they misstate, overstate or misrepresent the evidence before the Commission.

### 5 Role and responsibility

- 5.1 Mr Rowe gave credible, candid and reliable evidence in his appearances before the Commission. This should be accepted without Counsel Assisting's unexplained qualification that this was "*largely the case*".<sup>50</sup>
- 5.2 The qualification seems to depend on Counsel Assisting's suggestion that Mr Rowe's demeanour changed between his first appearance before the Commission in July 2019 and his second appearance in November 2019. Counsel Assisting assert this change in demeanour was "*clearly*" due to Mr Rowe reflecting on the implications of Ms Gobbo's use.<sup>51</sup> Counsel Assisting do not refer to evidence in coming to this conclusion.
- 5.3 This conclusion proceeds from an incorrect premise. During both his appearances before the Commission, Mr Rowe gave considered and reflective evidence and made appropriate concessions. For example, during his first appearance, Mr Rowe gave evidence observing how, with greater experience and knowledge of subsequent events, he now believed that his understanding at the time was incomplete or incorrect.<sup>52</sup>
- 5.4 In any case, there is no basis to ascribe such specific meaning to a change in demeanour. It would be more readily explained by the stressful context of a publicly broadcast compulsory examination on matters that occurred almost fifteen years ago. The complexity of the Commission's proceedings meant that Mr Rowe lived with the impending stress of further public examination for more than four months, after having been told at the end of his first appearance that he would "*come back in a few weeks*".<sup>53</sup>
- 5.5 In this section of the reply submissions, Counsel Assisting also make the general suggestion that Mr Rowe became accustomed to the idea that protecting Ms Gobbo's role as a source should be prioritised over potential risks to the administration of justice.<sup>54</sup>
- 5.6 This suggestion cannot be accepted. Mr Rowe never had any such attitude or belief. He never made any calculated decision to subordinate considerations of justice to Ms Gobbo's safety. Rather, the evidence demonstrates that, for Mr Rowe, not disclosing Ms Gobbo's role was part and parcel of the necessary practice of protecting

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<sup>50</sup> Counsel Assisting Reply Submissions at p 190 [689].

<sup>51</sup> Counsel Assisting Reply Submissions at p 190 [689].

<sup>52</sup> See, for example, T3291.32-37 (Rowe).

<sup>53</sup> T3324.4-6 (Rowe).

<sup>54</sup> Counsel Assisting Reply Submissions at p 191 [692].

any source. Indeed, when asked by Counsel Assisting if he was aware that efforts had been made not to disclose Ms Gobbo's role, Mr Rowe answered that:<sup>55</sup>

*There would have been efforts made to not identify her as a source – not because she's Nicola Gobbo but because she's a source. That happens in every case.*

## 6 Understanding of conflict in September 2005

- 6.1 In their primary submissions, Counsel Assisting proposed the finding that, as of 16 September 2005, Mr Rowe “well-understood that a barrister could not act in conflict between duties owed to their clients and a role as a human source”.<sup>56</sup>
- 6.2 As noted in Mr Rowe’s primary submission, the relevant conflict must be properly and precisely identified. In this case, the relevant conflict was the conflict that would arise if Ms Gobbo supplied non-privileged information about a client's ongoing or future crimes and then continued to act for them.<sup>57</sup>
- 6.3 Previously, Counsel Assisting submitted that Mr Rowe’s understanding of this conflict was “implicit given [his] training, role and seniority”.<sup>58</sup> For the reasons stated in Mr Rowe’s primary submission, those matters cannot support a finding that Mr Rowe understood the relevant conflict.<sup>59</sup> Three other matters canvassed in Mr Rowe’s primary submission demonstrate that he did not understand the relevant conflict:
- (a) Mr Rowe properly relied on the SDU to deal with risks arising from Ms Gobbo’s profession, as those risks were the “*whole reason*” the experts from the SDU were assessing her;<sup>60</sup>
  - (b) A precise analysis of the relevant evidence demonstrates Mr Rowe did not understand the relevant conflict;<sup>61</sup> and
  - (c) It was highly unlikely that a Senior Constable in his first year as a detective would understand a conflict of interest that even the highly experienced SDU officers present on 16 September 2005 did not understand.<sup>62</sup>
- 6.4 The matters newly identified in paragraph 697 of the reply submission cannot otherwise support the proposed finding that Mr Rowe understood the relevant conflict. That is because the assertions in paragraph 697 are oversimplified and imprecise to the extent that they misrepresent the evidence. On proper analysis, the broad assertions made in that paragraph do not reflect the evidence.
- 6.5 **First**, the evidence relied upon is not sourced to each proposition asserted. Where there is a series of separate factual assertions, this imprecise approach obscures proper assessment of the evidence, both by Mr Rowe and by the Commissioner.
- 6.6 **Second**, Counsel Assisting assert that Mr Rowe “*indicated that he was aware of obvious risks, including conflict of interest, in using Ms Gobbo as a human source*”. The evidence does not say this. Mr Rowe’s evidence was only that he understood risks to Ms Gobbo’s safety and general risks arising from the fact Ms Gobbo was a barrister.

<sup>55</sup> T3308.16-23 (Rowe).

<sup>56</sup> Counsel Assisting Submissions at p 298-299 [1343.2], Vol 2.

<sup>57</sup> Tranche 1 Submissions, Submission of DS Rowe [57.16].

<sup>58</sup> Counsel Assisting Submissions at p 298-299 [1343.2], Vol 2.

<sup>59</sup> Tranche 1 Submissions, Submission of DS Rowe [57.8].

<sup>60</sup> Tranche 1 Submissions, Submission of DS Rowe [57.10]-[57.12].

<sup>61</sup> Tranche 1 Submissions, Submission of DS Rowe [57.13]-[57.23].

<sup>62</sup> Tranche 1 Submissions, Submission of DS Rowe [57.24]-[57.26].

6.7 As set out below, Counsel Assisting twice sought to frame Mr Rowe's evidence in the terms of conflict, but his consistent evidence was only that he understood general risks arising from Ms Gobbo's profession. He never accepted conflict of interest was an obvious risk.

6.8 Counsel Assisting questioned Mr Rowe as to whether he had conversations about conflict either at the 16 September 2005 meeting or subsequently. Mr Rowe's evidence was that he could not recall any such conversations. Importantly, while Counsel Assisting's questions were posed in terms of conflict, Mr Rowe explained he only had an understanding of risks at the general level of Ms Gobbo being a barrister and that he relied on the SDU to address those matters.<sup>63</sup>

Ms Tittensor: Was there any discussion at all about her having a conflict in relation to the things that she was telling you and the members of the SDU that day?

Mr Rowe: Well, everything that was said is on the transcript.

Ms Tittensor: Well, do you recall then, or at any other stage, there being any discussion? You might have had some discussion with members of the SDU prior to this or after this. Was there any discussion about Ms Gobbo having a conflict, in her discussions about these matters with you?

Mr Rowe I don't recall ever talking directly with the SDU in relation to it. I think we'd met once, prior to this meeting, with the SDU, but I don't remember whether it was discussed or not - I mean, bearing in mind the whole reason that we're even there with the SDU is based on the fact - the risks associated with her, both to her safety but also the fact that she's a barrister, that's the whole reason we were there, so it wasn't - it's not like it was something that none of us were aware of or were blind to. We knew that was a risk associated with her and that's why we were there with the SDU.

6.9 Shortly after this evidence, Counsel Assisting again sought to summarise Mr Rowe's position in terms of conflicts. Again, Mr Rowe expressed his understanding at the level of general risks arising from Ms Gobbo's profession. Tellingly, Counsel Assisting then identified that risk as Ms Gobbo having "*privileged and confidential information*" – not conflict.<sup>64</sup>

Ms Tittensor: What you're saying, essentially, is in this case, the risks associated with using a legal practitioner were patently obvious because of the patently obvious conflicts that could occur?

Mr Rowe: Yeah, there was - yep, there was - to me, the risk was twofold. It was her safety by virtue of the people that she was associating with, and I don't mean just by representing because, you know, I think her associations went far and beyond that. So there was the risk to her safety and then

<sup>63</sup> T3276.15-35 (Rowe).

<sup>64</sup> T3277.44-T3278.15 (Rowe).

there was the risk the fact that she was a barrister, absolutely.

Ms Tittensor: And that she would have privileged and confidential information that she ought not be disclosing?

Mr Rowe Yes, but as I said on Friday, at no point in time did I have any interest in, you know, the way she was defending clients, what she was doing for preparation of defence, any of that stuff, I had no interest in that. All we cared about - all we cared about was the offences that, I guess, she was privy to, aware of, that's all we cared about.

6.10 Mr Rowe never indicated he was aware that conflict was an “obvious risk”. Mr Rowe’s evidence demonstrates the limited understanding that a police officer in his position would understandably have had. He understood there were could be issues arising from Ms Gobbo’s profession – most particularly privilege. Ms Gobbo was referred to the SDU’s specialist handlers precisely to deal with those risks.

6.11 **Third**, Counsel Assisting assert that Mr Rowe “*referred twice in his evidence to occasions on which he and others had turned their minds to whether such a thing could be done*”. This evidence did not relate to conflicts of interest. This evidence related only to general issues of a lawyer being a human source, which is evident from Counsel Assisting’s own questioning:<sup>65</sup>

Ms Tittensor: When you said, "Can this be done?", were you talking about using a legal practitioner as an informer?

Mr Rowe: Yes.

6.12 **Fourth**, Counsel Assisting suggest that Mr Rowe “*baulked*” and “*point[ed] to other crime that would otherwise occur*” when it was put to him that there might be conflict between Ms Gobbo providing information to police and advising clients. The unstated adverse implication appears to be that Mr Rowe’s focus on obtaining information to prevent crime was created as an excuse to cover him knowingly ignoring conflict.

6.13 This adverse implication only arises because the reply submissions misrepresent the sequence of Mr Rowe’s evidence. By the time Counsel Assisting suggested Ms Gobbo’s profession and role with police were in conflict,<sup>66</sup> Mr Rowe had already given evidence that he was focused on preventing serious crimes and believed there was no impediment to obtaining non-privileged information from Ms Gobbo about her clients’ ongoing crimes.<sup>67</sup> That belief was not an invention or an excuse to respond to questioning, as the reply submissions imply – it was Mr Rowe’s own evidence and his honest belief and understanding.

6.14 **Fifth** and finally, Counsel Assisting suggest that Mr Rowe may have appreciated the conflict of interest, but simply prioritised fighting crime. However, the proper understanding of the evidence demonstrates Mr Rowe did not understand the relevant conflict. The evidence was not that Mr Rowe understood there was a conflict and decided to push on anyway to “*prioritis[e] fighting crime*”. Rather, the evidence was that

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<sup>65</sup> T3277.14-15 (Rowe).

<sup>66</sup> T3303.10-11 (Rowe).

<sup>67</sup> T3302.14-28 (Rowe).

Mr Rowe did not comprehend that Ms Gobbo's professional obligations might prevent disclosure of serious ongoing crimes.

## 7 Ms Gobbo's referral to the SDU

- 7.1 In paragraph 701 of the reply submissions, Counsel Assisting appear to suggest that the decision to refer Ms Gobbo to the SDU was taken so that MDID members would not have to engage in "*subterfuge*" to conceal from Tony Mokbel the fact that Ms Gobbo was supplying information. Counsel Assisting suggest this "*risk all but disappeared if the SDU became the intermediary for the information*". The allegation is not seemingly not only made against Mr Rowe, but also "*those senior*" to him.
- 7.2 While not explicitly stated, Counsel Assisting seem now to allege some form of dishonest intent in the decision to refer Ms Gobbo to be assessed by the SDU.
- 7.3 The matters in paragraph 701 must be disregarded. They represent an entirely new, undeveloped theory that has no basis in the evidence. Counsel Assisting cite no evidence to support these matters. They were never put to Mr Rowe or any other witness, either during hearings or in Counsel Assisting's primary submissions.
- 7.4 The true position is that the SDU had been recently and especially established to manage high-risk sources separately from investigators. The risk to Ms Gobbo's safety and the complexities surrounding her profession made her a prime candidate for referral to the SDU.<sup>68</sup> There was no element of subterfuge or dishonesty in referring her for assessment. Mr Rowe and his senior officers acted entirely appropriately and in accordance with Victoria Police policy in referring Ms Gobbo to the SDU.

## 8 Matters related to disclosure

- 8.1 Counsel Assisting submit that, having attended a meeting between SDU members and Purana investigators on 29 June 2007, Mr Rowe would have been aware that plans to redact notes concerning Mr Cooper's arrest and cooperation involved a "*deliberate subterfuge to avoid disclosing information to the court*".<sup>69</sup>
- 8.2 Mr Rowe was questioned extensively about disclosure and redaction as well as this meeting in particular.<sup>70</sup> Counsel Assisting's primary submissions addressed the meeting and included significant extracts from Mr Rowe's evidence.<sup>71</sup> No allegations of this kind were made either in questioning or Counsel Assisting's primary submissions.
- 8.3 The new submission that Mr Rowe was aware of deliberate subterfuge is not open because the evidence establishes the following:
- (a) At the time, Mr Rowe did not believe Ms Gobbo's role in supplying information was relevant to subsequent prosecutions. He thought there was a "*separation*" because Ms Gobbo had pointed investigators in a certain direction, but all evidence was gathered separately and independently.<sup>72</sup>
  - (b) There was a serious and specific threat to Ms Gobbo's safety. Mr Rowe understood that Ms Gobbo was concerned about recriminations from the Mokbel family because she had not informed them of Mr Cooper's arrest immediately after it had occurred.<sup>73</sup> This was a consistent concern for Ms Gobbo from the

<sup>68</sup> Exhibit 266 – Statement of Paul Rowe at [46] (VPL.0014.0035.0028 at .0034).

<sup>69</sup> Counsel Assisting Reply Submissions at p 194 [707].

<sup>70</sup> T9474.1-T9475.17 (Rowe).

<sup>71</sup> Counsel Assisting Submissions at p 670-671 [2737]-[2740], Vol 2.

<sup>72</sup> T9261.21-27 (Rowe).

<sup>73</sup> T9465.39-44 (Rowe).

night of Mr Cooper's arrest.<sup>74</sup> Mr Rowe was at the time the primary investigator in relation to other serious threats Ms Gobbo had been receiving since December 2006.<sup>75</sup>

- (c) Ms Gobbo's role was not disclosed because she was a source, not because she was Nicola Gobbo.<sup>76</sup> Ordinarily the fact a lawyer advised someone would not be redacted, but this could not be untangled from the fact she was also a source.<sup>77</sup>
- (d) At the time, Mr Rowe understood it was ordinary practice to redact diary notes without indicating whether a public interest immunity claim was made. There was no practice to distinguish between redactions that were for relevance and redactions that were for PII.<sup>78</sup> Legal advice about redaction or PII would only be sought if the defence challenged a redaction or PII claim.<sup>79</sup>
- (e) Mr Rowe had never had any training about how to redact his notes. Rather, he learned on the job from others.<sup>80</sup>
- (f) When redacted notes were served, it was commonly the case that defence lawyers would question informants or witnesses about redactions.<sup>81</sup> Defence lawyers could always call for original diaries and Mr Rowe's practice was to take his original diaries to court for every court matter.<sup>82</sup>

8.4 It is evident that these disclosure and redaction practices were insufficient. Mr Rowe accepted both during his evidence<sup>83</sup> and in his primary submissions<sup>84</sup> that with the benefit of greater experience and hindsight, there were shortcomings in his approach to disclosure. However, it is not open to find that Mr Rowe's approach to disclosure or redaction involved deliberate or conscious wrongdoing or anything like deliberate subterfuge.

## 9 Matters concerning Mr Bickley's second arrest

9.1 Counsel Assisting continue to cavil at the proposition that Mr Rowe believed Ms Gobbo was to make herself unavailable at the time of Mr Bickley's arrest on 13 June 2006. Counsel Assisting accept that "*there is no direct evidence*" of the SDU giving investigators the information that they discussed with Ms Gobbo on 9 June 2006. Despite accepting that, Counsel Assisting then appear to suggest the SDU did pass on the information because it is "*inexplicable why the SDU would not have shared this information*".<sup>85</sup>

9.2 The available evidence determines this issue with certainty. Mr Rowe's evidence was that the SDU did not pass on the information because he believed at the time of Mr Bickley's arrest that Ms Gobbo would not be available.<sup>86</sup> Counsel Assisting do not refer to this evidence, let alone challenge it.

<sup>74</sup> Victoria Police Tranche 2 Submissions (**Tranche 2 Submissions**) [74.32]-[74.33].

<sup>75</sup> Exhibit 266 – Statement of Paul Rowe at [24]-[125] (VPL.0014.0035.0028 at .0044).

<sup>76</sup> T3308.16-23 (Rowe).

<sup>77</sup> T9474.35-45 (Rowe).

<sup>78</sup> T9179.29-T9180.30 (Rowe).

<sup>79</sup> T3308.25-46 (Rowe); T9178.20-T9180.39 (Rowe).

<sup>80</sup> T9521.11-22 (Rowe).

<sup>81</sup> T9179.2-14 (Rowe).

<sup>82</sup> T9522.3-16 (Rowe).

<sup>83</sup> T9236.35-41 (Rowe).

<sup>84</sup> Tranche 1 Submissions, Submission of DS Rowe [58.72].

<sup>85</sup> Counsel Assisting Reply Submissions at p 195 [711].

<sup>86</sup> Untendered Further Supplementary Statement of Paul Rowe dated 25 May 2020 at [10]-[11] (VPL.0014.0035.0061 at .0063).

- 9.3 This means there was no ruse. Mr Rowe believed Ms Gobbo was unavailable. When she unexpectedly answered, Mr Rowe believed he could not stop the two talking, as doing so would have breached the familiar post-arrest requirements under the *Crimes Act 1958 (Vic)*,<sup>87</sup> exposed Ms Gobbo as a human source, or both.
- 9.4 Accordingly, as explained in Mr Rowe's primary submission, it is open and appropriate for the following factual findings to be made concerning Mr Bickley's second arrest:
- (a) At the meeting between investigators from the Purana Task Force (Mr O'Brien, Mr Flynn and Mr Rowe) and Officer White and Officer Green from the SDU, it was agreed that Ms Gobbo would make herself unavailable at the time of Mr Bickley's planned arrest on 13 June 2006.
  - (b) On 9 June 2006, Officer White and Officer Green spoke with Ms Gobbo and discussed Ms Gobbo advising Mr Bickley by phone. The investigators, including Mr Rowe, were not made aware of this.
  - (c) Mr Rowe arrested Mr Bickley on 13 June 2006. Mr Rowe allowed Mr Bickley to attempt to contact Ms Gobbo because Mr Rowe was obliged by s 464C of the *Crimes Act 1958 (Vic)* to afford Mr Bickley the opportunity to contact a legal practitioner.
  - (d) At the time of that arrest, Mr Rowe did not expect Mr Bickley to be able to reach Ms Gobbo as Mr Rowe still understood that Ms Gobbo would be unavailable to receive Mr Bickley's call.

## 10 Matters concerning meeting with DPP on 14 March 2007

- 10.1 Counsel Assisting's reply submissions make a number of new criticisms of Mr Rowe's conduct at and following a meeting that he and Mr Flynn attended on 14 March 2007 with then-Director of Public Prosecutions, Paul Coghlan QC, and a solicitor from the OPP, Ms Tamara Heffernan.
- 10.2 The meeting concerned the progress of charges against Mr Bickley. However, Counsel Assisting's submissions also seek to raise matters concerning Milad Mokbel based on what occurred at the 14 March 2007 meeting.

### *Meeting regarding Mr Bickley on 14 March 2007*

- 10.3 Counsel Assisting accept that Mr Rowe acted appropriately in following up with the OPP about Ms Gobbo's conflict to prevent her from acting for Mr Bickley.<sup>88</sup>
- 10.4 However, Counsel Assisting still criticise the steps taken to address her conflict despite the result being that Ms Gobbo would be kept out of Mr Bickley's proceeding.<sup>89</sup> That continued criticism appears to be influenced by two important errors in Counsel Assisting's reply submissions.
- 10.5 First, Counsel Assisting assert Ms Gobbo's conflict was only raised in the first place by the OPP solicitor.<sup>90</sup> This is incorrect. As Counsel Assisting's primary submissions record, the Purana investigators requested the conference to obtain advice, including in

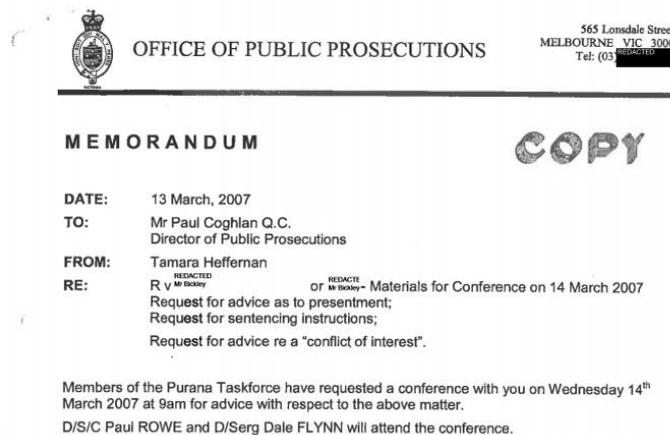
<sup>87</sup> Tranche 1 Submissions, Submission of DS Rowe [59.25]-[59.33].

<sup>88</sup> Counsel Assisting Reply Submissions at p 196 [718].

<sup>89</sup> Counsel Assisting Reply Submissions at p 196 [721].

<sup>90</sup> Counsel Assisting Reply Submissions at p 196 [722.1].

respect of conflict of interest.<sup>91</sup> The following extract from the memorandum that Ms Heffernan prepared prior to the conference confirms this:<sup>92</sup>



- 10.6 Second, Mr Rowe did not suggest that Mr Bickley's determination to use Ms Gobbo was the "only reason Mr Rowe was making the enquiry" about conflict. Counsel Assisting's submission<sup>93</sup> evidently picks up – but misconstrues – the language of Mr Rowe's email to Ms Heffernan sent on 29 March 2007. That email relevantly reads:<sup>94</sup>

*Its my understanding that the onus would be on Nicola GOBBO to excuse herself, is this correct? And if she doesn't, is it the case that there would be very little we could do? The only reason I ask is [Bickley] has been very determined in wanting to use her.*

- 10.7 This email was sent in response to an email that Ms Heffernan sent the day before. In her email, Ms Heffernan noted that she had spoken to Mr Bickley's solicitor, who was aware of Ms Gobbo's conflicts and so would brief a different counsel.<sup>95</sup> Mr Rowe sent the above follow up email on 29 March 2007 as he was evidently not satisfied that this was sufficient to solve the problem.<sup>96</sup>
- 10.8 Read in its context, the reference to "only reason" in Mr Rowe's email was just Mr Rowe explaining why he was asking follow-up questions. He wanted to confirm whether the mechanisms available to address Ms Gobbo's conflict would work in circumstances where Mr Bickley was determined to use Ms Gobbo. He did not make any representation that there was only "one reason" for his enquiry, as the reply submissions suggest.

#### *Other matters concerning Milad Mokbel*

- 10.9 The reply submissions attempt to link the meeting about Mr Bickley with separate matters concerning Milad Mokbel. There is no basis in the evidence do to so.
- 10.10 The meeting on 14 March 2007 was to discuss the progress of Mr Bickley's prosecution and assistance as a witness. The only indication that Milad Mokbel was discussed at

<sup>91</sup> Counsel Assisting Submissions at p 646 [2626], Vol 2.

<sup>92</sup> Exhibit 737 – Office of Public Prosecutions Memorandum from Tamara Heffernan to Paul Coghlan dated 13 March 2007 (COR.1000.0001.0159).

<sup>93</sup> Counsel Assisting Reply Submissions at p 196 [719]-[720].

<sup>94</sup> Exhibit 739 – Email chain between Rowe, Flynn and Heffernan re Bickley dated 29 March 2007 (VPL.6030.0200.3220).

<sup>95</sup> Exhibit 739 – Email chain between Rowe, Flynn and Heffernan re Bickley dated 29 March 2007 (VPL.6030.0200.3220).

<sup>96</sup> Tranche 1 Submissions, Submission of DS Rowe [59.46].

the meeting comes from a single reference in a file note that Ms Heffernan prepared after the meeting.<sup>97</sup> That reference reads:

***Conflict of interest – Nicola Gobbo:***

*In the DPP's view Nicola plainly has a conflict due to her representation of Tony Mokbel.*

*She also acted in the Milad Mokbel matter for [Mr Cooper].*

- 10.11 Importantly, the file note also records the details of the conspiracy charge against Mr Bickley – including that Mr Cooper had given a statement against Mr Bickley, that Mr Cooper had given an undertaking to give evidence against him and that there was an incriminating transcript of the conversation between Mr Cooper and Mr Bickley.<sup>98</sup>
- 10.12 In those circumstances, the reference to conflict in the file note is most likely a reference to a further reason that Ms Gobbo should not act for Mr Bickley – namely, she should not act for Mr Bickley because she had previously acted for Mr Cooper, who might be a witness against him. In all likelihood, Milad Mokbel was mentioned only in passing.
- 10.13 There is no other evidence that Milad Mokbel was discussed at this meeting. Counsel Assisting never raised this issue with Mr Rowe or Mr Flynn. There has not been a statement tendered from either Mr Coghlan QC or Ms Heffernan.
- 10.14 In those circumstances, there is no basis in the evidence to link the meeting with the DPP about Mr Bickley to separate issues concerning Milad Mokbel. There is certainly nothing to justify Counsel Assisting's assertion that, after this meeting, it "could not have been clearer to Mr Rowe and Mr Flynn that Ms Gobbo's representation of Milad Mokbel would not be tolerated by Mr Coghlan or the courts".<sup>99</sup>
- 10.15 Finally, in paragraph 725, Counsel Assisting submit that Mr Rowe (and unnamed others) were content to allow Ms Gobbo to advise Milad Mokbel "in circumstances where it would not be apparent to others, such as the DPP, who would have taken steps to address the conflict".
- 10.16 This paragraph involves a serious and entirely new proposed adverse finding. Counsel Assisting appear to allege that Mr Rowe and others positively knew the DPP would look poorly on Ms Gobbo's conflict but considered – in a calculated fashion – that the circumstances were such that they could safely conceal that fact.
- 10.17 This submission must be rejected. Counsel Assisting do not identify any basis for this new submission and it was never put to any witness. This is an undeveloped theory that has no basis in the evidence.
- 10.18 In any case, the submission is highly illogical. Ms Gobbo could have made herself known to the DPP or others at any time. There was nothing to suggest Ms Gobbo's informal role advising Milad Mokbel could have been effectively concealed, even if Mr Rowe or others wished to do so.

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<sup>97</sup> Exhibit 738 – Office of Public Prosecutions file note re conference with DPP dated 14 March 2007 (VPL.6030.0200.3203 at .3205).

<sup>98</sup> Exhibit 738 – Office of Public Prosecutions file note re conference with DPP dated 14 March 2007 (VPL.6030.0200.3203 at .3204).

<sup>99</sup> Counsel Assisting Reply Submissions at p 197 [722.5].

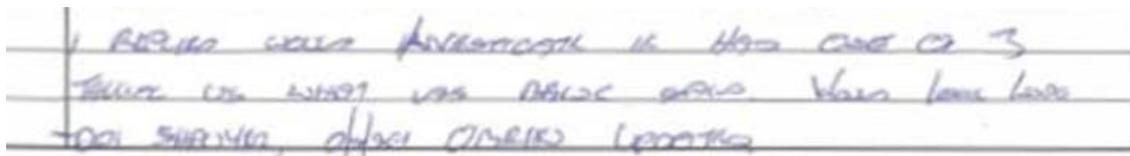
## D. Submission of Dale Flynn

### 11 Introduction

- 11.1 There are two issues in Counsel Assisting's reply submissions in respect of Mr Flynn which are necessary to address. This is because they misrepresent evidence or raise new matters for the first time in reply.

### 12 Misrepresentations of evidence

- 12.1 The first misrepresentation of evidence is in respect of a conversation between Ms Gobbo and Mr Flynn in relation to Operation Quills. At paragraph [291] of their reply submissions, Counsel Assisting point to evidence of Mr Flynn's to establish that Ms Gobbo advised Mr Flynn that "*she was concerned that Solicitor 2 was working on behalf of Tony Mokbel and giving instruction to those men on behalf Mr Mokbel [and that Solicitor 2 was] committing the offence of 'perverting the course of justice'*".
- 12.2 Counsel Assisting state further at [291] that: "*Mr Flynn said that he would investigate the matter and notified Messrs Shaywer and O'Brien*". The reference provided by Counsel Assisting is to their primary submissions at paragraphs [1310] and [1311]. In turn, those paragraphs refer to a diary entry of Mr Flynn on 17 August 2005.
- 12.3 This representation of the evidence is inconsistent with the evidence in Mr Flynn's diary entry. Set out below is the diary entry of Mr Flynn of 17 August 2005 at 11:25am:



- 12.4 Mr Flynn was asked to read this passage in cross-examination.<sup>100</sup> It provides: "*I replied would investigate if had one of 3 telling us what was being said. Would look into. DDI Shaywer, Officer O'Brien updated*".
- 12.5 The entry clearly provides that Mr Flynn would only investigate the matter if one of the three accused reported it to him. It is conditional. Counsel Assisting have however represented Mr Flynn's evidence as stating that he would investigate the matter as a direct response to Ms Gobbo's concern. This is incorrect.
- 12.6 The second misrepresentation relates to an example relied on by Counsel Assisting to allege that Mr Flynn was aware of the risks created by Ms Gobbo's involvement as a human source to the proper administration of justice. This example is used at paragraph in their reply submissions at paragraph [560]. There are two allegations in this example which misrepresent the evidence.
- 12.7 First, Counsel Assisting state that Mr Flynn knew there was a "*serious irregularity in the investigative and post arrest phase of the operation*".<sup>101</sup> This statement ignores Mr Flynn's evidence that he did not fully understand the issues of conflict of interest that

<sup>100</sup> T6695.11-19 (D Flynn).

<sup>101</sup> Counsel Assisting's Reply Submissions at [601] also refer to Mr Flynn knowing that Ms Gobbo's involvement "represented an extreme irregularity".

arose from Ms Gobbo's involvement. Mr Flynn's evidence is summarised at paragraph [67.10] of his primary submission. For convenience, that summary is set out below:

*The evidentiary finding in paragraph [1911.12] is not open on the evidence. As has been explained repeatedly in these submissions, Mr Flynn did not fully understand the issues of conflict of interest that arose from Ms Gobbo's involvement. He was of the view that any of these issues would have been resolved by the SDU and that he was entitled to act on any intelligence he received.<sup>102</sup> He also thought that Ms Gobbo could still provide Mr Cooper with proper legal advice.<sup>103</sup> Finally, he expected Ms Gobbo to abide by her professional and ethical obligations.*

- 12.8 Once Mr Flynn's evidence is properly considered, it is clear that Mr Flynn was not aware that there was a "serious irregularity" in respect of Ms Gobbo's involvement in the investigative and post arrest phase.
- 12.9 Second, Counsel Assisting state that Mr Flynn failed to disclose to Mr Cooper that Ms Gobbo was an "agent of police". In making this statement, Counsel Assisting fall squarely into the trap of relying on hindsight reasoning – the very thing they eschew at the beginning of that same paragraph. As was stated in Mr Flynn's primary submission at [65.33] and [65.44], there is no basis to suggest that Mr Flynn considered Ms Gobbo to be a police agent at any relevant time. The use of this language by Counsel Assisting in their primary submissions and again in reply submissions unfairly attributes knowledge to Mr Flynn that he did not possess at the time.

### 13 New matters raised by Counsel Assisting in Reply

- 13.1 In their reply submissions, Counsel Assisting rely on four matters that were not put to Mr Flynn in evidence and were also not substantively addressed by Counsel Assisting in their primary submissions regarding Mr Flynn. This is a failure to afford Mr Flynn procedural fairness.
- 13.2 The first two matters relate to Mr Flynn's knowledge of Ms Gobbo's conflict of interest. First, at paragraph [580], Counsel Assisting assert that "[i]t is submitted that this was a conflict of such significance that it could not simply be resolved on the assumption that others had determined Victoria Police could receive and act on such information".
- 13.3 It was never put to Mr Flynn that the nature of the conflict, namely its "significance", meant that he was not able to rely on the systems and processes within Victoria Police. It is unfair for Counsel Assisting to make this broad assertion when Mr Flynn has not had the opportunity to address it. Mr Flynn otherwise relies on his primary submissions which explain why Mr Flynn failed to appreciate and deal adequately with Ms Gobbo's conflict of interest. In addition to the matters listed by Counsel Assisting at paragraph [577], these reasons include Mr Flynn's lack of training in relation to the identification and management of lawyers' conflicts of interest and the trust he placed in the specialist officers within the SDU and his superiors who knew of Ms Gobbo's use as a human source.
- 13.4 Second, at paragraph [581] of their reply submissions, Counsel Assisting assert that there were five instances when Mr Flynn should have had "specific cause" to consider the issue of conflict of interest. This list of instances has not previously been presented to Mr Flynn in this form – namely as a list. The effect of the list is that it ignores the detail concerning these events. Putting the list to Mr Flynn would have allowed him to

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<sup>102</sup> T6723.34-39 (D Flynn).

<sup>103</sup> T6786.13-16 (D Flynn).

provide crucial context, some but not all of which is detailed in Mr Flynn's primary submissions.

- 13.5 In particular, for the reasons explained in Mr Flynn's primary submissions, Mr Flynn denies that he was aware of and participated in a plan to use Ms Gobbo to assist police to bring about Mr Cooper's co-operation, contrary to Counsel Assisting's assertion at paragraph [581.1].<sup>104</sup> Mr Flynn's primary submissions also address the circumstances of Ms Gobbo's attendance to advise Mr Cooper.<sup>105</sup>
- 13.6 Mr Flynn's evidence in relation to Messrs M. Mokbel and Cvetanvoski was similar to his explanation for permitting Ms Gobbo to advise Mr Cooper. He honestly although mistakenly believed that, as the SDU were the specialists responsible for handling Ms Gobbo, they would have considered the issue of her acting for Messrs M. Mokbel and Cvetanovski prior to her doing so and taken any necessary steps.<sup>106</sup> In relation to M. Mokbel, Mr Flynn was not aware of the communications that had occurred between Ms Goboo and the SDU and Ms Gobbo and M. Mokbel in the lead up to the arrest, as recorded in the ICRs.<sup>107</sup> Once Messrs M. Mokbel and Cvetanvoski had been arrested and asked for Ms Gobbo, Mr Flynn's "*hands were tied*".<sup>108</sup> He was of the understanding that he could not refuse a request made by an arrested person to contact a specific lawyer. This was an entirely reasonable position given Mr Flynn's training and experience and the requirements of s 464C of the *Crimes Act 1958*. Mr Flynn also believed that Ms Gobbo could provide advice to these persons, despite being a human source and having advised Mr Cooper.<sup>109</sup>
- 13.7 Third, in respect of Mr Flynn's disclosure obligations, Counsel Assisting assert at paragraph [620] that Mr Flynn was "*aware of the availability of witness protection for Ms Gobbo*". Similarly, at paragraph [625] Counsel Assisting suggest that Mr Flynn was aware that witness protection would be available to Ms Gobbo. This might well be the case, however, the matter of Ms Gobbo and witness protection has never been specifically raised with Mr Flynn, either during cross examination or in submissions. There is therefore no evidence before the Commission as to the extent of his knowledge on this issue. Furthermore, the potential availability of witness protection does not undermine Mr Flynn's understanding of the "*golden rule*" which he understood required him to regard the protection of the human source as the paramount consideration.<sup>110</sup>
- 13.8 Fourth, Counsel Assisting seek to submit - for the first time - that after Mr O'Brien retired, Mr Flynn could have raised issues about Ms Gobbo's involvement, and his disclosure obligations with Mr Bernard Edwards, who assumed the role of Officer in Charge in 2008. This suggestion has not previously been raised with Mr Flynn, is not the subject of evidence and is entirely speculative.
- 13.9 Each of these matters impugn Mr Flynn's conduct. It is simply unfair that they been raised for the first time in reply.

<sup>104</sup> Tranche 1 Submissions, Mr Flynn Submissions [64.20], [64.39]-[64.64]. Counsel Assisting's Reply make further submissions about this issue at paragraphs [583]-[591] which Mr Flynn disputes for the reasons set out in his primary submissions.

<sup>105</sup> Tranche 1 Submissions, Mr Flynn Submissions [65.6]-[65.24].

<sup>106</sup> Exhibit 538B – Statement of Dale Stephen Flynn at [62] (VPL.0014.0042.0001 at .0011-0012).

<sup>107</sup> T6899.19-6901.3 (D Flynn).

<sup>108</sup> T7265.20 (D Flynn).

<sup>109</sup> T6909.31-34 (D Flynn).

<sup>110</sup> Tranche 1 Submissions, Mr Flynn Submissions [63.7]-[63.8].

## E. Diary keeping practices

### 14 Note taking and memory

- 14.1 At [300] of Counsel Assisting's submissions, they submit that the diaries of "a number of investigators" do not record every single event concerning Ms Gobbo and do not record some events concerning her in detail.
- 14.2 Counsel Assisting do **not** submit that it is open on the evidence to find that any particular investigator deliberately refrained from making notes or detailed notes of a relevant event. They were, respectfully, correct not to make such a submission.
- 14.3 Whilst Counsel Assisting do not submit that such a finding is open, at [301] they submit this:
- Consequently, in evidence to the commission there were claims of non-recollection and a questioning of records which were not those of the witness. Submissions have similarly been made. It is submitted that in considering such submissions, regard should be had as to whether there was a deliberate decision taken not to take notes, and the reason for it.
- 14.4 The meaning of that submission is not clear.
- 14.5 The effect of it seems to be that where a member states that he or she has no recollection of an event and does not have a note or a detailed note of the event then the Commissioner should decide whether that member made a deliberate decision not to make a note and then infer the member's reason for making that decision.
- 14.6 If that is the submission, it is misconceived for two reasons:
- (a) the task is impossible for the Commissioner to undertake properly and safely in the time available; and
  - (b) it invites the Commissioner into error because to proceed in that way would be a contravention of section 36 of the *Inquiries Act 2014* (Vic).
- 14.7 In relation to (a), before the Commissioner could safely make a finding that a member made a deliberate decision not to make a diary note or a detailed note of an event, at the very least, it would be necessary for the Commissioner to closely analyse the member's diary as a whole to consider their note taking practices generally and in relation to Ms Gobbo.
- 14.8 It is not open to make a serious finding of the kind above on the basis of the isolated examples set out at [303] to [330]. Counsel Assisting appear to acknowledge that because they do not submit that it is open to find on the basis of those examples that the three members the subject of the examples – Messrs O'Brien, Ryan and O'Connell – deliberately refrained from taking notes or detailed notes.
- 14.9 Further, in relation to Mr Ryan, only two examples are given and one of them (being the example at [307]) is not an example of Mr Ryan failing to take a diary note. Mr Ryan's diary for the period relevant to the matter at [307] could not be located by Victoria Police. That leaves one example given of Mr Ryan not having a diary note of a discussion concerning Ms Gobbo in circumstances where he produced hundreds of pages of diary notes spanning many years.
- 14.10 In relation to Mr O'Brien, he also produced hundreds of pages of diary notes spanning many years. The description of Mr O'Brien's notes at [309] (second sentence) is

disputed. Mr O'Brien's first witness statement is almost 60 pages. It relies heavily on his diary notes which gives a broad indication of the volume of diary notes made by Mr O'Brien about Ms Gobbo.

- 14.11 Where a member's diary does not contain a note or detailed note of an event, it cannot simply be inferred that the member made a deliberate decision not to make a note or detailed note and that the decision was made for an improper purpose. Such an inference is only open if it is the most probable inference supplied by the whole of the evidence. There are many reasons why a note or detailed note might not have been made by a member, such as the member did not have their diary with them at the time and forgot to later make a note or the member was busy and so did not make a note or only made a brief note. Further, as addressed in Victoria Police's submissions, police diaries are not, and are not intended to be, verbatim notes. That would be impossible given the nature of their work.
- 14.12 It is, with respect to Counsel Assisting, of no assistance to speculate at [299] that a member may have deliberately chosen not to make a note or a detailed note of an event so that they could later claim lack of memory if they ever wanted to do so. The events the subject of this Commission are not recent. They occurred well over a decade ago. In those circumstances, where a member has given evidence to the Commission that he or she does not remember a conversation or other discrete event (or the detail) when it occurred over a decade ago, then, in all likelihood, he or she does not remember.

## F. The Thomas Case Study

### 15 Overview

- 15.1 Counsel Assisting have submitted that Com. Bateson and Ms Gobbo “*studiously avoided*” in their submissions the real issue of conflict that Counsel Assisting had addressed in their submissions: see [341] and [347].
- 15.2 That submission should be rejected for the following key reasons.
- 15.3 First, Com. Bateson could not have been more upfront in his submissions that he found Counsel Assisting’s submissions about conflict to be unclear. At [20.2]-[20.4], he submitted the following:

Counsel Assisting’s submissions on the question of conflict are difficult to engage with. That is principally because Counsel Assisting do not identify with clarity and precision the conflicts that they say arose, nor do they assemble a complete and accurate statement of the evidence relevant to each potential conflict, including the evidence of Com. Bateson’s state of mind about those conflicts.

As Com. Bateson understands the submissions, Counsel Assisting submit that he ought to have intervened to address:

- (a) Ms Gobbo’s potential conflict of interest in acting for Mr Thomas after she had acted for Mr McGrath; and
- (b) Ms Gobbo’s potential conflict of interest as a potential witness in the murders of Jason Moran and Pasquale Barbaro; and
- (c) an alleged conflict of interest in Ms Gobbo providing information about Mr Thomas to Victoria Police while representing him.

If they are the submissions, they should not be accepted because...

- 15.4 Second, the broad conflict at (a) above was at the centre of Counsel Assisting’s examination of witnesses, was the subject of Com. Bateson’s detailed supplementary witness statement<sup>111</sup>, and did appear to be at the centre of Counsel Assisting’s primary submissions. The submissions contained the following:

By the time Mr Thomas was charged, Ms Gobbo had no business remaining involved in any proceedings brought on the basis of the information in Mr McGrath’s statement, even if she could properly have been involved before that time.

It is submitted that there is no question that Ms Gobbo understood that she was conflicted having acted for Mr McGrath at a time that he decided to give evidence against Mr Thomas and advised him about the content of his statements. It is submitted that there can be no excuse for her continuing to act for Mr Thomas.<sup>112</sup>

...

On the evidence, it is open to the Commissioner to find that on 30 March 2006 (if not before) Mr Bateson was well-aware of the impropriety of Ms Gobbo acting for Mr Thomas due to her previous representation of Mr McGrath and failed to raise the issue

<sup>111</sup> Exhibit R0269 – Supplementary Statement of Commander Stuart Bateson dated 17 November 2019 at [3]-[45] (VPL.0014.0027.0020 at .0020-0032).

<sup>112</sup> Counsel Assisting Submissions at p 145 [688]-[689], Vol 2. Also see Counsel Assisting Submissions at pp 99-100 [452]-[454] and pp 150-152 [697]-[716], Vol 2.

for consideration with the lawyers prosecuting the matters or lawyers from whom advice could have been obtained. That is so because:

- He knew of Ms Gobbo's previous representation of Mr McGrath;
- He knew Ms Gobbo was acting for Mr Thomas;
- The Court raised the propriety of a similar situation, concerning Solicitor 2, in his presence.<sup>113</sup>

15.5 Third, the DPP seems to have understood Counsel Assisting's submissions in the same way as they were understood by Com. Bateson and Ms Gobbo: see DPP [73]-[76].

15.6 In any event, in their reply submissions, Counsel Assisting now seem to submit that the conflict that Ms Gobbo had in acting for Mr Thomas was in fact this:

- (a) when Ms Gobbo was acting for Mr McGrath, she allegedly handwrote changes on his draft witness statement in relation to the murder of Michael Marshall and provided those handwritten amendments to Insp Hatt;
- (b) the handwritten amendments allegedly included that Mr McGrath believed that Mr Marshall was to be murdered;
- (c) that as a result of a separate witness statement made by Mr McGrath about the murders of Moran and Barbaro, Mr Thomas was charged with the murder of those two men;
- (d) Ms Gobbo then acted for Mr Thomas in relation his charges of murdering Moran and Barbaro;
- (e) Ms Gobbo did not tell Mr Thomas that she handwrote amendments on Mr McGrath's witness statement in relation to the Marshall murder which denied Mr Thomas a line of attack on Mr McGrath's credit generally; and
- (f) Ms Gobbo had a conflict because she had information (that she had amended Mr McGrath's statement) that may have assisted Mr Thomas which she could not disclose to Mr Thomas without Mr McGrath's consent and which she did not disclose to Mr Thomas.

15.7 It is not clear whether Counsel Assisting also maintain the broad conflict - that Ms Gobbo was conflicted out of acting for Mr Thomas in relation to the murder charges solely because she had previously acted for Mr McGrath who was a witness against him. That is the conflict that Com. Bateson, Ms Gobbo and the DPP understood that Counsel Assisting had raised in their primary submissions which Counsel Assisting submit in their reply submissions was not the conflict.

15.8 However, Counsel Assisting's position remains unclear because their reply submissions state the following in the context of submissions about a separate topic, at [458.2]:

If the intention was simply to provide Mr Thomas' legal representative with material relevant to his plea [the transcripts], this material should have been provided to his instructing solicitor, rather than to someone who:

- ...
- had a recognised conflict in acting for Mr Thomas given her previous representation of Mr McGrath (as expressly recognised by the Court two days later on 21 April 2006);

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<sup>113</sup> Counsel Assisting Submissions at p 198 [898], Vol 2.

- had a conflict unknown to the Court and Mr Thomas for her role in relation to Mr McGrath's statement amendments;
- was motivated, along with police, to prevent disclosure of material held by police which would reveal the latter conflict.

- 15.9 That submission raises both the broad conflict and the specific conflict set out in paragraph 18 above as two different types of conflict.
- 15.10 If Counsel Assisting do intend to raise both conflicts, then, in relation to the broad conflict, that alleged conflict is addressed in detail in the Tranche 1 submissions.
- 15.11 The specific conflict raised in Counsel Assisting's reply submissions is addressed in these submissions. The key submissions are these:
- (a) Counsel Assisting did not submit in their primary submissions that Ms Gobbo handwrote amendments on Mr McGrath's draft witness statement, provided them to Insp Hatt and that Com. Bateson knew about it. That is new;
  - (b) it is not open on the evidence to find that Ms Gobbo handwrote amendments on Mr McGrath's statement and provided them to Insp Hatt;
  - (c) there is no evidence whatsoever that Com. Bateson had knowledge of any handwritten amendments on Mr McGrath's draft witness statement; and
  - (d) if the event did occur, it was conduct by Ms Gobbo in her role as a legal practitioner, it occurred before she was a human source, it is unrelated to her role as a human source and, therefore, falls outside the Commission's Terms of Reference.
- 15.12 Those submissions are developed below.
- 15.13 The next matter to address is Counsel Assisting's persistence that it is open on the evidence to find that Com. Bateson concealed documentation from the Court and the defence in the committal proceeding before Chief Magistrate Gray.
- 15.14 It seems to now be put that his motivation for doing so was to conceal the fact that Ms Gobbo had allegedly made handwritten amendments to Mr McGrath's statement. That is new.
- 15.15 It is not clear why Counsel Assisting target Com. Bateson and seek findings against him in relation to this topic in circumstances where:
- (a) he was not responsible for taking the relevant witness statement from Mr McGrath, being the statement in relation to the Marshall murder (**Marshall witness statement**). The work was divided between Mr Bateson and Mr Hatt. Mr Bateson was responsible for taking the witness statement in relation to the Moran and Barbaro murders and Mr Hatt was responsible for taking the Marshall witness statement;<sup>114</sup>
  - (b) Com. Bateson did not deliver the draft of the Marshall witness statement to Ms Gobbo for review and was not present when she reviewed it and allegedly made handwritten amendments;
  - (c) there is not a skerrick of evidence that Com. Bateson had knowledge of Ms Gobbo allegedly making handwritten amendments to the draft Marshall witness statement when it was taken to her for review at the request of her client, Mr

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<sup>114</sup> T10126.44-10127.2 (Bateson).

McGrath. Counsel Assisting did not ask Insp Hatt if he told Com. Bateson that Ms Gobbo had made handwritten amendments to statements at the meeting;

- (d) Mr Bateson put together the documents to be produced to the Court and the defence in the committal proceeding but he did that by compiling his own documents and the documents provided to him by other police members;
- (e) In relation to the non-disclosure of drafts of the Marshall witness statement:
  - (i) Mr Bateson had no knowledge that an electronic draft existed until it was located by Victoria Police during the course of this Royal Commission;
  - (ii) He did not create that electronic draft;
  - (iii) The meta-data for the electronic draft shows that it was created by Scott Elliott who was an intelligence analyst at Victoria Police;<sup>115</sup>
  - (iv) There is no evidence or suggestion by Counsel Assisting that when Mr Bateson asked police members to provide him with all relevant documents for disclosure that he was given drafts of the Marshall witness statement and concealed them;
  - (v) Mr Bateson's evidence was that he assumed that there were no drafts of the Marshall witness statement because his own practice was not to retain drafts. The evidence before the Commission is that drafts of witness statements were generally not retained by police members.<sup>116</sup>
- (f) In relation to the diary note of Mr Hatt dated 10 July 2004, there is no evidence that Mr Bateson ever received a photocopy of the diary note to include in the documents for disclosure and nor is that explicitly alleged by Counsel Assisting.

- 15.16 Accordingly, to the extent that Counsel Assisting submit that it is open to find on the evidence that Mr Bateson concealed, from the Court and the defence, drafts of the Marshall witness statement and Mr Hatt's diary note of 10 July 2004, the submission cannot be accepted.
- 15.17 Counsel Assisting's submission that it is open on the evidence to find that Com. Bateson concealed from the Court and the defence his own daybook notes of 9 to 11 July 2004 should be rejected for the reasons developed below.
- 15.18 Com. Bateson's earlier submissions expressed concern to the Commissioner that Counsel Assisting's submissions displayed an over-eagerness to have adverse findings made about him. The cross-examination of Com. Bateson had been especially hostile which continued into the primary submissions made by Counsel Assisting.
- 15.19 The reply submissions of Counsel Assisting have exacerbated that concern.
- 15.20 Counsel Assisting compared Mr Bateson's diaries and daybooks to the depositions and identified three pages of daybook notes (for 22 March 2004 and 9-11 July 2004) that were not in the depositions. They then reviewed the cross-examination of Mr Bateson during the committal proceeding to check that counsel had not cross-examined him about the events recorded on those pages. On the basis of that analysis, Counsel Assisting then put to Mr Bateson and submit that he deliberately concealed the three pages from the Court and the defence.

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<sup>115</sup> Exhibit RC1428 - Statement of Tim McKinney dated 22 November 2019 at p 2 (VPL.0005.0260.0008 at .0009).

<sup>116</sup> Statement of AC Casey dated 15 August 2020 at [78]-[81] (VPL.0014.0134.0001 at .0012-0013).

- 15.21 That analysis, in our respectful submission, provides a wholly inadequate basis to find that Com. Bateson deliberately concealed his notes from the Court and the defence, especially given that Counsel Assisting:
- (a) seem to accept that the depositions are not an accurate record of the material that was before the Court. That is a fact that cannot reasonably be disputed and Counsel Assisting have not disputed it; and
  - (b) accept that, given the seriousness of the allegation, the Commissioner must be satisfied to the *Briginshaw* standard.
- 15.22 The additional troubling aspect is this. Counsel Assisting conducted the same analysis in relation to Mr Hatt's notes and found that his diary note for 10 July 2004 was also not in the depositions and that he was not cross-examined at the committal proceeding about that day. On the basis of that same analysis, they do **not** submit that Insp Hatt deliberately concealed his diary note from the Court and the defence. **Nor** do they submit that Insp Hatt concealed the draft of the Marshall witness statement that he took to Ms Gobbo for review or the electronic draft that was found during the Royal Commission.
- 15.23 Counsel Assisting were, with respect, correct not to submit that such findings were open against Insp Hatt. They were correct for the reasons stated above – the simple absence of notes in the incomplete depositions and no cross-examination about the date of the notes at the committal hearing does not provide a sufficient evidentiary basis to find that Insp Hatt deliberately concealed his notes from the Court.
- 15.24 Counsel Assisting have not explained why that same analysis provides a sufficient basis to conclude that Com. Bateson deliberately concealed his notes from the Court. Further, Counsel Assisting seem to imply that Com. Bateson concealed all of the documents – his notes, Insp Hatt's note and the printed draft statement that Mr Hatt took to Ms Gobbo: e.g. see CA [392]. There is no basis in the evidence to find that Com. Bateson concealed another police member's documents which likely explains why the allegation is not squarely put by Counsel Assisting. Com. Bateson remains concerned about the approach that has been taken to him in Counsel Assisting's primary and reply submissions.
- 15.25 Lastly, in the Tranche 1 submissions, it was submitted that Counsel Assisting's approach to the events of 9-12 July 2004, and their particular focus on Com. Bateson, had obscured the real issues. It is submitted, with respect to Counsel Assisting, that that remains the case.
- 15.26 If all of the relevant police notes of Mr Bateson and Mr Hatt were not identified by them and provided to the Court, then they should have been. The electronic draft of the Marshall witness statement created by Scott Elliott and found during the course of the Royal Commission should have been found during the committal proceeding and disclosed. The evidence is that disclosure procedures at Victoria Police at the time were poor. There was no disclosure training. There was no emphasis on the importance of disclosure. There was no process for retaining documents and making disclosure, redacting notes and making PII claims. Drafts of witness statements were generally not retained for disclosure. These are, with respect to Counsel Assisting, important issues that they have not addressed.
- 15.27 The matters set out in this overview are developed below.

### **Ms Gobbo did not write amendments on a draft of the Marshall witness statement**

- 15.28 Counsel Assisting have submitted in their reply submissions that the real issue in connection with Ms Gobbo's representation of Mr Thomas is the non-disclosure of information concerning the circumstances of the change in Mr McGrath's witness statement and Ms Gobbo's role in that change. That appears to represent a narrowing of the issue.
- 15.29 At paragraph [387] of their reply submissions, Counsel Assisting have summarised some of the relevant facts. The summary is not complete or agreed:
- (a) as to paragraph [387.6.3], it is not open to conclude that Ms Gobbo amended the Marshall witness statement on 10 July 2004 (or at all);
  - (b) in relation to paragraph [387.10], Mr McGrath's witness statement formed **part** of the evidentiary basis for the charges laid against Mr Williams, Mr Thomas and Mr Andrews. It was not the only evidence. Witness statements are corroborated before they are relied upon to charge a person with a criminal offence;
  - (c) in relation to paragraph [387.11], Com. Bateson did not give false or misleading evidence under cross-examination by Mr Faris;
  - (d) in relation to paragraph [387.12.1], Com. Bateson did not conceal daybook entries from 22 March, 9, 10 or 11 July 2004 or any other documents from the Court; and
  - (e) in relation to paragraph [287.12.3], it is not accepted that a daybook entry of Mr Hatt for 10 July 2004 was not disclosed to the Court.
- 15.30 As to the new allegation at (a) above (that Ms Gobbo made handwritten amendments on a draft of the Marshall witness statement without instructions from Mr McGrath), the following submissions are made in the very limited time that has been available to address the matter.
- 15.31 First, Counsel Assisting did not submit in their primary submissions that it was open to the Commissioner to find that Ms Gobbo amended a draft of the Marshall witness statement during her meeting with Mr Hatt on 10 July 2004.
- 15.32 Under the heading 'Gobbo involvement in McGrath statement process' (at [619]-[648]), Counsel Assisting stepped through what they considered to be the events of 8 to 13 July 2004. In relation to 10 July 2004, they submitted, at [627]-[632], that Mr Hatt attended Ms Gobbo's chambers so that she could "review" the statements. There is no reference to Ms Gobbo marking up the draft statements with amendments. In relation to 12 July 2004, they submitted, at [635]-[637], that Mr McGrath made changes to his statement when he met with Com. Bateson and Mr Hatt on 12 July 2004 after he had obtained legal advice from Ms Gobbo.
- 15.33 Further, at [452.4] of their primary submissions, Counsel Assisting submitted that Ms Gobbo "assisted Mr McGrath and police by *suggesting* 'edits' to a statement". No reference to the evidence was given. This appears to be a reference to Ms Gobbo advising Mr McGrath that he should make changes to his witness statement which Mr McGrath then made on 12 July 2004.
- 15.34 There are some references in Counsel Assisting's primary submissions to Ms Gobbo's claims to Officer Sandy White that she had amended Mr McGrath's witness statements (see [646]-[648] and [695.2]-[695.3]) but they are not put as submissions that Ms Gobbo's claims should be believed and that it is open to the Commissioner on all of the evidence to find that she did engage in that conduct.

15.35 Second, it is **not** open on all of the evidence to find that Ms Gobbo's made handwritten amendments to the draft of the Marshall witness statement during her conference with Mr Hatt or that she gave the amended draft to Mr Hatt.

15.36 In the time that has been available to review the evidence, the facts are these:

- (a) Mr Hatt attended on Ms Gobbo in her chambers on 10 July 2004;
- (b) Mr Hatt did so as a result of a request by Mr McGrath for Ms Gobbo to review his statements before he signed them;
- (c) Mr Hatt took Mr McGrath's statements to Ms Gobbo in hard copy;
- (d) Ms Gobbo variously used the term 'edited' or 'altered' to describe her role in connection with the Marshall witness statement to Officer Sandy White;
- (e) Ms Gobbo's evidence to the Commission on the topic was vague and changed during the course of her cross-examination (set out below);<sup>117</sup>
- (f) Mr Hatt said in his written statement that Ms Gobbo "suggested some changes";
- (g) consistently with Mr Hatt's written statement, Mr Hatt's diary note of his meeting with Ms Gobbo on 10 July 2004 records that Ms Gobbo identified several issues about the statements and how those issues were to be resolved;
- (h) in connection with the issue of the indemnity clause, Mr Hatt advised Ms Gobbo that the police would discuss the matter with the OPP;
- (i) in connection with two matters of substance, Mr Hatt recorded that Ms Gobbo was to discuss the matter with Mr McGrath;
- (j) Ms Gobbo's court book records the notes that she took while reviewing the statements;
- (k) Mr Hatt's evidence to the Commission was that Ms Gobbo did not mark up the draft statements in any way;<sup>118</sup>
- (l) once she had read the draft statements and made notes in her notebook about them, Ms Gobbo gave the unmarked draft statements back to Mr Hatt;
- (m) Ms Gobbo met with Mr McGrath in prison the following day, on 11 July 2004, and took detailed notes of his instructions;
- (n) Com. Bateson and Mr Hatt met with Mr McGrath on 12 July 2004;
- (o) Com. Bateson's notes for 12 July 2004 record the changes requested by Mr McGrath, including in relation to the matters noted by Ms Gobbo in her note book;
- (p) Mr McGrath again asked that Ms Gobbo review the changes that he had made to his statements that day;
- (q) the same day, Com. Bateson then contacted Ms Gobbo and informed her of the changes; and
- (r) on 13 July 2004, Ms Gobbo said that Mr McGrath could sign the statements and he later did.

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<sup>117</sup> T13266.24-13267.46 (Gobbo).

<sup>118</sup> T3138.16-17, T3138.22-25 (Hatt).

- 15.37 As submitted in the Tranche 1 submissions, Mr McGrath was not asked by those assisting the Commission why he made the changes to his witness statement, nor whether he had done so on Ms Gobbo's advice.
- 15.38 Mr McGrath was also not asked whether he was presented with a typed draft of his witness statement containing changes made without his instructions or a printed draft of his witness statement containing handwritten amendments.
- 15.39 Mr McGrath was not asked whether he spoke with Ms Gobbo in the period 9-12 July 2004 (other than at their conference on 11 July 2004) nor, if he did so, what they discussed or whether he provided her with instructions about the statements.
- 15.40 Counsel Assisting did not call Mr McGrath to give evidence before the Commission. His unsigned, undated and unsworn statement is of no assistance for the reasons set out in previous submissions and which does not seem to be disputed by Counsel Assisting.
- 15.41 As such, the only evidence before the Commission that Ms Gobbo made handwritten amendments to a draft of the Marshall statement during her conference with Mr Hatt is the transcript of her conversation with Sandy White and her vague and changing evidence given under cross-examination. Counsel Assisting have only set out some of Ms Gobbo's oral evidence at [371]-[372]. Ms Gobbo also gave this evidence:
- Ms Gobbo: ...what I am saying is I can't, I don't know from, I haven't got a specific memory of what I said or what either Hatt or Bateson said.
- Mr Winneke: Yes, all right?
- Ms Gobbo: Only that obviously after being allowed to view the draft statement I went back and saw him.
- Mr Winneke: Yes.
- Ms Gobbo: And I am assuming that I didn't have a copy of it with me. I only had those notes [in her notebook] about the, about the paragraphs that had issues.
- Mr Winneke: If you told your handlers that you made amendments to the statement, would that have been truthful?
- Ms Gobbo: Yes, it would have been, yes.
- Mr Winneke: All right. Now it appears that—
- Ms Gobbo: Sorry, I don't know **what I just don't know is whether I hand wrote amendments** or whether or whether Mr Hatt was writing things down. I've got no, I'm sorry, **I just can't remember specifically who was writing what or doing what on that day.**
- Mr Winneke: Did you make notes yourself and provide those to Mr Hatt, is that **possible**?
- Ms Gobbo: Yes it could have been.
- Mr Winneke: Perhaps Post-it notes?
- Ms Gobbo: Could have been, yes.
- ...

Mr Winneke: Did you have a copy of the statement when you were with Mr McGrath do you believe?

Ms Gobbo: No, that's what I'm saying. I don't, I don't think I was allowed to have it. I think that's why I've written what I've written in that book [her note book].<sup>119</sup>

15.42 Even if Ms Gobbo had given unequivocal evidence that she recalled making handwritten amendments to the draft of the Marshall witness statement (which she did not), it is not clear how Counsel Assisting submit that it is open to positively find on the basis of information provided by Ms Gobbo that she did make such amendments, especially in circumstances where:

- (a) Mr Hatt, the police member who was present at the time she allegedly made amendments, gave evidence on oath that she did **not** make any amendments; and
- (b) Ms Gobbo accepted under cross-examination that she is a "*spectacular liar*".

15.43 Counsel Assisting seem to submit, at [374] and [376], that Ms Gobbo should be believed in relation to this matter because stating that she amended the statement to Officer Sandy White was against her interests and "*there is no apparent reason for Ms Gobbo to have lied*" about it. As to those submissions:

- (a) first, Ms Gobbo's evidence to the Commission changed throughout her cross-examination, was very vague, she could not recall what happened in her chambers and she said "*what I just don't know is whether I hand wrote amendments*";
- (b) second, there is a large body of evidence before the Commission of Ms Gobbo overstating and exaggerating both events and her role in them to her handlers;
- (c) third, the evidence is that Ms Gobbo lied on oath to Justice Ginnane about her involvement in advising Mr McGrath about his statements;
- (d) fourth, there is evidence of Ms Gobbo giving other false and dishonest evidence;
- (e) fifth, Counsel Assisting have not explained how it was against Ms Gobbo's interests for her to tell Mr White that she had amendment the statements;
- (f) sixth, if Ms Gobbo's unequivocal evidence was that she amended the draft statement and gave it to Mr Hatt (which it was not), she had every reason to give such evidence. It was adverse to the interests of police.

15.44 There is ample evidence that Ms Gobbo did **not** mark-up amendments to the statement. The evidence includes:

- (a) the changes themselves between the draft of the statement dated 9 July 2004 and the final signed version dated 13 July 2004. Ms Gobbo could not have known some of the matters the subject of the changes;
- (b) Ms Gobbo said in evidence to the Commission that she had no actual recollection of making amendments to the statement and her propensity to exaggerate her importance when speaking to her handlers is known and accepted;
- (c) Mr Hatt's evidence under cross-examination that Ms Gobbo did not mark-up amendments to the statements and the absence of any challenge to that

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<sup>119</sup> T13266.44-13267.37 (Gobbo).

evidence in cross-examination. It was not put to Mr Hatt that he was lying or that his memory was wrong;

- (d) Mr Hatt made no note of Ms Gobbo marking up changes to the draft statements, and there is no evidence that Mr Hatt processed any such changes. His note states:

Paragraph included re indemnity (M/B [Moran/Barbaro])

Advised police will liaise with OPP

Last paragraph – doesn't make sense as there is previous mention of being paid \$50,000 (M/B) – Gobbo **to canvass with [McGrath]**

Knowledge it was a murder (MM [Marshall]) – Gobbo **to canvass with [McGrath]**

- (e) there is no draft of the statement containing Ms Gobbo's handwritten amendments;
- (f) Com. Bateson made no note of Ms Gobbo marking up changes to the draft statements;
- (g) Ms Gobbo made no note of her having marked up changes to the draft statements. Her note states:

- knowledge re going to be shot para 51

more than a stand over job

this job

- \$200K collection

- payment for me/individual outs

- para 9 believed it would involve a shooting

- Thomas (Moran murder)

- Contract killing

- \$200K

- (h) Ms Gobbo met with Mr McGrath on 11 July 2004 and took instructions from him about the matters of concern she had identified and noted in her note book when she reviewed the draft statements;
- (i) Com. Batson and Mr Hatt met with Mr McGrath on 12 July 2004 and Mr McGrath requested changes;
- (j) the changes were made, and fresh copies of the statements printed; and
- (k) Mr McGrath again asked that Ms Gobbo review those changes.

15.45 These facts are inconsistent with Ms Gobbo having amended the statements herself on 10 July 2004 and having provided the amended drafts to Mr Hatt.

15.46 Ms Gobbo's note book records her taking instructions from Mr McGrath on 11 July 2004 about the very matters that she made notes of on 10 July 2004 and in relation to which Mr McGrath made changes on 12 July 2004. There is nothing in Ms Gobbo's notes from 11 July 2004 that suggests that she took instructions from Mr McGrath about further or

other changes or that she unilaterally, and without instructions, had made changes to his statements on 10 July 2004.

- 15.47 It should also not be forgotten that Ms Gobbo did not have, in 2004, a relationship of trust with Victoria Police, Mr Hatt or Com. Bateson. She was not a human source at the time. She could not have known that the draft statements would not be disclosed in later prosecutions, or that Mr Hatt would not disclose that she had made amendments to the draft statements.
- 15.48 Counsel Assisting's submission that Ms Gobbo made amendments to the draft statement and gave the amended draft to Mr Hatt is not open on the evidence.
- 15.49 Further, no evidence was adduced from key witness, Mr McGrath. For that reason alone, it is not open to make a finding that Ms Gobbo amended his statement without his instructions.
- 15.50 Lastly, Counsel Assisting submit, at [381], that Com. Bateson's submission that there was nothing improper in Ms Gobbo reviewing Mr McGrath's draft statements should be rejected because Ms Gobbo edited the statements without instructions – conduct that is improper.
- 15.51 It was not put in Counsel Assisting's primary submissions that Ms Gobbo edited or amended the draft Marshall witness statement or that such conduct was improper or "extraordinary".
- 15.52 The submission introduces a new allegation to which Com. Bateson was not responding and creates an asymmetry in the submissions. It also has the effect that Counsel Assisting do not engage with the submissions of Com. Bateson that there was nothing improper about Ms Gobbo reviewing drafts of Mr McGrath's statements at his request.
- 15.53 The submissions of Counsel Assisting at [381] cannot be accepted. As to the first two matters referred to in [381], Counsel Assisting ascribe to Ms Gobbo an intention to amend Mr McGrath's statement unilaterally, without regard for the truth and without instructions for the purpose of ensuring that Mr McGrath received the best possible discount. Ms Gobbo did not give that evidence, that allegation was not put to her and these matters were not explored with Mr McGrath. Serious allegations of this kind ought to have been made - if they were to be made at all - in the Counsel Assisting's primary submissions. They are not allegations that can be raised for the first time in reply submissions when there is insufficient time for a response. In any case, for the reasons given above, the submission must be rejected.
- 15.54 As to the third matter in [381], Counsel Assisting do not explain how the committal hearing would have been able to contemporaneously explore Ms Gobbo's desire to ensure that Mr McGrath had not implicated her. There is no evidence that Com. Bateson or Mr McGrath knew of any such desire, and Counsel Assisting do not suggest that Ms Gobbo herself would have been cross-examined at the committal hearing on those matters.
- 15.55 The submission at paragraph [385] – again, not being a submission that should be put for the first time in a reply submission – analyses events through the prism of hindsight. At the time the statements were taken from Mr McGrath, Ms Gobbo did not have any relationship with Victoria Police, Com. Bateson or Inspector Hatt. The prism through which Counsel Assisting views these events distorts them. They had none of the significance that is now – and for the first time in reply submissions - attributed to them.

- 15.56 Counsel Assisting submit that the question of whether Ms Gobbo's conduct in allegedly amending a draft of the Marshall statement was improper is irrelevant to the findings proposed against Com. Bateson. Com. Bateson does not understand that submission.
- 15.57 Counsel Assisting's new allegations about Ms Gobbo amending the statement seem to be raised to supply the motivation for Com. Bateson to conceal his notes of 10 and 11 July 2004. Absent that motivation, the events take on the less sinister character posited by Com. Bateson – that his concern was Ms Gobbo's safety and his conduct in making PII claims over his notes was directed not to disguising improper conduct but to protecting Ms Gobbo from harm.
- 15.58 To that extent, the propriety of Ms Gobbo's conduct is highly relevant. Presumably this is why Counsel Assisting have pivoted to their new argument in the reply submissions that Ms Gobbo amended the draft Marshall witness statement without instructions and to secure Mr McGrath the biggest discount possible irrespective of the truth of the amendments.
- 15.59 For the reasons set out above, and for natural justice reasons, the Commissioner should not find that Ms Gobbo amended a draft of the Marshall witness statement at her meeting with Insp Hatt or that Com. Bateson had any knowledge of her doing so.

### Disclosure

- 15.60 In their reply submissions, Counsel Assisting submit that the "real issue" in connection with Ms Gobbo's representation of Mr Thomas is the non-disclosure of information concerning the circumstances of the change in Mr McGrath's witness statement and Ms Gobbo's role in that change. Counsel Assisting also accept that if "all relevant materials, including Com. Bateson's and Insp Hatt's notes and the draft statement were put before the Chief Magistrate, and the circumstances were made clear to enable him to make an informed decision about whether it was appropriate to protect Ms Gobbo, then there could be no complaint about the conduct of Com. Bateson".<sup>120</sup>
- 15.61 It is accepted that the draft statements (the printed drafts and the electronic draft) were not provided to the Chief Magistrate. Com. Bateson did not know that any draft existed when he compiled the material for disclosure and for the Chief Magistrate. If proper disclosure processes had existed at Victoria Police at the time and had the practice at Victoria Police been to retain drafts of witness statements for disclosure then the printed drafts would have been retained and provided and someone would have found the electronic draft created by Scott Elliott. As to the practices at Victoria Police at the relevant time, see the witness statement of AC Casey dated 15 August 2020.
- 15.62 For the reasons advanced in the Tranche 1 submissions and in these submissions, it is not open to the Commissioner to find that Com. Bateson did not disclose pages of his daybooks to the Chief Magistrate or that he did not disclose them deliberately.
- 15.63 The only conclusions available on the evidence are:
- (a) in relation to Com. Bateson's daybook notes:
    - (i) that Com. Bateson did not fail to disclose the daybook entries to the Chief Magistrate; or
    - (ii) that the evidence does not permit a conclusion either way in the absence of the notes being in the depositions and the absence of the transcript of the

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<sup>120</sup> Counsel Assisting Reply Submissions at pp 107-108 [384].

closed hearing in which Com. Bateson gave evidence to the Chief Magistrate about his notes; and

- (b) in relation to the draft statements, that Com. Bateson was not aware of the existence of any drafts to be disclosed.

15.64 Counsel Assisting speculate in their reply submissions that, if Ms Gobbo's role in reviewing Mr McGrath's statement had been made known, Ms Gobbo would not have been able to act for the individuals that Mr McGrath gave evidence against. Counsel Assisting also speculate that Ms Gobbo might have lost the confidence of Mr Williams and would not thereafter have been in a position to provide ongoing information to Victoria Police.

15.65 Speculation of this kind is of no assistance and does not aid the acquittal of the terms of reference. Ms Gobbo's personal involvement in the criminal crew of Williams, McGrath and Thomas was so deep and complicated that it is most unlikely that the position would have been as simplistic as speculated in the preceding paragraph. There are too many contested facts, and too many possible alternative paths, for the Commissioner to speculate in the way that Counsel Assisting have done.

#### **Approach taken to Com. Bateson**

15.66 As submitted earlier, Counsel Assisting's reply submissions have exacerbated Com. Bateson's concern about the approach that has been taken to him.

15.67 The reply submissions:

- (a) accuse Mr Bateson's counsel of dealing with contentions not raised by Counsel Assisting, rather than confronting those that have;
- (b) narrow the original allegations against Mr Bateson to the "real issue" described above;
- (c) add additional allegations connected to the events of 9 to 13 July 2004, most particularly the positive assertion that it is open to the Commissioner to find that Ms Gobbo amended Mr Marshall's statement on 10 July 2004 during her meeting with Mr Hatt and that it was that conduct that motivated Com. Bateson to conceal his daybook notes and the draft statements; and
- (d) rely on additional facts not included in their primary submissions.

15.68 In addition, there are the paragraphs in the reply submissions that insinuate that Com. Bateson and Ms Gobbo (or their lawyers) cooperated in preparing submissions that deliberately avoided dealing with the issues raised by Counsel Assisting, focussed on irrelevant matters and then used the resultant commonalities to fortify their submissions. That insinuation is wrong. But in any case, insinuation and innuendo have no place in the submissions of those assisting an inquiry. To the extent that Com. Bateson and Ms Gobbo have raised the same matters in response to Counsel Assisting's submissions then the obvious and logical inference is that they (and their lawyers) believed those matters to be the relevant matters and that they are the relevant matters.

15.69 The reply submissions also continue to use language that risks creating the perception of bias or inflaming the views of the Commissioner against Com. Bateson. The 'hypothetical cross-examination' at paragraph [430] is a good example. A confected device of that kind is not necessary to demonstrate the importance of the drafts of the Marshall witness statement (which Mr Bateson did not print or create) being retained (noting that Counsel Assisting's reference to the statements being 'annotated' must be rejected). As the hypothetical cross-examines goes on, the drafts person gets carried

away and attributes answers to Com. Bateson that are an inappropriate caricature of him and which indicates ill-will towards him. It reinforces the caution with which Counsel Assisting's submission about Com. Bateson must be received. For the avoidance of doubt, Com. Bateson would never have given some of the answers attributed to him in the hypothetical because they are not accurate.

- 15.70 Rather than create a hypothetical cross-examination (which could never provide a sound basis for a finding of fact), it would have been of assistance to direct the Commissioner to the actual cross-examination that occurred. That cross-examination is addressed below in the submissions about the daybook entries.

**It is not open to find that Com. Bateson engaged in improper conduct in relation to draft statements and daybook notes**

- 15.71 At paragraph [387.11.1] of their reply submissions, Counsel Assisting submit that the draft statements of Mr McGrath were not disclosed because of the answers given by Com. Bateson in cross-examination by Mr Faris and because Ms Gobbo – who knew of their existence – could not cross-examine him about them without disclosing her role. The import of that allegation – which is not expressly stated - appears to be that:
- (a) Com. Bateson knowingly misled Mr Faris; and
  - (b) Ms Gobbo did not challenge Com. Bateson's evidence because of her personal interest in the information not becoming public.
- 15.72 If Counsel Assisting intend, by paragraph [387.11.1], to infer that Com. Bateson gave a knowingly false answer to Mr Faris, then such an allegation should have been made in direct terms. A matter that serious should not be left to inference. It should be squarely stated, and the facts supporting it clearly identified, so that Com. Bateson is afforded procedural fairness and can respond.
- 15.73 Instead, Counsel Assisting emphasise Com. Bateson's evidence, given in response to questioning by Mr Faris that there were no statements "relevant to these charges", before observing that it is "suggested" that Com. Bateson believed the statements had been overwritten and the hard copies destroyed. What Counsel Assisting mean by the term "suggested" is that Com. Bateson gave evidence on oath to that effect – something that is far more than mere 'suggestion'.
- 15.74 If Counsel Assisting seek to do no more than identify that draft of the statements were not disclosed in the criminal proceeding, then that fact is uncontroversial. Com. Bateson did not know of the existence of Scott Elliott's electronic draft and assumed that Mr Hatt would have discarded printed drafts given that that was the practice at Victoria Police at the time and given that he had not been given any drafts for disclosure. If Counsel Assisting intend to submit that Com. Bateson's answer to Mr Faris was knowingly false, then it is not open to the Commissioner to make that finding.
- 15.75 In relation to Com. Bateson's evidence that he believed that the draft statement shown to Mr McGrath on 9 July 2004 had been discarded, Counsel Assisting advance the new submission that his evidence should not be accepted because Ms Gobbo marked up amendments to the draft statements on 10 July 2004.<sup>121</sup> It is not explained or clear how the allegation that Ms Gobbo marked up amendments to the draft statement on 10 July 2004 (which is disputed) is inconsistent with Com. Bateson's evidence that he believed drafts would have been discarded. The suggestion was not put to Com. Bateson in cross-examination. It has been included for the first time in the reply submissions.

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<sup>121</sup> Counsel Assisting Reply Submissions at p 123 [427].

Further, there is no evidence whatsoever that, if Ms Gobbo did make amendments to the drafts, that Com. Bateson knew about it. He was not present. There is no evidence that he was told by anyone. There is no documentary evidence that he was told.

- 15.76 In relation to [387.11.2] of the reply submissions, it is not clear what the significance of these matters is. Counsel Assisting do not identify any documents that fall within the description of documents “relating to Mr McGrath agreeing to give evidence” and which Counsel Assisting submit ought to have been, but were not, disclosed. It is clear from Mr Faris’ questioning that this was a different category of documents to those connected to Mr McGrath’s statement taking process. The category appears to be directed to documents that record the terms on which Mr McGrath had agreed to give evidence, such as documents recording any benefits that he was to receive in exchange for his evidence.
- 15.77 Again, if Counsel Assisting intended for the reader to infer that Com. Bateson gave a knowingly false or misleading answer to Mr Faris, they should have stated that allegation in clear terms. There is no evidence supporting such an allegation. It is unsatisfactory to try to create an impression in reply submissions.
- 15.78 In relation to [387.12.1] of the reply submissions, the allegation that Com. Bateson deliberately failed to disclose his daybook entries for 22 March 2004 and 9 to 11 July 2004 rests on the notes not being in the depositions and the four inferences at [392].
- 15.79 When the evidence is assessed reasonably and dispassionately, it is evident that the evidence is manifestly inadequate to provide a basis for such a serious finding.
- 15.80 The relevant evidence not cited by Counsel Assisting at [387] includes the following:
- (a) Com. Bateson did not accept in evidence that he had failed to disclose the daybook entries;
  - (b) Com. Bateson’s notes for days including 9 July 2004 and 12 July 2004 were disclosed, and a PII claim was made, and upheld, by the Chief Magistrate;
  - (c) the material from Com. Bateson’s daybooks that was redacted in accordance with the finding of the Chief Magistrate includes:
    - (i) a telephone call from Ms Gobbo to Com. Bateson on 2 April 2004 about Mr McGrath;
    - (ii) a telephone call from Ms Gobbo to Com. Bateson on 5 April 2004, during which Com. Bateson outlined the **‘can say’ statement process** for Mr McGrath;
    - (iii) notes of a meeting between Com. Bateson and Mr McGrath on 26 May 2004, which record, among other things, that Mr McGrath told Com. Bateson that he wanted to know the bottom sentence, that he “doesn’t tell Nicola” what he is offering, that he wanted an estimate from Horgan and that **“Nicola’s guess was 4-5 years”**;
    - (iv) notes from 18 June 2004, in which Ms Gobbo’s name is recorded as appearing for the defence at Bendigo, and which record that Ms Gobbo told Com. Bateson that she was concerned for her own safety;
    - (v) notes from 9 July 2004, which record that Mr McGrath **“won’t sign before going to Nicola for approval”**;
    - (vi) notes from 12 July 2004, which record the changes requested by Mr McGrath to his two statements; and

- (vii) notes from 12 July 2004, which record that Com. Bateson **spoke to Ms Gobbo “re changes to statement”** after Mr McGrath requested them.
- 15.81 Com. Bateson’s entries for the afternoon of 9 July 2004, and 10 and 11 July 2004 (a single page), would have identified that (a) he made arrangements for Ms Gobbo to review the statements as requested by Mr McGrath, (b) that Ms Gobbo reviewed the statements, (c) that Ms Gobbo had expressed scepticism about one aspect of the Marshall statement and (d) that he arranged for Ms Gobbo to be able to see Mr McGrath on 11 July 2004 at her request.
- 15.82 The question that arises is why Com. Bateson would have disclosed pages that reveal that Mr McGrath asked, on two occasions (9 July and 12 July 2004) for Ms Gobbo to review his draft statements if he did not want anyone to know that she had reviewed the draft statements.
- 15.83 Com. Bateson had given to the Chief Magistrate his notes of 9 July 2004 identifying that Mr McGrath had asked for the draft statements to be given to his lawyer. As such, there was no reason for Com. Bateson not to also provide his notes from the afternoon of 9 July 2004, which recorded him making arrangements accordingly.
- 15.84 As to 10 July 2004, absent a finding that Ms Gobbo made handwritten amendments to the statements on 10 July 2004 in the presence of Insp Hatt and that Com. Bateson knew about it, there was nothing improper about what occurred on 10 and 11 July 2004. There was no reason for Com. Bateson to hide it. And, in any case, Com. Bateson’s notes say nothing about any “editing” or amendments of statements. They do not reveal anything improper.
- 15.85 As to Ms Gobbo’s expressed scepticism, again, there is no credible motivation for Com. Bateson to deliberately hide his note about that matter. Com. Bateson’s notes state only that, as requested by Mr McGrath, Ms Gobbo had reviewed his statements and that she had expressed some scepticism about an aspect of it. Again, they reveal nothing improper (save, for some indiscretion by Ms Gobbo, which Com. Bateson would have had no reason not to reveal because they were her indiscreet remarks, not his). Further, the scepticism was in relation to Mr McGrath first stating that he did not know that Marshall was to be murdered and, as set out in the Tranche 1 submissions, the change in his story (not knowing it was to be a murder to knowing that it was to be a murder) was known and explored at the committal hearing.
- 15.86 Com. Bateson’s evidence was that his motivation for making the PII claim over his notes insofar as they disclosed Ms Gobbo’s involvement in the events was that it was done for the purpose of protecting Ms Gobbo from potential retribution by Carl Williams and others. There is no direct evidence to the contrary, and there is nothing in the notes of 22 March 2004 and 9-11 July 2004 (being the notes not in the depositions) that provides a credible motivation for Com. Bateson to hide or withhold them when he disclosed the remainder.
- 15.87 Counsel Assisting also submit that the significance of Mr McGrath’s evidence to Purana is a relevant factor to take into account when assessing Com. Bateson’s submissions to the Commission. Com. Bateson agrees, but not for the reasons advanced by Counsel Assisting.
- 15.88 Counsel Assisting use the significance of Mr McGrath’s evidence to supply the motive for Com. Bateson to conceal his daybook entries for the purpose of obtaining an advantage to the prosecution. There are three important facts that are inconsistent with this submission.

- 15.89 First, as Counsel Assisting accept,<sup>122</sup> Com. Bateson expected that Mr McGrath would sign the Marshall witness statement in the form presented to him on 9 July 2004 (which was before he had received any advice from Ms Gobbo about his statements). At that time, Mr McGrath's evidence was that he did not know that Mr Marshall was to be murdered. While sceptical about that fact, Com. Bateson and Insp Hatt had faithfully recorded it as Mr McGrath's evidence in his statement and anticipated that to be the evidence he would give. There is no evidence that Com. Bateson did anything to attempt to persuade Mr McGrath to change this aspect of his evidence. There is no evidence that Com. Bateson or anyone else from Victoria Police sought to engage with Ms Gobbo about this, or any other, aspect of Mr McGrath's evidence.
- 15.90 Second, Ms Gobbo had no role in persuading Mr McGrath to cooperate with police. Mr McGrath had decided to cooperate without any encouragement from Ms Gobbo. Ms Gobbo had little involvement in the lead up to Mr McGrath's 'can say' statement process and was not present when his statements were taken.
- 15.91 Third, the circumstances in which Mr McGrath changed his statement were easily ascertainable, irrespective of whether Com. Bateson's daybook entries had been disclosed and this created a substantial risk to the prosecution if it was deliberately concealed.
- 15.92 It was known that Mr McGrath had asked his legal representative to review his statements. Com. Bateson was cross-examined about that fact at the committal hearing. If Com. Bateson had been asked whether Mr McGrath had made any changes to his statements after he obtained legal advice from his legal representative, Com. Bateson's answer would have been yes. That answer would have almost certainly elicited further enquiries about the changes that were made following advice from his lawyer.
- 15.93 In the course of the committal hearing, Com. Bateson gave evidence that:
- (a) the Marshall statement was completed between 22 and 23 June 2004;
  - (b) there were minor alterations after that date;
  - (c) between 23 June 2004 and 13 July 2004, Mr McGrath's legal representative reviewed the statement;
  - (d) Victoria Police had not altered the statement; and
  - (e) (in response to a direct question from Mr Heliotis) alterations that were made were at Mr McGrath's request or at the request of his lawyers.
- 15.94 Mr Heliotis then put the following proposition to Com. Bateson:
- There was no alterations made by you or by Purana, it was basically alterations at his request or at the request of his lawyers?<sup>123</sup>
- 15.95 Com. Bateson answered "correct". That question makes clear that Mr Heliotis understood that changes had been made to the Marshall statement. Mr Heliotis chose, for whatever reason, not to explore it any further.
- 15.96 Mr Heliotis was not asked by those assisting the Commission why he did not explore the topic in any more detail with Com. Bateson.

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<sup>122</sup> Counsel Assisting Reply Submissions at p 109 [387.5].

<sup>123</sup> Untendered Depositions of Committal, R v Carl Williams, Thomas and Andrews, OPP.0041.0001.0002 at T779.8-10.

- 15.97 Mr Heliotis moved on to the Moran and Barbaro statement. Com. Bateson was asked almost nothing about the preparation of that statement. The only question of substance was whether the delay between its preparation and its signing was “basically his lawyers reading it”, to which Com. Bateson replied “correct”.<sup>124</sup> Again, Mr Heliotis chose not to ask any further questions.
- 15.98 If Com. Bateson had deliberately concealed his daybook entries, there was a real risk that this would have become known in the course of the committal hearing and the prosecution then irreparably damaged. That is evidenced by Mr Heliotis’ questioning. It is implausible that Com. Bateson would have taken such a course.
- 15.99 Similarly, if Mr McGrath had been asked during his cross-examination whether he had spoken to his lawyer after requesting her to review his statements, he would have answered yes. If he was asked whether he then made changes to the statements, he also would have answered yes. Whether or not these questions were asked and answered honestly was beyond the control of Com. Bateson.
- 15.100 Counsel Assisting point to the absence of any questions about 10 and 11 July 2004 to support the hypothesis that Mr Heliotis and Mr Lovitt were unaware of daybook entries for these days. However, it was known that Com. Bateson and Mr Hatt attended on Mr McGrath on a Friday (the 9<sup>th</sup>) at which time he asked for his lawyer to review his statements and that they attended on him again on Monday morning **after his lawyer reviewed the statements**. The question of when the lawyer reviewed the statements was not explored, but the timing of the meetings with Mr McGrath squarely points to the review having occurred over the weekend. Further, Ms Gobbo gave evidence to the Commission that she told Mr Lovitt’s instructing solicitor, Mr Valos, about her involvement in Mr McGrath’s statements.
- 15.101 It is unthinkable that Com. Bateson would conceal daybooks notes which he had no reason to hide and which could have been discovered so easily through his cross-examination, the cross-examination of Mr McGrath or the cross-examination of Insp Hatt. That is underscored by the reality that Com. Bateson, despite being sceptical, attended on Mr McGrath on 9 July 2004 fully expecting that Mr McGrath would sign a statement in which he attested that he did not know in advance that Mr Marshall was to be murdered.
- 15.102 Finally, as was explained in the Tranche 1 submissions, the depositions are not an accurate record of the material that was disclosed.
- 15.103 The issue of the three forms of pagination that appear on some of the Victoria Police notes has assumed too much significance, partly as a result of the Tranche 1 submissions. It is accepted that the Tranche 1 submissions overstated the certainty with which conclusions could be drawn from the pagination. All parties’ submissions on the pagination issue were overstated. In Counsel Assisting’s primary submissions and the Tranche 1 submissions, and now Counsel Assisting’s reply submissions, conclusions were and are drawn in emphatic terms that are not borne out by closer examination. The analysis of this issue by Counsel Assisting presents one likely explanation. But there are other explanations too.
- 15.104 After having considered all the submissions about the pagination and after having stepped through the voluminous depositions, the actual position is that the pagination does not and cannot answer the question of whether the relevant entries were disclosed or not.

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<sup>124</sup> Untendered Depositions of Committal, R v Carl Williams, Thomas and Andrews, OPP.0041.0001.0002 at T779.17-18.

15.105 That is so because:

- (a) the transcript of the closed session before Chief Magistrate Gray is not available, and therefore the question of which pages he had before him and the documents on which he ruled cannot be known with any certainty;
- (b) the Compilation Pagination (as defined in the reply submissions) extends to more than 1800 pages while Exhibit 32 has fewer than 1000 pages, and it follows that a large number of documents that formed part of the Compilation Pagination were not included in Exhibit 32;
- (c) the evidence is that police notes were disclosed in tranches<sup>125</sup> – and there are bundles of police notes in the depositions that do not bear either the Bateson Pagination (as defined in the reply submissions) or the Compilation Pagination, evidencing that there were later disclosures of police notes;
- (d) extra pages of police notes were provided during the course of the committal hearing;<sup>126</sup>
- (e) not all of the police notes were tendered as part of the hand up brief;<sup>127</sup>
- (f) while Exhibit 32 was described as “all police notes outside of the hand up brief”,<sup>128</sup> there is no doubt that Exhibit 32 does **not** contain all police notes outside of the hand up brief, in that:
  - (i) the notes of Mr Iddles are not in the depositions (see the Tranche 1 submissions);
  - (ii) the depositions themselves include notes that do not bear the Bateson Pagination or the Compilation Pagination, and which, it seems have been disclosed after the bundle that became Exhibit 32;
- (g) there are many missing deposition pages, which suggests either the deliberate exclusion of pages or an error in its compilation. This was demonstrated during the re-examination of Com. Bateson;<sup>129</sup>
- (h) if Com. Bateson did provide his daybook entries to Chief Magistrate Gray then, consistent with his ruling in relation to the other pages, he would have allowed the PII claims over those pages which would then likely have been entirely blank (which may explain their absence from the depositions); and
- (i) the cross-examination reveals that further police notes were to be produced after the committal hearing.<sup>130</sup>

15.106 Further, there are discrepancies in the depositions that are capable of innocent explanation and which further demonstrate that some produced material was ultimately excluded from the depositions. The entry for 22 March 2004, which Counsel Assisting address at [405], is an example. Counsel Assisting acknowledge that this page was paginated for production but then excluded from the final depositions. Despite acknowledging that the exclusion may have been accidental, Counsel Assisting go on to submit that it is open to the Commissioner to infer that it was deliberately excluded

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<sup>125</sup> For example see Untendered Depositions of Committal, R v Carl Williams, Thomas and Andrews, OPP.0041.0001.0002 at T799.14-21.

<sup>126</sup> T10134.38-41 (Bateson).

<sup>127</sup> Untendered Depositions of Committal, R v Carl Williams, Thomas and Andrews, OPP.0041.0001.0002 at T802.1-4.

<sup>128</sup> Untendered Depositions of Committal, R v Carl Williams, Thomas and Andrews, OPP.0041.0001.0002 at T804.3.

<sup>129</sup> See Tranche 1 Submissions and the re-examination of Com. Bateson.

<sup>130</sup> Untendered Depositions of Committal, R v Carl Williams, Thomas and Andrews, OPP.0041.0001.0002 at 824, 7-12.

after it was paginated for production.<sup>131</sup> The inference urged by Counsel Assisting cannot be drawn. There are other explanations that are equally open. Further, no witness was asked about this matter and, therefore, for natural justice reasons alone, the finding should not be made.

- 15.107 In their primary submissions, Counsel Assisting submitted, only in passing, that Mr Hatt's daybook entry for 10 July 2004 was not in the depositions. Counsel Assisting did not make any submission about whether that was deliberate, nor did they submit that it was open to make findings about the circumstances in which that daybook entry was not disclosed.
- 15.108 However, the absence of Mr Hatt's daybook entry for 10 July 2004 from the depositions is given new emphasis in Counsel Assisting's reply submissions. In particular, it is said to be a fact from which it can be inferred that Com. Bateson deliberately concealed some of his own daybook entries for the period 9 to 11 July 2004. This is new.
- 15.109 For the reasons given above, the evidence does not permit a finding that Mr Hatt's daybook note was not disclosed.
- 15.110 Further, Insp Hatt was not cross-examined about the issue or given an opportunity to explain the absence of the page from the depositions.
- 15.111 Com. Bateson was not cross-examined about the absence of Mr Hatt's note for 10 July 2004 either or given an opportunity to speak to why the page is not in the depositions.
- 15.112 Further, there is no evidence that Com. Bateson ever had knowledge or possession of Mr Hatt's daybook note.
- 15.113 The many pages of argument on the issue of what police notes were and were not provided in the committal hearing in the submissions of Counsel Assisting and the Tranche 1 and 2 submissions underscores that the issue is a heavily contested and difficult one. The facts are highly contested. The contemporaneous documentary evidence is incomplete, and some of the individuals who had a direct and important role were not asked about it.
- 15.114 As Counsel Assisting acknowledge, their submissions on this issue are largely based on inferences. Those inferences are drawn from heavily contested facts concerning events that occurred 16 years ago.
- 15.115 There has been limited time to address Counsel Assisting's latest submissions on this issue.
- 15.116 It should also not be overlooked that the issue does not concern Ms Gobbo's role as a human source. She was not a human source at the time. The alleged concealment of notes had nothing to do with her role as a human source.
- 15.117 In circumstances where:
- (a) the evidence is weak;
  - (b) the facts are heavily contested and detailed;
  - (c) new submissions have now been made in Counsel Assisting's reply submissions about the issue;
  - (d) limited time has been available to respond;
  - (e) the allegation is very serious and must be established to the Briginshaw standard;

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<sup>131</sup> Counsel Assisting's Reply Submissions at p 118 [406].

- (f) the allegation is unrelated to Ms Gobbo's role as a human source and falls outside the terms of reference;
- (g) an inconsistent approach has been taken to the fact that Com. Bateson's notes are not in the depositions compared to the fact that Insp Hatt's notes are not either, in that Com. Bateson is said to have deliberately withheld his but Insp Hatt is not said to have done the same. This is unexplained;
- (h) Com. Bateson has reasonable concerns about the approach that has been taken to him by Counsel Assisting; and
- (i) the Commission's final report is soon to be sent for publishing and, therefore, there is little time for these submissions and the issue generally to be closely considered,

the Commissioner should not make the serious finding proposed by Counsel Assisting that Com. Bateson did not disclose three pages of his daybook notes during the committal hearing or that such conduct was deliberate.

### **The Thomas Transcripts**

- 15.118 Paragraphs [451]-[494] of Counsel Assisting's reply submissions contain (among other material) substantial new factual material that should not be raised for the first time in reply and so late. The material ought to have been detailed in Counsel Assisting's primary submissions pursuant to their obligation to identify all relevant facts for the Commissioner.
- 15.119 It is unsatisfactory that individuals now need to try to engage with the further facts with insufficient time. An individual is not afforded procedural fairness if relevant material is not included in Counsel Assisting's submissions and then it is deployed at the last minute in a reply submission in order to undermine the submissions made on the evidence that had been relied upon by Counsel Assisting.
- 15.120 This is a particular vice that arises because the fact-finding task was not correctly undertaken at first instance. If Counsel Assisting had identified all relevant evidence in their primary submissions (as they were obliged to do), the individuals would not have found themselves having to identify all of the missing evidence and setting it out in lengthy submissions in a short period of time.
- 15.121 In any case, the additional material now identified by Counsel Assisting does not alter the conclusion identified in the Tranche 1 submissions.
- 15.122 First, Counsel Assisting do not dispute all matters identified in the Tranche 1 submissions on this issue. The six matters identified in paragraph [454] are not the totality of the matters on which Mr O'Brien, Mr Ryan and Mr Bateson relied and it is not necessary for the Commissioner to accept any or all of them in order to reject the findings proposed by Counsel Assisting.
- 15.123 Second, Counsel Assisting have, with respect to them, misunderstood the submission put in relation to the uncertainty about who was representing Mr Thomas. It is not said that any of Mr O'Brien, Mr Ryan or Mr Bateson knew whether or not Mr Valos had stopped acting. It was said they were not certain. It was also not said that they could not have taken steps to determine whether or not Mr Valos had stopped acting – they could have.
- 15.124 The submission made was that there was uncertainty about who was representing Mr Thomas for the reasons identified by Counsel Assisting – namely, that Mr Thomas had told Com. Bateson that Mr Valos had said he would "relieve himself". Consequently,

while no one was certain as to whether or not Mr Valos was acting, it was known that Ms Gobbo was. Mr Thomas had told Com. Bateson that Ms Gobbo intended to continue representing him, and that he intended to continue retaining her.

- 15.125 Third, whether the transcripts were provided to Ms Gobbo on the night of the 19th or the 20th is not material to the submission made by the relevant police members. It was known that Ms Gobbo was to meet with Mr Thomas on 22 April 2006. It was known that the SDU was to meet with Ms Gobbo shortly after the discussion of 19 April 2006 and so it was simple to just give her the transcripts then. If the relevant members knew how it would later be misconstrued then they would not have taken the convenient option. They all also accepted in their submissions that, on reflection, it was not prudent.
- 15.126 Fourth, nothing in what Counsel Assisting put at [471]-[477] undermines the proposition put by the relevant officers in the Tranche 1 submissions – which is that Ms Gobbo came to be in possession of the transcripts and that it may have been the case that, notwithstanding that it was originally said by the SDU officers that she was not to keep the transcripts, she did. The information pointed to by Counsel Assisting does not foreclose that possibility. It is undeniable that the transcripts came to be in her possession.
- 15.127 Fifth, all of the matters in paragraphs [478]-[492] are new. There is no justification for these matters being raised in reply. They are not responsive to matters raised by the relevant individuals. If these facts were to be relied on, they ought to have been set out in the primary submissions.
- 15.128 In any event, they do not lead to the conclusion urged by Counsel Assisting. Indeed, they point to the conclusion that the transcripts were given to Ms Gobbo in her capacity as Mr Thomas' lawyer. In particular:
- (a) the matter at [480.2] is describing an expectation that Ms Gobbo will obtain independent instructions from Mr Thomas, consistent with her obligations as his legal representative;
  - (b) the matters in paragraphs [481] and [482] describe Ms Gobbo identifying what was and was not in Mr Thomas' best interests, consistent with her obligations as a legal practitioner;
  - (c) paragraph [483] describes the acknowledgement that it was "awkward" for the SDU to be involved and that Ms Gobbo should speak directly to Com. Bateson – again, wholly consistent with Ms Gobbo acting as a legal representative and entirely inconsistent with Ms Gobbo being tasked (because if she was being tasked, there would be no awkwardness and Com. Bateson would not have been involved);
  - (d) paragraph [487] is consistent with the SDU referring the issues relating to Mr Thomas to Com. Bateson because it was not appropriate for the SDU to be involved (because Ms Gobbo was acting as Mr Thomas' lawyer, not as a human source).
- 15.129 Counsel Assisting have given this event great attention but have not recommended any findings about the decision by the relevant officers to provide the transcripts to Ms Gobbo through the SDU – despite that decision being the relevant "conduct" of the officers to which the terms of reference are directed. Indeed, Counsel Assisting do not even propose findings in the terms set out in paragraph [458] of the reply submissions. This highlights the difficulty of the approach taken by Counsel Assisting.

- 15.130 Instead of proposing graduated findings that deal with the facts progressively and sequentially, ending with findings as to (mal)intent, Counsel Assisting persist with only proposing findings that depend on a finding that Mr O'Brien engaged in conscious wrongdoing. That underscores the criticism made in the Tranche 1 and 2 submissions about the focus being almost exclusively on individuals and not on organisational factors.
- 15.131 In the circumstances of this example, the finding proposed by Counsel Assisting in relation to the provision of transcripts to Ms Gobbo is that it is open to the Commissioner to reject Com. Bateson's evidence that Ms Gobbo was given the transcripts in her capacity as a lawyer. The finding focusses, yet again, on Com. Bateson and rejecting a single aspect of his evidence. That is in circumstances where the evidence is that it was not his decision to give the transcripts to Ms Gobbo and he did not want to continue to engage with her about Mr Thomas' possible co-operation. He was overruled.
- 15.132 If the Commissioner cannot make that finding (which is not open), she is left in the unfortunate position of being unable to make an alternative finding without the risk that the individuals will have been denied procedural fairness.
- 15.133 To avoid any doubt, Counsel Assisting has not proposed a finding in the terms set out in paragraph [496]. The relevant individuals have not responded to it and do not regard it as a proposed finding.
- 15.134 Further, Counsel Assisting appear to invite the Commissioner to make an additional finding against Mr Bateson, in the terms set out in paragraph [457]. That finding is similar, though not identical to the finding at paragraph [935] of Counsel Assisting's primary submissions. The Commissioner should not have regard to the submissions at [457] and following insofar as they are intended to support this new allegation. The proposed new finding at [457] is not an issue that arises in reply to Com. Bateson's submissions. It is an issue raised by Counsel Assisting in their primary submissions and should be dealt with according to those submissions, and the Tranche 1 submissions.
- 15.135 Next, at [477], Counsel Assisting submit that the Tranche 1 submissions contain a submission that the provision of the transcripts to Ms Gobbo was a false issue raised by them. That was not the submission at all.
- 15.136 The submission was that Counsel Assisting Mr Woods had analysed this issue correctly. He put to Mr Ryan that the transcripts were to be provided to Ms Gobbo in her role as a lawyer. Junior Counsel for Ms Gobbo then put to Mr Ryan that the transcripts were provided to Ms Gobbo in her role as a human source, not a lawyer. In cross-examining subsequent witnesses, Counsel Assisting Mr Winneke and Ms Tittensor then adopted counsel for Ms Gobbo's characterisation of the event, not Mr Woods' correct characterisation. It was submitted that they presumably did that on the *reasonable* assumption that what had been put by Ms Gobbo's counsel was to be Ms Gobbo's evidence when called. However, when she was called, Ms Gobbo did not give that evidence at all. Her evidence was not that she was shown the transcripts in her role as a human source. It was submitted that Ms Gobbo's counsel had inadvertently created a false issue which had led Counsel Assisting Mr Winneke and Ms Tittensor down the wrong path. See the tranche 1 submissions at [28.37]-[28.51].
- 15.137 Finally, the submission at [498] is rejected for all of the reasons set out in the Tranche 1 submissions and these submissions.

## G. Submission of Jim O'Brien

### 16 Overview

- 16.1 Counsel Assisting have responded to eight matters particular to Jim O'Brien. The reply submissions is replete with additional facts and contentions not relied on in the primary submissions and which do not properly arise in reply.
- 16.2 In the time available, Mr O'Brien has not been able to respond to every matter identified in the reply submissions. In this response, Mr O'Brien has focussed on what he understands to be the key issues. Mr O'Brien understands from the absence of any boxed paragraphs that Counsel Assisting do not intend to add any new or additional proposed findings by way of their reply submissions.

#### **Tony Mokbel and conflict matters**

- 16.3 Counsel Assisting submitted in their primary submissions that Mr O'Brien knew that Ms Gobbo was acting for Tony Mokbel when she was registered as a human source. Mr O'Brien disputed that. Counsel Assisting now, in reply, call in aid substantial additional evidence that was not referred to in their primary submissions which is said to support the allegation. It is not appropriate to use a reply for that purpose. And, in any case, the evidence does not support the contention.
- 16.4 Mr O'Brien does not deny that he knew that Ms Gobbo had acted for Tony Mokbel in the past, or that he knew that Ms Gobbo acted for Tony Mokbel from January 2006 onwards. He does not deny that Victoria Police saw Ms Gobbo as one of Mr Mokbel's crew.
- 16.5 The submission of Mr O'Brien was twofold. First, that he did not know that Ms Gobbo was acting in a professional capacity for Tony Mokbel at the time that she was registered as a human source and, second, that he did not appreciate that Ms Gobbo could not provide police with information about new criminal offending being engaged in by a current or former client.
- 16.6 There is nothing in the new material referred to in the reply submissions that provides evidence to the contrary. Much of the material relates to the period after January 2006 (during which time Mr O'Brien acknowledges that he knew Ms Gobbo was acting for Tony Mokbel in connection with his trial and, later, his extradition proceedings). This is so for the material in paragraphs [503.2] to [503.5]. The material that dates to September 2005 does not show that Mr O'Brien knew that Ms Gobbo was acting for Mr Mokbel **at that time**.
- 16.7 In paragraph 502.3, Counsel Assisting conflate the question of whether Ms Gobbo was acting for Tony Mokbel in late 2005 with the question of whether Mr Mokbel was directing or influencing the advice that Ms Gobbo was giving those of her clients who had interests that were opposed to those of Mr Mokbel.
- 16.8 As to the issue of whether Mr O'Brien did not believe that Ms Gobbo would provide information about Tony Mokbel in relation to matters for which she was then briefed or had been briefed to act in the past, the 'evidence' relied on by Counsel Assisting to counter that submission does no such thing.
- 16.9 Many "facts" relied on by Counsel Assisting are submissions or assertions about heavily contested facts. For example:

- (a) the assertion in paragraph [505.5] that Mr O'Brien was "aware that an important component of Operation Posses was to use Mr Tony Mokbel's **current lawyer**, Ms Gobbo, to assist Victoria Police to have him convicted and gaoled" – is not a fact (Mr O'Brien's knowledge being contested) but a submission;
- (b) the assertion in paragraph [505.8] that junior members had raised concerns directly with Mr O'Brien, notwithstanding his evidence that he had no recollection of such discussions is misleading. Ms Burrow's statement refers to concerns for Ms Gobbo's personal safety and "how to manage her registration as a human source".<sup>132</sup> Mr Rowe's evidence was that there had been a conversation about conflict, privilege or confidentiality issues prior to Ms Gobbo's registration, but that he thought the extent of it was "*Can this be done? If it's going to be done, she's got to be managed by the SDU.*" In that context "this" was "*using a legal practitioner as an informer*".<sup>133</sup> The second reference to Mr Rowe's evidence, given at footnote 560 to paragraph [505.8] is properly understood as a reference to general issues discussed in 2005 about whether Ms Gobbo could supply information to police. As considered in detail in Mr Rowe's primary submission,<sup>134</sup> Mr Rowe was not referring to legal concerns prior to Mr Cooper's arrest. That evidence therefore does not support the assertion that these concerns were raised with Mr O'Brien;
- (c) the assertion in paragraph [506.1] that Mr O'Brien was aware that the SDU would debrief Ms Gobbo about confidential information is not supported by reference to any evidence and has no basis in fact.

- 16.10 The balance of the matters relied on by Counsel Assisting do not provide direct evidence that contradicts Mr O'Brien. Moreover, they reflect an ongoing disjunction between the level of knowledge that Counsel Assisting attempt to impute to Mr O'Brien and the truth. The matters in paragraph [506] are directed to showing that Mr O'Brien knew that Ms Gobbo would be asked to provide information about Tony Mokbel. That is not, and has never been, in issue. The submission is that there is nothing in that material that is inconsistent with Mr O'Brien's evidence that he did not know that Ms Gobbo was retained by Tony Mokbel in September 2005 and, more importantly, that he did not know that Ms Gobbo could not provide information to police about new criminal offending.
- 16.11 In connection with Mr Cooper, all of the evidence identified by Counsel Assisting is consistent with the position advanced by Mr O'Brien – namely, that he believed that Ms Gobbo could provide police with information about ongoing criminal offending being committed by her clients.
- 16.12 Moreover, the manner in which Counsel Assisting have presented the evidence suggests links that do not exist. For example, in paragraph [507.3], Counsel Assisting link the SDU discussions with Ms Gobbo about Mr Cooper, and Mr O'Brien. They do not identify evidence that Mr O'Brien was aware of the SDU discussions or that Ms Gobbo had informed the SDU that obtaining a bail variation for Mr Cooper would "enhance" her relationship with Mr Cooper. This is a further example of Counsel Assisting imputing the knowledge of the SDU to an investigator without identifying evidence of that fact. It is also to be recalled that these events occurred in January 2006 – in the very infancy of Mr O'Brien receiving information from the SDU that was sourced from Ms Gobbo. Mr

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<sup>132</sup> Exhibit RC0118 – Statement of Liza Burrows dated 10 May 2019 at [56]-[57] (VPL.0014.0030.0001 at .0009).

<sup>133</sup> T3276.37-3277.15 (Rowe).

<sup>134</sup> Tranche 1 Submissions, Submissions of Mr Rowe [58.55]-[58.63].

O'Brien presented the event as a straightforward dealing between Victoria Police and Ms Gobbo<sup>135</sup> because it was.

- 16.13 The evidence set out in paragraph [507] is said to support the conclusion that follows in paragraph [507.5]. That conclusion appears to be a new allegation made against Mr O'Brien. The matters in paragraph [507.1]-[507.3] do not provide the basis for an inference to that effect and there has been insufficient time to consider the evidence as a whole.
- 16.14 Counsel Assisting's unwillingness to accept Mr O'Brien's evidence on the above matters is difficult to understand. Mr O'Brien's evidence is consistent with the evidence given by a great many of his former colleagues and which is a matter that could not sensibly be denied on the evidence – namely, that he did not appreciate that Ms Gobbo could not tell police about crimes being committed by her former or current clients. It is also entirely consistent with the Tranche 2 submissions and the evidence of AC Casey as to the absence of training that officers received about how to identify and respond to conflicts of interest.
- 16.15 The frank admissions made by Mr O'Brien, and many other current and former officers, about their inadequate understanding of conflicts provides an evidentiary basis for the Commissioner to make findings about the conduct of officers in connection with the registration and use of Ms Gobbo, including a finding that there was a failure to identify and properly respond to conflicts of interest and to identify how that failure may have affected cases. It also allows the Commissioner to make recommendations about steps that should be taken by Victoria Police to address its training deficiencies.
- 16.16 However, Counsel Assisting do not propose findings of this kind. Instead, they persist in proposing findings that rely on the Commissioner finding malintent on the part of Mr O'Brien and many others, contrary to the conclusion reached by Mr Kellam.

#### **Ms Gobbo's representation of Mr Cooper on 22 April 2006**

- 16.17 Not one of the matters referred to in paragraphs [508]-[512] undermine Mr O'Brien's submission on these matters. Save for the two footnoted sentences, paragraph [512] contains no references to evidence. The conclusions drawn in that paragraph are not inferences that are open on the evidence. They are pure speculation and cannot fill the evidentiary gaps in Counsel Assisting's submissions.

#### **Matters related to Mr Bickley**

- 16.18 In connection with Mr Bickley, Counsel Assisting reject Mr O'Brien's evidence that he did not identify the complex legal conflict of interest that might arise. Mr O'Brien's submission was as follows:

The entry [of 8 June 2006] is significant. It reveals that none of those present identified the complex legal conflict of interest that would arise if Ms Gobbo represented Mr Bickley. It emphasises that if Operation Posse had been oversighted by a committee focussed on risk and with access to specialist legal advisers, it is likely that events would have unfolded very differently.<sup>136</sup>

- 16.19 To counter this, Counsel Assisting rely, in paragraphs [515.2] and [515.3], on speculation. Mr O'Brien did not give evidence consistent with those paragraphs. There is no evidence (and certainly none identified by Counsel Assisting) that would permit

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<sup>135</sup> Counsel Assisting's Reply Submissions at p 147 [507.2].

<sup>136</sup> Tranche 1 Submissions, Submissions of of Mr Rowe at [52.12].

inferences to be drawn in the form of paragraphs [515.2] and [515.3]. Counsel Assisting do not say that Mr O'Brien was not a witness of credit, nor have they submitted that his evidence should not be believed. Speculation cannot stand in the place of evidence and cannot be used to fill evidentiary gaps.

- 16.20 As noted above, Counsel Assisting's refusal to accept Mr O'Brien's frank concessions that he did not understand conflicts of interest and did not always identify them or respond to them appropriately and to, instead, persist in attempting to prove knowing wrongdoing is not justified on the evidence.

**Concern over the use of Ms Gobbo and the administration of justice**

- 16.21 At paragraph [520] Counsel Assisting identify 10 matters that, in conjunction with the matters in paragraph [505], are said to contradict Mr O'Brien's submissions that he failed to comprehend the risk to the administration of justice posed by Ms Gobbo's use as a human source.

- 16.22 Paragraph [505] has been addressed above.

- 16.23 As to paragraph [520]:

- (a) paragraph [520.1] is predicated on Counsel Assisting's submission that Mr O'Brien spoke to the SDU and that certain matters were conveyed to him. Mr O'Brien does not recall the conversation and, even if such an interaction occurred, there is no evidence that it was anything other than transactional. This event is equally consistent with Mr O'Brien's submission that the risks to the administration of justice were not identified and that the failure to identify those risks allowed the situation to persist;
- (b) paragraph [520.2] contains the submission that it is "difficult to accept" Mr O'Brien's evidence that he did not foresee the risk that Ms Gobbo would attend to advise Mr Cooper and that he did not turn his mind to the administration of justice. Counsel Assisting do not invite the Commissioner to reject Mr O'Brien's evidence on that point. The comment in paragraph [520.2] is of no assistance or effect;
- (c) similarly, in paragraph [520.3], Counsel Assisting submit that if the Commissioner were to find that Mr O'Brien had any concerns about the potential loss of evidence and the interference with the right to a fair process, then it "may be difficult" to accept that Mr O'Brien believed that the conflict was a matter for Ms Gobbo. Again, Counsel Assisting do not invite the Commissioner to reject Mr O'Brien's evidence and have not submitted that he was not a witness of truth generally. More particularly, Mr O'Brien's evidence identifies matters that are of interest to the Commission and provides a foundation for appropriate conduct findings and associated recommendations to be made. Counsel Assisting continue to overlook the findings that are available on Mr O'Brien's evidence in favour of attempting to establish deliberate wrongdoing;
- (d) paragraph [520.4] misstates the evidence. The passage referred to does not identify which aspects of his concerns Officer Sandy White says he spoke to Mr O'Brien about. It is not in contest that Mr O'Brien was informed that there was a plan in place to prevent Ms Gobbo from attending and representing Mr Cooper and that, accordingly, some concerns must have been discussed. There is no evidence, however, that Officer Sandy White and Mr O'Brien's discussion revealed a wider understanding of the risks to the administration of justice;
- (e) paragraph [520.4] says nothing about Mr O'Brien or his state of mind;

- (f) the matters in paragraph [520.6] do not advance Counsel Assisting's contention that Mr O'Brien in fact turned his mind to the risks to the administration of justice – they are equally consistent with Mr O'Brien not doing so;
- (g) the matters in paragraph [520.7] are equally consistent with Mr O'Brien's evidence that he was concerned about Ms Gobbo's safety and that her safety was his principal concern;
- (h) the matters in paragraph [520.8] are contested and Mr O'Brien has no recollection of them – and, in any case, they are equally consistent with a failure by those present to recognise the risks to the administration of justice, with the emphasis on Ms Gobbo not representing Mr Bickley being explained by the persistent concerns for her safety;
- (i) as to the matters in paragraph [520.9], when Mr O'Brien's evidence about these matters is considered, it is evident that Mr O'Brien was heavily influenced by his belief that Milad Mokbel was not serious about cooperating with police and, as such, did not consider that any potential conflict was likely to arise.

16.24 Almost every matter identified by Counsel Assisting is capable of being seen as the consequence of a failure to identify and respond to the conflicts of interest that were arising. As has been emphasised above, it may have been open to the Commissioner to make findings about whether the conflicts should have been identified and the consequences flowing from the failure to do so. Again, however, they are not the findings urged by Counsel Assisting. Counsel Assisting urge only findings of knowing wrongdoing.

#### **The mid-2007 meetings**

- 16.25 Counsel Assisting persist in their reliance on the evidence of Mr Blayney and on a particular construction of that evidence. In particular, Mr O'Brien does not accept that Mr Blayney's evidence that he did not recall the meeting "other than what was in his notes" meant that he had a detailed recollection of the matters **related to** those notes, but no recollection of anything else said at the meeting. On a fair reading, Mr Blayney's evidence was exactly what Mr Blayney said it was: that he did not have a recollection other than what was in his notes. Mr Blayney's evidence was a fair attempt by him to reconstruct the events leading to the making of those notes but was not based on actual recollection.
- 16.26 The construction given to Mr Blayney's evidence has the consequence that Mr Blayney, having identified serious risks to the administration of justice, then did nothing about them following the meeting of 24 July 2007 on the basis that he understood that legal advice had been obtained, but without having sighted that advice or receiving any form of briefing about such advice. That does not do justice to Mr Blayney as a diligent and ethical officer and is inconsistent with the evidence of every other participant at the meeting of 24 July 2007.
- 16.27 In effect, Counsel Assisting ask the Commissioner to find that Mr Blayney had concerns about the risk to the administration of justice, was told that legal advice had been obtained, was not given a copy of that advice (because it did not exist), was not briefed about its contents (because it did not exist) and then elected to do nothing further. It also requires the Commissioner to accept that those in attendance on 24 July 2007 were able to give Mr Blayney sufficient assurances to allay his concerns, despite no legal advice having been obtained and some of those present at the meeting being largely unaware of the extent of Ms Gobbo's relationship with Victoria Police. It is far-fetched.

- 16.28 Counsel Assisting submit at paragraph [531] that the discussion on 18 July 2007 was about Ms Gobbo becoming a witness against Mr Karam. That is not accepted. The discussions at that time were about Ms Gobbo becoming a witness for the Petra investigation – this is one of the possible explanations for Mr O’Connell’s presence at the meeting of 24 July 2007.
- 16.29 Counsel Assisting identify no evidence that investigators were considering using Ms Gobbo as a witness against Mr Karam. That matter was discussed between the SDU and Ms Gobbo, along with the prospect of Ms Gobbo being a witness against various other persons, but there is no evidence that investigators were actively considering Ms Gobbo’s use in connection with Mr Karam. What there is clear evidence of is that Petra was actively considering Ms Gobbo as a witness at the time.
- 16.30 At paragraph [534] Counsel Assisting appear to propose a new finding. Again, it is wholly inappropriate for a new finding to be proposed in reply. It is not responsive to a submission in the Tranche 1 submissions. The proposed finding should be rejected on procedural fairness grounds alone.
- 16.31 In any case, the finding urged by Counsel Assisting is directly contradictory to the terms of the note prepared by Officer Sandy White on which Counsel Assisting relies. Officer Sandy White made a note of the concern and there is no reason to believe that his concerns were anything other than what he recorded.

#### **24 July 2007**

- 16.32 Counsel Assisting now assert, for the first time, that the meeting of 24 July 2007 related to the potential that Ms Gobbo might become a witness against Mr Karam and that the need for legal advice arose in this context.<sup>137</sup> This is a new allegation, not put in Counsel Assisting’s primary submissions and about which the relevant individuals were not cross-examined.
- 16.33 Counsel Assisting’s new submissions about the 24 July 2007 meeting must be rejected. Mr O’Brien adopts the submissions of Mr Biggin, and adds the matters set out below.
- 16.34 The proposition at [539] is contested, and Mr O’Brien refers to the Tranche 1 submissions on this matter.
- 16.35 The proposition in [547] must also be rejected. It is inherently unlikely that if Mr Blayney had the serious concerns alleged by Counsel Assisting in paragraphs [522]-[527] he would not have raised them at the meeting of 24 July 2007. It is also inherently unlikely that if had raised them, those present could have satisfactorily addressed those concerns. The likely explanation is the one given in the Tranche 1 submissions which, consistent with Mr Blayney’s evidence to IBAC, is that he was concerned about legal professional privilege and those present at the meeting explained the systems in place to prevent the dissemination of information subject to legal professional privilege.

#### **Matters related to Mr Thomas**

- 16.36 As to paragraph [552], Mr O’Brien has not failed to understand that this is the proposition put by Counsel Assisting, nor has he failed to grapple with it.
- 16.37 To the contrary, Mr O’Brien provided a detailed response highlighting that he and his investigators did not ever task Ms Gobbo in connection with Mr Thomas, that he received very little information from the SDU about Mr Thomas that was sourced from Ms Gobbo and that the information he did receive (some of which is extracted by

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<sup>137</sup> Counsel Assisting’s Reply Submissions at p 185 [664].

Counsel Assisting at [552.2]-[552.3]) did not alert him to the potential conflict because it was insignificant and not contrary to Mr Thomas' interests.

## H. Submission of Gavan Ryan

### 17 Lack of clarity

- 17.1 In response to Mr Ryan submitting that he did not know to what Counsel Assisting was referring at paragraph [1067] of their primary submissions, Counsel Assisting decline to explain.<sup>138</sup>
- 17.2 Instead, Counsel Assisting refer to one example – being the only example addressed by Mr Ryan in his submissions. Counsel Assisting otherwise decline to tell Mr Ryan the facts, matters and circumstances on which they rely.<sup>139</sup>
- 17.3 That is a denial of procedural fairness. The proposed finding at [1067] must, therefore, be rejected on that basis alone.

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<sup>138</sup> Counsel Assisting's Reply Submissions at pp161-162 [553]-[557].

<sup>139</sup> *Ibid.*

I. Attachment One: Letter to the Royal  
Commission dated 1 October 2020 and  
Attachment

**Our reference**  
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1 October 2020

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Dear Alex

## Royal Commission into the Management of Police Informants – Counsel Assisting's new submissions

We refer to your letter dated 28 September 2020 asking that we identify the issues our clients may want to respond to within Counsel Assisting's latest submissions.

As we have only had the submissions since Friday, we have not yet conferred with each of our individual clients and taken instructions about the submissions. However, in the time available, we have prepared the **attached** table which identifies the matters to which our individual clients may wish to exercise their legal right to respond.

If the submissions are to address each of the matters in the table then they will take some time to prepare. As Counsel Assisting's latest submissions were not expected and have been received 6 weeks after the Tranche 1 submissions were filed, counsel involved in the Tranche 1 submissions have not been able to immediately commit all of their time to dealing with the latest submissions.

In the interest of providing responsive submissions to the Commission as quickly as possible, if there are any matters in the enclosed table that are no longer pressed by Counsel Assisting then we ask that they inform us and we will then not respond to them.

If the Commissioner would not be assisted by submissions on any matter in the table because she will not be having regard to the submissions of Counsel Assisting on the matter, due to their lateness or because they are outside of the scope of the further submissions that she requested from Counsel Assisting or for another reason, we will also not address the matter.

In the meantime, we will confer with our individual clients and prepare responsive submissions as quickly as possible.

Yours faithfully

**Corrs Chambers Westgarth**

**Abigail Gill**  
Partner

**Attachment to the Letter to the Royal Commission dated 1 October 2020**Categories

1. New submission.
2. New proposed finding or recommendation.
3. New proposed adverse conclusion or factual finding.
4. Additional facts not relied on in Counsel Assisting's initial submissions requiring fact checking and/or substantive response or facts relied upon for a different purpose.
5. Legal response required.
6. Correction of a misstatement of the Tranche 1 submissions or clarification of Tranche 1 submissions.
7. Misrepresentation of the evidence

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
1.	7 163 164	All Tranche 1 members	6	<p>Counsel Assisting (CA) submit that the Tranche 1 submissions alleged bias. The paragraphs they point to do not allege bias or apprehended bias for reasons which will be explained briefly in responsive submissions.</p> <p>By way of example, it was submitted by Tranche 1 members that:</p> <ol style="list-style-type: none"> <li>1. Pejorative comment by CA in their submissions was not appropriate. One reason it was not appropriate was because such language from counsel assisting an inquiry <i>risks</i> creating a perception that the Commissioner has been inflamed against the member or incited to hold a biased view.</li> <li>2. CA had fallen into error by only setting out the evidence that they considered supported the findings proposed by them and had not, as their role requires, brought to the attention of the Commissioner and addressed in their submissions the evidence against the findings.</li> </ol> <p>Neither of those submissions is an allegation of bias or apprehended bias.</p> <p>Further, the erroneous approach to the evidence in CA's initial submissions is repeated in parts of their latest submissions.</p>

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
2.	165 249-50	All	4	At 165, CA list further facts which they submit support a finding about the issue of members not seeking legal advice. Those facts need to be checked and addressed if necessary. Further, CA's submissions on this issue are an example of CA not bringing to the attention of the Commissioner directly relevant evidence against the finding proposed and not having assisted the Commissioner with submissions about how that evidence is to be weighed. The evidence is that of Assistant Commissioner Kevin Casey who sought to assist the Commission with a witness statement that directly addresses the usual practices that existed at Victoria Police at the relevant time in relation to seeking legal advice.
3.	40.3 40.5	Hatt	5	CA assert that it is open to the Commission to make adverse findings about Mr Hatt in relation to matters that were not put to him in cross-examination without breaching the obligation of procedural fairness. He has a right to respond.
4.	40.4 40.6	Hatt	1	CA have recast the allegation against Mr Hatt concerning Ms Gobbo's conflict in relation to Mr Thomas. Mr Hatt may wish to respond to the allegation as it is now put.
5.	202-207 213-215 217-219 223-224 343	All Tranche 1 members	6	<p>At 205-206, CA characterise the Tranche 1 overview as suggesting that they should not have inquired into the conduct of individuals. That is not the submission that was put. The submission put was that the focus on attributing blame to individuals was obscuring the real issues, which were systemic. CA's reply perpetuates the problem – by elevating individual decision-making above the systems and processes in which those decisions were made.</p> <p>CA also submit that they were as comprehensive with the facts as possible. The factually dense nature of the individual reply submissions (for the Tranche 1 members, along with the SDU, Ms Gobbo and Mr Overland) evidence that this is not so, and has created the factual disputation evidenced in the reply, and our proposed rejoinder.</p> <p>The Tranche 1 submissions have not, contrary to CA's submission at 218, "elided" individual responsibility with organisational responsibility.</p>

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
				<p>At 213, CA mischaracterise the submission that was put in relation to the findings of Mr Kellam. It was not submitted that he had found “mere” negligence. Mr Kellam’s finding as to negligence was extracted verbatim in the submissions: see [62.4].</p> <p>CA have also glossed over the submission that was put about them having taken a radically different view to the conclusion reached by Mr Kellam about individual conduct. The Tranche 1 submissions acknowledged that there was a much greater body of evidence before the Commission than had been before Mr Kellam. However, it was submitted that Mr Kellam had key evidence (which was described in the submissions) that is before the Commission and heard evidence from members who were not on notice of why they had been called to IBAC for examination. It was submitted that CA had not pointed to a piece of evidence before the Commission that was not before Mr Kellam that shows that a member that had been examined before him had, contrary to Mr Kellam’s finding, an intention to act with impropriety. Those submissions remain good because CA’s detailed latest submissions do not point to any such piece of evidence despite the Tranche 1 submissions inviting them to do so.</p>
6.	208	All Tranche 1 members	4	<p>CA submit in broad and general terms, and without reference to evidence, that the evidence given by unidentified members was “self-serving”. However, CA did not in its original submissions identify those aspects that were “self-serving” or submit that this was a reason for evidence not to be accepted. Members may wish to respond to this new allegation. It is also illustrative of the broader problem with CA’s initial submissions – which was the failure to set out all the relevant evidence and then analyse it, including by identifying those aspects of the evidence that CA submits should not be accepted (and the reasons why).</p>
7.	228-229	All Tranche 1 members	1	<p>Paragraphs 228 and 299 are a refinement of the issues concerning Mr Thomas. It appears to be an acceptance that the broader conflicts of interests and the statement taking processes generally are outside the terms of reference. Members have a right to respond to the revised way in which the allegations are put.</p>

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
8.	232	O'Brien Ryan Bateson	1	This is a new submission. The submission that Ms Gobbo “facilitated” Victoria Police’s desire to obtain evidence from Mr McGrath is a new variation on the submission put by CA at first instance and requires correction.
9.	233-4	Bateson O'Brien	1	CA makes the new submission that Ms Gobbo's provision of information to Mr Bateson in 2005 was the deliberate ingratiation of herself as an “asset of the Purana Taskforce”. That is a new submission that members may wish to answer.
10.	247-8	All Tranche 1 members	1	CA submit that the failure of officers to raise their concerns about Ms Gobbo’s registration “might reflect reluctance of members lower in the hierarchy to question superiors ... “. It is not clear whether CA is submitting that a finding of this kind should be made. It is put in speculative terms.  CA's submission at 248 is vague, unclear and not referenced.
11.	256-8	All Tranche 1 members	1, 5, 6	This is a new allegation about conflict which members may wish to provide a legal and factual response to.  At 258, CA mischaracterise the submission put by members.
12.	261-262 263-281	All Tranche 1 members O'Brien	1	This is a new submission in part. It is a contention that the members deliberately chose not to obtain legal advice. This was the subject of specific submissions in relation to particular events (for example, the 24 July meeting). It is now put as a general submission, and the allegation is that the failure to obtain legal advice was “a deliberate choice”.  Along the way, new specific submissions are made – including at 275.4.  The members have a right to respond, including by drawing the Commissioner’s attention to evidence that is directly relevant, such as that of AC Casey.

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
13.	301	O'Brien Ryan O'Connell	1, 2	A specific submission is now made that each of these officers deliberately chose not to make diary notes of their interactions with Ms Gobbo. This submission was not made about these officers specifically. The evidence included in the section is new.
14.	305	Ryan	6	There is now a factual dispute about whether Mr Ryan was asked questions about the provision of transcripts to Ms Gobbo. CA's submission needs to be checked.
15.	309 310-321	O'Brien	4	It is not clear whether CA say that because (in their submission) it is unlikely that Mr O'Brien would have recorded a direction to Purana Taskforce to deal with information in a way that would protect it from disclosure, that CA are submitting that such a finding should be made.  The factual matters at 310-321 need to be checked.
16.	322 347	Bateson Hatt	1*, 4	This is a narrowing of the submission in relation to Mr McGrath's statements. It may also be a response to the Tranche 1 submission that CA had not identified the conflicts with precision.  Com. Bateson has a right to respond to the narrowed form of conflict identified.  CA allege that Com. Bateson has "studiously" avoided grappling with the real issue. He is entitled to respond.
17.	334	Bateson	4, 6	Com. Bateson is entitled to an opportunity to respond to CA's analysis of the pagination. That analysis was not in CA's original submissions. The matters pointed to by CA also do not address all of the matters raised by Com. Bateson on this issue, and he has a right to explain why the matters pointed to by CA do not alter the analysis on the wider issue in the Tranche 1 submissions about alleged concealment of notes. CA's allegation of concealment is serious and he must be given an opportunity to respond to each matter put by CA.

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
18.	339	Bateson	1, 6	The insinuation and speculation at 339 (and in related paragraphs) is not appropriate and should be disregarded. Members of counsel assist an inquiry by providing submissions on the law and facts. The submission made at 339 is neither of those things.
19.	356	Bateson O'Brien Ryan	1, 2	CA make the new submission (and possibly seek a new finding or recommendation) that Ms Gobbo was provided with the transcripts for the purpose of "bringing about an account from Mr Thomas that was more satisfactory to the Purana Taskforce". That is new.
20.	358 366 373	Bateson Hatt	1, 2	It is now put specifically that Ms Gobbo amended the hard copies of Mr McGrath's statement in the presence of Mr Hatt, that either Com. Bateson or Mr Hatt amended the statement and then presented the revised version to Mr McGrath. This is new and serious.
21.	365-368	Hatt Bateson	1	It is now said that there was a "plan" between Ms Gobbo and Mr Hatt that Ms Gobbo would speak to Mr McGrath about the contents of Mr McGrath's statement. This is new.
22.	378	Bateson Hatt	1	It is now put that Mr Hatt would have told Mr Bateson that Ms Gobbo had edited Mr McGrath's statements. This is new.
23.	387-391 392-433	Bateson	1, 6	This is an entirely new factual analysis which, while responsive to Com. Bateson's submissions, nonetheless raises new factual matters that Com. Bateson has a right to respond to.
24.	457	Bateson	1, 2	CA make the new submission that "Mr Bateson's conduct [in connection with the provision of the transcripts to Ms Gobbo] was deliberate and engaged in as a means to attempt to avoid appropriate disclosure". This was not previously put specifically against Mr Bateson.

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
25.	467 475	O'Brien Ryan Bateson	4, 6	There is a factual dispute about the provision of the Thomas transcripts to Ms Gobbo (in particular, when they were provided to Ms Gobbo). The new factual material needs to be assessed and considered.  There is a misstatement of Mr Bateson's submissions at 475 that requires correction.
26.	478-494	O'Brien Ryan Bateson	1, 4	CA have included a dense factual section purportedly supporting its original proposed findings in response to the transcript issue. Mr O'Brien, Mr Ryan and Com. Bateson have not had an opportunity to review and consider these facts or respond to them. They are new.
27.	503	O'Brien	1, 4	The submission that an inference (supporting a submission made by CA at first instance) can be drawn on the basis of the matters in paragraph 503 is new. Mr O'Brien has not had an opportunity to consider or respond to these facts, or the submission that an inference can be drawn from them.
28.	505-507	O'Brien	1, 4	Paragraphs 505-507 are dense and fact intensive. Mr O'Brien has not had an opportunity to consider or respond to the matters.
29.	515.2 515.3	O'Brien	1, 4	The allegation that Mr O'Brien was "clearly aware" of the conflict that would arise in connection with Mr Bickley, as he had been troubled by the conflict with Mr Cooper was not put in CA's first submissions. This is new and Mr O'Brien has not had an opportunity to respond.
30.	516	O'Brien	1, 2, 3	There is a new allegation that Mr O'Brien's failure to seek legal advice about Mr Bickley's situation was the result of a "determination" not to do so.

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
31.	520	O'Brien	1, 2, 4	This paragraph is a dense and fact intensive section supporting the new allegation that "it was plain" to Mr O'Brien that "there were obvious risks to the proper administration of justice associated with the use of Ms Gobbo as an informer whilst representing Mr Cooper".
32.	521 – 549	O'Brien Ryan O'Connell	1, 2, 4	These paragraphs are a dense and fact intensive section supporting the earlier allegations about the meeting of 24 July 2007. There are new allegations contained in this section – see, for example, 522 (final sentence), 534.
33.	549	O'Brien	1, 4	This is a new allegation about Mr O'Brien's purported awareness of a risk to the administration of justice.
34.	291	Flynn	7	At 291, in the context of Ms Gobbo speaking to Mr Flynn on 17 August 2005, Counsel Assisting state: 'Mr Flynn said that he would investigate the matter and notified Messrs Sawyer and O'Brien'. This representation of the evidence is inconsistent with the evidence contained in Mr Flynn's diary.
35.	560	Flynn	7	This is a detailed allegation which misrepresents Mr Flynn's evidence – (e.g. knowing there was a serious irregularity in the post investigative and post arrest phase of the operation or there was determination to press ahead). It will need to be addressed in detail.
36.	580	Flynn	1	This is a partially new submission in that it is a narrowing of the submission that Mr Flynn was in fact aware of Ms Gobbo's conflict of interest. It has not been put to Flynn that this was "a conflict of such significance that it could not simply be resolved on the assumption that others had determined Victoria Police could receive and act on such information".

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
37.	581	Flynn	1	It has not previously been put that each of the listed instances would have given Mr Flynn "specific cause" to consider issues of conflict of interest.
38.	583 – 596	Flynn	4	<p>CA's submission conflates allowing Ms Gobbo to attend and advise Mr Cooper, and a plan to use Ms Gobbo to persuade Mr Cooper to roll. This issue needs to be addressed. It also misconstrues the evidence as to Mr Flynn's level of awareness.</p> <p>The list of evidence at 586 - which CA suggest reveals that "Mr Flynn was aware of a plan involving Ms Gobbo to put Mr Cooper into a position to ensure his cooperation with police" – has not previously been put in that form.</p>
39.	601	Flynn	1	<p>The issue of whether Mr Flynn should have sought legal advice in respect of Ms Gobbo's involvement with Mr Cooper has not specifically been put previously.</p> <p>Mr Flynn volunteered in evidence that with the benefit of hindsight that "there was no legal advice sought for several years after the registration, so you know that's something I look back and think that's perhaps something we should have done earlier...".</p>
40.	620, 625	Flynn	4	CA assert that Mr Flynn was aware of the availability of witness protection. His knowledge of witness protection has previously not been raised.
41.	623	Flynn	4	CA have not previously asserted that Mr Flynn could raise this issue with Mr Bernard Edwards – the new officer in charge after Mr O'Brien's retirement.
42.	634, 636-637	Biggin	1, 3, 4	CA rely on five circumstances that are said to provide relevant "context" within which the discussion between Mr Biggin and Mr Overland occurred on 16 February 2006, based on which CA invite the Commissioner to draw inferences concerning Mr Biggin's knowledge which are adverse to Mr Biggin.

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
				<p>While CA's original submissions, and Mr Biggin's response, dealt with the 16 February meeting with Mr Overland, these contextual considerations and the suggested inferences have not previously been put - either in evidence or submissions – and he has therefore not had an opportunity to respond to these matters.</p> <p>In particular, Mr Biggin has not had the opportunity to respond to the following factual assertions:</p> <ul style="list-style-type: none"> <li>- The relevance to the Overland conversation of the fact that various covert units were within Mr Biggin's command (634.1)</li> <li>- The suggestion that members of the units under Mr Biggin's command "had the potential to compromise Ms Gobbo's role as a human source" (634.2)</li> <li>- His knowledge of a proposed undercover operation (634.3)</li> <li>- Ms Gobbo's expressed concern about her phone being intercepted (634.4)</li> <li>- Any connection between his conversation with Officer White on 14 February 2006 and Ms Gobbo (643.5)</li> </ul> <p>In addition, Mr Biggin has not had an opportunity to respond to the unspecified "legitimate inferences" CA assert may be drawn from the context of the meeting (636), nor the alleged adverse conclusion at paragraph 637.</p>
43.	641-642	Biggin	4	<p>This evidence was not relied upon in CA's original submissions and therefore Mr Biggin has not had an opportunity to respond to it.</p> <p>Paragraph 642 overstates Mr Biggin's overall evidence about the ICRs he had access to and may have perused whilst undertaking his audit.</p>
44.	643-645 & 647	Biggin	1, 3, 4	<p>CA's latest submissions make new submissions and identify new factual bases upon which the Commissioner is invited to find that Mr Biggin knew that Ms Gobbo had provided information which had led to Mr Cooper's arrest.</p> <p>Mr Biggin has not had the opportunity to respond to the list of matters detailed in paragraphs 645.1 to 645.11 nor the allegations in paragraphs 644 and 647.</p>

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
				Furthermore, CA's submissions (both original and the latest submissions) have not referred to or addressed Mr Biggin's sworn evidence that he did not know that Ms Gobbo had provided information which led to Mr Cooper's arrest, as detailed in Mr Biggin's Responsive Submissions. Accordingly, Mr Biggin is not aware of the basis upon which CA maintain that the contrary finding is open to the Commissioner. If CA submit that Mr Biggin's sworn evidence should be rejected, the basis for this submission must be identified so that Mr Biggin may respond to it prior to any adverse finding being made against him.
45.	652-653	Biggin	1, 2, 3, 4	At paragraph 652 CA make the new submission that there were issues that arose during the use and management of Ms Gobbo "which indicated an awareness on the part of Mr Biggin that the administration of justice might be or had been jeopardised" and which "demanded action on his part to expose those matters to scrutiny and not to conceal them". These matters are listed at 653 and addressed in more detail in paragraphs 654 to 685. They are new submissions which are adverse to Mr Biggin and he has not had the opportunity to respond.
46.	654-659	Biggin	1, 2, 3, 4	CA's submissions about the "deficient risk assessments" are new and Mr Biggin has not had an opportunity to respond to these allegations, which invite the Commissioner to make adverse comments or findings about Mr Biggin.
47.	660-677	Biggin	1, 2, 3, 4	This section contains new allegations about the 24 July 2007 meeting and the "context" now said to be relevant to the Commissioner's assessment of what occurred at the meeting. While some allegations about this meeting were made in Counsel Assisting's original submissions, which Mr Biggin responded to, additional new allegations are now made that Mr Biggin has not had an opportunity to respond to, including allegations concerning Ms Gobbo's potential use as a witness against Mr Karam. Mr Biggin has never been asked about, nor been provided with an opportunity to respond to, allegations concerning Ms Gobbo's potential use as a witness against Mr Karam.

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
48.	678-680	Biggin	1, 4	Counsel Assisting link the 24 September 2007 meeting to the earlier meetings on 24 July 2007. Mr Biggin has not had an opportunity to respond to submissions about the alleged relevance of this meeting to the meeting on 24 July 2007 about which adverse findings are sought against Mr Biggin.
49.	689	Rowe	2	<p>CA submit that there was a significant change in Mr Rowe's demeanour on his second appearance before the Commission. CA state, as fact, this was because he had "clearly reflected upon the implications of Ms Gobbo's use as a human source by Victoria Police, including its potential effect upon the justice system." No evidence is identified to support this submission.</p> <p>This is a newly raised submission and factual finding concerning Mr Rowe's demeanour and the attributed reason for it. CA proposed no findings about Mr Rowe's demeanour or the reasons for it in their original submissions.</p>
50.	692	Rowe	1	<p>CA submit that "Mr Rowe, like others, seemingly became inured to the notion that any potential risks to the administration of justice should be secondary to the concealment of Ms Gobbo's role as a human source, even if it is accepted by the Commissioner that the concealment was motivated by concern for Ms Gobbo's safety".</p> <p>CA appear to accept the premise of Mr Rowe's submission that disclosure failures were due to a concern for Ms Gobbo's safety (see Rowe [58.74]).</p> <p>However, CA have now reframed their submission to allege that, accepting there was some safety concern, there was a deliberate choice to ignore potential risks to the administration of justice or to subordinate them to that safety concern. This is a new and materially different submission that Mr Rowe must be given an opportunity to respond to.</p>

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
51.	697-698	Rowe	4	<p>CA allege that Mr Rowe did understand the relevant conflict of interest but overlooked or ignored it because he prioritised fighting crime or because of a “lack of thought or concern for the rights of the clients Ms Gobbo continued to represent”.</p> <p>CA’s submission previously identified that Mr Rowe “well understood” issues of conflict as it was “implicit given [his] training, role and seniority” (CA Submissions at [1343.2]). CA now seek to rely upon a string of seven assertions said to be drawn from the evidence, but for which only one evidence reference is supplied.</p> <p>Mr Rowe must be given an opportunity to critically assess and properly respond to the evidence now said to be relevant. This is particularly so where CA’s proposed finding about knowledge of conflict is at a specific point in time (16 September 2005), but CA rely on evidence that covered matters that Mr Rowe “became aware” of long time after September 2005: see T3307.39-47.</p>
52.	701	Rowe Others	1	<p>CA suggest that the decision to refer Ms Gobbo to the SDU was taken in part so that MDID members would not have to engage in “subterfuge” to conceal from Tony Mokbel the fact that Ms Gobbo was supplying information. The allegation is made that “risk all but disappeared if the SDU became the intermediary for the information”. This new allegation is seemingly not only made against Mr Rowe, but also “those senior” to him.</p> <p>In essence, CA now allege dishonest intent in the decision to refer Ms Gobbo to be assessed for management by the SDU.</p> <p>This is an entirely new submission that was never put to Mr Rowe, either in evidence or in CA’s submissions. CA have identified no basis in the evidence to support the submission and identified no occasion on which this theory was put to any other witnesses.</p>
53.	706-707	Rowe	2	<p>CA refer to a meeting between SDU members and Purana investigators on 29 June 2007 where it was agreed that references to Ms Gobbo would be redacted from diary notes. At paragraph 707, CA state it is “open to conclude that Mr Rowe would have been aware that</p>

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
				<p>the plan involved a deliberate subterfuge to avoid disclosing information to the court, contrary to disclosure obligations on the part of police investigators.”</p> <p>CA propose an entirely new finding that is extremely serious. In essence they allege that Mr Rowe was part of a deliberate plan to knowingly and dishonestly withhold material from the Court.</p> <p>The fact of the 29 June 2007 meeting was recorded in Counsel Assisting’s original submissions at [2737]-[2738]. Mr Rowe’s evidence about this meeting is set out in [2740]. However, CA previously made no allegations against Mr Rowe concerning this meeting. CA did not previously make any allegations that Mr Rowe appreciated this was a “deliberate subterfuge”. Nor was it put to Mr Rowe during his evidence that what occurred at this meeting was anything like a “deliberate subterfuge”.</p>
54.	715-716	Rowe	1	<p>These paragraphs address Mr Bickley’s second arrest on 13 June 2006, when Mr Bickley contacted Ms Gobbo in circumstances where the SDU had told Purana investigators that Ms Gobbo would be unavailable. In the latest submissions, CA appear to accept that the SDU had failed to tell Mr Rowe or other investigators that they had arranged with Ms Gobbo to speak with Mr Bickley by phone.</p> <p>However, CA at paragraph 715 now identify a new criticism of Mr Rowe – namely, that he should have queried the SDU as to why Ms Gobbo had answered the call when she should have been unavailable. Mr Rowe has not had any opportunity to respond to this newly put allegation.</p>
55.	718-725	Rowe	1, 2 and 4	<p>In paragraphs 718 to 725, CA address the circumstances surrounding a meeting on 14 March 2007 with DPP Paul Coghlan QC and a solicitor from the OPP concerning Mr Bickley that Mr Rowe attended with Mr Flynn.</p> <p>At paragraph 718, CA accept that Mr Rowe appropriately followed up with the OPP after the meeting to keep Ms Gobbo from acting for Mr Bickley.</p>

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
				<p>However, in the paragraphs that follow, CA seek new factual findings, make newly framed submissions, and seek to identify factual matters newly said to be relevant. The separate proposed factual findings and submissions are addressed below.</p>
56.	720-721	Rowe	2	<p>At paragraphs 719-721, CA pick up the language of Mr Rowe's email to the OPP solicitor as the basis for a new proposed factual finding that there were multiple reasons why Ms Gobbo should not act for Mr Bickley.</p> <p>This is a new submission and a new proposed finding. CA did not refer to Mr Rowe's email in their original submissions, nor did they seek anything like the finding now sought.</p> <p>As a matter of substance, this submission misconstrues Mr Rowe's email. The reference to "only reason" is not a reference to the only reason why a conflict was raised, as CA's new submission assumes. Rather, the email as a whole indicates that Mr Rowe was seeking to understand whether the mechanisms available to address Ms Gobbo's conflict would be effective in circumstances where Mr Bickley was insisting on wanting to use Ms Gobbo.</p>
57.	722	Rowe	2 and 4	<p>Paragraph 722 raises a string of new criticisms – described as "other concerning issues" – about Mr Rowe's conduct at or following the meeting with the DPP. These "other concerning issues" are based on newly identified evidence now said to be relevant.</p> <p>Mr Rowe must have an opportunity to critically assess and properly respond to evidence now said to be relevant. This is particularly so where there are obvious substantive errors in CA's new factual assertions.</p> <p>For example, in paragraph 722.1, CA assert that the solicitor from the OPP first raised Ms Gobbo's conflict. However, this is directly contrary to CA's own original submission at paragraph 2626, where it is recorded that the solicitor from the OPP "drafted a memorandum to Mr Coghlan QC in advance of the meeting, advising that <i>Purana Taskforce members had requested the conference for advice</i> in relation to the presentment, sentencing instructions and a 'conflict of interest'."</p>

NO.	PARAGRAPH	MEMBER	CATEGORY	COMMENT
58.	723-724	Rowe	2	<p>CA submit:</p> <ul style="list-style-type: none"> <li>• in paragraph 723, that Mr Rowe failed to take appropriate steps given what had occurred at the 14 March 2007 meeting; and</li> <li>• in paragraph 724, that the Commissioner should reject Mr Rowe's evidence about having confidence in his superiors and the SDU in dealing with issues of conflict concerning Milad Mokbel.</li> </ul> <p>Both of these submissions are entirely new. At paragraph 2671 of their original submissions, CA refer directly both to Mr Rowe's evidence that he had confidence in those above him and in the SDU in dealing with issues related to Milad Mokbel. In their original submissions, CA made no comment whatsoever on Mr Rowe's evidence and made no submission that there should be an adverse finding that he failed to act appropriately or that his evidence on this topic should be rejected.</p> <p>In those circumstances, Mr Rowe must have an opportunity to respond to these newly put allegations.</p>
59.	725	Rowe	2	<p>CA conclude with an observation that Mr Rowe and others were content to deal with Ms Gobbo as Milad Mokbel's lawyer because it was "in circumstances where it would not be apparent to others, such as the DPP, who would have taken steps to address the conflict of interest."</p> <p>This paragraph involves an entirely new and very serious proposed finding. In essence, CA are alleging that Mr Rowe and unidentified others knew the DPP would look poorly on Ms Gobbo's conflict but considered in a calculated fashion that the circumstances were such that he and others could safely conceal that fact.</p> <p>Mr Rowe must have an opportunity to address this newly introduced and serious allegation. This is particularly so where CA did not put this matter to Mr Rowe, either in evidence or in submissions, and where CA identify no instance where their proposed finding was put to any other witness.</p>

J. Attachment Two: Statement of AC Casey  
dated 15 August 2020

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## Royal Commission into the Management of Police Informants

### Statement of Assistant Commissioner Kevin Casey

#### A. Introduction

1. My name is Kevin Casey. I am an Assistant Commissioner of Victoria Police.
2. I graduated from the Victoria Police Academy in 1978 and have performed duties across a range of work locations since then. A summary of the work locations in the following chronological order and approximate dates includes:
  - (a) 1978 - Administrative roles, general duties;
  - (b) 1983 - Appointed to Criminal Investigations Branch as an investigator;
  - (c) 1985 - Temporary assignment to the Stolen Motor Vehicle Squad;
  - (d) 1987 - Appointed to the Homicide Squad;
  - (e) 1990 - Promoted to sergeant - general duties;
  - (f) 1991 - Temporary assignment to the Spectrum Task Force;
  - (g) 1993 - Appointed to the Homicide Squad;
  - (h) 1994 - Appointed to the Detective Training School (**DTS**) as an instructor;
  - (i) 1996 - Promoted to senior sergeant in charge of Intelligence Analysis Course;
  - (j) 1998 - Temporary assignment to a corporate role at Training Department Headquarters;
  - (k) 2000 - Promoted to Inspector at the Ethical Standards Department – Staff Officer;
  - (l) 2002 - Appointed to Maribyrnong Police Service Area as Local Area Commander;
  - (m) 2004 - Promoted to superintendent in charge of the Community and Cultural Division;
  - (n) 2007 - Appointed to Road Policing Headquarters;
  - (o) 2010 - Appointed to Divisional Commander (Pahran); and
  - (p) 2013 - Promoted to Assistant Commissioner.

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**Purpose of statement**

3. I make this statement to the Royal Commission into the Management of Police Informants on behalf of Victoria Police.
4. This statement is directed to the training that members of Victoria Police received about:
  - (a) the process of taking statements from an accused;
  - (b) conflicts of interest;
  - (c) legal professional privilege; and
  - (d) the obligation of disclosure to the defence, including the process for making claims of public interest immunity (PII).
5. In preparing this statement, I have:
  - (a) read the statement of Wendy Steendam dated 16 April 2020; and
  - (b) had regard to, and utilised relevant sections of, a statement I made to the Independent Broad-Based Anti-Corruption Commission for the purposes of Operation Gloucester (the **IBAC Statement**).
6. For the purpose of preparing the IBAC Statement, I reviewed:
  - (a) six volumes of Detective Training School Course notes from course No. 127 in 1983 (**1983 DTS Notes**);
  - (b) several volumes of course notes from 1996 (the **1996 DTS Notes**); and
  - (c) course material for police recruits at the Victoria Police Academy as at 30 July 1991 (**1991 Academy Course Material**).

**Current role**

7. I am currently the Assistant Commissioner in charge of the Victoria Police People Development Command (**PDC**) based at the Glen Waverly Police Academy. I have held this position since August 2013.
8. PDC, as it is known today, originated as a formal Department/Command in 1996 and today is structured as a School of Policing with four delivery divisions which comprise a range of centres of learning as follows:
  - (a) Foundation Division: Recruit Training, Protective Services Officer Training and Policy Custody Officer Training;
  - (b) Specialist Programs Division: Investigation Training, Promotional Programs, Incident & Emergency Management, Family Violence and Intelligence and Road Policing Investigations;
  - (c) Operational Safety Division: Operational Safety Training, Physical Training and Driver Training; and

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- (d) Leadership & Career Development Division: Leadership Development, Career Development Leadership Capability Uplift and Respectful Workplaces Unit (Gender Equality).
- 9. Victoria Police became a Registered Training Organisation (RTO) in July 1997 and all members completing accredited courses have nationally recognised qualifications. Registration under the Victorian Registration and Qualifications Authority requires an RTO to ensure that, amongst other matters, educators are qualified trainers and assessors and that accredited training programs are developed to meet nationally agreed competency standards. Victoria Police is therefore required to have systematic, end to end processes in place to ensure quality training is delivered to all learners and continuously improved.
- 10. The qualifications that can be awarded through Victoria Police as an RTO include diplomas, advanced diplomas and graduate certificates. A Statement of Attainment can also be awarded for short courses based on units of competency. In June 1998, the first Diploma of Police for recruit training was added to the scope of registration — the Diploma of Public Safety (Policing). Since this time, there have been several versions of the Diploma of Policing. In 2015, Policing attained its own national training package, developed for police by police under the auspices of the Australian & New Zealand Police Advisory Agency.
- 11. The various courses now offered by PDC are supported by a Quality Education Division comprising Victorian Public Servant Education specialists who support the scoping, design and development of training programs. Generally, all programs delivered by PDC are either initially scoped or redesigned as a result of job role analysis, training needs analysis and training gap analysis.

## **B. Training and curricula**

### ***Identifying training curricula for the period from the late 1970s to the late 2000s***

- 12. On 29 February 2019, I made the IBAC Statement for the purposes of Operation Gloucester. In the course of preparing that statement, I caused inquiries to be undertaken about the curriculum for topics relevant to IBAC's investigation.
- 13. While my inquiries were directed to three particular topics, on the basis of those inquiries, I make the following observations about access to training material more generally:
  - (a) The task to locate historical training material prior to 1998 has proven difficult. Until Victoria Police became an RTO in 1997, there was no archive system for curricula. Prior to becoming an RTO, there would have been no external requirement to retain curriculum or training records and enquiries reveal that there was no robust system in place. Since 1997, Victoria Police curricula, and modern teaching practices, identify a range of learning outcomes to be achieved during training, allowing a degree of certainty as to the material covered in training. However, this was not the case prior to Victoria Police becoming a registered training organisation, meaning that even if old curricula

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are found, there is no way to determine exactly what was covered and taught in which course.

- (b) While all courses had presenter notes, these were not archived by the program owners for each course. The originals would be adjusted for improvements over time, but document dates were not amended, and version control was rarely applied.
- (c) Hard copies of previously published study and reference guides have been retained and archived. These guides were provided to members to assist them to study for their promotional exams. The study guides are the most current version of 'curriculum' available for each year. Having located 'old curricula', there is no certainty that the date on the documents reflect the actual period that the training was delivered.

***Recruit training***

- 14. In the period between the late 1970s and the late 2000s (the **Relevant Period**), the overwhelming majority of police recruits were young men. The number of female recruits increased steadily over time. As at July 2020, 28.75% of Victoria Police employees were female.
- 15. During the Relevant Period, the vast majority of recruits were young, with many starting at the Academy prior to completing their schooling, immediately after completing school or within several years of doing so.
- 16. On the basis of my experience, I make the following general observations about the Victoria Police Academy training for recruits in the Relevant Period:
  - (a) The length of Academy training has varied over time, from about 20 weeks in the 1970s through to the 1990s, to the current 31 weeks;
  - (b) The Academy is a foundational training program, and its objective is to train competent general duties police officers who are equipped to function as front line police officers;
  - (c) Academy training included a combination of class-room based theory and practical and physical training;
  - (d) Academy training covered a large degree of the knowledge needed by junior officers (which I describe here as the "essential knowledge" material) to be able to capably perform operational duties post-graduation — this material covered the common law, and later legislative rights, duties and obligations of general duties police officers (subject to the matters outlined below) and gave recruits an understanding of the breadth of practical policing operations that a newly appointed constable would be expected to deal with; and
  - (e) Academy training did not focus on specialist areas of policing, such as human source management.
- 17. To the best of my recollection, the curriculum for Academy training in the Relevant Period did not include any content on:

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- (a) lawyers' professional obligations;
  - (b) identifying and responding to lawyers' conflicts of interest;
  - (c) the management of human sources; and
  - (d) the obligation of disclosure to the defence (which, prior to 1989 was based on the common law, and, from 1989, was found in Schedule 5 to the *Magistrates' Court Act 1986* (Vic)), or how to make public interest immunity (PII) claims.
18. Concepts of this kind were not included in basic recruit training. Frontline officers did not typically deal with situations that required them to have this knowledge.
19. Recruits received training about the right of an accused person to engage a lawyer and the right to engage the lawyer of their choice and, in that context, are likely to have dealt with legal professional privilege briefly and in general terms only (emphasising the right of a suspect to communicate privately with their lawyer).
20. After graduation, probationary constables were deployed, usually to an operational police station, undertaking general duties policing. Some probationary constables were assigned to non-operational roles, such as in the Criminal Records Section. Probation generally was twelve months, following which the probationary constable became a constable and continued with general duties policing. Officers generally remained on general duties for between two and four years.
21. General duties officers:
- (a) investigated local crime, including execution of low-level search warrants;
  - (b) performed watch house duties, managing prisoners and police station reception counter duties;
  - (c) undertook files and enquiry duties, such as serving subpoenas and executing warrants for outstanding fines;
  - (d) undertook traffic control or enforcement duties;
  - (e) prevented anti-social behaviour (by, for example, providing a presence in public spaces and conducting foot and vehicle patrols);
  - (f) dealt with community safety concerns, such as neighbourhood disputes, domestic violence, missing persons, public drunkenness and community reports of suspicious behaviour;
  - (g) undertook community engagement work (including by becoming familiar with the local neighbourhood and environment, engaging with schools and community groups, developing relationships with known offenders, persons of interest and local identities);
  - (h) were first responders to emergency incidents in their area;
  - (i) attended and investigated vehicle crashes; and

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- (j) attended court to give evidence.
- 22. A common task for probationary constables deployed to stations near major metropolitan business centres was to conduct foot patrols. It was commonplace for new constables to undertake solo foot patrols through central business districts.
- 23. The purpose of this deployment was to build on the foundation training received at the Academy. A significant portion of a probationary constable's training occurred by way of on the job experience, which contextualised the training and refined the police craft the probationary constable had learned at the Academy as a recruit. In this period, while there were policies and procedures in place to which officers could refer, probationary constables principally learned by watching, and taking guidance from, those more senior to them.
- 24. While probationary constables were under the ultimate supervision of their station sergeant, they could be required to exercise substantial autonomy in decision-making.
- 25. While probationary constables could act autonomously with some experience, a consequence of this work environment was that probationary constables were nearly always matched in their formative careers with a more senior member who guided their decision making directly. Probationary constables developed their knowledge and skills and refined their approach and practices based on the guidance of their station sergeant and their station colleagues. This form of learning built on the institutional education and training.

***Training after the academy***

- 26. After the Academy, the most common formal training environments were:
  - (a) retention; and
  - (b) Detective Training School (Investigator Training).

***Retention***

- 27. After 12 months, probationary constables undertook a further 2 weeks of training.
- 28. This training segment was primarily focussed on law, covering the basic legislation that officers operate under, including:
  - (a) refresher training in all of the foundational information that had been taught to recruits at the Academy, including to reinforce knowledge of:
    - (i) powers of arrest; and
    - (ii) points of proof;
  - (b) review, for learning purposes, of particular situations, incidents or investigations that probationary constables had been involved in over the previous 12 months; and
  - (c) an update on legislative and policy changes from the previous 12 months.
- 29. I am confident that, in the Relevant Period, this training did not include content about:

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- (a) lawyers' professional obligations;
- (b) identifying and responding to lawyers' conflicts of interest;
- (c) the management of human sources; and
- (d) the obligation of disclosure to the defence or how to make PII claims.

### ***Detective Training School***

#### My personal experience of Detective (Investigator) Training as a participant in 1983

- 30. In this part of my statement, I describe the training I received at DTS and which I later delivered as an instructor at DTS.
- 31. The 1983 DTS course was 12 weeks in duration, predominately classroom teacher led with some field trips and three outdoor practical exercises. One of those exercises was what I would describe as a 'command and control' exercise, but all involved scenario training for initial action at a crime scene.
- 32. To my knowledge, there are no course instructor lesson guides, plans, teaching aides or session timetables available. The notes I have accessed have particular sections and paragraphs highlighted which I would describe as the 'essential knowledge' information or in current parlance, 'learning outcomes' that the instructors highlighted as being important.
- 33. Whilst the notes are prescriptive, as previously stated, the training in 1983 was teacher led. Given that there are no session plans available, the context, clarification, explanation and examples being drawn out in the various lectures between the directing staff and the course participants is not recorded.

#### My personal experience of DTS as an instructor in 1996

- 34. The 1996 DTS course was also 12 weeks in duration, predominately classroom teacher led with some field trips. However, there were a number of practical exercises threaded throughout the course linked to initial action at crime scenes, interviewing witnesses, identification parades, nexus evidence, avenues of enquiry and search warrants. My recollection is that the practical exercises involved witness interviews and verbal interview skills.
- 35. To my knowledge, there are no course instructor lesson guides, plans, teaching aides or session timetables available. At the time, the instructors delivered their respective allocated sessions using the particular course notes personally marked up and teaching aides were developed by each instructor also. Similar to my notes from 1983, in 1996 the instructor marked up their personal copy and focussed on that as the desired learning outcomes for the subject.

### **The Victoria Police Manual**

- 36. The Victoria Police Manual (**VPM**) has existed in various forms since the 1970s.
- 37. In the 1970s it was principally a human resources manual, addressing items such as dress standards, compensatory incidental entitlements and other employment entitlements and

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discipline standards. In the 1980s, it began to include policies and procedures, but it was not until the late 1990s that it came to be a central repository of operational information.

38. In its modern form, the VPM contains the published policies and procedures of Victoria Police. The VPM sets the behavioural, operational and administrative standards and guidelines for the organisation and is divided into Policy Rules, which provide mandatory accountabilities, and supporting Procedures and Guidelines.
39. Annexed hereto and marked **KC-1** is the index to the 1981 version of the VPM, together with the section of that VPM addressing 'Confidentiality of information received'. That section is reproduced here in full:

**CONFIDENTIALITY OF INFORMATION RECEIVED**

- 4.69 A member shall maintain the utmost confidentiality in relation to the identity of his informants in the case of any information he may receive about the identity or location of criminal offenders.
- 4.70 A member shall not disclose the names of his informants in written reports, unless especially directed to do so by an Officer.
- 4.71 Where it is necessary, a member may verbally inform his superiors of the names of his informants, and he shall disclose the names of his informants to an Officer when directed to do so.
- 4.72 If in any criminal proceedings a member is asked questions designed to reveal the identity of an informant, he shall request the Court to direct whether or not the question should be answered on the grounds that it is contrary to public policy and not in the interest of public safety that such a disclosure should be made. A member shall obey the direction of any Court in such a case.

40. I have reviewed the index to the 1981 VPM. It does not include information (and certainly no detailed information) about:
- (a) lawyers' professional obligations;
  - (b) identifying and responding to lawyers' conflicts of interest;
  - (c) the management of human sources; and
  - (d) the obligation of disclosure to the defence or how to make PII claims.

41. To the best of my recollection, this was the position throughout the Relevant Period.

**C. The Four Key Areas**

42. In this section, I set out what I have been able to identify from the material described above, and my personal experience, in relation to each of the four training areas identified above.
43. This statement does not address training in specialist areas of Victoria Police, such as human source management or the prosecutors' course.

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***Conflicts of interest and legal practitioners' ethical obligations***

44. To the best of my knowledge, Victoria Police did not, in the Relevant Period (or indeed thereafter) deliver training at the Academy or Detective Training School about the professional and ethical obligations of legal practitioners.
45. I am not aware that Victoria Police has ever delivered training to its officers about how to identify, and respond to, legal practitioners' conflicts of interest.
46. I have not identified any material that expressly deals with conflicts of interest for the Relevant Period.
47. However, it is likely that conflicts of interests were discussed in the context of a policing role, to provide guidance to officers on matters like investigating friends or family members. It is unlikely that the language "conflict of interest" was used or that the concept itself was taught. My best recollection is that there were rules and standards of behaviour that officers were required to follow that were directed to subject matters that would today be described as a conflict of interest for the police member.
48. During the Relevant Period, Victoria Police began to codify its policies on police member conflicts of interest. One of the early steps in this process was the introduction of a requirement for officers to report disclosable associations. That obligation required officers to disclose any association with a person or persons who had committed or was suspected of committing a serious criminal offence.
49. This process included requirements for officers to report and seek approval to associate with such persons known to them and, a separate policy outlining obligations to seek approval to engage in outside interests or secondary employment or voluntary work.
50. Currently, the VPM contains a detailed description of responsibilities and procedures in relation to conflicts of interest in a policing context. However, during the Relevant Period, there was an expectation that officers would discuss matters such as those identified above with their superior officers and other officers to obtain appropriate guidance.
51. In the mid-1990s, Victoria Police introduced a simple, ethical framework namely: the Scrutiny, Ethical, Lawful, Fair, framework (**SELF Test**). The application of this test was the principal means of addressing police member conflicts of interest.
52. The SELF Test was intended to overlay all police decision-making.

***Legal professional privilege; right to a lawyer of choice***

53. I have not identified any course content from the Academy from the Relevant Period expressly addressing legal professional privilege (**LPP**). It is possible that LPP was mentioned in the Academy training, but it is unlikely to have been covered in any detail. It is possible that specialised courses offered outside of PDC may have touched on this area, but that is not within my knowledge.

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54. I understand that LPP was introduced at a basic level at the DTS around 2000. I have identified a module from the 2000 DTS curriculum, headed "Legal Professional Privilege".<sup>1</sup> That module addresses the basic principles of LPP. Annexed hereto and marked **KC-2** is a copy of those notes.
55. At the Academy and in DTS, during the Relevant Period, Victoria Police emphasised the importance of ensuring that suspects were lawfully arrested. This training emphasised:
- (a) the right of an accused person to a lawyer of their choice; and
  - (b) the right of an accused person to take advice from their lawyer of choice privately.
56. Subsequently, in 1988, these matters were formalised in legislation with the introduction of section 464 of the *Crimes Act 1958* (Vic) and its related provisions.<sup>2</sup> From that time, the training at the Academy and in DTS related to those specific provisions (and the further introduced provisions).

**Human source management**

57. As with many aspects of policing, the management of human sources has developed over time. Prior to the 1990s, the management of human sources was primarily undertaken at a local level.
58. Human source management did not form part of the Academy curriculum during the Relevant Period.
59. Managing human sources was something learned on the job from an experienced sergeant (usually with a Detective background) or from advice sought from serving Detectives. My recollection was that officers were taught that the 'golden rule' of police informer management (now referred to as source management) is to never reveal their identity. This feature of source management has always been heavily emphasised by Victoria Police.
60. Basic information about the management of police informers was taught at the DTS from at least 1983. Annexed hereto and marked **KC-3** is a copy of an index to a set of 1983 DTS Notes, which includes a reference to 'informers' in Folder Two.
61. I am not aware of any training provided by Victoria Police during the Relevant Period about identifying and responding to conflicts of interest, or LPP, in the context of human sources.
62. Over time, there was a gradual process of formalising and standardising Victoria Police practices for the management of human sources. In its infancy, this involved officers being required to formally record their human source relationships, with such details stored in a secure safe in the office of the relevant superior officer. Police officers were usually required to record all interactions with a police informer in their official police diary and to notify a superior officer of any such contacts. Later, Victoria Police developed the Human Source Management Unit

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<sup>1</sup> Victoria Police Crime Courses Unit – Legal Professional Privilege dated 9 October 2000 (VPL.0098.0036.0201).

<sup>2</sup> *Crimes (Custody and Investigation) Act 1988* (Vic).

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(initially called the Informer Management Unit) and the SDU. Information about those units is outside my knowledge.

63. I am not able to comment on the specialised training that members of the source development unit and its predecessors received.

***The obligation of disclosure, including claims for PII***

64. Prior to 1986, the disclosure duties and obligations of police officers were governed by the common law.
65. From 1986 until 2009, duties and obligations were also contained in the *Magistrates' Court Act 1986 (Vic)*, Schedule 5. Since 2009, duties and obligations are also found in the *Criminal Procedure Act 2009 (Vic)*.
66. To the best of my knowledge, no training on the obligation of disclosure was delivered at either the Academy or DTS prior to 1986.
67. I am not aware that Victoria Police has conducted any specific training in the context of recruit and DTS on how to make a claim for PII. I am not aware of any Victoria Police policy or procedure that prescribes how such claims are to be made, or any process or procedure for the manner and form in which material over which such a claim is to be made is presented to the relevant court in order for a ruling on such a claim to be made.
68. This accords with my personal recollection of my training.
69. For the purpose of preparing my IBAC Statement, I reviewed the 1983 DTS Course Notes and my 1996 DTS Course Notes for material about the obligation to provide the defendant / defence counsel with material obtained during the investigation. Those notes did not contain any material about the obligation of disclosure.
70. The adequacy of Victoria Police's disclosure practices was discussed in the IBAC Operation Gloucester Special Report. I refer the Commissioner to sections 3.6 (pages 59–61) and 4.2 (pages 68–72).

**Taking statements**

71. At both the Academy and in DTS, officers received training about taking witness statements.
72. The purpose of the training was to equip officers with the skills necessary to take a probative, relevant, accurate and detailed statement from a witness. As such, the training was focussed on how to engage with the witness and how to best capture the evidence.
73. I have identified that the 1991 Academy Materials included a module titled "Witness Statements". Annexed to this statement and marked **KC-4** is a copy of that module.
74. That module contains the following material:
- (a) purpose of statements;
  - (b) content of statements;

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- (c) procedure when taking a witness statement;
  - (d) distribution of copies;
  - (e) completion of statement;
  - (f) jurat;
  - (g) statements from females in respect to sex offences; and
  - (h) negative statements.
75. The 1983 DTS Notes include a module called "Interviewing Witnesses". Annexed hereto and marked **KC-5** is a copy of that module.
76. During the Relevant Period, there was not, to my knowledge, a Victoria Police policy or procedure that:
- (a) concerned draft statements;
  - (b) directed members to retain each completed draft statement;
  - (c) directed members to keep a clear record of what changes were made, when and by whom to each completed draft statement; or
  - (d) identified the circumstances in which completed draft statements, and any record of changes, were required to be disclosed.
77. To the best of my knowledge there was no training content at the Academy or at DTS about the matters in the preceding paragraph. Victoria Police has taken steps to address this. I understand that these steps are addressed in other evidence before the Commission.
78. To my knowledge, and in my experience, there is no practice across Victoria Police of retaining draft statements (which, in the present environment, are almost always drafted on a computer) with only the final signed document/exhibit, or final unsigned draft, kept. To the best of my knowledge, Victoria Police has never had any policy or procedure governing version control processes.
79. Prior to computer use, when statements were hand-written or prepared on a typewriter, the practice with "drafts" was different depending on whether the statement was of a witness, or an informant.
80. For witnesses, it was usual for amendments to be handwritten on to the statement. As such, the only "draft" was the original typed version – which was usually also the final version, containing any handwritten amendments.
81. The position was slightly different for informant statements prepared by general duties police officers. It was usual for the original draft of the statement to be reviewed by a supervising sub-officer. The superior officer would often mark notes on the original, for example, by directing the informant to expand on detail or on the known available facts, so that the statement could be accurately completed. The officer who drafted the statement would then have to prepare a

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new statement, addressing the issues identified by the superior officers. The revised draft, along with the marked up original, was then presented to the supervising officer for review. Thereafter, the draft would be discarded.

82. In both cases, if further detail was required or obtained after a statement was signed, a supplementary statement was expected to be taken.
83. The adequacy of Victoria Police's statement practices was discussed in the IBAC Operation Gloucester Special Report. I refer the Commissioner to sections 3.1–3.2 (pages 27–56).

#### **D. Aspects of policing**

84. In this section of my statement, I address several aspects of policing that I believe are relevant to the terms of reference for the Commission. They applied throughout the Relevant Period.

##### ***Rank Structure***

85. The rank structure of sworn members was and continues to be divided into non-commissioned and commissioned ranks.
86. The non-commissioned ranks from lowest to highest are: Constable, Senior Constable, Leading Senior Constable, Sergeant and Senior Sergeant.
87. An officer moves from the non-commissioned ranks to the commissioned ranks when they are promoted from Senior Sergeant to Inspector. The commissioned ranks from lowest to highest are: Inspector, Superintendent, Commander, Assistant Commissioner, Deputy Commissioner and Chief Commissioner.
88. A member's rank includes the term 'Detective' if they have completed DTS, they have been gazetted as a detective and they are assigned to a role that involves criminal investigation work or overseeing the work of criminal investigators. Ranks of Commander and above did not take the nominal designation of Detective.
89. As part of the promotion process, members were and continue to be required to temporarily act in roles held by those of a higher rank. When a member is acting in a more senior rank, they are referred to as holding that senior rank in an acting capacity.
90. Acting roles were and are part of the rank structure because it is always critical to establish a clear chain of command by putting one person in charge, even if a superior officer is absent for only a short period. With one person identified in that acting role, those below know who is in charge and who has some delegated approval authority.
91. Acting roles are also an important part of the promotion process because they help members to learn and understand what is involved in the more senior rank that they might be promoted into.

##### ***Chain of command***

92. Victoria Police operated, and continues to operate, by a chain of command.
93. Save for the Chief Commissioner, every officer in the chain of command leads and is led.

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94. The chain of command balances two central duties:
- (a) an officer's duty to carry out their own duties autonomously according to their own education, training and experience; and
  - (b) an officer's duty to act according to the lawful direction of their superior officer.
95. This can be seen in two key elements of the chain of command within Victoria Police.
96. First, the most senior person in a situation or unit usually takes charge of the situation or unit unless or until someone more senior, or more specialised, takes over responsibility.
97. Unless a matter is reported up to a superior officer, the officer has the autonomy and responsibility to deal with that matter and must exercise their independent decision-making and professional judgment in doing so.
98. "Reporting up" is an important part of the rank structure. Reporting up refers to the process of informing a superior (or specialist) officer of an emergent issue, event or risk. Not every matter can or needs to be reported up.
99. As policing often involves a dynamic environment, there are generally no prescriptive rules around when officers should report matters up, save for matters that must be reported up in accordance with Victoria Police policy. Otherwise, the decision to report up (or not) is one for the individual officer. Sometimes, though not always, supervising officers will give guidance to officers about what matters they expect to be reported up to them.
100. Ultimately, because reporting up is, in most cases, a judgment call which relies on the experience and instinct of individual officers, there will always be circumstances where some officers do not report up a matter that other officers would have reported up, or where the superior officer would have preferred the matter to have been reported up.
101. The rank structure could not operate effectively if officers involved their superior officer in every decision they had to make. One feature of Victoria Police in the Relevant Period was an emphasis on following the chain of command. Traditionally, a member would only raise issues with their direct superior. That superior would either provide direction about the issue or elevate it either further up the chain of command or to another relevant unit. Generally though, the nature of this hierarchy meant that it was rare for a more junior officer to interact with senior officers other than their immediate supervisor.
102. While it was not the case that junior officers would blindly follow orders, communication outside the chain of command was not common. A more junior officer was expected to, and generally did, accept the direction and guidance of their superior officer, except where corruption issues were involved. In such cases, it was acceptable for a more junior officer to step outside the chain of command. In some cases, a more junior officer might have had access to an officer in a specialised area of Victoria Police that they could approach for advice or guidance. However, failing to follow the direction of an officer's immediate superior was generally inappropriate. The practice of seeking advice from another officer at rank (called "sergeant shopping") was

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generally discouraged. In the context of junior police officers who were principally investigating summary offending, the general practice was that a junior officer would take the guidance and direction and adopt it accordingly.

103. In modern policing, the chain of command is strictly observed in the execution of operations and in emergency response situations. In a day-to-day operational context, individual officers have more freedom to communicate broadly and outside the chain of command where appropriate.
104. In the 1990s, Chief Commissioner Neil Comrie introduced Local Priority Policing. One feature of this program was that Inspectors were given increased levels of responsibility for police services aligned to Local Government Areas. Under the Local Priority Policing model, Inspectors moved from having administration functions to having management control of frontline policing operations and greater interaction with the local community. This change saw Inspectors take on greater levels of decision-making responsibility for the general duties, crime and road policing operations within their area. As such, Inspectors were expected to be the principal decision-maker for operational matters in their area.
105. From about 2003, while Christine Nixon was Chief Commissioner, communication across the organisation was further encouraged. There was a conscious effort to break down the command structure and provide pathways for communication outside of the chain of command.

***Need to know / confidentiality***

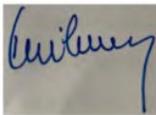
106. A third aspect of policing that is relevant to the terms of the inquiry concerns the practice of observing “need to know” information security and confidentiality.
107. The structure of Victoria Police and the Office of Constable means that officers have a high degree of autonomy and work within tightly defined organisational areas. Traditionally, at station or local detective level, where officers are dealing principally with summary offending or local crime investigations, police officers developed avenues of enquiry and consulted with other areas of Victoria Police when they needed expertise or knowledge in a particular area or sought to make connections to cross-locality offending. However, in the context of more complex, significant and sensitive investigations, which have more dedicated and specialised resources and which are staffed by officers with specialist skills, the “need to know” principle meant there was less sharing of information between work areas and specialist investigative units, particularly covert units.
108. There is a very strong culture within Victoria Police of operating on the “need to know” principle. As a matter of general practice, officers do not discuss their work or operations with other officers unless there is a need to do so. As such, while officers will share information for the purpose of seeking or receiving advice, obtaining access to specialist resources, reporting up to their superiors or directing their subordinates, there is otherwise a strong culture of confidentiality. Further, confidentiality is required by Victoria Police’s information management frameworks.

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**Availability of legal advice**

109. The fourth aspect of policing in the Relevant Period was access to legal advice.
110. In the Relevant Period, officers had access to legal advice for court based matters, including PII claims and the like. This advice was obtained through the relevant police prosecutor or external legal advisers, depending on the size and complexity of the case.
111. I expect that the most senior members of Victoria Police could also seek access to legal advice on request if it were required.
112. However, it was very rare for officers to access legal advice about operational matters. That was because, first, officers used their knowledge, skills and experience to make decisions about operational matters, second, because the practice was to brief problems and issues up to a more senior officer, and, third, because there were formalities attached to seeking advice. It was necessary for a written request for legal advice to be made, a brief prepared and advice formally commissioned. Formal processes of that kind were of little practical utility in the context of the dynamic work environment in which operations took place.
113. When the Victoria Police Legal Services Division (**LSD**) was established, it was not set up, nor utilised, as a resource for operational policing matters. The LSD provided high level formal legal advice about a range of legislative and policy matters. It also provided advice in response to a formal written request. It was not used as a resource for day to day operational policing. I am not aware of any occasion on which an officer telephoned the LSD for urgent advice about a dynamic operational policing matter.
114. Over time, certain complex investigations began to make use of embedded lawyers employed by Victoria Police. An example I am aware of is a complex fraud investigation, involving complex facts. For investigations of this nature, lawyers were sometimes embedded within the investigation team. However, this was unusual and generally reserved for complex operations.
115. It was not common practice throughout the Relevant Period for officers to phone a lawyer internally or externally to obtain legal advice.

Dated: 15 August 2020



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Assistant Commissioner Kevin Casey

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**On behalf of the following seven individuals:**

Former Detective Inspector Gavan Ryan  
Former Superintendent Tony Biggin  
Former Detective Inspector Jim O'Brien  
Detective Sergeant Paul Rowe  
Inspector Dale Flynn  
Commander Stuart Bateson  
Inspector Mark Hatt