



**Royal Commission  
into the Management of Police Informants**

# Final Report

## Summary and Recommendations

NOVEMBER 2020

**Royal Commission  
into the Management of Police Informants**

**Final Report**  
Summary and Recommendations

**The Honourable Margaret McMurdo, AC**  
Commissioner

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*The Royal Commission into the Management of Police Informants acknowledges the traditional Aboriginal owners of country throughout Victoria. We pay our respects to them, their culture and their Elders, past, present and future, and their ancient tradition of striving for a better functioning community.*

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# Final Report Summary

## INTRODUCTION

The Victorian Government established the Royal Commission on 13 December 2018, after the High Court of Australia upheld the decisions of Victorian courts to allow the Director of Public Prosecutions (DPP) to disclose to a group of convicted persons that Victoria Police had used former defence barrister, Ms Nicola Gobbo, as a human source.

The High Court described the conduct of Ms Gobbo and Victoria Police as a corruption of the criminal justice system:

*[Ms Gobbo's] actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of [her] obligations as counsel to her clients and of [her] duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging [Ms Gobbo] to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.<sup>1</sup>*

Police are not entitled to pursue suspects at any cost—they must comply with the law and use their powers in a fair and ethical way. Additionally, lawyers cannot freely hand over information about their clients to police—if they do so, they risk breaching their professional obligations and undermining the criminal justice system.

When the State prosecutes, convicts and punishes a citizen, it uses considerable powers, including the power to deprive them of their liberty. As a check on those powers, there are well-established rules and principles, such as those now enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter), to ensure that as far as possible, criminal investigations and court processes are fair and balanced. These rules and principles apply no matter how serious the crime, and regardless of the accused person's identity.

<sup>1</sup> *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). The term 'Convicted Persons' refers to seven people who were represented by Ms Gobbo and were convicted of serious criminal offences.

The community might question the need to scrutinise and denounce seemingly effective intelligence-gathering by the police. The fact that Victoria Police was able, with Ms Gobbo's assistance, to secure convictions against people accused of committing serious violent and drug-related offences could be seen as a positive outcome for the community.

That view, while understandable, overlooks the far-reaching and detrimental consequences of the conduct of Ms Gobbo and Victoria Police. During the Commission's inquiry, two of Ms Gobbo's former clients had their convictions overturned. Both had been deprived of their liberty, spending many years in prison after unfair trials. Numerous other people are seeking to appeal their convictions. There have been many court proceedings and inquiries, at great public expense, and there are likely to be more. These events have put at risk the integrity of the criminal justice system, harmed the reputation of the legal profession, and diminished public confidence in Victoria Police.

The Commission was established to find out how and why these events occurred, and to make sure they can never happen again.

In line with this objective, the Commission recommends that the conduct of Ms Gobbo and relevant current and former Victoria Police officers be referred to a Special Investigator, to consider whether there is sufficient evidence to bring criminal charges against them, and/or disciplinary charges in the case of current Victoria Police officers. It also recommends a suite of reforms to increase accountability and transparency in Victoria Police's use and management of human sources; establish a model of independent external oversight; reinforce police disclosure obligations; and improve aspects of legal profession regulation. Finally, it proposes governance and monitoring measures to make sure that Victoria Police and other relevant agencies implement these reforms in an effective and timely way.

The Commission's recommendations aim to enable and support Victoria Police in its work to protect the community from criminal activity and protect the rights of individual citizens, while strengthening the operation of, and public confidence in, Victoria's criminal justice system.

## THE COMMISSION'S TASK

The Commission had both an investigative task and a policy reform task. Its terms of reference are set out in Box 1.

### BOX 1: THE COMMISSION'S TERMS OF REFERENCE

The Commission was appointed to inquire into and report on:

1. The number of, and extent to which, cases may have been affected by the conduct of Ms Gobbo as a human source.
2. The conduct of current and former Victoria Police officers in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source.

3. The current adequacy and effectiveness of Victoria Police's processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, including:
  - a. whether Victoria Police's practices continue to comply with the recommendations of the Kellam Report
  - b. whether the current practices of Victoria Police in relation to such sources are otherwise appropriate.
4. The current use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege, subject to section 123 of the *Inquiries Act 2014* (Vic), including:
  - a. the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of such human sources to prosecuting authorities
  - b. whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the Office of Public Prosecutions prosecutes indictable matters on behalf of the Director of Public Prosecutions, when the investigation has involved human source material.
5. Recommended measures that may be taken to address:
  - a. the use of any other human sources who are, or have been, subject to legal obligations of confidentiality or privilege and who came to the Commission's attention during the inquiry
  - b. any systemic or other failures in Victoria Police's processes for its disclosures about and recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, and in the use of such human source information in the broader criminal justice system, including how those failures may be avoided in future.
6. Any other matters necessary to satisfactorily resolve the matters set out in terms of reference 1–5.

## The scope of the inquiry

In line with its terms of reference, the Commission's inquiry focused on some specific aspects of Victoria Police's role, responsibilities and functions in the criminal justice system, including the use of human sources subject to legal obligations of confidentiality or privilege, the use of information from such sources in criminal proceedings, and how cases may have been affected by the conduct of Ms Gobbo and Victoria Police.

## What are human sources?

Also known as police ‘informants’ or ‘informers’, human sources are people registered to covertly (secretly) supply information about a crime or people involved in criminal activity to police and other law enforcement agencies, usually on an ongoing basis, with the expectation that their identity will be protected. Human sources can also be ‘tasked’; that is, given an assignment or instruction by police to gather information about criminal activity. This, combined with the covert nature of their informing, is what generally distinguishes human sources from other people who give information to police, such as witnesses or victims of crime. The information that human sources provide can be critical to the ability of police to combat serious and organised crime.

It is widely accepted that the identity of a human source must be kept confidential to protect the safety of the source and those close to them, and to make sure that people remain willing to provide information to police.

Victoria Police has produced internal guidance for its officers about the use of human sources since 1986. The current policy, the *Victoria Police Manual—Human Sources* (Human Source Policy) came into effect in May 2020 and sets out a range of requirements for managing human sources.

The police officers who act as the primary point of contact with human sources are called ‘handlers’. They are typically supervised by more senior police officers, including ‘controllers’, who are responsible for direct supervision of the handler–human source relationship.

The human source management process typically involves the following key stages or elements: assessment, registration, management, sharing of information and deactivation. These are displayed in Figure 1.

**Figure 1: Common elements of human source management**



## What are legal obligations of confidentiality or privilege?

Legal obligations of confidentiality and privilege are duties, based in law, that require people entrusted with confidential or privileged information not to disclose or disseminate that information.

Confidential information, in the context of the Commission's inquiry, is information communicated in certain professional relationships (such as lawyer–client and doctor–patient relationships). It can also be information that a person acquires in the course of their occupation or employment and that they are legally obliged to keep secret (for example, some government employees). Privileged information is confidential information that attracts a higher level of protection. A court can order disclosure of confidential information in legal proceedings, but it cannot order disclosure of privileged information unless an exception applies. Privilege only applies to certain information, such as that sometimes shared by a person with their lawyer, doctor or counsellor, or with a journalist or cleric.

Part of the Commission's role was to consider whether it was appropriate for Victoria Police to seek, acquire and use information from a human source, Ms Gobbo, who as a lawyer was legally obliged to keep that information confidential. Another part of the Commission's role was to examine Victoria Police's current processes for using and managing human sources who have legal obligations of confidentiality or privilege, or who otherwise have access to confidential or privileged information.

While it might be advantageous for police to have ready access to information that supports their investigations of criminal activity, other important and competing interests need to be considered. Permitting police to 'override' confidentiality protections enshrined in law risks interfering with a person's right to and expectations of privacy. It also risks undermining the public interest in establishing professional relationships built on trust, and jeopardising prosecutions and convictions if the access to and/or use of the information is found to be illegal or improper.

## What is disclosure in criminal proceedings?

In criminal proceedings, police and prosecuting agencies have a duty to disclose all material that is relevant, or potentially relevant, to an accused person's case. This includes material on which the prosecution intends to rely in its case against the accused person, and material that may undermine the prosecution case or help the accused person's case. The duty of disclosure is fundamental to a person's right to a fair trial.

As part of this duty, the prosecution may need to disclose to an accused person how the evidence against them was obtained. If the case against an accused person is based on information provided by a human source, however, the identity of the human source will typically not be disclosed. This is because, in court proceedings, the identity of human sources is generally protected by public interest immunity (PII).

PII is a rule of evidence and a principle under the common law where the State seeks to withhold relevant information on the basis that its production or disclosure would be contrary to the public interest. Only a court can determine PII claims, and the information will only be protected by PII if the court determines that the public interest in withholding the information (for example, to protect the identity of a human source) outweighs other public interests (for example, to provide the accused person with all evidence relevant to their case). If the court determines that the PII claim is made out, the material is not disclosed to an accused person and cannot become evidence in the case.

In the cases of Ms Gobbo's clients and other people she informed on, her status as a human source was not disclosed to the court or the accused persons at the time of their prosecutions.

In the court proceedings related to the DPP's proposed disclosure to the convicted persons represented by Ms Gobbo, the Victorian courts and the High Court concluded that it was not in the public interest to keep her identity as a human source confidential. The courts determined that, because of the egregious actions of Ms Gobbo and Victoria Police officers, the public interest in disclosing the information to the convicted persons outweighed the public interest in protecting Ms Gobbo's identity as a human source.

### What is an affected case?

To identify cases that may have been affected by Ms Gobbo's conduct as a human source, the Commission interpreted the phrase 'may have been affected' to mean that the conduct in question could have caused someone to be convicted in circumstances where there was a substantial miscarriage of justice. Circumstances that may constitute a substantial miscarriage of justice include when there has been a departure from or interference with the rules, principles or processes that underpin the integrity of the criminal justice system, and the accused person has therefore been deprived of a fair trial. Various factors—including errors or omissions in a trial or in evidence-gathering processes, failure to disclose relevant material to an accused person, or improper conduct of lawyers or police officers—can give rise to a substantial miscarriage of justice. This can occur even if the case against an accused person is considered to be a very strong one, if the process leading to the conviction was unfair.

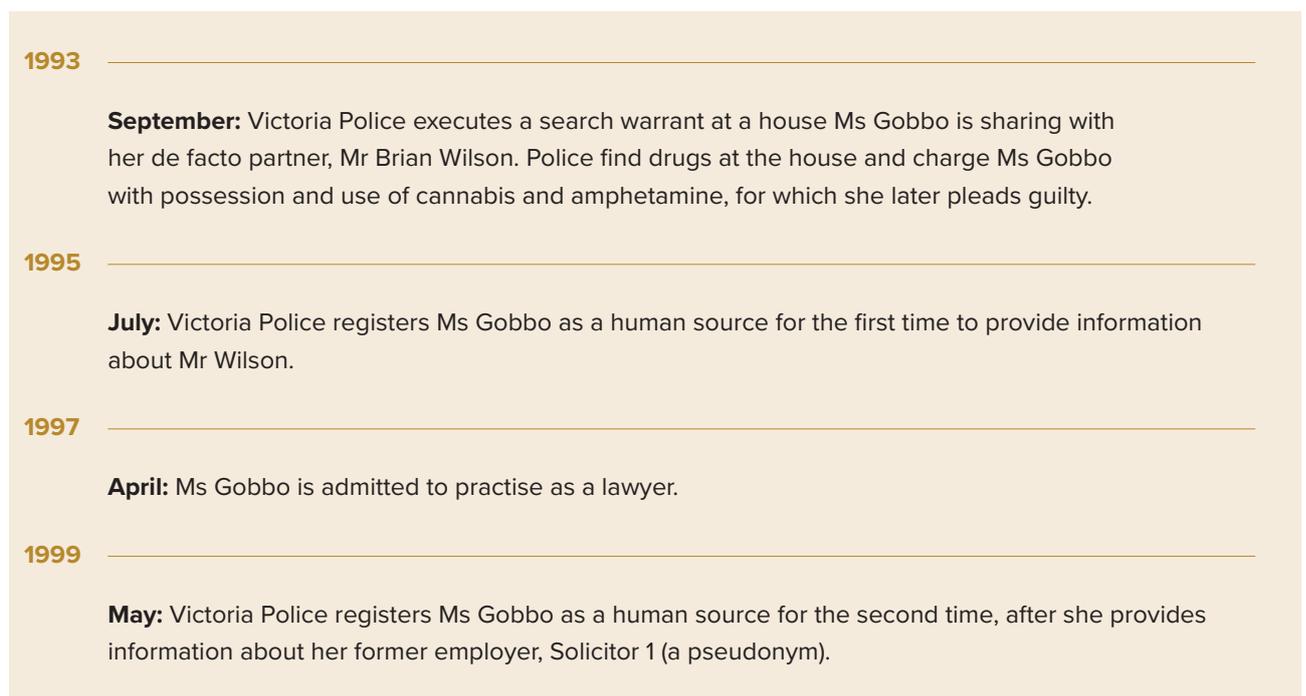
While the Commission focused on cases that resulted in convictions or findings of guilt, it is important to acknowledge that Ms Gobbo's conduct may have also affected people who were not ultimately convicted or found guilty of a crime, including those who were investigated, charged and/or prosecuted due in part to her role as a human source.

## Chronology of key events

At various times between 1993 and at least 2010, Ms Gobbo provided information to Victoria Police about her clients, their associates and other people, some of whom were involved in Melbourne's so-called 'gangland wars'.

Key events related to Ms Gobbo's relationship with Victoria Police and the establishment of the Commission are listed in Figure 2.

**Figure 2: Timeline of key events**



**2002–03**

Ms Gobbo continues to provide information to Victoria Police informally.

**2003–04**

Ms Gobbo has conversations with officers of Victoria Police's Purana Taskforce, which is investigating several murders associated with the 'gangland wars'.

**2005**

**September:** Victoria Police registers Ms Gobbo as a human source for the third time. Over the following years, she provides a significant amount of information about her clients, their associates and other people, some of whom are involved in the gangland wars.

**2009**

**January:** Ms Gobbo's role as a human source ends when Victoria Police tries to transition her to the role of a witness in the first of two high-profile police investigations.

**2010**

**April:** Ms Gobbo commences civil litigation against Victoria Police, claiming that it failed to fulfil promises made to her when she agreed to become a witness.

**2011**

**February:** Former Victoria Police officer, Mr Paul Dale, is charged with criminal offences. Ms Gobbo is to give evidence in the proceedings. Mr Dale subsequently serves a subpoena on Victoria Police seeking documents that could have revealed Ms Gobbo's status as a human source.

**October:** As a result of Mr Dale's subpoena, Victoria Police obtains legal advice. That advice triggers the first of three confidential reviews into the use of Ms Gobbo as a human source (Comrie Review).

**2012**

**July:** Former Chief Commissioner of Victoria Police, Mr Neil Comrie, AO, APM, completes a confidential report, *Victoria Police Human Source 3838: A Case Review* (Comrie Review), which examines the use of Ms Gobbo as a human source and Victoria Police's policies and practices relevant to her management.

**2014**

**March:** The *Herald Sun* newspaper publishes an article alleging that Victoria Police recruited a lawyer, 'Lawyer X', to inform on criminal figures running Melbourne's drug trade.

**April:** Victoria Police makes a formal notification to the Independent Broad-based Anti-corruption Commission (IBAC) regarding the use of Ms Gobbo as a human source.

**2015**

**February:** On behalf of IBAC, the Honourable Murray Kellam, AO, QC, completes a confidential report, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Kellam Report), which examines the conduct of current and former Victoria Police officers in their management of Ms Gobbo as a human source, and Victoria Police's human source management policies and procedures. The report identifies nine people whose prosecutions may have been affected by the use of Ms Gobbo as a human source.

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**2016**

**February:** The Director of Public Prosecutions (DPP), Mr John Champion, SC, completes a confidential report, *Report of the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Champion Report), regarding the cases of the nine people identified in the Kellam Report. He considers that he has a duty to disclose the matters raised in the Kellam Report to six people, all of whom were represented by Ms Gobbo and prosecuted by the DPP. The DPP later identifies a seventh potentially affected person.

**June:** The Chief Commissioner of Victoria Police, Mr Graham Ashton, lodges an application in the Supreme Court of Victoria to stop the DPP from disclosing Ms Gobbo's role as a human source to the seven potentially affected people, on the basis that this information is subject to a PII claim. Ms Gobbo later files her own proceeding against the DPP and the applications are heard together in a closed court.

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**2017**

**June:** The Supreme Court determines that the DPP should be permitted to disclose information to the potentially affected people about Ms Gobbo's role as a human source. Victoria Police and Ms Gobbo later appeal the decisions to the Court of Appeal of the Supreme Court of Victoria.

**November:** The Court of Appeal dismisses the appeals and upholds the earlier decisions of the Supreme Court.

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**2018**

**May:** The Chief Commissioner and Ms Gobbo obtain special leave (permission) to appeal the Court of Appeal's decision to the High Court of Australia.

**November:** The High Court revokes special leave to appeal, thereby allowing the DPP to disclose the information to the potentially affected people. The High Court orders that the hearing's occurrence and outcomes not be published until 3 December 2018.

**December:** The Victorian Government establishes the Commission. At this time, Ms Gobbo's identity has not been made public. She is referred to in court proceedings and the Commission's Letters Patent as 'EF'. It is generally understood that Ms Gobbo was a human source for Victoria Police between 2005 and 2009.

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**2019**

**January:** The Commission is told that Victoria Police first registered Ms Gobbo as a human source in 1995 and registered her as a human source for a second time in 1999. Victoria Police also identifies that other legal practitioners and employees may have been used as human sources.

The Chief Commissioner initiates new court proceedings seeking a permanent order prohibiting the publication of the names and images of Ms Gobbo and her children.

**February:** The Victorian Government expands the Commission's terms of reference in light of Victoria Police's disclosures about its earlier involvement with Ms Gobbo and the possible use of other legal practitioners and employees as human sources.

**March:** Ms Gobbo's identity as a human source is made public.

**July:** The Commission publishes its progress report.

## THE COMMISSION'S INQUIRY

The Commission examined matters of significant public interest that had been cloaked in secrecy for many years. Consequently, one of its critical functions was to assist the Victorian community to understand how Ms Gobbo came to be used as a human source, the consequences of her and Victoria Police's actions, and what could be done to prevent similar events occurring in the future. The Commission therefore sought to conduct as much of its inquiry in public as possible.

This was complicated by the sensitive nature of material before the Commission. It was important to protect the identities of certain people who gave evidence at the Commission's hearings and certain people affected by the inquiry in other ways. Releasing this information could have put their safety or the safety of people close to them at serious risk. It was also important not to reveal confidential methods and tactics that police use to detect and investigate crimes. The Commission adapted its processes to manage these risks and issues, including by closing hearings when necessary and using pseudonyms to deidentify certain people in its final report.

### The Commission's work

The Commission structured its inquiry around the five key areas of work outlined below.

#### Obtaining information relevant to the inquiry

The Commission issued notices to individuals and organisations to compel them to produce documents to the Commission by a specific time ('notices to produce'). Some organisations and office holders are exempt from the Commission's coercive powers under the *Inquiries Act 2014* (Vic) (Inquiries Act) and provided information voluntarily. The Commission received over 155,000 documents during its inquiry.

#### Engaging with members of the public

The Commission received 157 submissions from members of the public and organisations about matters related to the terms of reference. These submissions informed the Commission's review of potentially affected cases. They also helped the Commission identify issues requiring examination at its hearings, and possible reforms relating to human source management policies and practices; the use and disclosure of human source information in criminal proceedings; and legal ethics and legal profession regulation. The Commission also engaged with the community through its website and the media.

#### Conducting hearings

The Commission held 129 days of public and private hearings and heard from 82 witnesses. In hearings held between February 2019 and February 2020, the Commission examined issues related to cases potentially affected by the use of Ms Gobbo as a human source and the related conduct of Victoria Police officers (terms of reference 1 and 2). In May 2020, the Commission held hearings to examine policy and practice issues related to the use of human sources and human source information (terms of reference 3 and 4).

## Conducting research

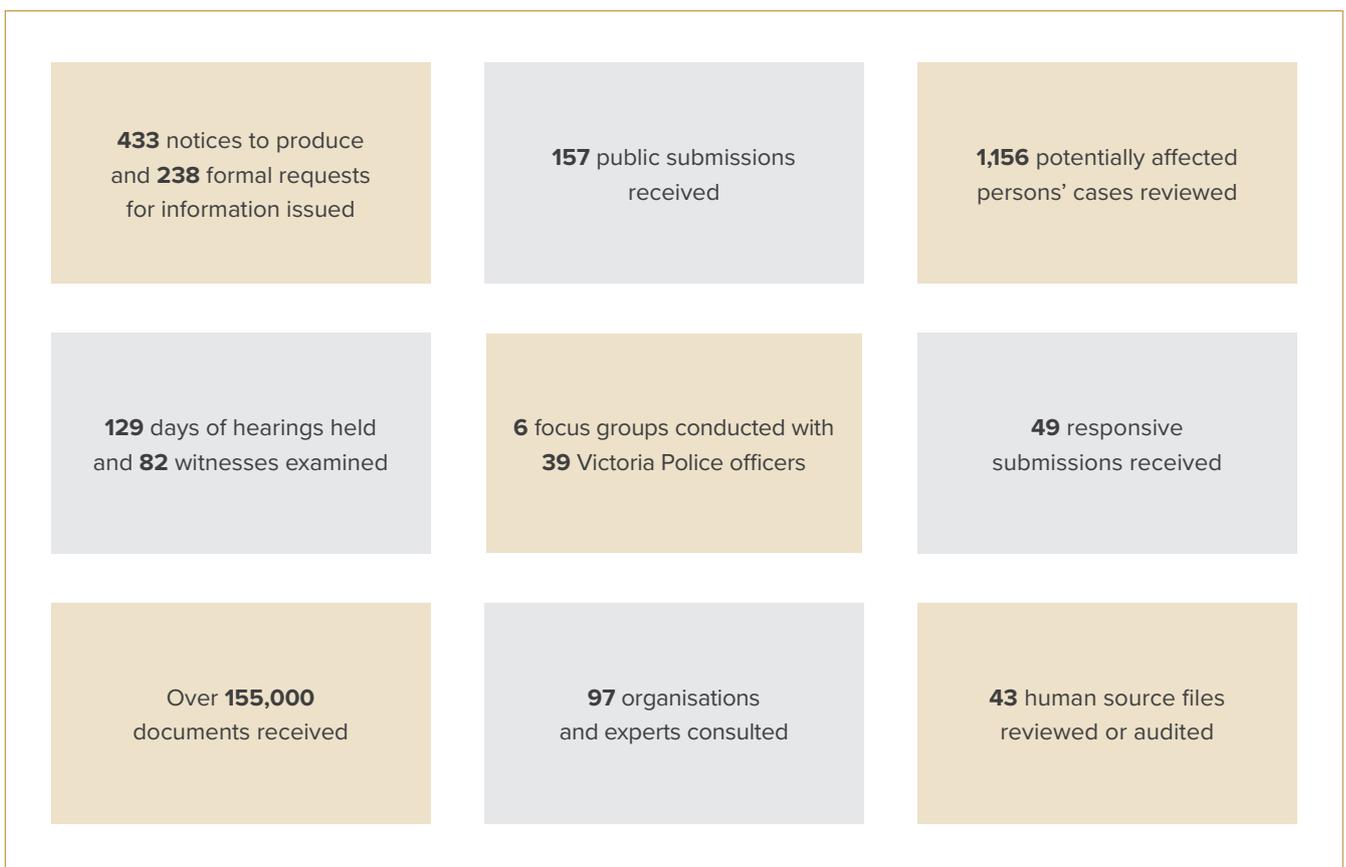
The Commission conducted an in-depth research program to inform its inquiry into terms of reference 3–6. This included undertaking literature reviews and desktop research; assessing policies and procedures provided by law enforcement and other agencies; conducting focus groups with currently serving Victoria Police officers involved in human source management; auditing and reviewing relevant human source files; preparing a consultation paper on disclosure issues and practices; and consulting with 97 organisations and experts from Australia and overseas.

## Receiving submissions from Counsel Assisting

The role of Counsel Assisting the Commission was to identify and advance lines of inquiry; identify and determine the order of witnesses and examine witnesses at the Commission’s hearings; provide advice on particular areas of law and procedure; and make submissions to the Commission. In June and September 2020, Counsel Assisting provided written submissions to the Commission relating to terms of reference 1 and 2, including the findings they considered were open to the Commissioner to make about the conduct of Ms Gobbo and Victoria Police officers, and the cases they considered may have been affected by Ms Gobbo’s use as a human source.

Some key figures related to the Commission’s work are displayed in Figure 3.

**Figure 3: The Commission’s work**



## Procedural fairness

Under the Inquiries Act, the Commission was able to conduct its inquiry in the manner it considered appropriate, subject to the Letters Patent, its powers under the Inquiries Act and the requirements of procedural fairness.

The Commission afforded procedural fairness to potentially affected persons and organisations in various ways, including by giving them the opportunity to apply to appear at the Commission's hearings and/or cross-examine witnesses, and to make public submissions or provide other information in support of their interests.

In June 2020, after it received Counsel Assisting closing submissions, the Commission commenced a formal adverse findings and procedural fairness process. This enabled people whose interests were adversely or otherwise materially affected by Counsel Assisting's proposed findings to make written submissions in response ('responsive submissions'). The Commission received 45 responsive submissions relevant to terms of reference 1 and 2. The Commission also provided Victoria Police, the DPP and Office of Public Prosecutions (OPP), and The Police Association with relevant extracts from its draft final report relating to terms of reference 3–6 and received four responsive submissions.

The Commission considered Counsel Assisting submissions, all responsive submissions and other evidence obtained during the inquiry when making its findings, conclusions and recommendations. Where the Commission has made a finding adverse to a person or organisation, it has fairly set out their response in the final report.

A royal commission is not a court and it does not have judicial power. In light of this, and to avoid the risk of unfairly prejudicing possible future investigations or trials, the Commissioner decided not to make findings in the final report as to whether Ms Gobbo and/or any named current or former Victoria Police officers may have engaged in criminal conduct. The Commission, did, however, consider the duties and standards of professional behaviour required of police and lawyers, as well as the tests set down in law, to establish whether they may have engaged in misconduct. The question of whether Ms Gobbo and Victoria Police officers did, in fact, commit criminal offences or misconduct, and the implications of any such conduct for potentially affected persons' cases, will be matters for investigatory and prosecuting agencies and the courts to determine.

## THE COMMISSION'S CONCLUSIONS

### The potential effects of Ms Nicola Gobbo's conduct as a human source

All people charged with a criminal offence, no matter who they are or what they are accused of, have the right to independent legal advice. They have the right to expect that their lawyer will act ethically and in their best interests, and will not disclose information shared in confidence. They have the right to a fair trial, in which the prosecution must prove their guilt beyond reasonable doubt; and they have the right to receive both information on which the prosecution intends to rely, and information that may undermine the prosecution case. A large number of people may have been denied these rights because of the conduct of Ms Gobbo and some current and former Victoria Police officers.

The Commission's task was to examine the number of cases that may have been affected by the conduct of Ms Gobbo as a human source, and the extent to which they were potentially affected. The Commission had no power to overturn convictions, order re-trials, change sentences or release people from custody. Decisions to take or not to take these steps will be made by the courts, in the event that the potentially affected persons choose to pursue their appeal rights.

After a rigorous analysis of the evidence, including all relevant submissions, the Commission has concluded that the convictions or findings of guilt of 1,011 people may have been affected by Victoria Police’s use of Ms Gobbo as a human source. This includes people who were deprived of the opportunity to be represented by an independent lawyer acting in their best interests, and those who may have been affected by Ms Gobbo’s conflicts of interest and/or tainted evidence arising from her conduct as a human source. It includes cases where she was acting as the person’s lawyer, and cases where she was not; for example, where the person was a co-accused of one of her clients.

Figure 4 shows the categories of conduct relevant to whether the Commission found a case may have been affected by Ms Gobbo’s use as a human source. At least one of these categories applied to each of the 1,011 people identified by the Commission.

**Figure 4: Categories of conduct—Ms Gobbo and Victoria Police**

Ms Nicola Gobbo	Victoria Police
<b>Conflict of interest</b>	
Ms Gobbo acted for an accused person <b>and she did not disclose her status as a human source</b>	Ms Gobbo acted for an accused person and <b>Victoria Police did not disclose her status as a human source</b> or take steps to have public interest immunity (PII) claims considered by the Director of Public Prosecutions (DPP) or the courts
Ms Gobbo <b>provided information</b> to Victoria Police in relation to the accused person, and/or otherwise assisted or attempted to assist in their prosecution, before and/or during the period she acted for them, and <b>she did not disclose this</b>	Ms Gobbo <b>provided information</b> to Victoria Police in relation to the accused person, and/or otherwise assisted or attempted to assist in their prosecution, before and/or during the period she acted for them, and <b>Victoria Police did not disclose this</b> or take steps to have PII claims considered by the DPP or the courts
<b>Tainted evidence</b>	
Evidence relied on in prosecuting the accused person <b>may have been illegally or improperly obtained</b> due to Victoria Police’s use of Ms Gobbo as a human source	Evidence relied on in prosecuting the accused person <b>may have been illegally or improperly obtained</b> due to Victoria Police’s use of Ms Gobbo as a human source, and Victoria Police did not take steps to have PII claims considered by the DPP or the courts

The 1,011 people can also be split into two groups. The first group of 887 people are potentially affected in a broad way, like the manner identified in *R v Szabo*. These people were represented by Ms Gobbo between 1998 and 2013 and it was not disclosed to them that she was providing information to police as a human source. The second group of 124 people are potentially affected in a more specific way. Counsel Assisting wrote case studies on each of these 124 people in their submissions.

Ms Gobbo's duplicitous and improper conduct spanned a period of more than 15 years. It started before she was admitted as a lawyer in the early 1990s, and became progressively more entrenched and destructive until her third period as a human source for Victoria Police came to an end in 2009.

Even as a young law student in the 1990s, Ms Gobbo was willing to give police information about those who trusted her. In 1993, when Ms Gobbo was sharing a house with her then de facto partner, Mr Brian Wilson, Victoria Police executed a search warrant at the property. Ms Gobbo told police that drugs were hidden in a vent in the laundry. Ms Gobbo was charged with use and possession of cannabis and amphetamine. She pleaded guilty and received a non-custodial sentence without conviction. Mr Wilson was charged with trafficking, use and possession of a drug of dependence, and received a suspended sentence.

In the following two years, Ms Gobbo maintained contact with Victoria Police, actively seeking out and cultivating opportunities to meet with police officers and give them information. In 1995, Victoria Police officers registered her as a human source, evidently because of information she had provided against Mr Wilson.

Ms Gobbo was admitted to legal practice in 1997. As part of the admission process, she was required to make submissions to the Board of Examiners about her suitability to practise law, including by submitting an affidavit. The affidavit she provided to the Board was misleading in several respects regarding her drug-related offending.

Between 1997 and 1999, Ms Gobbo gave information to police about the alleged fraudulent activity of her employer, Solicitor 1 (a pseudonym). She approached police proactively and enthusiastically, suggesting people and matters they should investigate. These actions undermined the interests of her clients at the time. The information Ms Gobbo provided led to Victoria Police registering her as a human source for the second time in 1999.

By the time the gangland wars escalated in the early 2000s, Ms Gobbo had developed professional and personal relationships with prominent organised crime figures. Victoria Police's Purana Taskforce was established to combat the violence arising from the gangland wars. Purana pursued a strategy of persuading people suspected of criminal activity to 'roll'; that is, to give evidence against their associates, particularly those higher up in their criminal networks, in exchange for a reduced sentence. Ms Gobbo proved a valuable resource to achieve that end.

The case of Mr McGrath (a pseudonym) illustrates how Ms Gobbo assisted the Purana Taskforce to pursue this strategy. Ms Gobbo played a part in convincing Mr McGrath, her client, to give evidence against his associates. This conduct was not in itself improper, but she made corrections to and comments about his statements, to assist police, without taking instructions from him. She encouraged him to change his story to strengthen Victoria Police's case against his associates, and concealed from him the true nature of her relationship with police. Despite Ms Gobbo and some Victoria Police officers submitting that this aspect of Ms Gobbo's conduct was not improper, and even though the outcome for Mr McGrath was favourable, the Commission has found that he did not have the benefit of an independent lawyer acting on his instructions.

Mr McGrath's evidence led to the prosecution of Mr Thomas (a pseudonym). Given that Ms Gobbo had acted for Mr McGrath and refined his statements to strengthen his credibility as a witness, including against Mr Thomas, it was unethical for her to then act as Mr Thomas' lawyer. It does not matter that Mr Thomas knew she had acted for Mr McGrath—he did not know she had worked with police to bolster Mr McGrath's credibility. As with Mr McGrath, Ms Gobbo encouraged Mr Thomas to roll. She was actively involved in this process, advising police about how to approach him, suggesting topics to explore and editing his statements. Mr Thomas ultimately made many statements to police implicating others in criminal activity.

The case of Mr Faruk Orman, also Ms Gobbo's client, illustrates the chain reaction caused by her conduct. The case against Mr Orman relied heavily on Mr Thomas' evidence. Ms Gobbo took active steps to ensure that Mr Thomas gave evidence against Mr Orman. She divulged Mr Orman's defence tactics to Victoria Police officers, and kept the true nature of her involvement with Mr Thomas and Victoria Police hidden from Mr Orman.

Perhaps the most brazen example of Ms Gobbo's conduct is the case of Mr Cooper (a pseudonym), a drug manufacturer for the Mokbel family. Police believed that if Mr Cooper were to roll, he might disclose key details of the Mokbel criminal syndicate. Ms Gobbo leveraged her position as Mr Cooper's lawyer, friend and confidant to persuade him to divulge information about his criminal activities. She gave Victoria Police information about his drug laboratory, leading to his arrest. When police encouraged Mr Cooper to roll, he asked for Ms Gobbo to attend the police station as his lawyer. She obliged and, acting as both Mr Cooper's lawyer and an agent for police, advised him to assist authorities. Mr Cooper heeded Ms Gobbo's advice and ultimately made over 40 statements to police.

Mr Zlate Cvetanovski was also caught in the web of Ms Gobbo's compounding conflicts of interest. Ms Gobbo represented Mr Cvetanovski after his arrest on drug charges. The evidence of Mr Cooper was crucial in the case against him. Perhaps unsurprisingly given her previous conduct, Ms Gobbo did not disclose her involvement with Mr Cooper to Mr Cvetanovski. She also assisted Victoria Police to obtain warrants and gather evidence used to prosecute him.

The case of Mr Antonios (Tony) Mokbel points to the sheer volume of information Ms Gobbo gave to Victoria Police. She told police about Mr Mokbel's properties, finances, contact numbers, associates, and the vehicles and code names he used. She divulged the defence strategies and tactics used by Mr Mokbel's legal team, both in his criminal trial and his extradition proceedings. She represented numerous clients, such as Mr Cooper, who with her assistance gave evidence against Mr Mokbel.

The 'Tomato Tins' drug syndicate cases exemplify the wide-ranging impacts of Ms Gobbo's conduct. She provided Victoria Police with information about the drug syndicate led by Mr Pasquale Barbaro and, taking advantage of her relationship with another of her clients, Mr Rabie (Rob) Karam, gave police the bill of lading for a shipment of tomato tins that contained vast amounts of MDMA. She told police about the locations of meetings between Mr Karam and other co-conspirators. Ultimately, 32 people were convicted for their part in the Barbaro drug syndicate. Remarkably, Ms Gobbo acted for at least 10 of these people, after having provided police with information that may have led to them being charged.

As these brief case studies show, Ms Gobbo's conduct as a human source for Victoria Police, while practising as a criminal defence lawyer, was extensive and sustained. It was also inexcusable. Her breach of her obligations as a lawyer has undermined the administration of justice, compromised criminal convictions, damaged the standing of Victoria Police and the legal profession, and shaken public trust and confidence in Victoria's criminal justice system.

Already, two people, Mr Orman and Mr Cvetanovski, have successfully appealed their convictions based on Ms Gobbo's conduct. There are many more appeals in progress.

The Commission's role in exposing Ms Gobbo's actions, although not judicial, is a powerful one. Its inquiry has shone a bright light on the extraordinary reach of her once-hidden wrongdoing. Ms Gobbo herself, in giving evidence before the Commission, admitted that aspects of her conduct were unethical and wrong. The Commission's work will allow the community to better understand the nature of this conduct and, critically, empower those whose convictions or findings of guilt may be affected to make informed decisions about any future action they may take.

The Commission recommends that the Victorian Government appoints a Special Investigator to investigate whether Ms Gobbo may have committed any criminal offences connected with her conduct as a human source for Victoria Police.

Ms Gobbo was recently struck off the Supreme Court's Roll of Legal Practitioners and is unable to practise law. She remains, however, on the Victorian Bar Roll's list of 'retired' barristers. The Commission is concerned that this has the potential to undermine public confidence in the Victorian Bar. In light of Ms Gobbo's conduct, the Commission recommends that the Victorian Bar seeks to address this issue, given the symbolic significance of her remaining on the Bar Roll.

## The conduct of Victoria Police officers

The duties and obligations of police officers arise from their oath or affirmation, legislation, prosecutorial guidelines and the common law. Before they can commence service, every police officer must take an oath or make an affirmation promising to:

- well and truly serve without favour or affection, malice or ill-will
- keep and preserve the peace
- prevent, to the best of their abilities, all offences
- discharge all of the duties legally imposed on them faithfully and according to law.

In their recruitment, use and management of Ms Gobbo as a human source, the conduct of a number of Victoria Police officers seems to have fallen short of the behaviour required by their legal, ethical and professional obligations when they:

- encouraged Ms Gobbo to act as counsel for an accused person or at least condoned it, knowing that she was a human source and was therefore not providing the person with independent legal advice; was covertly informing on them or had covertly informed on them; and/or had provided information that assisted police to obtain incriminating evidence against them
- failed to disclose these matters to the prosecution, the defence or the court, or to properly claim PII, despite the fact that this evidence would potentially have assisted the defence of accused persons
- failed to seek legal advice on these matters.

The Commission accepts Victoria Police's contentions that it is important to contextualise the lead up to Ms Gobbo's third registration as a human source in 2005. The murders of Mr Jason Moran and Mr Pasquale Barbaro at a children's football match in 2003 intensified political and public pressure for Victoria Police to end Melbourne's gangland wars. It established the Purana Taskforce to do just that. As noted above, Purana's key strategy was to target the 'weakest link' in criminal networks and have them give evidence against more senior figures. At around this time, Victoria Police also established the Source Development Unit (SDU) to better utilise human sources, and its officers were eager to prove its worth.

In this environment, Ms Gobbo found herself in a precarious situation with her high-profile gangland clients and turned to Victoria Police. Remarkably, Ms Gobbo and the officers involved were unaware that this was her third registration as a human source for Victoria Police.

Despite the extraordinary circumstances of a criminal defence barrister becoming a human source against the very people she represented, neither the SDU officers who registered her, nor their superior officers, sought legal advice as part of the registration process. The absence of such advice in the face of serious and obvious risks became a recurrent theme in Victoria Police's management of Ms Gobbo. A compelling explanation is that Victoria Police did not want to be told they could not use Ms Gobbo in the ways they intended.

Mr McGrath's case in 2004, a year before Ms Gobbo's third registration, established patterns of police behaviour that would continue in the years following. Purana investigators worked with Ms Gobbo in encouraging Mr McGrath to become a prosecution witness. The investigators left Ms Gobbo to manage her conflicts of interest, and concealed the true nature of her involvement from Mr McGrath and from those he implicated in serious crimes.

Similar events occurred shortly afterwards with Ms Gobbo's representation of Mr Thomas. Purana Taskforce investigators worked with her as she encouraged Mr Thomas to confess to serious crimes and become a prosecution witness. When Mr Thomas considered whether he should change his legal team, investigators vouched for Ms Gobbo's honesty. Again, Victoria Police did not make proper disclosure about Ms Gobbo's role to Mr Thomas or the people he implicated in the statements he gave to police.

There were elements of opportunism in Victoria Police using Ms Gobbo to help them roll Mr McGrath and Mr Thomas. In Mr Cooper's case, however, this outcome was carefully planned.

Mr Cooper was on bail for two episodes of serious drug offending, the second committed while he was on bail for the first, and he was likely to receive a heavy sentence. Victoria Police officers worked with Ms Gobbo, his lawyer, to facilitate his third arrest for serious drug offending so that his situation would be so dire that he had no alternative but to assist police in bringing down the Mokbel cartel. With Ms Gobbo's assistance, Victoria Police set up Mr Cooper for his third arrest. He went on to make over 40 statements that helped them charge, and ultimately convict, 26 people.

As prosecutions relying on Mr Cooper's evidence progressed, Victoria Police avoided disclosing to the accused persons Ms Gobbo's role in persuading Mr Cooper to become a prosecution witness against them. Investigators told the Commission that they acted in accordance with their training and standard practice at the time; that they assumed their superiors or Ms Gobbo's SDU handlers were managing the risks; and that they were always motivated by the need to protect her safety, rather than any improper intent. While part or all of that may be true, it does not change the fact that accused persons, many of whom faced lengthy prison terms, were denied information to which they were entitled and that could have assisted them to defend the criminal charges against them.

It should have been clear to the Victoria Police officers involved that they needed to disclose Ms Gobbo's status and conduct as a human source to the DPP and accused persons, or to make a PII claim to the court accompanied by all relevant supporting material. It was for the court, not Victoria Police, to determine whether this information should be kept from the accused persons. At the very least, the officers should have appreciated that this was a matter requiring legal advice.

At various times, the SDU officers managing Ms Gobbo were concerned about the potential ethical and legal problems involved in using her as a human source. By mid-2006, the prospect of a royal commission had been raised, signalling a growing appreciation of the risks within Victoria Police. Ms Gobbo's health had also deteriorated. From mid-2006 to mid-2007, the SDU officers had in place an 'exit strategy' to bring Ms Gobbo's role as a human source to an end. She was not ready to stop. And as senior Victoria Police officers began to see her potential value in helping to solve high-profile murder investigations involving suspected police corruption, the plans to deregister Ms Gobbo were shelved.

These investigations, Petra Taskforce and Briars Taskforce, each involved a series of 'sliding door' moments when senior officers could and should have acted to stop using Ms Gobbo as a human source, and to the extent possible, prevent further damage to Victoria's criminal justice system. They did not do so. This meant Victoria Police could continue to use Ms Gobbo as a source and capitalise on the valuable information and tactical advice she provided.

After receiving a subpoena in January 2011 to provide documents that could have revealed Ms Gobbo's status as a human source, Victoria Police finally obtained legal advice in October 2011. The advice identified that Ms Gobbo's role as a human source may need to be disclosed and that potentially affected persons may seek to challenge their convictions. At that point, Victoria Police should have acted with great urgency to address the fact that people who had been convicted of crimes and lost their liberty may have been denied their rights to a fair trial. Its progress, however, was slow—both in taking steps to fully understand the consequences of Ms Gobbo's use as a human source, and in seeking to remedy the situation.

This delay was completely unacceptable, not least because it was a problem of Victoria Police's own making. It is likely that it stemmed not just from concerns for Ms Gobbo's safety, but also a desire to avoid reputational damage, external inquiries, judicial criticism and appeals against convictions. These factors were placed ahead of accepting responsibility and ensuring justice was done according to law.

After three confidential reviews, and two years in which Victoria Police fought to prevent the DPP from disclosing to certain people that their convictions may have been tainted, Ms Gobbo's use as a human source was revealed to affected persons and the Victorian community, following the High Court's decision in 2018. This revelation occurred some 13 years after Victoria Police registered Ms Gobbo as a human source for the third time.

The Commission considers that the conduct of several current and former Victoria Police officers in managing Ms Gobbo, including their failure to fulfil their disclosure obligations in prosecutions affected by her informing, may have constituted misconduct and/or breaches of discipline at that time. That conduct was apt to bring Victoria Police into disrepute and diminish public confidence in it.

The Commission recommends that the Victorian Government refers the conduct of current and former Victoria Police officers to the proposed Special Investigator to investigate whether there is sufficient evidence to establish the commission of criminal and/or disciplinary offences connected with the use of Ms Gobbo as a human source. With the Special Investigator's investigation into the conduct of Ms Gobbo and current and former officers of Victoria Police, and with those who may have failed to receive a fair trial because of this conduct now able to pursue their appeal rights in an informed way, Victorians can be assured that their criminal justice system is working in accordance with the rule of law, as it should.

## Victoria Police's conduct: systemic issues and causal factors

While the use of Ms Gobbo as a human source was in many ways extraordinary, it was also a systemic failure. It continued for several years, even though many Victoria Police officers, including some very senior officers, were aware of Ms Gobbo's informing.

Victoria Police concedes that more than 100 police officers and personnel knew that Ms Gobbo was a human source between 2005 and 2009. It appears that none of these officers or personnel reported it to or raised concerns with Victoria Police's then Ethical Standards Department or with an external oversight body.

Several officers who gave evidence to the Commission stressed that, at the time of Ms Gobbo's use as a human source, Victoria Police was under significant pressure to stem the violence associated with Melbourne's gangland wars. Some suggested that there was nothing unlawful or improper about their management of Ms Gobbo and the associated risks.

In late August 2020, Victoria Police provided a submission to the Commission, in which it accepted:

*... without reservation that the way in which Ms Gobbo was managed as a human source in a way that resulted in a profound interference with the relationship between lawyer and client was a major failing. The consequences of that failing are resonating through the criminal justice system and will do so for many years. It has come at a very high cost to the organisation, to public confidence and to the criminal justice system.<sup>2</sup>*

Victoria Police also issued a public apology to the courts, whose processes were affected by what occurred, and to the community for breaching its trust.

<sup>2</sup> Responsive submission, Victoria Police, 24 August 2020, 10 [2.8].

In its submission, Victoria Police contended that the conduct occurred because of reasons that are ‘primarily organisational and systemic’. It accepted that individual officers should have done better in some instances, but maintained that those involved in the recruitment, handling and management of Ms Gobbo did not engage in *knowing* impropriety.

The Commission does not accept that there was no knowing impropriety on the part of any officer involved in these events. The conduct of some officers fell well short of an acceptable standard. Further, an organisation is the sum of its parts; it is not an entirely separate entity that functions independently of the people within it. If the organisation and systems were flawed, it was because the individuals who made up the organisation and developed its systems, particularly senior leaders, lacked the moral clarity, vision and ability to fix those flaws. Several officers, including those responsible for leadership of the organisation, knew enough about the risks and the potential consequences of using Ms Gobbo as a human source to have taken a different and more appropriate course.

The Commission agrees that there were several organisational conditions, structures, cultures and processes that contributed to the events and the fact that they were able to continue for so many years. These include failures of leadership and governance, of management and supervision, of policy and training, and of processes to properly identify, assess and manage risk.

Much of the conduct demonstrated by individual officers could not have occurred without critical failures of leadership and governance in Victoria Police—in particular, an ineffective command and governance structure; and a pervasive and negative cultural emphasis, led from the top down, on getting results, with insufficient regard to the serious consequences for the rights of individuals and the proper administration of the criminal justice system.

There were also deficiencies in the human source management policy framework at the time of Ms Gobbo’s relationship with Victoria Police. The policies and processes in place from 1995 to 2003 were rudimentary. The overriding focus was protecting the confidentiality of a human source’s identity and location—known as the ‘golden rule’. There was no risk assessment process and little guidance on the appropriateness of registering people whose use as a human source could pose serious risks to themselves, other people or Victoria Police.

By 2003, Victoria Police had begun to implement a contemporary human source management policy. While it considered this a best practice approach, the organisation maintained a rigid, unnuanced application of the golden rule. There is an obvious and critical need to protect the safety of human sources—but this must be balanced against other important public interests. Victoria Police’s sole and exclusive focus on protecting the identity of the human source at all costs seems to have contributed to officers neglecting other fundamental obligations, including their duty of disclosure. The human source management policy was also deficient as it lacked guidance relating to obtaining and using confidential or privileged information, and when to seek legal advice.

There were also instances of SDU officers and investigators failing to comply with parts of the human source management policy and associated procedures. This went largely unchecked by more senior officers, suggesting a willingness to tolerate bending the rules to help solve serious crime.

While the daily engagement with and management of Ms Gobbo was the SDU’s responsibility, the officers appointed as her handlers were not wholly responsible for the problems that arose from her use as a human source. Other factors contributed, including the lack of an appropriately trained senior officer with dedicated responsibility for overseeing the SDU; the apparent willingness of managers to defer to SDU officers’ expertise rather than actively supervising their actions; and a possible perception among some SDU officers and investigators that, because certain senior officers were aware of Ms Gobbo’s use as a human source, they condoned or even encouraged it.

Another organisational factor was the inadequacy of policies, procedures and training related to police disclosure obligations, a fact that has been highlighted by other recent inquiries into Victoria Police practices.

Victoria Police has long been on notice about the need to make proper disclosure to people whose cases may have been affected by the use of Ms Gobbo as a human source. The Commission is concerned about how slowly Victoria Police has acquitted its disclosure obligations and provided these people with the information that they should have received many years ago as part of their trials. To address this, the Commission recommends that Victoria Police provides monthly reports on its progress to the proposed Implementation Taskforce and Implementation Monitor, discussed below.

The Commission is also concerned that so many officers across different levels within Victoria Police did not take adequate responsibility for their part in the events that were the subject of this inquiry. This suggests a reluctance to acknowledge their contribution to the individual and collective failures that led to the recruitment, use, management and non-disclosure of Ms Gobbo as a human source, and to be accountable for their actions.

While Victoria Police's use of Ms Gobbo as a human source occurred many years ago, the systemic repercussions are still being felt. Court proceedings, and the various inquiries established to examine the events, have cost many millions of public dollars. Public confidence in police has been undermined. Given the systemic failures identified by the Commission, it is critical that Victoria Police assures the Victorian Government and community that it has taken and will continue to take steps to prevent past mistakes being repeated, including in its response to the Commission's recommendations. It is encouraging that the Chief Commissioner of Victoria Police has commented publicly that the organisation will heed the Commission's recommendations and take whatever steps necessary to learn from its mistakes.

## **Victoria Police's use of other human sources with legal obligations of confidentiality or privilege**

In January 2019, shortly after this inquiry commenced, the Commission became aware that Victoria Police had identified a number of other human source files related to people associated with the legal profession. Consequently, the Victorian Government extended the scope of the inquiry, requiring the Commission to examine Victoria Police's use of any other human sources with legal obligations of confidentiality or privilege (term of reference 5a).

To this end, during the inquiry, the Commission:

- reviewed 12 Victoria Police human source files related to people associated with the legal profession dated between 1990 and 2016, and in some cases examined relevant issues in private hearings
- conducted an audit of 31 human source files related to people with other occupations potentially subject to legal obligations of confidentiality or privilege (such as nurses and government workers), dated between 2016 and 2019
- inquired into allegations by members of the public that 45 people with legal obligations of confidentiality or privilege had been used as human sources by Victoria Police.

Based on the information available to the Commission, there is no evidence to indicate that Victoria Police's use of any human sources, other than Ms Gobbo, resulted in the use of confidential or privileged information that may have affected the validity of any criminal prosecutions or convictions. While this finding is encouraging, it must be qualified by the Commission's limited access to relevant files, as discussed below.

The Commission's review and audit of files did identify some instances of Victoria Police officers not complying with the organisation's policies and procedures, along with a potential lack of understanding among some officers about the risks of using human sources with legal obligations of confidentiality or privilege. These observations were consistent with themes and issues that emerged in other aspects of the Commission's work, including its focus groups with Victoria Police officers who hold human source management responsibilities.

There were some limitations on the Commission's review of these human source files, including its lack of access to Interpose, Victoria Police's intelligence and case management system, which contains human source records. Consequently, the Commission had to rely entirely on Victoria Police to identify and disclose relevant files and information, and to advise if and how it used any information it received from these human sources.

Victoria Police did not give the Commission access to 11 human source files relating to people with potential legal obligations of confidentiality or privilege. It said these files were extremely sensitive and could not be provided to the Commission because they were subject to a PII claim.

As these 11 human source files have not been independently reviewed, the Commission recommends that the Victorian Government appoints a suitably qualified person to review them as a priority.

The review should identify whether there is evidence to suggest that any criminal prosecutions were affected—either because evidence was improperly obtained by Victoria Police from any of the 11 human sources, or because relevant evidence that should have been disclosed to prosecuting authorities and accused persons was not disclosed. If such evidence is identified, the Chief Commissioner should make a referral to the Victorian DPP and/or the Commonwealth Director of Public Prosecutions.

## Victoria Police's implementation of the Kellam Report recommendations

In 2014, following a notification from Victoria Police, IBAC appointed the Honourable Murray Kellam, AO, QC, to confidentially examine the conduct of current and former Victoria Police officers in relation to their use of Ms Gobbo as a human source, and the application and adequacy of Victoria Police policies, control measures and management practices during the period from 2005 to 2009.

Mr Kellam's inquiry followed an earlier review into Victoria Police's use of Ms Gobbo as a human source by former Chief Commissioner Neil Comrie, AO, APM, entitled *Victoria Police Human Source 3838: A Case Review* (Comrie Review).

It also followed a series of other internal and external reviews into Victoria Police's use of human sources dating back to the early 2000s. Those reviews consistently highlighted:

- insufficient management and supervision of officers responsible for handling human sources, creating risks of misconduct and corruption
- the development of inappropriate and sometimes corrupt relationships between human sources and police officers
- insufficient information management controls, leading to the leaking of sensitive and secretive information to criminal networks
- a lack of compliance with Victoria Police's Human Source Policy among certain officers and units, including the use of 'unregistered sources'
- a lack of sufficient safeguards within the policy framework
- inadequate training of officers responsible for handling human sources.

Mr Kellam completed his confidential report, entitled *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Kellam Report), in 2015. His key findings, many of which echoed those of the Comrie Review, are set out in Box 2.

### BOX 2: KEY FINDINGS OF THE KELLAM REPORT

The Kellam Report found that:

- Ms Gobbo’s handlers in the SDU had an imperfect understanding of the meaning and extent of confidential or privileged information.
- Handlers were not subject to sufficient oversight in their dealings with Ms Gobbo.
- There was a lack of formal documentation that set out the key risks and boundaries of Victoria Police’s relationship with Ms Gobbo.
- In the absence of formal documentation, officers made their own subjective assessments to determine what was ethical and appropriate.
- Victoria Police was negligent in using confidential and privileged information provided by Ms Gobbo for the purpose of furthering police investigations against her clients, without first obtaining legal advice.
- There may have been ‘wilful blindness’ on the part of Ms Gobbo’s handlers, but any impropriety on their part was ‘substantially mitigated by the lack of guidance and supervision’ that they should have had from their superior officers.

The Kellam Report’s 16 recommendations addressed three key areas of Victoria Police’s human source management practices:

- safeguards associated with obtaining and using confidential or privileged information from human sources
- improvements to risk assessment practices
- changes to Victoria Police policies and procedures for the day-to-day management of human sources.

Victoria Police has now implemented most of the Kellam Report recommendations, having introduced a series of policy changes between 2014 (in response to the Comrie Review) and 2020, while the Commission’s inquiry was underway.

The policy changes introduced by Victoria Police include:

- additional safeguards for human sources in occupations subject to legal obligations of confidentiality or privilege
- a requirement that risk assessments clearly outline the purpose for engaging a human source and a requirement for a revised risk assessment if the purpose changes
- a requirement that ‘high risk’ human sources be reviewed each month to consider whether any new risks have arisen that may change Victoria Police’s approach to engaging and managing the source
- new references to Victoria Police’s obligations under the Charter in the Human Source Policy, along with some hypothetical scenarios related to human sources involving legal obligations of confidentiality or privilege.

Some aspects of Victoria Police’s response to the Kellam Report recommendations are commendable. It took early action to address certain policy deficiencies while the Kellam inquiry was underway. It also implemented most recommendations within 12 months of the inquiry’s completion.

In other areas Victoria Police's response was not as effective or timely as it could have been. The most important Kellam Report recommendations related to safeguards associated with the use of confidential or privileged information from human sources, and risk assessment practices. The policy changes that Victoria Police introduced did not adequately fulfil the intention of these recommendations, which was to:

- manage the risk of obtaining or using confidential or privileged information from any human source, not just those with occupations subject to legal obligations of confidentiality or privilege
- make clear that, before registering any human source, officers should consider whether the use of the source is necessary and proportionate to the law enforcement objective to be achieved by obtaining the information.

In May 2020, Victoria Police further revised its Human Source Policy after receiving advice from its counsel during the Commission's inquiry. While some of these policy changes more fully addressed the intention of the Kellam Report recommendations, they came five years after completion of the Kellam Report, and eight years after the Comrie Review made the same recommendations. Given the importance of the policy improvements, this delay is unacceptable.

There is also evidence that Victoria Police did not take all necessary steps to embed its policy reforms into operational practice, through supporting guidance, communication and training for officers with human source management responsibilities. This appears to have contributed to uncertainty and confusion among officers about critical policy requirements and safeguards relating to the use of confidential or privileged information from human sources.

Victoria Police could have taken more effective action to monitor and evaluate the effectiveness of policy changes, including by engaging with officers responsible for human source management regarding their understanding of the new requirements and expectations.

The Commission recommends that Victoria Police establishes clear processes for the future review and amendment of human source management policies and procedures, including processes for seeking and incorporating operational input from officers involved in human source management; providing timely and accurate advice to officers about policy and procedural changes; and undertaking regular review and evaluation to address any emerging risks or developments in the operating environment. This will in turn help to ensure that policy requirements are clear, understood by officers, and applied effectively and consistently across the organisation.

## **Victoria Police processes for the use and management of human sources involving legal obligations of confidentiality or privilege**

As this inquiry has shown, the use of lawyers as human sources poses clear risks. These risks also apply to the use of other human sources who have access to confidential or privileged information. This is not to say that police should be absolutely prohibited from using human sources who are subject to legal obligations of confidentiality or privilege, but it does mean that the use of a human source who has access to confidential or privileged information should be a rare occurrence, treated with extreme caution and subject to strict safeguards.

While specific risks arise from the use of human sources involving legal obligations of confidentiality or privilege, the use of *any* human source by police presents legal and ethical risks. Human sources are typically people involved in criminal activity, and the need for police to form relationships with them to obtain information sometimes blurs ethical and professional boundaries, creating risks of misconduct and corruption. Because the engagement between police and the human source necessarily occurs in secret, any improper conduct may not be detected.

Further, the tasking of human sources—and the issuing of rewards to them—can involve police exploiting relationships and encouraging sources to engage in deception. This can in turn involve limiting the human rights of the source or of others. Finally, by covertly providing information to police about people known to them, human sources can put themselves and those close to them at risk of serious harm or even death.

Given these risks and the need for a consistent, coherent policy and procedural framework for the use of human sources, the Commission adopted a broad approach to its examination of Victoria Police's current processes. It identified safeguards needed not only to prevent the improper use of confidential or privileged information, but also to support the ethical use of human sources more generally.

Victoria Police has made significant improvements to its human source management processes since its registrations of and interactions with Ms Gobbo. It is now one of the few Australian law enforcement agencies that adopts specific rules and safeguards for the use of human sources involving legal obligations of confidentiality or privilege.

While these improvements are commendable, an internal policy is not sufficient to appropriately govern Victoria Police's use and management of human sources, nor to instil confidence in the Victorian community about the integrity and propriety of its human source management program. The Commission has concluded that legislation is necessary to regulate Victoria Police's registration and management of human sources, and provide clear, enforceable rules about when and how they can be used. This would bring the requirements for Victoria Police's use of human sources into line with those that govern its use of other covert powers and methods.

The proposed human source management legislation needs to permit and facilitate the effective use of sources to gather intelligence, conduct investigations, and prevent, disrupt and detect criminal activity, while simultaneously ensuring that their use is necessary, proportionate, justified and compatible with human rights. It should include specific safeguards for the use of sources who are reasonably expected to have access to confidential or privileged information.

The legislative framework should also incorporate clear, streamlined responsibilities and arrangements for registering human sources, to increase accountability and efficiency in decision making. Rather than dispersing responsibility across multiple people in a committee or business unit, these important decisions should be made by specific officers with the appropriate seniority and experience.

Decisions about the registration of human sources who may access confidential or privileged information should be made by an officer of or above the rank of Assistant Commissioner, informed by legal advice and external, independent input. In the unlikely event that Victoria Police confronts a situation where it wishes to register a source due to a specific intention to obtain or disseminate confidential or privileged information, the legislation should specify that this can only occur if there are exceptional and compelling circumstances; that is, where there is a serious threat to national security, the community, or the life and welfare of a person, and the information cannot be obtained through any other reasonable means.

The Commission does not make the recommendation for a legislative framework lightly. It recognises that Victoria Police may have concerns that such a framework will result in the use of human sources becoming more widely known in the community, or compromise source safety or police methodology. Victoria Police may also be concerned that it will deter officers from using human sources. While these are legitimate concerns, evidence before the Commission—including from law enforcement agencies working under a comparable legislative framework in the United Kingdom—suggests that neither of these risks will eventuate, provided the legislation is appropriately drafted. With this in mind, the Commission urges those drafting the legislation to undertake meaningful consultation with Victoria Police and other relevant stakeholders.

The introduction of legislation will not displace the need for internal policies and procedures. Rather, the Human Source Policy should complement and expand upon legislative requirements and provide officers with practical guidance about why these requirements exist and how to satisfy them. The current Human Source Policy would benefit from the inclusion of a clear set of principles and objectives to support police decision making and actions, and encourage a shared understanding of Victoria Police's expectations for the proper and ethical use of human sources.

The Human Source Policy would also benefit from the inclusion of more comprehensive guidance about human rights, the nature of confidential and privileged information, and the risks of obtaining and disseminating it. This guidance should also be embedded in human source management training.

The Commission also makes recommendations to complement the new legislative and policy framework and strengthen Victoria Police's human source management capability and capacity. These include:

- a centralised organisational model, where all human sources are managed by dedicated source teams reporting directly to central management and by officers with the appropriate skills, training and experience
- ongoing training for officers involved in human source management, to update their knowledge and understanding of policy requirements, and to reinforce and build on their existing skills to manage human sources and the associated risks
- training for senior officers that focuses on effective risk management, supervision, oversight and decision making, to give them the knowledge and skills to effectively supervise and support the officers responsible for the day-to-day management of human sources
- clear instructions and practical guidance about who is responsible for the supervision of officers who manage human sources, why supervision is necessary and how it should be performed in practice
- more emphasis in human source risk assessments on confidential and privileged information, human rights and the risks that the use of a source could pose to the proper administration of justice
- an independent evaluation of risk assessment tools under development or recently implemented by Victoria Police
- formal processes and a reporting framework for compliance audits and monitoring of human source management
- 'maximum time in position' requirements for police officers in dedicated human source management roles, to support officer health and wellbeing, and reduce the risks of corruption and misconduct that can arise in specialist, covert areas of policing.

The Commission also emphasises the importance of diversity in Victoria Police and among its officers who work with and oversee the use of human sources, recognising that the composition of the organisation should reflect that of the Victorian community.

The scale of change recommended by the Commission is significant. This should not discourage Victoria Police. It has already taken steps to improve its human source management framework, which the Commission acknowledges and commends. The Commission's recommendations aim to build on these reforms and existing strengths, and support Victoria Police officers to manage sources lawfully, ethically and even more effectively.

Figure 5 displays the Commission’s recommendations, across each part of the human source management process.

**Figure 5: Overview of recommendations to strengthen Victoria Police’s human source management framework**



## External oversight of Victoria Police's use of human sources

Independent, external oversight encourages police officers to use their significant powers fairly and lawfully, and adhere to high ethical and professional standards, including when they are using covert methods and tactics. It helps to hold officers to account when they act improperly, and supports public trust and confidence in policing.

There is currently no external oversight of Victoria Police's use of human sources beyond IBAC's general jurisdiction to investigate alleged police misconduct and corruption; for example, in response to a complaint from a member of the public or a notification from Victoria Police. It is unlikely, however, that a person other than a human source would complain to IBAC about possible police misconduct relating to human source management, because of the secret nature of the activity and the high risks to a source's safety should their identity become widely known.

In contrast, external oversight regimes exist to monitor and scrutinise Victoria Police's use of other covert powers, methods and functions, such as the use of surveillance devices, telecommunications intercepts, controlled operations, covert search warrants, assumed identities and the admission of a person to witness protection.

As in Victoria, in other Australian states and territories, there are no agencies with specific, dedicated functions to independently oversee police agencies' use of human sources. At the Commonwealth level, the Inspector-General of Intelligence and Security monitors intelligence agencies' operational activities through regular inspections, and reviews their human source management processes and practices to make sure that agency personnel act legally and with propriety, comply with ministerial guidelines and directives, and respect human rights.

In the United Kingdom, the Investigatory Powers Commissioner's Office (IPCO) provides independent oversight of public authorities' use of investigatory powers, including the use of human sources. IPCO monitors authorities' compliance with legislation, codes of practice and relevant policies by undertaking inspections and reviewing human source files. In addition, law enforcement agencies must seek the final approval of an IPCO Judicial Commissioner if they intend to use a human source to obtain legally privileged information.

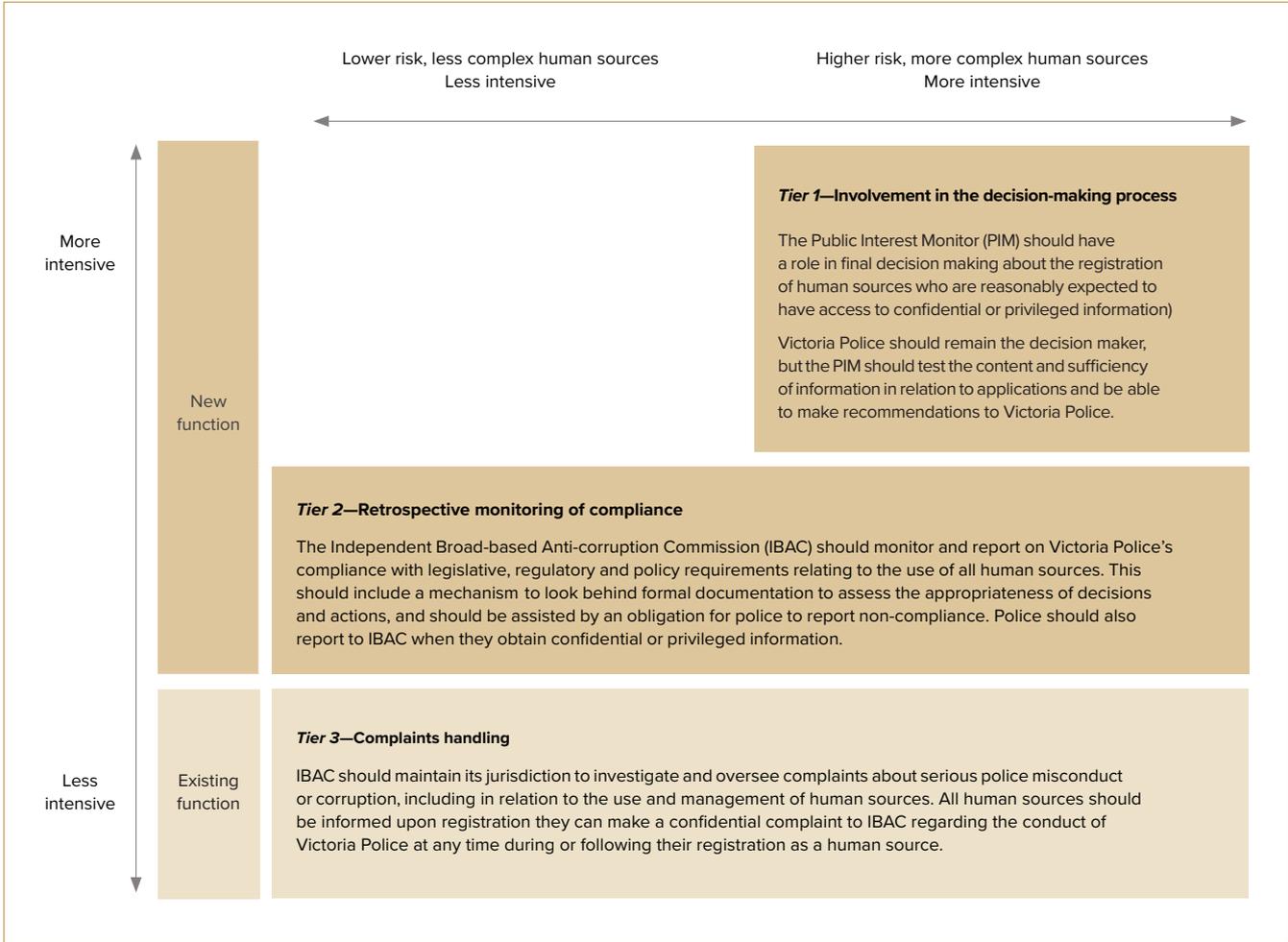
Consistent with the views of stakeholders and other available evidence, the Commission considers that external oversight of Victoria Police's use of human sources would:

- encourage compliance with legal and policy requirements for the registration and use of human sources
- mitigate risks to Victoria Police, human sources and the criminal justice system
- raise policing standards, including by assisting police to balance competing public interests and make ethical decisions
- address a gap in Victoria's current oversight system, noting that other covert police powers and methods are subject to external oversight
- support transparency and improve public confidence in Victoria Police's use of human sources.

While the Commission considers that greater scrutiny is warranted for human sources who might provide confidential or privileged information to Victoria Police, it is also of the view that a broad external oversight function is warranted for all human sources. This recognises the inherent risks and potential intrusiveness of the use of human sources, evidence of historical and ongoing non-compliance with human source management policy requirements among some Victoria Police officers, and the need to assure the community that police manage all human sources ethically and appropriately.

Figure 6 displays the Commission’s recommended model for the external oversight of Victoria Police’s use of human sources.

**Figure 6: Proposed external oversight model for Victoria Police’s use of human sources**



The Commission recommends a tiered external oversight model, with the nature and intensity of oversight aligned to the level of risk involved. This model consists of three tiers:

- **Tier 1**—Consistent with its role in relation to other police powers and functions, the Public Interest Monitor (PIM) should be involved in Victoria Police’s decisions to register human sources who are reasonably expected to have access to confidential or privileged information. On notification of a proposed registration, the PIM’s role would be to test the content and sufficiency of the material relied on in the registration application and to make submissions or recommendations to Victoria Police, including advice on whether the PIM considers it necessary and proportionate to register the human source.
- **Tier 2**—IBAC should be responsible for monitoring Victoria Police’s compliance with the human source legislative and policy framework. This monitoring function should extend to Victoria Police’s use of all human sources, and should consist of regular inspections and public reporting.
- **Tier 3**—IBAC should retain its existing jurisdiction to investigate complaints about police misconduct and corruption, which may include complaints about Victoria Police’s use and management of human sources.

The Commission also considers that it would be beneficial for the Victorian Government to undertake a principle-based review of the broader police oversight system, with a view to improving the coherence and consistency of this system and encouraging meaningful, outcome-focused monitoring of Victoria Police conduct and compliance.

## The use and disclosure of information from human sources in the criminal justice system

Victoria Police's obligations and practices for disclosing information from human sources with legal obligations of confidentiality or privilege are essentially covered by the same laws and policies that regulate the disclosure of human source information more generally in the Victorian criminal justice system.

Police, as part of the prosecution, play a vital role in ensuring that criminal proceedings are conducted fairly. They have several well-defined legal duties to ensure this occurs, including the duty of disclosure. In Victoria, the duty of disclosure comes from a combination of legislation (primarily the *Criminal Procedure Act 2009 (Vic)*), common law and professional guidelines. This duty extends to police because prosecuting authorities are not responsible for investigating matters and can therefore only act on the material police bring to their attention.

The duty of disclosure requires police to give prosecutors and accused persons all material they are aware of that is relevant, or potentially relevant, to an accused person's case. This includes material that may undermine the prosecution case and help the accused person. The duty of disclosure continues even after proceedings related to a prosecution have been finalised.

There are some exceptions to the duty of disclosure, one of which is material protected by PII. The prosecution may refuse to disclose material on the basis of PII when, for example, disclosure of the material is not in the public interest because it may place a person in danger or reveal the identity of a human source. In Victoria, the police, not the prosecutors, are responsible for making PII claims, which are then determined by the courts.

The Commission heard of several challenges associated with the ability of police to fulfil their disclosure obligations, including:

- the complexity and volume of material police obtain in many investigations and their ability to review this material
- the difficulties associated with determining whether material is relevant and needs to be disclosed
- the additional difficulties where the investigation relies on information from human sources and may be subject to PII.

The Commission considers that there is scope to strengthen, clarify and reinforce the legislative regime governing police disclosure obligations. It recommends the introduction of a statutory duty for police to provide the DPP with material and information that might be relevant to either the prosecution or the accused person's case; to notify the DPP of the existence and nature of any material subject to a claim of PII, privilege, legislative immunity or publication restriction; and, when requested, to disclose that material and information to the DPP. It also recommends the introduction of a legislative requirement for Victoria Police to complete a disclosure certificate, to remind officers of their important disclosure obligations and ensure they have disclosed all relevant material to prosecuting authorities in an accountable and transparent way. The certificate would need to describe relevant material not being disclosed due to a claim of PII or some other restriction or exception.

It is important that key stakeholders work together to develop procedures that support Victoria Police to navigate and make decisions about complex disclosure and PII issues. The roles of police and prosecutors are interdependent, and effective communication and consultation is critical to the proper functioning of the criminal justice system.

The Commission recommends that the DPP and Victoria Police jointly establish clearer and more transparent protocols and procedures to facilitate early and effective discussion of complex issues relating to disclosure and PII claims. These protocols and procedures should:

- ensure Victoria Police has adequate and early support, including legal advice, when making complex decisions about relevant and disclosable information that may be subject to PII
- tailor the level of support provided to Victoria Police so that greater support is provided in respect of complex PII and disclosure issues
- ensure the DPP's independence is maintained.

Victoria Police advised the Commission that it is in the process of implementing a range of improvements to disclosure processes and practices, including additional training for officers and a pilot program involving the use of dedicated disclosure officers. While these initiatives look promising, they are in their early stages. The Commission recommends that they be independently reviewed to ensure they are effective and able to achieve sustained and long-term improvements in Victoria Police's disclosure practices.

Organisational improvements also depend on effective leadership, governance and cultural change. To support this, the Commission recommends the establishment of a disclosure governance committee consisting of members from Victoria Police, the Victorian Office of Public Prosecutions and other relevant stakeholders, with responsibility for identifying and monitoring systemic disclosure issues, and overseeing the development and implementation of reforms to improve disclosure practices.

## Legal profession regulation

Lawyers have considerable power and authority when representing a client. They have expert knowledge about the law and legal system, and access to their client's confidential information. Their advice and actions can have a direct and significant influence on their client's wellbeing, the outcomes the client is able to achieve, and the client's future. When lawyers deliberately betray their client's trust or act in ways contrary to their client's interests, it can have a devastating impact on the client. It is also, as this inquiry has shown, apt to undermine both the integrity of the criminal justice system and public confidence in the legal profession.

Legal profession regulation exists to protect consumers and the public, and to support the proper administration of justice. Victoria's legal profession regulatory framework consists of legislation, the common law, professional conduct rules, support services and ongoing education. These elements work together, requiring lawyers to demonstrate high standards of ethical and legal practice. When lawyers fail to uphold these standards, complaint, investigation and disciplinary mechanisms act to correct and deter the behaviour.

Due to the limits of the Commission's terms of reference, it has not undertaken a wholesale review of legal profession regulation in Victoria. Rather, it has focused on the specific aspects of legal profession regulation that support the ethical conduct of lawyers, and related issues raised by stakeholders the Commission consulted.

While Victoria's legal profession regulatory framework has changed significantly since Ms Gobbo practised as a lawyer, there is scope to further strengthen and improve aspects of it.

It is important that lawyers fully understand the duty of confidentiality they owe to their clients and their responsibility to maintain appropriate professional boundaries. It would be beneficial to clarify and harmonise these aspects of the professional conduct rules for solicitors and barristers.

Legal ethics education is integral to supporting lawyers' understanding and application of their ethical duties and obligations in practice, as well as their ongoing professional development. Embedding legal ethics education in lawyers' continuing professional development, including through the use of practical, scenario-based learning,

would support them to understand the common ethical issues that can arise in legal practice and enhance their skills to manage those issues. Strengthening awareness of and access to the various ethical supports that are available to lawyers is also important.

When a complaint is made about a lawyer's conduct, it is critical that the processes for investigating it are not only independent, but also seen to be independent. Under the current model, the Victorian Legal Services Commissioner is responsible for the receipt, management and resolution of complaints about the professional conduct of lawyers. The Commissioner delegates some of their powers regarding the conduct of barristers to the Victorian Bar, including the power to investigate complaints against barristers. While this approach has benefits—including the ability to draw on the practical insights and subject matter expertise of the Victorian Bar regarding accepted standards of legal practice and advocacy—it risks a public perception that the model lacks independence, given that another function of the Victorian Bar is to advocate on behalf of its members. Recognising the importance of public confidence in all branches of the legal profession, the Commission recommends that the Victorian Legal Services Commissioner holds sole responsibility for investigating complaints about barristers, so that there is a single, consistent, independent approach to the management of all complaints regarding lawyers in Victoria.

The Commission has also carefully considered the potential benefits and risks of a mandatory requirement for lawyers to report suspected misconduct by other lawyers. While some submitters raised legitimate issues and concerns, the Commission considers that the introduction of such a mandatory reporting requirement would deter misconduct by lawyers, encourage their adherence to high ethical standards, strengthen public confidence in the legal profession, and bring it into line with other professions and fields where mandatory obligations apply, including the health sector and policing.

The Commission also recommends reforms to strengthen the rigour of the legal admission process and to support access to independent legal representation for people in police custody.

Finally, in light of the events that led to this inquiry, the Commission recommends that legal profession regulators and professional associations work together to develop communications material for the public about lawyers' professional and ethical obligations, with the aim of restoring and maintaining public confidence in the legal profession and the broader criminal justice system.

## Issues arising during the conduct of the Commission's inquiry

The Commission had both an investigative task, focused on examining events that happened many years ago, and a policy reform task, focused on assessing current policies and processes and identifying ways that they could be improved. Both tasks required the Commission to use its powers under the Inquiries Act and gather information from a range of sources, including from Victoria Police and other law enforcement agencies, statutory bodies and office holders, the courts and government departments.

The Commission's inquiry involved highly sensitive matters that are not typically subject to public scrutiny. There are many good reasons for this. Keeping the identities of human sources confidential is critical to their safety, and not revealing specific details of covert police methods helps to ensure police are not hindered in their efforts to disrupt, prevent and investigate crime. Some sensitive information relevant to the inquiry was specifically covered by *the Witness Protection Act 1991* (Vic) or court suppression orders, which prevented the Commission from publishing the information or referring to it in public hearings.

Accordingly, the nature of many matters examined by the Commission created unavoidable obstacles to accessing, using, sharing and publishing certain information. To a significant degree, the Commission was able to manage and resolve these issues. In many cases, it developed protocols and arrangements that enabled access to, and publication of, relevant information in a way that minimised the legal, operational and safety risks.

As the Inquiries Act is relatively new, having commenced in 2014, this was the first Victorian royal commission that relied heavily on the investigative and coercive powers the legislation provides. This meant the Commission had to tackle novel issues relating to the practical operation of the legislation and its interaction with other areas of law.

The most significant challenge for the Commission related to information subject to PII claims. Under the Inquiries Act, it is a reasonable excuse for a person not to comply with the Commission's power to compel the production of documents on the basis that the information is subject to PII. This legislative exception, combined with the volume of material over which Victoria Police claimed PII and the broad nature of many claims, complicated and delayed the production, review and publication of material. This in turn hindered the Commission's ability to inquire into subject matter relevant to its terms of reference. Accordingly, the Commission recommends amendment of the Inquiries Act to remove the ability to refuse production of material to a royal commission on the basis that the information is subject to PII.

Other potential reforms to improve and modernise the operation of the Inquiries Act include:

- clarifying provisions that exempt certain bodies and persons from the requirement to comply with the coercive powers of a royal commission
- creating a power to compel a person to provide a written statement within a specified timeframe
- enhancing the flexibility of requirements regarding service of notices to attend and produce
- modernising requirements for publishing non-publication or suppression orders made by royal commissions and boards of inquiry.

The Commission faced considerable challenges in relation to document production. In particular, Victoria Police's frequent failure to produce documents in a timely and comprehensive manner—together with its at times narrow view of, and obdurate approach to, the scope of notices to produce—unnecessarily diverted the Commission's resources and impeded the inquiry. Consequently, at the time of finalising the report, the Commission cannot be certain that it received all information from Victoria Police that was relevant to the inquiry. The Commission's findings and recommendations, and the submissions of Counsel Assisting, are based on material that was available to the Commission at the time of writing.

## Work beyond the Commission

Because the conduct of Ms Gobbo and Victoria Police has had significant consequences, the Commission has made wide-ranging recommendations directed to various agencies across government, the justice system and the legal profession. Its recommendations fall into three broad categories:

- referrals for investigation to determine whether further action should be taken in relation to the conduct of Ms Gobbo and current and former Victoria Police officers, including prosecution of criminal offences or disciplinary action
- processes to ensure that all potentially affected persons receive timely disclosure of information relevant to their cases
- reforms to laws, policies and procedures governing the use of human sources, disclosure of information in criminal proceedings, and aspects of legal profession regulation.

The Commission considers that, for various reasons, it would be problematic or challenging for the conduct of Ms Gobbo and Victoria Police officers to be examined by existing investigative authorities; that is, Victoria Police or IBAC. Instead, it recommends that the Victorian Government establishes a dedicated Special Investigator with all necessary powers to investigate potential criminal conduct on the part of Ms Gobbo and relevant current and former Victoria Police officers, and any disciplinary breaches by relevant current Victoria Police officers. Like IBAC, a Special Investigator would be separate from and independent of Victoria Police. Unlike IBAC, however, a Special Investigator would be able to investigate the full spectrum of conduct by Victoria Police officers and Ms Gobbo.

The Commission has also made recommendations to facilitate the Special Investigator's access to the Commission's records.

Finally, the Commission recommends the establishment of two key mechanisms to oversee the implementation of its recommendations:

- a cross-agency taskforce to drive and coordinate the careful, effective and timely development and implementation of the recommendations (Implementation Taskforce)
- an independent monitor to assess and report on the status and adequacy of implementation, and to engage closely with the Taskforce as reforms are developed, implemented, embedded and completed (Implementation Monitor).

The Implementation Monitor should report annually to the Attorney-General, or more frequently as needed, on the progress and adequacy of implementation. The Attorney-General should report annually to the Victorian Parliament until implementation is complete.

# Recommendations

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The Commission's recommendations are detailed in Volumes II, III and IV of the final report.

Together, they aim to ensure that conduct associated with Victoria Police's use of Ms Nicola Gobbo as a human source is thoroughly investigated; to prevent the recurrence of similar events in the future; and to help restore and maintain public confidence in Victoria Police, the legal profession and the criminal justice system.

The Commission has made 111 recommendations, as listed below. Further information about the purpose and context of the recommendations and their rationale is detailed in the Commission's final report.

## VOLUME II

### **The potential effects of Ms Nicola Gobbo's conduct as a human source**

#### **RECOMMENDATION 1**

That the Victorian Government, immediately after it has established the Special Investigator proposed in Recommendation 92, refers the conduct of Ms Nicola Gobbo to the Special Investigator to investigate whether there is sufficient evidence to establish the commission of a criminal offence or offences connected with her conduct as a human source for Victoria Police.

If the Special Investigator considers that there is sufficient evidence to establish the commission of a criminal offence or offences, they should prepare a brief of evidence for the Victorian Director of Public Prosecutions to determine whether to prosecute.

**RECOMMENDATION 2**

That the Victorian Bar Council, within three months, considers removing Ms Nicola Gobbo from the Victorian Bar Roll, including by any necessary amendment to the Victorian Bar Constitution.

## The conduct of Victoria Police officers

**RECOMMENDATION 3**

That the Victorian Government, immediately after it has established the Special Investigator proposed in Recommendation 92, refers the conduct of current and former Victoria Police officers named in this report or the complete and unredacted submissions of Counsel Assisting to the Special Investigator to investigate whether there is sufficient evidence to establish the commission of a criminal and/or disciplinary offence or offences connected with Victoria Police's use of Ms Nicola Gobbo as a human source.

If the Special Investigator considers that there is sufficient evidence to establish the commission of a criminal offence or offences, they should prepare a brief of evidence for the Victorian Director of Public Prosecutions to determine whether to prosecute.

If the Special Investigator considers that there is sufficient evidence to establish the commission of a disciplinary offence or offences, they should deal with those matters in accordance with Recommendation 99.

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**RECOMMENDATION 4**

That the Chief Commissioner of Victoria Police, within three months:

- a. takes steps to ensure that Victoria Police's organisational and executive structure enables the role of Executive Director, Legal Services to provide independent legal advice to Victoria Police Executive Command (or creates an alternative senior legal advisory role for this purpose)
- b. considers whether limits should be placed on the maximum time a person may spend in the position of Executive Director, Legal Services (or any alternative senior role created within Victoria Police for the purpose of providing independent legal advice to Executive Command).

## Victoria Police's conduct: systemic issues and causal factors

**RECOMMENDATION 5**

That Victoria Police provides monthly progress reports to the Implementation Taskforce proposed in Recommendation 107, regarding its progress in fulfilling its ongoing disclosure obligations to potentially affected persons identified by the Commission. These reports should also be made available to the Implementation Monitor proposed in Recommendation 108.

## VOLUME III

### Victoria Police's use of other human sources with legal obligations of confidentiality or privilege

#### RECOMMENDATION 6

That the Victorian Government, within three months, appoints a suitably qualified and independent person to review the 11 Victoria Police human source files subject to a claim of public interest immunity. The appointed person should have full and unfettered access to the human source files and report to the Attorney-General, the Minister for Police and the Chief Commissioner of Victoria Police on whether:

- a. any of the human sources provided information to Victoria Police in possible breach of their legal obligations of confidentiality or privilege
- b. any confidential or privileged information provided by the human sources was used or disseminated by Victoria Police
- c. a referral should be made to the Victorian Director of Public Prosecutions and/or Commonwealth Director of Public Prosecutions for further consideration, if there is evidence to suggest a prosecution or conviction was based on information improperly obtained by Victoria Police or may have been affected by the non-disclosure of relevant evidence.

### Victoria Police's implementation of the Kellam Report recommendations

#### RECOMMENDATION 7

That Victoria Police, within three months and consistent with its *Capability Plan 2016–2025*, establishes clear processes for the review and amendment of human source management policies and procedures, including processes for:

- a. seeking and incorporating operational input from police officers involved in human source management
- b. disseminating and communicating policy and procedural changes so that all relevant officers receive timely and accurate advice about impending change
- c. reviewing and evaluating policies and procedures on an annual basis to ensure its human source management practices are responsive to emerging risks, changes to the operating environment and changes to any relevant legislation; and are consistent with Victoria Police's human rights obligations under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

## Victoria Police's processes for the use and management of human sources involving legal obligations of confidentiality or privilege

### RECOMMENDATION 8

That the Victorian Government, within two years, implements legislation for Victoria Police's registration, use and management of human sources, to provide a clear framework for police to obtain and use information from human sources and to ensure they are used in an ethical and justifiable manner.

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### RECOMMENDATION 9

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, makes it an offence to disclose information relating to a human source without authorisation (including information that a human source provided or was tasked to provide, and information about the identity of a human source and their registration and management).

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### RECOMMENDATION 10

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, defines 'reportable human sources' as a class of people who are prospective or registered human sources and who are reasonably expected to have access to confidential or privileged information.

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### RECOMMENDATION 11

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, establishes clear decision-making arrangements that demonstrate alignment between the seniority of the decision maker and the level of risk posed by the registration of human sources. The legislation should:

- a. empower the Chief Commissioner of Victoria Police to register human sources to assist in gathering criminal intelligence and/or investigating criminal activity
- b. permit the Chief Commissioner to delegate the power to register reportable human sources to an officer of or above the rank of Assistant Commissioner and non-reportable human sources to an officer of or above the rank of Superintendent
- c. require that an application for the registration of a prospective human source must be authorised by the Chief Commissioner or their delegate before the person can be used as a human source.

### **RECOMMENDATION 12**

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, requires the Chief Commissioner of Victoria Police or their delegate to be satisfied that in registering any human source, the registration is appropriate and justified, including that:

- a. the use of the person as a human source is necessary to achieve a legitimate law enforcement objective and is proportionate to that objective
- b. the risks associated with the person's registration have been identified and can be adequately managed.

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### **RECOMMENDATION 13**

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources:

- a. empowers the Chief Commissioner of Victoria Police or their delegate to impose conditions in respect of the registration of any human source
- b. requires the Chief Commissioner or their delegate to determine the period that a human source may be registered
- c. requires the Chief Commissioner or their delegate to determine the frequency with which the registration of a human source should be reviewed.

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### **RECOMMENDATION 14**

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, requires that a prospective human source who is reasonably expected to have access to information that would be confidential or privileged but for an exception to the duty of confidentiality or privilege, should for the purpose of the human source registration process be treated as though they are a reportable human source.

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### **RECOMMENDATION 15**

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, requires that:

- a. the Chief Commissioner of Victoria Police or their delegate must consider formal legal advice before deciding to register a reportable human source
- b. the Chief Commissioner or their delegate must have regard to any recommendations or submissions on the proposed registration that the Public Interest Monitor has made before deciding to register a reportable human source.

**RECOMMENDATION 16**

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources:

- a. requires that the Chief Commissioner of Victoria Police or their delegate must be satisfied that there are exceptional and compelling circumstances to justify the registration of a human source where Victoria Police intends to obtain or disseminate confidential or privileged information from that person
  - b. provides that 'exceptional and compelling circumstances' be defined as circumstances where there is a serious threat to national security, the community or the life and welfare of a person; and where the information cannot be obtained through any other reasonable means
  - c. requires that the Chief Commissioner or their delegate must consider formal legal advice before deciding to register a human source with the intention to obtain or disseminate confidential or privileged information from that person
  - d. requires that the Chief Commissioner or their delegate must have regard to any recommendations or submissions on the proposed registration that the Public Interest Monitor has made before deciding to register a human source with the intention to obtain or disseminate confidential or privileged information from that person.
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**RECOMMENDATION 17**

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, requires that where a reportable or non-reportable human source provides confidential or privileged information to police that was not expected or authorised at the time of their registration as a human source:

- a. Victoria Police must quarantine the confidential or privileged information
  - b. Victoria Police must cancel the registration and commence a new application (if Victoria Police considers it necessary to continue using the person as a human source), in line with Recommendations 11, 15 and 16.
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**RECOMMENDATION 18**

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, allows the Chief Commissioner of Victoria Police or their delegate to make an emergency authorisation of a reportable human source. This power should only be used in circumstances where: there is a serious threat to national security, the community, or the life and welfare of a person; the threat is imminent; and the information is not able to be obtained through any other reasonable means.

**RECOMMENDATION 19**

That Victoria Police, within 12 months, implements changes to its decision-making model and associated requirements in the Human Source Policy, on an interim basis until the legislation proposed in Recommendation 8 comes into force. The Human Source Policy should:

- a. provide that the Assistant Commissioner, Intelligence and Covert Support Command, is responsible for decisions to register Category 1–3 human sources and to disseminate confidential or privileged information obtained from any human source
  - b. provide that the Central Source Registrar is responsible for the registration of human sources other than Category 1–3 human sources
  - c. require the Assistant Commissioner to consider formal legal advice in deciding whether to authorise the registration of a Category 1 human source or to disseminate confidential or privileged information, and to consider other specialist advice as required in deciding whether to register a Category 2 or 3 human source
  - d. replace the requirement for officers to seek approval from the Human Source Ethics Committee to ‘approach’ a prospective Category 1–3 human source with a requirement for the handling team to consult with the Human Source Management Unit before approaching such a prospective source
  - e. remove Category 4 human sources as a separate category under the Human Source Policy.
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**RECOMMENDATION 20**

That Victoria Police, within 12 months:

- a. implements changes to its Human Source Policy to include a statement of the organisation’s objectives and guiding principles for the registration, use and management of human sources, including but not limited to principles of integrity, necessity and proportionality, accountability, effectiveness, consistency, and safety and sensitivity
  - b. obtains operational input to inform the development of these objectives, principles and associated guidance.
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**RECOMMENDATION 21**

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide practical examples of the ways in which human source management can engage and limit the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and guidance for police officers in considering whether the use of a human source is necessary and proportionate.

**RECOMMENDATION 22**

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide practical guidance to assist police officers to identify potentially confidential or privileged information. This guidance should include advice and examples relating to:

- a. the types of occupations and professional relationships that attract legal obligations of confidentiality or privilege
- b. the exceptions to legal obligations of confidentiality or privilege and when these may apply
- c. the implications of using confidential or privileged information, including the potentially adverse consequences for any resulting investigations, prosecutions or convictions
- d. when and how to seek further advice, including from the Human Source Management Unit.

Victoria Police should seek legal advice from its Legal Services Department or the Victorian Government Solicitor's Office in developing this guidance.

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**RECOMMENDATION 23**

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide clear requirements and instructions to police officers on the use and handling of confidential and privileged information, including in relation to the quarantine, retention, dissemination and destruction of such information.

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**RECOMMENDATION 24**

That Victoria Police, within 12 months, implements changes to its Human Source Policy to require that:

- a. when dealing with human sources involving legal obligations of confidentiality or privilege, the Acknowledgement of Responsibilities must clearly set out any limitations on the information a human source can provide
  - b. police officers must not actively, without appropriate authority, seek information from a human source that would cause the human source to breach a legal obligation of confidentiality or privilege.
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**RECOMMENDATION 25**

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide clear instructions and practical guidance on the circumstances in which it may be appropriate to dispense with the requirement for a sterile corridor and the measures that officers should adopt to manage the associated risks.

### RECOMMENDATION 26

That Victoria Police, within two years, establishes an organisational model for the registration, use and management of human sources that provides for:

- a. the management of all human sources by dedicated source teams
  - b. centralised internal oversight of the management of human sources by the Human Source Management Unit, the Central Source Registrar and the Assistant Commissioner, Intelligence and Covert Support Command.
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### RECOMMENDATION 27

That Victoria Police, within two years, removes the roles of Officer in Charge and Local Source Registrar from its decision-making process and organisational model for the registration, use and management of human sources.

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### RECOMMENDATION 28

That Victoria Police, within two years, introduces requirements limiting the maximum time that police officers can hold positions within dedicated source teams and the Human Source Management Unit to five years.

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### RECOMMENDATION 29

That Victoria Police, within two years:

- a. develops a prevention and detection strategy to mitigate the risk of misconduct and corruption that may arise from the implementation of a centralised and dedicated human source management model, taking into account the Commission's findings and those of previous inquiries
  - b. ensures that this strategy is regularly reviewed and refined as part of Victoria Police's strategic management of this high-risk area of policing.
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### RECOMMENDATION 30

That Victoria Police, within 12 months and as part of its current work to improve its human source risk assessments, develops guidance on how to assess:

- a. the source and nature of information reasonably expected to be provided by a human source, to identify whether that information could be confidential or privileged
- b. the risks that the use of a human source could pose to the proper administration of justice
- c. the engagement of any human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), including how any limitation is reasonable, necessary and proportionate in the circumstances.

**RECOMMENDATION 31**

That Victoria Police, within three years, engages an independent expert to evaluate and report on the effectiveness of its new human source management risk assessment tools, to determine whether they support effective identification and management of risks.

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**RECOMMENDATION 32**

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide clear instructions and practical guidance about who is responsible for supervision of the handling team, why effective supervision is necessary and how it should be applied in practice.

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**RECOMMENDATION 33**

That Victoria Police, within 12 months, develops guidance in its human source management training to assist police officers to identify confidential and privileged information, focusing on the origin of information and circumstances in which such information could be provided to police, including:

- a. how to identify potential legal obligations of confidentiality or privilege through the risk assessment process
- b. how to manage any professional conflicts of interest that may arise for a human source with legal obligations of confidentiality or privilege.

Victoria Police should seek legal advice from its Legal Services Department or the Victorian Government Solicitor's Office in developing this training material.

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**RECOMMENDATION 34**

That Victoria Police, within 12 months, develops guidance in its human source management training on:

- a. the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* that are generally engaged by the management of human sources, including the right to life, the right to privacy and the right to a fair hearing
- b. how to assess whether the use of a human source unreasonably limits the human rights of the source or other people.

Victoria Police should seek input from the Victorian Equal Opportunity and Human Rights Commission in developing and delivering this training.

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**RECOMMENDATION 35**

That Victoria Police, within 12 months, develops and implements training for controllers, the Human Source Management Unit, the Central Source Registrar and the Assistant Commissioner, Intelligence and Covert Support Command, focused on effective risk management, supervision, oversight and decision making in respect of the use of human sources. This training should include guidance on identifying confidential and privileged information, and the circumstances in which such information could be provided to police.

**RECOMMENDATION 36**

That Victoria Police, within 12 months, requires all handlers and controllers to successfully complete intermediate human source management training at a minimum.

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**RECOMMENDATION 37**

That Victoria Police, within 12 months, introduces requirements for mandatory annual human source management training for all police officers with human source management responsibilities and timely training associated with any significant policy or legislative changes.

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**RECOMMENDATION 38**

That Victoria Police, within 12 months, enhances Interpose or develops some other system for recording details of the origin of information provided by human sources and how it was obtained.

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**RECOMMENDATION 39**

That Victoria Police, within 12 months, reviews the broader functionality of Interpose to ensure that it will support the effective implementation of the Commission's recommendations.

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**RECOMMENDATION 40**

That Victoria Police, within 12 months, implements changes to its Human Source Policy and associated processes to:

- a. provide for six-monthly compliance audits of human source files at all risk levels by the Compliance and Risk Management Unit within the Intelligence and Covert Support Command
  - b. clearly set out the compliance monitoring functions of both the Compliance and Risk Management Unit and the Human Source Management Unit.
- 

**RECOMMENDATION 41**

That Victoria Police, within 12 months, implements changes to its Human Source Policy and associated processes to require that:

- a. the results of human source management audits be reported to the Assistant Commissioner, Intelligence and Covert Support Command
- b. any system-wide risks or major failings that are identified through human source management audits be reported to the Victoria Police Audit and Risk Committee.

**RECOMMENDATION 42**

That Victoria Police, within three months, establishes a strategic governance committee to:

- a. contribute to the development, and oversee Victoria Police's implementation of, the human source management reforms recommended by the Commission
  - b. identify, address and monitor emerging risks, issues and opportunities in Victoria Police's human source management program and provide strategic advice to the Assistant Commissioner, Intelligence and Covert Support Command and Deputy Commissioner, Specialist Operations
  - c. be responsible for strategic planning for Victoria Police's human source management program.
- 

**RECOMMENDATION 43**

That the Victorian Government ensures Victoria Police is appropriately funded and resourced to implement the Commission's recommendations.

## External oversight of Victoria Police's use of human sources

**RECOMMENDATION 44**

That the Victorian Government, within two years, implements legislation for external oversight of Victoria Police's registration, use and management of all human sources.

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**RECOMMENDATION 45**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, adopts a model comprised of the following three tiers:

- a. The Public Interest Monitor should be involved in Victoria Police's decision-making process for registering reportable human sources.
- b. The Independent Broad-based Anti-corruption Commission should retrospectively monitor Victoria Police's compliance with the human source management framework recommended by the Commission, including the proposed legislation, any regulations, Victoria Police's Human Source Policy and related procedures.
- c. The Independent Broad-based Anti-corruption Commission should continue to receive, handle and investigate complaints about Victoria Police, including any complaints about Victoria Police's use of human sources.

#### **RECOMMENDATION 46**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides the Public Interest Monitor with the following legislative functions in relation to Victoria Police applications to register reportable human sources:

- a. test the sufficiency and adequacy of information relied on by Victoria Police in its application to register a reportable human source
- b. ask questions of any person giving information about the application
- c. assess the appropriateness of, and make recommendations or submissions on, the application to the Chief Commissioner of Victoria Police or their delegate
- d. such other functions as considered necessary or appropriate.

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#### **RECOMMENDATION 47**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides the Public Interest Monitor with all necessary and reasonable powers required to fulfil its functions under the new legislation, including the power to:

- a. request, access and receive relevant documents, information or other material from Victoria Police
- b. require the Chief Commissioner of Victoria Police or other relevant Victoria Police personnel to answer questions relevant to an application to register a reportable human source
- c. make recommendations to the Chief Commissioner or their delegate regarding Victoria Police's decisions relating to human sources
- d. refer to the Chief Commissioner for reconsideration a delegate's decision not to accept a recommendation of the Public Interest Monitor relating to an application to register a reportable human source.

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#### **RECOMMENDATION 48**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, empowers the Public Interest Monitor to make retrospective submissions or recommendations to the Chief Commissioner of Victoria Police or their delegate about the adequacy of any decisions made or actions taken by Victoria Police in relation to an emergency authorisation (made in line with the process proposed in Recommendation 18).

**RECOMMENDATION 49**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, requires the Public Interest Monitor to:

- a. report to the Attorney-General annually on, among other things, the performance of its legislative functions, Victoria Police's acceptance or rejection of its recommendations and its views about the adequacy of actions taken by Victoria Police
- b. provide special reports to the Attorney-General on other occasions if it deems necessary, or on the Attorney-General's request
- c. provide copies of these annual and special reports to the Minister for Police and the Chief Commissioner of Victoria Police.

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**RECOMMENDATION 50**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, requires the Attorney-General to:

- a. table in the Victorian Parliament annual and special reports prepared by the Public Interest Monitor
- b. cause the reports to be published on a Victorian Government website, subject to any redactions that the Public Interest Monitor considers necessary on safety and security grounds.

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**RECOMMENDATION 51**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides that the Chief Commissioner of Victoria Police has obligations to:

- a. notify the Public Interest Monitor of any application to register a reportable human source
- b. provide all information relevant to the application, whether supportive or adverse, to the Public Interest Monitor
- c. ensure that any relevant Victoria Police personnel provide information and answer questions relevant to an application when requested by the Public Interest Monitor
- d. provide the Public Interest Monitor with all information relevant to an emergency authorisation of a reportable human source and a report explaining why the circumstances were exceptional and compelling and why the threat was imminent
- e. respond to the Public Interest Monitor within a reasonable time after a recommendation has been made as to whether the recommended action has been or will be taken, or provide reasons as to why the recommendation is not accepted
- f. ensure that Victoria Police personnel provide all reasonable assistance to support the Public Interest Monitor in the performance of its functions.

**RECOMMENDATION 52**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides the Independent Broad-based Anti-corruption Commission with legislative functions to:

- a. monitor Victoria Police's compliance with the human source management framework recommended by the Commission
  - b. conduct inspections of Victoria Police human source records at least once every six months
  - c. receive and consider reports from Victoria Police regarding material breaches of compliance with, or material deviations from, the human source management framework
  - d. receive and consider reports from Victoria Police regarding its management of confidential or privileged information obtained from a human source
  - e. make findings and recommendations to the Chief Commissioner of Victoria Police.
- 

**RECOMMENDATION 53**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides the Independent Broad-based Anti-corruption Commission with all necessary and reasonable powers required to fulfil its legislative functions, including the power to:

- a. enter any Victoria Police premises, after notifying the Chief Commissioner of Victoria Police
  - b. have full and free access to Victoria Police human source records and systems
  - c. make copies of records, in accordance with appropriate security measures
  - d. request Victoria Police personnel to answer questions and provide documents
  - e. request further inspection outside the legislative inspection period to monitor and assess Victoria Police's implementation of any of its recommendations
  - f. do any other thing reasonably necessary to discharge its legislative functions effectively.
- 

**RECOMMENDATION 54**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides that the Chief Commissioner of Victoria Police has obligations to:

- a. report regularly (every three or six months) to the Independent Broad-based Anti-corruption Commission on any material breach of, or material deviation from, the human source management framework recommended by the Commission, and explain the circumstances of that breach and steps taken or planned to rectify the breach and prevent it recurring
- b. report regularly (every three or six months) to the Independent Broad-based Anti-corruption Commission on confidential or privileged information that Victoria Police has obtained from any human source and how that information has been or will be dealt with
- c. respond in writing within a reasonable time of receiving a recommendation of the Independent Broad-based Anti-corruption Commission, either to accept the recommendation or explain why it has not been accepted
- d. implement a recommendation of the Independent Broad-based Anti-corruption Commission within a reasonable time of receiving and accepting it
- e. ensure that Victoria Police personnel provide all reasonable assistance to the Independent Broad-based Anti-corruption Commission in the performance of its functions.

**RECOMMENDATION 55**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, requires the Independent Broad-based Anti-corruption Commission to:

- a. report to the Attorney-General annually on, among other things, the performance of its legislative functions and Victoria Police's compliance with the human source management framework recommended by the Commission
- b. provide special reports to the Attorney-General on other occasions if the Independent Broad-based Anti-corruption Commission deems necessary, or on the Attorney-General's request
- c. provide copies of these annual and special reports to the Minister for Police and the Chief Commissioner of Victoria Police.

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**RECOMMENDATION 56**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, requires the Attorney-General to:

- a. table in the Victorian Parliament annual and special reports prepared by the Independent Broad-based Anti-corruption Commission
- b. cause the reports to be published on a Victorian Government website, subject to any redactions that the Independent Broad-based Anti-corruption Commission considers necessary on safety and security grounds.

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**RECOMMENDATION 57**

That Victoria Police, within three months, implements changes to its Human Source Policy to require that all human sources are informed upon registration that they are able to make complaints to the Independent Broad-based Anti-corruption Commission, which may be confidential if they wish.

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**RECOMMENDATION 58**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, allows the Public Interest Monitor and Independent Broad-based Anti-corruption Commission to securely share information relevant to their respective legislative functions regarding Victoria Police's use and management of human sources.

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**RECOMMENDATION 59**

That the Public Interest Monitor and the Independent Broad-based Anti-corruption Commission, within two years and prior to the commencement of the proposed new legislation for external oversight of Victoria Police's registration, use and management of human sources, implement appropriate security protocols and infrastructure to securely receive, share, store and dispose of sensitive human source information.

### RECOMMENDATION 60

That the Victorian Government, within two years, ensures that the Public Interest Monitor, Independent Broad-based Anti-corruption Commission and Victoria Police are appropriately funded and resourced to undertake the additional legislative functions and fulfil associated obligations that the Commission has recommended for the external oversight of the use of human sources.

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### RECOMMENDATION 61

That the Victorian Government, within two years, undertakes a review of institutional and legislative structures for the oversight of Victoria Police's exercise of powers, to ensure that Victoria's police oversight system is consistent and coherent and contributes to improved police accountability, including through outcome-focused monitoring of police decisions and actions.

## VOLUME IV

### Use and disclosure of information from human sources in the criminal justice system

#### RECOMMENDATION 62

That the Victorian Government, within 12 months, introduces a legislative requirement for the responsible Victoria Police officer to:

- a. provide the Victorian Director of Public Prosecutions with all material obtained during an investigation that may be relevant to either the prosecution or the accused person's case, except for material that is subject to a claim of privilege, public interest immunity, a legislative immunity or publication restriction
  - b. notify the Director of the existence and nature of any material subject to a claim of privilege, public interest immunity, a legislative immunity or publication restriction
  - c. where requested, provide the Director with any material subject to a claim of privilege, public interest immunity, legislative immunity or publication restriction.
- 

#### RECOMMENDATION 63

That the Victorian Government, within 12 months, introduces a legislative requirement for Victoria Police to complete a disclosure certificate in summary proceedings when a full brief is served and in indictable proceedings when a hand-up brief is served, which describes:

- a. relevant material not contained in the brief of evidence that is subject to a claim of privilege, public interest immunity, a legislative immunity or publication restriction
- b. the nature of the privilege or immunity claim or publication restriction in relation to each item.

A copy of the disclosure certificate should be provided to the Victorian Director of Public Prosecutions and served on accused persons.

**RECOMMENDATION 64**

That Victoria Police, within 12 months, amends its internal policies and procedures to align with the legislative changes proposed in Recommendations 62 and 63. These amendments should include guidance for the responsible Victoria Police officer on disclosure obligations and how to describe withheld materials in the proposed disclosure certificate.

Victoria Police should consult with the Victorian Director of Public Prosecutions in developing these amendments.

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**RECOMMENDATION 65**

That the Victorian Director of Public Prosecutions, within 12 months, amends the *Policy of the Director of Public Prosecutions for Victoria* to align it with the legislative changes proposed in Recommendations 62 and 63.

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**RECOMMENDATION 66**

That the Victorian Government, within 12 months, amends sections 41(e) and 110(e) of the *Criminal Procedure Act 2009* (Vic) to clarify that any information, document or thing that is relevant to an alleged offence includes any material relevant to the credibility of a prosecution witness.

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**RECOMMENDATION 67**

That the Victorian Government, within six months, in consultation with the Victorian Director of Public Prosecutions, Victoria Police, the Victorian courts, Victoria Legal Aid and other relevant stakeholders:

- a. reviews the adequacy of existing court powers to make non-disclosure orders
  - b. considers whether a legislative power should be introduced to empower Victoria Police and/or the Director to initiate applications for a court to determine public interest immunity claims without giving notice to an accused person.
- 

**RECOMMENDATION 68**

That the Victorian Director of Public Prosecutions, Victoria Police, the Victorian Government Solicitor's Office and any other relevant stakeholders work together to establish clear protocols and procedures, within 12 months, to facilitate effective engagement with, and resolution of, complex issues arising from disclosure obligations and public interest immunity claims.

These protocols and procedures should:

- a. ensure Victoria Police has adequate and early support, including legal advice, when making complex decisions about relevant and disclosable information that may be subject to public interest immunity
- b. tailor the level of support provided to Victoria Police, to enable greater support in cases involving complex public interest immunity and disclosure issues
- c. ensure the Director's independence is maintained and potential conflicts of interest are avoided.

### RECOMMENDATION 69

That the Victorian Director of Public Prosecutions, within 12 months, amends the *Policy of the Director of Public Prosecutions for Victoria* to provide appropriate guidance on when and how the Director can be consulted by Victoria Police in relation to complex issues arising from disclosure obligations and public interest immunity claims. These amendments should reflect the protocols and procedures proposed in Recommendation 68.

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### RECOMMENDATION 70

That Victoria Police, within 12 months, amends its internal policies and procedures to provide appropriate guidance on when and how Victoria Police can consult the Victorian Director of Public Prosecutions in relation to complex issues arising from disclosure obligations and public interest immunity claims. These amendments should reflect the protocols and procedures proposed in Recommendation 68 and the need for police officers to obtain early legal advice when potentially complex disclosure and public interest immunity issues arise; and provide a clear framework for seeking that advice.

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### RECOMMENDATION 71

That Victoria Police, within six months, implements the measures it has proposed to improve training and support for police officers regarding their disclosure obligations, across all levels of the organisation.

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### RECOMMENDATION 72

That Victoria Police commissions two independent reviews of the measures implemented in Recommendation 71, to ensure that they adequately reflect any applicable changes to law and policy and are effective in improving police officers' understanding of their disclosure obligations. The reviews should be undertaken as follows:

- a. an initial independent external review within two years of implementation
  - b. an additional independent external review within five years of the initial review.
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### RECOMMENDATION 73

That Victoria Police commissions two independent reviews of the implementation of its dedicated disclosure officer initiative, to ensure that it is effective in improving disclosure processes and practices. The reviews should be undertaken as follows:

- a. an initial independent external review within two years of implementation
- b. an additional independent external review within five years of the initial review.

**RECOMMENDATION 74**

That Victoria Police, within six months, reviews the information management systems it relies on to fulfill its disclosure obligations, to assess with specificity:

- a. the extent to which the implementation of recent system reforms will enable Victoria Police to fulfil its disclosure obligations adequately
  - b. remaining system gaps and issues
  - c. system functionality needed to address any identified gaps and issues
  - d. investment requirements to develop and implement any additional system functionality needed.
- 

**RECOMMENDATION 75**

That Victoria Police, within three months, establishes a disclosure governance committee that has responsibility for identifying and monitoring systemic disclosure issues and overseeing the development and implementation of reforms to improve disclosure processes and practices.

The committee's membership should consist of stakeholders with expertise in policing, disclosure, public interest immunity and the conduct of criminal prosecutions, including the Victorian Office of Public Prosecutions, the Victorian Government Solicitor's Office, the Department of Justice and Community Safety, Victoria Legal Aid and any other relevant legal profession representatives.

## Legal profession regulation

**RECOMMENDATION 76**

That the Victorian Legal Services Board and Commissioner, the Law Institute of Victoria and the Victorian Bar work with community legal services and Victoria Legal Aid to, within six months, prepare and distribute communications aimed at restoring and promoting public and client confidence in the legal profession. These communications should:

- a. educate clients and the public on lawyers' ethical duties and obligations, particularly in relation to confidentiality, conflicts of interest and legal professional privilege
  - b. inform clients and the public about where they can seek help or advice regarding concerns they may have about their lawyer.
- 

**RECOMMENDATION 77**

That the Victorian Government, within six months, considers whether the Victorian Legal Admissions Board requires any additional powers to request and consider documentation from other agencies for the purpose of assessing applications for admission to the legal profession.

If such powers are conferred in Victoria, a Council of Attorneys-General working group should consider whether a harmonised approach could be adopted in all Australian jurisdictions.

### **RECOMMENDATION 78**

That the Legal Services Council, Law Council of Australia and Australian Bar Association work together to, within 12 months, clarify and harmonise the duty of confidentiality and its exceptions, as contained in the Solicitors' Conduct Rules and the Barristers' Conduct Rules.

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### **RECOMMENDATION 79**

That the Law Council of Australia, within 12 months, updates the commentary to the Solicitors' Conduct Rules in relation to the duty of confidentiality and its exceptions, to include guidance on:

- a. the factors to be considered when assessing whether a disclosure of confidential information is justified
  - b. where and how a solicitor can obtain advice on ethics when considering making a disclosure
  - c. steps to be taken to document the actions taken by a solicitor regarding the information received and the disclosure made
  - d. any further actions that a solicitor should take when considering making a disclosure.
- 

### **RECOMMENDATION 80**

That the Victorian Bar, within 12 months, prepares guidance in relation to the duty of confidentiality and its exceptions, including:

- a. the factors to be considered when assessing whether a disclosure of confidential information is justified
  - b. where and how a barrister can obtain advice on ethics when considering making a disclosure
  - c. steps to be taken to document the actions taken by a barrister regarding the information received and the disclosure made
  - d. any further actions that a barrister should take when considering making a disclosure.
- 

### **RECOMMENDATION 81**

That the Victorian Bar, within six months, develops ethics guidance on specific conflict of interest issues and scenarios that can arise for criminal defence barristers.

The Victorian Bar should prepare this guidance in consultation with the Criminal Bar Association, Victoria Legal Aid and other relevant stakeholders.

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### **RECOMMENDATION 82**

That the Law Council of Australia, within 12 months, includes specific guidance on maintaining appropriate professional boundaries in the commentary to the Solicitors' Conduct Rules.

**RECOMMENDATION 83**

That the Victorian Bar, within 12 months, develops specific guidance for barristers on maintaining appropriate professional boundaries.

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**RECOMMENDATION 84**

That the Victorian Legal Services Board and Commissioner, within six months, issues clear guidance about how legal ethics education should be embedded in the four compulsory fields of continuing professional development, including through the use of practical, scenario-based learning.

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**RECOMMENDATION 85**

That the Legal Services Council, Law Council of Australia and Australian Bar Association work together to, within 12 months, harmonise the powers held by local regulatory authorities through the Solicitors' Continuing Professional Development Rules, so that policies and requirements for continuing professional development can be made for solicitors as they can already for barristers.

If this change has not been made within 12 months, the Victorian Government should, within a further 12 months, provide the Victorian Legal Services Board and Commissioner with the power to regulate solicitors' continuing professional development, as it is currently able to do in respect of barristers.

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**RECOMMENDATION 86**

That the Victorian Government, within 12 months, pursues through the Council of Attorneys-General and the Legal Services Council, an amendment to the Legal Profession Uniform Law introducing a mandatory requirement for lawyers to report the suspected misconduct of other lawyers. The Victorian Government should ensure the Victorian Legal Services Board and Commissioner is appropriately resourced to implement this recommendation.

If the amendment incorporating a mandatory reporting obligation has not been agreed within 12 months, the Victorian Government should, within a further 12 months, introduce a mandatory reporting requirement for Victorian lawyers to report the suspected misconduct of other lawyers.

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**RECOMMENDATION 87**

That the Victorian Legal Services Board and Commissioner, the Victorian Bar and the Law Institute of Victoria, in consultation with other relevant stakeholders and prior to the commencement of the mandatory reporting obligation proposed in Recommendation 86, prepare harmonised guidance and continuing professional development activities for the legal profession to accompany and support the introduction of a mandatory reporting requirement.

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**RECOMMENDATION 88**

That the Victorian Legal Services Commissioner, within 12 months, revokes the Instrument of Delegation conferred on the Victorian Bar for receiving and handling complaints regarding barristers and resumes that function.

**RECOMMENDATION 89**

That the Victorian Bar and the Law Institute of Victoria, within six months, assess the awareness level, use and views of the ethical, health and wellbeing support services and resources offered to their members. If the awareness levels and usage are found to be low, the Victorian Bar and the Law Institute of Victoria should review the quality of the services and resources and improve marketing and communications to ensure members are aware of the useful supports available.

The Victorian Bar and the Law Institute of Victoria should regularly review the effectiveness of these services and resources (at least every two years) and update them as required to meet the needs of members.

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**RECOMMENDATION 90**

That Victoria Police, within 12 months, amends the *Victoria Police Manual* and relevant training materials to comprehensively set out obligations under section 464C of the *Crimes Act 1958 (Vic)* and the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* related to the right of a person in police custody to communicate with a lawyer.

Victoria Police should undertake this work in consultation with relevant stakeholders including Victoria Legal Aid, the Department of Justice and Community Safety, Law Institute of Victoria, Victorian Bar, Federation of Community Legal Centres and Victorian Aboriginal Legal Service.

## Issues arising during the conduct of the Commission's inquiry

**RECOMMENDATION 91**

That the Victorian Government, within 18 months, amends the *Inquiries Act 2014 (Vic)* to:

- a. remove the ability for a person to refuse to comply with a notice to give information to a royal commission on the basis that the information is the subject of public interest immunity
- b. insert a provision to make clear that it is not a reasonable excuse for a person to refuse or fail to comply with a requirement to give information (including answering a question) or produce a document or other thing to a royal commission on the basis that the information, document or other thing is the subject of public interest immunity
- c. specify that any such information or document or other thing does not cease to be the subject of public interest immunity only because it is given or produced to a royal commission in accordance with a requirement under the Act.

## Work beyond the Commission

**RECOMMENDATION 92**

That the Victorian Government, within 12 months, develops legislation to establish a Special Investigator with the necessary powers and resources to investigate whether there is sufficient evidence to establish the commission of a criminal offence or offences (connected with Victoria Police's use of Ms Nicola Gobbo as a human source) by Ms Gobbo or the current and former police officers named in the Commission's final report or in the complete and unredacted submissions of Counsel Assisting.

**RECOMMENDATION 93**

That the Victorian Government, in developing the legislation to establish the Special Investigator, requires that the person appointed as the Special Investigator be an Australian lawyer with at least 10 years' experience in criminal law or a related field.

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**RECOMMENDATION 94**

That, where the Special Investigator compiles a brief of evidence containing sufficient evidence to establish the commission of a criminal offence or offences by Ms Nicola Gobbo or current or former Victoria Police officers, the Victorian Director of Public Prosecutions should be responsible for determining whether to prosecute and, if so, for the prosecution of the matter under the *Public Prosecutions Act 1994* (Vic).

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**RECOMMENDATION 95**

That the Victorian Government, in developing the legislation to establish the Special Investigator, requires the Special Investigator to report regularly to the Implementation Monitor proposed in Recommendation 108 on their progress to establish their operations, and on the outcomes of their investigations.

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**RECOMMENDATION 96**

That the Victorian Government, in developing the legislation to establish the Special Investigator, requires the Special Investigator to investigate whether there is sufficient evidence to establish the commission of misconduct or a breach of discipline under the *Victoria Police Act 2013* (Vic) (connected with Victoria Police's use of Ms Nicola Gobbo as a human source) by current Victoria Police officers named in the Commission's final report or in the complete and unredacted submissions of Counsel Assisting.

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**RECOMMENDATION 97**

That the Victorian Government, in developing the legislation to establish the Special Investigator, empowers the Special Investigator to investigate:

- a. whether there is sufficient evidence to establish the commission of a criminal offence or offences (connected with Victoria Police's use of Ms Nicola Gobbo as a human source) by any current or former Victoria Police officers other than those named in the Commission's final report or in the complete and unredacted submissions of Counsel Assisting
- b. whether there is sufficient evidence to establish the commission of misconduct or a breach of discipline under the *Victoria Police Act 2013* (Vic) (connected with Victoria Police's use of Ms Gobbo as a human source) by any current Victoria Police officers other than those named in the Commission's final report or in the complete and unredacted submissions of Counsel Assisting.

### **RECOMMENDATION 98**

That the Victorian Government, in developing the legislation to establish the Special Investigator, provides the Special Investigator with all necessary and reasonable powers required to fulfil their role in investigating misconduct or breaches of discipline, including but not limited to the power to direct any police officer to give any relevant information, produce any relevant document or answer any relevant question during a disciplinary investigation.

Any information, document or answer given in response to such a direction should not be admissible in evidence before any court or person acting judicially, other than in proceedings for perjury or for a breach of discipline.

To support the Special Investigator's powers, the failure of an officer to comply with a direction from the Special Investigator should itself constitute a breach of discipline.

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### **RECOMMENDATION 99**

That the Victorian Government, in developing the legislation to establish the Special Investigator, empowers the Special Investigator to lay disciplinary charges against relevant police officers if satisfied there is sufficient evidence to do so.

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### **RECOMMENDATION 100**

That the Chief Commissioner of Victoria Police ensures that a suitably qualified, independent authorised person, who is not a police officer, determines any disciplinary charges laid by the Special Investigator.

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### **RECOMMENDATION 101**

That the Chief Commissioner of Victoria Police reports to the Special Investigator and Implementation Monitor proposed in Recommendation 108 on the outcome of any disciplinary proceedings arising from the Special Investigator's investigation of current Victoria Police officers.

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### **RECOMMENDATION 102**

That the Victorian Government ensures that under the *Public Records Act 1973* (Vic), the Commission's records be unavailable for public inspection for 75 years, subject to: any order of the Supreme Court of Victoria; the legislation providing the Special Investigator and the Independent Broad-based Anti-corruption Commission with access to the records; or any decision of the responsible Minister under section 9(2)(b) of the Act to permit all or any of the records to be open for inspection by any specified person or class of persons.

**RECOMMENDATION 103**

That the Victorian Government, in developing the legislation to establish the Special Investigator, ensures that the legislation:

- a. gives the Special Investigator full and free access to the Commission's records
- b. requires the Special Investigator to establish appropriate security arrangements for access to and the management of such records.

The Victorian Government should also ensure that the Independent Broad-based Anti-corruption Commission has a legislative entitlement to obtain full and free access to the Commission's records.

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**RECOMMENDATION 104**

That the Department of Premier and Cabinet notifies Victoria Police of any court order or request to access the closed records of the Commission, except in relation to requests made by the Special Investigator or Independent Broad-based Anti-corruption Commission.

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**RECOMMENDATION 105**

That Victoria Police and the Victorian Director of Public Prosecutions, within three months, in accordance with their ongoing disclosure obligations, apply the Commissioner's determinations in relation to the public interest immunity claims (or as otherwise determined by a court) over the complete and unredacted submissions of Counsel Assisting, and, where relevant, facilitate disclosure of these revised versions of the submissions to potentially affected persons.

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**RECOMMENDATION 106**

That Victoria Police and prosecuting agencies, within six months, make all reasonable attempts to advise the 887 people whose cases may have been affected in the manner identified in *R v Szabo* that their cases may have been affected by Ms Nicola Gobbo's conduct as a human source, and facilitate ongoing disclosure of relevant information to those persons.

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**RECOMMENDATION 107**

That the Victorian Government, within three months, establishes an Implementation Taskforce, chaired by a senior executive of the Department of Justice and Community Safety, with responsibility for coordinating and completing implementation of the Commission's recommendations. The Taskforce should:

- a. consist of members from the Department of Justice and Community Safety, Department of Premier and Cabinet, Victoria Police, the Victorian Office of Public Prosecutions, the Special Investigator and other relevant stakeholders
- b. engage regularly with, and report formally and informally to, the Implementation Monitor proposed in Recommendation 108 throughout the implementation process.

### **RECOMMENDATION 108**

That the Victorian Government, within three months, appoints an independent Implementation Monitor to monitor the implementation of the Commission's recommendations until implementation is completed.

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### **RECOMMENDATION 109**

That the Victorian Government, in establishing the role of the Implementation Monitor, provides the Implementation Monitor with the support of a small secretariat located within the Department of Justice and Community Safety, and all necessary and reasonable legislative powers required to fulfil their role, including the power to:

- a. assess the implementation of the Commission's recommendations throughout the implementation process, not only once responsible agencies have reported on the completion of implementation
  - b. access Implementation Taskforce documents and attend meetings of the Implementation Taskforce
  - c. indicate to responsible agencies the extent to which their implementation of the Commission's recommendations is considered adequate
  - d. request regular reports from Victoria Police on its progress in fulfilling its ongoing disclosure obligations to potentially affected persons identified by the Commission
  - e. request reports from the Special Investigator on progress to establish their operations and the outcomes of their investigations
  - f. request reports from the Chief Commissioner of Victoria Police on the progress and outcomes of any disciplinary proceedings arising from the Special Investigator's disciplinary investigations.
- 

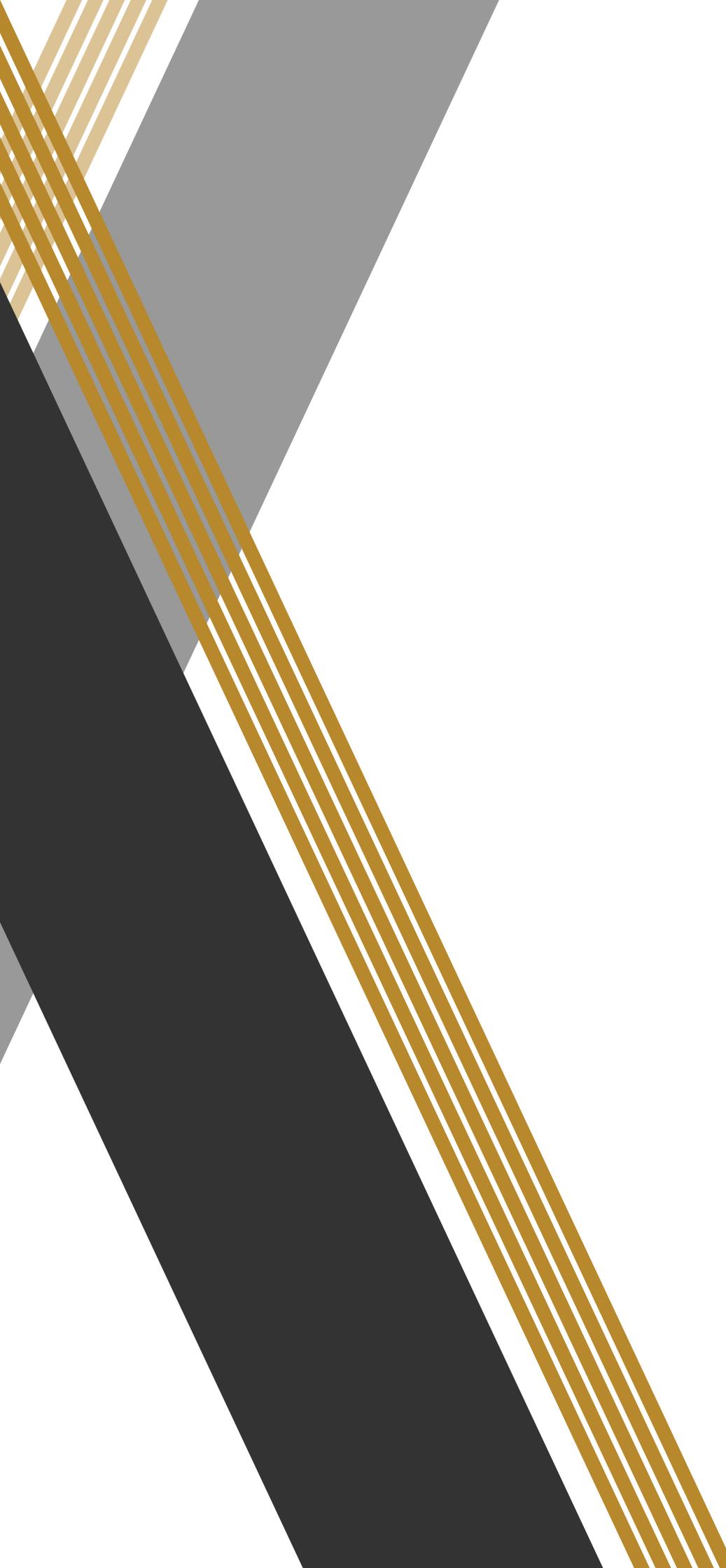
### **RECOMMENDATION 110**

That the Victorian Government, in establishing the role of the Implementation Monitor, requires it to report to the Attorney-General annually, or more frequently as it deems necessary, on the progress of the implementation of the Commission's recommendations, the adequacy of implementation and what further measures may be required to ensure the Commission's recommendations are implemented fully within the specified timeframes.

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### **RECOMMENDATION 111**

That the Attorney-General reports annually to the Victorian Parliament on the progress of the implementation of the Commission's recommendations, until implementation is complete.



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**Royal Commission  
into the Management of Police Informants**

# Final Report

## Volume I

NOVEMBER 2020



**Royal Commission  
into the Management of Police Informants**

**Final Report**  
Volume I

**The Honourable Margaret McMurdo, AC**  
Commissioner

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**ORDERED TO BE PUBLISHED**

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*The Royal Commission into the Management of Police Informants acknowledges the traditional Aboriginal owners of country throughout Victoria. We pay our respects to them, their culture and their Elders, past, present and future, and their ancient tradition of striving for a better functioning community.*





**Royal Commission  
into the Management of Police Informants**



30 November 2020

Her Excellency the Honourable Linda Dessau, AC  
Governor of Victoria  
Government House  
Melbourne VIC 3004

Your Excellency

In accordance with the Letters Patent dated 13 December 2018 and the amendments to the Letters Patent dated 7 February 2019, I have the honour of presenting to you the Final Report of the Royal Commission into the Management of Police Informants.

Yours sincerely

**The Honourable Margaret McMurdo, AC**  
Commissioner



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# Commissioner's foreword

In December 2018, the High Court of Australia published its judgement upholding the decisions of Victorian courts to allow the Director of Public Prosecutions (DPP) to disclose to a group of convicted people that defence barrister, Ms Nicola Gobbo, had been a human source. The Court stated:

*[Ms Gobbo's] actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of [her] obligations as counsel to her clients and of [her] duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging [her] to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law.*

On 13 December 2018, the Victorian Government established this Royal Commission to inquire into and report on cases that may have been affected by Ms Gobbo's conduct as a human source; the conduct of Victoria Police officers in their use of her as a human source; the adequacy of current processes for the management of human sources with legal obligations of confidentiality or privilege; and the use and disclosure of information from such human sources in the criminal justice system.

In the foreword to the Commission's progress report, I described this task as mammoth in scale and Janus-like in its need to look both to the past and to the future. That description was apt.

The Commission examined events dating back to 1993; received 157 public submissions and 280 witness statements; issued 433 notices to produce and 238 formal requests for information resulting in the production of over 155,000 documents; held 129 days of mostly public hearings; examined 82 witnesses; tendered 1,957 exhibits; and consulted with 97 individuals and organisations. It received a further 45 submissions in response to the closing submissions of Counsel Assisting.

I was greatly assisted by a fine legal team of Counsel Assisting and Solicitors Assisting; a wonderful Chief Executive Officer and lawyer, Ms Kylie Kilgour; and the Commission's hard-working and talented policy and research, investigations, operations, enquiries, and media and communications teams. The names of the many valued individuals and organisations who contributed to the Commission's work are listed in Appendix H. I sincerely thank every one of them.

I thank the Fair Work Commission for the use of its premises to conduct hearings, and the Victorian courts for providing the Commission with material essential to the inquiry and prioritising the suppression order proceedings that aided the Commission's public reporting and other work.

The Victorian media played a critical role in this inquiry. It conscientiously complied with the many complex non-publication orders, appreciating that any slip could endanger lives. In the interests of the public, it rightly tested Victoria Police's applications to close hearings and for suppression orders. Importantly, its reporting of the hearings increased community awareness of the Commission's work and helped restore public confidence in the criminal justice system.

I am also grateful to the Victoria Police officers who assisted the Commission, especially those who shared their experience and insight in the Commission's focus groups. My thanks, too, to the former Chief Constable of Merseyside Police, Professor Sir Jonathan Murphy, QPM, DL, for generously sharing his expertise and giving evidence remotely from the United Kingdom, and to the many organisations and experts who shared their knowledge in consultations with the Commission.

On 24 August 2020, 18 months after the High Court's scathing criticism and the Commission's establishment, Victoria Police stated for the first time that it:

*...accepts without qualification or reservation, that permitting Ms Gobbo...to give information to Victoria Police about her own clients...is reprehensible. It was an indefensible interference in the lawyer/client relationship...essential to the proper functioning of the justice system and to the rule of law. Victoria Police's failure at the time to ensure that these circumstances were identified and disclosed was also a profound failure.*

I welcome Victoria Police's belated apology for the serious harm caused by its use of Ms Gobbo.

In their complete and unredacted closing submissions, Counsel Assisting invited me to find that Ms Gobbo and named current and former officers may have committed criminal offences. For reasons explained fully elsewhere, I declined to do this. I have found, however, after considering the responsive submissions of Ms Gobbo, those current and former officers, and Victoria Police, that there is sufficient merit in Counsel Assisting's contentions to warrant further investigation to determine whether to bring criminal charges. I have therefore recommended legislation to establish an independent Special Investigator to undertake this task.

If the Special Investigator assembles sufficient admissible evidence to support criminal charges, they will prepare a brief for the Victorian DPP to determine whether it is in the public interest to prosecute. Even if there is sufficient evidence to bring charges, the DPP's decision may be difficult. These events occurred long ago. Records may be incomplete and memories may have faded. Ms Gobbo was encouraged in her behaviour by police and now lives in fear of being murdered. The current and former officers acted within what Victoria Police accepts was a failed system and many, perhaps all have had otherwise exemplary careers serving the public good.

If the DPP determines that it is in the public interest to prosecute, those charged will receive a fair trial according to law, unlike those whose trials were corrupted by their conduct.

Taking a broad approach, the Commission has identified 1,011 individuals with convictions or findings of guilt that may have been affected by the conduct of Ms Gobbo and Victoria Police. That is not to say that all these convictions will be overturned on appeal, but at least these individuals are now aware of the relevant facts and can obtain legal advice to make an informed decision about whether to pursue any appeal rights.

The deception of Ms Gobbo and Victoria Police meant that for many years, their improper conduct was hidden. With the future investigation of those responsible, and the appeals of those who failed to receive a fair trial because of this conduct, Victorians can now be assured that their criminal justice system is working as it should.

I recognise that most current Victoria Police officers would not countenance an end-justifies-means approach to criminal investigations. I also recognise that human sources are a valuable tool in detecting and investigating crime. But a robust system of checks and balances is needed to support the ethical management of human sources and prevent improper use of confidential or privileged information.

The Commission has recommended practical, evidence-based reforms to strengthen human source management processes, establish independent oversight and reinforce police disclosure obligations. Together, these recommendations aim to strengthen police practices and the operation of the criminal justice system so that the events that led to this inquiry can never happen again.

In striving for that goal, I welcome the Premier of Victoria's statement of the Government's intention to implement all of the Commission's recommendations, and the commitment of the Chief Commissioner of Victoria Police to heed those recommendations and take whatever steps necessary for Victoria Police to learn from its mistakes.

# Terms of reference

The Royal Commission into the Management of Police Informants is appointed to inquire into and report on:

1. The number of, and extent to which, cases may have been affected by the conduct of [Ms Nicola Gobbo] as a human source.
2. The conduct of current and former members of Victoria Police in their disclosures about and recruitment, handling and management of [Ms Gobbo] as a human source.
3. The current adequacy and effectiveness of Victoria Police's processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, including:
  - a. whether Victoria Police's practices continue to comply with the recommendations of the Kellam report
  - b. whether the current practices of Victoria Police in relation to such sources are otherwise appropriate.
4. The current use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege, subject to section 123 of the *Inquiries Act 2014*, including:
  - a. the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of such human sources to prosecuting authorities
  - b. whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the Office of Public Prosecutions prosecutes indictable matters on behalf of the Director of Public Prosecutions, when the investigation has involved human source material.
5. Recommended measures that may be taken to address:
  - a. the use of any other human sources who are, or have been, subject to legal obligations of confidentiality or privilege and who come to your attention during the course of your inquiry
  - b. any systemic or other failures in Victoria Police's processes for its disclosures about and recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, and in the use of such human source information in the broader criminal justice system, including how those failures may be avoided in future.
6. Any other matters necessary to satisfactorily resolve the matters set out in paragraphs 1–5.

# Acronyms

<b>ACIC</b>	Australian Criminal Intelligence Commission
<b>AFP</b>	Australian Federal Police
<b>AOR</b>	Acknowledgement of Responsibilities
<b>ASCR</b>	<i>Australian Solicitors' Conduct Rules 2015</i>
<b>ASIO</b>	Australian Security Intelligence Organisation
<b>CaRMU</b>	Compliance and Risk Management Unit, Victoria Police
<b>CDPP</b>	Commonwealth Director of Public Prosecutions
<b>CMRD</b>	Corporate Management Review Division, Victoria Police
<b>CPD</b>	continuing professional development
<b>CPS</b>	Crown Prosecution Service, United Kingdom
<b>CSR</b>	Central Source Registrar, Victoria Police
<b>DEA</b>	Drug Enforcement Administration, United States of America
<b>DJCS</b>	Department of Justice and Community Safety, Victoria
<b>DPP</b>	Director of Public Prosecutions, Victoria
<b>DSG-A</b>	District Support Group 'A', Victoria Police
<b>DST</b>	Dedicated Source Team
<b>DSU</b>	Dedicated Source Unit, Victoria Police
<b>ESD</b>	Ethical Standards Department, Victoria Police
<b>HSMU</b>	Human Source Management Unit, Victoria Police
<b>IBAC</b>	Independent Broad-based Anti-corruption Commission, Victoria
<b>ICT</b>	Information and Communication Technology
<b>ICR</b>	Informer Contact Report
<b>ICSC</b>	Intelligence and Covert Support Command, Victoria Police
<b>IGIS</b>	Inspector-General of Intelligence and Security, Australia
<b>IPCO</b>	Investigatory Powers Commissioner's Office, United Kingdom
<b>IR</b>	Information Report
<b>LEAP</b>	Law Enforcement Assistance Program, Victoria Police
<b>LSR</b>	Local Source Registrar, Victoria Police

<b>MDID</b>	Major Drug Investigation Division, Victoria Police
<b>NCA</b>	National Crime Authority, Australia
<b>NDIP</b>	National Disclosure Improvement Plan, United Kingdom
<b>OCE</b>	Office of the Chief Examiner, Victoria
<b>OIC</b>	Officer in Charge, Victoria Police
<b>OLSC</b>	Office of the Legal Services Commissioner, New South Wales
<b>OPI</b>	Office of Police Integrity, Victoria
<b>OPP</b>	Office of Public Prosecutions, Victoria
<b>PAB</b>	Police Advisory Branch, Victorian Government Solicitor's Office
<b>PII</b>	public interest immunity
<b>PIM</b>	Public Interest Monitor, Victoria
<b>RCMP</b>	Royal Canadian Mounted Police
<b>RIPA</b>	<i>Regulation of Investigatory Powers Act 2000 (UK)</i>
<b>SCR</b>	Source Contact Report
<b>SDU</b>	Source Development Unit, Victoria Police
<b>SML</b>	Source Management Log
<b>SRA</b>	Solicitors Regulation Authority, United Kingdom
<b>SWOT</b>	strengths, weaknesses, opportunities and threats
<b>TPA</b>	The Police Association of Victoria
<b>VEOHRC</b>	Victorian Equal Opportunity and Human Rights Commission
<b>VGSO</b>	Victorian Government Solicitor's Office
<b>VI</b>	Victorian Inspectorate
<b>VLAB</b>	Victorian Legal Admissions Board
<b>VLAC</b>	Victorian Legal Admissions Committee
<b>VLRC</b>	Victorian Law Reform Commission
<b>VLSB+C</b>	Victorian Legal Services Board and Commissioner

# Glossary

<b>Accused person</b>	A person who has been charged with a criminal offence but is yet to be found guilty or not guilty of that offence. An accused person is also referred to as a defendant in court proceedings.
<b>Acquittal</b>	A judgement by a court that a person is not guilty of a crime with which they have been charged.
<b>Affidavit</b>	A written statement confirmed by oath or affirmation that may be used as a substitute for oral evidence in court.
<b><i>Amicus curiae</i></b>	A lawyer who is appointed to assist the court, known as a ‘friend of the court’. They may advise the court on a point of law or on a manner of practice, or when a public interest immunity claim is heard <i>ex parte</i> .
<b>Appeal</b>	A review of a court or tribunal’s decision by a higher court.
<b>Bail</b>	A procedure that allows a person who has been charged with an offence to be released from police control or prison until the hearing of the case.
<b>Barrister</b>	A type of lawyer. Barristers tend to specialise in representing people in court and may give specialist legal advice on complex legal matters. A barrister generally receives instructions from their client (that is, the person they are representing) through a solicitor.  Barristers and solicitors are often collectively referred to as ‘lawyers’.
<b>Brief of evidence</b>	A collection of documents such as witness statements and photographs gathered by the police that the prosecution will use as evidence at a court hearing to prove a criminal charge.
<b>‘Can say’ statement</b>	An unsigned statement given by an accused person (or a person about to be charged with an offence) to police outlining the evidence they will be able to give regarding their offence or other offences. A ‘can say’ statement is provided by a person seeking an indemnity or a reduction in penalty.
<b>Civil proceeding</b>	A legal dispute progressing through the courts that is not related to a criminal matter; for example, a personal injury dispute, defamation claim or property dispute.
<b>Client legal privilege</b>	The statutory form of legal professional privilege under the <i>Evidence Act 2008</i> (Vic).
<b>Committal proceeding</b>	An initial hearing held in the Magistrates’ Court to decide whether there is sufficient evidence against an accused person charged with a serious criminal offence for them to be tried in a higher court.
<b>Common law</b>	Law that derives its authority from decisions of the courts rather than from legislation. Also known as ‘case law’.
<b>Conference</b>	A meeting between a person and their barrister to discuss legal matters.
<b>Controlled operation</b>	A police operation that allows police officers or civilians to engage in activity that may otherwise be unlawful, for the purpose of obtaining evidence that may lead to the prosecution of a person for a crime.
<b>Conviction</b>	A formal declaration by a court that a person is guilty of a criminal offence. Convictions appear on a person’s criminal record.
<b>Covert policing</b>	Secret methods or techniques used by police without the person of interest being aware that information about them is being collected.  The use of human sources is one example of covert policing. Other methods include covert recording or surveillance, undercover policing and controlled operations. Covert methods are often used by police in circumstances where information or evidence is difficult to obtain through conventional or ‘overt’ policing methods, such as property search warrants or interviews.

<b>Covert search warrant</b>	A search warrant that permits a secret search of a location. Generally, these need to be approved by a court.
<b>Criminal proceeding</b>	The process of criminal charges being brought against an accused person (also known as the defendant) before a court, from the first court appearance to the final decision.
<b>Disclosure</b>	<p>A process in court proceedings where each party is required to disclose any documents that may be considered relevant to the court case.</p> <p>In criminal proceedings, the prosecution (including police) has a duty to disclose all evidence that is relevant to the case against an accused person, even if that evidence might undermine the prosecution’s case or help the accused person.</p>
<b>Executive Command</b>	<p>A senior executive group within Victoria Police responsible for setting the strategic direction of Victoria Police, monitoring organisational performance, determining key priorities and risks, and managing organisational capacity and capability.</p> <p>The Chief Commissioner is the head of the Executive Command group, which also comprises the four Deputy Commissioners and senior public servants.</p>
<b>Ex parte hearing</b>	A hearing where one party (a person or organisation) involved in a court case is not present and has not been given notice of the court proceedings.
<b>Human source</b>	<p>An individual who covertly supplies information to police about crime or people involved in criminal activity, usually with an expectation that their identity will be kept confidential.</p> <p>Generally, human sources can be distinguished from other people who might provide information to police; for example, witnesses to an accident or victims of crime.</p> <p>A human source is often referred to as a police ‘informer’ or ‘informant’.</p>
<b>Indictable offence</b>	<p>A more serious criminal offence where the person charged has the right to have their case heard by a judge or jury in the County Court of Victoria or Supreme Court of Victoria.</p> <p>The ‘indictment’ is the formal charge before the court.</p>
<b>Indictable proceeding</b>	A court proceeding about indictable offences.
<b>Informant</b>	<p>The person who commences a criminal proceeding against an accused person. They are usually a police officer or government official, and are generally responsible for charging a person and giving evidence against the person in court.</p> <p>Human sources are sometimes referred to as police ‘informants’ or ‘informers’. To avoid confusion, this report generally does not use these terms when referring to human sources.</p>
<b>Law enforcement agency</b>	An agency responsible for enforcing the law; for example, Victoria Police, the Australian Federal Police and the Australian Crime and Intelligence Commission.
<b>Lawyer</b>	<p>A person who has studied law, completed practical legal training and been admitted to legal practice. A lawyer can advise a person about the law and represent them in court.</p> <p>Both solicitors and barristers are referred to as ‘lawyers’.</p>
<b>Leave to appear</b>	Permission granted by a royal commission to allow a person to appear before or otherwise participate in the inquiry, under the <i>Inquiries Act 2014</i> (Vic).
<b>Legal obligations of confidentiality or privilege</b>	Duties imposed on people entrusted with confidential or privileged information to protect the information, and not to disclose or distribute it. For example, lawyers are subject to legal obligations of confidentiality or privilege in relation to information their clients provide them, and doctors are subject to legal obligations of confidentiality or privilege in relation to information their patients provide them.
<b>Legal professional privilege</b>	A common law right that protects the disclosure of certain communications between a lawyer and a client when those communications are for the purpose of obtaining legal advice or for use in legal proceedings. The statutory form of legal professional privilege is ‘client legal privilege’.
<b>Legislation</b>	Written law made by Parliament. Also known as ‘statutory law’ or ‘statute’.

<b>Letters Patent</b>	The document issued by the Governor of Victoria that formally establishes a royal commission, under the <i>Inquiries Act 2014</i> (Vic).
<b>Miscarriage of justice</b>	Where an accused person is wrongfully convicted of an offence they did not commit, or where they have not received a fair trial due to rules of procedure and evidence not being followed.
<b>Non-parole period</b>	The minimum part of the term of imprisonment a convicted person must serve in prison before they are released on parole to complete their sentence in the community. A non-parole period is set by a magistrate or judge when an accused person is sentenced.
<b>Non-publication order</b>	An order that prohibits or restricts the publication of information.
<b>Notice to attend</b>	A written notice served on a person requiring them to attend a royal commission at a specified time and place to either produce a specified document or give evidence, under the <i>Inquiries Act 2014</i> (Vic).
<b>Notice to produce</b>	A written notice served on a person requiring them to produce a specified document or other thing to a royal commission before a specified time and in a specified manner, under the <i>Inquiries Act 2014</i> (Vic).
<b>Oversight agency</b>	An agency responsible for independent scrutiny and protection of the integrity of the public sector and police; for example, the Independent Broad-based Anti-corruption Commission, Public Interest Monitor and Victorian Inspectorate.
<b>Parole</b>	The temporary or permanent release of a prisoner before the end of the term of imprisonment under their sentence, to allow the prisoner to serve part of their sentence in the community under supervision and subject to certain conditions on their freedoms.
<b>Petition for mercy</b>	<p>A request by a person convicted of an indictable offence or found not guilty by reason of mental impairment to the Attorney-General, to have their case heard when other avenues of appeal have been exhausted.</p> <p>Under the <i>Criminal Procedure Act 2009</i> (Vic), the Attorney-General can refer a person's case to the Court of Appeal of the Supreme Court of Victoria for determination or refer a question about the petition to the Supreme Court Trial Division for advice.</p>
<b>Plea agreement</b>	An agreement between the prosecution and an accused person about conditions under which the accused person will plead guilty; for example, a plea agreement might include a condition that the accused person will not be charged for other offences.
<b>Plea hearing</b>	A hearing that occurs if an accused person pleads guilty. It provides an opportunity for the prosecution, defence and victim to present information that they want the judge to take into account when deciding on the accused person's sentence.
<b>Police misconduct</b>	Conduct that constitutes an offence punishable by imprisonment; is likely to bring Victoria Police into disrepute or diminish public confidence in it; or is disgraceful or improper, under the <i>Victoria Police Act 2013</i> (Vic).
<b>Police officer</b>	<p>A member of Victoria Police who has taken an oath or made an affirmation to, among other things, discharge all the duties legally imposed on them faithfully and according to law.</p> <p>This report generally uses the term 'police officer' rather than 'police member'.</p>
<b>Potentially affected person</b>	A person, convicted of a criminal offence, whose case the Commission assessed and then determined may have been affected by Victoria Police's use of Ms Nicola Gobbo as a human source.
<b>Prosecuting authority</b>	An agency responsible for conducting criminal matters in court on behalf of the State.

<b>Public interest immunity</b>	<p>A rule of evidence used in court proceedings or inquiries where the State seeks to withhold relevant information on the basis that production of that information would be contrary to the public interest.</p> <p>The identity of human sources and information that might reveal covert police methods are typically protected by public interest immunity, because of the need to keep the information confidential. The information will not be protected by public interest immunity if the court determines that there is a greater public interest in disclosing it.</p>
<b>Quash</b>	A decision of a court to discharge or set aside a decision previously made by a court.
<b>Rank</b>	<p>The level of a police officer's position within an organisation, defining their authority and responsibility.</p> <p>Victoria Police ranks, in order of seniority, are: Constable; First Constable; Senior Constable; Leading Senior Constable; Sergeant; Senior Sergeant; Inspector; Superintendent; Commander; Assistant Commissioner; Deputy Commissioner and Chief Commissioner.</p>
<b>Remand</b>	An order that an accused person be kept in police custody or imprisoned until they go to court for a hearing.
<b>Sentence</b>	The penalty (or punishment) issued by a magistrate or judge when a person has been convicted or found guilty of a criminal offence.
<b>Solicitor</b>	<p>A type of lawyer. Solicitors provide legal advice to individuals and organisations and will sometimes instruct a barrister to assist with representing their clients in court or to provide advice on complex legal issues.</p> <p>Solicitors and barristers are often collectively referred to as 'lawyers'.</p>
<b>Statutory law</b>	Written law made by Parliament. Also known as 'legislation' or 'statute'.
<b>Stay (a proceeding)</b>	A decision by a court to temporarily or indefinitely stop a court proceeding.
<b>Subpoena</b>	A legal document issued by the court at the request of a party to a case, which compels a person or entity to produce documents to a court or compels a person to attend court and give evidence at a hearing or trial. It is sometimes also referred to as a 'summons'.
<b>Summary offence</b>	A less serious criminal offence generally heard in the Magistrates' Court by a magistrate.
<b>Summary proceeding</b>	A court proceeding about a summary offence in the Magistrates' Court.
<b>Suppression order</b>	An order that prohibits or restricts the disclosure of information.
<b>Surveillance devices</b>	Any instruments, apparatus or equipment used for the purposes of monitoring or tracking an individual or group of people subject to surveillance. Generally, the use of such devices by police requires a warrant issued by a court.
<b>Telephone intercepts</b>	Covert listening and recording of communications passing over a telecommunications network, such as telephone conversations or text messages. Generally, police need a warrant issued by a court to intercept telecommunications.
<b>Terms of reference</b>	A statement setting out the purpose and scope of an inquiry. A royal commission's terms of reference are set out in its Letters Patent.

# Summary of human source management terms and processes

In several parts of this final report, the Commission discusses how Victoria Police uses and manages human sources.

The key terms, processes, roles and responsibilities related to Victoria Police's current use and management of human sources are set out below. Some of these are broadly similar to those that existed when Victoria Police registered and used Ms Nicola Gobbo as a human source for the third time between 2005 and 2009; for example, the requirement to appoint a police 'handler' to manage day-to-day interactions with a human source. Others have changed since then; for example, the governance and decision-making processes applicable to the use of certain human sources, such as lawyers.

Where arrangements have changed substantially over time, this is indicated below.

## TYPES OF HUMAN SOURCES

Human sources are people who covertly supply information about a crime or people involved in criminal activity to police or other law enforcement agencies, generally on an ongoing basis, with the expectation that their identity will be protected. This distinguishes them from other people who provide information to law enforcement agencies; for example, victims of crime or witnesses.

Human sources are sometimes also referred to as police 'informants' or 'informers'. These terms are not used to describe human sources in this final report, in part to avoid confusion with police officer informants who commence a criminal proceeding against an accused person.

The Commission uses the following terms to refer to different types of human sources:

- **Human sources with legal obligations of confidentiality or privilege**—people who covertly supply information about a crime or people involved in criminal activity to police and are also subject to legal obligations of confidentiality or privilege as a result of their occupations (for example, lawyers or doctors).
- **Human sources involving legal obligations of confidentiality or privilege**—people who covertly supply information about a crime or people involved in criminal activity to police, and either hold legal obligations of confidentiality or privilege themselves; or do not hold those obligations themselves but have access to information that may be confidential or privileged (for example, the spouse of a lawyer or receptionist working in a medical clinic).
- **High-risk human sources**—human sources who are considered 'high risk' based on a risk assessment conducted by Victoria Police. Factors that might increase a person's risk include them having a violent criminal history, a high likelihood of coming to personal harm or death should their informing become known, or legal obligations of confidentiality or privilege.

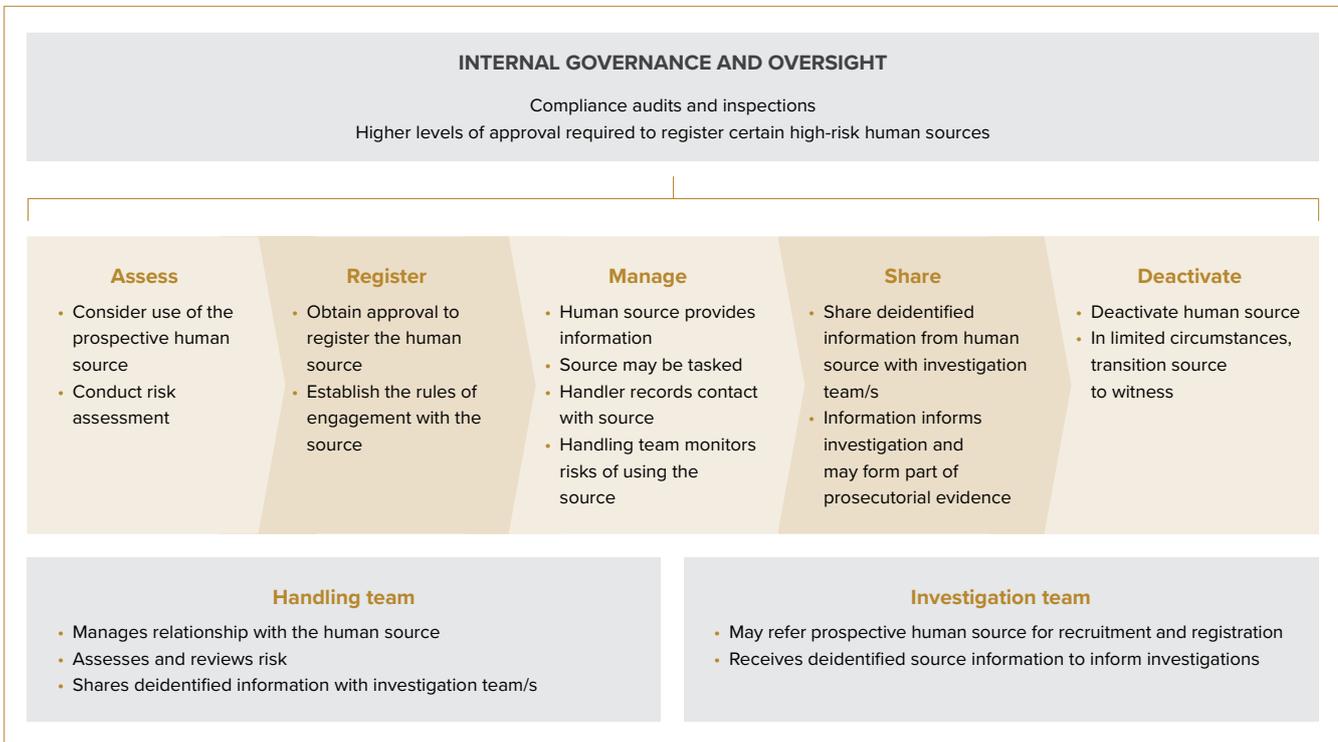
- **Community sources**—human sources whose role is typically confined to providing general information acquired during their daily activities and whom the police cannot ‘task’ to actively gather information. In May 2020, Victoria Police stopped using this term and broadened its general definition of human source to cover these types of sources.
- **Prospective human sources**—people being assessed or considered by Victoria Police as to whether they will be registered as a human source. Victoria Police policy requires that all human sources be registered.

## KEY ELEMENTS OF HUMAN SOURCE MANAGEMENT

Figure A displays the key elements of Victoria Police’s human source management framework. These elements are broadly similar to those that operate in other jurisdictions.

While specific requirements have changed over time, the overarching elements that operate now are consistent with those that existed when Victoria Police used Ms Gobbo as a human source in 2005–09.

**Figure A: Common elements of human source management**



## Assess

Prior to using a human source, police officers must assess the risks and the appropriateness of using that person as a source. Officers do this by completing a:

- **Risk assessment**—the process of identifying and assessing risks and any steps that can be taken to reduce identified risks, whether to the source, Victoria Police, its officers or others. Officers use a form to record information about the prospective human source and this information is assessed to determine a risk rating (for example, ‘low risk’, ‘medium risk’ or ‘high risk’).

## Register

Registration refers to the process whereby the use of a person as a human source is authorised. A police officer must first prepare a registration application, which is then reviewed by more senior officers. The application must include a risk assessment, mentioned above, along with an:

- **Acknowledgement of Responsibilities (AOR)**—formal acknowledgement by the human source that they are to be registered as a source and the conditions of their registration (for example, the AOR might state that the source is not to engage in criminal activity).

## Manage

The management phase involves police meeting and engaging with the human source, gathering information from them and making records of their interactions.

In managing a human source, police should conduct ongoing reviews to monitor any changes to the risks of using the source and/or identify any new risks that may have arisen.

Key terms associated with the day-to-day management of human sources are:

- **Human source information**—information that is supplied to police by a human source about a person or organisation associated with alleged criminal activity.
- **Source Contact Report (SCR)**—a report that details all relevant information about any contact with a human source, whether by phone, face-to-face or other means. A SCR was previously called an Informer Contact Report (ICR). A report should contain a detailed account of the meeting and any other information to be disseminated to investigators.
- **Source Management Log (SML)**—a record of the day-to-day management of a human source detailing all relevant information; specifically, information provided by the source, references to Source Contact Reports and Information Reports, any risks that have arisen in the management of the source and any information disseminated to investigators.
- **Sterile corridor**—the practice whereby the police officers responsible for managing the human source (handling team) are not the same officers who are conducting investigations that may rely on information that the human source has provided. Officers in the handling team ‘sanitise’ (de-identify) information provided by the human source before disseminating the information to investigators. The main purpose of the sterile corridor is to protect the safety of the human source, by minimising the number of people aware of their identity and/or existence.
- **Tasking**—an assignment or instruction given to a human source by police, in order to gather intelligence about criminal activity. If tasking involves conduct that could be criminal, authority must be first be obtained under the *Crimes (Controlled Operations) Act 2004* (Vic).

## Share

The sharing of human source information by the handling team to investigating teams occurs through an:

- **Information report (IR)**—a short summary of information gathered by police. In the case of human source management, an IR is generated from information in a Source Contact Report, which is sanitised to remove or reduce any detail that might enable someone to ascertain the identity and/or existence of the human source.

## Deactivate

Police officers may deactivate a human source when there is no further operational need for the source or if they are to be transitioned to the role of a witness in the prosecution of a criminal offence.

## VICTORIA POLICE HUMAN SOURCE POLICY

Victoria Police has produced internal guidance for officers about the use of human sources since 1986. It issued the first comprehensive organisation-wide policy in 2003.

The current policy is:

- **Victoria Police Manual—Human Sources (Human Source Policy)**—a document that sets out requirements for risk assessment, registration, management and deactivation of human sources. It also sets out the roles and responsibilities of those involved in the use and management of human sources and outlines other requirements; for example, relating to record keeping and approval of payments to human sources.

For most of the Commission's inquiry, from December 2018 to May 2020, the Human Source Policy in force was the May 2018 version. A new policy dated 15 April 2020 came into force on 4 May 2020.

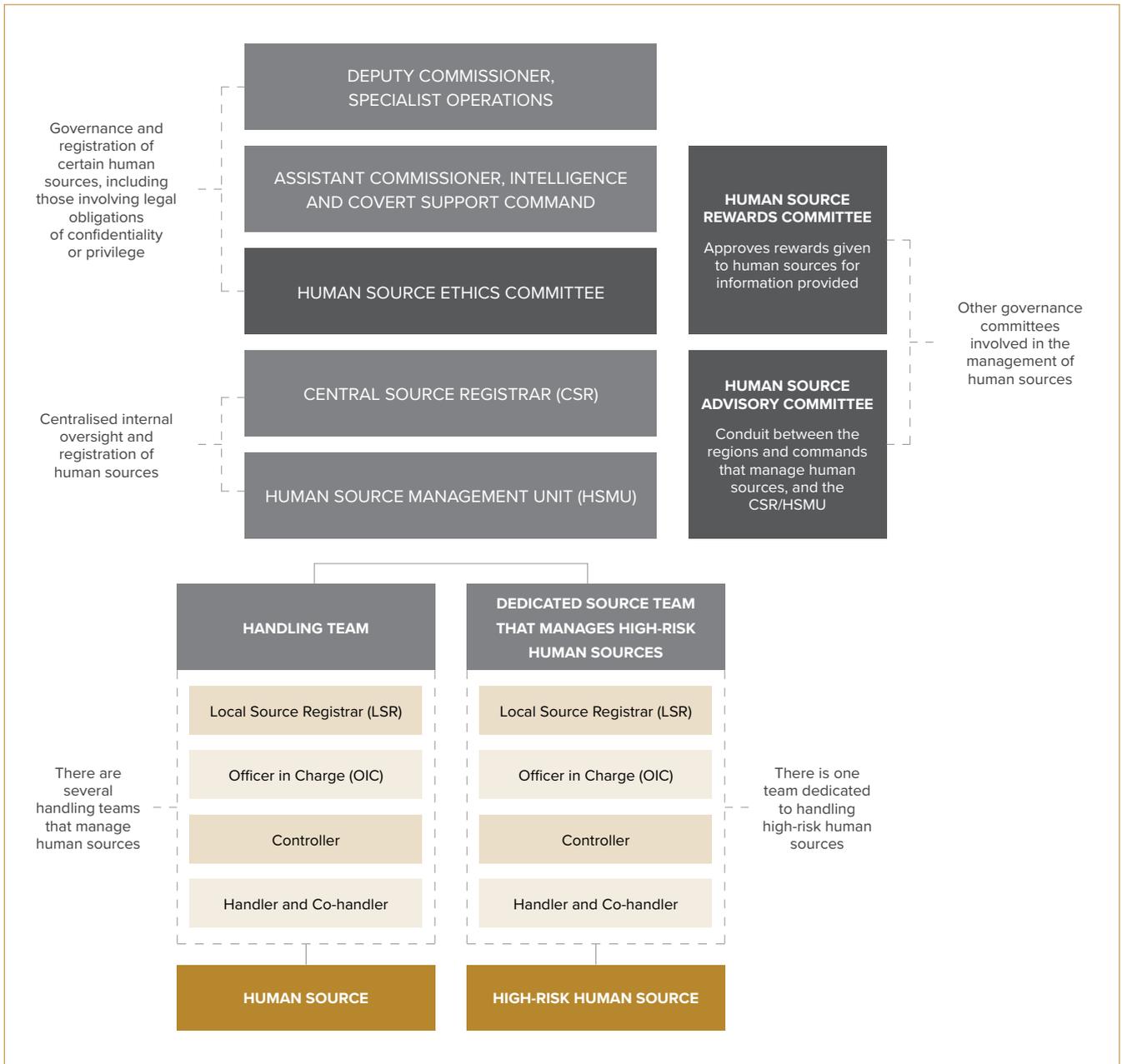
## HUMAN SOURCE MANAGEMENT ROLES AND RESPONSIBILITIES

As shown in Figure B, the governance and decision-making structure in Victoria Police's human source management framework is multi-levelled and consists of:

- handling teams
- centralised internal oversight
- governance by senior officers and committees.

Figure B and the information in this section represent Victoria Police's current governance arrangements, roles and responsibilities, but these are broadly consistent with those that existed when Ms Gobbo was used as a human source from 2005–09. There are some key differences, however—for example, the Human Source Ethics Committee was only introduced in 2014.

Figure B: Human source governance structure, Victoria Police



## Handling teams

A **handling team** is a team of police officers responsible for the handling and management of a human source. Handling teams may be ‘dedicated’ or ‘non-dedicated’:

- **Dedicated source team (DST)**—a team of police officers who are dedicated to and specialise in managing human sources. These teams may also focus on recruitment and development of new sources.
- **Non-dedicated handling team**—a team of police officers who manage human sources but also have other policing duties, such as investigating crime.

In either case, a handling team is made up of the following police officers, listed here in ascending order of seniority:

- **Handler**—an officer who acts as the primary point of contact for a human source. They are also responsible for applying to register a prospective human source, keeping and maintaining the records associated with the source’s registration and notifying senior officers of issues and risks that may arise in managing the source.
- **Co-handler**—an officer who assists the handler and acts as the primary point of contact for a human source if the primary handler is unavailable.
- **Controller**—an officer generally at the rank of Sergeant or above, who directly supervises the handler and co-handler. They monitor and review human source files to ensure compliance with policy requirements, such as the completion of risk assessments, documentation of contacts with the human source, and requests for deactivation. A controller also provides guidance to the handler and co-handler and is responsible for knowing how, where and when handlers are meeting with human sources.
- **Officer in Charge (OIC)**—an officer generally at the rank of Senior Sergeant or Inspector, who has responsibility for managing the officers in the handling team (except the Local Source Registrar). They review registration applications and provide oversight and advice.
- **Local Source Registrar (LSR)**—a Superintendent who heads a divisional command and who has responsibility for oversight of handling teams in their division. LSRs were previously known as Local Informer Registrars. The LSR endorses, rejects or makes recommendations in relation to proposed actions or applications, such as registering or deactivating a human source. In doing so, they are required to review and evaluate the risk assessments and mitigation strategies and ensure that required documentation is uploaded to the electronic investigation and intelligence management system, Interpose, within specified timeframes.

During Ms Gobbo’s third registration as a human source in 2005–09, she was handled by the Source Development Unit (SDU) and its predecessor, the Dedicated Source Unit (DSU). Both units consisted of specially trained handlers and controllers.

## Centralised internal oversight

Centralised internal oversight is a governance model where one section of an organisation is responsible for setting standards and overseeing a certain function. In Victoria Police’s human source management framework, this is performed by the:

- **Central Source Registrar (CSR)**—the Detective Superintendent, Covert Services Division. The CSR has oversight of all human source registrations and activity and has final decision-making authority if a disagreement about the handling and management of individual human sources arises.
- **Human Source Management Unit (HSMU)**—a unit within the Covert Services Division that:
  - oversees all human source activity to ensure compliance with the Human Source Policy requirements
  - provides advice and support to handling teams
  - coordinates and provides human source management training.

The Covert Services Division is one of the six divisions that form Victoria Police’s Intelligence and Covert Support Command.

Broadly, these roles and functions have existed in Victoria Police’s human source management framework since 2007; however, prior to 2006, the HSMU’s role was performed by the then Informer Management Unit and, prior to 2007, the CSR was called the Central Informer Registrar.

## Governance and final registration

Under its current Human Source Policy, and as shown in Figure B, Victoria Police's internal governance and decision-making structure for human source management is carried out by the:

- **Human Source Ethics Committee**—an internal Victoria Police committee, established in 2014 and chaired by the Assistant Commissioner, Intelligence and Covert Support Command, that provides governance and approves the registration of certain human sources, including those involving legal obligations of confidentiality or privilege.
- **Assistant Commissioner, Intelligence and Covert Support Command**—the officer who oversees all human source management across the organisation and is responsible for the Human Source Policy.
- **Deputy Commissioner, Specialist Operations**—the officer who is responsible for the promotion and implementation of the Human Source Policy. Since May 2020, the Deputy Commissioner has been responsible for approving: (a) any registration of a human source where it is intended to obtain legally confidential or privileged information; and (b) any proposed use of information that appears to be in breach of a human source's legal obligations of confidentiality or privilege.
- **Human Source Advisory Committee**—an internal Victoria Police committee, chaired by the Central Source Registrar, that provides strategic advice, feedback and guidance in the management of human sources. It is the conduit between Victoria Police regions and commands that manage human sources, the Central Source Registrar and the Human Source Management Unit.
- **Human Source Rewards Committee**—an internal Victoria Police committee, chaired by the Assistant Commissioner, Intelligence and Covert Support Command, that manages and approves the payment of cash or any benefit to a human source as a reward for information given to Victoria Police.

As this governance structure has only existed since 2014, not all these arrangements were in place in 2005–09 when Ms Gobbo was registered as a human source. Victoria Police's human source program did, however, report through a chain of command to an Assistant Commissioner and Deputy Commissioner. There were also similar committees to the Human Source Rewards Committee that were responsible for approving payments to human sources, including one called the Payments Committee.

# List of key police taskforces and operations

**Briars Taskforce** The Briars Taskforce was established in 2007 as a joint taskforce between Victoria Police and the Office of Police Integrity. It was established after Mr Gregory (a pseudonym) made several statements alleging police corruption regarding the 2003 murder of Mr Shane Chartres-Abbott. The Briars Taskforce Board of Management initially included Victoria Police officers Mr Simon Overland, Mr Thomas (Luke) Cornelius, and Assistant Director (later Deputy Director) of the Office of Police Integrity, Mr Graham Ashton. Key investigators were Mr Rodney (Rod) Wilson, Mr Stephen (Steve) Waddell and Mr Ronald (Ron) Iddles.

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**Ceja Taskforce** The Ceja Taskforce was established by Victoria Police in 2002 as part of the Ethical Standards Department. It was the successor to Operation Hemi and was tasked to investigate allegations of criminality against Victoria Police Drug Squad officers, including Mr Wayne Strawhorn. Mr Peter De Santo was a key investigator transferred from Operation Hemi to Ceja Taskforce.

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**Driver Taskforce** The Driver Taskforce was established by Victoria Police in 2010 to investigate the circumstances surrounding the murder of Mr Carl Williams. The Driver Taskforce Steering Committee included Victoria Police officers Sir Kenneth (Ken) Jones, Mr Danye Moloney, Mr Graham Ashton, Mr Jeffrey (Jeff) Pope, Mr Emmett Dunne, Mr Doug Fryer and Mr Michael (Mick) Frewen.

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**Taskforce Kayak** Taskforce Kayak was established by Victoria Police in 2000. Its most prominent investigation was Operation 1 (a pseudonym). Key investigators included Mr Paul Firth, Mr David Bartlett, Mr David Miechel, Mr Stephen (Steve) Paton, Mr Martin Allison, Mr Malcolm Rosenes, Mr Wayne Strawhorn and Police Officer 1 (a pseudonym).

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**Taskforce Landow** Taskforce Landow was established by Victoria Police in 2018 to assist the work of the Royal Commission into the Management of Police Informants.

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**Lorimer Taskforce** The Lorimer Taskforce was established by Victoria Police in 1998 to investigate the murders of Sergeant Gary Silk and Senior Constable Rod Miller. Investigators connected to the Lorimer Taskforce that are relevant to this inquiry included Mr Paul Sheridan, Officer Black (a pseudonym) and Mr Paul Dale.

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<b>Petra Taskforce</b>	The Petra Taskforce was established by Victoria Police and the Office of Police Integrity in 2007 to investigate the murders of Mr Terrence (Terry) and Mrs Christine Hodson. The Petra Taskforce Board of Management initially included Victoria Police officers Mr Simon Overland, Mr Thomas (Luke) Cornelius, Mr Gavan Ryan and the Assistant Director (later Deputy Director) of the Office of Police Integrity, Mr Graham Ashton. Key Victoria Police investigators included Mr Shane O’Connell, Mr Solon (Sol) Solomon, Mr Gavan Ryan, Mr Steven (Steve) Smith and Mr Cameron Davey.
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<b>Purana Taskforce</b>	The Purana Taskforce was established by Victoria Police in 2003 to investigate the Melbourne ‘gangland’ murders. It was overseen by an executive management team that initially included Mr Simon Overland, Mr Terry Purton, Mr John Whitmore and Mr Andrew Allen. Key investigators included Mr Stuart Bateson, Mr Mark Hatt, Mr Dale Flynn, Mr Jason Kelly, Mr Gavan Ryan and Mr James (Jim) O’Brien.
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<b>Operation 1 (a pseudonym)</b>	Operation 1 was established by Victoria Police in 2000 as part of the Kayak Taskforce and targeted drug importation, manufacture and trafficking. The major target of this operation was Mr Antonios (Tony) Mokbel. Mr Luxmore (a pseudonym) and Mr Joseph Parisi were ultimately convicted as a result of Operation 1. Charges laid against Mr Tony Mokbel, Mr Milad Mokbel and Mr Rabie (Rob) Karam were later withdrawn.
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<b>Operation Bendigo</b>	Operation Bendigo was established by Victoria Police in 2014. Its terms of reference included overseeing the protection and management of Ms Nicola Gobbo and overseeing Victoria Police’s implementation of recommendations made by several reviews of Ms Gobbo’s use as a human source. Operation Bendigo investigated five cases of potential legal conflict that arose from the use of Ms Gobbo as a human source and that may have resulted in miscarriages of justice.
<hr/>	
<b>Operation Bootham Moko</b>	Operation Bootham Moko was established by the Australian Federal Police in 2007 to target the importation of MDMA. The shipment commonly referred to as the ‘Tomato Tins’ importation was seized under Operation Bootham Moko. Mr Rabie (Rob) Karam, Mr Saverio Zirilli, Mr Pasquale Barbaro, Mr John Higgs, Mr Salvatore Agresta, Mr Pasquale John Sergi, Mr Jan Visser and Mr Carmelo Falanga were ultimately convicted as a result of the operation.
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<b>Operation Clarendon</b>	Operation Clarendon was established by Victoria Police in 2002 to assess and investigate information provided by former police officer and barrister Mr Kerry Milte regarding organised crime. In 2008, the Office of Police Integrity produced a report on Operation Clarendon, which identified significant deficiencies in Victoria Police’s human source management policies and procedures.
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<b>Operation Clonk</b>	Operation Clonk was established by Victoria Police in 2003 to investigate the murder of Mr Shane Chartres-Abbott. Operation Clonk was conducted by the Homicide Squad until the establishment of the Briars Taskforce in 2007.

**Operation Diana** Operation Diana was established by the Office of Police Integrity in 2007. It was tasked with investigating alleged unauthorised communication of confidential information by Victoria Police officer Mr Noel Ashby regarding the Briars Taskforce and alleged improper associations between Mr Ashby and others. Mr Ashby and The Police Association Secretary, Mr Paul Mullett, were charged in 2008 with offences arising out of Operation Diana. The criminal charges were ultimately resolved by way of a combination of discharge, discontinuance and acquittal.

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**Operation Galop** Operation Galop was established by the Victoria Police Major Drug Investigation Division in 2003, to investigate the commercial drug manufacturing and trafficking of ecstasy tablets at a house located in Dublin Street, Oakleigh. The investigation targeted Mr Azzam (Adam) Ahmed, Ms Colleen O'Reilly, Ms Abbey Haynes and others who were ultimately charged. The investigative team was led by then Victoria Police officer Mr Paul Dale and included Mr David Miechel.

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**Operation Gosford** Operation Gosford was established by Victoria Police in 2007 to investigate threats made against Ms Gobbo. The investigation was conducted by Purana Taskforce officers, including Mr Paul Rowe, Mr Craig Hayes and Mr Dale Flynn.

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**Operation Hemi** Operation Hemi was established by Victoria Police's Ethical Standards Department in 2000 to investigate allegations of corruption. The investigation led to the arrest of Mr Stephen (Steve) Paton and Mr Malcolm Rosenes of Victoria Police's Drug Squad. Mr Peter De Santo was a key investigator.

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**Operation Inca** Operation Inca was established in 2008 as a joint investigation between the Australian Federal Police, Victoria Police, the then Australian Crime Commission, Australian Customs and the Australian Taxation Office into money laundering, drug importation and trafficking after the 'Tomato Tins' shipment was seized. Twenty-eight people were convicted as a result of Operation Inca, including Mr Rabie (Rob) Karam, Mr Pasquale Barbaro, Mr Saverio Zirilli, Mr Francesco Madafferi, Mr Salvatore Agresta, Mr Pasquale John Sergi, Mr Giovanni Polimeni, Mr Antonio (Tony) Sergi and Ms Sharon Ropa.

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**Operation Khadi** Operation Khadi was established in 2006 as a joint investigation between the Victoria Police Ethical Standards Department and the Office of Police Integrity into an alleged attempt to pervert the course of justice by officers of Victoria Police's Brighton police station, including Mr David Waters, Mr Stephen Campbell, Mr Steven Boyle and Mr Richard Shields. Key investigators were Mr Rodney (Rod) Wilson and Mr Lindsay Attrill from the Ethical Standards Department and Mr John Kapetanovski from the Office of Police Integrity.

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**Operation Landslip** Operation Landslip was established by Victoria Police in 2001 to investigate the manufacture of methamphetamine at a clandestine laboratory in Pascoe Vale. Operation Landslip ended when the Pascoe Vale South laboratory caught fire in 2002. Mr Cooper (a pseudonym) was ultimately convicted as a result of Operation Landslip. Mr Antonios (Tony) Mokbel and Mr Kabalan Mokbel were charged but the charges were ultimately discontinued. Key investigators included Mr Dale Flynn and Mr James (Jim) O'Brien.

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<b>Operation Loricated</b>	Operation Loricated was established by Victoria Police in 2013 to implement Recommendation 1 of the Comrie Review. Its objective was to reconstruct and consolidate Ms Gobbo's human source file into one place on Victoria Police's Interpose system.
<b>Operation Loris</b>	Operation Loris was established in 2004 by Victoria Police. It was the initial investigation into the murder of Mr Terrence (Terry) and Mrs Christine Hodson and involved telephone intercepts targeting Mr Antonios (Tony) Mokbel, who had been identified as involved in the transmission of a police information report containing intelligence provided by Mr Hodson as a human source. Key investigators included Mr Solon (Sol) Solomon and Mr Cameron Davey.
<b>Operation Magnum</b>	Operation Magnum was established by Victoria Police's Purana Taskforce in 2006 to investigate the large-scale manufacture and distribution of methylamphetamine by a criminal enterprise headed by Mr Antonios (Tony) Mokbel. It culminated in the arrest of Mr Mokbel in Athens in 2007. Sixteen people were convicted as a result of Operation Magnum, including Mr Mokbel, Mr David Tricarico, Mr Chafic Issa and Mr Elk (a pseudonym). Key investigators included Mr James (Jim) O'Brien and Mr James Coghlan.
<b>Operation Matchless</b>	Operation Matchless was established by the Victoria Police Major Drug Investigation Division in 2003 to investigate the manufacture of methamphetamine at a clandestine laboratory in Rye. Numerous individuals were convicted as a result of Operation Matchless, including Mr Cooper (a pseudonym), Mr Jacques El-Hage, Mr King (a pseudonym), Mr Ibrahim Kurnaz, Mr Kabalan Mokbel, Mr Milad Mokbel and Mr Noel Laurie. Charges against Mr Antonios (Tony) Mokbel under this operation were ultimately discontinued. Key investigators included Mr James (Jim) O'Brien and Mr Dale Flynn.
<b>Operation Neon</b>	Operation Neon was established in 2007 as a joint investigation between Victoria Police's Briars Taskforce and the Office of Police Integrity into the murder of Mr Shane Chartres-Abbott, including the alleged involvement of then Victoria Police officers Mr David Waters and Mr Peter Lalor.
<b>Operation Nutation</b>	Operation Nutation was established by the Victoria Police Ethical Standards Department in 2003, in response to the unexpected conclusion of Operation Galop. It investigated the roles of then Victoria Police officers Mr Paul Dale and Mr David Miechel in the burglary of a house in Dublin Street, Oakleigh. It also involved avenues of inquiry in relation to statements made by Mr Terrence (Terry) Hodson implicating Mr Dale in the burglary.
<b>Operation Oboe</b>	Operation Oboe was established by the Office of Police Integrity in 2004 to investigate whether Mr Paul Dale or another Victoria Police officer was responsible for the disclosure of an information report identifying Mr Terrence (Terry) Hodson as a human source. The Office of Police Integrity identified Mr Dale as a person of interest, and communications between him and Ms Gobbo were examined by the operation. Mr Timothy (Tim) Argall was identified as the 'go between' for Ms Gobbo and Mr Dale.

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**Operation Orbital** Operation Orbital was established by the Australian Federal Police in 2005 and targeted Mr Antonios (Tony) Mokbel. Under this operation, Mr Mokbel sought to purchase MDMA powder from two undercover operatives, which was to be used in pill presses to manufacture MDMA pills. Mr Mokbel was ultimately convicted as a result of this operation.

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**Operation Pedal** Operation Pedal was established by Victoria Police's Purana Taskforce in 2005 to investigate alleged money laundering offences committed by Solicitor 2 (a pseudonym). Key Victoria Police investigators included Mr Craig Wilson, Mr Stuart Bateson and Mr Gavan Ryan.

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**Operation Phlange (or Operation Flange)** Operation Phlange was established by the Australian Federal Police in 1995 to investigate money laundering activities of the Goldberg family. It led to the arrest of Ms Rita Goldberg, who was charged with conspiracy to defraud the Commonwealth. Ms Gobbo worked as a solicitor at the law firm that represented Ms Goldberg during the committal proceedings.

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**Operation Posse** Operation Posse was established by Victoria Police in 2004. It was conducted by the Purana Taskforce and concerned the manufacture of methamphetamine by the Mokbel family and associates at three clandestine laboratories. Many people were convicted as a result of this operation, including Mr Agrum (a pseudonym), Mr Cooper (a pseudonym), Mr Zlate Cvetanovski and Mr Milad Mokbel. Key investigators included Mr James (Jim) O'Brien, Mr Paul Rowe, Mr Dale Flynn, and Mr Craig Hayes.

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**Operation Quills** Operation Quills was established by Victoria Police's Major Drug Investigation Division in 2005. It investigated the use of pill presses to manufacture MDMA. Mr Bickley (a pseudonym) and Mr Antonios (Tony) Mokbel were ultimately convicted as a result of this operation. Key investigators included Mr James (Jim) O'Brien, Mr Dale Flynn, Mr Steve Mansell, Mr Craig Hayes and Mr Paul Rowe.

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**Operation Ramsden** Operation Ramsden was established by the Victoria Police Asset Recovery Squad in 1999 to investigate alleged fraud and money laundering by Solicitor 1 (a pseudonym). Mr Jeffrey (Jeff) Pope registered Ms Gobbo as human source 'MFG13' as part of this operation, which concluded later in 1999.

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**Operation Scorn** Operation Scorn was established by Victoria Police in 1996 to investigate Mr Brian Wilson, Ms Gobbo's then de facto partner, in relation to alleged possession of drugs and firearms. Mr Craig Brien was the lead investigator and Ms Gobbo provided information to assist police. Operation Scorn was cancelled due to concerns Ms Gobbo was behaving inappropriately.

**Operation Spake** Operation Spake was established by Victoria Police in 2003 to investigate the manufacture of methylamphetamine at clandestine laboratories in Toolern Vale and Springvale. Mr Matthew Finn and Mr Wayne Finn were convicted as a result of this operation, while charges against Mr Antonios (Tony) Mokbel were ultimately discontinued. Key investigators included Mr Craig Hayes and Mr Jason Kelly.

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**Operation Yak** Operation Yak was established by Victoria Police in 1993 following information received that Mr Brian Wilson, Ms Gobbo's then defacto partner and co-owner of a house in Carlton, Melbourne, was trafficking drugs. This led to the execution of a search warrant at the house. Mr Wilson was charged with drug trafficking and use and possession of a drug of dependence, for which he received a suspended sentence. Ms Gobbo was charged with the possession and use of amphetamine and cannabis. She pleaded guilty and received a good behaviour bond with no conviction recorded.

# List of key people relevant to the use of Ms Nicola Gobbo as a human source

**Nicola Gobbo** Ms Nicola Gobbo was a practising criminal defence barrister between 1997 and 2010 and represented a number of high-profile clients involved in Melbourne’s ‘gangland wars’. At various times between 1995 and 2009, Ms Gobbo was also a registered human source for Victoria Police. In this role, she provided information about numerous people, including some of her clients. After being deregistered as a human source in January 2009, Ms Gobbo continued to provide information to Victoria Police until at least 2010. Ms Gobbo has also been referred to as ‘Lawyer X’, ‘EF’, ‘Witness F’ and by her human source registration numbers ‘3838’ and ‘2958’.

## VICTORIA POLICE

### Leadership of Victoria Police

**Graham Ashton** Between 2004 and 2009, Mr Graham Ashton, AM, APM was the Assistant Director and later Deputy Director of the Office of Police Integrity. He was a member of joint Victoria Police–Office of Police Integrity Boards of Management for the Petra and Briars Taskforces involved in the use of Ms Gobbo as a human source, and was involved in discussions about Ms Gobbo transitioning from a human source to a witness in relation to the prosecution of Mr Paul Dale.

In 2009, Mr Ashton joined Victoria Police and in 2011, he was appointed Assistant Commissioner, Crime. Mr Ashton was appointed Chief Commissioner of Victoria Police in 2015. He retired from this position in 2020.

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**Timothy (Tim) Cartwright** In 2011, Mr Tim Cartwright, APM was the Acting Deputy Commissioner, Crime and Operations Support, at Victoria Police. He took part in negotiations about the use of Ms Gobbo as a witness against Mr Paul Dale. In 2012, he supported the establishment of the Comrie Review, which examined the use of Ms Gobbo as a human source.

In 2013, Mr Cartwright was appointed Executive Sponsor for Operation Loricated, which implemented a recommendation of the Comrie Review. In 2014, as Acting Chief Commissioner, he was involved in Victoria Police’s response to the ‘Lawyer X’ articles published by the *Herald Sun*. In early 2015, Mr Cartwright was involved in responding to the Kellam Report and implementing a number of its recommendations.

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<b>Thomas (Luke) Cornelius</b>	Mr Luke Cornelius, APM was the Assistant Commissioner of the Ethical Standards Department of Victoria Police between 2005 and 2010. In 2006, he was involved in Operation Khadi. From 2007 to 2010, he was a member on the Briars Taskforce Board of Management and between 2008 and 2010, he was a member of the Petra Taskforce Board of Management.
<b>Sir Kenneth (Ken) Jones</b>	Between 2009 and 2011, Sir Ken Jones, QPM held the role of Deputy Commissioner, Crime, at Victoria Police. Prior to this, Sir Ken had occupied a number of senior policing roles in the United Kingdom. He took control of the Briars and Petra Taskforces in early 2010 and led the Driver Taskforce after the murder of Mr Carl Williams in 2010. Sir Ken left Victoria Police in 2011.
<b>Kenneth (Ken) Lay</b>	During 2011, Mr Ken Lay, AO, APM was the Acting Chief Commissioner of Victoria Police and was involved in establishing the Comrie Review. In late 2011, Mr Lay was appointed Chief Commissioner of Victoria Police. He remained in that position until his resignation in 2015.
<b>Christine Nixon</b>	Ms Christine Nixon, APM was Chief Commissioner of Victoria Police between 2001 and 2009. In 2001, she commissioned the Purton Review to examine corruption and other issues in the Drug Squad. As a result of that review, she introduced structural changes to the Drug Squad, replacing it with the Major Drug Investigation Division. Victoria Police's first comprehensive, organisation-wide human source management policy was introduced during Ms Nixon's time as Chief Commissioner.
<b>Simon Overland</b>	<p>Mr Simon Overland, APM was the Assistant Commissioner, Crime, at Victoria Police in 2003. Between 2003 and 2008, he had oversight of several investigations relating to the Purana, Petra and Briars Taskforces, in which officers had dealings with Ms Gobbo. In 2006, he sat on the Rewards Committee that approved the withdrawal of Ms Gobbo's speeding fines, along with Mr Jack Blayney and Mr Danyne Moloney. In the same year, he was appointed Deputy Commissioner and continued to be involved in investigations that related to Ms Gobbo.</p> <p>In 2009, Mr Overland was appointed Chief Commissioner of Victoria Police. He resigned from that role in 2011.</p>
<b>Shane Patton</b>	<p>Mr Shane Patton, APM is the current Chief Commissioner of Victoria Police. He assumed that role in mid-2020. Mr Patton previously held the role of Deputy Commissioner, Specialist Operations, from 2015, before moving to the role of Deputy Commissioner, Regional Operations, in 2018.</p> <p>Mr Patton chaired the Bendigo Taskforce Steering Committee. While in this role, he was involved in discussions with the Director of Public Prosecutions regarding disclosure of Victoria Police's use of Ms Gobbo as a human source and with the Independent Broad-based Anti-corruption Commission regarding potential misconduct by police officers in their use of Ms Gobbo.</p> <p>Mr Patton was Mr Simon Overland's chief of staff at the time that Mr Overland resigned in 2011.</p>

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## Officers of the Source Development Unit<sup>1</sup>

**Anthony (Tony) Biggin** Between 2005 and 2010, Mr Tony Biggin was a Superintendent in the Covert Services Division of the Intelligence and Covert Support Command and managed several units in this division. In 2006, he audited Ms Gobbo's human source file and in the same year he went on to manage the Source Development Unit, which had responsibility for the management of Ms Gobbo as a human source.

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**Douglas (Doug) Cowlshaw** Between 2005 and 2006, Mr Doug Cowlshaw was the Detective Acting Superintendent of the State Intelligence Division. He was the immediate supervisor of Officer Sandy White (a pseudonym), who was Ms Gobbo's dedicated controller when she was managed by the Source Development Unit. He was listed as the Officer in Charge on the application that registered Ms Gobbo as a human source.

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**Robert (Rob) Hardie** Between 2005 and 2008, Mr Rob Hardie was the Detective Inspector and Officer in Charge of the Source Development Unit.

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**Andrew Glow** Between 2008 and 2011, Mr Andrew Glow was the Inspector in charge of the Source Development Unit.

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**John O'Connor** Mr John O'Connor was a Detective Inspector in charge of the Source Development Unit from 2010 until its closure in 2013. He acted as Ms Gobbo's point of contact between 2010 and 2012.

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**Paul Sheridan** Between 2010 and 2015, Mr Paul Sheridan was the Detective Superintendent in charge of the Covert Services Division, which included the Source Development Unit until its closure in 2013. He was involved in discussions about managing Ms Gobbo as a witness in relation to Mr Paul Dale.

## Handlers and Controllers

**Officer Sandy White (a pseudonym)** Officer Sandy White was Ms Gobbo's dedicated controller at the Source Development Unit during the period of her registration as a human source between 2005 and 2009. His role also included acting as the Officer in Charge of the unit, given the absence of a full-time Inspector.

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**Officer Black (a pseudonym)** Officer Black acted as Ms Gobbo's controller when Officer Sandy White was on leave. He also acted as one of Ms Gobbo's handlers between 2005 and 2006.

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**Officer Peter Smith (a pseudonym)** Officer Peter Smith attended the introductory meeting between the Source Development Unit, Ms Gobbo and members of the Major Drug Investigation Division. He acted as one of Ms Gobbo's handlers for periods between 2005 and 2009.

<sup>1</sup> The Source Development Unit was formerly known as the Dedicated Source Unit.

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**Officer Anderson  
(a pseudonym)**      Officer Anderson was Ms Gobbo's handler at certain periods between 2006 and 2007.

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**Officer Green  
(a pseudonym)**      Officer Green was Ms Gobbo's handler at certain periods between 2006 and 2008. He was also seconded to the Drug Taskforce between June and September 2007.

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**Officer Fox  
(a pseudonym)**      Officer Fox was Ms Gobbo's handler at certain periods between 2007 and 2009.

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**Officer Pearce  
(a pseudonym)**      Officer Pearce was seconded to the Source Development Unit in 2011. He was involved in matters relating to Ms Gobbo during the trial of Mr Zlate Cvetanovski.

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**Officer Richards  
(a pseudonym)**      Officer Richards was handler between 2006 and 2009 for human sources other than Ms Gobbo. He acted as controller when Officer Sandy White was on leave in 2007, 2008 and 2009.

In 2012, Mr Richards had conversations with Ms Gobbo while she was being assessed for witness protection.

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**Officer Wolf  
(a pseudonym)**      Officer Wolf was Ms Gobbo's handler at certain periods in 2008.

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## Investigators and other Victoria Police personnel

**Timothy  
(Tim) Argall**      Between 1995 and 1996, Mr Tim Argall was a Constable in District Support Group 'A'. He spoke to Ms Gobbo several times about her then de facto partner, Mr Brian Wilson.

In 2003, Mr Argall associated with Ms Gobbo socially. During this time, he also associated with Mr Paul Dale. After Mr Dale was arrested in connection with the burglary of a house in Dublin Street, Oakleigh, Mr Argall sought legal advice from Ms Gobbo due to his friendship with Mr Dale.

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**Noel Ashby**      Mr Noel Ashby, APM was an Assistant Commissioner at Victoria Police from 1998 to 2007. He was alleged to have been involved in leaking confidential information regarding the Briars Taskforce, alongside Mr Paul Mullett. In 2008, he was charged with offences that were ultimately resolved by a combination of discharge, discontinuance and acquittal.

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**Trevor Ashton**      Mr Trevor Ashton was involved in executing a search warrant at Ms Gobbo's house in 1993, when he was a Sergeant at District Support Group 'A' at Victoria Police. Ms Gobbo later provided information to him about her partner's drug activities. He registered her as a human source in 1995 (her first registration).

**Lindsay Attrill** Mr Lindsay Attrill was a Detective Inspector at the Ethical Standards Department of Victoria Police in 2006. He was involved in Operation Khadi.

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**Stuart Bateson** Mr Stuart Bateson was a Detective Sergeant in the Purana Taskforce in 2003. He was involved in the arrests of Mr McGrath (a pseudonym) and Mr Andrews (a pseudonym) for the murder of Mr Michael Marshall. He dealt with Ms Gobbo in relation to Mr McGrath's plea negotiations in 2004. During this time, Ms Gobbo had numerous discussions with Mr Bateson about assisting police and her safety concerns. Mr Bateson later dealt with Ms Gobbo in 2005 and 2006 in relation to Mr Thomas (a pseudonym), whom she represented after he was charged with the murders of Mr Jason Moran and Mr Pasquale Barbaro.

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**Charlie Bezzina** Mr Charlie Bezzina was a Detective Senior Sergeant at the Homicide Squad at Victoria Police between 1996 and 2007. He led the investigation into the murders of Mr Terrence (Terry) Hodson and his wife Mrs Christine Hodson. As part of the investigation, he interviewed Ms Gobbo as a potential witness about her knowledge of the murders.

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**John (Jack) Blayney** Mr Jack Blayney, APM was a Detective Senior Sergeant in the Covert Investigation Unit of Victoria Police at the time of Ms Gobbo's first registration as a human source in 1995. He was involved in the decision to cancel an operation that used Ms Gobbo. From 2004, Mr Blayney was a Detective Superintendent in the Crime Department and in 2006, he sat on the Rewards Committee that approved the withdrawal of Ms Gobbo's speeding fines, along with Mr Simon Overland and Mr Danye Moloney.

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**Boris Buick** Mr Boris Buick was a Detective Senior Constable in Victoria Police's Purana Taskforce in 2003. He had dealings with Ms Gobbo during this time, when she was representing Mr McGrath (a pseudonym), and later Mr Thomas (a pseudonym). In 2011, Mr Buick dealt with Ms Gobbo again, when she was a prosecution witness in relation to charges against Mr Paul Dale brought by the Australian Crime Commission.

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**Stephen Campbell** Mr Stephen Campbell met Ms Gobbo in 1999, when he was a Detective Senior Constable of Victoria Police and the informant in a matter in which Ms Gobbo was acting for the accused person. They commenced a casual intimate relationship that continued sporadically over several years. In 2003, Mr Campbell was charged with drug-related offences.

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**Paul Dale** Mr Paul Dale was a Detective Sergeant in Victoria Police's Major Drug Investigation Division from 2002 until he resigned from Victoria Police in 2005. He was alleged to be involved in the 2003 burglary of a house in Dublin Street, Oakleigh with Mr Terry Hodson, and in the 2004 murders of Mr Hodson and his wife, Mrs Christine Hodson. Mr Dale alleges he sought legal advice from Ms Gobbo as well as associating with her socially. In 2003 or 2004, Mr Dale had a brief intimate relationship with Ms Gobbo. Ms Gobbo was to be a witness in the trials against Mr Dale in 2009 and 2010.

- Cameron Davey** Mr Cameron Davey was a Detective Senior Constable in the Homicide Squad of Victoria Police between 2002 and 2007. He was involved in the investigation of the murders of Mr Terry Hodson and Mrs Christine Hodson. In 2004, he and Mr Charlie Bezzina interviewed Ms Gobbo about her knowledge of the murders. He was later seconded to the Petra Taskforce. Mr Sol Solomon and Mr Davey interviewed Ms Gobbo in relation to that investigation.
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- Peter De Santo** Mr Peter De Santo was a Detective Inspector in the Ethical Standards Department involved in Victoria Police's Ceja Taskforce in 2002. Between 2002 and 2003, while Ms Gobbo was representing Mr Antonios (Tony) Mokbel, she spoke to Mr De Santo a number of times in relation to allegations that officers investigating Mr Mokbel and others had engaged in police corruption. Mr De Santo was also involved in the Dublin Street, Oakleigh burglary investigation in 2003.
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- Dale Flynn** Mr Dale Flynn was a Detective Sergeant at Victoria Police's Major Drug Investigation Division before moving to the Purana Taskforce, first as a Detective Sergeant and then a Detective Senior Sergeant. Between 2002 and 2008, he was involved in investigations that received information provided by Ms Gobbo, particularly Operation Posse.
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- Andrew (Murray) Gregor** Mr Murray Gregor was a Detective Senior Sergeant in Victoria Police's Ethical Standards Department between 2001 and 2004. In 2003, he was involved in the Dublin Street, Oakleigh burglary investigation. He spoke to Mr Terry Hodson about cooperating with police in their investigations of then Victoria Police officers Mr David Miechel and Mr Paul Dale.
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- Mark Hatt** Mr Mark Hatt was a Detective Senior Constable in Victoria Police's Purana Taskforce between 2003 and 2004, and between 2006 and 2010. He was involved in a number of investigations that dealt with Ms Gobbo, both in her capacity as a barrister representing accused persons and as a human source.
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- Paul Hollowood** Mr Paul Hollowood was a Detective Superintendent in the Crime Department of Victoria Police between 2004 and 2011. From 2008 until 2011, he was Tasking Coordination Manager in the Crime Department, which involved him receiving regular briefings about major investigations, including the Purana and Petra Taskforces.
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- Ronald (Ron) Iddles** Mr Ron Iddles, OAM, APM was a Detective Senior Sergeant in Victoria Police's Homicide Squad in 1989 and between 1994 and 2014. He was seconded to the Briars Taskforce between 2007 and 2008. He was also involved in the Taskforce in 2009, when he travelled to Bali with Mr Steve Waddell to obtain a statement from Ms Gobbo about her knowledge of the murder of Mr Shane Chartres-Abbott, and information about then Victoria Police officer Mr David Waters and his alleged involvement in the murder.

**Officer Kruger (a pseudonym)** Officer Kruger had contact with Ms Gobbo between 1997 and 1999 when he was an officer in Victoria Police's Drug Squad. Ms Gobbo was representing a number of accused persons being investigated by Mr Kruger. He introduced her to members of the Asset Recovery Squad after she made allegations that her employer, Solicitor 1 (a pseudonym), was misusing his trust fund.

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**Christopher Lim** Mr Christopher Lim was an officer in Victoria Police's Drug Squad in 1998. He and Officer Kruger (a pseudonym) met with Ms Gobbo several times regarding her allegations about Solicitor 1 (a pseudonym).

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**Steve Mansell** Mr Steve Mansell was a Detective Sergeant in Victoria Police's Major Drug Investigation Division in 2005. In 2005, he and Mr Paul Rowe were involved in discussions with Ms Gobbo, during which she expressed a willingness to provide information to Victoria Police. These conversations resulted in her being referred to the Source Development Unit.

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**Findlay (Fin) McRae** Since 2006, Mr Fin McRae has been the Executive Director of Legal Services at Victoria Police. In 2009, he was involved in negotiations with Ms Gobbo and Victoria Police about her entry into witness protection. In 2010, he dealt with the settlement of Ms Gobbo's civil litigation against Victoria Police.

In late 2011, Mr McRae was provided with the 'Maguire advice' that led to the Comrie Review, and between 2012 and 2014, he held discussions with the Director of Public Prosecutions about the steps Victoria Police was taking to identify if any prosecutions may have been affected by the use of Ms Gobbo as a human source. As the Executive Director of Legal Services, he was involved in the court proceedings in which Ms Gobbo and Victoria Police sought to prevent the Director of Public Prosecutions from disclosing Ms Gobbo's identity to several individuals.

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**David Miechel** Mr David Miechel was a Detective Senior Constable in the Victoria Police Drug Squad. In 2003, Mr Miechel was arrested alongside Mr Terry Hodson for the burglary of a house in Dublin Street, Oakleigh that was believed to contain large amounts of cash and drugs. At the time, Mr Hodson was a human source for Victoria Police and Mr Miechel was his handler. Mr Miechel was later convicted for the Dublin Street burglary and sentenced to 15 years' imprisonment, with a non-parole period of 12 years.

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**Dannye Moloney** Mr Dannye Moloney, APM was a Superintendent and Acting Commander of Victoria Police's Ceja Taskforce between 2001 and 2006. He also held the role of Commander, Intelligence and Covert Support. He was a member of the Human Source Management Project Steering Committee in 2004, which oversaw the Dedicated Source Unit Pilot Project. After the completion of the pilot, this unit went on to manage Ms Gobbo after she was registered as a human source. In 2006, he sat on the Rewards Committee that approved the withdrawal of Ms Gobbo's speeding fines, along with Mr Simon Overland and Mr Jack Blayney. In 2008, after taking up the role of Assistant Commissioner, Crime, Mr Moloney was a member of the Petra Taskforce Board of Management. In 2009, he was a member of the Briars Taskforce Board of Management.

**Paul Mullett** Mr Paul Mullett, APM was a Victoria Police officer from 1974 to 1992 and Secretary of The Police Association from 1998 to 2009. He was alleged to have been involved in leaking confidential information regarding the Briars Taskforce, alongside Mr Noel Ashby. In 2008, he was charged with offences that were ultimately resolved by a combination of discharge, discontinuance and acquittal.

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**James (Jim) O'Brien** Mr Jim O'Brien was a Detective Senior Sergeant at Victoria Police's Major Drug Investigation Division in 2005. He referred Ms Gobbo to the Source Development Unit after she expressed interest in providing information to police. He then became the Officer in Charge of the Purana Taskforce. In this role, he managed a number of investigations, particularly Operation Posse, which utilised information provided by Ms Gobbo. He was later appointed as the Acting Detective Inspector of the Purana Taskforce and promoted to Detective Inspector of the Taskforce in 2007.

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**Shane O'Connell** Mr Shane O'Connell was transferred from Victoria Police's Purana Taskforce to its Petra Taskforce in 2007. He soon assumed the role of Acting Inspector of the Petra Taskforce due to the departure of Mr Gavan Ryan. He was involved in discussions with Ms Gobbo about her assisting the Taskforce by providing a statement, and later about her role as a witness in the prosecution of Mr Paul Dale.

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**Jeffrey (Jeff) Pope** Mr Jeff Pope was a Detective Senior Constable in Victoria Police's Asset Recovery Squad between 1999 and 2000. He was introduced to Ms Gobbo by officers of the Drug Squad after she made money laundering allegations against her employer. He later registered her as a human source in 1999 (her second registration) due to the information she provided against her employer. Mr Pope left Victoria Police in 2004 but re-joined in 2009, after being appointed Assistant Commissioner, Intelligence and Covert Support. He was involved in drafting the terms of reference for the Comrie Review and in the decision to close the Source Development Unit in 2013.

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**Paul Rowe** Mr Paul Rowe was a Detective Senior Constable in Victoria Police's Major Drug Investigation Division in 2005. Mr Rowe and Mr Steve Mansell had conversations with Ms Gobbo in 2005, during which she showed a willingness to provide information to Victoria Police. He was involved in her introduction to the Source Development Unit, which went on to manage her as a human source. He then moved to the Purana Taskforce, where he was involved in investigations that dealt with Ms Gobbo.

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**Gavan Ryan** Mr Gavan Ryan was a Detective Senior Sergeant in Victoria Police's Purana Taskforce. In 2005, he was promoted to Detective Inspector at the Major Drug Investigation Division. Ms Gobbo gave information to investigations in which Mr Ryan was involved. In 2007, he was appointed to lead the Petra Taskforce, and in the same year he attended the Office of Police Integrity examinations of Ms Gobbo by the Honourable Gerald Edward (Tony) Fitzgerald, AC, QC. Mr Ryan left Victoria Police in 2008 to join the Australian Federal Police.

**Solon (Sol) Solomon** Mr Sol Solomon was a Detective Sergeant in Victoria Police's Homicide Squad. In 2007, he was seconded to the Petra Taskforce. He and Mr Cameron Davey interviewed Ms Gobbo in relation to the Petra Taskforce investigation.

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**Wayne Strawhorn** Mr Wayne Strawhorn was a Detective Senior Sergeant in Victoria Police's Drug Squad in 1998. He was involved in investigations in which Ms Gobbo was acting for several accused persons, including Person 2 (a pseudonym). Ms Gobbo later made allegations to him regarding her former employer. Mr Strawhorn's interactions with Ms Gobbo overlapped with her representation of Mr Dragan Arnautovic between 1997 and 1999. Mr Strawhorn was later convicted and imprisoned for drug offences.

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**Philip Swindells** Mr Philip Swindells was a Detective Senior Sergeant in charge of gangland murder investigations at Purana Taskforce between 2003 and 2005 and was involved in murder investigations involving Mr McGrath (a pseudonym) as a suspect who was represented by Ms Gobbo. In 2003, Mr Swindells had a conversation with Ms Gobbo about her safety concerns. He later became a Detective Inspector at the Ethical Standards Department, during which time he was involved in Operation Khadi.

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**Stephen (Steve) Waddell** Mr Steve Waddell was an Inspector in Victoria Police's Ethical Standards Department in 2006. In early 2007, he was seconded to the Briars Taskforce during its first phase of operations. After it was reconvened in 2009, he returned to the Taskforce. In 2009, he travelled with Mr Ron Iddles to Bali to take a statement from Ms Gobbo.

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**David Waters** Mr David Waters was a former Victoria Police officer who was a person of interest in the murder of Mr Shane Chartres-Abbott. Ms Gobbo was linked to Mr Waters through her friendship with Mr Stephen Campbell.

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## PEOPLE INVOLVED IN INQUIRIES INTO THE USE OF MS GOBBO AS A HUMAN SOURCE

**Neil Comrie** Mr Neil Comrie AO, APM was Chief Commissioner of Victoria Police between 1993 and 2001. In 2012, Mr Comrie conducted a confidential Victoria Police review titled *Victoria Police Human Source 3838: A Case Review* (Comrie Review). This review examined Victoria Police's use of Ms Gobbo as a human source and the policies and practices relevant to her management between 2005 and 2009.

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**John Champion** The Honourable Justice John Champion, SC was the Director of Public Prosecutions between 2011 and 2017. In 2016, Mr Champion finalised a report titled *Report of the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Champion Report). This report considered whether the prosecution of individuals named in the Kellam Report resulted in miscarriages of justice. Mr Champion concluded he had a duty to disclose this possibility to the affected individuals.

**Murray Kellam** The Honourable Murray Kellam, AO, QC is a former Justice of the Court of Appeal of the Supreme Court of Victoria. Between 2014 and 2015, Mr Kellam led an inquiry on behalf of the Independent Broad-based Anti-corruption Commission into Victoria Police's use of Ms Gobbo as a human source between 2005 and 2009. His report, titled *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Kellam Report), identified nine individuals who were convicted of serious criminal offences and whose cases may have been affected by Victoria Police's use of Ms Gobbo as a human source.

## CLIENTS AND OTHER ASSOCIATES OF MS GOBBO

**Mr Agrum  
(a pseudonym)** Mr Agrum was an associate of Mr Cooper (a pseudonym). Ms Gobbo appeared for Mr Agrum after he was arrested in 2006 alongside Mr Cooper. He was convicted in relation to drug trafficking offences and sentenced to four years' imprisonment, with a non-parole period of two years and six months.

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**Mr Andrews  
(a pseudonym)** Mr Andrews was an associate of Mr Carl Williams and Mr McGrath (a pseudonym). He pleaded guilty to the murders of Mr Michael Marshall, Mr Jason Moran and Mr Pasquale Barbaro. He later assisted police by making statements against criminal associates. He was sentenced to life imprisonment with a minimum of 23 years.

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**Dragan  
Arnautovic** Mr Dragan Arnautovic was a former client of Ms Gobbo in the late 1990s who was convicted of heroin trafficking. In 1999, he was sentenced to 12 years' imprisonment with a non-parole period of nine years.

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**Mr Bickley  
(a pseudonym)** Mr Bickley was an associate of the Mokbels. Ms Gobbo represented him during his first and second arrests for drug-related offences in 2005 and 2006. Around the time of Mr Bickley's first arrest and bail hearing, police officers Mr Paul Rowe and Mr Steve Mansell had conversations with Ms Gobbo that led to her introduction to the Source Development Unit.

Mr Bickley went on to assist police and made several statements against associates. He was sentenced to three years' imprisonment, which was wholly suspended.

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**Mr Cooper  
(a pseudonym)** Mr Cooper was an associate of the Mokbels who manufactured methamphetamine. He was both a client and a close friend of Ms Gobbo. Beginning in late 2005, Ms Gobbo provided information about him to her handlers, including the location of a laboratory he used to manufacture drugs.

After Mr Cooper was arrested in 2006, Ms Gobbo represented him. Mr Cooper provided statements to police and gave evidence in relation to various other targets of the Purana Taskforce. He was ultimately sentenced to 10 years' imprisonment with a non-parole period of seven years.

**Alexandra Cvetanovski** Mrs Alexandra Cvetanovski was the wife of Mr Zlate Cvetanovski and a client of Ms Gobbo. She was sentenced to a two-year community based order for her role in her husband’s fraudulent loan applications.

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**Zlate Cvetanovski** Mr Zlate Cvetanovski was an associate of Mr Cooper (a pseudonym) and a client of Ms Gobbo. He was sentenced to 13 years’ imprisonment for various offences relating to drug manufacturing and trafficking, fraudulent loan applications and credit card transactions.

In October 2020, some of Mr Cvetanovski’s convictions relating to drug offences were overturned by the Court of Appeal on the basis that a substantial miscarriage of justice occurred when key facts were not disclosed, such as various payments being made into the prison account of Mr Cooper as well as Ms Gobbo’s role in Mr Cooper’s decision to cooperate with police and implicate Mr Cvetanovski.

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**Mr Domenic (Mick) Gatto** Mr Mick Gatto headed the ‘Carlton Crew’ and was a target of the Purana Taskforce. He was the first person prosecuted by the Taskforce, after he killed Mr Andrew Veniamin in 2004. His murder trial resulted in a verdict of not guilty on the grounds of self defence in 2005. From 2006, Ms Gobbo and Mr Gatto began to socialise and in 2007, she began representing him in relation to his business matters.

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**Terrence (Terry) Hodson** Mr Terry Hodson was a registered human source for Victoria Police. In 2003, he was arrested along with his handler, then Detective Senior Constable David Miechel, in relation to the burglary of a house in Dublin Street, Oakleigh. Mr Hodson later agreed to cooperate with investigators from the Ethical Standards Department, leading to Mr Miechel and his Sergeant, Mr Paul Dale, being arrested and charged in relation to the burglary. In 2004, before he could give evidence, Mr Hodson and his wife were murdered in their home.

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**Christine Hodson** Mrs Christine Hodson was the wife of Mr Terry Hodson. The pair were murdered in their home in 2004.

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**Andrew Hodson** Mr Andrew Hodson is the son of Mr Terry Hodson and Mrs Christine Hodson. He is also a former client of Ms Gobbo.

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**Mr McGrath (a pseudonym)** Mr McGrath was an associate of Mr Carl Williams. Ms Gobbo represented him after he was arrested for the murder of Mr Michael Marshall. He later assisted police and made statements against his associates. He was sentenced to 18 years’ imprisonment with a non-parole period of 10 years.

**Mr Faruk Orman** Mr Faruk Orman was a member of Mr Mick Gatto's 'Carlton Crew'. In 2009, Mr Orman was convicted of the murder of Mr Victor Peirce and sentenced to 20 years' imprisonment with a non-parole period of 14 years. In 2019, Mr Orman's conviction was overturned by the court on the basis that a substantial miscarriage of justice occurred when Ms Gobbo actively encouraged her client, Mr Thomas (a pseudonym), to give evidence in the murder trial against Mr Orman at a time when she was also representing Mr Orman.

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**Mr Thomas (a pseudonym)** Mr Thomas was an associate of Mr Tony Mokbel and Mr Carl Williams. Ms Gobbo began representing him in 2002. This representation continued when he was arrested and charged with the murders of Mr Pasquale Barbaro and Mr Jason Moran. Mr Thomas went on to make statements against associates, most notably against Mr Faruk Orman. He was sentenced to 23 years' imprisonment with a non-parole period of 12 years.

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**Carl Williams** Mr Carl Williams was a key figure in the gangland wars. Ms Gobbo regularly represented him between 2003 and 2005 and continued to advise him on an informal basis between 2006 and 2007. She also socialised with him. Ms Gobbo also provided information to her handlers about Mr Williams. In 2006, on becoming aware that Ms Gobbo proposed to act for one of his co-accused in relation to a murder trial, Mr Williams complained to the Supreme Court judge hearing his murder trial, the Victorian Bar Ethics Committee and the Law Institute of Victoria about her conflicted position.

In 2006 and 2007, Mr Williams was convicted of multiple murders and sentenced to life imprisonment with a non-parole period of 35 years. In early 2007, Mr Williams made a statement to the Petra Taskforce implicating Mr Paul Dale in the murders of Mr Terry Hodson and Mrs Christine Hodson, and alleging that Ms Gobbo acted as a conduit between himself and Mr Dale. He was murdered in prison in 2010.

## The Mokbels

**Antonios (Tony) Mokbel** Mr Tony Mokbel was a high-profile drug trafficker who headed one of the major drug cartels involved in the gangland wars. He is the third eldest sibling of the Mokbel family. Mr Mokbel was a key target of Victoria Police during the early 2000s. Ms Gobbo regularly represented him and his associates in criminal proceedings. She also socialised with him and his associates regularly.

In 2006, while on trial in relation to drug offences, Mr Mokbel fled to Greece. He returned to Australia in 2008 after being extradited. In 2012, Mr Mokbel was sentenced to 30 years' imprisonment with a non-parole period of 22 years.

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**Horty Mokbel** Mr Horty Mokbel is the second eldest of the five Mokbel children and was a client of Ms Gobbo. He was convicted of charges relating to possessing equipment and substances with the intention of drug trafficking. In 2010, he was sentenced to six years' imprisonment with a non-parole period of four years.

**Kabalan Mokbel** Mr Kabalan Mokbel is the eldest of the five Mokbel children and was a client of Ms Gobbo. He was convicted of drug trafficking. In 2007, he was sentenced to three years' imprisonment.

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**Milad Mokbel** Mr Milad Mokbel was the youngest of the five Mokbel children and a client of Ms Gobbo. He was convicted of various offences, including drug trafficking and dealing with proceeds of crime. Mr Mokbel was sentenced to 13 years' imprisonment with a non-parole period of eight years. He died in 2020.

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**Renate Mokbel** Ms Renate Mokbel is the widow of Mr Milad Mokbel. She was also a client of Ms Gobbo. She was convicted of perjury charges relating to her acting as surety for her brother-in law, Mr Tony Mokbel. In 2008, she was sentenced to a partially suspended term of imprisonment of two years and nine months.

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**Zaharoula Mokbel** Ms Zaharoula Mokbel is the wife of Mr Horty Mokbel and was a client of Ms Gobbo. She was convicted of offending related to falsified mortgage loan applications. In 2009, she was sentenced to a suspended term of imprisonment of two years and nine months.

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## The 'Tomato Tins' drug-trafficking syndicate

**Salvatore Agresta** Mr Salvatore Agresta was convicted for his role as a 'foot soldier', intermediary and trafficker in the drug-trafficking syndicate headed by Mr Pasquale Barbaro, which imported 15 million ecstasy pills into Melbourne. He was also a client of Ms Gobbo. He was sentenced to 16 years' imprisonment across two separate trials. In 2020, Mr Agresta launched an appeal against his conviction, citing Ms Gobbo's involvement with police.

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**Pasquale Barbaro** Mr Pasquale Barbaro was the head of the Tomato Tins syndicate and a client of Ms Gobbo. He was sentenced to life imprisonment with a non-parole period of 30 years. In 2020, he launched an appeal against his conviction, citing Ms Gobbo's involvement with police.

A different individual also known as Mr Pasquale Barbaro was murdered alongside Mr Jason Moran.

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**Carmelo Falanga** Mr Carmelo Falanga was convicted over his role as the co-financier and key organiser of the Tomato Tins syndicate. Mr Falanga was sentenced to 23 years' imprisonment with a non-parole period of 16 years and six months. In 2020, he launched an appeal against his conviction, citing Ms Gobbo's involvement with police.

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**John Higgs** Mr John Higgs was a veteran drug trafficker and a close associate of Mr Rob Karam. Convicted over his role in the Tomato Tins syndicate, Mr Higgs was sentenced to 18 years' imprisonment with a non-parole period of 14 years.

**Rabie (Rob)  
Karam**

Mr Rob Karam was an associate of the Mobbels and a client of Ms Gobbo. He was sentenced to 37 years' imprisonment for drug offences, with a non-parole period of 22 years. In 2020, he launched an appeal against his conviction, citing Ms Gobbo's involvement with police.

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**Francesco  
Madafferi**

Mr Francesco Madafferi was convicted for his 'high-level' role in the distribution chain of the Tomato Tins syndicate. He was sentenced to 10 years' imprisonment with a non-parole period of seven years. In 2020, he launched an appeal against his conviction, citing Ms Gobbo's involvement with police.

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**Sharon Ropa**

Ms Sharon Ropa was the girlfriend of Mr Pasquale Barbaro. She was convicted over her role in the Tomato Tins syndicate. She was sentenced to nine years and six months' imprisonment with a non-parole period of seven years.

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**Jan Visser**

Mr Jan Visser was long-time associate of Mr Pasquale Barbaro. He was convicted over his role as a 'foot soldier' and 'fixer' in the Tomato Tins syndicate. He was sentenced to 11 years' imprisonment with a non-parole period of eight years. In 2019, he launched an appeal against his conviction, citing Ms Gobbo's involvement with police.

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**Saverio Zirilli**

Mr Saverio Zirilli is the cousin of Mr Pasquale Barbaro and was a client of Ms Gobbo. He was convicted over his role as Mr Barbaro's 'right-hand man' in the Tomato Tins syndicate. Mr Zirilli was sentenced to 26 years' imprisonment with a non-parole period of 18 years. In 2020, he launched an appeal against his conviction, citing Ms Gobbo's involvement with police.

# 1

## Establishment of the Royal Commission

### INTRODUCTION

On 3 December 2018, the Victorian Government announced that it would establish a royal commission to conduct an independent inquiry into Victoria Police's recruitment and management of human sources (also known as police 'informants' or 'informers') subject to legal obligations of confidentiality or privilege. The announcement followed the public release of a unanimous decision of the High Court of Australia regarding Victoria Police's use of former criminal defence barrister Ms Nicola Gobbo as a human source.

The High Court decision was the culmination of extensive litigation between the Chief Commissioner of Victoria Police, Ms Gobbo and the Victorian Director of Public Prosecutions (DPP) between 2016 and 2018. The court proceedings were initiated in the Supreme Court of Victoria by the Chief Commissioner in an attempt to prevent the DPP from disclosing to seven potentially affected individuals that their lawyer Ms Gobbo, in possible breach of her professional obligations and duties, had covertly informed on them to Victoria Police.<sup>1</sup>

In its 2018 decision, the High Court described Ms Gobbo's actions as 'fundamental and appalling breaches' of her obligations to her clients and her duties to the court.<sup>2</sup> Similarly, the High Court considered that Victoria Police was 'guilty of reprehensible conduct' by knowingly encouraging Ms Gobbo to act as a human source; and that, by doing so, Victoria Police was involved in 'sanctioning atrocious breaches of the sworn duty of every police officer' to act faithfully and in accordance with the law.<sup>3</sup>

A person charged with a criminal offence is entitled to a fair hearing, independent legal advice and representation, and a lawyer who acts in their best interests.<sup>4</sup> The effective operation of the criminal justice system requires its participants, including lawyers and the police, to act with integrity to uphold the rights and freedoms of individuals, and fairly apply the rule of law. The failure to do so can undermine public trust and confidence in the criminal justice system.

In the Supreme Court decision related to the DPP's proposed disclosure of information to the seven individuals, Justice Ginnane explained:

*... a fundamental feature of our community is that all persons, whatever crime they have committed, are entitled to independent legal advice and counsel and an opportunity for a fair trial if they contest the charges or to be properly represented if they plead guilty. There is a strong public interest in ensuring that a lawyer's breach of duty and obligations do not undermine the fairness of a trial, or the negotiation of a plea of guilty. The knowledge of [Ms Gobbo's] role might have assisted the seven persons in a criminal trial if they had pleaded not guilty or in a plea.<sup>5</sup>*

Due to the use of Ms Gobbo as a human source by Victoria Police, people who were represented by her may seek to have their convictions or sentences overturned. For example, during the Commission's inquiry, the Court of Appeal of the Supreme Court of Victoria set aside Mr Faruk Orman's 2009 conviction for murder and acquitted him. The Court determined that Ms Gobbo's actions in the case had subverted Mr Orman's right to a fair trial, and that this amounted to a substantial miscarriage of justice.<sup>6</sup>

This chapter outlines the key events that led to the establishment of the Commission, including:

- the formal reviews into the use of Ms Gobbo as a human source
- the proceedings between the Chief Commissioner, Ms Gobbo and the DPP
- the announcement of the Commission
- the proceedings to protect the identity of Ms Gobbo.

The chapter also outlines the structure of this final report.

## THE USE OF HUMAN SOURCES

A human source is commonly understood to be a person who covertly supplies information about crime or people involved in criminal activity to police or other law enforcement agencies.<sup>7</sup>

Victoria Police describes a human source as a person who:

- volunteers or provides information on a confidential basis to Victoria Police to assist with criminal investigations
- has an expectation that their identity will remain confidential
- is registered as a human source.<sup>8</sup>

Human sources are generally distinguishable from witnesses, victims of crime, and members of the community who volunteer information to police about events they have seen or heard in the course of their day-to-day activities.

## Protecting the identity of human sources

Protecting the identity of human sources is paramount. In a statement to the Commission, then Assistant Commissioner Neil Paterson, APM, Intelligence and Covert Support Command, explained:

*The ability of Victoria Police to recruit and use human sources is inherently dependent on potential human source[s] believing that their identity will be kept confidential and that their personal safety will be of paramount importance to Victoria Police and will be protected. When the identity of a human source is compromised there are many examples of such a compromise leading to the death or serious injury of the human source. For this reason, the confidentiality of human sources is paramount.<sup>9</sup>*

It is commonly accepted that it is in the public interest to maintain the anonymity of human sources, both to avoid harm to them should their informing become known to others; and to maintain public confidence in the police's ability to protect human sources and thus ensure that people remain willing to provide information to police.<sup>10</sup> For these reasons, a person accused of a crime will typically not learn the identity of a human source who may have assisted police in their criminal investigation.<sup>11</sup>

Maintaining the confidentiality of a human source, however, needs to be balanced against the right of an accused person to be informed of the evidence relied upon to bring a criminal charge against them, particularly evidence that would assist them to defend their case.<sup>12</sup>

A person charged with a criminal offence is entitled to be 'informed promptly and in detail of the nature and reason for the charge'.<sup>13</sup> The common law imposes obligations on prosecutors to fully disclose to an accused person any material relevant to the court proceedings.<sup>14</sup> When police or prosecutors wish to withhold relevant evidence from an accused person in order to maintain the confidentiality of a human source, they may claim what is known as 'public interest immunity' (PII).

PII is a rule of evidence that is used in court proceedings. The rule provides that relevant evidence is not to be disclosed in court proceedings where disclosure would damage the public interest, and the need to avoid the damage outweighs the accused person's right to have all of the relevant evidence made available to them.<sup>15</sup>

Determining PII claims is a balancing exercise for the courts, which must consider whether the public interest in withholding disclosure outweighs the public interest in disclosing the information in accordance with the proper administration of justice.

The use of human source information in the criminal justice system and the rules surrounding the disclosure of such information is discussed in Chapter 14.

## The use of Ms Gobbo as a human source

At various times from 1993 and until at least until 2010, Ms Gobbo provided information to Victoria Police about her clients, their associates and other individuals, some of whom were involved in Melbourne's so-called 'gangland wars'. During that period, Ms Gobbo was registered as a human source on three occasions, the third time between 2005 and 2009 when she provided information to Victoria Police about many people involved in organised crime, including her clients.

In her evidence to the Supreme Court in the proceedings relating to the DPP's intended disclosure of her status as a human source, Ms Gobbo estimated that 386 people had been arrested and charged due to the information she had provided to Victoria Police.<sup>16</sup> She described a range of motivations that led to her becoming a human source in 2005, including her fear of being charged as an accessory to crimes she was aware of and her wish to rid herself of her clients; in particular, the 'Mokbel cartel'.<sup>17</sup>

A chronology of key events related to Ms Gobbo's interactions with Victoria Police and subsequent events leading to the establishment of the Commission is set out in Chapter 6.

Ms Gobbo's conduct as a human source is discussed in Chapter 7.

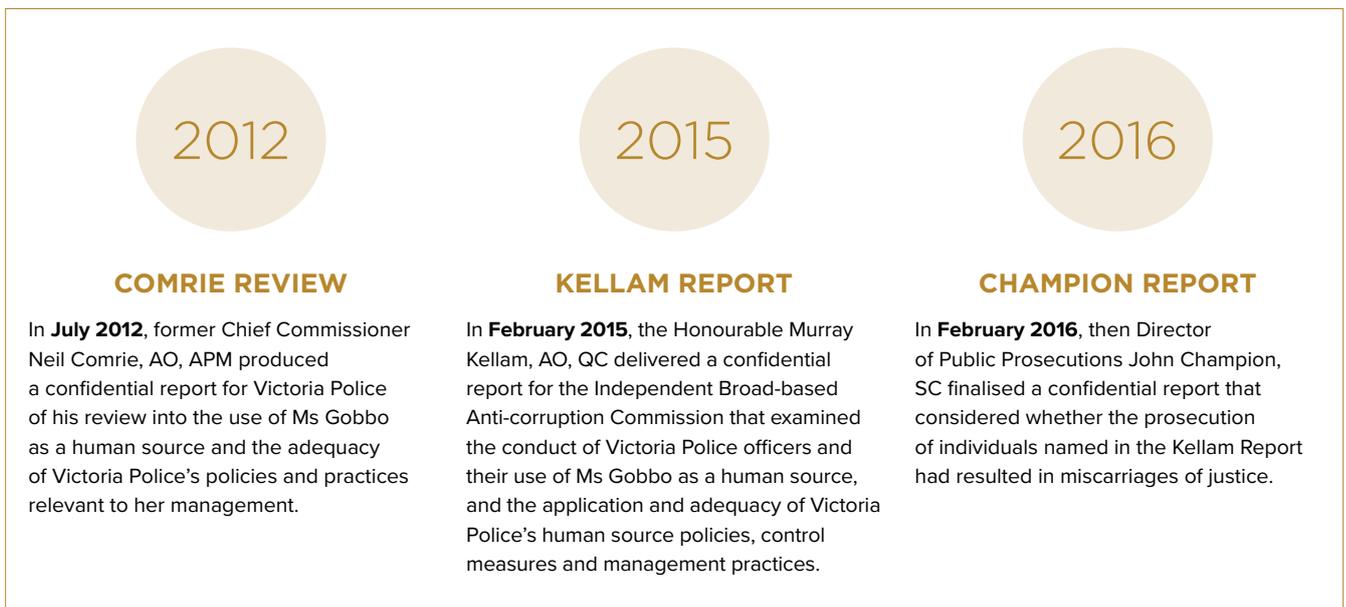
## REVIEWS INTO THE USE OF MS GOBBO AS A HUMAN SOURCE

In late 2008, Ms Gobbo assisted Victoria Police to obtain evidence against former Victoria Police officer Mr Paul Dale. Her evidence was used in support of charges that were laid against Mr Dale and Mr Rodney Collins for the murders of Mr Terrence (Terry) Hodson and his wife, Mrs Christine Hodson.<sup>18</sup>

The proceedings against Mr Dale, and the subsequent proceedings brought against him in 2011 relating to alleged offences arising from evidence he gave to the Australian Crime Commission, triggered events that led to three external reviews into the use of Ms Gobbo as a human source between 2005 and 2009.<sup>19</sup> These reviews were not public and did not examine Ms Gobbo's earlier registrations as a human source because her previous use was not commonly known within Victorian Police until after the Commission was established.

The three reviews are outlined in Figure 1.1 and discussed below.

**Figure 1.1: External reviews into the use of Ms Gobbo as a human source, 2012–16<sup>20</sup>**



## Comrie Review

The first of the confidential external reviews came about after barrister Mr Gerard Maguire provided advice to Victoria Police in October 2011 regarding the disclosure of documents sought by Mr Dale. These documents could have revealed Ms Gobbo's wider use as a human source by Victoria Police.<sup>21</sup>

In his advice to Victoria Police, Mr Maguire raised the potential for Ms Gobbo's clients to seek to challenge their convictions on the basis that the convictions were improperly obtained.<sup>22</sup> He recommended that the issues he had identified in his legal advice be raised with Victoria Police senior management.<sup>23</sup> This prompted Victoria Police to commission a review into the use of Ms Gobbo as a human source.

On 19 March 2012, Victoria Police engaged former Chief Commissioner Neil Comrie, AO, APM to undertake this review.<sup>24</sup> Mr Comrie's review focused on the use of Ms Gobbo as a human source, and Victoria Police's policies, control measures and practices relevant to her management between 2005 and 2009.<sup>25</sup> He also considered internal changes to human source policies and procedures since the registration of Ms Gobbo in 2005.<sup>26</sup>

On 30 July 2012, Mr Comrie produced his report entitled *Victoria Police Human Source 3838: A Case Review* (Comrie Review), in which he made 27 recommendations, including changes to Victoria Police's human source policies and practices.<sup>27</sup> Mr Comrie also endorsed the findings and recommendations of an internal Victoria Police audit of human source management practices, which took place in 2010.<sup>28</sup>

Following the completion of the Comrie Review, Victoria Police commenced two operations in relation to its use of Ms Gobbo as a human source:

- *Operation Loricated* commenced in 2013 as a result of a recommendation of the Comrie Review.<sup>29</sup> It was tasked to reconstruct a full electronic file of Victoria Police's use of Ms Gobbo as a human source, and identify issues regarding her use.<sup>30</sup>
- *Operation Bendigo* commenced in 2014 to coordinate and oversee matters connected to Ms Gobbo, including her protection and management. The operation also established an investigation group to examine five specific cases relating to the use of Ms Gobbo as a human source, in order to identify any instances of legal conflict that might have resulted in a miscarriage of justice.<sup>31</sup>

The Comrie Review and the implementation of its recommendations are discussed in Chapter 11.

## Kellam Report

On 31 March 2014, the *Herald Sun* published an article entitled 'Underworld Lawyer a Secret Police Informer'.<sup>32</sup> Shortly thereafter, on 10 April 2014, Victoria Police made a notification to the Independent Broad-based Anti-corruption Commission (IBAC) regarding the use of Ms Gobbo as a human source.<sup>33</sup>

IBAC appointed the Honourable Murray Kellam, AO, QC to examine:

- the conduct of current and former Victoria Police officers identified in the Comrie Review in relation to the management of Ms Gobbo as a human source
- Victoria Police's human source management policies, processes and procedures during the period between September 2005 and January 2009 when Ms Gobbo was a registered human source.<sup>34</sup>

On 6 February 2015, Mr Kellam produced a confidential report entitled *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Kellam Report).<sup>35</sup> In the report, Mr Kellam stated that he was unable

to conclude, on the evidence before him, that Victoria Police officers intended to pervert the course of justice. He did conclude, however, that the actions of Ms Gobbo's police handlers were improper and would—if exposed—likely bring Victoria Police into disrepute and diminish public confidence in it.<sup>36</sup> Mr Kellam considered that:

*... conduct by individual police officers resulted not from any personal intention to act with impropriety on their part, but from what I consider to be behaviour constituting negligence of a high order on the part of those responsible for their supervision, guidance, instruction and management in the particular prevailing circumstances of obvious attendant risk.*<sup>37</sup>

Mr Kellam found that there had been a serious systemic failure by Victoria Police when managing Ms Gobbo, which put her personal safety at risk.<sup>38</sup> Evidence provided to the inquiry indicated that, notwithstanding the need to keep Ms Gobbo's identity as a human source confidential and confined to a small number of individuals, by 2009 at least 150 Victoria Police officers were aware that she was a human source.<sup>39</sup>

The Kellam Report also set out examples of information provided by Ms Gobbo to Victoria Police in the cases of nine individuals who had received, or possibly received, legal assistance from Ms Gobbo while she was informing on them to Victoria Police. All nine had been convicted of serious criminal offences.

Mr Kellam made 16 recommendations in his report, including recommendations to improve Victoria Police's human source management policies. He also recommended that the Chief Commissioner provide a copy of the report and any relevant material to the DPP, so he could consider whether any prosecutions that may have been obtained in breach of legal professional privilege or confidentiality had resulted in miscarriages of justice due to the use of Ms Gobbo as a human source.<sup>40</sup>

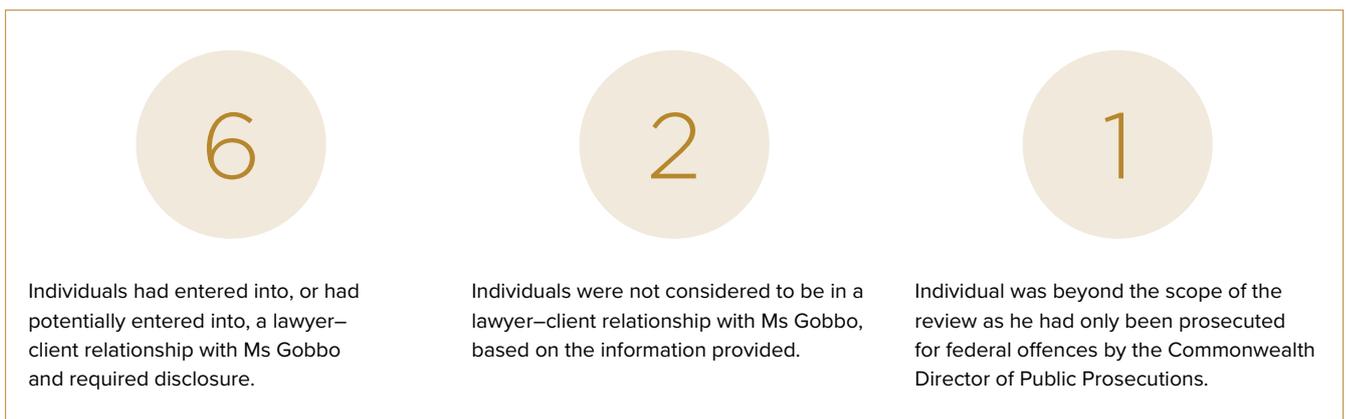
As part of its inquiry, the Commission was required to inquire into and report on whether Victoria Police's current human source practices comply with the recommendations of the Kellam Report. This is discussed in Chapter 11.

## Champion Report

As recommended by Mr Kellam, the Chief Commissioner provided a copy of the Kellam Report to the then DPP, Mr John Champion, SC, so he could consider whether any relevant prosecutions may have been obtained in breach of legal professional privilege or confidentiality and resulted in miscarriages of justice.<sup>41</sup>

On 5 February 2016, the DPP produced a confidential report entitled *Report of the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Champion Report).<sup>42</sup> He considered the cases of the nine individuals identified in the Kellam Report who were charged and prosecuted in Victoria.<sup>43</sup> The conclusions of the Champion Report regarding the nine cases are summarised in Figure 1.2.

**Figure 1.2: Conclusions of the Champion Report<sup>44</sup>**



From the material available to him, the DPP was unable to conclude that miscarriages of justice had occurred but could not exclude that possibility in the six cases where a lawyer–client relationship existed.<sup>45</sup> He believed it was possible that miscarriages of justice had occurred as:

- it was highly likely that Ms Gobbo had acted improperly in informing against her own clients
- it was highly likely that she had breached legal professional privilege and the confidence that exists between a lawyer and their client on multiple occasions
- almost certainly, her actions amounted to serious conflicts of interest.<sup>46</sup>

The DPP considered that:

*... the case-study individuals must be informed of the peculiar and unique role [Ms Gobbo] played in the investigation of their cases. That role was so unique that I cannot accept that had individuals known of that role, and the extent of the information supplied to police that was relevant to their roles, and against their interests, that arguments would not have been made to courts for the exclusion of unfairly obtained evidence.<sup>47</sup>*

The DPP concluded that he was obliged to disclose the possibility of miscarriages of justice having occurred to six of the nine individuals identified in the Kellam Report, all of whom had been represented by Ms Gobbo and had been prosecuted by the DPP.<sup>48</sup>

In recommending that disclosure be made to the six individuals, the DPP was mindful of Ms Gobbo's safety once disclosure had occurred. Accordingly, he considered that it was necessary for the Attorney-General of Victoria, the then Department of Justice and Regulation, and Victoria Police to discuss arrangements that could be put in place in relation to the safety of Ms Gobbo.<sup>49</sup>

## COURT PROCEEDINGS AGAINST THE DIRECTOR OF PUBLIC PROSECUTIONS

Following the completion of his report, the DPP wrote to then Chief Commissioner Graham Ashton, AM, APM enclosing a copy of the draft disclosure letter he intended to send to six of the individuals named in the Kellam Report and one other individual whom the DPP had later identified as being potentially affected.<sup>50</sup>

The DPP's draft letter would disclose to the seven individuals that their lawyer, in possible breach of legal professional privilege and/or confidentiality, had provided information to Victoria Police about them while acting as a human source.<sup>51</sup> To four of the seven individuals, the draft letter would also disclose that the lawyer had provided information to Victoria Police about other people for whom the lawyer had also acted, and that those people had made statements against them.<sup>52</sup>

The draft letter did not name Ms Gobbo as a human source, but the Chief Commissioner and Ms Gobbo considered the disclosures would have the effect of revealing her identity.<sup>53</sup>

When Ms Gobbo was registered as a human source in 2005, Victoria Police assured her that her identity as a human source would never be revealed.<sup>54</sup> In order to protect her identity, on 10 June 2016, the Chief Commissioner filed proceedings in the Supreme Court in an attempt to prevent the DPP from making his proposed disclosures. This was the start of extensive litigation between the Chief Commissioner, Ms Gobbo and the DPP, which continued until 2018 as outlined in Figure 1.3 below.

Victoria Police considered that the Supreme Court proceedings were necessary and appropriate. It was of the view that the disclosures proposed by the DPP, which would lead to Ms Gobbo being identified, would have ‘potentially catastrophic consequences for her safety and for the safety of her family’.<sup>55</sup> The Supreme Court also confirmed that where a human source opposes the release of information, a prosecutor should leave the issue of the applicability of a PII claim to the Court to decide.<sup>56</sup>

**Figure 1.3: Court proceedings between the Chief Commissioner of Victoria Police, Ms Gobbo and the Director of Public Prosecutions, 2016–18**

## 2016

**March:** The Director of Public Prosecutions (DPP) provides the Chief Commissioner of Victoria Police with a draft disclosure letter he proposes to send to seven potentially affected individuals.

**June:** The Chief Commissioner files proceedings in the Supreme Court of Victoria to prevent the DPP from making the disclosures to the seven individuals.

**November:** Ms Nicola Gobbo joins as a party to the Chief Commissioner’s proceeding and commences a separate proceeding to prevent the DPP from making the disclosures. Both proceedings are heard together by Justice Ginnane.

## 2017

**June:** The Supreme Court decides there is no obligation of confidence owed to Ms Gobbo that would prevent the DPP from disclosing the information to the seven individuals, nor is the information subject to a claim of public interest immunity.

**July:** The Chief Commissioner and Ms Gobbo appeal the decisions to the Court of Appeal of the Supreme Court of Victoria.

**November:** The Court of Appeal dismisses the appeals. The earlier decisions of the Supreme Court are upheld.

## 2018

**May:** The High Court of Australia grants the Chief Commissioner and Ms Gobbo special leave to appeal the Court of Appeal’s decision.

**November:** The High Court hands down its unanimous decision dismissing the appeals, thereby permitting the DPP to make his proposed disclosures.

**December:** The High Court releases its decision to the public (not identifying Ms Gobbo) and the Victorian Government announces the establishment of the Commission.

## Decision of the Supreme Court

The Chief Commissioner applied to the Supreme Court to prevent the DPP disclosing information from the Kellam Report to the seven individuals. He considered that:

- the information the DPP proposed to disclose was subject to PII because it might identify or endanger the life of the human source (Ms Gobbo)
- the DPP should be prevented from sending his disclosure letters or disclosing information contained in those letters or the Kellam Report that would identify or endanger the life of Ms Gobbo, on the grounds of PII.<sup>57</sup>

Ms Gobbo supported the Chief Commissioner's application. In November 2016, she filed her own proceeding against the DPP to prevent him from making the disclosures on the grounds that Victoria Police owed her an equitable obligation of confidence and the DPP was bound to preserve the confidentiality of her role as a human source.<sup>58</sup>

The Chief Commissioner and Ms Gobbo's applications were heard together in a closed court. The seven individuals concerned were not notified that the proceedings had commenced and took no part in them.

The Court ordered that special counsel be appointed to act as *amici curiae* to assist the court by advancing arguments that were in the interests of the seven individuals, given that they were not aware of, nor legally represented in, those proceedings.<sup>59</sup> The Victorian Equal Opportunity and Human Rights Commission also intervened in the proceedings and made submissions related to the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* and the interests of the seven individuals in a fair trial.<sup>60</sup>

After 18 days of hearings, Justice Ginnane handed down two decisions on 19 June 2017, dismissing both proceedings. He found that:

- the DPP's proposed disclosures were not subject to PII<sup>61</sup>
- there was no obligation of confidence in the identity or role of Ms Gobbo as a human source that would prevent the DPP from making his proposed disclosures.<sup>62</sup>

Justice Ginnane noted that Victoria Police would endeavour to provide Ms Gobbo and her children with protection once the disclosures were made.<sup>63</sup>

## Appeal proceedings

In July 2017, both the Chief Commissioner and Ms Gobbo applied to the Court of Appeal for leave to appeal the Supreme Court decisions. The Chief Commissioner contended that the Supreme Court had erred in its findings about the degree of risk to Ms Gobbo should the DPP's disclosures be made, and that Victoria Police could not protect Ms Gobbo or her children without her cooperation and agreement, which she refused to provide.<sup>64</sup> Ms Gobbo also raised concerns regarding the risk to her safety and that of her children should the disclosures be made.<sup>65</sup>

On 21 November 2017, the Court of Appeal dismissed both appeals and upheld the earlier decisions of the Supreme Court.<sup>66</sup>

On 9 May 2018, the High Court granted the Chief Commissioner special leave to appeal.<sup>67</sup> The Chief Commissioner's grounds of appeal were, in effect, that the Court of Appeal had erred in its failure to appreciate the public interest in Victoria Police honouring its assurances to Ms Gobbo that her identity as a human source would not be disclosed.<sup>68</sup>

The High Court also granted Ms Gobbo special leave to appeal on the grounds that the Court of Appeal had erred by assuming that she would enter the Witness Protection Program, and by concluding that the public interest favoured the disclosures to the affected individuals, given the gravity of the risk to Ms Gobbo and her children should the disclosures be made.<sup>69</sup>

The High Court acknowledged the significant risk of harm to Ms Gobbo and her children should she not enter the Witness Protection Program, and Victoria Police's responsibility for putting her safety at risk by encouraging her to inform on her clients.<sup>70</sup> The Court determined, however, that those considerations did not detract from its conclusion—that it was essential to the public interest for the information to be disclosed to the affected individuals.<sup>71</sup>

The High Court stated:

*... the maintenance of the integrity of the criminal justice system demands that the information be disclosed and that the propriety of each Convicted Person's conviction be re-examined in light of the information. The public interest in preserving [Ms Gobbo's] anonymity must be subordinated to the integrity of the criminal justice system.*<sup>72</sup>

In a unanimous decision dated 5 November 2018, the seven members of the High Court revoked special leave to appeal.<sup>73</sup> The High Court's decision upheld the decisions of the lower courts, which permitted the DPP to make the disclosures.

The High Court ordered that any information that would reveal the proceedings or the identity of the relevant parties could not be published until 3 December 2018, to allow for appropriate security arrangements for Ms Gobbo to be made.<sup>74</sup> The Court also ordered that information from the proceedings could not be published until 5 February 2019, although that date was later extended on the application of the Chief Commissioner to 1 March 2019, as discussed below.<sup>75</sup>

## ANNOUNCEMENT OF THE COMMISSION

On 3 December 2018, the Victorian Government announced that it would establish a royal commission to independently inquire into Victoria Police's use of Ms Gobbo as a human source.<sup>76</sup> That announcement coincided with the public release of the court decisions, which had until then been kept confidential.

### The Commission's Letters Patent

The Commission was formally established by Letters Patent issued by the Governor of Victoria on 13 December 2018. The Honourable Margaret McMurdo, AC, former President of the Court of Appeal of the Supreme Court of Queensland, was appointed as Commissioner and Chairperson and Mr Malcolm Hyde, AO, APM, former Commissioner of South Australia Police, was appointed as Commissioner.

When the Victorian Government drafted the Letters Patent, wider publication of Ms Gobbo's name or image was prohibited by a court order. The Letters Patent referred to her by the pseudonym 'EF', used in the court proceedings.

A royal commission's terms of reference are specified in its Letters Patent and set out the purpose and scope of an inquiry. The Commission's terms of reference required it to inquire into and report by 1 July 2019 on the number of, and extent to which, cases may have been affected by the conduct of Ms Gobbo as a human source, and the conduct of Victoria Police officers in managing Ms Gobbo as a human source. The terms of reference also required the Commission to inquire into and report by 1 December 2019 on:

- the adequacy and effectiveness of Victoria Police’s processes for managing human sources who are subject to legal obligations of confidentiality or privilege (for example, lawyers)
- the use of information obtained from such human sources in the criminal justice system
- recommended measures to address systemic or other failures identified by the Commission.

The Commission’s reporting dates and its terms of reference were later amended, for reasons outlined below.

A copy of the Commission’s Letters Patent can be found at Appendix A.

## Disclosures by Victoria Police

The confidential Comrie Review, the Kellam Report and Champion Report, and the extensive litigation that followed, which was not held in public, focused only on the period from Ms Gobbo’s registration as a human source on 16 September 2005 until her deregistration on 13 January 2009.<sup>77</sup> Accordingly, the Commission’s terms of reference were prepared in December 2018 on the understanding that the inquiry would be directed at Ms Gobbo’s use as a human source during that specific period.

Following its establishment, the Commission received information regarding Victoria Police’s wider use of Ms Gobbo as a human source, and the possible use of other legal practitioners or employees as human sources.

In January 2019, the Commission was told that Victoria Police:

- had first registered Ms Gobbo as a human source in 1995 and that her first contact with Victoria Police was in 1993 when she was a law student, some 12 years earlier than the Commission had previously understood<sup>78</sup>
- had registered Ms Gobbo as a human source for a second time in 1999<sup>79</sup>
- had conducted a review of its human source holdings and identified seven human source files that required an assessment to determine whether there had been ‘any possible breaches of legal professional privilege’.<sup>80</sup>

These disclosures had a significant impact on the work of the Commission and its reporting deadlines.

This increased span of inquiry—coupled with the greater volume of information to be examined by the Commission, a multitude of suppression orders in relation to the cases the Commission had to examine, and delays in the provision of information from Victoria Police—made it impossible to report on the first term of reference by 1 July 2019 and the other terms of reference by 1 December 2019.

## Amendments to the Commission’s Letters Patent

The Victorian Government amended the Commission’s Letters Patent on 7 February 2019 to reflect some of the matters disclosed to the Commission by Victoria Police and the subsequent resignation of Mr Hyde as Commissioner.

The matters disclosed to the Commission did not cause a direct conflict of interest for Mr Hyde. In light of his past employment with Victoria Police during the extended period of time relevant to the Commission’s inquiry, and his professional associations with police officers likely to be examined, he resigned to avoid any potential adverse perceptions about the impartiality of the Commission.

The Victorian Government also amended the terms of reference to expand the scope of the inquiry. These amendments required the Commission to recommend measures that could be taken to address Victoria Police’s use of any other human sources who were subject to legal obligations of confidentiality or privilege and who came to the Commission’s attention during the course of the inquiry.<sup>81</sup>

Due to the expansion of the terms of reference and the significant increase in the time period and body of material the Commission was required to examine, the Commission's final reporting date was initially extended until 1 July 2020, with the Commission to provide an update on its progress by 1 July 2019. The Victorian Government also provided \$20.5 million of funding to the Commission, in addition to its original funding allocation of \$7.5 million.<sup>82</sup>

A copy of the amendments to the Commission's Letters Patent can be found at Appendix B.

## PROCEEDINGS TO PROTECT THE IDENTITY OF MS GOBBO

When the Victorian Government amended the Commission's Letters Patent in February 2019, Ms Gobbo's name and image were still suppressed by an interim High Court order.

In January 2019, the Chief Commissioner initiated new proceedings in the High Court seeking a permanent order prohibiting the publication of the names and images of Ms Gobbo and her children.<sup>83</sup>

The DPP had by now sent the disclosure letters to the seven individuals who were the subject of the previous court proceedings, so the new proceedings were focused solely on ongoing issues around Ms Gobbo's safety.<sup>84</sup> Victoria Police considered that the wider publication of Ms Gobbo's name and image would severely prejudice its ability to keep her and her children safe.<sup>85</sup>

The Commission successfully intervened in the High Court proceedings, and the Court permitted it to disclose Ms Gobbo's name and image when exercising some of its powers under the *Inquiries Act 2014 (Vic)* (Inquiries Act).<sup>86</sup>

The High Court extended the interim non-publication order preventing the publication of Ms Gobbo's name or identity—which was due to lapse on 5 February 2019—to 1 March 2019, and deferred the decision about whether to make a permanent non-publication order to the Court of Appeal.<sup>87</sup>

### Further Court of Appeal and High Court proceedings

In the Court of Appeal, both the Chief Commissioner and Ms Gobbo sought permanent non-publication orders to prohibit the publication of Ms Gobbo's name and image, and non-publication orders in relation to certain audio recordings of meetings between her and Victoria Police officers.<sup>88</sup> Ms Gobbo also sought orders to prohibit the publication of some personal medical matters and the names and images of her children.<sup>89</sup>

The DPP, Ms Kerri Judd, QC and the Commonwealth Director of Public Prosecutions opposed the making of permanent orders to suppress Ms Gobbo's name.<sup>90</sup> The Commission intervened in the proceedings, together with some media outlets.

The Court of Appeal refused the applications of the Chief Commissioner and Ms Gobbo.<sup>91</sup> In its decision of 21 February 2019, the Court held that it was not satisfied that the making of permanent orders was necessary to protect the safety of Ms Gobbo or her children.<sup>92</sup> The Court found that, while there was no doubt that her safety was at considerable risk, Ms Gobbo's identity as a human source was already in the public domain and the Court noted the ease with which the community could find her name and image.<sup>93</sup> The Court of Appeal was not persuaded that publication of Ms Gobbo's name and image would materially increase the risk to her so as to necessitate a permanent non-publication order.<sup>94</sup>

Shortly thereafter, Ms Gobbo brought a new application to the High Court for orders to prohibit the publication of the names and images of her children.<sup>95</sup> The Commission did not oppose the order sought.<sup>96</sup> In his decision, Justice Nettle determined that it was necessary for the High Court to make this non-publication order.<sup>97</sup>

The High Court's interim non-publication order lapsed on 1 March 2019, and Ms Gobbo's name and image have been subsequently published in various media articles.

## PROGRESS REPORT AND EXTENSION OF THE COMMISSION'S REPORTING TIMELINE

To inform the community about the status of the inquiry, on 1 July 2019 the Commission produced a progress report on its first six months of work and its approach to the terms of reference.<sup>98</sup>

In May 2020, the Victorian Government further extended the Commission's reporting date to 30 November 2020, in light of the COVID-19 pandemic and other challenges that arose during the inquiry. The Government also provided additional funding of \$11.5 million.<sup>99</sup>

## STRUCTURE OF THIS FINAL REPORT

The Commission's inquiry took place over a period of almost two years, alongside considerable developments in matters relevant to its work. Some of these developments were still in progress at the time of writing this final report. For example, several people whose cases may have been affected by the use of Ms Gobbo as a human source had lodged appeals with the courts to overturn their convictions, and Victoria Police had commenced several new initiatives related to human source management and disclosure practices, after implementing a new iteration of the *Victoria Police Manual—Human Sources* in May 2020.<sup>100</sup>

The matters detailed in this final report are current as at 30 October 2020.

The report is divided into four volumes and one supplementary final report summary. A brief overview of the structure of the four volumes is provided below.

### Volume I: The Commission's approach

Volume I of this report outlines the circumstances leading to the Commission's establishment and details the importance of the inquiry and how it was conducted. It also provides background information including:

- a list of relevant police operations and taskforces
- a list of key people relevant to the use of Ms Gobbo as a human source
- a chronology of the key events related to Ms Gobbo's interactions with Victoria Police from 1993 to 2018.

This volume also outlines the Commission's methodology and approach in respect of its terms of reference. It sets out how the Commission:

- reviewed cases that may have been affected by the use of Ms Gobbo as a human source, relevant to term of reference 1
- examined the conduct of current and former Victoria Police officers, relevant to term of reference 2
- defined and examined the term 'legal obligations of confidentiality or privilege', relevant to terms of reference 3, 4 and 5.

## **Volume II: The use of Ms Gobbo as a human source by Victoria Police**

Volume II presents the Commission's recommendations in relation to terms of reference 1 and 2. In this volume, the Commission:

- describes how information obtained from Ms Gobbo was used by Victoria Police
- identifies the number of cases that were potentially affected by Victoria Police's use of Ms Gobbo as a human source
- presents its conclusions about the conduct of Ms Gobbo as a human source and the conduct of current and former Victoria Police officers
- outlines some of the broader organisational conditions and factors within Victoria Police that contributed to the use of Ms Gobbo as a human source.

## **Volume III: The use of human sources with legal obligations of confidentiality or privilege**

Volume III presents the Commission's recommendations in relation to terms of reference 3 and 5. In this volume, the Commission examines:

- Victoria Police's use of any other human sources with legal obligations of confidentiality or privilege that came to the Commission's attention during the inquiry
- Victoria Police's implementation of the Kellam Report recommendations
- the adequacy and effectiveness of Victoria Police's current processes for the management of human sources involving legal obligations of confidentiality or privilege
- opportunities for external oversight of Victoria Police's management of human sources.

## **Volume IV: Disclosure, legal profession regulation and work beyond the Commission**

Volume IV presents the Commission's recommendations in relation to terms of reference 4 and 6. In this volume, the Commission examines:

- the current use and disclosure of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege
- aspects of legal profession regulation and opportunities to prevent and detect lawyers' unethical conduct or misconduct.

In this volume, the Commission also outlines some of the challenges it faced during the inquiry, including the limitations of the powers of a royal commission under the Inquiries Act.

It also outlines the need for active oversight of and reporting on the implementation of the Commission's recommendations, to ensure they are implemented in a timely way, in the manner in which the Commission intended.

# Endnotes

- 1 The DPP's draft letter to the seven potentially affected individuals did not name Ms Gobbo as a human source, though the Chief Commissioner and Ms Gobbo contended in the court proceedings that the DPP's letter could reveal Ms Gobbo's identity: see *AB & EF v CD* [2017] VSC 350, [7] (Ginnane J).
- 2 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 3 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 4 The right to a fair hearing is a longstanding and fundamental principle of the criminal justice system, now enshrined in the Charter: *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–25. See also *AB & EF v CD* [2017] VSC 350, [160] (Ginnane J); *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* pt 2 r 3; *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 35.
- 5 *AB & EF v CD* [2017] VSC 350, [418] (Ginnane J).
- 6 *Orman v The Queen* (2019) 59 VR 511, 513 [12], 514 [16] (Maxwell P, Niall and Emerton JJA).
- 7 See J Mitchell Miller, 'Becoming an Informant' (2011) 28(2) *Justice Quarterly* 203, 205; Clive Harfield, 'Police Informers and Professional Ethics' (2012) 31(2) *Criminal Justice Ethics* 73, 73.
- 8 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 2.
- 9 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 4 [1.19].
- 10 See *AB v CD & EF* [2017] VSCA 338, [45] (Ferguson CJ, Osborn and McLeish JJA).
- 11 The common law position is that the identity of a human source must not be disclosed in legal proceedings, except where the disclosure is required for the defence of an accused person. This is discussed in Chapter 14.
- 12 See *AB v CD & EF* [2017] VSCA 338, [47] (Ferguson CJ, Osborn and McLeish JJA).
- 13 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(a).
- 14 See, eg, *Grey v The Queen* [2001] HCA 65; *Mallard v The Queen* (2005) 224 CLR 125; [2005] HCA 68.
- 15 *Evidence Act 2008* (Vic) ss 130, 131A; *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ); see *AB v CD & EF* [2017] VSCA 338, [42]–[59] (Ferguson CJ, Osborn and McLeish JJA).
- 16 In a letter to Assistant Commissioner Stephen Fontana dated 30 June 2015, Ms Gobbo estimated that 386 people had been arrested and charged due to the information she had provided to Victoria Police. A copy of that letter is published in the Supreme Court's decision: *AB & EF v CD* [2017] VSC 350, [19] (Ginnane J).
- 17 *AB & EF v CD* [2017] VSC 350, [18] (Ginnane J).
- 18 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 22–3 [3.106], 63–4 [8.3]–[8.10].
- 19 See, eg, Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 63 [8.3], 64 [8.10].
- 20 Based on Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012); Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015); John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016).
- 21 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 64 [8.10].
- 22 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 75, 12 [54].
- 23 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 75, 12 [55].
- 24 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 47 [5.17].
- 25 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012) 6.
- 26 See Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 478 [5.19]–[5.20].
- 27 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012).
- 28 In August 2010, the Victoria Police Corporate Management Review Division completed a review of Victoria Police human source management practices: Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012) 7.
- 29 Mr Comrie recommended that Victoria Police reconstruct the full interpose file to present a complete, factual, sequential and accountable record of its use of Ms Gobbo as a human source: Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012) 12 (Recommendation 1); Exhibit RC1273b Statement of Mr Tim Cartwright, 12 February 2020, 11 [68].
- 30 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 65 [8.16]–[8.17]; Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, 3 [1.22]; *AB & EF v CD* [2017] VSC 350, [36] (Ginnane J).

- 31 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 65–6 [8.18]–[8.19]; Exhibit RC1273b Statement of Mr Tim Cartwright, 17 December 2019, 16–17 [104]; Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, 3 [1.23]–[1.24].
- 32 Anthony Dowsley, ‘Underworld Lawyer a Secret Police Informer’, *Herald Sun* (Melbourne, 31 March 2014).
- 33 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 1 [1], [4]. The notification to IBAC by Victoria Police was made pursuant to section 57(2) of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic). The Act requires the Chief Commissioner of Victoria Police to notify IBAC of any complaint received by the Chief Commissioner about corrupt conduct or misconduct by a Victoria Police employee.
- 34 Mr Kellam was appointed by IBAC to lead the inquiry because the then Commissioner of IBAC, Mr Stephen O’Byrne, QC, declared himself unable to act because of a perceived conflict of interest: Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 1 [1], [4].
- 35 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015).
- 36 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 80. Mr Kellam noted that a full examination of the prosecutions of various clients of Ms Gobbo required to reach such a conclusion was beyond the jurisdiction of IBAC and his inquiry.
- 37 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 80–1.
- 38 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 81.
- 39 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 84 n 176.
- 40 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 91 (Recommendation 12).
- 41 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 6 [28].
- 42 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016).
- 43 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 5 [22].
- 44 Based on John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 5 [23]–[27], 31 [182]–[183].
- 45 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 33 [201]–[203]. The DPP considered that it was highly likely there was more relevant material within police records to which he did not have access: John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 27 [155].
- 46 *AB & EF v CD* [2017] VSC 350, [56] (Ginnane J).
- 47 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 35 [217].
- 48 See, John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 35 [212]–[217].
- 49 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 36 [224].
- 50 *AB & EF v CD* [2017] VSC 350, [56] (Ginnane J). Between 10 March and 31 May 2016 there was a series of correspondence between the DPP, Victoria Police and IBAC in relation to the DPP’s proposed disclosure: see Responsive submission, Victoria Police, 24 August 2020, [147.2]–[147.11].
- 51 *AB & EF v CD* [2017] VSC 350, [5] (Ginnane J).
- 52 *AB & EF v CD* [2017] VSC 350, [6] (Ginnane J).
- 53 *AB & EF v CD* [2017] VSC 350, [7] (Ginnane J).
- 54 In his reasons, Ginnane J accepted Ms Gobbo’s evidence that Victoria Police assured her that her identity as a human source would be kept confidential: *AB & EF v CD* [2017] VSC 350, [23]–[24], [28].
- 55 Responsive submission, Victoria Police, 24 August 2020, [147.4], [147.12].
- 56 *AB & EF v CD* [2017] VSC 350, [88] (Ginnane J); Responsive submission, Victoria Police, 24 August 2020, [147.12].
- 57 *AB & EF v CD* [2017] VSC 350, [10] (Ginnane J).

- 58 *AB & EF v CD* [2017] VSC 350, [10]–[11] (Ginnane J); *EF v CD* [2017] VSC 351, [3]–[4] (Ginnane J). An equitable obligation of confidence can arise where, in the absence of a formal contract, there is an understanding that information is to be treated on a limited basis, in this case, confidentially. Breach of an equitable obligation of confidence occurs when there is an unauthorised use or disclosure of that information: Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, May 2008) vol 1, 565 [15.127].
- 59 *AB & EF v CD* [2017] VSC 350, [63]–[68] (Ginnane J).
- 60 *AB & EF v CD* [2017] VSC 350, [69]–[70] (Ginnane J).
- 61 *AB & EF v CD* [2017] VSC 350, [422] (Ginnane J).
- 62 *EF v CD* [2017] VSC 351, [38] (Ginnane J).
- 63 *AB & EF v CD* [2017] VSC 350, [421] (Ginnane J).
- 64 See *AB v CD & EF* [2017] VSCA 338, [73] (Ferguson CJ, Osborn and McLeish JJA).
- 65 *AB v CD & EF* [2017] VSCA 338, [74] (Ferguson CJ, Osborn and McLeish JJA).
- 66 *AB v CD & EF* [2017] VSCA 338, [214], [231] (Ferguson CJ, Osborn and McLeish JJA).
- 67 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [6] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 68 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [6] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 69 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [6] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 70 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 5 [11] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 71 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 5 [11] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 72 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 5 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 73 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 5 [13] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 74 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, Order 3.2 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 75 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, Orders 3.1, 5 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). The High Court also ordered that the Court’s file remain closed until 5 February 2019: see *AB v CD & EF* [2019] VSCA 28, [5] (Ferguson CJ, Beach and McLeish JJA).
- 76 Victorian Premier, Attorney-General, Minister for Police and Emergency Services, ‘Royal Commission into Management of Informants’ (Media Release, 3 December 2018).
- 77 See, eg, *AB & EF v CD* [2017] VSC 350, [15] (Ginnane J).
- 78 The information was provided to the Commission in response to a Notice to Produce issued by the Commission to Victoria Police on 23 January 2019: see Transcript of Opening Statements, 15 February 2019, 10.
- 79 The information was provided to the Commission in response to a Notice to Produce issued by the Commission to Victoria Police on 23 January 2019: see Transcript of Opening Statements, 15 February 2019, 19.
- 80 In January 2019, the Commission learned that Victoria Police had identified six human source files that required an assessment and that one further human source file had been previously disclosed by Victoria Police to IBAC in March 2018: Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 78; Letter from Department of Justice and Community Safety to the Commission, 10 January 2019.
- 81 Term of reference 5a was inserted into the Letters Patent when it was amended on 7 February 2019.
- 82 Victorian Premier, ‘Statement on The Royal Commission into Informants’ (Media Release, 6 February 2019).
- 83 See *AB v CD & EF* [2019] VSCA 28, [5] (Ferguson CJ, Beach and McLeish JJA).
- 84 *AB v CD & EF* [2019] VSCA 28, [3] (Ferguson CJ, Beach and McLeish JJA).
- 85 See *AB v CD & EF* [2019] VSCA 28, [21] (Ferguson CJ, Beach and McLeish JJA).
- 86 On 11 February 2019, the High Court permitted the Commission to issue notices pursuant to section 17 of the *Inquiries Act 2014* (Vic) that disclosed Ms Gobbo’s name. A similar order was made in the Court of Appeal on 12 February 2019: see *AB v CD & EF* [2019] VSCA 28, [7], [42] (Ferguson CJ, Beach and McLeish JJA).
- 87 The order was made in the High Court by Justice Nettle on 25 January 2019: see *AB v CD & EF* [2019] VSCA 28, [5]–[6] (Ferguson CJ, Beach and McLeish JJA).

- 88 *AB v CD & EF* [2019] VSCA 28, [11] (Ferguson CJ, Beach and McLeish JJA).
- 89 *AB v CD & EF* [2019] VSCA 28, [11] (Ferguson CJ, Beach and McLeish JJA).
- 90 The DPP and the Commonwealth Director of Public Prosecutions also opposed making orders prohibiting the publication of the audio recordings, but did not oppose making orders prohibiting the publication of Ms Gobbo's image, medical practitioners and medical issues, and the names and images of her children: *AB v CD & EF* [2019] VSCA 28, [34], [39] (Ferguson CJ, Beach and McLeish JJA).
- 91 *AB v CD & EF* [2019] VSCA 28, [90] (Ferguson CJ, Beach and McLeish JJA).
- 92 *AB v CD & EF* [2019] VSCA 28, [76] (Ferguson CJ, Beach and McLeish JJA).
- 93 *AB v CD & EF* [2019] VSCA 28, [73] (Ferguson CJ, Beach and McLeish JJA).
- 94 *AB v CD & EF* [2019] VSCA 28, [77] (Ferguson CJ, Beach and McLeish JJA).
- 95 *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6, [1] (Nettle J).
- 96 *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6, [20] (Nettle J).
- 97 Publication of the names and images of Ms Gobbo's children is prohibited by a High Court order until publication of the Commission's final report, and thereafter for a period of not less than 15 years: Order of Nettle J in *AB (a pseudonym) v CD (a pseudonym)* (High Court of Australia, M73/2018 & M74/2018, 27 February 2019).
- 98 *Royal Commission into the Management of Police Informants* (Progress Report, July 2019).
- 99 Victorian Attorney-General, 'Statement on Extension for Royal Commission' (Media Release, 5 May 2020).
- 100 The Human Source Policy was finalised in April 2020 but came into effect in May 2020: Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020.

# 2

## The importance of the inquiry

### INTRODUCTION

The Commission's inquiry, taken at its broadest, had two essential purposes: to identify potential miscarriages of justice, and to restore the community's faith in the criminal justice system by exposing past failures and recommending measures to avoid such failures in the future.

The Commission was established to inquire into the conduct of Ms Nicola Gobbo in giving information about her clients to police, and the conduct of Victoria Police in using her as a human source. Their conduct—which resulted in the conviction and imprisonment of numerous individuals—has had significant implications not only for those whose cases may have been directly or indirectly affected, but also for the integrity of our criminal justice system.

Members of the public might question the need to scrutinise and denounce seemingly effective intelligence-gathering by the police. The fact that Victoria Police was able, with Ms Gobbo's assistance, to secure convictions against those accused of committing serious violent and drug-related offences could be regarded as a positive outcome for the community.

As the High Court of Australia identified, however, the conduct of Ms Gobbo and Victoria Police amounted to a corruption of the criminal justice system.<sup>1</sup> Police are not entitled to pursue suspects at any cost—the community's laws impose constraints on their power. Lawyers cannot freely hand over information about their clients to police—if they do so, they risk breaching their professional duties and obligations, and corrupting the justice system.

These laws exist because the community collectively places great importance on ensuring that the criminal investigation and trial process is fair, so that the public can have confidence that its criminal justice system is in fact just.

When the State prosecutes, convicts and punishes a citizen, it uses its considerable power and resources. To prevent it from abusing that power against individual citizens, it must observe well-established principles and processes to ensure, as far as possible, that there is ‘equality of arms’ between the parties—that is, that both the prosecution and the accused person have equal opportunity to make their case.<sup>2</sup> Consistent with the rule of law and the principles underpinning the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter), these arrangements apply no matter how serious the crime, and regardless of the identity of the accused person.<sup>3</sup>

Fair trial principles are therefore fundamental tenets of our democratic society. They protect unjustified incursions into the freedom of all citizens and help ensure that the same law applies to every person in society equally. Fairness underpins and fosters public trust and confidence in, and therefore the legitimacy of, the criminal justice system. The system cannot operate effectively if it does not command the public’s trust and confidence.

In our criminal justice system, failure by police and lawyers to comply with fair trial principles, laws governing investigation methods and professional duties can have serious consequences. The corruption of the fair trial process can result in, among other things, an accused person not having to face trial, a conviction being overturned, an order for acquittal, a new trial or a person being released from custody.

This chapter provides a brief overview of the criminal justice system, the roles and responsibilities of those working within the system, and the principles that need to be observed if it is to operate effectively.

It focuses on three aspects of the criminal justice system that are central to the Commission’s inquiry:

- the use of human sources to prevent, detect and solve crime
- police officers’ duties and obligations
- lawyers’ duties and obligations.

In particular, this chapter explains how principles and processes are applied to strike an appropriate balance between supporting police to combat crime and protecting citizens’ fundamental rights.

Later sections of this report consider these topics in greater detail when analysing the conduct of Ms Gobbo and Victoria Police, and examining the measures required to address Victoria Police’s management of human sources, in particular those where legal obligations of confidentiality or privilege may arise.

## OVERVIEW OF VICTORIA’S CRIMINAL JUSTICE SYSTEM

### Criminal justice system foundations

Our criminal justice system is founded on two broad imperatives:

- protecting community safety by empowering the State—through its agencies, to detect, investigate and prosecute crime; and through its independent courts, to convict and punish guilty offenders
- protecting individual citizens by guarding against the State and its agencies exercising their power arbitrarily, corruptly and/or unfairly.

These two imperatives are fundamental to our democratic society; and laws, principles and procedures have evolved over centuries to strike the appropriate balance between them. Individually, these laws, principles and procedures may sometimes seem to be obscure or technical, or even obstacles to the effective delivery of justice. Yet collectively, they enable the criminal justice system to uphold each of these fundamental imperatives, without one unduly undermining or compromising the other.

There are serious consequences for not giving these imperatives their due weight. The risks of not facilitating the investigation, prosecution and punishment of criminal activity are obvious. Our individual and collective safety relies on such conduct being publicly condemned, wrongdoers being held accountable for their actions, and action being taken to prevent further criminal activity. Without an effective criminal justice system, our society would descend into anarchy and vigilantism.

Accordingly, as a community, through Parliament we empower executive agencies within the criminal justice system to protect us from harm and to prosecute those alleged to have caused harm in independent courts. This is achieved by establishing and resourcing these agencies (the police service, prosecution authorities, and corrections services), and legislating to give them functions and powers so they can do their work. It is also achieved by establishing and resourcing an independent judiciary and court system, which perform a critical role in our democracy.

There are also consequences if these agencies do not exercise their powers lawfully, rigorously and competently. To properly administer justice, extensive checks and balances are needed throughout the criminal justice system. These include ensuring that those exercising discretionary executive power act independently, follow established principles of fairness, comply with professional duties, and act with integrity, appropriate transparency and accountability.

If the criminal justice system does not work in this way, there are risks that:

- people could be vulnerable to arbitrary, unjust, corrupt or incompetent action by the State
- innocent people could be wrongly convicted and punished, and guilty people could avoid prosecution, conviction or punishment
- the community could lose confidence and not engage with the criminal justice system—this could include victims opting not to seek the State’s protection, witnesses not cooperating with authorities, offenders not complying with court decisions and sanctions, jurors not convicting offenders even when evidence tends to suggest guilt beyond reasonable doubt, and wrongdoers not being deterred from committing crime.

The practical risks for individual cases are equally as serious. If criminal investigations or prosecutions are so compromised that an accused person is denied fundamental rights, then convictions may be overturned and alleged offenders may be released from custody. The time and effort expended, and paid for by the community, may be for nothing. If new trials are granted, victims may be forced to endure further proceedings long after the alleged offences occurred and the recollections of witnesses have faded. All of this can lead to diminished public trust in the criminal justice system.

## **Criminal justice system processes**

Australia’s Constitution establishes a separation of powers between the Parliament, the executive government and the courts, as does Victoria’s Constitution.<sup>4</sup> Under this system, the Parliament makes the law, the executive government—through the police and prosecution agencies—enforces the law, and independent courts (the judicial arm of government) interpret and apply the law.<sup>5</sup> In the criminal justice system, the separation of powers principle means that the Parliament is responsible for passing laws about what acts constitute a crime, the executive government is responsible for investigating and prosecuting crimes and enforcing court sentences, and independent courts are responsible for interpreting the laws, deciding whether a person is guilty or not guilty and sentencing.

When a crime is alleged, the police will investigate, gather evidence and identify suspects. A person who is suspected of committing a crime might be arrested by the police and questioned about their involvement in the crime.<sup>6</sup> If the police are satisfied that there is sufficient evidence to indicate that the suspect committed the crime, they may decide to charge the person with a criminal offence.<sup>7</sup> Offences can be ‘summary’ (less serious) or ‘indictable’ (more serious). Less serious cases are tried in the Magistrates’ Court of Victoria and more serious offences are tried in the County Court of Victoria and Supreme Court of Victoria.

Once a person has been charged with a crime, their guilt or innocence is determined in independent courts. After being charged, the person becomes known as an ‘accused person’ or a ‘defendant’.

A criminal case is a contest between two opposing sides. On one side, the prosecution represents the State. It presents the case against the accused person and is responsible for proving beyond reasonable doubt that the accused committed the crime. On the other side, the defence represents the accused person, and challenges the prosecution’s case if the accused pleads not guilty.

If the accused person pleads guilty, or the court finds them guilty, they will be sentenced by an independent magistrate or judge. Punishment may include, among many sentencing options, a fine, a community correction order or a sentence of imprisonment.<sup>8</sup> A person who has been found guilty and sentenced is known as an ‘offender’.

A person convicted by a court is generally entitled to appeal, or to apply to appeal their conviction and/or sentence to another independent court.<sup>9</sup> A successful appeal can result in a conviction being overturned, a verdict of acquittal being entered, a re-trial being ordered or a sentence being varied.<sup>10</sup> The appeal process is discussed in more detail in Chapter 5.

## Roles and responsibilities

A range of agencies, office holders and professionals play critical and distinct roles in the criminal justice system. Events of most direct relevance to the Commission’s inquiry are those involving the police in collecting intelligence, and investigating and assisting in the prosecution of cases, and Ms Gobbo as a defence lawyer and human source. The roles played by the prosecution service and courts are also relevant to considering the legality of the conduct of Victoria Police and Ms Gobbo.<sup>11</sup>

### Police

The role of Victoria Police is to serve the Victorian community and uphold the law to promote a safe, secure and orderly society.<sup>12</sup>

The police are responsible for, among other things, investigating crime, collecting intelligence and evidence, interviewing witnesses and suspects, and arresting and charging suspects. Police officers use a range of investigative powers and methods to carry out these responsibilities, including gathering intelligence and evidence covertly—that is, without the knowledge of the public or the person against whom it is being used. Examples of covert intelligence-gathering methods include the use of surveillance devices and human sources.

Once a suspect has been charged, the police compile a ‘brief of evidence’ that contains details of the evidence to be led in court to support the charge. The accused person is entitled to see the brief of evidence so they can prepare their defence.

Police officers are sometimes required to give evidence in court about the processes by which they investigated the crime, and defence lawyers may be entitled to ask questions about this.

Police use of human sources, and police officers’ general duties and obligations, are discussed below.

## Prosecution

Prosecutors represent the Crown and exercise the powers of the State in criminal cases. They appear in court to present the case against the accused person. In Victoria, most summary cases are prosecuted by police officers working in a specialised division of Victoria Police.<sup>13</sup> Indictable cases are prosecuted by the Victorian Director of Public Prosecutions (DPP)<sup>14</sup> or other lawyers who act for the DPP.<sup>15</sup> Federal crimes are prosecuted by the Commonwealth Director of Public Prosecutions.

Like judicial officers, prosecutors play an important role in ensuring that an accused person receives a fair hearing in criminal cases. This promotes public confidence in the criminal justice system.<sup>16</sup>

The prosecution's role, if there is sufficient evidence to support the charge, is to prove beyond reasonable doubt that the accused person committed the crime by leading the necessary evidence. In undertaking this role, the prosecution has obligations to act fairly.

Prosecutors' duties, in particular their duty to disclose all relevant evidence, are discussed below.

## Defence lawyers

Criminal defence lawyers play a vital role in providing advice to, and representing the interests of, accused persons at various stages of the criminal justice process. The right of a person charged with a criminal offence to communicate with a lawyer is enshrined in Victoria's Charter.<sup>17</sup>

A defence lawyer's involvement often begins when a person suspected of committing a crime is to be formally questioned by police. Before starting any questioning, the police must inform the person that they have a right to communicate with a lawyer, and they must allow this communication to take place.<sup>18</sup> This helps ensure that a suspect is treated fairly and that their interests are protected from the beginning of their contact with the criminal justice system.

A defence lawyer's role in the criminal justice system is to represent the interests of the accused person and to provide them with independent, competent advice. In some cases, particularly those involving serious crimes, a lack of legal representation may mean that an accused person is unable to receive a fair hearing.<sup>19</sup>

Defence lawyers advise an accused person to help them decide whether to plead guilty or not guilty.<sup>20</sup> This step is important not only in promoting an accused person's right to be presumed innocent, but also in ensuring an efficient criminal justice system—if a person pleads guilty, the cost of and time taken in holding a trial can be avoided, as can any trauma for victims and witnesses in testifying at trial.<sup>21</sup> An accused person who pleads guilty may receive a reduced sentence in recognition of these benefits.<sup>22</sup>

If an accused person pleads not guilty and the case proceeds to a trial, a defence lawyer's expertise can be critical in testing the evidence the prosecution puts forward. They may cross-examine witnesses and challenge aspects of the prosecution's case to determine whether there are any gaps or doubts about the evidence being presented to establish the accused person's guilt. They will discuss with the accused person whether to give or call evidence and whether to plead guilty to some or all of the charges, and will present any defence case. Without the assistance of a defence lawyer, the fairness of the process for the accused person may be compromised.

If an accused person pleads guilty or is found guilty by the courts, a defence lawyer also provides information helpful to the accused person to the sentencing magistrate or judge.

Lawyers' duties to their clients and to the court are discussed below.

## Courts

Courts are presided over by independent judicial officers (judges or magistrates) who have overall responsibility for the conduct and supervision of criminal cases in the court system.<sup>23</sup>

The judicial officer's most significant responsibility in a criminal case is to ensure that the accused person receives a fair hearing.<sup>24</sup> They also make rulings on legal issues, including what evidence can be used in the hearing.<sup>25</sup>

Juries allow the community to be part of the criminal justice system. They are usually responsible for determining whether an accused person is guilty or not guilty in serious criminal cases.<sup>26</sup> In less serious matters, it is the judicial officer who decides whether to convict or acquit the accused person.<sup>27</sup>

Judicial officers have sole responsibility for sentencing a person who has been found guilty of a crime. The sentencing process involves balancing competing principles and objectives, such as punishment, deterrence and rehabilitation, to determine an appropriate penalty.<sup>28</sup>

## Principles of the criminal justice system

As noted earlier, the criminal justice system is governed by laws and principles that ensure that when the State is prosecuting an individual, the process is fair to the accused person so that the public can have confidence in the administration of justice. In certain circumstances, these rules require a balancing exercise to be undertaken to ensure different public interest considerations are given the appropriate weight.

The following interrelated principles are of most direct relevance to the Commission's inquiry, and are outlined in this section:

- the rights of an accused person
- prosecutorial duties
- independent courts and open justice.

The professional duties of police and lawyers are also integral to the proper administration of the criminal justice system. They are discussed in later sections of this chapter.

### The rights of an accused person

An accused person is entitled to a fair trial. The right to a fair trial or hearing is reflected in both legislation and in common law principles. It is enshrined in Victoria's Charter, which provides that an accused person has the 'right to have the charge ... decided by a competent, independent and impartial court after a fair and public hearing'.<sup>29</sup>

An accused person has specific rights that should be adhered to if a trial is to be fair:

- the right to be presumed innocent until proven guilty—this places the onus (burden) on the prosecution to prove, beyond reasonable doubt, that the accused person committed the crime or crimes charged
- the right to have legal representation
- the right to know the case against them—this requires the prosecution to disclose all evidence relevant to the charges, including information that might undermine the prosecution case or assist the accused person
- the right to remain silent—this includes a right to refuse to answer questions during a police interview and a right not to be forced to incriminate themselves

- the right to be tried without unreasonable delay
- the right to examine witnesses to test the factual basis of their evidence and their credibility.<sup>30</sup>

These rights are not absolute—they can be limited or qualified if justified for other reasons. Any limitations or qualifications, however, must be reasonable; that is, such limits need to be ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.<sup>31</sup>

The courts are ultimately responsible for ensuring that an accused person receives a fair hearing. What is required to ensure that a hearing is fair will ultimately depend on the circumstances of the case, and requirements may change over time in line with changing community expectations.<sup>32</sup>

If an accused person is unable to secure a fair hearing, the court may decide to grant a permanent stay of the prosecution (an order stopping the case from continuing) because the court considers it an abuse of process.<sup>33</sup> In practical terms, a permanent stay means that the prosecution must be abandoned. While there is a significant public interest in prosecuting persons accused of serious crimes, and in the courts determining whether or not these persons are guilty, the hearing must be fair.<sup>34</sup> Otherwise, any ‘verdict of guilty, and the criminal conviction that follows it, is intrinsically flawed’.<sup>35</sup> The court’s power to grant a permanent stay, although reserved for extraordinary cases, reflects the importance of a fair hearing in the criminal justice system.<sup>36</sup>

## Prosecutorial duties

As agents of the State, all prosecutors have a duty to act as impartial ‘ministers of justice’ and must act in a way that assists the court to discover the truth.<sup>37</sup> This general duty of impartiality has several elements, including duties to act fairly, not to seek a conviction at all costs, and to call all relevant credible witnesses in the prosecution case.

Another duty central to this inquiry is the duty to disclose all relevant material to the defence.<sup>38</sup> The prosecution’s duty of disclosure is not limited to material that the prosecution will rely on and that supports the prosecution case, but extends to any other relevant material that may assist the defence case or undermine the prosecution case.<sup>39</sup> The prosecution must disclose anything relevant to the guilt or innocence of the accused person.<sup>40</sup>

The duty of disclosure applies to ‘the prosecution’ in a broad sense. This includes police prosecutors, the DPP, the CDPP and other lawyers who act on behalf of prosecuting authorities to prosecute a crime. For disclosure purposes, police are considered part of the prosecution. This means that police have a duty to disclose relevant material in their possession to an accused person regardless of whether the particular prosecutor is also aware of the existence of that material.<sup>41</sup>

The duty of disclosure supports a fair hearing in many ways, including by ensuring an equality of arms between all parties.<sup>42</sup> A failure to make proper disclosure can result in a miscarriage of justice and may lead to a conviction being set aside (overturned) on appeal, on the basis that the accused person did not receive a fair trial.<sup>43</sup>

There are some exceptions to the duty to disclose all relevant information. For the purposes of the matters relevant to this inquiry the main exception is public interest immunity (PII).

PII is a legal principle recognised by the common law and is also a rule of evidence.<sup>44</sup> It allows a person to refuse to disclose relevant material that they would otherwise need to disclose, because that disclosure would go against the public interest. Ultimately, this will depend on an assessment of whether the imperative to disclose the information to the accused person is outweighed by other policy and public interest considerations.<sup>45</sup>

In a criminal proceeding, when PII applies, it acts as an exception to a prosecutor’s duty to disclose all relevant material. If material is held to be covered by PII, it cannot become evidence in the case. It therefore qualifies an accused person’s right to know the case against them.<sup>46</sup> Importantly, neither the prosecution nor

the police is responsible for ultimately deciding whether PII applies. This is a matter for an independent court.<sup>47</sup> In some circumstances, the court may hear applications relating to PII without the defence being notified.<sup>48</sup> In determining whether PII applies, the court must assess whether allowing the material into evidence in the case outweighs the public interest in preserving the secrecy or confidentiality of the material.<sup>49</sup>

When a PII claim is made regarding the use or identity of a human source, considerations that support protecting the identity of a human source (preserving sources of information and thereby supporting the prevention and detection of crime, and protecting the personal safety of human sources and their families)<sup>50</sup> must be balanced against competing considerations that support disclosure (promoting open justice and ensuring a fair hearing, including by giving an accused person an opportunity to fully challenge the prosecution's case against them).<sup>51</sup> To ensure the accused person has access to evidence critical to their defence or, as in some cases involving Ms Gobbo, when basic premises of the criminal justice system are debased so that the accused person cannot have a fair trial, the latter considerations—those favouring open justice—will generally prevail.<sup>52</sup>

## Independent courts and open justice

The separation of powers principle requires that courts must be, and be perceived to be, independent and impartial in making decisions about the law. Independence and impartiality are fundamental to the administration of justice. These principles promote an accused person's right to a fair hearing, and foster public trust and confidence in the integrity of the judicial arm of government: the courts.<sup>53</sup>

Courts play an active role in monitoring whether all aspects of the trial process are fair to the accused person—that the accused person's right to be presumed innocent is observed, that they understand the case against them and that they have the opportunity to test the prosecution evidence. Courts are vigilant in ensuring that their processes are not used to oppress parties. They have broad powers to expose and remedy any abuse of process that may undermine the fairness of the trial.<sup>54</sup>

Openness in the court system is an equally important principle and ensures that justice is not only done but also seen to be done. It requires that, generally, court proceedings are held in public and that information disclosed in court can be communicated freely, including by the media.<sup>55</sup> Adherence to this principle is critical to maintaining public confidence in the courts.<sup>56</sup> Open justice is necessary because 'secrecy is conducive to the abuse of power and, thus, to injustice'.<sup>57</sup>

Victorian law recognises the importance of open justice and the free communication of information, including in demonstrating to the public that laws are applied fairly and effectively.<sup>58</sup> In Victoria, hearings in open court are favoured, as is allowing the disclosure of information before the court.<sup>59</sup>

The open justice principle may be qualified in some cases, such as on the basis of a PII claim. The court may need to decide cases behind closed doors or limit the disclosure of information in a proceeding to prevent prejudice to the administration of justice.<sup>60</sup> There are several recognised categories of cases to which this qualification may apply, including cases involving human sources.<sup>61</sup>

## THE USE OF HUMAN SOURCES TO PREVENT, DETECT AND SOLVE CRIME

As discussed in Chapter 1, a human source is commonly understood to be a person who covertly supplies information about crime or people involved in criminal activity to police or other law enforcement agencies.

Police might recruit a human source to observe or infiltrate a criminal enterprise.<sup>62</sup> Human sources may actively seek out further intelligence or information if police direct or ask them to. They may also develop or maintain a relationship with other people so that they can provide information about them to police.<sup>63</sup>

Human sources are a critical source of information and intelligence for law enforcement, especially in efforts to combat serious and organised crime and corruption, sometimes to prevent crimes before they occur.<sup>64</sup> Police have increasingly valued human sources as some traditional and new technologies have become more susceptible to counter-technologies, such as encryption.<sup>65</sup> As they are sometimes involved in criminal conduct themselves, human sources can provide police with access to criminal networks and activities that police often cannot access through other means.<sup>66</sup>

### Risks associated with the use of human sources

While the use of human sources has been described as ‘one of the most effective weapons in the hands of the detective’,<sup>67</sup> it can also be fraught with risks—to the human source, to the police officers involved, and to the administration of justice.<sup>68</sup>

Significant harm may come to the human source if their role is revealed to the people on whom they are informing.<sup>69</sup> A person who provides information to police as a human source, therefore, typically does so expecting that their identity will be protected.<sup>70</sup> For these reasons, police can be understandably reluctant to disclose information about human sources in subsequent criminal proceedings.

Other risks or concerns include:

- improper associations between police and human sources—the covert relationship between police and human sources can ‘[lend] itself to corruption and unethical behaviour’<sup>71</sup>
- police ‘licensing’ the human source to commit crime in the course of gathering intelligence<sup>72</sup>
- exploitation of police by the human source to gain an advantage or to engage in further illicit activity—sources are motivated to assist police for many reasons, including gaining an advantage over criminal adversaries, or the prospect of a financial reward or discounted sentence<sup>73</sup>
- the human source providing tainted, unreliable or fabricated information
- manipulation of the human source, arising from a power imbalance between police and the source<sup>74</sup>
- infringing the human rights of the people who are the targets of the intelligence-gathering—for example, their rights to privacy, reputation and a fair hearing under the Charter.<sup>75</sup>

There are also specific issues associated with human sources who are subject to legal obligations of confidentiality or privilege—that is, who have duties not to disclose the information they have even if it may be relevant to a police investigation. Human sources with legal obligations of confidentiality or privilege are central to the Commission’s inquiry and are discussed in Chapter 4.

An accused person may be denied access to the full details of the evidence that has been gathered because of the use of a human source, despite the prosecution’s duty of disclosure. As noted above, the use and identities of human sources are often subject to PII claims. This is partly because of the substantial risk of harm to them

and their families if their identities as human sources become known, and partly because of the community safety benefits to be gained from the continued use of human sources generally, as they will be unlikely to offer their services if their identities are not protected.

A successful PII claim may affect the right of an accused person to know the full details of the case being made against them, to test the veracity or quality of the evidence being presented, or to challenge the lawfulness of the investigation techniques used by the police.<sup>76</sup>

Concerns may also arise about systemic issues or problems in the use of human sources by police. Because their use is ordinarily hidden from the public, it is difficult to determine whether police recruitment and management of them is appropriately mitigating the risks involved and is complying with relevant laws, policies and guidelines. Powers that are exercised in secret tend to be more susceptible to misuse, and there is a strong public interest in independently scrutinising their use.

## Management of risks

Police must carefully manage and control the risks of using human sources through robust policies, procedures and practices, with accountability, oversight and appropriate transparency. Equally, the measures put in place to manage these risks need to protect the identity of human sources and their families. The measures need to be workable for police officers to implement effectively and must not discourage or deter human sources from assisting police in ongoing and future investigations.

An effective system for the management of human sources should have clear, consistent and practical rules and processes, and be secure and functional. Such a system should prevent corruption and provide adequate protection to human sources and their police handlers (the officers responsible for managing sources). In doing so, it should also help to maintain the community's trust and confidence in its police service.

In many law enforcement agencies across Australia and internationally, the management of human sources has evolved in recent decades from an unstructured model of individual police officer–human source relationships to 'a more comprehensive, professional and ethical system of recruiting and managing sources'.<sup>77</sup> Contemporary human source management is governed by detailed policies and guidelines that introduce new levels of scrutiny and accountability, and formally recognise the source as an asset of value to the law enforcement agency as a whole, instead of as an informal resource for individual police officers.<sup>78</sup>

Policies and codes of practice governing the management of human sources typically cover the processes involved in all phases of the relationship with the source: requests for human source assistance, recruitment, registration, interaction, payment and deactivation.<sup>79</sup> Current Victoria Police processes for the use of human sources are outlined in Chapter 12.

Although human source management policies and practices may differ across and within agencies, they generally provide for:

- assessing and evaluating the value of the information that the source can provide and the risks involved in engaging them, often by using a standard risk assessment tool
- approval, registration, formal tasking and directing of sources (the source may also be asked to sign a document acknowledging their responsibilities and the parameters of their relationship with police)
- day-to-day management of sources, including documentation of all interactions with them, and of decisions made about their use
- training of officers involved in managing sources
- appointment of police handlers and controllers to manage sources

- processes and arrangements to protect the identity of sources
- instructions about use, handling and destruction of information, and disclosure requirements in criminal proceedings
- guidance material about ethical and legal considerations
- requirements for regular supervision, internal compliance audits and reviews by senior officers or ethics committees.<sup>80</sup>

Risks can also be addressed through external governance of police use and management of human sources; for example, through legislative frameworks and codes of practice. Documenting processes and standards in legislation can support greater transparency and accountability of police actions and decisions, provide clarity and protection for police officers, and strengthen safeguards against unethical or high-risk conduct. Laws that apply generally to police also play an important role in imposing duties on individual officers in exercising their functions and powers. These laws not only protect those being investigated, but also provide guidance and protection to the officers. They are discussed in the next section.

Some aspects of the laws of evidence can also be considered an indirect form of governance of police use of covert powers and methods, such as the use of human sources, because these laws enable courts to exclude evidence that has been improperly obtained if including it would compromise the fairness of the trial process.<sup>81</sup> These laws, however, can only be used if the accused person or the court becomes aware of the investigation techniques that generated the evidence. If there are no other forms of regulation—such as legislation or codes of practice—governing the use of covert powers and methods, it is unlikely that the accused person or the court will have this knowledge.

These issues are discussed in further detail in Chapters 12–14.

## DUTIES OF POLICE OFFICERS

The public naturally expects police officers to uphold the law and to exercise their considerable power and authority according to law. Police are therefore subject to duties, obligations and professional standards that protect the freedoms of citizens, ensure that those charged with offences receive a fair trial, and promote overall community confidence in the police service.

As a public authority, Victoria Police must adhere to the provisions of the Charter when performing its functions and must act in ways that respect people's human rights.

By law, each police officer must promise to fulfil their duties 'faithfully and according to law' and 'without favour or affection, malice or ill-will' before they can commence service.<sup>82</sup>

Victoria Police recognises the importance of individual police officers acting honestly, fairly and with integrity, and this is reflected in the professional and ethical standards that apply to all Victoria Police employees (both sworn police officers and public servants employed by Victoria Police).<sup>83</sup>

The Victoria Police Manual reminds officers that:

*In taking on the authority and responsibility that comes with being a Victoria Police employee, you are held to a higher standard of conduct in both your public and private lives and are more open to public scrutiny than many other members of the public.*<sup>84</sup>

The Manual explains that acting with integrity involves being honest, respecting the right of fair process for all, demonstrating moral strength and courage, and behaving with honour and impartiality.<sup>85</sup>

Police officers are authorised to exercise powers that can interfere with the day-to-day rights and freedoms of citizens. They can search and seize property; administer drug and alcohol tests and take forensic samples; question people; issue intervention orders excluding people from entering their own homes; and arrest suspects and take them into custody. Some police powers are covert, and therefore intrude on other specific rights, such as privacy. These include the use of audio, visual and data surveillance devices, covert searches and human sources, and the deployment of undercover police officers. It is critical that, in using these powers, police follow the limits set by Parliament and the courts.

Police are also responsible for gathering evidence that can be used in court, and for starting proceedings against an accused person. In this context, and as agents of the State, they must follow laws and processes to ensure that the accused person receives a fair trial. Their conduct is relevant to whether the investigation and prosecution have been conducted lawfully. So, if police obtain evidence unlawfully—for example, by seizing property without a warrant or using a listening device without authorisation—the court may refuse to allow that evidence to be used at trial, potentially weakening the prosecution’s case. When unlawfully obtained evidence is admitted during trial and there has been no scrutiny of how it was gathered, an appeal court may decide that its use undermined the fairness of the trial as a whole. This, in turn, may justify overturning a conviction.

As discussed above, police are also bound by the duty of disclosure that applies to prosecutors. If they fail to disclose relevant evidence, this may similarly lead to a ruling that the accused person has not been given a fair trial.

To fulfil its role in preventing and investigating crimes, the police service relies on members of the community to report crimes or other suspicious activity. The community’s willingness to work in partnership with the police, and the effectiveness of police efforts in preventing and investigating crime, depend on the public having trust and confidence in the police.<sup>86</sup> To earn this trust and confidence, police officers must uphold the law. Unlawful, unethical or questionable conduct of individual police officers can erode public trust and confidence in the police service as a whole.<sup>87</sup>

## LAWYERS’ DUTIES AND OBLIGATIONS

Lawyers have detailed duties, professional obligations and ethical standards that have two concurrent purposes: to ensure they uphold the proper administration of justice and to act in the best interests of their clients. Lawyers’ compliance with their duties supports public confidence in the legal profession and the justice system.<sup>88</sup>

Lawyers’ obligations are drawn from a range of sources, such as the Legal Profession Uniform Law, professional conduct rules and the common law. Some of the key duties and obligations held by lawyers that are relevant to the Commission’s inquiry are described below. They are discussed in further detail in Chapters 4, 5 and 15.

### Duty to the court

Lawyers are integral participants in the administration of justice, and upon admission to the legal profession become ‘officers of the court’.<sup>89</sup> They have an overriding duty to the court and to act in the public interest, which means ensuring the integrity of the law and legal process. Out of this arises their duty to assist the court in the administration of justice.<sup>90</sup> This duty is reflected in legal profession conduct rules specifying that lawyers must not engage in conduct that is likely to be prejudicial to, or diminish public confidence in, the administration of justice, or to bring the legal profession into disrepute.<sup>91</sup>

A lawyer’s duty to the court is paramount.<sup>92</sup> They cannot act only in their client’s interests to the detriment of ensuring that justice is delivered in accordance with the law.<sup>93</sup>

The duty to the court requires lawyers to act honestly in all their dealings with the court and other lawyers.<sup>94</sup> They must never mislead the court, and must be frank in their responses and disclosures to it.<sup>95</sup> For example, if a client confesses guilt to their lawyer and then wants to give evidence in court that they are not guilty, the lawyer's paramount duty to the court will usually require that they cease to act for the client—to do otherwise would amount to misleading the court.<sup>96</sup>

Relevant to this inquiry, a breach of the duty to the court is likely to arise in the circumstances described below, where there has been a breach of another concurrent duty—such as a lawyer's failure to disclose a conflict of interest.

## Duties to the client

Lawyers have considerable authority and power when representing a client—they have knowledge and expertise about the law and legal system, and are privy to their client's confidential information. Their advice and actions can have a direct influence on the outcomes the client is able to achieve.

So, while lawyers owe a paramount duty to the court, they also owe a duty to their client to act in the client's best interests.<sup>97</sup> This duty promotes trust and helps remedy the imbalance of power between lawyers and their clients. It is subject to the overriding duty to the court, and exists to protect clients from careless or deliberate conduct by their lawyer that might adversely affect their interests. In the criminal justice system, lawyers' compliance with these obligations is integral to providing the accused person with a fair trial, and therefore integral to the system itself.

To enable their lawyer to act in a client's best interests, the client must know they can speak as freely as possible when consulting them. Accused persons, and clients of lawyers more generally, should feel comfortable in frankly providing all necessary information without fear that it will be given to anyone else, or later used against them. If clients withhold important information from their lawyers for fear the lawyer might tell the police, the prosecution or the judge without their permission, the client might well receive incomplete or inaccurate advice, and unfavourable outcomes in negotiations or court decisions. This may also lead to courts making flawed or unsafe decisions because they have been provided with incomplete or misleading information.

Together with lawyers' duty to the court, important rules and legal principles protect the confidentiality and 'privilege' of information that clients share with their lawyers, and of the advice lawyers give their clients. While these duties are fundamental to the administration of the justice system, they are not absolute—that is, there are some circumstances in which lawyers are permitted to disclose their communications with their clients.

## Legal professional privilege

A client who engages a lawyer has a right to legal professional privilege. The statutory form of legal professional privilege in Victoria is called 'client legal privilege'.<sup>98</sup>

Legal professional privilege prevents a lawyer from disclosing certain communications or documents shared between the lawyer and client, even to the court. Communications or documents are only privileged if they came into existence for the dominant purpose of litigation (actual or anticipated) or providing legal advice.<sup>99</sup> The client can waive (give up) privilege, in which case their lawyer is permitted, or obliged, to disclose the communications or documents to others.

A breach of legal professional privilege could include disclosure to third parties of communications between a client and their lawyer where those communications predominantly related to the provision of legal advice, or actual or anticipated litigation.

A client's right to claim privilege over communications with their lawyer is not absolute. Privilege can be lost in circumstances where the client, their lawyer or a third party engages in communications or prepares documents to commit a fraud, offence or other illegal act, or engages in an abuse of power; or if the client waives the privilege.<sup>100</sup>

## Confidentiality

Lawyers also have a broader duty of confidentiality to their clients, which requires that they do not disclose confidential information acquired from a client–lawyer relationship.<sup>101</sup>

There are limited exceptions to the duty of confidentiality. These might include when the client consents to the information being disclosed; when the information is obtained by the lawyer from another person in circumstances that do not attract confidentiality; or when disclosure is necessary to prevent a probable serious crime or imminent serious physical harm to the client or another person.<sup>102</sup>

The duties of legal professional privilege and confidentiality are similar, but confidentiality applies in a broader range of circumstances. For example, discussions between a lawyer and client that occur socially but in circumstances where a client still believes the discussion to be one of confidence, while not attracting legal professional privilege, may still be confidential.<sup>103</sup>

## Duty to avoid conflicts of interest

Lawyers are required to promote and protect the interests of their client, and avoid conflicts of interest.<sup>104</sup> The client needs to be able to rely on their lawyer and trust that they are acting in good faith and in accordance with the client's best interests, subject to the lawyer's overriding duty to the court.

Conflicts of interest can arise when a lawyer's duty to their client conflicts with the duties they owe to another current or former client, or with the lawyer's own personal interests.<sup>105</sup> For example, a lawyer may be prevented from representing two clients in the same matter when the clients' interests diverge to the extent that the lawyer is unable to act in the best interests of them both.

## IMPLICATIONS FOR THE COMMISSION'S INQUIRY

The conduct of Ms Gobbo and Victoria Police that is the subject of the Commission's inquiry was beset by breaches of fundamental legal principles and professional and ethical standards.

The criminal justice system can only produce just outcomes when it operates effectively as a whole—when those who work within it respect each other's distinct role, comply with their duties and act with integrity. It cannot produce just outcomes when key actors disregard long-established principles designed to protect the democratic right to a fair trial, and instead are driven by results-focused behaviour without regard to the broader public interest in the proper administration of justice.

The Commission's role has been to inquire into ways in which the conduct of Ms Gobbo and Victoria Police may have tainted and undermined the convictions of numerous people. Just as importantly, its role has been to restore public confidence in the criminal justice system by exposing any improper activities of those whom the community has entrusted to uphold the law, by assessing the adequacy of current policies and practices, and by recommending measures to protect against future misuse of power and breach of duty.

Victoria Police has now accepted that permitting Ms Gobbo to give them information about her own clients was 'reprehensible', and 'an indefensible interference in the lawyer–client relationship that is essential to the proper functioning of the criminal justice system and to the rule of law'.<sup>106</sup> In a submission to the Commission,

Victoria Police stated that it ‘apologises to the courts whose processes were impacted by what occurred, and to the community for breaching its trust’.<sup>107</sup>

Although the events the subject of the Commission’s inquiry took place in the past, they continue to have an impact many years later, as those whose cases have been affected file appeals and perhaps consider claims for compensation. Concerningly, public confidence in Victoria Police has diminished. A survey of Victorians conducted in September 2020 found that public rating of Victoria Police for honesty and ethical standards had dropped significantly over the period coinciding with the Commission’s inquiry. One of the main factors cited by respondents to the survey for their low ratings of police was Victoria Police’s conduct in using Ms Gobbo as a human source, which they believed was ‘unethical’ and ‘had undermined the legal system’.<sup>108</sup>

Victoria Police itself has acknowledged that:

*... the way in which Ms Gobbo was managed as a human source in a way that resulted in a profound interference with the relationship between lawyer and client was a major failing. The consequences of that failing are resonating through the criminal justice system and will do so for many years. It has come at a very high cost to the organisation, to public confidence and to the criminal justice system.*<sup>109</sup>

These consequences are a reminder that the carefully calibrated checks and balances that underpin the criminal justice system need to be valued and protected, even in the most challenging of times.

In publicly exposing Ms Gobbo’s and Victoria Police’s conduct, the Commission’s inquiry should reassure the community that disregard for the law and proper administration of justice will not go unchecked. It should also empower those whose convictions or findings of guilt may be affected to make informed decisions about any future action they may take.

The Commission’s recommendations aim to ensure the events that led to this inquiry cannot occur again, and to help guard against other potential or unforeseen cases of misuse of power or unethical conduct within the criminal justice system. They have been informed by reforms implemented in other jurisdictions, often in response to specific and identified problems and miscarriages of justice.

The Commission has examined the current laws, policy and practices that relate to the use of human sources in Victoria, and the obligations of police and lawyers in that context. Many changes have been implemented by Victoria Police and legal profession bodies since the events the subject of this inquiry took place.

The Commission’s policy recommendations are directed at remedying a number of gaps and shortcomings that persist in Victoria’s policy and governance arrangements in the following areas:

- the use and management of human sources, in particular those with legal obligations of confidentiality or privilege
- independent oversight of the use of human sources
- the use and disclosure of human source information in criminal proceedings
- regulation of the legal profession.

Together, the Commission’s recommendations aim to improve the transparency and accountability of the systems and processes that underpin the criminal justice system, and the capacity of agencies and individuals to fulfil their duties and obligations.

Fostering, embedding and embracing a culture of transparency, accountability and oversight is the most reliable mechanism the Victorian community has to ensure that, in the future, those tasked with administering the criminal justice system maintain the highest possible standards of conduct, and are not tempted to dispense with their duties and obligations, even when faced with challenging and high-profile investigations. A system with appropriate oversight, founded on transparency and accountability, is also critical for preserving the longevity of the policy and practice changes that have already been made by Victoria Police and others, as well as those recommended by the Commission.

The Commission has recommended a suite of reforms that, in combination, aim to create a robust framework that will improve the operation of various aspects of the criminal justice system. It is important that these reforms are considered and implemented together. They should also be monitored into the future to ensure that they have been successfully implemented and their intended purpose achieved.

The successful implementation of the Commission's recommendations and the subsequent monitoring of those recommendations are key to assuring the Victorian community that the regrettable events leading to this inquiry will not be repeated. It is also key to assuring the community that their police service will work effectively and lawfully within the criminal justice system to protect them from criminal activity without unfair and unjustified incursions on the rights of individual citizens.

# Endnotes

- 1 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 2 Mark Findlay, *Criminal Law: Problems in Context* (Oxford University Press, 2nd ed, 2006) 54.
- 3 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory* (Information Paper No 1, May 2015) 4 [13]; *Charter of Human Rights and Responsibilities Act 2006* (Vic) Preamble, s 8(3).
- 4 The courts are established in Chapter III of the *Australian Constitution* and Part III of the *Constitution Act 1975* (Vic). The term 'courts' is used here and in the remaining sections of this chapter to refer to both magistrates and judges.
- 5 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, December 2015) 451.
- 6 There are several limitations and other safeguards that apply to the arrest and questioning of a suspect: see *Crimes Act 1958* (Vic) pt III div 1 sub-divs (30)–(30A).
- 7 The police may also consider other factors in deciding whether to charge a person, including the public interest: see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Consultation Paper, July 2015) 43 [5.8].
- 8 *Sentencing Act 1991* (Vic) pts 3–3BA.
- 9 *Criminal Procedure Act 2009* (Vic) pts 6.1–6.4.
- 10 See, eg, *Criminal Procedure Act 2009* (Vic) ss 256, 272, 277, 282, 286, 326E.
- 11 Section 123 of the *Inquiries Act 2014* (Vic) provides that a royal commission cannot inquire into or exercise any powers in relation to a number of agencies, including a Victorian court and the Victorian DPP, although such agencies may voluntarily provide information to a commission.
- 12 *Victoria Police Act 2013* (Vic) s 8.
- 13 A separate prosecution division of Victoria Police has been in operation since 1981: see Karl Head, 'Police Prosecutors and Legal Practitioners' (1990) (September) *Law Institute Journal* 842, 842; Chris Corns, 'Police Summary Prosecutions in Australia and New Zealand: Some Comparisons' (2000) 19(2) *The University of Tasmania Law Review* 280, 300.
- 14 The DPP is an independent lawyer who is appointed by the Governor in Council: *Constitution Act 1975* (Vic) s 87AB.
- 15 For example, this may include Crown Prosecutors, Associate Crown Prosecutors or private barristers: see further *Public Prosecutions Act 1994* (Vic).
- 16 Chief Justice James Spigelman, 'Public Confidence in the Administration of Criminal Justice' (2007) 19(2) *Current Issues in Criminal Justice* 219, 220.
- 17 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(b).
- 18 *Crimes Act 1958* (Vic) s 464C.
- 19 *Dietrich v The Queen* (1992) 177 CLR 292.
- 20 See, eg, *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 38–41.
- 21 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) xvii.
- 22 *Sentencing Act 1991* (Vic) ss 5(2)(e), 6AAA.
- 23 Judicial College of Victoria, 'Role of the Judge', *Victorian Criminal Proceedings Manual* (Web Page, 1 March 2017) <[www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27527.htm](http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27527.htm)>. See also *Criminal Procedure Act 2009* (Vic) in relation to the court's powers in relation to criminal cases.
- 24 See, eg, Chief Justice Murray Gleeson, 'The Role of a Judge in a Criminal Trial' (Conference Paper, Lawasia Conference, 6 June 2007) 2.
- 25 The rules of evidence are set out in the *Evidence Act 2008* (Vic).
- 26 *Criminal Procedure Act 2009* (Vic) s 217; *Juries Act 2000* (Vic) s 22. Juries are used in indictable cases in the County Court and Supreme Court. In 2020, in response to the COVID-19 pandemic, the Criminal Procedure Act was amended to permit trials by judge alone (that is, without a jury), with the consent of the accused person, within the six-month period following commencement of the amendments: see *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) pt 3.8.
- 27 See *Criminal Procedure Act 2009* (Vic) ch 3.
- 28 *Sentencing Act 1991* (Vic) s 5(1).
- 29 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

- 30 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25; see *Criminal Procedure Act 2009* (Vic); see also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory* (Information Paper No 1, May 2015) 3–4 [12].
- 31 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7.
- 32 *Dietrich v The Queen* (1992) 177 CLR 292; Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, December 2015) 222 [8.13]; Sir Anthony Mason, 'Fair Trial' (1995) 19 *Criminal Law Journal* 7, 7.
- 33 Sir Anthony Mason, 'Fair Trial' (1995) 19 *Criminal Law Journal* 7, 11.
- 34 *Jago v District Court of New South Wales* (1989) 168 CLR 23, 72 (Toohey J).
- 35 *Grey v The Queen* (2001) 184 ALR 593, 607–8 [53] (Kirby J).
- 36 Judicial College of Victoria, 'Abuse of Process and Stays', *Victorian Criminal Proceedings Manual* (Web Page, 14 August 2017) <[www.judicialcollege.vic.edu.au/eManuals/VCPM/27777.htm](http://www.judicialcollege.vic.edu.au/eManuals/VCPM/27777.htm)>.
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# 3

## Conducting the inquiry

### INTRODUCTION

The Commission's inquiry commenced shortly after the public revelation that Victoria Police had used a former barrister, Ms Nicola Gobbo, as a human source. Prior to and during the inquiry, some of the people potentially affected, including former clients of Ms Gobbo, appealed their convictions to the Court of Appeal of the Supreme Court of Victoria. Accordingly, the Commission's work attracted significant public interest.

From the outset, the Commission sought to conduct its inquiry as openly and as transparently as possible. In addition to addressing the matters set out in its terms of reference, the Commission had a critical role in illuminating the events that led to the inquiry, and in restoring public confidence and trust in the criminal justice system.

This chapter describes how the Commission approached its inquiry, in accordance with its terms of reference, its obligations under the Letters Patent, and its powers and obligations under the *Inquiries Act 2014* (Vic) (Inquiries Act), including the requirements of procedural fairness.

The Commission's work required a team with multidisciplinary skills, expertise and experience. The Commission's policy and research, investigations, enquiries; operations and media and communications teams were supported by counsel appointed to assist the Commission (known as 'Counsel Assisting') and the Commission's solicitors (known as 'Solicitors Assisting').

As discussed below, the Commission's work included:

- seeking and obtaining relevant information; in particular, by issuing notices to produce and requests for information
- receiving submissions from members of the public, including potentially affected persons
- conducting hearings to examine evidence
- undertaking research and consulting with Victorian, interstate and international stakeholders and experts
- reviewing submissions from Counsel Assisting, and submissions from affected people and organisations received in response to Counsel Assisting submissions.

The matters the Commission considered were, at times, highly sensitive and could lead to safety risks for people giving information or evidence at its hearings and their families, or for those affected by the information examined. The Commission adapted its processes to mitigate those risks.

Over the course of the inquiry—almost two years—the Commission:

- received over 155,000 documents and materials from Victoria Police, individuals and other organisations
- received 157 submissions from members of the public or organisations during its public submissions process
- held 129 days of public or private hearings and examined 82 witnesses
- consulted with 97 individuals and organisations with experience and expertise relevant to terms of reference 3–6
- received 45 responsive submissions relevant to terms of reference 1 and 2 and four responsive submissions relevant to terms of reference 3–6.

The Commission faced a number of constraints and challenges that affected its reporting timelines and the way it conducted and reported on the inquiry, including challenges associated with the production of documents, the resolution of public interest immunity (PII) claims, and limitations on the Commission's powers under the Inquiries Act. These challenges are discussed in Chapter 16.

This chapter outlines:

- the Commission's powers and obligations
- how the Commission approached its inquiry
- the adverse findings process
- the Commission's reporting.

These matters are discussed in turn below.

## THE COMMISSION'S POWERS AND OBLIGATIONS

The Commission was established under the Inquiries Act. The Act provides for the conduct and establishment of a royal commission in Victoria and sets out the powers it may exercise.

The Inquiries Act enabled the Commission to conduct its inquiry in the manner it considered appropriate, subject to its powers under the Act, its Letters Patent and the requirements of procedural fairness.<sup>1</sup>

## Powers under the Inquiries Act

Under the Inquiries Act, the Commission had the power to:

- issue a notice to compel a person to produce documents to the Commission (known as a ‘notice to produce’)
- issue a notice to compel a person to attend and give evidence at the Commission’s hearings (known as a ‘notice to attend’)
- apply to the Magistrates’ Court of Victoria for a search warrant to, for example, inspect and copy a document relevant to the inquiry
- conduct hearings in public or in private.<sup>2</sup>

The Commission did not have any judicial powers. While it was required by its terms of reference to identify the number of, and the extent to which, cases may have been affected by Victoria Police’s use of Ms Gobbo as a human source, it was not the Commission’s role to overturn a conviction, order a re-trial, change a sentence or release a person from custody. These are matters for the courts.

For example, the avenues of recourse that may be available to a person convicted of a serious offence include:

- *an appeal against a conviction*—an appeal made to an appellate court, often on the basis there has been a substantial miscarriage of justice, usually seeking to overturn a conviction and either direct a verdict of acquittal or order a new trial<sup>3</sup>
- *a petition for mercy*—a formal petition to the Victorian Attorney-General to refer a case to the Court of Appeal or to refer a specific point of law to the Supreme Court of Victoria for an advisory opinion.<sup>4</sup>

As noted above, the Inquiries Act placed some constraints on the Commission’s powers, which affected the way it conducted the inquiry. These included a person’s ability under the Act to refuse to provide information to the Commission if that information is subject to PII, and the Commission’s inability under the Act to compel a person to prepare a written statement.<sup>5</sup> Challenges also arose because various Victorian independent bodies and office holders are exempt from the coercive powers of a royal commission.<sup>6</sup> Resolving these issues will be important for future inquiries, particularly inquiries that rely on the investigative powers provided by the Inquiries Act.

These challenges and the Commission’s conclusions about how they might be resolved are discussed in Chapter 16.

## Obligations under the Letters Patent

The Commission’s Letters Patent required the Commission to:

- take care not to prejudice any ongoing investigations or court proceedings, or exercise any coercive or investigative powers in a manner that would be in contempt of court
- avoid unnecessarily duplicating the investigations or recommendations of previous related inquiries
- work cooperatively with any other inquiries or investigations into Victoria Police’s handling of Ms Gobbo as a human source to avoid any unnecessary duplication
- have regard to related court proceedings and future court proceedings commenced by affected persons, and to the safety of Ms Gobbo and other persons affected by the matters raised in the Commission’s inquiry
- promptly alert the Victorian Director of Public Prosecutions (DPP) and Commonwealth Director of Public Prosecutions (CDPP) to any information or documents relevant to their functions, including their duty of disclosure.

A copy of the Commission's Letters Patent is at Appendix A and a copy of the amendments to the Letters Patent is at Appendix B.

## Procedural fairness

The Commission had the power under the Inquiries Act to conduct its inquiry in any manner it saw fit subject to the requirements of procedural fairness, and a common law obligation to exercise its powers with fairness to those persons whose interests might be affected.<sup>7</sup>

At common law, the obligation to afford procedural fairness extends to any person whose rights, interests or legitimate expectations may be affected in a direct and immediate way.<sup>8</sup> The scope of the obligation to afford procedural fairness is determined by the particular facts and circumstances of an inquiry, including its terms of reference.<sup>9</sup>

The Commission's obligation to afford procedural fairness therefore extended to those people whose interests were sufficiently affected by the inquiry. The Commission afforded procedural fairness to those people by providing them with the opportunity to:

- apply to be heard at the Commission's public hearings and/or cross-examine witnesses on certain matters
- provide written submissions to the Commission
- review and consider the critical issues and evidence relevant to the inquiry and potential findings that affected their interests
- put forward information to the Commission in support of their interests, including the opportunity to rebut or qualify information before the inquiry.

The Inquiries Act also imposes a statutory obligation on a royal commission to afford procedural fairness when a commission proposes to make an adverse finding against a person.<sup>10</sup>

Between June and September 2020, the Commission conducted a formal adverse findings and procedural fairness process to ensure that people whose interests were sufficiently affected by the Commission's potential findings were:

- aware of the matters on which the proposed finding was based, including the critical facts, evidence and other issues taken into account
- given the opportunity to make submissions to the Commission in support of their interests.

The Commission's adverse findings and procedural fairness process is discussed further below.

## Charter of Human Rights and Responsibilities

When conducting the inquiry, the Commission also considered and applied the principles under the Victorian *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Charter).

The Commission was acutely aware of the rights of people who may have been affected by the inquiry, particularly those whose cases may have been affected by the use of Ms Gobbo as a human source, and Victoria Police officers who were involved in using Ms Gobbo as a human source.

The Commission considered those persons' Charter rights—including the right to life, right to privacy and right to a fair hearing—during its public submissions process, its hearings, and during the formulation of this final report and its findings and recommendations.<sup>11</sup> This consideration of a person's rights influenced decisions such as whether the Commission would:

- conduct its hearings in public or in private
- make orders to protect the identity of a witness or prevent the publication of sensitive information
- publish information to its website, including submissions from members of the public who asked that their information be treated anonymously or confidentially.

## APPROACH TO THE INQUIRY

The Commission's inquiry was structured around five key areas of work to enable the production and examination of evidence. Those five areas involved:

- seeking and obtaining information from individuals and organisations by issuing notices to produce and requests for information
- engaging with members of the public to give them an opportunity to contribute to the inquiry and follow the Commission's work
- conducting public hearings to examine evidence and promote transparency of the Commission's work
- undertaking a comprehensive research program, including consultation with agencies and individuals with expertise in matters relevant to the terms of reference
- receiving advice from Counsel Assisting on matters relating to terms of reference 1 and 2.

These are discussed in turn below.

### Obtaining information relevant to the inquiry

The Commission's work involved piecing together events and interactions that occurred between 1993 and 2020. This required access to a large volume of documents and material relevant to that period. The Commission relied heavily on its power under the Inquiries Act to compel the production of documents. Many agencies and individuals also provided material to the Commission voluntarily.

#### Notices to produce and requests for information

Under the Inquiries Act, the Commission had the power to issue a notice to an individual or an organisation to compel them to produce a document to the Commission within a specified period of time.<sup>12</sup> That power did not extend to certain bodies and office holders, including the Independent Broad-based Anti-corruption Commission (IBAC), Victorian Ombudsman, DPP, CDPP and Victorian courts.<sup>13</sup> Those bodies could only provide information voluntarily.

When the Commission was prevented from issuing a notice to produce under the Inquiries Act, or when it required general information rather than the production of a specific document, it could issue formal requests for information.

From 4 January 2019 to 5 October 2020, the Commission issued notices to produce and formal requests for information to various individuals and agencies, including Victoria Police. The number of notices and requests issued and documents received by the Commission is displayed in Figure 3.1.

**Figure 3.1: Number of notices to produce and formal requests for information issued by the Commission**

In December 2018, Victoria Police established Taskforce Landow, to support its contribution to the Commission’s inquiry and to oversee its responses to the Commission’s notices to produce and other requests. Commission staff and Solicitors Assisting also met with Taskforce Landow and senior Victoria Police officers to enable access to documents and receive briefings on matters relevant to the inquiry.

The Department of Justice and Community Safety also established a business unit to coordinate and oversee the State of Victoria’s response to the Commission.

The Commission is grateful to the many individuals and agencies that provided material voluntarily, despite being exempt from the Commission’s compulsory powers, including IBAC, the Victorian Ombudsman, the DPP, CDPP, Victorian courts, Australian Federal Police (AFP) and Australian Criminal Intelligence Commission (ACIC).<sup>14</sup>

## Document management and security

The production of documents to the Commission was supported by a document management protocol that specified, among other things, how:

- documents and all attachments should be provided
- documents should be named and categorised
- documents subject to a PII claim or legal professional privilege should be produced.

Challenges relating to the production of documents, including delays and failures to comply with the document management protocol, are discussed in Chapter 16.

### Document security protocols

Given the sensitivity of material produced, the Commission created customised, protected level document management, information technology and security systems to securely store all documents received.

The Commission’s security arrangements, including physical, personnel, information and governance security, were developed to support holding and managing classified information up to ‘protected’ level and followed the Australian Government Protective Security Policy Framework. The Commission’s information technology systems included a secure internet gateway service that was assessed under the Information Security Registered Assessors Program and certified to ‘protected’ level by the Australian Signals Directorate.

In accordance with the Inquiries Act, at the conclusion of the inquiry, all documents and material held by the Commission will be transferred to the Victorian Department of Premier and Cabinet and the Public Record Office Victoria. The documents will be held there and dealt with on the same basis, and in the same manner, as they were by the Commission.<sup>15</sup> This is discussed in Chapter 17.

## Engaging with members of the public

The Commission examined matters of widespread public importance and interest. Accordingly, it was important to seek and understand the views and experiences of members of the public; in particular, people who were potentially affected by Victoria Police's use of Ms Gobbo as a human source. It was also important for the Commission to give members of the public an opportunity to participate in and observe the Commission's work.

Members of the public, and those who may have been affected by the inquiry, were able to attend the Commission's public hearings and were kept informed about the progress of the Commission's work on its website. The website was regularly updated with information about the Commission's processes, including public submissions and public hearings. The Commission published exhibits and hearing transcripts to its website as soon as practicable.

The Commission's enquiries line, email address and secure PO Box also gave members of the public an opportunity to communicate directly with Commission staff, including its team of investigators, who met regularly with people wishing to provide information to the Commission.

The Commission's public submissions process and the media also facilitated its engagement with the community, as discussed below.

### Public submissions

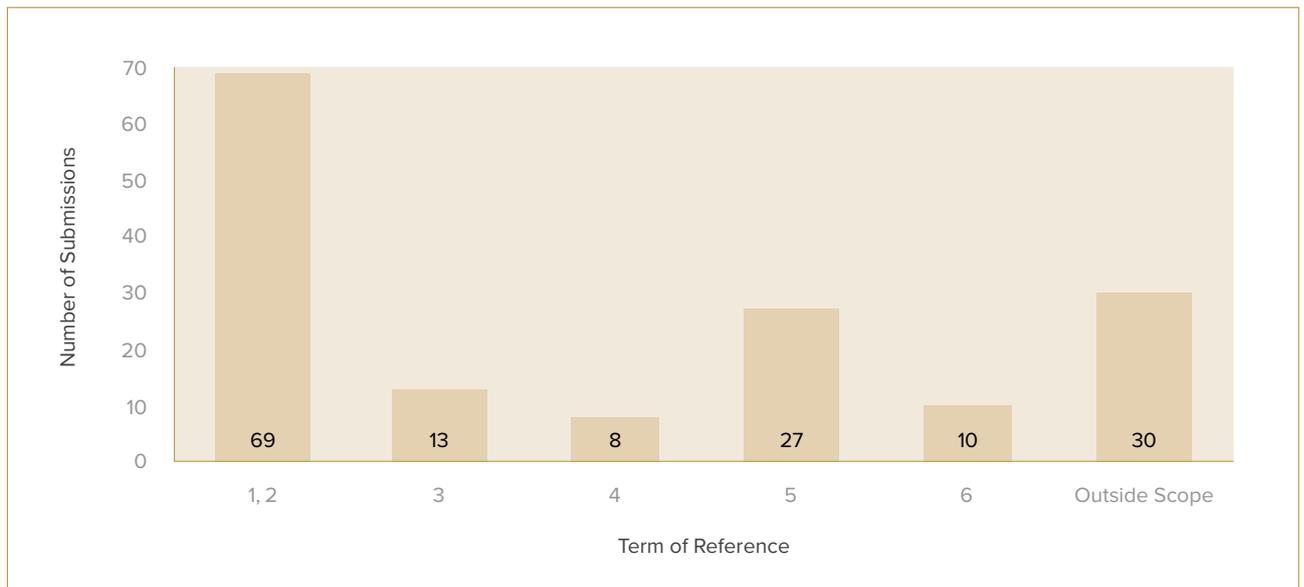
On 7 February 2019, the Commission invited members of the public and organisations to make written submissions relevant to its terms of reference. The Commission's call for submissions was advertised on its website, as well as through major metropolitan newspapers such as *The Age* and the *Herald Sun*. The Commission also engaged with Corrections Victoria to provide prisoners with information about the Commission's inquiry and submissions process.

Submissions were due by 12 April 2019, although the Commission continued to accept late submissions on a case-by-case basis; in particular, from persons who believed their case may have been affected by the use of Ms Gobbo as a human source.

In total, 157 submissions were received from members of the public and organisations regarding:

- potentially affected cases and the conduct of Victoria Police officers (terms of reference 1 and 2)
- the current adequacy of Victoria Police's processes for the use of human sources subject to legal obligations of confidentiality or privilege (term of reference 3)
- the current use and disclosure of human source information in the criminal justice system (term of reference 4)
- allegations relating to the potential use of other human sources with legal obligations of confidentiality or privilege by Victoria Police (term of reference 5)
- other related matters such as legal profession regulation (term of reference 6)
- matters outside the scope of the terms of reference.

The number of submissions received relevant to each term of reference is displayed in Figure 3.2.

**Figure 3.2: Submissions received by the Commission**

The Commission carefully considered all submissions that fell within its terms of reference.

Submissions received from potentially affected persons and former Victoria Police officers informed the Commission's review of potentially affected cases. These submissions also helped the Commission identify issues to be examined as part of its public hearings. Other submissions helped the Commission to explore possible reforms to laws, policies and practices relating to the terms of reference. These included submissions on the use and management of human sources, the use of human source information in the criminal justice system, legal ethics and legal profession regulation.

The Commission thanks the many individuals and organisations who took the time to make a submission for their important contribution to the inquiry.

### **Treatment of submissions**

When making a submission, submitters were asked to indicate how they would like the Commission to treat their submission. Submissions could be treated as public, anonymous or confidential.

During the inquiry, public and anonymous submissions were progressively published to the Commission's website.

While the Commission preferred to make all submissions received available to the public, for various reasons, some submissions were unable to be published to the Commission's website. These included the author's preference for the treatment of their submission; the need to protect the safety of the author or other people; and legal reasons such as restrictions on the publication of information that might be subject to legal professional privilege, PII or suppression orders made by the courts.

The 30 submissions that did not fall within the scope of the Commission's terms of reference were unable to be used as part of the Commission's inquiry.

A list of submissions received by the Commission that were treated as public submissions is at Appendix C.

## Media liaison

There was considerable public interest in the Commission’s inquiry. Liaison with the media was an important tool to communicate the Commission’s work to the community. Reporting of the Commission’s work by the media also encouraged potentially affected persons and their legal representatives to engage with the Commission.

Media releases and statements were regularly published to the Commission’s website to inform the media and the public of key milestones and events in the inquiry, such as the commencement and progress of public hearings.

Media representatives conscientiously abided by the many non-publication orders made by the Commission, as well as the many, sometimes complex court suppression orders.

The Commission thanks the media for the important role they played in the inquiry.

## Conducting public hearings

Public hearings were an important mechanism for the Commission to gather evidence and conduct an in-depth examination of matters relevant to the terms of reference.

The events being examined by the Commission were cloaked in secrecy for many years. A crucial function of the inquiry was to assist the Victorian community to understand how Ms Gobbo came to be used as a human source on multiple occasions, the consequences arising from Ms Gobbo’s and Victoria Police’s actions, and what could be done to prevent similar events occurring in the future. Accordingly, the Commission acknowledged at the outset of its inquiry the need to conduct as much of its inquiry in public as possible.<sup>16</sup>

The Commission’s hearings were held between 15 February 2019 and 13 May 2020. The number of hearing days, witnesses and parties granted leave to appear is displayed in Figure 3.3 and discussed further below.

**Figure 3.3: The Commission’s hearings, 2019–20**



## The focus and operation of the hearings

The primary focus of the hearings held between February 2019 and February 2020 was to examine the issues relating to cases potentially affected by the use of Ms Gobbo as a human source and the related conduct of Victoria Police officers (terms of reference 1 and 2). These hearings were held at the Fair Work Commission, Melbourne.<sup>17</sup> The Commission is grateful to the Fair Work Commission for making available its hearing room and other facilities.

During those hearings, the Commission examined evidence relating to the interactions between current and former Victoria Police officers and Ms Gobbo between 1993 and 2013. It particularly focused on her third registration and use as a human source between 16 September 2005 and 13 January 2009.<sup>18</sup>

The Commission also examined issues relating to Victoria Police's use or potential use of other human sources subject to legal obligations of confidentiality or privilege (relevant to term of reference 5a). These hearings were held in private to protect the identities of those people.

At times, the Commission's hearings touched on matters considered by previous inquiries, such as the Comrie Review and Kellam Report.<sup>19</sup> This was necessary in circumstances where, for example, the Commission had received additional information that was not available to these inquiries or where there were challenges to the facts upon which those inquiries were based.<sup>20</sup> In considering such matters, the Commission sought to adhere to its obligation under the Letters Patent to not duplicate the work of these inquiries.

In May 2020, the Commission held hearings to examine policy issues relating to terms of reference 3 and 4. These hearings were held virtually due to COVID-19-related restrictions.

The policy hearings focused on a range of issues to inform the Commission's inquiry into:

- Victoria Police's current policies and practices relating to the use of human sources with legal obligations of confidentiality or privilege
- how information provided by these human sources is used in the criminal justice system and how Victoria Police fulfils its disclosure obligations.

The hearings did not examine a specific set of events or cases. Instead, they explored how to strengthen the current framework for dealing with these types of human sources and the information they provide to police.

Where necessary, the Commission also held directions hearings to manage a range of procedural matters, such as delays in Victoria Police's production of documents and witness statements. The Commissioner also issued three directions outlining procedural guidelines and processes to support the public hearings.

Those directions related to:

- the general operation of the public hearings, including how witnesses would be called, the examination and cross-examination of witnesses, the tendering of documents and applications for leave to appear
- witnesses' legal representation
- the operation of the Commission's virtual hearings in May 2020, following the Victorian Chief Health Officer's directions in response to the COVID-19 pandemic.<sup>21</sup>

## Witnesses

Counsel Assisting determined which witnesses were called at the Commission's hearings and the issues to be explored in evidence, subject to the Commission's time limitations and reporting requirements. Witnesses were issued notices to attend the Commission's hearings on specific days.<sup>22</sup>

### Written statements

Witnesses who gave evidence at the hearings, and other individuals relevant to the inquiry, were asked by the Commission to prepare a written statement before giving their evidence.

As the Inquiries Act only empowers the Commission to compel the production of *existing* documents under a notice to produce, written witness statements were produced on a voluntary basis.<sup>23</sup> Once a statement was prepared, the Commission then issued a notice to produce to obtain a copy of it.

Having a written statement available to the Commission prior to a witness appearing to give evidence increased the efficiency of the inquiry, as it assisted in the preparation of questions to put to each witness. While many written statements were provided well in advance of a hearing, this did not always occur.

The Commission received 280 written witness statements.

Written statements and any annexures to statements were tendered as exhibits at the Commission's hearings and published to the Commission's website following PII review. This is discussed further below.

Challenges relating to the production of written statements to the Commission, including the timeliness of production, are discussed in Chapter 16.

The Commission thanks all those who voluntarily produced written statements to the Commission, particularly those who did so in a timely way, saving considerable time and public expense.

### **Witnesses called to give evidence**

The Commission heard evidence from 82 witnesses during its hearings.

Counsel Assisting led the examination of all witnesses and were well supported by Solicitors Assisting and the Commission's team of investigators, who helped to identify witnesses to call and lines of inquiry to pursue.

Whenever possible, a list of upcoming witnesses was regularly published to the Commission's website to give other people who were potentially affected by a witness' evidence an opportunity to participate in hearings by applying for leave to appear. The Commission's ability to publish these lists was sometimes disrupted by the late provision of written statements. These applications for leave to appear are discussed further below.

During its hearings relating to terms of reference 1 and 2, the Commission heard from current and former Victoria Police officers, including:

- officers involved in recruiting and registering Ms Gobbo as a human source
- handlers and controllers in Victoria Police's Source Development Unit (SDU) who were responsible for managing Ms Gobbo during her time as a human source between 2005 and 2009<sup>24</sup>
- officers involved in taskforces that had direct engagement with Ms Gobbo, such as the Briars Taskforce and the Petra Taskforce
- senior Victoria Police management and leadership, including then Chief Commissioner Graham Ashton, AM, APM, former Chief Commissioners Kenneth (Ken) Lay, AO, APM, Simon Overland, APM and Christine Nixon, APM, and former Acting Chief Commissioner Timothy (Tim) Cartwright, APM.

The Commission also heard evidence from some of Ms Gobbo's former clients and other persons who may have been affected by her use as a human source.

In February 2020, the Commission heard evidence from Ms Gobbo, who attended the hearings on video link from a remote location. Ms Gobbo was only visible to the Commissioner.

During the policy hearings relating to terms of reference 3 and 4, the Commission heard from Deputy Commissioner Wendy Steendam, APM, Specialist Operations, who had responsibility for Victoria Police's response to the Commission. The Commission also called Professor Sir Jonathan (Jon) Murphy, QPM, DL, Liverpool John Moores University, who generously shared his insights and experience of the United Kingdom's framework for managing human sources.

Witnesses' evidence assisted the Commission to better understand how the relationship between Ms Gobbo and Victoria Police evolved. The Commission also heard evidence relating to Victoria Police's decision making regarding their disclosures about, and recruitment, management and use of, Ms Gobbo as a human source.

The evidence of former and current officers also supported the Commission's exploration of issues relating to Victoria Police's human source management policies, practices and training. This included officers' understanding of their disclosure obligations and of the use of confidential or privileged information obtained from human sources.

A list of witnesses who appeared at the Commission's public hearings is at Appendix E.

### **The safety of witnesses**

In compelling witnesses to give evidence, the Commission was conscious of its responsibility to support the welfare of these people. The Letters Patent also specifically required the Commission to consider the safety of Ms Gobbo and other persons when undertaking the inquiry.

The matters examined by the Commission were at times highly sensitive and could lead to safety risks for people giving evidence or those affected by the information examined by the Commission. For this reason, some of the Commission's hearings were closed to the public.

The Commission implemented arrangements to ensure that witnesses were protected, and that sensitive material and information was appropriately managed. The Commission's hearings were generally live-streamed to its website with a 15 to 20 minute delay. This enabled the Commission to pause the live stream if sensitive information was disclosed inadvertently during the hearings.

In addition, where necessary, the Commission:

- provided witnesses with a discreet entrance to and exit from the hearing premises
- allowed witnesses to give evidence from a remote location through telephone or video link
- used pseudonyms to protect the identities of witnesses and other people mentioned in the inquiry
- made non-publication orders preventing the disclosure of information examined in hearings.

Counselling support was available to all witnesses to aid their mental health and wellbeing. The Commission engaged a specialist psychological counselling service to support all witnesses prior to, during and following their attendance at the hearings. Victoria Police and The Police Association of Victoria (TPA) also provided support to their members throughout the inquiry.

Expenses incurred by witnesses, including travel, meals and accommodation, if claimed, were reimbursed in accordance with the Inquiries Act and *Inquiries Regulations 2015* (Vic).<sup>25</sup>

### **Leave to appear at the Commission's hearings**

People wanting to take part in the Commission's hearings had to apply to the Commission for permission to participate, known as 'leave to appear'. Leave to appear enabled a person, or their legal representatives, to formally appear in part or all of the hearings, make submissions and, generally, to obtain a copy of the transcript and relevant material.<sup>26</sup> People could also make applications for leave to cross-examine a particular witness.

The Commission received 182 applications for leave to appear relating to 72 individuals or organisations, over the course of its hearings, and 11 applications for leave to cross-examine. Of these the Commission granted leave to appear to 63 parties.

The Commission granted 'standing leave' for hearings relating to terms of reference 1 and 2 to Victoria Police, Ms Gobbo, the State of Victoria, DPP, CDDP, AFP, ACIC, then Chief Commissioner, Mr Ashton, and former officers of the SDU who had been Ms Gobbo's handlers during her time as a human source. This allowed these parties' legal representatives to attend and appear at all of the Commission's hearings in relation to these terms of reference, make submissions and apply to cross-examine witnesses.

Other individuals and organisations were granted limited leave to appear for certain parts of the Commission's hearings, and leave to cross-examine certain witnesses where they held a direct or special interest in the matters that were being examined.

A list of parties granted leave to appear at the Commission's hearings is at Appendix F.

## Legal assistance

Current and former police officers who gave evidence at the Commission's hearings were either represented by the lawyers acting for Victoria Police or had their own separate legal representation.

Other people affected by the Commission's inquiry sought legal assistance. In October 2019, the State entered into a Memorandum of Understanding with Victoria Legal Aid to provide legal assistance to people who had been:

- issued with a notice to attend the Commission's hearings
- issued with a request for information by the Commission requiring them to prepare a written witness statement
- granted leave to appear at the Commission's hearings.<sup>27</sup>

The Commission referred a small number of people to Victoria Legal Aid to obtain legal representation.

## Non-publication orders and exclusion orders

The Commission endeavoured to conduct its inquiry as openly as possible. At times, however, it was necessary for legal, privacy or safety reasons to restrict access to some evidence given at its hearings.

Under the Inquiries Act, the Commissioner had the power to:

- prohibit or restrict the publication of any information that may identify a person who is a witness, or any information or evidence given to the Commission (known as 'non-publication orders')<sup>28</sup>
- exclude any person from a hearing for reasons including the safety of any person, sensitivity of the proceedings and the possibility of prejudicing any other legal proceeding (known as 'exclusion orders').<sup>29</sup>

In total, the Commission made 293 non-publication orders requiring people to be referred to by pseudonyms or restricting the publication of information.

The Commission also made 78 exclusion orders limiting the public, and on limited occasions the media, access to parts of the proceedings. It did so only where this was clearly required for security and/or safety reasons.

The Commission developed an accreditation system to permit members of the media, as appropriate representatives of the public interest, to attend many proceedings that were closed to the public. This allowed the media to report on matters arising from those closed hearings, subject to court suppression orders or Commission non-publication orders. In hearings where the content was highly sensitive, media representatives' lawyers were permitted to stay in the hearing room.

Prior to the publication of this final report, the Commission reviewed its non-publication orders to consider whether they remained necessary and revoked those that were no longer needed.

Future access to documents that are subject to a non-publication order—in particular, documents and materials relevant to persons affected by Victoria Police's use of Ms Gobbo as a human source—is discussed in Chapter 17.

## **Exhibits, transcripts and claims of public interest immunity**

Transcripts of the Commission's hearings and exhibits tendered during each day's proceedings were made available on the Commission's website as soon as practicable.

Many of the documents tendered as exhibits at the Commission's hearings could not be published due to court suppression orders, PII claims or other legal restrictions on their distribution and publication.

A PII claim is a claim by the State to withhold information from legal proceedings or inquiries, if production of that information would be contrary to the public interest.<sup>30</sup> These claims are generally made by police. A PII claim on information relating to the identity of human sources is generally based on the need to protect the safety of human sources. Information that might reveal covert police methodology also generally attracts a PII claim, because of the need to mention the confidentiality of techniques that police use to detect and solve crimes.

On 5 June 2019, a protocol was agreed between the Commission, the State of Victoria and Victoria Police regarding the management and publication of documents relevant to a PII claim in the belief that this would speed up the process and avoid the costs and delays of contesting the claims in court.<sup>31</sup>

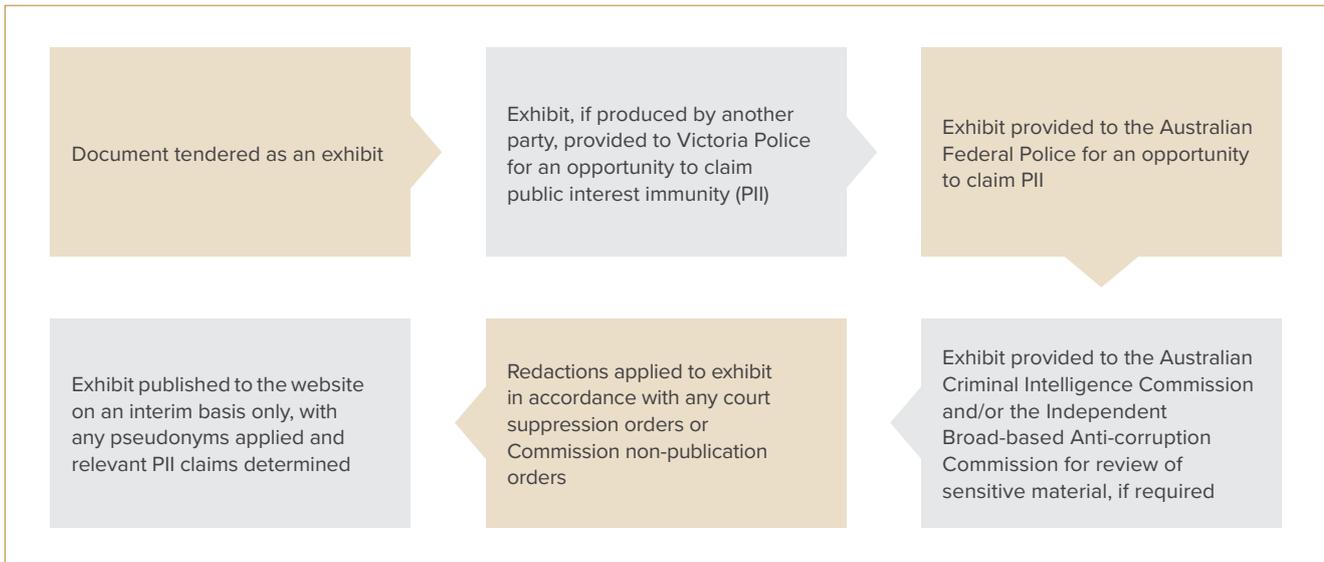
This protocol sought to enable Victoria Police to review exhibits (including witness statements) and transcripts and to redact content that was subject to a PII claim prior to the documents being posted to the Commission's website. For several reasons, the protocol could not be implemented fully. This is discussed further in Chapter 16.

The Commission also provided the AFP with exhibits and transcripts, and an opportunity to make PII claims. Where necessary, the ACIC and IBAC were also provided with documents for their review.

Prior to publication on the website, the Commission considered the requested redactions to exhibits and transcripts and resolved any PII claims. It also reviewed the exhibits and transcripts against any court suppression orders and against the Commission's own non-publication orders. The PII claims were then applied on an interim basis before publication to the website.

In total, 1,957 exhibits were tendered by the Commission. Of those, 125 exhibits were treated as confidential exhibits for safety and/or security reasons and were not able to be published.

The process the Commission adopted for the review and publication of exhibits is displayed in Figure 3.4. Transcripts were also reviewed in a similar way.

**Figure 3.4: Process for review and publication of exhibits tendered at the Commission's hearings**

This extensive review process at times caused delays in the publication of exhibits and transcripts to the Commission's website. This is discussed further in Chapter 16.

## Research

The Commission's inquiry into terms of reference 3–6 was informed by an in-depth research program that included:

- undertaking literature reviews and desktop research
- assessing policies and procedures provided by a range of law enforcement and other agencies
- consulting with organisations and experts with relevant knowledge and experience
- conducting focus groups with serving Victoria Police officers who hold human source management responsibilities
- auditing Victoria Police human source files relating to human sources with potential legal obligations of confidentiality or privilege
- preparing a consultation paper on disclosure practices relating to the use of human source information in the criminal justice system.

Some of these activities are discussed in more detail below.

## Engagement with stakeholder organisations and experts

The Commission conducted extensive stakeholder consultation to inform its inquiries into terms of reference 3–6.

Between March 2019 and June 2020, the Commission consulted with 97 Victorian, interstate and international stakeholders and experts, including:

- law enforcement, intelligence and justice agencies
- prosecuting authorities
- bar associations, law societies and legal profession bodies and regulators
- police oversight, integrity and anti-corruption agencies
- academics and research institutes.

The number of stakeholders consulted by the Commission is displayed in Figure 3.5.

**Figure 3.5: Australian and international stakeholders consulted by the Commission**



The expertise of individuals and organisations consulted by the Commission gave it a detailed understanding of relevant legislation, policies, processes and frameworks in other jurisdictions. The consultations helped the Commission understand the practical operation of:

- current policies and frameworks related to human source management
- police disclosure obligations
- legal profession regulation
- other matters related to the terms of reference.

The experiences and insights of these stakeholders also enabled the Commission to develop evidence-based and practical recommendations for reform in these areas. The Commission thanks them for sharing their expertise.

A list of individuals and organisations consulted by the Commission is at Appendix G.

### Focus groups with current Victoria Police officers

To obtain a comprehensive understanding of the adequacy and effectiveness of Victoria Police's current human source management processes, the Commission considered it necessary to obtain the views and experiences of the Victoria Police officers who currently apply those processes.

Between December 2019 and February 2020, the Commission hosted six focus groups with 39 serving Victoria Police officers involved in human source management.

The objectives of the focus groups were to:

- gather information about how Victoria Police officers understand and apply human source policies and practices
- give officers an opportunity to reflect on the challenges and complexities arising from their use and management of human sources, and to contribute to the Commission's inquiry and any potential improvements in policies, training, support and guidance material
- gain an understanding of Victoria Police's broader operating environment and the likely practical consequences of any changes to its human source management framework.

In conducting the focus groups, the Commission was conscious of the sensitivity of information being discussed and of the need to protect the identities of human sources, the identities of officers who handle human sources and the integrity of confidential police methods.

The Commission also wanted to ensure that officers felt they were able to participate openly and honestly in the focus groups, without any concerns that their comments would be attributed to them in this final report or otherwise obtained by Victoria Police Executive Command. To manage these risks and concerns, all information collected from participants was de-identified.

The focus groups gave the Commission important insights into the practical operation of Victoria Police's human source management framework and the processes that apply specifically to human sources who may be subject to legal obligations of confidentiality or privilege. The focus groups also enabled the Commission to test the operational feasibility of policy, procedural and structural reforms that might strengthen Victoria Police's human source management practices.

The Commission is grateful to the Victoria Police officers who volunteered their time to participate in and support this project, and to Victoria Police Executive Command and Taskforce Landow for encouraging the initiative.

The outcomes of the focus groups are discussed further in Chapters 10, 11 and 12.

## **Audit and review of human source files**

In late 2019, the Commission commenced an audit of 31 Victoria Police files relating to human sources with potential legal obligations of confidentiality or privilege, to assist the Commission's work on terms of reference 3 and 5a.

The purpose of the Commission's audit was to:

- inform the Commission's assessment of the adequacy and effectiveness of Victoria Police's current human source management policies and practices, and its compliance with the Kellam Report recommendations
- identify any issues arising from Victoria Police's use of other human sources with legal obligations of confidentiality or privilege.

The 31 human source files related to three professional categories: government, journalist and medical. Lawyers and occupations associated with the legal profession were excluded from the audit, as the relevant files had been separately disclosed to the Commission, as discussed below.

The scope and outcomes of the audit are discussed further in Chapters 10, 11 and 12.

### **Review of human source files associated with the legal profession**

During the inquiry, Victoria Police identified 12 human source files relating to people associated with the legal profession, other than Ms Gobbo.

Hard-copy redacted records were provided to the Commission for review. In some cases, issues relating to these human sources or prospective human sources were examined in private hearings.

The Commission's review of the 12 human source files and its observations are discussed further in Chapter 10.

## **Consultation paper on disclosure practices**

In November 2019, the Commission released a consultation paper seeking views from key stakeholders on:

- the current use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege
- Victoria Police's practices for disclosing the use of such human sources to prosecuting authorities.

The consultation paper related to the Commission's work on term of reference 4.<sup>32</sup>

The paper asked stakeholders to comment on the adequacy of current processes in Victoria and whether there is a need for reform, including in relation to:

- the framework, policies and practices governing disclosure of relevant material by Victoria Police to the prosecution and the accused person
- the framework, policies and practices for resolving PII claims
- whether Victoria Police should be required to disclose human source material to the prosecution
- how well Victoria Police understands issues relating to legal professional privilege, PII and disclosure.

The consultation paper was circulated to a range of key Victorian agencies that the Commission considered would have an interest in, and understanding and experience of, these issues. The Commission received submissions in response from Victoria Police, the DPP, CDPP, Victoria Legal Aid, the Law Institute of Victoria and the Criminal Bar Association.

These responses are discussed in Chapter 14.

## Counsel Assisting the Commission

The role of Counsel Assisting the Commission was to:

- identify and advance lines of inquiry
- identify and determine the order of witnesses and lead the examination of witnesses at the public hearings
- provide advice on discrete areas of law and procedure
- provide submissions, including reply submissions, in relation to terms of reference 1 and 2 (discussed below).

Counsel Assisting did not have a role in drafting this final report or in the formulation of the Commissioner's findings or recommendations.

Following the conclusion of the Commission's hearings, Counsel Assisting continued their inquiries and then prepared written submissions to the Commission on the legal principles underpinning their analysis, a narrative account of the relevant events that had occurred, the cases that may have been affected, and the findings they considered were open to the Commissioner to make in relation to terms of reference 1 and 2.

The submissions of Counsel Assisting were independent of the Commission and did not represent the concluded views of the Commissioner. In preparing this final report, the Commissioner considered the submissions of Counsel Assisting, the responsive submissions of those affected by the inquiry, and other evidence before the Commission.<sup>33</sup>

Counsel Assisting submissions and responsive submissions are discussed below.

## ADVERSE FINDINGS PROCESS

As discussed above, the Inquiries Act enabled the Commission to conduct its inquiry in the manner it considered appropriate, subject to the Commission's powers under the Act, its Letters Patent and the requirements of procedural fairness.<sup>34</sup> The Act also prescribes how procedural fairness is to be afforded when a royal commission proposes to make an adverse finding.

The Inquiries Act requires that when a royal commission proposes to make a finding that is adverse to a person, it has to be satisfied that the person:

- was aware of the matters on which the proposed finding was based
- had an opportunity, at any time during the inquiry, to respond to those matters.<sup>35</sup>

The Inquiries Act requires a royal commission to consider a person's response, if any; and, if an adverse finding is then made, to fairly set out their response in its report.<sup>36</sup>

In June 2020, the Commission commenced a formal adverse findings process, as detailed below.

## Adverse findings: terms of reference 1 and 2

The Commission's findings and recommendations in this final report relating to terms of reference 1 and 2—that is, cases potentially affected by the use of Ms Gobbo as a human source and the conduct of Victoria Police officers in using Ms Gobbo as a human source—were informed by:

- information produced under a notice or provided voluntarily to the Commission
- public submissions
- evidence examined at the Commission's hearings
- submissions received from Counsel Assisting
- submissions received from affected persons and organisations in response to Counsel Assisting submissions.

### Counsel Assisting submissions

On 26 June 2020, Counsel Assisting produced written submissions to the Commission to consider in relation to terms of reference 1 and 2.<sup>37</sup> Those submissions set out:

- the guiding legal principles and methods that informed their inquiries and analysis
- a narrative account of the conduct of current and former Victoria Police officers and Ms Gobbo
- the findings they considered were open to the Commissioner to make
- the cases they considered may have been affected by the use of Ms Gobbo as a human source based on the evidence available to the Commission.

In their submissions, Counsel Assisting detailed their examination of 124 cases that may have been affected by the use of Ms Gobbo as a human source.<sup>38</sup>

In September 2020, Counsel Assisting produced reply submissions to address some key issues raised in responsive submissions, discussed below.<sup>39</sup>

### Responsive submissions

The Commission provided certain people and organisations with copies of, or extracts from, Counsel Assisting submissions and invited them to make a submission to the Commission in response (known as a 'responsive submission').

Copies of Counsel Assisting submissions could not be distributed until the Commission's application to vary court suppression orders was resolved. The suppression order proceedings are discussed below.

In late June 2020, Counsel Assisting submissions were circulated to Victoria Police, a number of former and current police officers, Ms Gobbo, the State of Victoria, DPP, CDPP, Office of the Chief Examiner, AFP and ACIC, so that they could prepare responsive submissions and make any PII or other non-publication claims.

From July 2020, Counsel Assisting submissions, with any PII and other non-publication claims redacted, were circulated to other people who may have been adversely or otherwise sufficiently affected by Counsel Assisting's proposed findings, to prepare responsive submissions. Copies of the submissions were provided to:

- people whose cases were the subject of specific examination in Counsel Assisting submissions
- other people who may have been adversely affected by Counsel Assisting's proposed findings.<sup>40</sup>

All those who received a copy of Counsel Assisting submissions were provided with a reasonable opportunity to make a responsive submission. Where possible, and subject to its reporting timeframes, the Commission gave people additional time to respond, and accepted late submissions.

After publication of Counsel Assisting submissions and responsive submissions to the website, members of the public who considered that they may be adversely affected by proposed findings contended by Counsel Assisting or by responsive submissions were provided with seven days to make a submission to the Commission. Additionally, people and organisations who had already made a responsive submission were provided with the opportunity to make further submissions in response to submissions made by other parties.

Further detail on how the Commission met its procedural fairness obligations relating to terms of reference 1 and 2 is provided in Chapter 5.

The Commission received 45 responsive submissions from organisations and other affected persons.

The Commission carefully considered all responsive submissions and has fairly set out any relevant responses where it has made an adverse finding or comment in this final report.<sup>41</sup>

A list of responsive submissions received by the Commission is at Appendix D.

## Publication of submissions

Redacted copies of Counsel Assisting submissions and responsive submissions were published to the Commission's website in September 2020.

Prior to publication, those submissions were also reviewed by Victoria Police, the AFP and ACIC so that any PII claims and other non-publication claims could be made by those agencies.

Several people who received a copy of Counsel Assisting submissions—in particular, those whose cases may have been affected by the use of Ms Gobbo as human source—also approached the Commission to apply to:

- have their case study redacted from Counsel Assisting submissions prior to publication of those submissions to the Commission's website
- be assigned a pseudonym to protect their identity.<sup>42</sup>

The Commission redacted extracts from a number of case studies from Counsel Assisting submissions on PII, legal, reputational and/or safety grounds, and made non-publication orders to assign pseudonyms to people named in those submissions.

A decision not to assign a pseudonym to a current Victoria Police officer was challenged in court. This is discussed further below.

Following a decision of the Commissioner, content was also redacted from Counsel Assisting submissions relating to their contention that it was open to the Commissioner to find that various named current and former Victoria Police officers and Ms Gobbo may have committed criminal offences.

On 28 August 2020, at the request of Victoria Police, certain current and former Victoria Police officers and Ms Gobbo, the Commissioner published her reasons for that decision and her reasons supporting the Commission's jurisdiction to make findings of statutory misconduct.<sup>43</sup>

The Commission, under its Letters Patent, was required to conduct its inquiry in a manner that would not prejudice any ongoing investigations or court proceedings. The Commission has no judicial power. Whether criminal charges should be brought against an individual is a matter for the DPP, not the Commission. If charges are brought, those persons charged are presumed to be innocent and the charges must be determined in a court on the criminal standard of proof, which requires proof beyond reasonable doubt. This is discussed in Chapter 5.

## Adverse findings: terms of reference 3–6

Terms of reference 3–6 did not require the Commission to consider the conduct of Victoria Police or Ms Gobbo. These terms of reference related to:

- Victoria Police's current processes for using and managing human sources with legal obligations of confidentiality or privilege
- Victoria Police's current processes for using and disclosing in criminal proceedings information provided by such human sources
- recommended measures to address Victoria Police's use of any other human sources with legal obligations of confidentiality or privilege who came to the Commission's attention; or any systemic or other failures in Victoria Police's processes for its disclosures about, and recruitment, handling and management of, human sources with legal obligations of confidentiality or privilege
- any other matters necessary to satisfactorily resolve the matters set out in terms of reference 1–5.

In September 2020, the Commission provided Victoria Police, the DPP, Office of Public Prosecutions (OPP) and TPA with relevant extracts from the Commission's draft final report relating to terms of reference 3–6 and invited them to make responsive submissions. The Commission carefully considered the responsive submissions received before making any adverse comments and, where relevant and necessary, fairly set out these responses in this final report.

A list of responsive submissions received by the Commission is at Appendix D.

## THE COMMISSION'S REPORTING

On 1 July 2019, the Commission delivered a progress report to the Governor of Victoria. That report outlined the key events that led to the establishment of the Commission and its work as at 19 June 2019, including its interpretation of and approach to the terms of reference. The progress report did not include any findings or recommendations—these are included in this final report.

In this final report, the Commission reached conclusions regarding the number of potentially affected cases, the conduct of Victoria Police and its officers, and the conduct of Ms Gobbo.

The Commissioner did not have the power to make any findings of fact or law binding outside this Commission. In effect, the Commission's findings and recommendations in this final report are advisory in nature and hold no legal force or effect. The Commission nevertheless notes the statement of the Premier of Victoria,

The Hon Daniel Andrews, MP, to Parliament at the commencement of this inquiry that his Government intends to implement all of the Commission's recommendations.<sup>44</sup>

A list of the Commission's recommendations can be found in the Final Report Summary.

## Preparation of a public report

For the Commission to produce a public report, it had to:

- overcome restrictions imposed by existing court suppression orders
- navigate issues regarding the highly sensitive subject matter of the inquiry and issues regarding the safety of persons named in this final report.

It was also important that the Commission's reporting did not delay the disclosure of information to those people whose cases were potentially affected by the use of Ms Gobbo as a human source.

The steps taken by the Commission to navigate those issues are discussed below.

## Suppression order proceedings

During the course of its work, the Commission identified a significant number of court suppression orders that presented challenges for its inquiries.

In 2019, the Commission made three applications to the courts to vary suppression orders so that it could access protected information and facilitate witnesses to provide evidence at the Commission's hearings.<sup>45</sup>

On 1 May 2020, the Commission made an application to vary a further 52 suppression orders made in the Magistrates' Court, County Court and Supreme Court of Victoria. The Commission requested that the orders be varied to provide that nothing in them would prevent people from disclosing information to the Commission, or prevent the Commission itself from disclosing information, that would otherwise be prohibited by the orders.<sup>46</sup>

That application was filed in the Court of Appeal to overcome challenges the Commission faced in its reporting, in particular:

- the likelihood that Counsel Assisting submissions and responsive submissions would contain information that was the subject of suppression orders and that its disclosure could place the Commission and responding parties in breach of those orders
- the likelihood that the submissions and this final report would contain information that was the subject of suppression orders and the publication of those documents to the Commission's website would contravene one or more of those orders.<sup>47</sup>

There were 63 respondents to the Commission's application, 55 of whom were individuals either the subject of one or more of the suppression orders, or a party to the proceedings in which the suppression orders were made. Other parties to the proceedings included Victoria Police, the DPP, CDPP, AFP and State of Victoria. Five of the 63 respondents opposed the Commission's application.<sup>48</sup>

On 23 June 2020, the Court of Appeal granted the Commissioner's application to vary the suppression orders. The variation enabled the Commissioner to be able to determine for herself whether any orders in accordance with the Inquiries Act and *Witness Protection Act 1991* (Vic) were necessary, taking into account matters including any potential resulting risks, whether to the personal safety of affected individuals or to the administration of justice.<sup>49</sup>

Following the Court of Appeal's decision, the Commissioner made several non-publication orders to protect the safety and reputation of people referred to in Counsel Assisting submissions, responsive submissions and in this final report.

## The use of pseudonyms

At times, the sensitive nature of the information examined during the inquiry required the Commissioner to make orders to restrict the publication of information and protect the identity of people mentioned in Counsel Assisting submissions, responsive submissions and in this final report.

The Inquiries Act enables the Commissioner to make orders to protect the identity of a person in circumstances including where a person may be caused prejudice or hardship, including harm to their safety or reputation; there is a possibility of prejudice to other legal proceedings; or the Commissioner otherwise considers it appropriate.<sup>50</sup>

In this final report, the Commission has used pseudonyms to deidentify some former and current Victoria Police officers, people whose cases may have been affected by the use of Ms Gobbo as a human source, and other people relevant to the inquiry. All requests for pseudonyms were carefully considered by the Commissioner, but not all requests were granted.

In July 2020, a current serving Victoria Police officer applied to the Commission for a non-publication order to apply a pseudonym over their name in Counsel Assisting submissions, any responsive submissions filed by another party, and this final report.<sup>51</sup> That request was refused by the Commissioner as she was not satisfied, based on the material before her, that there was a significant risk to the officer's safety.<sup>52</sup>

The Chief Commissioner of Victoria Police commenced proceedings to review that decision. That application was dismissed by the Court of Appeal. The Court observed that if the order sought by the officer was made, other officers may similarly take advantage to anonymise their identity in the Commission's reports.<sup>53</sup>

The unanimous decision of the Court of Appeal found:

*The anonymisation of the names of alleged wrongdoers would render the recommendations of the Royal Commission far less potent, and would have a severe impact on the rights of those who may have been the victims of Ms Gobbo's conduct, and the complicity of any police in what might be established as having been a conspiracy to pervert the course of justice. Those people who might be shown to be victims of such conduct would be denied procedural fairness. Moreover, the community as a whole would be disadvantaged through a lack of transparency in relation to what might prove to be one of the greatest scandals of our time in relation to the workings of the criminal justice system.*<sup>54</sup>

During the Commission's public hearings and during the preparation of this final report, the Commission made non-publication orders to protect the identity of people. Some people were assigned multiple pseudonyms throughout the inquiry, to ensure that they could not be identified.

## Cases affected by the use of Ms Gobbo as a human source

The Commission was required to identify cases that may have been affected by the use of Ms Gobbo as a human source.

Alongside the Commission's work, Victoria Police, the AFP, DPP and CDPP also sought to identify affected cases to meet their disclosure obligations. Throughout the inquiry, the Commission kept those bodies informed of the cases it had identified and intended to review.

The DPP and CDPP provided key documents to the Commission relevant to each individual whom the Commission identified as potentially affected, including indictments, summary prosecutions, sentencing reasons, court orders and appeal proceedings. The Commission only sought documents for those cases it considered warranted an in-depth review.<sup>55</sup>

Further information was also sought from Victoria Police, including copies of criminal records relating to potentially affected persons.

During the inquiry, concerns arose regarding the timeliness of Victoria Police's disclosures to affected persons and to the DPP and CDPP. In January 2020, the Commission requested that Victoria Police provide it with weekly reports. Those reports provided the Commission with insight into Victoria Police's processes and methods for disclosing to affected individuals.

In Chapter 17, the Commission makes recommendations regarding the need for disclosure to be made to those persons identified by the Commission as individuals whose cases may have been affected. In Chapter 9, the Commission recommends that Victoria Police regularly reports on its disclosure to affected persons.

# Endnotes

- 1 *Inquiries Act 2014* (Vic) s 12.
- 2 *Inquiries Act 2014* (Vic) ss 17, 24, 28.
- 3 See *Criminal Procedure Act 2009* (Vic) ss 276(1), 277. There are several circumstances in which a court may determine that there has been a substantial miscarriage of justice: see *Baini v The Queen* (2012) 246 CLR 469, 479 [25]–[26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). A second or subsequent appeal against a conviction can also be made, with leave of the court. A court may grant leave to appeal if it is satisfied that there is ‘fresh and compelling evidence that should, in the interests of justice, be considered on appeal’: *Criminal Procedure Act 2009* (Vic) s 326C(1); see further ss 326A–326E.
- 4 *Criminal Procedure Act 2009* (Vic) s 327(1)(b).
- 5 *Inquiries Act 2014* (Vic) ss 17, 18.
- 6 *Inquiries Act 2014* (Vic) s 123(1).
- 7 *Inquiries Act 2014* (Vic) s 12; *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).
- 8 *Kioa v West* (1985) 159 CLR 550, 584 (Mason J); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 577 (Mason CJ, Dawson, Toohey and Gaudron JJ).
- 9 See *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) FLR 576; *Lawrie v Lawler* (2016) 168 NTR 1.
- 10 *Inquiries Act 2014* (Vic) s 36.
- 11 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 9, 13, 24.
- 12 *Inquiries Act 2014* (Vic) s 17(1)(a).
- 13 *Inquiries Act 2014* (Vic) s 123(1). The Office of Police Integrity is also covered by this section as the predecessor to IBAC: *Independent Broad-Based Anti-corruption Commission Act 2011* (Vic) sch cl 4.
- 14 *Inquiries Act 2014* (Vic) s 123.
- 15 *Inquiries Act 2014* (Vic) s 124.
- 16 Transcript of Opening Statements, 15 February 2019, 10.
- 17 The Commission’s hearings held in May 2020 were conducted remotely due to the COVID-19 pandemic social distancing restrictions.
- 18 This is discussed further in Chapter 6.
- 19 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012); Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015).
- 20 See, eg, Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 2–5 [4]–[5].
- 21 Royal Commission into the Management of Police Informants, *Practice Direction No 1: General Guidelines—Public Hearings*, 4 February 2019; Royal Commission into the Management of Police Informants, *Practice Direction No 2: Legal Representation and Witnesses*, 27 February 2019; Royal Commission into the Management of Police Informants, *Virtual Commission Hearings*, 5 May 2020.
- 22 The *Inquiries Act* enables the Commission to issue a notice to a person requiring them to attend a hearing at a specified time or place: *Inquiries Act 2014* (Vic) s 17(1)(b).
- 23 See *Inquiries Act 2014* (Vic) s 17(1)(a).
- 24 When Ms Gobbo was registered as a human source in 2005, the human source unit within Victoria Police was called the ‘Dedicated Source Unit’. That unit changed its name to the ‘Source Development Unit’ on 29 May 2006: Victoria Police, ‘Dedicated Source Unit Monthly Report’, May 2006, produced by Victoria Police in response to a Commission Notice to Produce.
- 25 The *Inquiries Act* provides that a person who is issued a notice to attend a Commission hearing as a witness is entitled to be paid expenses and allowances in accordance with a prescribed scale: *Inquiries Act 2014* (Vic) s 42; *Inquiries Regulations 2015* (Vic) regs 4–10.
- 26 *Inquiries Act 2014* (Vic) s 15.
- 27 Applications for legal assistance were assessed under Victoria Legal Aid’s Public Interest and Strategic Litigation Guidelines.
- 28 *Inquiries Act 2014* (Vic) s 26.
- 29 *Inquiries Act 2014* (Vic) s 24.
- 30 See *Sankey v Whitlam* (1978) 142 CLR 1; *Evidence Act 2008* (Vic) s 130.

- 31 A copy of the protocol was published to the Commission's website: Royal Commission into the Management of Police Informants, *Protocol: In relation to claims of public interest immunity over documents required to be produced to the Royal Commission into the Management of Police Informants* (5 June 2019).
- 32 A copy of the consultation paper was published to the Commission's website: Royal Commission into the Management of Police Informants, *Consultation Paper: The current use of specified human source information in the criminal justice system* (November 2019).
- 33 The Commission considered all responsive submissions, including submissions made in response to Counsel Assisting reply submissions.
- 34 *Inquiries Act 2014* (Vic) s 12.
- 35 *Inquiries Act 2014* (Vic) s 36.
- 36 *Inquiries Act 2014* (Vic) ss 36(2)–(3).
- 37 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020).
- 38 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020), vol 3.
- 39 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020).
- 40 Persons 'sufficiently affected' by Counsel Assisting submissions were convicted persons who were the subject of a case study in Volume 3 of the submissions. Counsel Assisting also identified that other persons' cases may have been affected by the conduct of Ms Gobbo as a human source. Those persons' cases, however, were not the subject of specific examination and comment by Counsel Assisting, and it was not considered that such persons' interests were sufficiently affected so as to trigger an obligation to afford procedural fairness: see Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020), vol 1, 7 [21]–[22], 14 [65].
- 41 The term 'responsive submissions' includes submissions made by individuals and organisations, including Victoria Police and Mr Simon Overland, that were made in response to Counsel Assisting reply submissions.
- 42 Pseudonyms were applied to submissions where court orders required it or where the Commissioner determined it was appropriate based upon requests for reputational, privacy or safety reasons.
- 43 Royal Commission into the Management of Police Informants, *Commissioner's reasons for decision that the royal commission has jurisdiction to make findings of statutory misconduct by named current or former police officers* (28 August 2020).
- 44 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 10 (Daniel Andrews, Premier).
- 45 See, eg, *Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154 (Whelan, Beach and Weinberg JJA).
- 46 *Chairperson of the Royal Commission into the Management of Police Informants v DPP* [2020] VSCA 184, [2] (Beach, McLeish and Weinberg JJA). Initially, the Commission sought to vary 57 suppression orders, but the application with respect to five of those orders was later abandoned.
- 47 *Chairperson of the Royal Commission into the Management of Police Informants v DPP* [2020] VSCA 184, [6] (Beach, McLeish and Weinberg JJA).
- 48 *Chairperson of the Royal Commission into the Management of Police Informants v DPP* [2020] VSCA 184, [9] (Beach, McLeish and Weinberg JJA).
- 49 *Chairperson of the Royal Commission into the Management of Police Informants v DPP* [2020] VSCA 184, [63], [79] (Beach, McLeish and Weinberg JJA); *Inquiries Act 2014* (Vic) s 26; *Witness Protection Act 1991* (Vic) s 10A.
- 50 *Inquiries Act 2014* (Vic) s 26(2).
- 51 *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants* [2020] VSCA 214, [3]–[4] (Beach, McLeish and Weinberg JJA).
- 52 *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants* [2020] VSCA 214, [5] (Beach, McLeish and Weinberg JJA).
- 53 See *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants* [2020] VSCA 214, [56] (Beach, McLeish and Weinberg JJA).
- 54 *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants* [2020] VSCA 214, [57] (Beach, McLeish and Weinberg JJA).
- 55 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 118.

# 4

## Legal obligations of confidentiality or privilege

### INTRODUCTION

Central to the Commission's inquiry was determining: (a) whether it was appropriate for Victoria Police to seek, acquire and use information from a human source who was legally obliged to keep that information confidential; and (b) the appropriateness of a lawyer, Ms Nicola Gobbo, divulging to Victoria Police information that her clients had entrusted to her. The Commission's analysis and conclusions about these matters are contained in Volume II of this final report.

In addition to identifying and reporting on the consequences of these events, the Commission was required to examine Victoria Police's current processes for using and managing human sources with legal obligations of confidentiality or privilege, and for using information acquired from such sources.

Before examining the adequacy and effectiveness of these processes, the Commission had to define and examine the term 'legal obligations of confidentiality or privilege', and consider the implications of using human sources who may be subject to these obligations.

Legal obligations of confidentiality or privilege are duties imposed on people entrusted with confidential or privileged information to keep it confidential and not disclose or disseminate (distribute) it. These duties exist primarily to protect communications in certain professional relationships (such as lawyer–client and doctor–patient relationships), but also to protect sensitive or secret information entrusted to individuals in their work (for example, government officials and employees).

Obligations of confidentiality or privilege arise from diverse legal sources, including legislation, contract, common law and equitable principles, and codes of conduct. The law not only imposes obligations of confidentiality and privilege; it also defines and regulates exceptions to these obligations. That is, it prescribes how and when confidential or privileged information may be lawfully disclosed. As explained in this chapter, such disclosure may happen if there is a competing interest that justifies it.

It is important to understand the difference between confidential and privileged information, and the corresponding obligations not to disclose or disseminate this information. Privileged information is confidential information that attracts a higher level of protection. So, while a court can order disclosure of *confidential* information in legal proceedings, it cannot order disclosure of *privileged* information unless an exception applies. Privilege only applies to certain information shared in some circumstances with lawyers, doctors, counsellors, journalists and religious clerics.

It is also important to focus not just on *who*—because of their profession or occupation—is subject to legal obligations, but on the *nature of the information* being provided. That is, when considering the implications of using a human source, it is important to determine whether the specific information that they provide is confidential or privileged, rather than simply looking at the source's occupation.

Confidentiality and privilege limit the scope of information available to law enforcement agencies and prosecuting authorities when building and presenting a case against a person. While it might be advantageous for police to have ready access to information that supports their investigations of criminal activity, other important and competing interests need to be considered. Permitting police to 'override' confidentiality protections enshrined in law raises several concerns. It risks:

- interfering with a person's right to and expectations of privacy
- undermining the public interest in professional relationships built on trust
- damaging the reputation and integrity of the profession and professionals involved.

Critically, it may also jeopardise investigations and prosecutions, if the access to and/or use of the information is later found to be illegal or improper.

Some stakeholders consulted by the Commission, particularly law enforcement agencies, considered that there are circumstances where it may be appropriate for police to use a human source with legal obligations of confidentiality or privilege; for example, to provide information unconnected to their legal obligations. Stakeholders even considered there might be very limited circumstances where police might appropriately recruit a human source with the specific intention of obtaining confidential or privileged information; for example, to prevent serious harm to a person or the community.

Other stakeholders were wholly opposed to police use of human sources with legal obligations of confidentiality or privilege, arguing that the risks are too significant and not realistically able to be managed. In particular, some legal profession associations and regulatory bodies submitted that lawyers' duties and obligations are inherently incompatible with using them as human sources.

Having considered the evidence, the Commission's view is that it is rarely appropriate for police to seek confidential or privileged information from a human source. The only circumstances where it might be appropriate for police to use a human source for this purpose would be when there are exceptional and compelling reasons for doing so, such as a need to respond to a significant threat to community safety. Any proposed use of a human source to obtain confidential or privileged information in these circumstances would still need to be subject to significant safeguards, including independent oversight by an agency external to Victoria Police.

The Commission acknowledges that there are some circumstances in which the use of human sources subject to legal obligations of confidentiality or privilege might pose fewer risks—if, for example, the information being provided is unrelated to the person’s occupation and professional duties, or an exception to the duty of privilege or confidentiality applies. Such scenarios involve complex legal questions, however; and resolving them will often depend on a detailed assessment of the particular case. Consequently, the Commission considers that when deciding whether to use any human source who is reasonably expected to provide confidential or privileged information, this decision must involve rigorous risk assessment and legal advice. The use of such a source should also be referred to senior police decision makers for authorisation.

## CURRENT CONTEXT AND LAW

Terms of reference 3–6 required the Commission to focus on Victoria Police’s use of human sources subject to legal obligations of confidentiality or privilege.

Before examining the adequacy and effectiveness of current processes relating to the use and management of such human sources, the Commission had to:

- define and examine legal obligations of confidentiality and the circumstances in which they arise
- define and examine legal obligations of privilege and the circumstances in which they arise
- identify the risks associated with police accessing and using confidential or privileged information
- consider how police currently manage any risks associated with the use of such human source information.

These matters are discussed in turn below.

### Legal obligations of confidentiality

Obligations of confidentiality are duties imposed on people entrusted with confidential information not to disclose or disseminate that information.

Broadly, legal obligations of confidentiality arise when a person entrusts confidential information to another person:

- for limited use
- in circumstances in which the law imposes an obligation on the person who receives the information to keep it confidential.<sup>1</sup>

At its core, confidentiality is about control over information, which empowers the person disclosing the information to ‘influence what others know and ... how they behave’.<sup>2</sup> For this reason, the law also recognises that obligations of confidentiality can extend to people who have received confidential information—even when they receive it from someone other than the person who originally disclosed it.<sup>3</sup>

While those subject to legal obligations of confidentiality must not disclose that information to any other party, a court is able to ‘override’ the confidentiality and order them to reveal or disclose the information in the context of legal proceedings.<sup>4</sup>

A failure to comply with confidentiality obligations may expose a person providing professional services (referred to in this chapter as the ‘professional’) to legal or disciplinary action. The person to whom the professional owes the obligation (referred to in this chapter as the ‘client’) may take legal action against a professional who breaches their confidentiality.<sup>5</sup> They could seek an award of damages to compensate

them for the effects of the unlawful disclosure, or, in the case of a threatened disclosure, an injunction to prevent the breach. The client may also report the professional to the appropriate regulatory body. Disciplinary proceedings may follow, and these may result in the professional's licence to practise being restricted or revoked.

## People subject to obligations of confidentiality

People may have legal obligations of confidentiality in a broad range of circumstances, including:

- in the context of service-based professional relationships (such as between lawyers and their clients, and doctors and their patients)
- where a person is entrusted with knowledge of or access to information designated as sensitive or secret (such as government officials and those with responsibility for handling individuals' private information)
- under commercial and employment contracts
- a combination of the above.

The Commission has focused primarily on legal obligations of confidentiality arising from professional relationships, and, by extension, confidential information derived from those relationships. This is because the law affords particular status to information divulged in these contexts, which is in turn a reflection of broader social interests.<sup>6</sup> As discussed further below, legal protection of confidential information supports the operation of important public and social institutions, such as the administration of justice and medical and health services.

Communications that arise in some professional relationships are legally confidential.<sup>7</sup> There is no legally recognised definition of 'professional' or 'profession' that determines whether the law protects the confidentiality of the relationship between the professional and their client.<sup>8</sup> Professional status tends to be given to certain occupations based on factors such as training and skill, power imbalances and the likelihood of confidential communications being made.<sup>9</sup>

The lawyer–client and the health practitioner–patient relationships (the latter most commonly illustrated by the doctor–patient relationship) are the most familiar examples. Other examples of professional relationships where obligations of confidentiality may arise include journalist–source, clergy–penitent, accountant–client and banker–customer.<sup>10</sup>

In addition to confidentiality obligations arising out of professional relationships, people in certain roles may also be subject to legal obligations to keep the information they acquire in the course of their occupation secret. Cabinet ministers, Members of Parliament and government employees are all required to keep certain categories of information that they obtain in the course of their public duties confidential.<sup>11</sup> Legislated protection of sensitive and secret information is similarly important for a range of other public policy objectives, including to facilitate the work of government and its agencies.

## The basis for obligations of confidentiality in professional relationships

In professional relationships, legal obligations of confidentiality exist for several reasons. When the relationship involves the giving of professional advice, confidentiality obligations encourage frank and open communication, and foster trust and loyalty.<sup>12</sup> The underlying assumption is that the professional will be best able to assist the client if the client discloses information fully and freely.<sup>13</sup> In other circumstances, such as in the financial sector, confidentiality obligations are considered to promote public confidence in the banking system and capital markets.<sup>14</sup>

Obliging a professional to maintain confidentiality is not only in the individual client's interest, but also in the public interest.<sup>15</sup> For example, a client's trust in their lawyer is in the interests of the administration of justice, and a patient's trust in their doctor is in the interests of maintaining public health.<sup>16</sup> The obligations enhance public confidence

in the standards and integrity of the legal, health and other systems, and help to ensure that citizens feel confident to use these services.<sup>17</sup>

## Legal obligations to maintain confidentiality

Generally, legal obligations to maintain confidentiality come from three main sources: contract, equity and legislation.<sup>18</sup> Obligations may also arise through professional codes of ethics prescribed by governing bodies.

### Contract

A contract can create an obligation to maintain confidentiality. The terms of a contract can be express or implied, so an obligation of confidentiality may exist either expressly or by implication.<sup>19</sup> An example of an express contractual obligation is a professional service provider, such as a lawyer or an accountant, signing a contract specifying that the service provider will keep the client's affairs confidential and will not disclose them unless this is justified. In those circumstances, such an express contractual term is designed to reflect a mutually agreed position as to what can and cannot be done with the information.<sup>20</sup>

Even if a contract does not include an express term requiring a service provider to keep the client's information confidential, the law may still recognise an obligation of confidentiality implied in the agreement.<sup>21</sup> A contractual obligation of confidentiality is often implied as a matter of law in a professional–client relationship (for example, between lawyers and clients, and doctors and patients), and sometimes also embedded in professional rules.<sup>22</sup>

### Equity

Equity is a branch of law that gives courts flexibility to rectify injustices even if a remedy is not available under other areas of law, such as contract or tort. While a contract may not exist in every confidential professional relationship or circumstance in which confidential information is shared, the equitable doctrine of confidentiality (or confidence) may be relied on to protect the disclosure of sensitive information intended to be kept confidential. If information is communicated in circumstances of confidence<sup>23</sup>—even if there is no contractual or legislated obligation of confidentiality—equity empowers the court to make orders to restrain the release of confidential information or to give a remedy for a breach of confidentiality.<sup>24</sup>

For example, there is usually a contract between a patient and their doctor when the patient attends a doctor's surgery or clinic.<sup>25</sup> In some circumstances, such as in a public hospital, there may not be a contract between the doctor and patient, but with or without a contract, a doctor would have an equitable duty of confidentiality to protect the patient's health information.<sup>26</sup>

### Legislation

Legislation may establish legal obligations of confidentiality and impose penalties for unlawfully obtaining or disclosing certain categories of information. For example, the *Health Records Act 2001* (Vic) and *Privacy and Data Protection Act 2014* (Vic) regulate the handling by public and private sector organisations of a person's health and personal information.

In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) protects a person's rights not to have unlawful or arbitrary interference with their privacy, family, home or correspondence.<sup>27</sup> The Charter requires public officials and authorities to act in a way that is compatible with these rights.<sup>28</sup> This imposes obligations on government employees to comply with confidentiality requirements.

## Codes of ethics

In professions where there is a special commitment to ethical conduct, codes of ethics or professional rules may mandate an obligation of confidentiality to a client. Breach of professional ethics may result in disciplinary proceedings. Professional ethics may also assist the courts in determining the scope of the legal obligation of confidentiality in cases concerning a breach. Professional codes of ethics typically reflect or are underpinned by obligations owed by the professional at law.

Professional codes of ethics are usually made by an industry's governing regulatory board or peak body.<sup>29</sup> They may also be enacted as subordinate legislation,<sup>30</sup> or given particular weight under an Act. Lawyers' obligations to maintain their clients' confidentiality are set out in the legal profession's conduct rules.<sup>31</sup>

## Exceptions to obligations of confidentiality

The law does not give a client a 'cast-iron guarantee of confidentiality'.<sup>32</sup> A professional may disclose confidential information; for instance, where an exception in the public interest arises, or where they have a duty to disclose the information because of legislation or a court order. As Lord Diplock stated in *Parry-Jones v Law Society*:

*Such a duty of confidence is subject to, and overridden by, the duty of any party to that contract to comply with the law of the land. If it is the duty of such a party to a contract, whether at common law or under statute, to disclose in defined circumstances confidential information, then he must do so, and any express contract to the contrary would be illegal and void. For example, in the case of banker and customer, the duty of confidence is subject to the overriding duty of the banker at common law to disclose and answer questions as to his customer's affairs when he is asked to give evidence on them in the witness box in a court of law.*<sup>33</sup>

Professionals can rely on exceptions to legal obligations of confidentiality to defend allegations that they have breached those obligations.

The main exceptions to an obligation of confidentiality are:

- waiver by the person to whom the obligation is owed through express or implied consent (when a person waives confidentiality, they give up their right to insist that it be maintained)
- where the professional collaborates with colleagues to fulfil the expected service to the client
- disclosure of de-identified information (for example, to support medical research)
- legislation that overrides any obligations of confidentiality and imposes a statutory duty to disclose (for example, mandatory reporting obligations that require people in particular roles to report suspected child physical or sexual abuse to authorities)
- compulsory court processes (for example, where a subpoena is issued, or the recipient of the information is called as a witness)
- disclosure in the public interest.<sup>34</sup>

The public interest exception allows the person who has received confidential information to disclose it to a third party, even if the person who provided the information has not consented, and even if there is no specific legislative provision requiring them to do so. This exception generally applies to information relating to unlawful conduct. The exception, also known as the 'iniquity rule', was established in 1856 in the English case of *Gartside v Outram*:

*There is no confidence as to the disclosure of an iniquity. You cannot make me confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist.*<sup>35</sup>

More recently, Australian courts have confirmed that courts will not protect duties of confidentiality when enforcing such duties would obstruct the administration of criminal law.<sup>36</sup>

What constitutes an iniquity is not clearly defined in case law, but it tends to mean information concerning ‘crimes or civil wrongs of a serious nature’.<sup>37</sup> For example:

*... the more serious the nature of the misdeed, the more likely the iniquity defence will succeed. At the other end of the spectrum, breach of a statutory proscription against misleading and deceptive conduct, or proof of actionable negligence, is unlikely to amount to ‘iniquity’ by itself. Nor is behaviour that some, or even many, in society may consider to be immoral, depraved or scandalous, if it is not otherwise illegal.*<sup>38</sup>

As such, the threshold for satisfying the ‘iniquity rule’ is high. When a person becomes aware of serious criminal conduct and believes there is a compelling public interest in providing confidential information to a law enforcement agency, they must ensure that ‘the information is required in the course of the investigation of an actual or reasonably apprehended breach of the criminal law’,<sup>39</sup> and not simply because a crime has been committed and they wish to disclose general information that may be only vaguely related.<sup>40</sup>

The public interest exception may also justify disclosure of confidential information to prevent imminent serious physical harm to the client or another person.<sup>41</sup> In these circumstances, care must be taken about what information to disclose, and to whom, so that the disclosure is only as extensive as is necessary to achieve the purpose of the exception.<sup>42</sup>

When a person raises a claim that the public interest requires the disclosure of otherwise confidential information, the courts have to carefully examine whether the disclosure is in fact warranted by law.<sup>43</sup> This exercise, at least implicitly, requires some assessment of whether the specified public interests are best served by disclosure or non-disclosure.<sup>44</sup>

Due to the many different ways public interest issues can arise, the legal rules about disclosure in the public interest are complex and can be confusing.<sup>45</sup> Despite the guidance case law provides, the courts have refrained from prescribing all the circumstances where a person may or must make a disclosure of confidential information.<sup>46</sup> Instead, the individual professional must decide whether to disclose, and this may be difficult to navigate.

Challenges associated with the exceptions to the duty of confidentiality owed specifically by lawyers are discussed in Chapter 15.

## Legal obligations of privilege

Privileged information can be considered a subset of confidential information. It is confidential information that has additional protections. In essence, the law of privilege allows a person to resist the otherwise compulsory disclosure of information in legal proceedings. If information is privileged, a court cannot order a person to reveal or disclose it. Therefore, its protection from disclosure is stronger than the protection attaching to confidential information generally.

There is a public interest in transparency and uncovering the truth, which facilitates access by courts and parties to any and all information relevant to a matter under consideration in a legal proceeding, even if it is considered confidential in all other contexts.<sup>47</sup> In certain narrow circumstances, however, the law recognises that there may be a competing public interest that outweighs the public interest in courts and parties gaining access to particular information. If that is the case, information will be regarded as ‘privileged’ and protected from disclosure requirements unless an exception applies.

Exceptions to privilege are outlined in more detail below, but generally speaking, privilege will not apply if the client waives the privilege—for example, if they intentionally disclose or consent to disclosure of the information. Nor will the privilege apply if the law permits it to be displaced by other public interest considerations, such as not protecting illegal conduct.

Obligations of privilege, therefore, are duties imposed on people entrusted with certain information to protect it, and not disclose or disseminate that information, including in the context of relevant legal proceedings.

## People subject to obligations of privilege

In Victoria, privilege applies to these people, in certain defined circumstances:

- lawyers
- doctors and counsellors
- journalists
- religious clerics.

Whether an individual member of these professions holds an obligation of privilege will depend on a range of legal and factual questions, including:

- the nature of the information communicated
- the circumstances in which it was communicated
- whether there are any exceptions to the privilege.

## The basis for obligations of privilege

Obligations of privilege exist for the same reasons as obligations of confidentiality, as outlined in each category of privilege below. The additional protection given to privileged information (over and above confidential information) suggests that the law places a particularly high degree of importance on the need to foster open communication in relationships with these categories of professionals.

## Categories of privilege

In Victoria, there are four legislated categories of privilege: legal professional privilege (or client legal privilege), medical privilege, journalist privilege, and religious privilege. These categories are discussed in turn below.

### Legal professional privilege

Legal professional privilege is the most well-known type of privilege. It exists at common law and also in statute.<sup>48</sup>

Legal professional privilege is a fundamental tenet of the administration of justice and cannot be displaced for reasons of convenience: it is regarded as a substantive right, rather than a mere rule of evidence or aspect of court procedure.<sup>49</sup>

As with confidentiality obligations, legal professional privilege exists to ensure that a client can speak candidly to their lawyer and obtain frank, independent legal advice without fear that the information will be disclosed in court.<sup>50</sup> This facilitates the proper administration of justice, by helping to ensure that individuals can receive adequate legal advice and a fair trial.<sup>51</sup>

The statutory form of legal professional privilege in Victoria is called client legal privilege.<sup>52</sup> There are two types of communication protected by client legal privilege:

- communications made for the dominant purpose of seeking and providing legal advice (advice privilege)<sup>53</sup>
- communications for use in existing or anticipated legal proceedings (litigation privilege).<sup>54</sup>

Client legal privilege protects both written and oral communication.<sup>55</sup> The communication must be confidential to be privileged.<sup>56</sup> The privilege belongs to the client, and the obligation to protect it rests on the client's lawyer, as well as any employees or agents of the lawyer (for example, a legal secretary).<sup>57</sup> Communications may be privileged even if there is no formal lawyer–client retainer (contract) in place.<sup>58</sup>

Client legal privilege can be lost when there is an inconsistency between the conduct of the client and the obligation to maintain the confidentiality.<sup>59</sup> This can occur when:

- the client expressly waives privilege<sup>60</sup>
- the client impliedly waives privilege—for example, if the client discusses the legally privileged information with third parties in such a way that it is no longer confidential<sup>61</sup>
- communications are made by the client to their lawyer or a third party in furtherance of the commission of:
  - a fraud
  - an offence
  - an act that makes a person liable to a civil penalty
  - a deliberate abuse of power (for example, if the client asks their lawyer to destroy documents knowing that they are required to be produced to a court, the communications about that request would not be privileged).<sup>62</sup>

### **Medical privilege**

Medical privilege protects certain communications made between a doctor and their patient from disclosure in a court proceeding.<sup>63</sup> Medical privilege reflects the importance of encouraging people to seek treatment for medical and psychological problems without fear that their sensitive and personal information may be disclosed in court proceedings and potentially used against their interests.

In Victoria, medical privilege is only available in the limited circumstances set out in the *Evidence (Miscellaneous Provisions) Act 1958 (Vic)*.<sup>64</sup>

A doctor (described in the legislation as a 'physician or surgeon') cannot be compelled to give evidence in any civil proceeding about information acquired in attending their patient and that was necessary to enable them to treat the patient.<sup>65</sup> The privilege does not apply to certain proceedings, including those relating to the death of the patient or in which the sanity or capacity of the patient is in dispute. Nor does it apply to criminal proceedings—in those matters, health information is treated as confidential information, meaning that it must be disclosed to the other parties to the proceeding if it is relevant.<sup>66</sup>

Additionally, registered medical practitioners<sup>67</sup> and counsellors<sup>68</sup> cannot be compelled to give evidence in a legal proceeding (either civil or criminal) about any confidential information divulged to them by a victim of sexual assault.<sup>69</sup> This privilege is not absolute—the court may allow evidence of a confidential communication to be given if, for example, the public interest in preserving the confidentiality of the information is outweighed by the public interest in admitting the communication into evidence.<sup>70</sup> In determining whether to order disclosure of the confidential communication, the court must assess how relevant that particular information is to proving the issues in the proceedings, and must also consider whether disclosure would cause harm to the victim, or could discourage other victims from seeking counselling.<sup>71</sup>

## Journalist privilege

Journalists have obligations of privilege relating to the identity of a person (referred to as a ‘source’ or an ‘informant’) who has given them information in the expectation that the information may be published in a news medium.<sup>72</sup>

Journalist privilege (also known as a ‘shield law’) recognises the importance of the freedom of the press and ‘the important role that journalists play in a democracy’ in providing information and opinions to the public.<sup>73</sup> To fulfil this role, journalists need access to information, and are often asked to assure sources that they will not disclose from whom they obtained the information. If journalists were compelled to reveal the identity of confidential sources in court proceedings, this could dissuade those with information about matters of public importance from coming forward, thereby preventing facts and opinions from being aired.

The *Evidence Act 2008* (Vic) provides that if a journalist has promised a source not to disclose their identity, neither the journalist nor their employer can be compelled by a court to give evidence or produce a document that would disclose the source’s identity or enable their identity to be ascertained.<sup>74</sup>

In Victoria, journalist privilege only applies to people ‘engaged in the profession or occupation of journalism in connection with the publication of information, comment, opinion or analysis in a news medium’ and who must comply with recognised standards or codes of practice.<sup>75</sup> It is therefore unlikely that the privilege would apply to people merely posting material on blogs or social media platforms.<sup>76</sup>

Journalist privilege is not absolute—it has been described as a ‘discretionary rule of evidence created by the Evidence Act’.<sup>77</sup> A court may override the privilege if the public interest in knowing the source’s identity outweighs:

- any likely adverse effect of the disclosure on the source or any other person
- the public interest in the communication of facts and opinion to the public by the news media and in the ability of the news media to access sources of facts.<sup>78</sup>

## Religious privilege

In Victoria, religious privilege enables members of the clergy of any church or religious denomination to refuse to give evidence that a religious confession was made to them or what the contents of a religious confession were.<sup>79</sup> A religious confession is ‘a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the church or religious denomination concerned’.<sup>80</sup>

This privilege recognises the value to society of encouraging people to seek advice about personal problems from a trusted cleric, such as a minister, rabbi or priest, in circumstances where they may be reluctant to ‘bare their souls’ to a stranger.<sup>81</sup>

There are exceptions to the privilege. A cleric may be compelled to give evidence about a religious confession if the communication was made for a criminal purpose. They can also be compelled to give evidence in proceedings for an offence involving a failure to:

- comply with mandatory reporting requirements about a child in need of protection
- disclose information that leads a person to reasonably believe that a sexual offence has been committed against a child.<sup>82</sup>

## The risks of police accessing and using confidential or privileged information from human sources

The Commission's terms of reference required it to examine policies and processes relating to the use of human sources who are subject to legal obligations of confidentiality or privilege.

As discussed in Chapter 2, human sources are people who covertly supply information about crime or people involved in criminal activity to law enforcement agencies. There are risks associated with the use of all human sources. There are additional risks associated with using human sources to obtain information that is confidential or privileged.

These additional risks fall into two broad categories:

- the risk of undermining the important objectives that underpin confidentiality and privilege protections, with negative implications for individuals, professions and the community
- the risk of interfering with the proper administration of justice, as illegal and improper investigation methods (and a failure to disclose how evidence was obtained) can compromise the integrity and ultimate success of prosecutions.

Arguably, these risks do not arise, or they are justifiable risks, if the human source provides information to police in one of these circumstances:

- there is an exception to the source's legal obligations to keep the information confidential
- they obtained the information outside the scope of their professional responsibilities.

Nevertheless, as discussed later in this chapter, determining whether any exceptions apply involves considering complex legal, ethical and operational questions. This makes it difficult to establish simple processes for avoiding or mitigating the risks involved.

### Undermining the objectives of confidentiality and privilege protections

As noted above, confidentiality and privilege protections underpin and foster relationships of trust and candour that are important for broader policy purposes.

When people confide in professionals about personal or sensitive matters, they do so with the expectation that their confidentiality will be respected and maintained. Such an expectation may be founded on assurances or undertakings provided by the professional in question (including in written privacy policies), a general understanding of the nature of the relationship, and/or a knowledge of the applicable legal principles. Information shared in the context of a professional relationship attracts greater legal protections than information that a person considers sensitive or confidential and shares in the context of a personal relationship.

Therefore, if a professional engaged by a person discloses the person's confidential or privileged information to others in a way that is inconsistent with their expectations or rights, this undermines the person's trust in the professional. It also exposes the person to the consequences of having others know their private information. Dissemination of such information may compromise their legal interests (if, for example, their opponents can use the information against them in legal proceedings), jeopardise their safety (if, for example, their whereabouts are made known to someone who intends to harm them) or expose them to discrimination (if, for example, someone treats them less favourably because they know they are suffering from a particular medical condition). Alternatively, it could merely cause them personal embarrassment.

Permitting police to access legally confidential or privileged information—or providing scope for professionals to breach their legal and ethical obligations—undermines the confidence that people can have in professionals. This may result in people not seeking advice and support for important legal problems or health concerns, not confiding in counsellors or religious advisers, or not coming forward with important information for journalists. All of this would have negative consequences not only for individuals, but for the community generally.

If professionals disclose confidential or privileged information about their clients to police or others, the reputation of the entire profession to which they belong may be damaged, and public confidence in institutions undermined. These risks are heightened if the disclosure is made to a person whose interests are in direct conflict with or adverse to those of the client.

## Interfering with the proper administration of justice

To the extent that police acquisition and use of confidential information involves contraventions of laws or ethical standards (by the police or by the human source), such acquisition and use may ultimately result in a prosecution being withdrawn or a conviction being overturned on appeal. Non-disclosure of the full details relating to the acquisition of evidence may also jeopardise the outcome of a prosecution. As discussed in Chapters 2 and 5, this is because such actions can prevent an accused person from obtaining a fair trial and may result in a substantial miscarriage of justice.

Given the higher level of protection afforded to privileged information, the consequences associated with its disclosure are likely to be more pronounced. Courts have held that the deliberate invasion of legal professional privilege may lead to a criminal proceeding being stayed on the basis that it involves ‘a serious affront to the integrity of the justice system’.<sup>83</sup> In considering whether to stay the proceeding, the court will consider the particular circumstances of the case, including the gravity of the crime and whether the conduct prejudiced the accused person.<sup>84</sup>

## Police management of risks associated with confidential or privileged information

Due to the risks involved in seeking information that may be confidential or privileged, some law enforcement agencies prescribe additional or more rigorous processes for acquiring, using and disseminating material from human sources that may be confidential or privileged. Such processes variously involve requirements:

- for senior representatives of the agency, or an external authority, to approve the use of the human source
- to apply a threshold test or criteria for using the human source—for example, a compelling public safety or national security reason
- to obtain legal advice about the implications of using the human source
- for police officers to refer any information obtained from a human source that may be confidential or privileged to more senior personnel and/or their legal advisers
- to notify prosecuting authorities that a human source with legal obligations of confidentiality or privilege has been engaged and/or that confidential or privileged information has been obtained.

These processes are discussed in detail in Chapter 12 but key features are outlined briefly here. Processes relevant to the disclosure of information obtained from human sources by police to prosecuting agencies and accused persons are discussed in Chapter 14.

The risks associated with police obtaining and using confidential or privileged information apply not only in relation to the use of human sources, but also to the use of other covert or coercive means, such as controlled operations,

covert surveillance, coercive questioning or search warrants. The Commission understands that Victoria Police has operating procedures in place for ‘quarantining’ privileged information obtained through certain covert powers.<sup>85</sup> In the case of information obtained through telephone intercepts under the *Telecommunications (Interception and Access) Act 1979* (Cth), for example, a dedicated unit of Victoria Police undertakes the initial monitoring of legally intercepted information and identifies any sensitive material, such as conversations between the target and a lawyer. If this information is assessed by senior officers and/or the Victorian Government Solicitor’s Office as being subject to legal professional privilege, it is quarantined so that it is not available to investigators working on the case. The staff in the responsible unit are provided with one-on-one training about this process and their role in identifying sensitive material.<sup>86</sup>

## Approval

In Victoria, New South Wales, the Northern Territory, the United Kingdom and the United States of America, human source policies expressly address police access to and use of confidential and/or privileged information. These policies take varying approaches to approving the use of human sources with legal obligations of confidentiality or privilege.

In certain circumstances and subject to a prescribed approval process, the *Victoria Police Manual—Human Sources* (Human Source Policy) permits:

- the registration of a human source with legal obligations of confidentiality or privilege
- the use of information that is or appears to be in breach of a human source’s legal obligations of confidentiality or privilege.<sup>87</sup>

In cases where approval is granted, it must be for a specific time period and specific purpose, and the human source must be managed as a ‘high-risk’ source.<sup>88</sup>

At the time when the Commission conducted its consultations with interstate law enforcement agencies, New South Wales and the Northern Territory were the only other Australian jurisdictions in which official police policies and procedures contained any specific guidance about the use of human sources with legal obligations of confidentiality or privilege.

New South Wales Police’s *Human Source Management Policy* instructs that, if a lawyer or legal representative is to be registered as a human source, caution should be exercised to ensure that any information provided does not impinge upon or breach obligations of legal professional privilege. It also explains to officers what legal professional privilege is, its purpose and that it can only be waived by the client.<sup>89</sup> Further information about this policy is contained in Chapter 12.

Northern Territory Police advised the Commission that its Human Source Management Instruction states that people bound by an obligation based in either legal or medical privilege cannot be used as human sources.<sup>90</sup> This would not, however, prevent a lawyer or doctor from providing information that falls outside the scope of their professional obligations.

Agencies in Tasmania and Western Australia advised the Commission that policies addressing the issue were being developed.<sup>91</sup> The policy under development by Western Australia Police is likely to require an elevated authorisation process for the recruitment of a human source with legal obligations of confidentiality or privilege.<sup>92</sup>

In the United Kingdom, the Covert Human Intelligence Sources (CHIS)<sup>93</sup> Code of Practice establishes a detailed process for approving access to and use of legally privileged or confidential information obtained from human sources.<sup>94</sup>

In the United States of America, at the federal level, the *Attorney General's Guidelines Regarding the Use of Confidential Informants* introduced in the early 2000s state that special approval is required if federal law enforcement agencies wish to use human sources (referred to as 'confidential informants') 'who are under the obligation of a legal privilege of confidentiality'.<sup>95</sup> The Commission was unable to confirm whether this version of the guidelines is still current.

## Permitted circumstances

In Victoria, if the specific purpose of using a human source is to obtain confidential or privileged information, or if police wish to use information that appears to have been provided in breach of a human source's legal obligation of confidentiality or privilege, approval will only be given if there are 'exceptional and compelling reasons'.<sup>96</sup> Those reasons must relate to national security or the prevention of a serious threat to life or serious injury, and there must be no other reasonable means of obtaining the information.<sup>97</sup> These provisions were inserted into the Human Source Policy in May 2020.<sup>98</sup>

In the United Kingdom, the use of any human source must be both *necessary* and *proportionate* to the aim of using the human source.<sup>99</sup> The policy framework includes additional safeguards for the use of human sources where confidential or privileged information may be acquired.<sup>100</sup> The requirements differ depending on whether the information is confidential or privileged in nature, and whether the use or conduct of the human source is *intended* or *likely* to obtain such information. The most stringent requirements apply where the use or conduct of a source is *intended* to obtain, provide access to or disclose *legally privileged* information. The authorisation of human sources in these circumstances requires prior notification to and approval of an independent Judicial Commissioner from the Investigatory Powers Commissioner's Office.<sup>101</sup> An authorisation should only be sought where there are 'exceptional and compelling circumstances that make the authorisation necessary'—for example, in the interests of national security.<sup>102</sup>

Under the available guidelines in the United States, at the federal level, no specific test appears to be applied to the decision about whether to register a human source under the 'obligation of a legal privilege of confidentiality'. The decision is made by the Confidential Informant Review Committee based on information contained in reports about the person's suitability to be registered as a source. However, the guidelines do prescribe a process for authorising a human source to engage in otherwise illegal activity if it is necessary for one of these reasons:

- to obtain information or evidence essential for the success of an investigation that is not otherwise reasonably available
- to prevent death, serious bodily injury or significant damage to property.<sup>103</sup>

In either case, the benefits to be obtained must outweigh the risks.<sup>104</sup> This process cannot be used to obtain information that would be unlawful if conducted by a law enforcement agent (for example, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search).<sup>105</sup>

## How police define legal obligations of confidentiality or privilege

The policies and processes in Victoria, New South Wales, the United Kingdom and the United States of America define legal obligations of confidentiality or privilege by reference to categories of sources, the nature of the information or a combination of both.

Since 2014, Victoria Police's Human Source Policy has defined human sources with legal obligations of confidentiality or privilege by reference to the source's occupation. In May 2020, the policy was amended to refer both to the occupation of the human source and the nature of information that may be obtained from a source.<sup>106</sup> Police officers must follow a special approval process before they receive information from or consider approaching a person

to whom a legal obligation of confidentiality or privilege may apply as a result of their occupation. These occupations are lawyers, doctors, parliamentarians, court officials, journalists and priests, and such people are classified as ‘Category 1’ sources in the policy.<sup>107</sup> Police also need to follow this special approval process:

- if a potential human source has a ‘connection to’ a lawyer, doctor, parliamentarian, court official or priest, and information may be obtained that would breach a legal obligation of confidentiality or privilege
- if an active human source who is not subject to a legal obligation of confidentiality or privilege provides information that appears to be subject to a legal obligation of confidentiality or privilege.<sup>108</sup>

A person who has a ‘connection to’ a Category 1 occupation is someone who previously worked in a Category 1 occupation; is likely to receive confidential or privileged information from a person in a Category 1 occupation; or is in a similar occupation or role where they are likely to receive such information.<sup>109</sup> The Human Source Policy does not provide any additional guidance to explain what roles or occupations may fall within ‘a similar occupation or role where they are likely to receive legally privileged or confidential information’.<sup>110</sup>

The Human Source Policy mandates that the decision to approach or approve a source in a Category 1 or connection to Category 1 occupation can only be made by the Victoria Police Human Source Ethics Committee—regardless of whether the information the person may be able to give to police appears to have been received in connection with their professional duties or whether it does in fact engage any legal obligations of confidentiality or privilege.<sup>111</sup>

The occupations listed in Category 1 include those who owe obligations of privilege as well as confidentiality (lawyers, doctors, journalists and priests). The inclusion of parliamentarians and court officials appears to be in response to the Kellam Report, which listed them as examples of human sources who may have conflicting duties.<sup>112</sup>

In the United Kingdom, it is the confidential or privileged *nature of the material or information* obtained or likely to be obtained from a human source, rather than the professional status of the human source, that is the focus of the policy and associated safeguards. Examples of professions are provided as guidance:

*Particular consideration should be given in cases where the subject of any intrusion might reasonably assume a high degree of confidentiality, or where confidential information is involved. Confidential information consists of matters subject to legal privilege, confidential personal information, confidential constituent information, or confidential journalistic material. So, for example, extra care should be taken where, through the use or conduct of a CHIS, it would be possible to acquire knowledge of discussions between a minister of religion and an individual relating to the latter’s spiritual welfare, or between a Member of Parliament and an individual or group of constituents relating to private constituency matters, or wherever matters of medical or journalistic confidentiality or legal privilege may be involved.*<sup>113</sup>

The United Kingdom Code of Practice also addresses law enforcement agencies’ management of any information obtained from a human source that may be privileged. Agencies must consult with their legal adviser if they believe they have acquired information that is privileged. The legal adviser, rather than the investigating officer, determines whether the material is privileged, and, in cases of doubt, the Investigatory Powers Commissioner’s Office may be consulted.<sup>114</sup>

The approach outlined in the available federal United States guidelines considers both the professional status of a potential source and the nature of any information that might be provided. When initially assessing the suitability of a potential source, federal law enforcement officers must consider, among other things, whether the source is ‘a party to, or in a position to be a party to privileged communications (eg a member of the clergy, a physician, or a lawyer)’.<sup>115</sup> Further, if the law enforcement agency, in conducting an investigation involving a human source, believes that the source ‘will obtain or provide information that is subject to, or arguably subject to, a legal privilege

of confidentiality belonging to someone other than the [source], they must notify the attorney assigned to the matter in advance whenever possible.<sup>116</sup>

## ISSUES AND CHALLENGES

In light of the risks associated with police using human sources with legal obligations of confidentiality or privilege—or otherwise accessing confidential or privileged information—the Commission considered whether it is ever appropriate for police to seek out or use such sources or information, and, if so, in what circumstances and subject to what safeguards. A key question is: Can the risks be meaningfully mitigated given the complexity of the legal and policy issues involved?

In the sections below, the Commission outlines:

- different views about the appropriateness of using human sources with legal obligations of confidentiality or privilege
- the challenges associated with identifying potentially confidential or privileged information.

The Commission primarily focused on the use of lawyers as human sources. The subject matter of its inquiry was one reason for this, but so were the potentially more significant consequences for the criminal justice system of using lawyers in this way. In particular, the accused person’s right to a fair trial is more likely to be impacted by the use of a lawyer as a human source than it is by using other categories of people with legal obligations of confidentiality or privilege in this capacity.

### The appropriateness of using human sources with legal obligations of confidentiality or privilege

Stakeholders consulted by the Commission expressed different views about the appropriateness of using lawyers and other professionals as human sources.

Several Australian law enforcement agencies supported policies enabling the potential use of lawyers and other professionals as human sources, arguing that their obligations of confidentiality and privilege can be identified and appropriately managed. They argued that it would not be reasonable to impose a blanket prohibition on a person acting as a human source simply because they had obligations of confidentiality or privilege arising from their occupation.<sup>117</sup> Such a prohibition would hinder the provision of information that may be important for preventing a significant risk to the public or solving a very serious crime.<sup>118</sup>

Victoria Police stated that it may be appropriate to use a lawyer as a human source in some circumstances:

*This can occur most obviously when the information that the person is giving has nothing to do with that person’s professional role. Also, Victoria Police’s current policy recognises that there may be situations of significant and immediate risk to public safety that can justify such use.*<sup>119</sup>

Other stakeholders similarly noted that there may be limited circumstances in which a lawyer could act as a human source without compromising their obligations and duties—for example, if they were passing on information at the request of a client, or information obtained in their capacity as a private citizen, unconnected with their professional role.<sup>120</sup>

Victorian legal profession and regulatory bodies consulted by the Commission generally opposed the use of lawyers as human sources—both in respect of their clients and in relation to matters outside the scope

of their practice—arguing that the nature of lawyers’ duties and obligations is inherently incompatible with their use as human sources.<sup>121</sup>

In their view, using a lawyer as a human source would risk:

- undermining the lawyer–client relationship and the trust required to support that relationship
- damaging the reputation of the legal profession overall, as clients may doubt that lawyers would treat their information as confidential
- placing conflicting duties (to clients, the courts and law enforcement agencies) on lawyers, which they would have difficulty reconciling
- creating unidentifiable conflicts of interest when representing a client who, unbeknown to the lawyer, was charged on the basis of information first derived from the lawyer—such a conflict of interest would be impossible to identify because human sources generally do not know how the information they provide is ultimately used
- compromising a lawyer’s independence if they appear in a matter in opposition to a law enforcement agency with whom they also have a covert relationship.

The Criminal Bar Association emphasised the heightened risk of using a criminal lawyer as a human source, as compared to lawyers engaged in other areas of practice. The Association submitted that ‘there is no possible justification for counsel acting in a criminal matter to provide information to police unless strictly on instructions of the client’.<sup>122</sup> To do so would create an inherent conflict of interest, and would prevent the lawyer from being able to act independently when opposed to law enforcement or regulatory authorities that they have covertly assisted in the past.<sup>123</sup> It would also place the personal safety of the lawyer at risk, because unsuccessful defendants may suspect that their lawyer contributed to an adverse result in a criminal trial.<sup>124</sup>

The Victorian Bar also noted the significant burden that would be placed on police responsible for managing human sources with legal obligations of confidentiality or privilege ‘to ensure that professional standards are not compromised by virtue of that person’s status as an informer’.<sup>125</sup> The Victorian Bar submitted that it would be practically impossible for law enforcement officers to discharge this responsibility satisfactorily in respect of human sources who are practising lawyers, and concluded that lawyers should not be used as human sources ‘in any circumstances in which there is a risk of a breach of professional obligation’.<sup>126</sup>

The Law Institute of Victoria expressed the view that it would never be appropriate for a lawyer to act as a human source, even if the information being provided to police related to their family or other contacts rather than to their clients. This is due to the risks that the information may still be subject to the duty of confidentiality; that the individual being informed on may believe they are in a lawyer–client relationship with the lawyer; and that the reputation of the profession may be damaged.<sup>127</sup>

The Victorian Legal Services Board and Commissioner (VLSB+C) similarly opposed lawyers disclosing information derived from social activities to police, but acknowledged that in the absence of a specific prohibition, law enforcement agencies may continue to consider registering and using lawyers as human sources. In their view, if this were to occur, it should be limited to matters wholly unconnected with the person’s practice as a lawyer.<sup>128</sup>

Several interstate legal profession bodies also concluded that it would be inappropriate to use lawyers as human sources in any circumstance, due to the centrality of obligations of confidentiality and privilege to the legal profession, and because it would be unacceptable to allow police to determine in which situations it would be appropriate to use lawyers as human sources.<sup>129</sup>

In light of the circumstances that led to the Commission’s inquiry, legal profession bodies in Victoria and New South Wales have published guidance for lawyers about their duty of confidentiality and the circumstances in which voluntarily providing information to police may be permissible.

The VLSB+C regulatory guideline titled *Lawyer Conduct in Providing Information to the Police* encourages lawyers to seek guidance from the Law Institute of Victoria or Victorian Bar ethics advisers if they are unsure about how to resolve competing obligations arising out of information they have received from or about their clients.<sup>130</sup>

Guidelines published by the New South Wales Bar Association provide unequivocal advice that ‘a barrister must never act as [a human source] against a current or former client’.<sup>131</sup> The Association also concludes that acting as a human source against a non-client would risk compromising a barrister’s independence, especially if they practise in criminal proceedings or other matters touching on the operation of law enforcement agencies.<sup>132</sup> The guidelines advise that a decision ‘to disclose threatened criminality for preventative purposes is largely a matter of professional conduct and ethics’.<sup>133</sup> It suggests that any barrister wanting to take such action should first attempt to advise the client against the threatened conduct. If no satisfactory reassurance is received, they should then seek ethical guidance, discuss the proposed disclosure with the client (if safe to do so), explain the conflict of interest that has arisen and the need to withdraw from representing the client, assist the client to access alternative legal representation if possible, and cease acting for the client.<sup>134</sup>

Other options for clarifying the exceptions to lawyers’ duty of confidentiality, and stakeholders’ views about them, are discussed in Chapter 15.

## Identifying legal obligations of confidentiality and privilege

The complex nature of legal obligations of confidentiality and privilege has implications for human source management at both a policy and an operational level. It is difficult to specify the full range of legal obligations and exceptions in official policies. It is equally challenging for individual officers to identify the precise legal constraints that apply to a human source or the information they hold, and to assess the risks of acquiring and using that information.

In many instances, it will be readily apparent that a human source has legal obligations of confidentiality or privilege in relation to the information provided—for example, when the source is a lawyer who is providing information obtained directly from an existing client while advising them about their legal position.

There will be other circumstances, however, in which it will be more difficult to determine whether legal obligations of confidentiality or privilege arise because:

- it is unclear whether the human source is subject to legal obligations of confidentiality or privilege in respect of the information being offered
- it is unclear whether an exception to the source’s legal obligations applies
- the source does not owe a relevant legal obligation to the person being informed on, but the *information* being provided may still be confidential or privileged.

In practice, it may be unrealistic to expect police officers to accurately determine the obligations of a potential human source, or the status of a category of information at face value. An assessment of whether particular legal principles apply generally requires the careful application of complex legal tests to the pertinent facts.

At the same time, given the risks that illegally or improperly obtained evidence can ultimately have for the outcome of a criminal prosecution, there is a strong imperative for police to understand and respect the boundaries of confidentiality and privilege when dealing with human sources.

## Unclear application and scope of legal obligations

Although many relationships of confidentiality or privilege will be readily apparent, the breadth and complexity of the law relating to such obligations means that there is a lack of clarity about their existence or scope in any given circumstance.

Legal obligations to keep certain information confidential can arise in very specific contexts, such as government employees who are subject to secrecy obligations,<sup>135</sup> or in very broad circumstances, such as when the equitable duty of confidence (discussed earlier in this chapter) applies.<sup>136</sup>

An equitable duty of confidence can be difficult to identify. In Australia, the test requires the court to ask whether the information is actually confidential and whether ‘a reasonable man in the position of the recipient would have recognised that the information was given to him in confidence’.<sup>137</sup>

The principles of equity have been used widely by courts to protect a range of relationships, including commercial, professional and personal relationships where the trust associated with confidentiality is necessary for the relationship to operate effectively.<sup>138</sup> The broad range of equitable obligations adds to the complexity in identifying who has obligations of confidentiality.

As noted above, even if a human source falls into a category of professionals who generally owe legal obligations of confidentiality or privilege to their clients, their professional status alone may not necessarily determine whether the information they are providing is legally confidential or privileged.<sup>139</sup>

For example, the information may have no connection to their professional or legal obligations—instead, it might relate to family members or friends based purely on the human source’s personal knowledge and relationships, in their capacity as a private citizen. Nevertheless, while certain matters may ostensibly be within a professional’s personal knowledge, the circumstances in which they received that information may still carry an expectation of confidentiality (and even privilege), given broad community perceptions about the obligations professionals—such as lawyers and doctors—generally owe. A lawyer may be subject to an equitable obligation of confidence, and even an obligation of privilege, to a non-client, regardless of whether the lawyer considers this to be the case.<sup>140</sup> For example, as evident in the case of Ms Gobbo, individuals might provide information to a lawyer in a personal or social context, yet still consider that the lawyer will keep the information confidential due to their professional obligations.

Other legal considerations may make it difficult to readily determine whether information is confidential or privileged:

- Confidential information is not limited to information communicated by the client to the professional. It can also include information or opinions based on observations or assessments by the professional.<sup>141</sup>
- How long an obligation of confidentiality must be observed depends on the professional relationship. For example, an obligation of confidentiality in professional relationships with lawyers, doctors and clergy may continue indefinitely; whereas in other cases, it may cease when the service contract comes to an end.<sup>142</sup>

The applicability of privilege will also depend on the precise terms of any legislative provisions establishing the privilege and the tests that have been developed by the courts concerning the privilege.

It may be challenging for a police officer to assess whether particular provisions apply to the information they have been given; for example, whether communications between a lawyer and their client were made for the ‘dominant purpose’ of seeking and providing legal advice. Further, the availability of some categories of privilege will depend on the nature of the legal proceeding in which disclosure of information may ultimately be sought. If, at the time when police are assessing the status of information, no legal proceedings are yet under way or contemplated, there may be uncertainty about whether the information should be regarded as privileged.

## Unclear exceptions to legal obligations

A human source who owes legal obligations of confidentiality or privilege to clients may be able to provide information to police without breaching those obligations, if there is a recognised exception permitting or encouraging disclosure despite the obligations of confidentiality. This would be the case, for example, if the confidential or privileged information was within an unambiguous legislative exception or communicated for a criminal purpose, or where it is in the public interest to disclose the information to prevent injury or death. These exceptions are, however, seldom clear-cut.

Exceptions to a person's legal obligations of confidentiality or privilege may exist at common law and in legislation, and may also be contained in codes of conduct. Sometimes, the exceptions may be too vague or ambiguous to apply swiftly in operational settings, have not yet been tested thoroughly in court, or rely on the professional's judgement and interpretation of the exception. For instance, Australian courts have established no prescriptive rules as to what constitutes disclosure under 'public interest' grounds for doctors.<sup>143</sup> Without clarity and certainty, a doctor in Australia must essentially make a professional judgement in each case as to whether they should disclose confidential information, a decision that could expose them to legal or disciplinary proceedings.<sup>144</sup>

## Confidential information provided by human sources not subject to direct legal obligations

As noted above, circumstances may arise where police are dealing with a human source who does not owe any direct legal obligations of confidentiality or privilege to the person being informed on, but who nevertheless has access to, and is in a position to provide police with, information that is itself confidential or privileged. In these circumstances, there may be restrictions on what the recipient of the information is permitted to do with it.

For example, if a person accompanies a friend to a meeting with the friend's lawyer for the purpose of the friend receiving legal advice, the person will become privy to information that is confidential and privileged. Although the person does not owe obligations of confidentiality or privilege to their friend (these are owed by the lawyer), there may be legal consequences if they disclose confidential or privileged information to others—for example, a court could order an injunction preventing further disclosure of the information, or order that the person to whom it was disclosed destroy all records of it in their possession.

In these circumstances, police may not be alerted by the occupation or role of the human source to consider whether the information the source provides is likely to be confidential or privileged, yet acquiring and using that information may jeopardise an investigation or prosecution if it turns out that using it is illegal or improper.

Accordingly, policies or procedures that rely solely or predominantly on the obligations or duties of the human source arising out of their professional or other employment arrangements may not necessarily explicitly capture all individuals with the potential to access and divulge confidential or privileged information. Therefore, they may fail to protect against the inappropriate use of confidential or privileged information in these circumstances.

## CONCLUSION

Having considered the risks associated with using lawyers and other professionals with legal obligations of confidentiality or privilege as human sources, the Commission has formed the view that their future use should be restricted and subject to strict requirements and safeguards.

In particular, the Commission considers that it is almost never appropriate for police to use a lawyer as a human source to provide information about their own client. This is because it is highly likely that doing so would undermine the fundamental purpose of the lawyer–client relationship, jeopardise the client's right to a fair hearing, and interfere with the proper administration of justice.

The Commission has stopped short of recommending a complete prohibition on using lawyers and other professionals with legal obligations of confidentiality or privilege as human sources. It accepts that there may be limited circumstances in which the use of such sources may be justified—for example, when there is a compelling public interest reason for acquiring and using the information, there is an unambiguous exception to the duty of confidentiality or privilege, and/or the source is providing information they have come by well beyond the scope of their professional obligations.

Even if one of these limited circumstances arises, justifying this use of lawyers and other professionals as human sources raises very complex legal and ethical questions. As evident in Ms Gobbo's case, it also increases the potential for significant consequences—for individual rights and for the integrity of the criminal justice system. Accordingly, as noted above, any decision to use such a human source must, in the Commission's view, be subject to strict requirements and safeguards. Police working in human source management must be vigilant in identifying whether a potential human source may be subject to relevant legal obligations, or whether the information the source is likely to provide may be legally confidential or privileged. They must also proactively consider the ultimate implications of using the source. Among other things, such implications may include compromising an investigation or the proper administration of justice, potentially resulting in a prosecution being withdrawn, a trial being stayed or an appeal against conviction being brought on the basis that a substantial miscarriage of justice has occurred.

The use of human sources where legal obligations of confidentiality or privilege exist must be limited to circumstances where access to the information the source possesses has been assessed as being necessary and proportionate to the aim of using the source. There would need to be a robust risk assessment to determine whether the need for the confidential or privileged information was so great that it outweighed the risks associated with obtaining and/or using it. As set out in Chapters 12 and 13, the Commission considers that a senior Victoria Police officer would need to authorise the use of any human source *who is reasonably expected to have access to confidential or privileged information*, after having considered the recommendation of an external and independent agency. In addition, if Victoria Police was seeking to use a human source *with the intention of obtaining confidential or privileged information*, it would need to establish that there were exceptional and compelling reasons for doing so—for example, to avert a risk to the community or the safety of a person, in circumstances where the information cannot be obtained by any other reasonable means.

The Commission recognises the practical challenges in identifying and navigating legal obligations of confidentiality and privilege. These obligations are broad and intricate. Therefore, the Commission also proposes measures to build the capacity of those working within human source management, and to make seeking legal advice more routine. In particular, detailed training and guidance should be provided to police officers about:

- identifying people who are likely to be subject to legal obligations of confidentiality or privilege
- determining whether information likely to be provided by any human source may be legally confidential or privileged.

The Commission's conclusions and recommendations about how to avoid (or, when appropriate, to manage) the risks associated with using human sources with legal obligations of confidentiality or privilege, and with acquiring in other ways information that is confidential or privileged, are detailed in Chapters 12–15.

# Endnotes

- 1 *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39; *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414; *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415.
- 2 J Pizer, 'The Public Interest Exception to the Breach of Confidence Action: Are the Lights About to Change?' (1994) 20(1) *Monash University Law Review* 66, 98.
- 3 *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39, 50-51.
- 4 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [18.1].
- 5 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.1].
- 6 P Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317, 318.
- 7 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [1.13].
- 8 P Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317, 321.
- 9 P Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317, 318.
- 10 *Parry-Jones v Law Society* [1969] 1 Ch 1 [9]; Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [1.38], [9.18]–[9.42]; P Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317, 321–2.
- 11 See, eg, Victorian Department of Premier and Cabinet, *Cabinet Handbook*, January 2019, 27–8; *Freedom of Information Act 1982* (Vic) s 28; John Waugh, 'Contempt of Parliament in Victoria' (2005) 26 *Adelaide Law Review* 29, 37; Victorian Public Service Commission, *Code of Conduct for Victorian Public Sector Employees* (2015) 21.
- 12 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.6].
- 13 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.6].
- 14 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.31]; D Chaikin, 'Adapting the Qualifications to the Banker's Common Law Duty of Confidentiality to Fight Transnational Crime' (2011) 33 *Sydney Law Review* 265, 269. See also Accounting Professional and Ethical Standards Board, *About APESB* (Web Page, 2015) <[www.apesb.org.au/page.php?id=2](http://www.apesb.org.au/page.php?id=2)>.
- 15 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.6]–[9.10]; P Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317, 318.
- 16 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [1.44].
- 17 P Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317, 318.
- 18 Australian Law Reform Commission, *Australian Privacy Law and Practice* (Report 108, August 2010). A person may also sue in tort for a breach of duty, although contract and equity are the more common sources of remedy: see Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [1.28].
- 19 *Parry-Jones v Law Society* [1968] 1 All ER 177.
- 20 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [1.23]–[1.24].
- 21 *Crown Resorts Ltd v Zantran Pty Ltd* (2020) 374 ALR 739 [24]; *Smorgon v Australian and New Zealand Banking Group Ltd* (1976) 134 CLR 475, 488–9 (Stephen J).
- 22 See, eg, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 9; Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [1.23]–[1.24].
- 23 *Commonwealth v Fairfax* (1980) 147 CLR 39, 21, citing *Lord Ashburton v Pope* (1913) 2 Ch 469, 475 (Swinfen Eady LJ). See also *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415.
- 24 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.4].
- 25 Law Reform Commission of Western Australia, *Confidentiality of Medical Records and Medical Research* (Discussion Paper, Project No 65—Part II, 1989) [3.3].
- 26 *Parry-Jones v Law Society* [1968] 1 All ER 177; Australian Law Reform Commission, *Australian Privacy Law and Practice* (Report 108, 2006) [15.127]; Law Reform Commission of Western Australia, *Confidentiality of Medical Records and Medical Research* (Discussion Paper, Project No 65—Part II, 1989) [3.5]–[3.6].
- 27 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13. As with other rights under the Charter, the right to privacy may be subject to reasonable limits: s 7(2).
- 28 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.
- 29 See, eg, Australian Medical Association Code of Ethics 2004 (Editorially Revised 2006. Revised 2016).
- 30 Subordinate legislation is a rule, regulation or other instrument made under the authority of an Act. See, eg, *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) s 4.

- 31 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 9.1; *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 114.
- 32 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [1.44].
- 33 *Parry-Jones v Law Society* [1969] 1 Ch 1 [9].
- 34 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [12.7], [12.9]–[12.11].
- 35 *Gartside v Outram* (1856) 26 LJ Ch (NS) 113, 114. See *Crown Resorts Ltd v Zantran Pty Ltd* (2020) 374 ALR 739 [28]–[34], which outlines the Australian development of the relevant legal principles following *Gartside v Outram*.
- 36 *Commonwealth v Helicopter Resources Pty Ltd* (2020) 377 ALR 191 [20]; *A v Hayden* (1984) 156 CLR 532, 543–4, 553, 555.
- 37 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [11.27]. See also *A v Hayden* (1984) 156 CLR 532, 545–6; *R v Lowe* [1997] 2 VR 465, 485 [25].
- 38 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [11.24] (citations omitted).
- 39 *Gofram Pty Ltd v KPMG Peat Marwick* (1993) 27 IPR 215, 222.
- 40 *A v Hayden* (1984) 156 CLR 532, 546–7 (Gibbs CJ).
- 41 See Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [12.14]–[12.19]; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 9.2.5.
- 42 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [12.16], [12.19].
- 43 *A v Hayden* (1984) 156 CLR 532; *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434 at 454–5.
- 44 See generally J Pizer, 'The Public Interest Exception to the Breach of Confidence Action: Are the Lights About to Change?' (1994) 20(1) *Monash University Law Review* 67, 69.
- 45 See generally John Heydon, Mark Leeming and Peter Turner, *Meagher, Gummow and Lehane: Equity Doctrines and Remedies* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2015) [42-160]–[42-189].
- 46 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [12.20].
- 47 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [12.12].
- 48 *Evidence Act 2008* (Vic) ss 118–119; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 [11].
- 49 *Glencore International AG v Federal Commissioner of Taxation* (2019) 93 ALJR 967 [21]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 [11], [44].
- 50 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49 [35] (Gleeson CJ, Gaudron and Gummow JJ).
- 51 Explanatory Memorandum, *Evidence Bill 2008* (Vic) cl 117.
- 52 See *Evidence Act 2008* (Vic) ss 117–126.
- 53 *Evidence Act 2008* (Vic) s 118.
- 54 *Evidence Act 2008* (Vic) s 119.
- 55 *Evidence Act 2008* (Vic) ss 118–119.
- 56 *Evidence Act 2008* (Vic) s 117(1) (definition of 'confidential communication' and 'confidential document').
- 57 *Kang v Kwan* [2001] NSWSC 698 [30] (Santow J); *Tuckiar v The King* (1934) 52 CLR 335, 346 (Gavan Duffy CJ, Dixon, Evatt, McTiernan JJ); *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, 414–15 (Bowen CJ); *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 589 (Kirby J); *Ott v Fleishman* [1983] 5 WWR 721, 724 (McEachern CJSC). See also Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.17].
- 58 *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (No 2)* 256 ALR 416, 422–3 [19]–[22].
- 59 *Evidence Act 2008* (Vic) s 122; *Mann v Carnell* (1999) 201 CLR 1 [28].
- 60 *Evidence Act 2008* (Vic) s 122; *Mann v Carnell* (1999) 201 CLR 1 [29]; *AB & EF v CD* [2017] VSC 350 [103].
- 61 *Evidence Act 2008* (Vic) s 122; *AB & EF v CD* [2017] VSC 350 [108].
- 62 *Evidence Act 2008* (Vic) s 125(1). The Evidence Act does not require a person to be knowingly involved in the fraud, offence or act that renders a person liable to a civil penalty: see *Amcors Limited v Barnes* [2011] VSC 341. As to abuse of power, see *Kang v Kwan* [2001] NSWSC 698 [37], [42]–[45] (Santow J).
- 63 *Royal Women's Hospital v Medical Practitioners Board* [2005] VSC 225; *Kemp v Medical Board of Australia* [2017] VSC 691. This privilege is available in much more limited circumstances than doctor–patient confidentiality. See Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [18.22].
- 64 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 28.
- 65 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 28(2).

- 66 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [18.39].
- 67 A 'registered medical practitioner' is defined as a person registered under the *Health Practitioner Regulation National Law* to practise in the medical profession (other than as a student): *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32B.
- 68 A 'counsellor' is defined as a person who is treating another person for an emotional or psychological condition: *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32B.
- 69 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C. A 'legal proceeding' includes 'any civil criminal or mixed proceeding and any inquiry in which evidence is or may be given before any court or person acting judicially including a Royal Commission or Board of Inquiry under the *Inquiries Act 2014*' (Vic): s 3(1).
- 70 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D.
- 71 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(2).
- 72 *Evidence Act 2008* (Vic) ss 126J, 126K. The Evidence Act uses the term 'informant' to refer to a journalist's source—this is distinct from the use of the term 'informant' to describe a human source, or a police officer who compiles the brief of evidence in a prosecution.
- 73 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2012, 2660 (Robert Clark, Attorney-General). See also Parliamentary Library Research Service, Parliament of Victoria, *Evidence Amendment (Journalist Privilege) Bill 2012* (Research Brief No 5, 2012) 10.
- 74 *Evidence Act 2008* (Vic) ss 126K(1), 131A. The privilege applies to search warrants as well as court-related disclosure procedures. Search warrants are not included in the equivalent Commonwealth provisions: see *Evidence Act 1995* (Cth) s 131A(2); *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133.
- 75 *Evidence Act 2008* (Vic) s 126J.
- 76 Parliamentary Library Research Service, Parliament of Victoria, *Evidence Amendment (Journalist Privilege) Bill 2012* (Research Brief No 5, 2012) 10.
- 77 *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133 [213], referring to the substantially equivalent provisions in the *Evidence Act 1995* (Cth).
- 78 *Evidence Act 2008* (Vic) ss 126K(2)(a)–(b).
- 79 *Evidence Act 2008* (Vic) s 127(1).
- 80 *Evidence Act 2008* (Vic) s 127(4).
- 81 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [18.54], quoting JM Yellin, 'The History and Current Status of the Clergy–Penitent Privilege' (1983) 23 *Santa Clara Law Review* 95, 148.
- 82 *Evidence Act 2008* (Vic) s 127(2). The specific offences in relation to which the privilege does not apply are those are against s 184 of the *Children, Youth and Families Act 2005* (Vic) and s 327(2) of the *Crimes Act 1958* (Vic).
- 83 See *Strickland v DPP (Cth)* (2018) 93 ALJR 1 [246]–[247]; *AB & EF v CD* [2017] VSC 350, [146], [151]–[153], citing *R v Grant* [2006] QB 60, *Warren v Attorney-General for Jersey* [2012] 1 AC 22 [35]–[36].
- 84 *AB & EF v CD* [2017] VSC 350 [152] (Ginnane J).
- 85 Exhibit RC1538 Statement of Inspector Ilena Pucar, 7 May 2020, 1 [1.3]. Victoria Police did not give the Commission access to these procedures on the basis that they considered them to be outside the scope of the Commission's terms of reference: Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 2 March 2020.
- 86 Exhibit RC1538 Statement of Inspector Ilena Pucar, 7 May 2020, 7-8 [6.1]–[6.12].
- 87 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29–31 [8.3]–[8.6].
- 88 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.4].
- 89 New South Wales Police, *Human Source Management Policy* (2019).
- 90 Consultation with Northern Territory Police, 4 March 2020. Northern Territory Police may consider accepting information from a person subject to legal obligations of privilege if there would be a risk to the community if the information was not used, but in these circumstances the person would be treated as a one-off 'complainant' and would not be registered as a human source. The decision about whether to use the information would be made by a group of people: Consultation with Northern Territory Police, 4 March 2020.
- 91 Consultation with Western Australia Police, 24 September 2019; Consultation with Tasmania Police, 12 September 2019.
- 92 Consultation with Western Australia Police, 24 September 2019.
- 93 'Covert human intelligence sources' is the term used to refer to human sources in the United Kingdom.
- 94 See Home Office (UK), *Covert Human Intelligence Source Revised Code of Practice* (August 2018) and Scottish Government, *Covert Human Intelligence Source Code of Practice* (December 2017), made under *Regulation of Investigatory Powers Act 2000* (UK) and *Regulation of Investigatory Powers (Scotland) Act 2000* (UK), respectively. The *Covert Human Intelligence Source Code of Practice* that applies in Scotland largely replicates the provisions of the United Kingdom *Covert Human Intelligence Source Revised Code of Practice*. For ease of reference, the Commission has focused primarily on the statutory framework set by the RIPA.

- 95 Department of Justice (USA), *The Attorney General's Guidelines Regarding the Use of Confidential Informants* (2002).
- 96 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 31 [8.6].
- 97 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 31 [8.6].
- 98 The Human Source Policy was finalised in April 2020 but came into effect in May 2020.
- 99 *Regulation of Investigatory Powers Act 2000* (UK) ss 29(2)–(3).
- 100 Definitions of 'matters subject to legal privilege', 'confidential personal information' and 'confidential journalistic material' are set out in *Police Act 1997* (UK) ss 98–100.
- 101 Home Office (UK), *Covert Human Intelligence Source Revised Code of Practice* (August 2018) 48.
- 102 Home Office (UK), *Covert Human Intelligence Source Revised Code of Practice* (August 2018) 49.
- 103 Department of Justice (USA), *The Attorney General's Guidelines Regarding the Use of Confidential Informants* (2002) 20–1.
- 104 Department of Justice (USA), *The Attorney General's Guidelines Regarding the Use of Confidential Informants* (2002) 21.
- 105 Department of Justice (USA), *The Attorney General's Guidelines Regarding the Use of Confidential Informants* (2002) 22.
- 106 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020.
- 107 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.3].
- 108 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 19 [5.3].
- 109 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29–30 [8.3]–[8.5].
- 110 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 30 [8.5].
- 111 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.3]–[8.4].
- 112 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 86 (Recommendation 1(b)). The inclusion of parliamentarians in the Kellam Report appears to have been based on a similar recommendation made in the Comrie Review (Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012)), which was in turn informed by advice from the Victorian Government Solicitor's Office (VGSO) (Letter of advice from VGSO to Superintendent Steve Gleeson, 6 June 2012). The VGSO had advised that Members of Parliament may have obligations to maintain the confidentiality of cabinet deliberations, or of information provided to a parliamentary committee prior to it being considered or made public by that committee.
- 113 Home Office (UK), *Covert Human Intelligence Source Revised Code of Practice* (August 2018) 43–4.
- 114 Home Office (UK), *Covert Human Intelligence Source Revised Code of Practice* (August 2018) 52.
- 115 Department of Justice (USA), *The Attorney General's Guidelines Regarding the Use of Confidential Informants* (2002) 8.
- 116 Department of Justice (USA), *The Attorney General's Guidelines Regarding the Use of Confidential Informants* (2002) 26.
- 117 Consultation with Western Australia Police, 24 September 2019; Consultation with South Australia Police, 6 September 2019; Consultation with Queensland Police, 8 October 2019. See also Submission 144a Victoria Police, 4 [19].
- 118 Consultation with Western Australia Police, 24 September 2019. See also Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 71 [11.8].
- 119 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 96 [413].
- 120 Consultation with Bar Association of Queensland, 2 September 2019; Consultation with Australian Capital Territory Bar Association, 24 October 2019; Consultation with Northern Territory Police, 4 March 2020.
- 121 Submission 091 Victorian Bar, 5–6; Submission 097 Criminal Bar Association, 2; Submission 112 Victoria Legal Aid, 2–3; Submission 116 Victorian Legal Services Board and Commissioner, 11.
- 122 Submission 097 Criminal Bar Association, 2.
- 123 Submission 097 Criminal Bar Association, 2. See also Submission 091 Victorian Bar, 5.
- 124 Submission 097 Criminal Bar Association, 3.
- 125 Submission 091 Victorian Bar, 5.
- 126 Submission 091 Victorian Bar, 6.
- 127 Consultation with Law Institute of Victoria, 15 January 2020.
- 128 Consultation with Victorian Legal Services Board and Commissioner, 8 January 2020.
- 129 Consultation with the New South Wales Office of Legal Services Commissioner, 26 August 2019; Consultation with the Northern Territory Bar Association, 31 October 2019.
- 130 Victorian Legal Services Board and Commissioner, *Lawyer Conduct in Providing Information to Police* (Regulatory Guideline, 2020) 2.
- 131 New South Wales Bar Association, *Guidance for NSW Barristers in the wake of the matter of Lawyer X*, 7.
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- 133 New South Wales Bar Association, *Guidance for NSW Barristers in the wake of the matter of Lawyer X*, 26.
- 134 New South Wales Bar Association, *Guidance for NSW Barristers in the wake of the matter of Lawyer X*, 26, 32 [86].
- 135 See, eg, *Australian Security Intelligence Organisation Act 1979* (Cth) s 18; *Criminal Code Act* (Cth) s 122.4A.
- 136 *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, 419 (Megarry J).
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- 138 K Koomen, ‘Breach of Confidence and the Public Interest Defence: Is It in the Public Interest? A Review of the English Public Interest Defence and the Options for Australia’ (1994) 10 *Queensland University of Technology Law Journal* 56, 56.
- 139 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.14].
- 140 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.14], [9.24]–[9.26]. See also *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (No 2)* 256 ALR 416, 422–3 [19]–[22]; *Apple Computer Australia Pty Ltd v Wily* [2002] NSWSC 855, [11] (Barrett J).
- 141 P Finn, ‘Professionals and Confidentiality’ (1992) 14 *Sydney Law Review* 317, 321.
- 142 *National Mutual Life Association of Australasia Ltd v Godrich* (1909) 10 CLR 1, 36; Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [1.2]; P Finn, ‘Professionals and Confidentiality’ (1992) 14 *Sydney Law Review* 317, 321. See also *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578, 586 (Jeffries J).
- 143 P Finn, ‘Professionals and Confidentiality’ (1992) 14 *Sydney Law Review* 317, 327; Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [12.17].
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# 5

## Legal principles guiding the inquiry

### INTRODUCTION

The Commission's terms of reference required both an investigation of certain past events (terms of reference 1 and 2), and an examination of current processes relating to the use of human sources with legal obligations of confidentiality or privilege, with a view to recommending measures to avoid any identified failures in the future (terms of reference 3–5).<sup>1</sup> This chapter looks at how the Commission approached its investigative functions in relation to past events.

The Commission's two primary investigative functions were to inquire into and report on:

- the number of cases that may have been affected by the conduct of Ms Nicola Gobbo as a human source and the extent to which they have been affected (term of reference 1)
- the conduct of current and former Victoria Police officers in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source (term of reference 2).

These two functions were inextricably linked. Ms Gobbo's conduct as a human source could only properly be understood by analysing the way in which Victoria Police recruited, handled and managed her in that capacity. Equally, the conduct of Victoria Police and its officers in their use of Ms Gobbo as a human source, and the non-disclosure of that fact, linked directly to whether cases may have been affected.

Undertaking the Commission’s primary investigative functions entailed a factual exercise—establishing who did what and when. It also entailed a legal exercise—determining whether the conduct of Ms Gobbo and Victoria Police may have ‘affected’ cases in which they were involved, and whether that conduct may have breached or fallen short of the conduct that their legal, ethical and professional duties demanded.

Importantly, the Commission’s role was not to make binding or conclusive determinations about whether individual cases were in fact affected by the conduct of Ms Gobbo and Victoria Police. This is the role of the courts. Instead, after having considered the evidence it was able to assemble, the Commission has identified how individual cases *may have been affected*.

Nor was it the Commission’s role to find any individual guilty of a criminal offence or of professional misconduct. This is the role of investigatory and prosecution agencies. As will become apparent later in this report, the Commission has, however, concluded that the conduct of Ms Gobbo and certain Victoria Police officers breached or fell short of the requirements of their professional duties. Drawing on the evidence and complete, unredacted submissions made by Counsel Assisting the Commission and parties, the Commission is satisfied that the allegations about the conduct of Ms Gobbo and certain Victoria Police officers warrant a comprehensive and independent investigation to determine whether there is sufficient evidence to bring any criminal charges and, in the case of certain current Victoria Police officers, any disciplinary action.

This chapter explains the legal principles that guided the Commission’s investigative functions, and how the Commission applied those principles to define the parameters of its inquiry and the nature of its findings. Specifically, it outlines:

- the key legal principles that apply to appeals in criminal proceedings and that informed the Commission’s deliberations regarding whether individual cases may have been affected by the conduct of Ms Gobbo’s conduct as a human source
- the laws and legal principles that apply to the conduct of lawyers and police officers and that informed the Commission’s assessment of the conduct of Ms Gobbo and Victoria Police officers
- the Commission’s role and approach to the consideration of potential findings of criminal conduct and other misconduct, including how it identified potentially affected cases and afforded parties procedural fairness.

These matters are set out in turn below.

The Commission’s analysis and findings in relation to its investigative functions are contained in Chapters 7, 8 and 9 of this final report.

This chapter should also be read in conjunction with Chapter 2, which outlines key concepts and legal principles that underpin the criminal justice system, and Chapter 3, which explains the processes that the Commission followed in conducting the inquiry.

## LEGAL PRINCIPLES: POTENTIALLY AFFECTED CASES

The Commission was tasked with identifying the number of cases that ‘may have been affected’ by the conduct of Ms Gobbo as a human source (and, by extension, the related conduct of Victoria Police officers), and the extent to which those cases may have been affected. The Letters Patent establishing the Commission noted that appeal proceedings had been brought by three individuals whose convictions were alleged to have been affected by Ms Gobbo’s conduct, and that it was anticipated that other cases may have been affected and further proceedings could be commenced.

Notably, at the time of finalising this report, the Court of Appeal of the Supreme Court of Victoria had already determined two such appeals: those of Mr Faruk Orman and Mr Zlate Cvetanovski.<sup>2</sup>

In *Orman v The Queen*, the Court of Appeal concluded that Ms Gobbo's conduct as a human source while acting as Mr Orman's lawyer 'subverted Mr Orman's right to a fair trial, and went to the very foundations of the system of a criminal trial. There was, accordingly, a substantial miscarriage of justice'.<sup>3</sup> The Victorian Director of Public Prosecutions (DPP) conceded that in her role as a human source, Ms Gobbo pursued the presentation of the principal evidence against Mr Orman on the charge of murder. The Court allowed the appeal, set aside the conviction, declined to order a re-trial, and ordered a judgment of acquittal (not guilty) be entered for Mr Orman.<sup>4</sup>

In *Cvetanovski v The Queen*, the Court of Appeal found that there had been a substantial miscarriage of justice in Mr Cvetanovski's trial for drug trafficking, and set aside his conviction.<sup>5</sup> The miscarriage of justice related to the non-disclosure, at the trial, of information about the key witness who gave evidence against Mr Cvetanovski. As conceded by the DPP, Ms Gobbo, who was Mr Cvetanovski's lawyer, had been providing information to police in her role as a human source, had persuaded the key witness in the trial to give evidence against her client, and had (along with Victoria Police) been providing financial assistance to the witness. The Court allowed the appeal, set aside the conviction, declined to order a re-trial and ordered a judgment of acquittal be entered for Mr Cvetanovski.<sup>6</sup>

The Court of Appeal considered the particular circumstances leading to Mr Orman's and Mr Cvetanovski's convictions only. Other cases may have been affected in different ways, according to their own facts and circumstances. It will be for the Court of Appeal to decide in any future appeals whether the facts and circumstances of those cases have given rise to a substantial miscarriage of justice.

As discussed in Chapter 1, in *AB & EF v CD*, the Supreme Court of Victoria decision relating to the use of Ms Gobbo as a human source and the DPP's proposed disclosure of information to seven potentially affected individuals, Justice Ginnane concluded that the potentially affected individuals in those cases had an argument that their convictions involved a substantial miscarriage of justice:

*The possible grounds include that because of the conduct of Victoria Police and [Ms Gobbo], they did not receive a trial as required by the criminal justice system and that the trials involved an abuse of process, because their legal counsel did not provide independent advice. The requirements of a fair trial include that counsel will provide independent advice to a client and will not have separate obligations to the police who have brought the prosecution.*<sup>7</sup>

In this context, and as noted later in this chapter, the Commission interpreted the phrase 'may have been affected' in term of reference 1 as referring to whether the conduct in question provided a reasonably arguable ground of appeal against conviction in a particular case, and more specifically whether it could have caused a substantial miscarriage of justice.

The following section outlines some of the key principles that apply to appeals in criminal proceedings and types of error in the trial process that may result in a successful appeal. It is not intended to provide a comprehensive summary of the law relating to appeals, but refers to principles and past decisions that are likely to be relevant to the events under examination by the Commission, and that have informed the Commission's deliberations.

## Appeal processes and grounds

The appeal process is a fundamental feature of our criminal justice system—it allows for any substantive or procedural errors in the trial process to be identified and remedied. In doing so, it promotes the safety of verdicts, adherence to fair trial principles, and the integrity of the justice system as whole. Fair trial principles and their role in upholding the integrity of the justice system are explained in Chapter 2.

The law provides for convictions and sentences to be reviewed and overturned if certain matters are established. The precise processes, grounds and outcomes differ according to whether an individual is appealing against their conviction (including for a second or subsequent time), making a petition for mercy (which is referred to the Court of Appeal for determination as an appeal), or appealing against their sentence.

This chapter focuses on the principles underpinning appeals against conviction, as that is the pathway likely to be of most direct relevance to any person whose case may have been affected by the conduct of Ms Gobbo and Victoria Police.<sup>8</sup>

Broadly, the court hearing an appeal against conviction or a referral of a petition of mercy is required to determine whether there has been a ‘substantial miscarriage of justice’. This concept is explained below.

In Victoria, a convicted person may, with leave, appeal to the Court of Appeal against their conviction under section 274 of the *Criminal Procedure Act 2009* (Vic). On a successful appeal, the Court of Appeal can order a new trial, enter a judgment of acquittal, or substitute the original conviction with a conviction for a different offence.<sup>9</sup>

The Court of Appeal must allow the appeal if the appellant (the person lodging the appeal) satisfies the court that:

- the verdict of the jury is unreasonable or cannot be supported having regard to the evidence
- there has been a substantial miscarriage of justice as the result of an error or an irregularity in, or in relation to, the trial
- there has been a substantial miscarriage of justice for any other reason.<sup>10</sup>

The first of these grounds has limited application to the circumstances the Commission considered. The following sections therefore focus on the second and third grounds.

## Substantial miscarriage of justice

There is no single or universal definition of what amounts to a substantial miscarriage of justice for the purpose of a criminal appeal.<sup>11</sup> The circumstances giving rise to a substantial miscarriage of justice are ‘too numerous and too different to permit prescription of a single test’.<sup>12</sup> Generally, however, a substantial miscarriage of justice will concern a departure from or interference with the rules, principles or processes that underpin the integrity of the criminal justice system, rather than an assessment of the appellant’s guilt or innocence:

*... the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distracted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.*<sup>13</sup>

In this way, there is a strong link between the notion of a substantial miscarriage of justice and fair trial principles. Circumstances in which an accused person has been deprived of a fair trial may amount to a substantial miscarriage of justice, and in turn result in a successful appeal against conviction.<sup>14</sup> Similarly, circumstances found to be an abuse of the court’s process may also amount to a substantial miscarriage of justice.<sup>15</sup>

Conduct that undermines public confidence in the administration of justice may also provide grounds for an appeal against conviction. The principle that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’ requires courts, lawyers and State agencies such as the police to ensure the courts’ processes are used fairly.<sup>16</sup> It also requires lawyers and investigating authorities to perform their functions with due regard to their legal duties and obligations.<sup>17</sup>

Even if the Court of Appeal concludes that a conviction was inevitable—that is, that the jury would have convicted the accused person even if the error or irregularity in question had not occurred—the appeal may still succeed if the court finds that the error or irregularity amounted to a substantial miscarriage of justice.<sup>18</sup>

## Challenging the integrity of a guilty plea after conviction

An appeal against a conviction may still succeed even if the appellant pleaded guilty at first instance,<sup>19</sup> although they must demonstrate ‘very exceptional circumstances’.<sup>20</sup> The appellant must show that their guilty plea was not due to a consciousness of guilt but instead was due to another objective factor.<sup>21</sup>

Factors that may satisfy a court that there has been a miscarriage of justice relating to a guilty plea include a failure to provide adequate advice to the accused person about the nature of the charges,<sup>22</sup> and applying improper pressure on the accused person to plead guilty.<sup>23</sup>

In *AB & EF v CD*, Justice Ginnane observed that there is ‘a duty on legal practitioners and others associated with prosecutions not to do anything that corrupts or subverts the administration of justice, and ... a conviction following a guilty plea can also be quashed by application of that principle’.<sup>24</sup> This conclusion was endorsed by the Court of Appeal in *AB v CD & EF*.<sup>25</sup>

The right of appeal in these circumstances reflects the importance of ensuring that an accused person has sound and independent legal advice and is not deprived of free choice when deciding whether to plead guilty or not guilty.<sup>26</sup>

## Examples of conduct and circumstances that may amount to a substantial miscarriage of justice

As noted above, there are numerous factors that may amount to a substantial miscarriage of justice. They range from an inadvertent failure to observe an apparently minor procedural requirement, right through to deliberate misconduct by those responsible for upholding the proper administration of justice. In some instances, the fact that a procedural or other error has occurred may, in and of itself, be sufficient to set aside a conviction (such as an error in selecting a jury).<sup>27</sup> In others, it may be the failure to disclose the error or other impropriety to the accused person, depriving them of the opportunity to raise an objection to the issue or to take steps to adopt a different approach to the trial.

This section outlines some of the factors that courts have previously found sufficient to allow an appeal against a conviction and that are relevant to the matters under consideration by the Commission (noting that some of the cases were decided in jurisdictions other than Victoria).

Circumstances found to have constituted a substantial miscarriage of justice include:

- issues relating to the accused person’s legal representation, such as the incompetence of their lawyer, their lawyer breaching their duties to the court and to the client, or a perception that their lawyer may not have been acting independently, in the client’s best interests
- failure by the prosecution to disclose all relevant information to the defence
- inequality of arms; for example, where the prosecution had possession of information that was wrongfully provided to it
- where evidence used in the trial was improperly or illegally obtained
- where there is fresh evidence that, if it had been available to the jury, is likely to have resulted in an acquittal.

These matters are discussed in turn below.

## Deprivation of competent and independent counsel

As discussed in Chapter 2, an important element of an accused person's right to a fair trial is the right to legal representation. A lack of competent and/or independent legal representation at trial may provide grounds for a successful appeal against conviction if it can be shown that this deficiency resulted in a substantial miscarriage of justice.

### Absence of legal representation

In cases involving serious offences, a trial may be unfair if the accused person does not have legal representation. In *Dietrich v The Queen*, the High Court of Australia concluded that there had been a miscarriage of justice because the accused person did not have legal representation at the trial, and ordered that his conviction be set aside and that he be granted a new trial.<sup>28</sup>

### Errors and omissions by defence counsel

The manner in which defence counsel conducted the trial may be relevant to whether the trial was a fair one:

*In some cases, the conduct of counsel may be such that it has deprived the accused of a fair trial according to law. If the conduct of counsel has resulted in an unfair trial, that of itself constitutes a miscarriage of justice... [T]he failure of counsel to conduct the defence properly is inconsistent with the notion of a fair trial according to law.*<sup>29</sup>

In general, an accused person is bound by the way in which their counsel conducted the trial; however:

*... there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.*<sup>30</sup>

Acts and omissions (failures to act) by defence counsel may, in some circumstances, be found to have led to a substantial miscarriage of justice.<sup>31</sup> A court is unlikely to allow an appeal on this basis if the conduct complained of was undertaken for a legitimate forensic purpose.<sup>32</sup> If, however, the conduct complained of relates to something other than a forensic choice, there is a higher likelihood that an appeal will succeed.<sup>33</sup> Such conduct might include a critical error such as omitting to call a material witness, failing to argue that certain evidence should be excluded, introducing evidence that was prejudicial to the accused person's interests, or not pursuing available arguments about the prosecution's case.<sup>34</sup>

In *Nudd v The Queen*, Justice Kirby observed that errors by counsel may occur as a result of inexperience, a failure to study the applicable law, or 'in some cases, personal characteristics that render that practitioner prone to misbehaviour, ineptitude or inattention'.<sup>35</sup> His Honour further noted that:

*Sometimes, rarely, the misbehaviour, errors or incompetence in the legal representation of an accused at trial may be so egregious, frequent or obvious as, without more, to amount to a miscarriage of justice.*<sup>36</sup>

### **Breach of duties to the court and client**

In light of the central role that the legal profession plays in upholding the proper administration of justice, a breach of a lawyer's duties to the court or their client (including the duties not to mislead the court, to maintain privilege and to avoid conflicts of interest) may cause or contribute to a miscarriage of justice.

In *Tuckiar v The King*, the High Court set aside the accused person's conviction for murder (and death sentence) for several reasons, including that his lawyer had, in breach of his professional duties, disclosed privileged communications with the accused person to the trial judge in private and openly in court.<sup>37</sup> The Court described the actions of the lawyer as 'wholly indefensible' and 'a grave mistake', which contributed to the trial miscarriage.<sup>38</sup> The Court observed that:

*It was [the lawyer's] paramount duty to respect the privilege attaching to the communication made to him as counsel ... he was not entitled to divulge what he had learnt from the prisoner as his counsel. Our system of administering justice necessarily imposes upon those who practise advocacy duties which have no analogies, and the system cannot dispense with their strict observance.*<sup>39</sup>

As noted above, in *Orman v The Queen*, the Court of Appeal concluded that in pursuing the presentation of the principal evidence against her own client, Ms Gobbo's conduct was self-evidently 'a fundamental breach of her duties to Mr Orman and to the Court'.<sup>40</sup> Her actions subverted Mr Orman's right to a fair trial, went to the very foundations of the system of criminal trial, and accordingly, resulted in a substantial miscarriage of justice.<sup>41</sup>

### **Perceived deprivation of independent counsel**

In *R v Szabo*, the Court of Appeal of the Supreme Court of Queensland allowed an appeal against conviction on the basis that the failure of the defence barrister to disclose to his client that he had previously had an intimate relationship with the prosecutor amounted to a perceived injustice against the client.<sup>42</sup> The issue was not that the defence barrister had failed to conduct the defence competently or vigorously (the court found that his conduct of the defence was otherwise above reproach), nor was there any reason to suspect 'any collusion, connivance or lack of dedication to his task' by defence counsel.<sup>43</sup> The Court was instead concerned that his non-disclosure of the relationship might have created reasonable suspicion about whether he had acted with fearless independence, and whether the accused person had received a fair trial.<sup>44</sup>

The Court noted that barristers play a vital role in the administration of justice, and in promoting public confidence in the justice system:

*Litigants see members of the bar conducting themselves as officers of the Court, owing a special duty to the Court. Just as the Court expects fearlessly independent presentation by counsel, so the client expects that subject to counsel's supervening duty to the Court, counsel will with fearless independence promote the client's cause.*<sup>45</sup>

The Commission notes that in *R v Szabo* and the cases relating to incompetence of counsel discussed above, the conduct of the accused person's lawyer was found to have contributed to a miscarriage of justice even though it involved actions or omissions generally attributable to inadvertence or inexperience, rather than conduct intentionally aimed at undermining the defence case. In *R v Szabo*, Justice Thomas expressed the view that conduct of the latter kind would be sufficient to justify a conviction being set aside:

*The disquiet that arises from the fear that counsel may have failed in their duty ... arises out of concern that a person with an important role in the trial may not have discharged it adequately in favour of the client. If a reasonable suspicion arises that defence counsel has 'run dead' or colluded with the Crown prosecutor contrary to the interests of the accused or for some extraneous purpose failed to play the proper role of defence counsel, that would reveal a seriously unfair contest, and would in my view demonstrate a miscarriage of justice sufficient to require the conviction to be set aside.<sup>46</sup>*

## Non-disclosure of relevant evidence

As discussed in Chapters 2 and 14, the prosecution has a duty to disclose all relevant material to the defence, including any material that may assist the defence case or undermine the prosecution case. This duty is regarded as fundamental to the fairness of a criminal trial, and is owed to the court, not the accused person.<sup>47</sup> The duty of disclosure extends to material obtained by investigating police, even if that material is not known to the prosecutor.<sup>48</sup> The duty of disclosure continues even after the proceedings have been finalised.<sup>49</sup> This means that if, after a person has been convicted, the prosecution becomes aware of important information that is central to the case, it must still be disclosed to the accused person.

A failure by the prosecution to disclose all relevant evidence to an accused person may result in a miscarriage of justice, and a guilty verdict being set aside on appeal.<sup>50</sup> The court will consider whether the failure to disclose the material in question caused the trial to be unfair and therefore resulted in a substantial miscarriage of justice.<sup>51</sup> A failure to disclose relevant material can amount to a substantial miscarriage of justice in this way:

*Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.<sup>52</sup>*

As noted above, in *Cvetanovski v The Queen*, the DPP conceded that the non-disclosure of payments made by Victoria Police and Ms Gobbo to the key prosecution witness meant that the accused person, Mr Cvetanovski, was deprived of the opportunity to test the evidence being presented against him, and the jury was unable to make a proper assessment of the witness' credibility.<sup>53</sup> Mr Cvetanovski had also argued that because he was unaware that Ms Gobbo was a human source, he was unable to raise the issue of Ms Gobbo's breaches of duty to him as her client.<sup>54</sup> Reiterating that 'the principles governing disclosure are fundamental to the integrity of criminal trials and to the maintenance of public confidence in the administration of justice', the Court of Appeal concluded that there had accordingly been a substantial miscarriage of justice.<sup>55</sup>

## Inequality of arms

In *Lee v The Queen*, the High Court set aside the appellants' convictions and ordered a new trial on the basis that at the time of the trial, the prosecution had possession of information that had been wrongfully released to it.<sup>56</sup> The prosecution had obtained a copy of transcripts of the accused persons' evidence before the New South Wales Crime Commission even though there was a prohibition on that evidence being released to police and prosecutors because it might prejudice the fair trial of a person who may later be charged with an offence. The High Court found that the appellants' trial 'was altered in a fundamental respect by the prosecution having the appellants' evidence before the Commission in its possession'.<sup>57</sup>

The High Court found that:

*The circumstances of this case involve the wrongful release and possession of evidence. However, its effects cannot be equated with the use of evidence illegally or improperly obtained... Rather, these appeals concern the effect of the prosecution being armed with the appellants' evidence. It is not necessary to resort to questions of policy to determine whether a miscarriage of justice has occurred. What occurred in this case **affected this criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused.** There was no legislative authority for that alteration. Indeed, it occurred contrary to the evident purpose of s 13(9) of the [New South Wales Crime Commission Act 1985], directed to protecting the fair trial of examined persons.<sup>58</sup>*

The High Court concluded that the prosecution should have alerted the trial judge to the fact that they had received the transcripts, so that the judge could have ordered a temporary stay, while another prosecutor and other prosecution personnel, not privy to the evidence, were engaged.<sup>59</sup> It was of no relevance that the defence had not objected to the trial proceeding—it was the responsibility of the prosecution to ensure the case was presented properly and with fairness to the accused person.<sup>60</sup>

## Improperly or illegally obtained evidence

If the conviction of the accused person was based on evidence improperly or illegally obtained, in circumstances where the accused person, and the court, were unaware of that fact, the accused person may have been deprived of a fair trial. This is due to the accused person having been deprived of the opportunity to object to the admissibility of the evidence.

Section 138(1) of the *Evidence Act 2008* (Vic) provides that evidence that was obtained improperly or in contravention of an Australian law is not admissible, unless the court decides that the desirability of admitting it outweighs the undesirability of permitting its use. This provision recognises the public interest in the criminal justice system discouraging the use of unlawfully or improperly obtained evidence and unlawful conduct by those whose task it is to enforce the law.<sup>61</sup> By giving courts the discretion to admit such evidence, this provision also recognises the public interest in sometimes having important and relevant evidence before the court, even if unlawfully obtained.

In determining whether to admit disputed evidence, the court engages in a balancing exercise:

*... the weighing against each other of two competing requirements of public policy, namely, the public interest in admitting reliable and probative evidence so as to secure the conviction of the guilty and the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the system of criminal justice.<sup>62</sup>*

As part of its balancing exercise, the court must take into account several specified considerations, including the gravity of the impropriety or contravention and whether the impropriety or contravention was deliberate or reckless or contrary to a person's rights under the *International Covenant on Civil and Political Rights*.<sup>63</sup>

In this context, when scrutinising the conduct of police in gathering evidence, courts have considered not only the legality or propriety of the specific methodologies in question, but also the attitudes of the police to their obligations:

*When evidence is improperly or illegally obtained by police officers ... the attitude of those officers to the rule of law, as displayed during the relevant investigation and any associated prosecution, before, during and after the obtaining of the evidence, must be relevant to the exercise of the discretion conferred by s 138.<sup>64</sup>*

As part of this balancing exercise, the court can also consider how widespread the conduct giving rise to the impropriety is within the relevant law enforcement organisation. This can have a bearing on the seriousness of the impropriety.<sup>65</sup>

There are two types of evidence referred to in section 138: evidence that was ‘improperly’ obtained, and evidence obtained ‘in contravention of an Australian law’. Improperly obtained evidence involves conduct that is broader than a contravention of law and should not be narrowly construed.<sup>66</sup> It includes conduct by police that:

*... is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances, including, among other things, the nature and extent of any known or suspected existing or threatened criminal activity, the basis and justification of any suspicion, the difficulty of effective investigation or prevention and any imminent danger to the community.*<sup>67</sup>

Some deceptive tactics by police, which do not involve illegal conduct, may be considered legitimate.<sup>68</sup> Evidence obtained in contravention of an Australian law includes contravention of a law of the Commonwealth, a state or territory, and of the common law.<sup>69</sup>

The chain of causation between the impropriety or illegality and the evidence sought to be adduced (offered in evidence) may be direct or indirect, provided that the chain represents a course of rational, inferential reasoning.<sup>70</sup> The link does not need to be immediate. It may arise through various steps.<sup>71</sup>

*If the impropriety or contravention bears only a distant causal relationship to the evidence, the public interest in deterring impropriety or contravention of the law by obtaining evidence in the manner concerned might be thought more likely to be outweighed by the public interest in admitting probative evidence. Conversely, exclusion of evidence closely connected to the impropriety or contravention might more obviously serve the public interest in deterring the obtaining of evidence in that manner.*<sup>72</sup>

## Fresh evidence

In some circumstances, a convicted person may be given leave to appeal against conviction on the basis of fresh evidence.<sup>73</sup> Fresh evidence is evidence that was not available to the appellant at the time of the trial, assuming they had exercised reasonable care in the conduct of their case.<sup>74</sup>

A court may allow an appeal against conviction if the appellant adduces fresh evidence that demonstrates the original conviction constituted a substantial miscarriage of justice. The relevant test is whether the fresh evidence, when viewed in combination with the evidence given at the trial before the jury, shows that there is a ‘significant possibility that the jury, acting reasonably, would have acquitted the accused’ had the fresh evidence been before it at trial.<sup>75</sup>

## LEGAL PRINCIPLES: CONDUCT OF LAWYERS AND POLICE OFFICERS

In Chapters 7 and 8, the Commission examines how the conduct of Ms Gobbo as a human source and the related conduct of Victoria Police officers:

- may have affected individual cases
- may have breached or fallen short of the behaviour demanded by their legal, ethical and professional duties.

In Chapter 9, the Commission identifies the systemic factors across Victoria Police that encouraged, enabled or condoned the failings of individual police officers. These factors largely involved cultural issues and failures of leadership, governance and management. In certain respects, however, they involved failures to comply with legal obligations, notably the obligation to disclose all relevant information to the defence.

The following sections outline the laws and legal principles relating to the Commission's assessment of the conduct of Ms Gobbo and Victoria Police officers. The legal principles outlined in these sections refer to laws in operation at the time of the Commission's inquiry. Although some of the legislation referred to came into force after the key events investigated by the Commission, previous versions of these laws similarly set and governed fundamental professional standards of conduct for lawyers and police officers. Indeed, obligations to uphold the law and observe fair trial principles are long-established and fundamental to the proper administration of the criminal justice system. The Commission is confident, therefore, that the duties and standards of behaviour required of lawyers and police officers under current laws also applied during the period when Ms Gobbo was acting as a human source.<sup>76</sup>

More detail about key legal principles is also contained in the following chapters:

- Chapter 2: The importance of the inquiry
- Chapter 4: Legal obligations of confidentiality or privilege
- Chapter 14: The use and disclosure of information from human sources in the criminal justice system
- Chapter 15: Legal profession regulation.

## Lawyers' conduct

In Chapter 7, the Commission describes Ms Gobbo's conduct as a human source, and the ways in which her conduct may have affected the cases of her clients and others. The chapter also explores the broader impacts of Ms Gobbo's conduct on individuals, the legal profession and the criminal justice system.

The Commission has concluded that Ms Gobbo's activities as a human source, while practising as a lawyer, amounted to a grave violation of her duties as a legal practitioner, and that the potential impacts of her misconduct were extraordinarily wide-ranging. Her misconduct involved a disregard for the most basic legal professional and ethical standards of independence, of integrity and of avoiding conflicts of interest.

In assessing Ms Gobbo's conduct, the Commission had regard to the standards of professional and ethical behaviour expected and required of lawyers, and the tests set down in law to establish whether a lawyer has engaged in misconduct.

Professional misconduct is defined in the *Legal Profession Uniform Law Application Act 2014* (Vic).<sup>77</sup> It includes:

- unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and*
- conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.*<sup>78</sup>

The legislation lists examples of conduct that may amount to professional misconduct.<sup>79</sup> They include contraventions of the Legal Profession Uniform Law (whether or not the person has been convicted), contraventions of the Legal Profession Uniform Rules, and being convicted of a serious offence or an offence involving dishonesty.<sup>80</sup>

The *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Barristers' Conduct Rules) are a principal source of a barrister's professional obligations, breach of which may amount to professional misconduct.<sup>81</sup> The Barristers' Conduct Rules in many important respects reflect the obligations that lawyers owe under the common law. Lawyers are also bound by the laws that apply to members of the community.

The Barristers' Conduct Rules state that barristers:

- have an overriding duty to the court to act with independence in the interests of the administration of justice
- owe duties to their clients and to their colleagues
- must maintain high standards of professional conduct
- must act honestly and fairly
- must give their advice independently and for the proper administration of justice.<sup>82</sup>

The Barristers' Conduct Rules accordingly prohibit barristers from engaging in conduct that:

- deceives or misleads the court or an opponent
- is dishonest or otherwise discreditable to a barrister
- is prejudicial to the administration of justice
- is likely to diminish public confidence in the legal profession or the administration of justice, or otherwise bring the legal profession into disrepute.<sup>83</sup>

The Barristers' Conduct Rules describe a barrister's duty to the client in this way:

*A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.*<sup>84</sup>

In observing their duty to the client, barristers must keep communications with the client confidential (subject to some exceptions) and must avoid conflicts of interest.<sup>85</sup> These duties are not only set out in the Barristers' Conduct Rules; they are fundamental duties that arise out of the fiduciary relationship that exists between a lawyer and client.<sup>86</sup> A fiduciary relationship is one in which a person (the client) places their confidence, good faith, reliance and trust in another (the lawyer), whose advice is being sought.<sup>87</sup> The fiduciary duties owed by a lawyer to a client are protected by the branch of law called equity, which is discussed in Chapter 4.

The duty of confidentiality requires a barrister not to use or disclose any confidential information they have received from a client unless the client consents, or the disclosure is compelled or permitted by law.<sup>88</sup> As discussed in Chapter 4, communications between a lawyer and client made for the dominant purpose of seeking and providing legal advice, or for use in legal proceedings are also protected by privilege.<sup>89</sup>

The duty to avoid conflicts of interest requires a barrister not to act for a person if that person's interests are or would be in conflict with the barrister's own interests.<sup>90</sup> At the very least, the barrister must disclose the conflict to the client and may only continue to act for them if the client provides fully informed consent.<sup>91</sup> Barristers are also prohibited from working in another vocation if it is likely to impair or conflict with the barrister's duties to clients.<sup>92</sup>

Further, a barrister cannot act for a person if that person's interests are or would be in conflict with the interests of another of the barrister's clients,<sup>93</sup> or if the barrister has already discussed the person's case with someone who is likely to be, or associated with, the opposing party in the matter.<sup>94</sup>

Depending on the nature and seriousness of the conduct involved, and the degree to which the breach was wilful or intentional, a barrister who breaches their professional duties may face:

- disciplinary action for professional misconduct, which may result in sanctions including suspension or cancellation of the barrister's practising certificate, removal of the barrister's name from the Supreme Court Roll of Legal Practitioners, a caution and publication of the details of the disciplinary action taken<sup>95</sup>
- criminal proceedings if the conduct is alleged to have involved the commission of an offence (for example, perverting or attempting to pervert the course of justice)<sup>96</sup>
- civil proceedings brought by the client to claim damages or compensation (for example, for breach of confidence or breach of fiduciary duty), or to seek an injunction to restrain the barrister from future disclosure of confidential information or from acting for other parties if a conflict of interest exists.<sup>97</sup>

As discussed above, breaches of a lawyer's duties to the court or to their client may also affect the outcome of a criminal trial, either because the breach affects a particular aspect of the trial process (for example, the evidence that is available for the court to consider), or because it undermines public confidence in the administration of justice.

If a court becomes aware of the breaches during the trial and decides that they compromise the accused person's right to a fair trial, it may order that the proceeding be stayed permanently or temporarily. If the breaches become apparent after the accused person has been convicted, they may be raised as grounds of appeal or in a petition for mercy. An appeal court may find that the misconduct involved deprived the accused person of a fair trial and amounted to a substantial miscarriage of justice.

## Police officers' conduct

In Chapter 8, the Commission describes the conduct of several Victoria Police officers in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source, and the ways in which that conduct may have affected the cases of numerous individuals.

The Commission has concluded that the conduct of some current and former Victoria Police officers in managing Ms Gobbo as a human source at various times and in various ways was improper, potentially falling short of the behaviour demanded by their legal, ethical and professional duties. In assessing the conduct of those current and former Victoria Police officers, the Commission had regard to the standards of professional and ethical behaviour expected and required of police, and the tests set down in law to establish whether a police officer's conduct was improper and amounted to misconduct.

The duties and obligations of police officers arise from their oath or affirmation of office, legislation and prosecutorial guidelines, and the common law. Before they can commence service, every police officer must take an oath or make an affirmation promising to:

- well and truly serve without favour or affection, malice or ill-will
- keep and preserve the peace
- prevent, to the best of their abilities, all offences
- discharge all of the duties legally imposed on the officer faithfully and according to law.<sup>98</sup>

Upon making this promise, the officer assumes all of the duties and powers imposed or conferred on a police officer by legislation or the common law.<sup>99</sup> The common law tends to describe police duties only in general terms.<sup>100</sup> As reflected in their oath or affirmation of office, police have two broad duties: to prevent and detect crime, and to keep the peace.<sup>101</sup>

One specific duty police have is the duty of disclosure. As noted above and in Chapter 2, police are bound by the prosecution's duty to disclose all relevant information to the accused person. The duty of disclosure continues to apply even after an accused person has been convicted. If police wish to resist disclosure of certain information in their possession on the basis that it is subject to public interest immunity (PII), they must apply to the court for an order authorising non-disclosure.<sup>102</sup>

As a public authority, Victoria Police, along with its officers, is also required to comply with the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Charter).<sup>103</sup> The Charter only applies to acts or decisions made after 1 January 2008.<sup>104</sup>

The *Victoria Police Act 2013 (Vic)* (Victoria Police Act) and the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)*, set out what 'breaches of discipline' or 'misconduct' mean.<sup>105</sup>

Breaches of discipline include:

- contraventions of the Victoria Police Act or regulations
- conduct that is likely to bring Victoria Police into disrepute or diminish public confidence in it
- disgraceful or improper conduct
- negligence or carelessness in the discharge of duty
- acting in a manner prejudicial to the good order or discipline of Victoria Police
- aiding or abetting or directly or indirectly being knowingly concerned in, or a party to the commission of a breach of discipline.<sup>106</sup>

Misconduct means:

- conduct that constitutes an offence punishable by imprisonment
- conduct that is likely to bring Victoria Police into disrepute or diminish public confidence in it
- disgraceful or improper conduct (whether in the officer's official capacity or otherwise).<sup>107</sup>

Depending on the nature and seriousness of the conduct involved, and the degree to which the breach was wilful or intentional, a police officer who breaches their professional duties may initially face an investigation by Victoria Police or the Independent Broad-based Anti-corruption Commission (IBAC),<sup>108</sup> which may in turn result in:

- management action under internal Victoria Police policy, such as workplace guidance, formally recording the breach on the officer's professional development assessment or an admonishment notice<sup>109</sup>
- action for breach of discipline, which may result in a reprimand; a fine; a reduction in rank, seniority or remuneration; dismissal or a requirement to pay compensation or costs<sup>110</sup>
- criminal proceedings if the conduct is alleged to have involved the commission of an offence (for example, misconduct in public office, or perverting or attempting to pervert the course of justice).<sup>111</sup>

Breaches of certain legal obligations by police officers may provide grounds for civil proceedings (for example, for malicious prosecution), and may also affect the outcome of a criminal trial. In particular, as outlined above, any impropriety or unlawfulness in the processes by which they gathered evidence, or any failure to disclose relevant information to the defence, may be directly relevant to whether an accused person has received a fair trial.

## THE COMMISSION'S ROLE AND APPROACH

As noted in Chapter 3, the Commission's role was to inquire into and report on the matters specified in its terms of reference. This involved uncovering facts, and reaching general conclusions about their consequences.

As an investigative body, the Commission had no judicial or prosecutorial power, and was unable to make any determinative findings. It had no power to overturn convictions, order re-trials, change sentences, release people from custody or otherwise affect anyone's legal position.<sup>112</sup> Only courts have these powers. Nor did the Commission have the power to initiate any criminal or disciplinary charges. Instead it will be for other authorities to determine whether charges or disciplinary proceedings should be brought.<sup>113</sup> If such action is taken, it will be for a court (or other agencies in the case of some conduct) to make findings about whether offences or other types of unlawful conduct have been committed, and if so, to impose sanctions.

### No power to find people guilty of criminal offences

Under our legal system, only a court exercising criminal jurisdiction can make a finding that a person is guilty of a criminal offence and impose criminal sanctions.<sup>114</sup> A royal commission or other body of inquiry does not have these powers. This reflects the 'principle of legality'. This principle aims to avoid 'the risk of reputational damage and prejudice to any criminal proceedings that might follow publication of a finding of corrupt [or criminal] conduct'.<sup>115</sup>

In the *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (commonly known as the 'Fitzgerald Inquiry'), the Chair of the Commission, the Honourable Gerald Edward (Tony) Fitzgerald, AC, QC, explained why bodies other than courts should refrain from making findings about criminal conduct, even when they are investigating events involving potentially unlawful conduct:

*The community would be badly served by any unnecessary departure from the fundamental presumption of innocence to which each citizen is entitled unless and until tried and convicted. Every person who was adversely mentioned in evidence before this Inquiry (or who is mentioned in material held by the Commission) is innocent unless and until proven guilty in a court or other appropriate tribunal, which must make such a finding in the proper discharge of its functions.*

*Even where it is necessary to make an adverse finding in this report against a particular person, the question of his or her criminal guilt must remain for the appropriate court to determine. To the extent that findings of fact are necessary for the purposes of the report, it goes no further than to record matters and draws short of any conclusion as to the commission (or otherwise) of any criminal offence by any person.*<sup>116</sup>

### Power to consider potential unlawful conduct

The principle of legality does not prevent certain regulatory authorities and investigative bodies from inquiring into potential criminal and other unlawful activity and making findings about individual conduct.

The parameters of an inquiry will ultimately depend on the legislation or other instrument establishing the agency or body, as well as relevant legal principles developed by the courts.<sup>117</sup> For example, an administrative body with regulatory functions may be empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action.<sup>118</sup> Such a determination may lay the foundations for instituting legal proceedings or other enforcement measures.<sup>119</sup> In other circumstances, it may only be permissible for the agency or body to report on the existence of material that may establish that a criminal offence has been committed, without expressing any actual finding that an offence may have been or was committed.<sup>120</sup>

In the case of a royal commission, its terms of reference will determine whether it is permissible to express views about the conduct of those involved in the events that are the subject of its inquiry.<sup>121</sup>

Findings made by administrative or investigative bodies like this Commission about the conduct of those it investigates have an entirely different character to findings made by courts exercising criminal jurisdiction. They are made for a different purpose, and are reached by reference to a different standard of proof and a different approach to the rules of evidence (discussed further below). In addition, subject to some exceptions, evidence given or produced to a royal commission cannot be used against a person in criminal proceedings.<sup>122</sup> This prohibition preserves the important distinction in our democracy between an inquiry such as a royal commission—an exercise of power by the executive branch of government—and a criminal proceeding before a court—an exercise of power by the judicial branch of government. The distinction means that the evidence used in a criminal trial remains subject to the strict rules developed over centuries to ensure that criminal justice is administered fairly.

## The Commission’s approach to considering potential unlawful conduct

The Commission’s terms of reference required it to consider potential unlawful conduct. This was not to determine guilt, but to address the terms of reference within the parameters of the Letters Patent establishing the Commission.

The Commission’s consideration and identification of potential unlawful conduct by individuals was necessary and justified for several reasons.

As discussed in Chapter 1, the High Court, in its decision in *AB v CD*, observed that Ms Gobbo’s actions were ‘fundamental and appalling breaches’ of her obligations as counsel to her clients and of her duties to the court.<sup>123</sup> It also concluded that Victoria Police was ‘guilty of reprehensible conduct’ in knowingly encouraging Ms Gobbo to act as a human source and was ‘involved in sanctioning atrocious breaches of the sworn duty of every police officer’ under the Victoria Police Act and its predecessor, such that the prosecution of several people ‘was corrupted in a manner which debased fundamental premises of the criminal justice system’.<sup>124</sup> This decision precipitated the Commission’s inquiry and is cited in the background to the Commission’s terms of reference. Accordingly, these statements of the High Court informed the purpose of the Commission’s inquiry and its overall approach—namely, an examination of relevant events and the extent to which the criminal justice process was undermined by potentially illegal or improper conduct. It was appropriate for the Commission to adopt this approach in light of the High Court’s observations—that is, to have regard to the context and reasons for the establishment of the inquiry.<sup>125</sup>

The terms of reference required the Commission to report on the ‘conduct’ of Ms Gobbo as a human source, and the ‘conduct’ of current and former Victoria Police officers. Against the background of the High Court’s decision in *AB v CD*, it was necessary for the Commission to examine the appropriateness of their conduct, including whether it fell short of that required by applicable laws, regulations and professional standards.

Examining the extent to which cases ‘may have been affected’ required consideration of potential unlawful or improper conduct on the part of Ms Gobbo and Victoria Police officers. As discussed above, a case may be affected in many ways, such as if those involved in investigating or prosecuting it obtained evidence through improper or unlawful means, or if their conduct otherwise undermines public confidence in the administration of justice. The nature and extent of any unlawful or improper conduct by current or former police officers and Ms Gobbo may be relevant to a court determining whether a substantial miscarriage of justice has occurred, resulting in a conviction being quashed and/or a charge permanently stayed.

Term of reference 6 also authorised the Commission to inquire into and report on any other matters necessary to satisfactorily resolve the matters included in terms of reference 1–5. This further supported the Commission’s broad scope envisaged by the Letters Patent to investigate, consider and report on all dimensions of the conduct of Ms Gobbo and current and former Victoria Police officers.

## Counsel Assisting submissions

In their submissions, Counsel Assisting, while recognising and applying the principle of legality, invited the Commission to find that Ms Gobbo and a number of current and former police officers *may* have committed criminal conduct, and *may* have engaged in conduct that breached their professional and ethical duties. In the case of Ms Gobbo, Counsel Assisting submitted she may have engaged in conduct that breached her obligations under the Barristers’ Conduct Rules or its predecessor.<sup>126</sup> In the case of certain current and former police officers, Counsel submitted that they may have engaged in conduct that breached their obligations under the Victoria Police Act or its predecessor.<sup>127</sup> Importantly and appropriately, they did not submit that the Commission should find they *had* done so, appreciating the limitations upon the Commission’s administrative powers.

In their responsive submissions, Victoria Police, some current and former Victoria Police officers and Ms Gobbo urged the Commission not to make such findings and requested that those portions of Counsel Assisting submissions be redacted.

## The Commissioner’s ruling

The Commission determined that even though it was required to consider potential criminal conduct, it would not make findings that any named individuals (such as Ms Gobbo or current or former Victoria Police officers) committed or may have committed criminal offences. The Commission determined, however, that it might make findings against individuals concerning potential breaches of the Victoria Police Act or its predecessor.<sup>128</sup> The Commission communicated this position to Victoria Police, the relevant current and former police officers and Ms Gobbo in August 2020 and, at their request, gave reasons for that decision.<sup>129</sup>

In arriving at the decision not to make findings that any individual had or may have committed criminal offences, the Commission was guided by the approach adopted in previous comparable inquiries and royal commissions, by its Letters Patent and the background to them, and by a concern not to unfairly prejudice any future court proceedings or put at risk the presumption of innocence and the right to a fair trial, as enshrined in Victoria’s Charter. Any findings of this Commission would not, in any event, be admissible to establish the guilt of individuals in a criminal trial. It follows that, even accepting this Commission had power to make findings about potential criminal conduct as Counsel Assisting persuasively submitted, those findings would have no effect and would be inadmissible in a criminal proceeding.

The Commission’s decision that it may make findings, if satisfied to the requisite standard, that some current and former police officers may have committed breaches of the Victoria Police Act or its predecessor was also guided by the terms of its Letters Patent and the events that led to this Commission, including the High Court’s observations in *AB v CD* about the conduct of Victoria Police. It was also influenced by the fact that determinations about breaches of the Victoria Police Act and its predecessor are made, not by courts exercising judicial power, but by the Chief Commissioner of Victoria Police or their authorised delegate exercising executive power.<sup>130</sup> This means that the concern about prejudicing the deliberations of a jury in relation to potential criminal charges is not applicable. A professional decision maker with statutory functions would be able to make decisions according to the applicable criteria and evidentiary requirements, without being swayed by previous findings of this Commission or by media reporting of them.

## The Commission's findings and conclusions about individual conduct

Consistent with the Commissioner's ruling, the Commission has not made any findings that any individual committed or may have committed any criminal offences.

The Commission is satisfied, however, that some current and former Victoria Police officers engaged in conduct that, at the time, may have amounted to breaches of discipline and/or misconduct. The Commission's conclusions about the conduct of these officers are set out in Chapter 8.

It is also satisfied that Ms Gobbo engaged in conduct that breached her duties as a legal practitioner. In this regard it should be noted that in her written submissions, Ms Gobbo admitted that she had engaged in conflicts of interest and breaches of legal professional privilege and confidentiality.<sup>131</sup> The Commission's conclusions about Ms Gobbo's conduct are set out in Chapter 7.

Having reached these conclusions and having received submissions from Counsel Assisting about potentially criminal or unlawful conduct,<sup>132</sup> the Commission had to consider what further action was warranted with respect to these serious allegations.

The Commission considered the evidence and submissions made by all parties. The Commission is persuaded that, despite the arguments made in responsive submissions,<sup>133</sup> there is sufficient merit in the contentions about potential criminal conduct and other misconduct made in the complete and unredacted version of Counsel Assisting submissions to require a full and independent investigation to determine whether there is sufficient admissible evidence to support a prosecution or disciplinary action.<sup>134</sup> The Commission was also mindful of the limitations of its own investigations, in part because of the extent and breadth of the matters it was required to investigate and its time and budgetary constraints, but also due to the challenges it faced in accessing all relevant materials from Victoria Police (these are discussed further in Chapter 16). As a result, it cannot be confident it has identified all instances of potential wrongdoing by individuals, received all pertinent material or heard from all relevant witnesses. In any case, much of the evidence gathered by this Commission is not admissible in a criminal proceeding.<sup>135</sup> For these reasons, the Commission has concluded that investigation by a law enforcement body is required.

For reasons explained in Chapter 17, however, the Commission formed the view that it would be problematic for the conduct of Ms Gobbo and of current and former Victoria Police officers to be probed by existing investigative authorities. Instead, it has recommended that the Victorian Government appoints a dedicated Special Investigator with all necessary powers to investigate whether there is sufficient evidence to establish the commission of any criminal offences connected with the events that led to this Commission. If the Special Investigator concludes that there is sufficient evidence to establish the commission of any criminal offences, they would compile a brief of evidence for the DPP who would then decide whether to prosecute, and if so would be responsible for prosecution of the matter in the courts.

The Special Investigator should also be empowered to investigate whether there is sufficient evidence to establish the commission of or a breach of discipline under the Victoria Police Act or its predecessor by any serving police officer. If satisfied there is sufficient evidence, the Special Investigator would be able to lay disciplinary charges against individual police officers.

The Commission's recommendations about the appointment of the Special Investigator are set out in Chapter 17. As Ms Gobbo has now been struck off the Roll of Legal Practitioners and she can no longer practise as a lawyer, there is no basis for her professional misconduct to be investigated further.<sup>136</sup> As discussed in Chapter 7, the only remaining action to be taken in relation to Ms Gobbo's practice as a lawyer is for the Victorian Bar to take the symbolically significant step to have her name removed from the Victorian Bar Roll.

## Establishing the scope of the inquiry

The scope of a royal commission’s inquiry is determined by the content of the instrument establishing the inquiry. The Letters Patent establishing the Commission specified its terms of reference, and also, as discussed in the previous section, included information about the background to the inquiry.

### Defining key words and phrases in the terms of reference

Once the Letters Patent for the Commission were issued, it became the Commission’s responsibility to determine the scope of the inquiry and to construe its terms of reference.<sup>137</sup> Defining key words and phrases helped the Commission to establish the parameters of its inquiry, and in turn to complete its functions and report on time, and apply its resources in a targeted and efficient manner.<sup>138</sup>

Tables 5.1 and 5.2 below describe how the Commission defined or construed key words and phrases in terms of reference 1 and 2 relating to its investigative functions.

**Table 5.1: Definition of key words and phrases in term of reference 1**

Term of reference 1: <i>the number of, and extent to which, cases may have been affected by the conduct of Ms Gobbo as a human source</i>	
Word or phrase	Definition
<b>conduct of Ms Gobbo</b>	<p>Refers to Ms Gobbo’s acts and omissions as a human source, in the context of her also representing, acting for or providing legal advice to clients.</p> <p>This includes an examination of Ms Gobbo’s duties as a legal practitioner to the administration of justice, to the courts, to her fellow practitioners and to her clients, and the potential consequences of breaching those obligations, including whether such conduct may have affected cases.</p>
<b>as a human source</b>	<p>Concerns conduct in connection with Ms Gobbo providing information to, and otherwise assisting (or attempting to assist) Victoria Police.</p> <p>Assisting police includes conduct aimed at helping police in the investigation and prosecution of her clients and others, such as informing on her clients to police, encouraging co-accused or other witnesses or clients to provide evidence against her clients or others, and encouraging her clients to plead guilty when she was acting as an agent of police.</p> <p>Includes conduct of Ms Gobbo in periods when she was not a registered human source, but may have been providing information, or otherwise assisting (or attempting to assist) police in a manner consistent with being a human source.</p>
<b>case</b>	<p>Refers to a specific proceeding (either indictable or summary) that resulted in a conviction or finding of guilt. Restricting cases to those that resulted in a conviction or finding of guilt was necessary due to the definition given to ‘affected’, its connection to appeals against conviction, and the High Court’s statement in <i>AB v CD</i> that upon the disclosure of information regarding the conduct of Ms Gobbo and Victoria Police, ‘the propriety of each Convicted Person’s conviction be re-examined’.<sup>139</sup></p>

<b>affected</b>	<p>Refers to whether the conduct of Ms Gobbo and Victoria Police officers may be relevant to the Court of Appeal when:</p> <ul style="list-style-type: none"> <li>• determining an appeal against conviction, a second or subsequent appeal against conviction, a referral from a petition for mercy</li> <li>• considering whether there has been a substantial miscarriage of justice.</li> </ul>
<b>extent</b>	<p>Refers to the number of ways in which, and the degree to which, the case may have been affected, by reference to the types of conduct relevant to the Court of Appeal's determination of an appeal against a conviction, or a second or subsequent appeal against conviction, or a referral from a petition for mercy.</p>
<b>may</b>	<p>Refers to the notion of 'reasonable possibility', a lower threshold than that applied by appellate courts.</p> <p>Does not indicate any conclusions as to the merits of any potential challenge to a conviction in the Court of Appeal, or any determination that a case <i>was</i>, as opposed to <i>may have been</i>, affected.</p>

**Table 5.2: Definition of key words and phrases in term of reference 2**

<b>Term of reference 2: the conduct of current and former officers of Victoria Police in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source</b>	
<b>Word or phrase</b>	<b>Definition</b>
<b>disclosures</b>	<p>Refers to the disclosures made by Victoria Police directly to an accused person and/or their legal representatives, prosecuting authorities such as the Director of Public Prosecutions, other bodies such as the Victorian Government Solicitor's Office and/or a court.</p>
<b>recruitment</b>	<p>Refers to the circumstances in which Ms Gobbo was recruited or came to act as a human source.</p>
<b>handling and management</b>	<p>Refers to how Ms Gobbo was handled and managed as a human source by Victoria Police.</p>
<b>conduct of current and former officers of Victoria Police</b>	<p>Refers to the acts and omissions of those officers in their relevant interactions with Ms Gobbo or that resulted from Victoria Police's use of Ms Gobbo as a human source.</p> <p>Construed broadly to reflect the duties and obligations of officers of Victoria Police at law, including the sworn or affirmed duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will.</p>
<b>as a human source</b>	<p>Concerns conduct in connection with Ms Gobbo providing information to and otherwise assisting (or attempting to assist) police.</p>

## Identifying potentially affected cases

Counsel Assisting submitted to the Commission that the following methodology they developed for identifying the number of cases that may have been affected by the conduct of Ms Gobbo as a human source, and the extent to which they were potentially affected, was appropriate and accurate. The methodology was designed in accordance with the definitions ascribed to the words and phrases in the terms of reference as outlined above.

The overall objective of this process was to identify cases that resulted in a conviction or finding of guilt, and which fell into any of these categories:

1. Ms Gobbo advised, conferred with or represented the accused person between 14 May 1998<sup>140</sup> and 16 August 2013.<sup>141</sup> (This category did not require any evidence that Ms Gobbo had provided information to Victoria Police or had otherwise assisted the prosecution—it was sufficient that she had provided legal services to the accused person while also acting as a human source and had not disclosed her role as a source.)
2. Ms Gobbo advised, conferred with or represented the accused person and there was evidence that her conduct as a human source may have more directly affected the outcome of the accused person's case. This was because she had communicated information about them, or about people with whom they had associated or events in which they may have been involved, to Victoria Police and she was also providing legal services to them, without disclosing her role as a human source to the accused person.
3. Ms Gobbo did not advise, confer with or represent the accused person, but there was evidence that her conduct as a human source may otherwise have tainted the evidence used by the prosecution against the accused person, without anyone disclosing her role as human source.

Broadly, the process involved first ascertaining the people Ms Gobbo advised or represented while also acting as a human source (whether registered as such or not). Those cases were then filtered according to certain criteria relating to Ms Gobbo's representation, case outcomes, and evidence of relevant interactions between Ms Gobbo (in her capacity as a human source) and Victoria Police. The details of this process are documented in Counsel Assisting submissions.<sup>142</sup>

The analysis of Counsel Assisting, supplemented by further work undertaken by Commission staff, revealed that there were 973 individuals with convictions or findings of guilt for whom Ms Gobbo acted between 1998 and 2013 without disclosing her role as police agent. It was not necessary for there to be a link between her representation of the accused person and the conviction or finding of guilt. These were the cases that fell within the first two categories listed above.

A further 38 individuals, for whom Ms Gobbo did *not* act, were identified as having convictions or findings of guilt potentially affected by her conduct and that of Victoria Police—in particular, because evidence used against them may have been improperly or illegally obtained through the use of Ms Gobbo as a human source, and the origins of the evidence were not disclosed to the accused person. These were the cases that fell within the third category listed above.

This provides a total cohort of 1,011 individuals whose cases were potentially affected by the conduct of Ms Gobbo acting as a human source.

Counsel Assisting developed detailed case studies for 124 individuals from this cohort, demonstrating how their cases may have been specifically affected by the conduct of Ms Gobbo and Victoria Police. Of these, 86 were Ms Gobbo's clients (and fell within the second category listed above), and 38 were related cases (falling within the third category). The cases of these 124 individuals were identified as potentially having been affected because they were persuasive examples of conduct that may be found to amount to a substantial miscarriage of justice on the following two broad grounds.

### Undisclosed conflict of interest

- Ms Gobbo was acting for the accused person and also provided information to Victoria Police in relation to the accused person, and/or otherwise assisting (or attempting to assist) in the prosecution of the accused person; and
- This conduct was not disclosed to the accused person, nor did Victoria Police seek permission from the court not to disclose that information.

### Tainted evidence

- Evidence relied upon in prosecuting the accused person may have been obtained as a result of the improper or illegal use of Ms Gobbo as a human source by Victoria Police; and
- The origins of that evidence were not disclosed to the accused person, nor did Victoria Police seek permission from the court not to disclose that information.

In respect of the remaining 887 individuals, Counsel Assisting submitted that Ms Gobbo failed to disclose that she was a human source while also advising or representing them. Even in the absence of any indication that Ms Gobbo provided information about these people to Victoria Police, or that the evidence used in their prosecution was tainted, this circumstance alone is potentially capable of giving rise to a substantial miscarriage of justice, pursuant to the approach in *R v Szabo* (described above). This may depend, however, on the role of Ms Gobbo in each accused person's case. In this regard, Counsel Assisting noted that in many cases Ms Gobbo did not appear at the accused person's trial or if she did she was led by senior counsel.<sup>143</sup> Instead she may only have provided advice, or have appeared at preliminary stages of proceedings, such as in mention hearings, bail applications and committals.

## Evidentiary principles

A royal commission may conduct its inquiry in any manner that it considers appropriate, subject to the requirements of procedural fairness, the Letters Patent and the *Inquiries Act 2014* (Vic) (Inquiries Act).<sup>144</sup> It is not bound by the rules of evidence and may inform itself on any matter as it sees fit.<sup>145</sup> Even though a royal commission is not bound by the rules of evidence, it should have regard to those rules because they assist in providing 'substantial justice' to the parties concerned.<sup>146</sup>

So, while the Commission was able to conduct the inquiry in the manner it considered appropriate, it was also mindful of its scope, statutory requirements and the rules of procedural fairness and evidence. Accordingly, the Commission:

- gathered evidence from a range of sources: written statements, oral evidence, submissions and documents obtained in response to notices to produce
- took a broad, liberal approach to the questions of relevance and admissibility of evidence, being mindful of its investigative nature and the purpose of the inquiry
- established processes for considering and determining applications to refuse to give information to the Commission, principally on the grounds of PII
- afforded procedural fairness to any person whose interests were sufficiently affected by the inquiry (discussed further below)
- in making findings in this final report, adopted the civil standard of proof as explained in the case of *Briginshaw v Briginshaw*.<sup>147</sup>

As explained above, the Commission's role was not to make findings that any person had committed a criminal offence. That is the role of the courts. When courts exercise criminal jurisdiction, the fact-finder must be satisfied beyond reasonable doubt of the elements of the offence with which the accused person is charged before that person can be found guilty. This is called the criminal standard of proof, and is considered an appropriately high threshold given the gravity of imposing criminal sanctions on an individual.

When making its findings, the Commission was not exercising judicial power in a criminal proceeding and it was therefore not necessary to apply the criminal standard of proof. Instead, as noted, it adopted the civil standard of proof, which requires satisfaction on the balance of probabilities.<sup>148</sup> This is a lower threshold than the criminal standard of proof. In making findings about conduct that, if found to be misconduct, could have serious consequences for those who may be charged, the Commission did so cautiously. This is consistent with the legal principle explained by Justice Dixon in *Briginshaw*, that:

*Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*<sup>149</sup>

## Procedural fairness requirements

As noted above and in Chapter 3, the Commission was obliged to afford procedural fairness to interested parties. This obligation arises under the Inquiries Act and the common law.<sup>150</sup>

Procedural fairness is a fundamental legal principle. This principle requires courts and commissions of inquiry to exercise their powers with fairness to those whose interests might be affected.<sup>151</sup>

The entitlement to procedural fairness generally extends to any person whose rights, interests or legitimate expectations may be affected in a direct and immediate way.<sup>152</sup> The variety of interests that are protected by the requirements of procedural fairness are 'almost infinite'<sup>153</sup> and are not limited to legal rights.<sup>154</sup> They can also include status, reputation, liberty, confidentiality, livelihood and financial or other benefit.<sup>155</sup>

There are many ways in which a royal commission or other inquiry can ensure interested parties are afforded procedural fairness. The scope and content of the obligation to afford procedural fairness is determined by the facts and circumstances of the inquiry.<sup>156</sup> The requirements are flexible and their application in each case will depend on matters such as the nature of the inquiry, the legislation and terms of reference governing the inquiry, and the subject matter being dealt with.<sup>157</sup> They are also shaped by matters of practicality, such as the time and resources available to the decision maker, the duration and complexity of the inquiry, and the volume of material the inquiry traverses.<sup>158</sup>

The overriding consideration in determining the scope and content of the obligation to afford procedural fairness is 'fairness'.<sup>159</sup>

Significantly, procedural fairness requires anyone conducting an inquiry to refrain from making any finding adverse to the interests of a person without first giving them the opportunity to make submissions against such a finding.<sup>160</sup> This obligation is reflected in section 36 of the Inquiries Act and required the Commission to:

- ensure that any person against whom an adverse finding was proposed was aware of the matters on which the proposed finding was based, and that they had an opportunity to respond to those matters
- consider the person's response before making an adverse finding
- fairly set out the person's response in its report when making an adverse finding against them.

Procedural fairness also requires that decision makers not be, and not appear to be, affected by bias—that is, they must bring an impartial mind to the resolution of the questions they are required to decide.<sup>161</sup> This is known as the 'bias rule'. A decision maker should not by their words or actions convey:

*... the impression that he or she had preconceived adverse views about a party's case and that those views were so strongly held that he or she was unwilling or unable to consider on their merits any submissions made, or evidence adduced, by that party which were inconsistent with those views.*<sup>162</sup>

The bias rule does not, however, preclude a decision maker from expressing tentative views during a hearing, nor does it require the absence of any predisposition or inclination for or against an argument or conclusion.<sup>163</sup> A person presiding over a royal commission is permitted to take a more active, interventionist and robust role in the conduct of hearings, ascertaining facts and reaching conclusions, than a judge in adversarial court proceedings.<sup>164</sup>

The bias rule may require the decision maker to redress any 'evident and persisting inequality of treatment' of particular witnesses by any counsel assisting.<sup>165</sup> It does not, however, prevent counsel assisting from advancing a 'case theory' in the presentation of evidence and argument.<sup>166</sup> What matters is whether, by the time the public part of the inquiry draws to a close, the decision maker can still consider the evidence given and the submissions put to them on their merits, and reach a conclusion, irrespective of the case theory.<sup>167</sup> The main question will be whether the decision maker is reasonably open to persuasion and is seen to be so.<sup>168</sup>

Procedural fairness also requires that interested parties be given a fair hearing throughout the inquiry.<sup>169</sup> A fair hearing involves ensuring that parties are able to ascertain the critical issues, evidence and considerations relevant to their interests and that they have access to material that is both supportive of and adverse to their interests. It also involves giving parties the opportunity to present their case and to respond to evidence that contradicts their position.

## Application of procedural fairness by the Commission

The Commission afforded procedural fairness not only to those individuals against whom an adverse finding may have been made, but also to those whose cases may have been affected by the use of Ms Gobbo as a human source (whom the Commission came to refer to as 'potentially affected persons'), as well as to agencies involved in the prosecution of the potentially affected cases. Many of the potentially affected persons had a direct personal interest in the Commission's findings due to the possible infringement of their legal rights, including the deprivation of their liberty if they had been imprisoned following their conviction.

The processes the Commission adopted for ensuring interested parties were afforded procedural fairness are set out in Chapter 3. Broadly, they involved allowing certain individuals and entities to appear and often also to be heard at the Commission's hearings, to cross-examine relevant witnesses, to make oral and written submissions on issues affecting them, and to have access to documentary materials. Parties were provided with Counsel Assisting submissions about what findings they considered ought to be made, as well as submissions made by other interested

parties, and were invited to make responsive submissions (including, where necessary, reply submissions) so that any potential adverse findings could be addressed. The Commission carefully considered all such responsive and reply submissions.

The Commission implemented and facilitated all of these processes in the context of tight timeframes, finite resources, extensive documentary material often being provided late, a large number of interested parties, a labyrinth of complex historical court non-publication orders requiring several applications to the Supreme Court, protracted arrangements for resolving an extraordinary number of PII claims, hundreds of applications for non-publication orders, and an application to the Supreme Court to judicially review one of its decisions.

The Commission's capacity to share relevant materials with interested parties was constrained in several instances by Victoria Police and sometimes other entities insisting that certain material not be disclosed to others on the basis of PII, or that it otherwise be treated as confidential. In some cases, Victoria Police agreed to provide these materials to others, subject to them providing legal undertakings to keep the material confidential. But on many occasions, they refused to disclose the material even when an appropriate undertaking was offered. The Commission was also impacted by Victoria Police's often late and voluminous production of documents, some of which contained material relevant to witnesses who had already appeared or were about to appear before the Commission. Because of time constraints and the size of its task, the Commission did not have the opportunity to recall all such witnesses to fully explore this material with them or allow others to do so. These issues are addressed in Chapter 16.

In their submissions in response to Counsel Assisting submissions, Ms Gobbo, Victoria Police and some current and former Victoria Police officers asserted that they had not received procedural fairness from the Commission (either directly or through the actions of Counsel Assisting). They argued that the Commission should be careful not to simply adopt Counsel Assisting submissions.

Ms Gobbo submitted that Counsel Assisting (and, in more limited ways, the Commissioner) were biased against her and/or pursued a predetermined narrative.<sup>170</sup> Six former officers of the Victoria Police Source Development Unit also argued that Counsel Assisting pursued a predetermined narrative that was unsupported by the evidence.<sup>171</sup>

The other contentions made by parties included that:

- Counsel Assisting's proposed findings and criticisms were based on inaccuracies, unsupported inferences and selective use of available material<sup>172</sup>
- Counsel Assisting's proposed findings were based on material that had not been tendered during hearings, or not put to parties when they gave evidence before the Commission<sup>173</sup>
- they had inadequate access to relevant witness statements and documents, which hampered their efforts to refresh their memories about past events and prevented them from understanding the allegations being made against them<sup>174</sup>
- they had insufficient time to prepare for giving evidence and/or for responding to Counsel Assisting submissions<sup>175</sup>
- the Commission had insufficient time to conduct the detailed inquiry necessary to reach accurate conclusions about the conduct of individuals.<sup>176</sup>

The Commission fully understood its obligations to afford procedural fairness to interested individuals and entities. Given the time and financial constraints within which it operated and the unsatisfactory, piecemeal way that Victoria Police provided information, the Commission did everything reasonable to ensure procedural fairness. It is true that some of the material referred to by Counsel Assisting in their submissions was identified after the conclusion of the hearings in relation to terms of reference 1 and 2. But all parties had the opportunity to respond to Counsel Assisting submissions, to answer any allegations amounting to adverse findings and to place further material before the Commission. The Commission is satisfied that, in this way, all interested individuals and entities received procedural fairness throughout the inquiry, and in relation to the findings and conclusions included in this final report.

Assertions that counsel are biased should not be lightly made.<sup>177</sup> Those assertions, however, were vigorously made by Ms Gobbo and must be dealt with, however trivial or misconceived.<sup>178</sup>

The tests for bias concern the decision maker, not those in supporting roles such as that of Counsel Assisting. The submissions of Counsel Assisting plainly did not represent the views of the Commissioner. The Commissioner, who constituted the Commission, carefully scrutinised Counsel Assisting submissions when reaching the Commission's findings.<sup>179</sup> She also carefully considered all responsive submissions, including any objections to Counsel Assisting's assertions and proposed findings. The Commissioner's decision, after receiving the responsive submissions, not to find that particular individuals may have engaged in criminal conduct, was one of many examples of the Commission's decisions not to accept Counsel's contentions and/or risk prejudicing the rights or interests of parties.<sup>180</sup>

The Commission rejects the other assertions made by individuals that they were not afforded procedural fairness. As to the arguments that they were not sufficiently aware of key issues, facts and evidence, had insufficient time to review materials or formulate positions, and that Counsel Assisting submissions referred to matters that had not been raised during hearings, the Commission makes the following points:

- The Commission's inquiry was preceded by several other reviews and court proceedings conducted over many years, including the *AB v CD* proceedings in the Supreme Court, Court of Appeal and High Court, such that the parties were already broadly aware of the events and issues involved before the Commission's inquiry began.
- The requirement to ensure fair notice of the critical issues, facts and evidence relevant to any adverse findings that might be made was discharged on an ongoing basis throughout the Commission's inquiry. People subject to scrutiny by the Commission were represented by lawyers who had access to a vast quantity of documents and transcripts of evidence, ample opportunity to cross-examine relevant witnesses at the Commission's hearings and listen to evidence, and to make and respond to submissions. If relevant material was not shown to them in a timely way, it was because Counsel Assisting did not then have or were not then aware of the significance of the material or because court or other orders or PII claims prevented this. The submissions process rectified any such shortcomings and provided an opportunity for the individuals to provide their response (and on occasion, multiple times).
- Although the Commission's timeframes were tight, the parties were routinely afforded appropriate procedural fairness, necessarily tailored to the circumstances in which this Commission operated. The Commission's inquiry was conducted over a period of almost two years, which afforded individuals and entities ample time to consider their positions. The Commission frequently granted parties extensions of time to make submissions and review materials. In addition, special arrangements were made for Ms Gobbo to give evidence, in light of her medical conditions and other personal circumstances. These personal circumstances also impacted upon the Commission's ability to make documents available to Ms Gobbo in a secure form.
- As an investigatory body, the Commission was not bound by evidentiary rules in the same way that courts are. Accordingly, the fact that not every point or allegation was put to a witness, and not every document was tendered during hearings, did not preclude the Commission from making an adverse finding in respect of those matters, as long as the affected individual or entity first had the opportunity to respond (for example, in written submissions). If a matter was not put during a witness' evidence, that did, however, have an impact on whether the Commission made findings in relation to it. The late provision of a great deal of material from Victoria Police also meant that the Commission's investigative role continued after the hearings on terms of reference 1 and 2 concluded in February 2020. The provision of Counsel Assisting submissions to relevant individuals afforded them an adequate opportunity to respond to matters not raised at the hearings, given the challenging circumstances in which this Commission had to function.<sup>181</sup>
- Before making adverse findings, the Commission took into account the fact that individuals did not always have access to relevant documents and material when giving evidence, that serious allegations contained in Counsel Assisting submissions were not always put to them, and that not every relevant witness may have been called. This is another way in which the Commission afforded all individuals procedural fairness.

## CONCLUSION

The laws and legal principles outlined in this chapter demonstrate the importance of ensuring accused persons receive a fair trial, and the consequences for convictions if an appeal court identifies any oversight, impropriety or illegality that tainted the accused person's trial and resulted in a substantial miscarriage of justice. Not only can errors or omissions in a trial or evidence-gathering processes amount to a substantial miscarriage of justice, so too can the conduct of lawyers and law enforcement officers if it breaches professional and ethical standards, or otherwise undermines public confidence in the administration of justice.

The Commission's findings, conclusions and recommendations in relation to its primary investigative functions were guided and informed by these principles. They are set out in Chapters 7, 8 and 9 and should be read in light of the consistent expectation of appeal courts that fair trial principles be adhered to, even if the case against the accused person is considered a very strong one.

# Endnotes

- 1 In addition, term of reference 6 authorised the Commission to inquire into and report on ‘any other matters necessary to satisfactorily resolve’ the matters within terms of reference 1–5.
- 2 *Orman v The Queen* (2019) 59 VR 511 (Maxwell P, Niall and Emerton JJA); *Cvetanovski v The Queen* [2020] VSCA 272 (Maxwell P, Beach and Weinberg JJA).
- 3 *Orman v The Queen* (2019) 59 VR 511, 513 [12] (Maxwell P, Niall and Emerton JJA).
- 4 *Orman v The Queen* (2019) 59 VR 511, 514 [15]–[16] (Maxwell P, Niall and Emerton JJA).
- 5 *Cvetanovski v The Queen* [2020] VSCA 272, [9]–[10], [13] (Maxwell P, Beach and Weinberg JJA).
- 6 *Cvetanovski v The Queen* [2020] VSCA 272, [13] (Maxwell P, Beach and Weinberg JJA).
- 7 *AB & EF v CD* [2017] VSC 350, [160] (Ginnane J).
- 8 For principles relevant to the other pathways, see Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 26–31.
- 9 *Criminal Procedure Act 2009* (Vic) s 277.
- 10 *Criminal Procedure Act 2009* (Vic) s 276.
- 11 *Baini v The Queen* (2012) 246 CLR 469, 479.
- 12 *Andelman v The Queen* (2013) 38 VR 659, [85].
- 13 *R v Hickey* [1997] EWCA Crim 2028 (Roch LJ) (cited in *AB v CD* [2017] VSCA 338 [198] (Ferguson CJ, Osborn and McLeish JJA)).
- 14 See, eg, *Nudd v The Queen* (2006) 80 ALJR 614, 617 [6]–[7] (Gleeson CJ); *Wilde v The Queen* (1988) 164 CLR 365, 375 (Deane J); *Ratten v The Queen* (1974) 131 CLR 510, 516 (Barwick CJ). See also *Orman v The Queen* (2019) 59 VR 511, 513 [12] (Maxwell P, Niall and Emerton JJA) citing *Wilde v The Queen* (1988) 164 CLR 365, 373 (Brennan, Dawson and Toohey JJ).
- 15 *AB v CD & EF* [2017] VSCA 338, [63] (Ferguson CJ, Osborn and McLeish JJ); *Baini v The Queen* (2012) VLR 469.
- 16 *Williams v Spautz* (1992) 174 CLR 509, 520 (Mason CJ, Dawson, Toohey and McHugh JJ); *R v Szabo* [2001] 2 Qd R 214, 215–6 [6] (De Jersey CJ).
- 17 *Grimwade v Meagher* [1995] 1 VR 446, 452; *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 93 ALJR 1, 23 (Kiefel CJ, Bell and Nettle JJ). See also *Roberts v The Queen* [2020] VSCA 277 [259] (T Forrest and Osborn JJA and Taylor AJA).
- 18 *Baini v The Queen* (2012) 246 CLR 469, 479–81 (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
- 19 See *AB v CD & EF* [2017] VSCA 338, [135] (Ferguson CJ, Osborn and McLeish JJA), affirming *AB & EF v CD* [2017] VSC 350, [299] (Ginnane J), which cited *R v Reed* [2003] VSCA 95, [2] (Winneke P); *R v Mokbel (‘Change of Pleas’)* (2012) 35 VR 156, 176–7 [261]–[264] (Whelan J); *R v KCH* (2001) 124 A Crim R 233.
- 20 See cases in Judicial College of Victoria, *Victorian Criminal Proceedings Manual: 20.4.1.7 – Appeal Against Conviction Following Guilty Plea* (Web page) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27874.htm>>.
- 21 *Peters v The Queen (No 2)* [2019] VSCA 292, [39] (Maxwell P, Kaye and McLeish JJA); *Weston (a Pseudonym) v The Queen* (2015) 48 VR 413, 445–6 [109(11)] (Redlich JA); *R v Murphy* [1965] VR 187, 190 (Sholl J).
- 22 *Kohari v The Queen* [2017] VSCA 33.
- 23 *R v KCH* (2001) 124 A Crim R 233; *Guariglia v The Queen* (2010) 208 A Crim R 49; *Meissner v The Queen* (1995) 184 CLR 132, 142 (Brennan, Toohey and McHugh JJ).
- 24 *AB & EF v CD* [2017] VSC 350, [299] (Ginnane J); *KCH v R* [2001] NSWCCA 273; (2001) 124 A Crim R 233.
- 25 See *AB v CD & EF* [2017] VSCA 338, [135] (Ferguson CJ, Osborn and McLeish JJA).
- 26 *Meissner v The Queen* (1995) 184 CLR 132, 142 (Brennan, Toohey and McHugh JJ).
- 27 See *Theodoropoulos v The Queen* (2015) 51 VR 1.
- 28 *Dietrich v The Queen* (1992) 177 CLR 292.
- 29 *TKWJ v The Queen* (2002) 212 CLR 124, [76] (McHugh J).
- 30 *R v Birks* (1990) 19 NSWLR 677, 685.
- 31 *R v Birks* (1990) 19 NSWLR 677; *Nudd v The Queen* [2006] HCA 9; *TKWJ v The Queen* (2002) 212 CLR 124.
- 32 *TKWJ v The Queen* (2002) 212 CLR 124, [76] (McHugh J).

- 33 *TKWJ v The Queen* (2002) 212 CLR 124, [85] (McHugh J).
- 34 *TKWJ v The Queen* (2002) 212 CLR 124, [85] (McHugh J); *R v Birks* (1990) 19 NSWLR 677, 703 (Lusher LJ); *Seymour v The Queen* (2006) 162 A Crim R 576; *Tuckiar v The King* (1934) 52 CLR 335.
- 35 *Nudd v The Queen* [2006] HCA 9, [44] (Kirby J).
- 36 *Nudd v The Queen* [2006] HCA 9, [100] (Kirby J).
- 37 *Tuckiar v The King* (1934) 52 CLR 335, 346–7 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ), 354–5 (Starke J).
- 38 *Tuckiar v The King* (1934) 52 CLR 335, 346–7 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ), 354–5 (Starke J).
- 39 *Tuckiar v The King* (1934) 52 CLR 335, 346–7 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ).
- 40 *Orman v The Queen* (2019) 59 VR 511, 513 [11] (Maxwell P, Niall and Emerton JJA).
- 41 *Orman v The Queen* (2019) 59 VR 511, 513 [12] (Maxwell P, Niall and Emerton JJA).
- 42 *R v Szabo* [2001] 2 Qd R 214.
- 43 *R v Szabo* [2001] 2 Qd R 214, 229 (Thomas JA).
- 44 *R v Szabo* [2001] 2 Qd R 214, 215–6 (De Jersey CJ), 234 (Thomas JA).
- 45 *R v Szabo* [2001] 2 Qd R 214, 215 (De Jersey CJ).
- 46 *R v Szabo* [2001] 2 Qd R 214, 228 (Thomas JA).
- 47 *Roberts v The Queen* [2020] VSCA 58, [56] (Osborn and T Forrest JJA, and Taylor AJA).
- 48 *Mallard v The Queen* (2005) HCA 68, 8–9 [16] (Gummow, Hayne, Callinan and Heydon JJ); *Grey v The Queen* (2001) 184 ALR 593; *R v Farquharson* (2009) 26 VR 410, 464 [210]–[212] (Warren CJ, Nettle and Redlich JJA).
- 49 *Roberts v The Queen* [2020] VSCA 58, [56] (Osborn and T Forrest JJA, and Taylor AJA); *AB & EF v CD* [2017] VSC 350, [54] (Ginnane J).
- 50 *Mallard v The Queen* (2005) 224 CLR 125, 133 (Gummow, Hayne, Callinan and Heydon JJ); *R v Farquharson* (2019) 26 VR 410; *Roberts v The Queen* [2020] VSCA 58, [56] (Osborn and T Forrest JJA, and Taylor AJA); *Roberts v The Queen* [2020] VSCA 277 [19] (T Forrest and Osborn JJA and Taylor AJA).
- 51 *Grey v The Queen* (2001) 75 ALJR 1708, 1710–11 [8]–[9], 1713 [23] (Gleeson CJ, Gummow and Callinan JJ), 1718 [49]–[50] (Kirby J); *Mallard v The Queen* (2005) 224 CLR 125, 133 [17] (Gummow, Hayne, Callinan and Heydon JJ), 148 [57], 156 [84] (Kirby J); *Roberts v The Queen* [2020] VSCA 277 [258]–[259] (T Forrest and Osborn JJA and Taylor AJA).
- 52 *R v Ward* [1993] 1 WLR 619, 642 (Glidewell, Nolan and Steyn LJ).
- 53 *Cvetanovski v The Queen* [2020] VSCA 272, [7]–[8] (Maxwell P, Beach and Weinberg JJA).
- 54 *Cvetanovski v The Queen* [2020] VSCA 272, [6] (Maxwell P, Beach and Weinberg JJA).
- 55 *Cvetanovski v The Queen* [2020] VSCA 272, [10] (Maxwell P, Beach and Weinberg JJA).
- 56 *Lee v The Queen* [2014] HCA 20, [51] (French CJ, Crennan, Kiefel, Bell, Keane JJ).
- 57 *Lee v The Queen* [2014] HCA 20, [43] (French CJ, Crennan, Kiefel, Bell, Keane JJ).
- 58 *Lee v The Queen* [2014] HCA 20, [51] (emphasis added) (French CJ, Crennan, Kiefel, Bell and Keane JJ).
- 59 *Lee v The Queen* [2014] HCA 20, [44] (French CJ, Crennan, Kiefel, Bell and Keane JJ).
- 60 *Lee v The Queen* [2014] HCA 20, [44] (French CJ, Crennan, Kiefel, Bell and Keane JJ).
- 61 *Kadir v The Queen; Grech v The Queen* (2020) 94 ALJR 168, 173 [12]–[13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
- 62 *DPP v Marijancevic; DPP v Preece; DPP v Preece* (2011) 33 VR 440, 445 [18] (Warren CJ, Buchanan and Redlich JJA), citing *Bunning v Cross* (1978) 141 CLR 54.
- 63 *Evidence Act 2008* (Vic) s 138(3).
- 64 *Tasmania v Crane* (2004) 148 A Crim R 346, 354 [21] (Blow J). See also *Slater (A Pseudonym) v The Queen* [2019] VSCA 213 [57]; *R v Hunt* (2014) 286 FLR 59, 85–6 [149] (Hiley J).
- 65 See *Director of Public Prosecutions v Marijancevic* (2011) 33 VR 440, 458 [67] (Warren CJ, Buchanan and Redlich JJA); *DPP (Cth) v Farmer (a Pseudonym)* (2017) 54 VR 420, 435 [56]–[57], 436 [63] (Maxwell P and Beach JA).
- 66 See *DPP v Carr* (2002) 127 A Crim R 151, 159 [34] (Smart AJ).
- 67 *Ridgeway v The Queen* (1995) 184 CLR 19, 36 (Mason CJ, Deane and Dawson JJ).
- 68 *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612, 622 [36] (Basten JA).
- 69 *Dictionary to the Evidence Act 2008* (Vic), Pt 1 and Pt 2 cl 9.
- 70 *R v Hill* (2012) 6 ACTLR 167, 185 [98]–[99] (Refshauge J); *R v Petroulias [No 8]* (2007) 175 A Crim R 417, 425 [25] (Johnson J).
- 71 *Re Lee* (2009) 212 A Crim R 442, 449 [31] (Penfold J); *DPP v Kaba* (2014) 44 VR 526, 618 [337], 648 [472] (Bell J).

- 72 *Slater (A Pseudonym) v The Queen* [2019] VSCA 213, [44]–[45] (McLeish and Weinberg JJA and Tinney AJA).
- 73 See, eg, *R v AHK* [2001] VSCA 220; *Roberts v The Queen* [2020] VSCA 277 [19], [156] (T Forrest and Osborn JJA and Taylor AJA).
- 74 *R v Kucma* (2005) 11 VR 472; *Lawless v The Queen* (1979) 142 CLR 659; *Mickelberg v The Queen* (1989) 167 CLR 259.
- 75 *Rodi v Western Australia* (2018) 265 CLR 254, 262 [26], 263–4 [28]–[30] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
- 76 See Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 75 [326], 88–9, 117–18.
- 77 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1.
- 78 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 297(1). Unsatisfactory professional conduct includes ‘conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer’: cl 296.
- 79 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 298.
- 80 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 298(a), (b), (e).
- 81 The Uniform Conduct Rules came into operation on 1 July 2015: *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 2. Prior to this, the conduct rules applying to barristers were set out in the *Victorian Bar Practice Rules 1998* (Vic).
- 82 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, rr 4, 23.
- 83 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, rr 8, 24, 49.
- 84 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 35.
- 85 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, rr 114–22.
- 86 *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ); see also *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197–8 [74] (McHugh, Gummow, Hayne and Callinan JJ), and *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 99 [32] (French CJ and Keane J).
- 87 ‘Solicitors’ Duties to Clients’, *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-client-relationship/solicitors-duties-to-clients](http://www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-client-relationship/solicitors-duties-to-clients)>.
- 88 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, rr 114, 115, 122. See Chapter 4 for a detailed discussion of the duty of confidentiality and the exceptions to it.
- 89 *Evidence Act 2008* (Vic) ss 117–26.
- 90 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 101(b).
- 91 *Maguire v Makaronis* (1997) 188 CLR 449, 466.8 (Brennan CJ, Gaudron, McHugh and Gummow JJ), 495.9 (Kirby J).
- 92 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 9(b).
- 93 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 119.
- 94 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, rr 101, 118.
- 95 *Legal Profession Uniform Law Application Act 2014* (Vic), cl 150A. See also *Victorian Legal Services Board v Gobbo* [2020] VSC 692, [7] in which Justice Forbes explained that the purpose of an order removing a practitioner from the roll is protective and not punitive: ‘The protective nature of the power is broader than simply protection of the public from misconduct by practitioners. It is to ensure protection of the standing of the legal profession generally, and to strengthen community confidence in the legal system and its institutions including the courts and participants in the justice system both civil and criminal’.
- 96 See *Crimes Act 1958* (Vic) s 320; *Meissner v The Queen* (1994) 184 CLR 132; *R v Rogerson* (1992) 174 CLR 268.
- 97 Such a proceeding may be based in contract or equity. A person taking action based on equitable principles may be prevented from any remedy if they do not have ‘clean hands’; that is, if their own conduct in connection with the claim involved a degree of legal or moral wrongdoing. See *Dering v Earl of Winchelsea* (1787) 1 Cox 318, 319–20; 29 ER 1184, 1185 (Lord Chief Baron Eyre).
- 98 *Victoria Police Act 2013* (Vic) s 50, sch 2 form 1.
- 99 *Victoria Police Act 2013* (Vic) s 51.
- 100 *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, 319–20 [33] (Kenny J); *State of NSW v Tyszyk* [2008] NSWCA 117 (Campbell JA).
- 101 *State of NSW v Tyszyk* [2008] NSWCA 107, [83] (Campbell JA).
- 102 *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).
- 103 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4(1)(d), 38; *DPP v Kaba* (2014) 44 VR 526, 647 [466] (Bell J).
- 104 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 2(2), 49(3).
- 105 *Victoria Police Act 2013* (Vic) ss 125, 166; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 5.
- 106 *Victoria Police Act 2013* (Vic) s 125.

- 107 *Victoria Police Act 2013* (Vic) s 166; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 5.
- 108 *Victoria Police Act 2013* (Vic) pts 7, 9, 10; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) pt 3.
- 109 Independent Broad-based Anti-corruption Commission, *Audit of Victoria Police Complaints Handling Systems at Regional Level* (Report, September 2016) 14. Admonishment notices are not part of the discipline regime under the *Victoria Police Act 2013* (Vic) and are designed as an alternative to the formal discipline process. They are used when a minor breach of discipline has been substantiated.
- 110 *Victoria Police Act 2013* (Vic) s 132. The breach of discipline process applies only to serving officers, and not to former officers. Former members of Victoria Police can only be charged with accessing, using or disclosing police information: s 227.
- 111 *Crimes Act 1958* (Vic) s 320; *R v Quach* (2010) 27 VR 310; *DPP v Marks* [2005] VSCA 277.
- 112 *Lockwood v Commonwealth* (1954) 90 CLR 177, 181 (Fullagar J); see also *McGuinness v Attorney-General* (Vic) (1940) 63 CLR 73, 84 (Latham CJ).
- 113 The Commission notes that in October 2020, the Legal Services Board applied to the Supreme Court of Victoria to have Ms Gobbo's name removed from the roll of legal practitioners pursuant to section 23(1) of the *Legal Profession Uniform Law Application Act 2014* (Vic): see *Victorian Legal Services Board v Gobbo* [2020] VSC 692 (Forbes J).
- 114 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) CLR 352; see also Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (Lawbook Co, 2004), [12.55].
- 115 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) CLR 352 [41].
- 116 *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Final Report, 3 July 1989)* 8–9. Similar positions were adopted in the *Royal Commission into the New South Wales Police Service* (commonly known as the 'Wood Royal Commission'), the *Royal Commission into the Building and Construction Industry*, and *Royal Commission into Trade Union Governance and Corruption*.
- 117 See, eg, *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.
- 118 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) CLR 352, 371–2 [33]–[34].
- 119 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) CLR 352, 379 [58]–[59].
- 120 See *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 [22], in which the High Court noted that there may be a fine line between making a finding and merely reporting the results of an investigation.
- 121 *Royal Commission into Trade Union Governance and Corruption* (Interim Report, December 2014) vol 1, 28 [31], 31 [40], 34 [49]–[50].
- 122 *Inquiries Act 2014* (Vic) s 40(1). The prohibition does not apply to documents or things that are able to be obtained independently of their production to the royal commission: s 40(2). Evidence given before a royal commission is admissible in proceedings for offences under the *Inquiries Act* and for destruction of evidence and perjury offences under sections 254 and 314 of the *Crimes Act 1958* (Vic).
- 123 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 124 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 125 See *Thiess v Collector of Customs* (2014) 250 CLR 664, 671, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ), cited with approval in *Independent Commission Against Corruption v Cunneen* (2015) 261 CLR 1, 20–1 [31] (French CJ, Hayne, Kiefel and Nettle JJ).
- 126 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 226–27 [1034].
- 127 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 250 [1081.1]–[1081.2].
- 128 Royal Commission into the Management of Police Informants, *Commissioner's reasons for decision that the royal commission has jurisdiction to make findings of statutory misconduct by named current or former police officers* (28 August 2020).
- 129 Royal Commission into the Management of Police Informants, *Commissioner's reasons for decision that the royal commission has jurisdiction to make findings of statutory misconduct by named current or former police officers* (28 August 2020).
- 130 *Victoria Police Act 2013* (Vic) pt 7 div 1.
- 131 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 6 [25], 47 [149], 60 [193], 215 [690].
- 132 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 225–26 [1036]–[1037], 249 [1082], 486 [1936], 487 [1938].
- 133 Responsive submission, Victoria Police, 24 August 2020, [11] 26–7; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 9–10 [2]–[3.2]; Responsive submission, Mr Simon Overland, 18 August 2020, 9 [24]–[25], 10–17 [28]–[49]; Responsive Submission, Six former officers of the Source Development Unit, 7 August 2020, 140 [320]–[321].

- 134 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 247–8 [1081]–[1084], 489–90 [1936]–[1938].
- 135 *Inquiries Act 2014* (Vic) s 40(1).
- 136 *Victorian Legal Services Board v Gobbo* [2020] VSC 692, [50] (Forbes J).
- 137 See *Easton v Griffiths* (1995) 69 ALJR 669, 672 [12] (Toohey J): '[i]t is for the Commissioner to determine the scope of [the] inquiry, subject to any decision on the matter by a court of competent jurisdiction'.
- 138 See Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (Macmillan Education Centre Pty Ltd, 1994), Preface, x, cited in Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (Lawbook Co, 2004), 536 [9.105].
- 139 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 140 The date when Ms Gobbo met with the Australian Federal Police and discussed her willingness to act as a human source, and which is also the first identified occasion on which she indicated her willingness to act as a human source after her admission as a legal practitioner.
- 141 The date of the last recorded instance of Ms Gobbo representing someone in court.
- 142 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, Annexure A, 119–32.
- 143 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 42 [183].
- 144 *Inquiries Act 2014* (Vic) s 12.
- 145 *Inquiries Act 2014* (Vic) s 14.
- 146 *R v The War Pensions Entitlement Appeal Tribunal; Ex Parte Bott* (1933) 50 CLR 228, 256 (Evatt J).
- 147 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
- 148 *Evidence Act 2008* (Vic) s 140(1).
- 149 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–2.
- 150 *Inquiries Act 2014* (Vic) ss 12(a), 36; *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).
- 151 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ).
- 152 *Kioa v West* (1985) 159 CLR 550, 584–5 (Mason J); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 577 (Mason CJ, Dawson, Toohey and Gaudron JJ).
- 153 *Kioa v West* (1985) 159 CLR 550, 617 (Brennan J).
- 154 *Kioa v West* (1985) 159 CLR 550, 616–7 (Brennan J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658–9 [66] (Gummow, Hayne, Crennan and Bell JJ).
- 155 See the discussion in Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) [7.90].
- 156 See *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) FLR 576; *Lawrie v Lawler* (2016) 168 NTR 1.
- 157 *Kioa v West* (1985) 159 CLR 550, 585 (Mason J), 613 (Brennan J).
- 158 *New South Wales v Canellis* (1994) 181 CLR 309, 324–5, 331 (Mason CJ, Dawson, Toohey and McHugh JJ).
- 159 *Lawrie v Lawler* (2016) 39 NTR 1, 69 [333], 73–4 [353] (Heenan AJ).
- 160 *Annetts v McCann* (1990) 170 CLR 596, 600–1.
- 161 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344, 345 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
- 162 *Gild v The Queen* [2017] VSCA 367 [24] (Kyrou and Coghlan JJA); *Johnson* (2000) 201 CLR 488, 493 [13].
- 163 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 532 [72].
- 164 *R v Carter; Ex parte Gray* (1991) 14 Tas R 247, 260–3 [29]–[34]; *Carruthers v Connolly* [1998] 1 Qd R 339, 3458; *Keating v Morris* [2005] QSC 243, [46] (Moynihan J).
- 165 *Firman v Lasry* [2000] VSC 240, [28]; *Victoria Police Special Operations Group Operators 16, 34, 41 and 64 v Coroners Court of Victoria* (2013) 42 VR 1, 15 [46].
- 166 *McCloy v Latham* [2015] NSWSC 1879.
- 167 *McCloy v Latham* [2015] NSWSC 1879.
- 168 *Firman v Lasry* [2000] VSC 240, [22] (Ashley J).

- 169 *Kioa v West* (1985) 159 CLR 550.
- 170 Responsive submission, Ms Nicola Gobbo, 14 August 2020, i–iii, 16–25.
- 171 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 8–10, 13, 21.
- 172 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 11–17; Responsive submission, Ms Nicola Gobbo, 14 August 2020, 17–20; Responsive submission, Mr Simon Overland, 18 August 2020, 18; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, [7.3]; Responsive submission, Victoria Police, 25 August 2020, [14.16].
- 173 Responsive submission, Mr Graham Ashton, 7 August 2020, 5; Responsive submission, Mr Simon Overland, 18 August 2020, 5, 18; Responsive submission, Ms Nicola Gobbo, 14 August 2020, 18; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 17–19; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, [7.3]; Responsive submission, Victoria Police, 24 August 2020, [14.16].
- 174 Responsive submission, Mr Graham Ashton, 7 August 2020, 3–6; Responsive submission, Mr Simon Overland, 18 August 2020, 18; Responsive submission, Mr Simon Overland, 28 August 2020; Responsive submission, Ms Nicola Gobbo, 14 August 2020, 11–16; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, [7.3], [7.6].
- 175 Responsive submission, Ms Nicola Gobbo, 14 August 2020, i, 11–16; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, [7.3]; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 8.
- 176 Responsive submission, Mr Simon Overland, 18 August 2020, 1–2, 18–19; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 6 [1.31].
- 177 See *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 8, 65, 97–9.
- 178 More detailed responses to each of the allegations of bias on the part of Counsel Assisting are set out in Counsel Assisting reply submissions: Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (21 September 2020) 27–61.
- 179 *Inquiries Act 2014* (Vic) s 3.
- 180 Other examples include the Commission’s decision to accept (on an interim basis) Victoria Police’s PII claims in relation to exhibits, even though Counsel Assisting had advised against such an approach: see Email from the Commission to Victoria Police, 23 December 2019. See also its decision to close hearings at the request of a party, despite Counsel Assisting submitting that evidence should be heard in public: see Transcript of Mr Paul Rowe, 13 November 2019, 9225–6.
- 181 More detailed responses to each of the allegations of failure to provide procedural fairness are set out in Counsel Assisting reply submissions: Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (21 September 2020) 8–27.

# 6

## Chronology of key events

### INTRODUCTION

This chapter outlines the key periods of interaction between Ms Nicola Gobbo and Victoria Police and associated events from 1993 to 2018. It details Ms Gobbo's history of providing information to Victoria Police and her three registrations as a human source, based on evidence provided to the Commission during its inquiry.

These events are explored in more detail in Volume II of this final report, which examines the conduct of Ms Gobbo and Victoria Police officers. The narrative presented in this chapter does not seek to interrogate the evidence of witnesses or the material received by the Commission. That is reserved for later chapters.

The first part of this chapter addresses Ms Gobbo's interactions with Victoria Police between 1993 and 1999. Following a search of Ms Gobbo's property in 1993, she was charged with drug offences and provided information to police about her then de facto partner, leading to her first registration as a human source in 1995. After being admitted to practise as a lawyer in 1997, Ms Gobbo gave Victoria Police information about her employer at the time, leading to her second registration as a human source in 1999.

The second part of this chapter outlines Ms Gobbo's involvement with Victoria Police between 2000 and 2005. During this time, she continued to provide information to Victoria Police informally. This period also covers the escalation of Melbourne's 'gangland wars' and Ms Gobbo's representation of Mr McGrath (a pseudonym), who provided evidence against several criminal identities. In 2003–04, Ms Gobbo had a series of conversations with officers of Victoria Police's Purana Taskforce, which was investigating several murders associated with the gangland wars. These conversations laid the groundwork for Ms Gobbo's most prolific period of informing, between 2005 and 2009.

The third part of this chapter outlines events that occurred between 2005 and 2009, when Ms Gobbo was registered as a human source for the third time and, through almost daily contact with Victoria Police's Source

Development Unit (SDU), provided information about many individuals involved in organised crime, including her clients. Ms Gobbo's role as a human source ended when Victoria Police tried to transition her to the role of a witness in two high-profile investigations.

The final part of this chapter provides an overview of the period from 2010 to 2018, starting with Ms Gobbo's decision to commence civil litigation against Victoria Police. After she was withdrawn as a witness, a series of confidential external reviews were undertaken into Ms Gobbo's use as a human source. This resulted in Victoria Police pursuing court proceedings to suppress her identity and, in 2018, to the establishment of the Commission.

## 1993 TO 2000: INITIAL INVOLVEMENT WITH VICTORIA POLICE AND USE AS A HUMAN SOURCE

An overview of Ms Gobbo's initial involvement with Victoria Police is outlined in Figure 6.1 and discussed below.

**Figure 6.1: Timeline of Ms Gobbo's initial involvement with Victoria Police, 1993 to 2000**



## Ms Gobbo's first contact with Victoria Police (Operation Yak)

Ms Gobbo's first relevant contact with Victoria Police was in September 1993. At the time, she was a law student at the University of Melbourne.

Ms Gobbo lived with her de facto partner, Mr Brian Wilson, in a house in Rathdowne Street, Carlton.<sup>1</sup> They had bought the property in July 1993 as tenants in common.<sup>2</sup> At the time, Mr Wilson worked as a hotel bouncer.<sup>3</sup> Ms Gobbo later said that she became acquainted with Mr Wilson about three months before they bought the property.<sup>4</sup>

On 19 August 1993, Victoria Police received a Crime Stoppers tip-off alleging that Mr Wilson was trafficking drugs, and launched an investigation known as Operation Yak.<sup>5</sup>

On 3 September 1993, Victoria Police executed a search warrant on the property. Among the officers present at the raid were then Sergeant Trevor Ashton, Sergeant Michael Holding and Constable Peter Trichias.<sup>6</sup> Ms Gobbo was not present when police initially entered and began searching the house at about 5.25 pm. She arrived around two hours later.<sup>7</sup> During a search of Ms Gobbo's bedroom, officers found a small amount of cannabis and amphetamine in a cigarette packet in a chest of drawers.<sup>8</sup>

During the search, Ms Gobbo informed Mr Ashton that drugs were hidden behind a vent in the laundry.<sup>9</sup> A search of the vent revealed two bags of amphetamine.<sup>10</sup> A total of three pounds of amphetamine and three-quarters of a pound of cannabis were seized.<sup>11</sup>

Ms Gobbo was charged with use and possession of cannabis and amphetamine.<sup>12</sup> Mr Wilson was charged with trafficking, use and possession of a drug of dependence. Ms Gobbo admitted that she knew that drugs were being kept at the premises, but denied being involved in the trafficking operation.<sup>13</sup> Mr Holding recalled that the evidence against her in relation to the trafficking operation was not strong.<sup>14</sup> He also recalled his impression of Ms Gobbo as 'very confident and opinionated. I felt that she thought the process was like a game'.<sup>15</sup>

In late September 1993, Ms Gobbo spoke with Mr Holding about providing a statement against Mr Wilson, though she did not ultimately make any statement to police.<sup>16</sup>

On 29 November 1993, Ms Gobbo pleaded guilty to the possession and use of amphetamine and cannabis and received a 12-month good behaviour bond without the recording of a conviction. Mr Wilson received a sentence of eight months' imprisonment, suspended for 24 months.

Later police intelligence revealed that Ms Gobbo was considered a 'significant' supplier of drugs at the University of Melbourne.<sup>17</sup>

## Ms Gobbo's initial registration as a human source

Throughout 1994 and 1995, Mr Trevor Ashton remained in contact with Ms Gobbo. He led a team in District Support Group 'A' (DSG-A) and was the primary point of contact between Victoria Police and Ms Gobbo. The core functions of the DSG-A included detection and investigation of drug-related offending, as well as other crimes. Mr Ashton met Ms Gobbo several times at the Melbourne Cricket Ground, where she had a part-time job with a catering company.<sup>18</sup> A member of his team, then Constable Timothy (Tim) Argall, also attended at least one of those meetings.<sup>19</sup>

Then Senior Constable Rodney (Rod) Arthur also recalled meeting with Mr Ashton and Ms Gobbo in early 1995 on about three occasions on the street near the old Magistrates' Court.<sup>20</sup> Mr Arthur did not recall Ms Gobbo providing any information valuable to an investigation during these meetings.<sup>21</sup> In his statement, Mr Arthur said that he recalled Mr Ashton telling him prior to the meeting that Ms Gobbo's father was a judge.<sup>22</sup> In fact, for many years, her uncle served as a judge of the Supreme Court of Victoria.

On 3 April 1995, another search warrant was executed at Ms Gobbo's home in Rathdowne Street. Small quantities of drugs were seized during the raid, and Mr Wilson was charged with possession and use of cannabis. He was ultimately convicted of these offences and fined \$500. Ms Gobbo was not present at the time, nor was she charged with any offences arising from this search warrant.

In July 1995, due to the information that Ms Gobbo was providing to police about Mr Wilson, Mr Ashton and Mr Argall registered her as a human source.<sup>23</sup> The following details were included in the registration form:

*Informer is a law student at Melbourne [University] currently living with a known criminal. She was charged with [possessing amphetamine] last year as a result of the criminal that was living with her, is quite reliable and seeking a career as a solicitor.*<sup>24</sup>

The registration form specified that the reason for Ms Gobbo being registered as a human source was that she 'genuinely want[ed] to assist police'. Mr Ashton thought that it was likely that she was registered as a human source due to the 'substantial' nature of the information that she was providing.<sup>25</sup>

At that time, Victoria Police's process for registering a human source involved an officer giving a registration form in an unsealed envelope to a more senior officer, who would review the information and seal the envelope. A number would then be allocated to the human source.<sup>26</sup>

Ms Gobbo's registration number was 'G3/95'.<sup>27</sup>

On 12 July 1995, Mr Ashton and Mr Argall took Ms Gobbo to the St Kilda Road Police Station to meet officers of the Special Response Squad.<sup>28</sup> The purpose of the meeting was for Ms Gobbo to provide information to Victoria Police about Mr Wilson's involvement in drug trafficking and firearm possession.<sup>29</sup>

Throughout the latter part of 1995, Ms Gobbo continued to give information about Mr Wilson to police.<sup>30</sup> The Commission understands that Victoria Police has not located any contact reports or information reports (IRs) made by officers documenting their interactions with Ms Gobbo during this period.<sup>31</sup>

## **Ms Gobbo is a 'loose cannon' (Operation Scorn)**

By February 1996, Victoria Police had started another operation in relation to Mr Wilson, known as 'Operation Scorn'.

In March 1996, police discontinued that operation. At the time, then Detective Senior Sergeant John (Jack) Blayney, APM noted in a report that Ms Gobbo was a 'loose cannon' because she was 'making her own arrangements and not liaising with investigators'.<sup>32</sup> He also noted that Ms Gobbo was the 'informer re ALP/LIB document leaked prior to election'. This was a reference to a recent public dispute that Ms Gobbo was believed to have involved herself in that was occurring between Victorian political parties concerning the source of a forged letter.<sup>33</sup>

Later, in 2006 and 2007, Mr Blayney came across Ms Gobbo again, when he was a Detective Superintendent and held the position of Major Crime Tasking and Coordination Manager within the Crime Department.

In a statement to the Commission, then Assistant Commissioner Neil Paterson, APM, Intelligence and Covert Support Command, noted that it is unlikely that the observation that Ms Gobbo was a 'loose cannon' would have been known by other officers who later had contact with her, as Victoria Police did not keep an electronic database of information relevant to human sources at the time.<sup>34</sup>

## Ms Gobbo's admission to practise as a lawyer

On 7 April 1997, Ms Gobbo was admitted to practise as a lawyer in Victoria.<sup>35</sup> She completed her articles at Molomby & Molomby Solicitors.<sup>36</sup>

In her affidavit to the Board of Examiners dated 4 February 1997, Ms Gobbo set out details of her arrest in 1993.<sup>37</sup> She described Mr Wilson as a friend who had moved in with her to help with the mortgage, rather than as her de facto partner and a co-owner of her property. She said that she had contacted Victoria Police upon becoming suspicious that Mr Wilson was engaging in drug-related criminal activities and further, that when the police found the drugs at the premises, she had been 'embarrassed' and 'shocked' as she did not know what had been happening at her house.

Ms Gobbo did not mention that drugs had been located in her bedroom or that she had been found in possession of them, nor that she had shown police where three pounds of amphetamine was hidden. Instead she stated that she had been deemed liable because she was the owner and occupier of the premises where the drugs were found and had followed advice to plead guilty, feeling no other option was available to her.<sup>38</sup>

## Ms Gobbo provides information to police about her employer

By November 1997, Ms Gobbo had left Molomby & Molomby Solicitors and moved to a different Melbourne law firm, Law Firm 1 (a pseudonym). That firm was acting for a number of people charged with drug offences arising from an investigation by the Victoria Police Drug Squad.<sup>39</sup> Officer Kruger (a pseudonym) was the informant (the officer responsible for charging the accused person) in proceedings related to some of the accused persons.<sup>40</sup>

Between 1997 and 1998, Mr Kruger had a number of meetings and telephone conversations with Ms Gobbo about the investigation.<sup>41</sup> At some point, Ms Gobbo made allegations to Mr Kruger that her employer, Solicitor 1 (a pseudonym), was engaging in fraudulent activity.<sup>42</sup>

In July 1998, Mr Kruger and then Detective Senior Constable Christopher Lim, also an officer in the Drug Squad, met Ms Gobbo in relation to Solicitor 1.<sup>43</sup> Mr Kruger prepared an IR, which recorded that during the meeting, Ms Gobbo alleged that Solicitor 1 was involved in money laundering.<sup>44</sup>

Mr Lim thought that it was inappropriate for Ms Gobbo to be used as a human source because she was a lawyer. He also felt she had inappropriate relationships with police officers and was too 'overt' in her desire to provide information to police.<sup>45</sup>

In November 1998, Ms Gobbo left Law Firm 1 to become a barrister.

Around the same time, Ms Gobbo considered undertaking a thesis about police powers of investigation, including the use of undercover operatives and human sources.<sup>46</sup>

## Ms Gobbo's early conflicts of interest

### Representation of Mr Dragan Arnautovic

On 18 November 1997, Mr Dragan Arnautovic was arrested and charged by the Victoria Police Drug Squad in relation to commercial drug trafficking offences. He was subsequently sentenced to 12 years' imprisonment, with a non-parole period of nine years.<sup>47</sup> Ms Gobbo represented Mr Arnautovic, both while as a solicitor employed at Law Firm 1 and after she became a barrister, including appearing as junior counsel at his trial.

While representing Mr Arnautovic, Ms Gobbo also represented other accused persons who had been arrested as part of the same investigation. Evidence before the Commission indicates that there may have been a conflict between the interests of these clients.<sup>48</sup>

Throughout this period, Ms Gobbo was communicating with then Detective Senior Sergeant Wayne Strawhorn of the Drug Squad about another client. According to Mr Strawhorn's diaries and day books, he and Ms Gobbo met on around nine occasions between May 1998 and August 1999, including six times in relation to some of the clients she was representing referred to above.<sup>49</sup>

Ms Gobbo acknowledged that during meetings with Mr Strawhorn, he was able to elicit from her information that she had gained in her role as a lawyer acting for people charged by the Drug Squad, and that it was improper for her to provide this information.<sup>50</sup>

## Operation Ramsden

Evidence before the Commission suggests that, around this time, Victoria Police Drug Squad officers investigated whether Ms Gobbo's then employer, Solicitor 1, was engaging in criminal activity.<sup>51</sup> On 2 February 1998, Ms Gobbo recorded in her diary a conversation with then Detective Senior Sergeant Mark Bowden and Mr Kruger. Her notes indicate that they pressured her to help the investigation by implicating Solicitor 1 and told her that her name had appeared 'on tapes'.<sup>52</sup> She wrote in her diary 'mud sticks; get a raincoat soon'.<sup>53</sup>

Between May and October 1998, Ms Gobbo met with officers of the Australian Federal Police (AFP) a number of times, and provided information about Solicitor 1, along with information about her clients.<sup>54</sup> The AFP told the Commission that Ms Gobbo was never registered as a human source for that agency.<sup>55</sup>

The following year, on 28 April 1999, Mr Kruger told then Detective Senior Constable Jeffrey (Jeff) Pope of the Asset Recovery Squad about Ms Gobbo's information that Solicitor 1, her now former employer, had engaged in money laundering.<sup>56</sup>

The Asset Recovery Squad began an investigation into Solicitor 1 known as 'Operation Ramsden'.<sup>57</sup> At this time, the Asset Recovery Squad was part of the Crime Department in the Major Fraud Group at Victoria Police. It investigated activities including the confiscation of illicit profits pursuant to the *Confiscation Act 1997* (Vic) and often interacted with the Drug Squad because of the common cross-overs in their investigations.<sup>58</sup>

Officers of the Asset Recovery Squad and the Drug Squad met several times about this investigation. A former Victoria Police officer recalled that these meetings often occurred in the open area muster room of the Drug Squad. Consequently, he believed many people may have known that Ms Gobbo was providing information to Victoria Police.<sup>59</sup>

On 12 May 1999, there was another meeting between Mr Kruger, Mr Strawhorn, Mr Pope and then Detective Sergeant Gavan Segrave, who was also an officer in the Asset Recovery Squad. Mr Kruger recalled that the likely purpose of that meeting was to prepare for the introduction of Ms Gobbo to the Asset Recovery Squad.<sup>60</sup>

Later that day, Mr Strawhorn and Mr Kruger introduced Mr Pope to Ms Gobbo at the Emerald Hotel in South Melbourne, where they met to discuss her allegations about Solicitor 1.<sup>61</sup> This meeting lasted a couple of hours.<sup>62</sup>

The following day, Mr Pope applied to register Ms Gobbo as a human source.<sup>63</sup> In this application, he stated that she was to provide information largely related to 'fraud/money laundering'. The application also included her criminal record.

On 17 May 1999, Mr Pope and Mr Segrave met with Ms Gobbo to discuss her allegations against Solicitor 1. Mr Pope's IR recorded that she had made a range of allegations against Solicitor 1, including that he was:

- fraudulently charging clients eligible for funding from Legal Aid, and simultaneously receiving payments from Legal Aid
- charging clients for money that was already paid under cost certificates
- breaching his obligations in relation to his trust account
- breaching his obligations under the *Legal Practice Act 1996 (Vic)*.<sup>64</sup>

On 26 May 1999, Mr Segrave approved the application to register Ms Gobbo as a human source. Mr Pope was assigned as her handler. In Mr Segrave's comments on the application recommending her registration, he noted:

*It is believed [Ms Gobbo] will be an ongoing source of info re money laundering/fraud activities. Is both credible/reput ... informer had no known previous history of supplying information to law enforcement agencies.*<sup>65</sup>

Ms Gobbo's registration number was 'MFG 13'.<sup>66</sup>

In a statement to the Commission, Mr Segrave noted that Victoria Police policy at the time would have provided little guidance on the appropriate registration of human sources and that registration and other details were recorded in an unsophisticated, paper-based system.<sup>67</sup>

Around this time, the National Crime Authority (NCA) started an investigation into Solicitor 1 and a real estate agent, Mr Peter Reid, known as Operation Adesine.<sup>68</sup> Mr Pope recorded in an IR submitted on 26 May 1999 that Mr Kruger and Mr Lim had introduced Ms Gobbo to Member 1 (a pseudonym) at the NCA.<sup>69</sup> Member 1 had informed Mr Pope that Ms Gobbo 'told them the exact same information which is outlined in previous information reports for this job'.<sup>70</sup> In a statement to the Commission, Member 1 said that, having not had access to all of the relevant diaries for that period, they could not recall having had any involvement in any investigation involving Ms Gobbo.<sup>71</sup>

In a conversation with the Commission, Ms Gobbo recalled that Mr Kruger believed that Mr Reid was using his financial position as a real estate agent to launder money, and that Solicitor 1 was somehow involved. She recalled that she told Solicitor 1 that Mr Kruger and Mr Strawhorn were pressuring her to provide information. She told the Commission that Solicitor 1 wrote to Mr Kruger telling him to stop asking her to speak about Solicitor 1 and the firm's clients.<sup>72</sup>

In late May and early June 1999, Mr Pope and Mr Segrave met with other people in relation to the investigation.<sup>73</sup> During this time, Mr Pope was in regular contact with Ms Gobbo. Mr Pope submitted IRs recording that they discussed personal matters, such as Mr Pope's law studies, and Solicitor 1.<sup>74</sup> Ms Gobbo gave him computer disks containing documents from Solicitor 1's computer that she said were relevant to her allegations that he was laundering money.<sup>75</sup> In his evidence to the Commission, Mr Paterson advised that Victoria Police has been unable to locate those disks. These disks have not otherwise been provided to the Commission, so it has been unable to ascertain their contents.<sup>76</sup>

Mr Pope's IRs also indicated that he and Ms Gobbo discussed her ongoing contact with Mr Reid, and the progression of Mr Reid's matter in court.<sup>77</sup> Mr Pope could not recall whether she was representing Mr Reid at the time.<sup>78</sup>

During a telephone conversation on 23 June 1999, Ms Gobbo asked Mr Pope whether consent could be obtained to a variation of a restraining order on a property owned by one of her clients.<sup>79</sup> Mr Pope told her that he would speak to the informant in the matter. During his evidence to the Commission, Mr Pope agreed that this would not be the 'appropriate way' of seeking consent to a variation, as Ms Gobbo should ordinarily have approached the informant.<sup>80</sup> In approaching Mr Pope instead, Ms Gobbo was likely 'testing the relationship' between them.<sup>81</sup>

Between August and October 1999, Mr Pope continued to have contact with Ms Gobbo in relation to Operation Ramsden. He described the information she provided during that time as being of no value. In an IR, he recorded that she did not have any new information to provide and was mainly interested in how the investigation was progressing.<sup>82</sup>

Operation Ramsden did not result in any charges being laid against any individuals.<sup>83</sup>

## Relationship with Detective Senior Constable Stephen Campbell

In around January 1999, Ms Gobbo met then Detective Senior Constable Stephen Campbell, who was a police officer stationed in St Kilda as part of the Embona Taskforce. They began a casual intimate relationship that continued for several years.<sup>84</sup>

Between 1999 and 2000, during their relationship, Ms Gobbo appeared as defence counsel for Mr John Genis. Mr Campbell was the informant in that matter.<sup>85</sup> Mr Campbell told the Commission that he was not aware whether Ms Gobbo had told her client that he and Ms Gobbo were involved in a relationship.<sup>86</sup> He considered that the onus was on Ms Gobbo to inform her client but agreed that if the relationship had not been disclosed, it could appear improper.<sup>87</sup>

In a conversation with the Commission, Ms Gobbo said that it was unlikely that she would have told her client about the relationship.<sup>88</sup> She told the Commission she did not believe that she needed to disclose her involvement with an informant if there were no facts in dispute or it would not affect the outcome.<sup>89</sup>

## Declassification as a human source

On 3 January 2000, Mr Segrave requested that Ms Gobbo's status as a human source be reclassified as inactive.<sup>90</sup> The document records the reason for doing so as:

*Investigators have had no contact with [Ms Gobbo] since the 23rd September 1999. A final report will shortly be submitted in relation to 'Operation Ramsden'. Accordingly, it is requested that [Ms Gobbo] be reclassified from 'active' to 'inactive'.<sup>91</sup>*

## 2000 TO 2005: GANGLAND WARS AND FURTHER INVOLVEMENT WITH VICTORIA POLICE

An overview of Ms Gobbo's continued involvement with Victoria Police during Melbourne's gangland wars is outlined in Figure 6.2 and discussed further below.

During this period, Victoria Police established the Dedicated Source Unit (DSU). In 2006, the DSU changed its name to the 'Source Development Unit' (SDU).<sup>92</sup> In this chapter, the Commission refers to both as the 'SDU'.

**Figure 6.2: Timeline of Ms Gobbo's further involvement with Victoria Police, 2000–05****2000**

**2000–02:** Melbourne's 'gangland wars' are taking place, driven by deep animosity between, on the one hand, Mr Carl Williams and Mr Antonios (Tony) Mokbel, and on the other, the Moran family. Events escalate with a series of murders including those of Mr Mark Moran, Mr Dino Dibra, Mr Victor Peirce and Mr Paul Kallipolitis.

**2001**

**September:** Mr Terrence (Terry) Hodson is registered as a human source by Victoria Police after being arrested by Detective Senior Constable David Miechel of the Drug Squad. Mr Miechel becomes Mr Hodson's handler.

**2002**

**Early 2002:** The Victoria Police Drug Squad is replaced by the Major Drug Investigation Division (MDID) after serious corruption is identified among its officers, including in relation to the management of human sources. Mr Miechel is transferred to the MDID.

**2002–03:** By early 2002, Ms Gobbo is representing Mr Mokbel. Ms Gobbo meets with then Detective Inspector Peter De Santo of the Ceja Taskforce to discuss corrupt police officers who had been involved in investigating Mr Mokbel.

**2003**

**12 May:** The Purana Taskforce is established to investigate the gangland murders.

**21 June:** Mr Jason Moran and Mr Pasquale Barbaro are murdered in a public place in front of children, leading to elevated community concerns about the gangland wars.

**22 September:** Then Detective Senior Sergeant Philip Swindells speaks to Ms Gobbo about threats she has received from Mr Andrew Veniamin, an associate of Mr Williams, for representing Mr Lewis Moran.

**27 September:** An attempted burglary occurs at a house in Dublin Street, Oakleigh, resulting in the arrest of Mr Hodson and Mr Miechel.

**3 October:** Mr Hodson tells then Detective Senior Sergeant Andrew (Murray) Gregor of the Ethical Standards Department that then Detective Sergeant Paul Dale of the MDID was also involved in the Dublin Street burglary. Mr Dale is Mr Miechel's supervisor.

**9 October:** Ms Gobbo meets Mr Dale at a pub after he contacts her for legal advice. She meets with him again a few days later.

**25 October:** Mr Michael Marshall is murdered by Mr Andrews (a pseudonym) and Mr McGrath (a pseudonym) on the orders of Mr Williams.

**November:** Ms Gobbo begins representing Mr McGrath, who has been arrested for the murder of Mr Marshall. He is also suspected of involvement in the murders of Mr Moran and Mr Barbaro.

**5 December:** Mr Dale, Mr Miechel and Mr Hodson are arrested for the Dublin Street burglary. Mr Dale calls Ms Gobbo.

**7 December:** Ms Gobbo visits Mr Dale in prison. He gives her some handwritten notes to give to his solicitor. Ms Gobbo keeps a copy.

**2004**

**January:** After a pilot program, Victoria Police establishes a specialised unit to manage high-risk human sources, known then as the Dedicated Source Unit (DSU) and later known as the Source Development Unit (SDU).

**15 or 16 May:** Mr Terry Hodson and his wife, Mrs Christine Hodson, are murdered in their home.

**18 June:** Mr McGrath agrees to become a witness in relation to gangland murders. Ms Gobbo speaks to then Detective Sergeant Stuart Bateson about her safety concerns if it became known to Mr Williams and others that she was acting for Mr McGrath.

**24 July:** Ms Gobbo has a stroke.

**August:** The MDID is interested in Ms Gobbo as she is thought to have useful information regarding organised crime.

**2005**

**15 August:** Mr Bickley (a pseudonym) is arrested in relation to manufacturing drugs for Mr Mokbel. Ms Gobbo is contacted but cannot attend his police interview. Mr Mokbel later briefs her to act for Mr Bickley.

**31 August:** Ms Gobbo speaks to then Detective Senior Constable Paul Rowe and then Detective Sergeant Steve Mansell about her concerns that she is compromised in her representation of Mr Bickley, and in relation to providing information to police about organised crime.

## Beginning of the gangland wars

The gangland wars involved violent disputes between rival gangs in Melbourne, including multiple murders of organised crime figures, which occurred in the late 1990s and early 2000s. Two of the major rival gangs were individuals associated with the Moran family and the Williams family.

Although there had been conflict between gangland identities throughout the 1990s, the wars appear to have escalated when Mr Carl Williams was shot in the stomach by Mr Jason and Mr Mark Moran due to a dispute about money in late 1999. Mr Williams survived and sought revenge against the Morans.

Approximately 17 people were murdered between 1998 and mid-2003.

## Escalation of the gangland wars

### Establishment of Purana Taskforce

Between 2000 and 2002, many criminal figures were murdered as the violence associated with the gangland wars continued.

It became clear that the murders and shootings were retributive or pre-emptive strikes involving various organised crime groups fighting for control and influence in Melbourne's illicit drug trade.

On 12 May 2003, in response to public concern over the escalation of violence, Victoria Police set up the Purana Taskforce. Its goal was to dismantle the criminal syndicates responsible for these murders. Initially, it was tasked to investigate three unsolved homicides, those of Mr Dino Dibra, Mr Paul Kallipolitis and Mr Nikolai Radev. Its first target was Mr Andrew Veniamin, a hitman associated with Mr Williams' crew.<sup>93</sup>

In a statement to the Commission, former Detective Senior Sergeant Gavan Ryan, an officer of the newly formed taskforce, described the environment as ‘pressure-packed’.<sup>94</sup> He said police were under pressure from Government to halt the shootings and the flow of drugs through Melbourne. Mr Ryan gave evidence that the Purana Taskforce was receiving ‘constant’ intelligence about impending murders from a variety of sources.<sup>95</sup>

There are two key phases of the investigative activities of the Purana Taskforce that are of relevance to the Commission:

- phase one, which focused on the gangland murders and Mr Williams’ criminal enterprise (May 2003–November 2005)
- phase two, which focused on the criminal enterprise of Mr Antonios (Tony) Mokbel (November 2005 onwards).<sup>96</sup>

Ms Gobbo’s involvement spanned both phases.

On 21 June 2003, just weeks after the formation of the Purana Taskforce, Mr Jason Moran and his associate Mr Pasquale Barbaro were shot and killed while sitting in a van with a number of children after an Auskick football clinic. This was a significant event, as it was the first gangland murder that occurred in a public place, in front of children. Community concerns about the violence and fears for public safety increased, and as a result, the Purana Taskforce received significant additional resources.

On 25 October 2003, Mr Michael Marshall died after being shot five times outside his home in front of his young son in South Yarra. The individuals who carried out this murder were also involved in the murders of Mr Moran and Mr Barbaro.

## **Ms Gobbo’s connections with gangland identities**

Ms Gobbo was developing a client base that included many members of various Melbourne organised crime groups. By 2002, she was acting for a range of clients who Victoria Police suspected were engaging in serious criminal conduct, including drug trafficking and murder.<sup>97</sup> Those clients included Mr Williams, Mr Mokbel and many of their associates.<sup>98</sup>

In his evidence to the Commission, Commander Stuart Bateson, who was a Detective Sergeant in the Purana Taskforce at the time, said that he believed Ms Gobbo was a close associate of many of her clients. He added that Purana Taskforce investigators considered that she was part of a ‘small cadre’ of criminal lawyers who ‘were willing to do anything to keep their clients out [of prison] and operating their criminal enterprises’.<sup>99</sup>

## **Ms Gobbo’s conflict in representing Person 12 (a pseudonym)**

In 2003, Mr Campbell and others were charged with several offences.<sup>100</sup> Mr Campbell said that, on the day he was charged, Ms Gobbo approached him and offered assistance. He continued to speak to her about his case as it progressed.<sup>101</sup> During this time, Mr Campbell maintained his casual intimate relationship with Ms Gobbo, including when she represented Person 12 (a pseudonym), who had agreed to give evidence against Mr Campbell and his co-accused.<sup>102</sup> Mr Campbell told the Commission that he was aware Ms Gobbo was representing Person 12 at that time.<sup>103</sup>

In his evidence to the Commission, Person 12 told the Commission that he only learned of Ms Gobbo’s personal relationship with Mr Campbell, and that she was providing advice to him about his charges, when Counsel Assisting the Commission told him during cross-examination. He said he was shocked that this occurred; that he would not have engaged Ms Gobbo to represent him had he known; and that he was concerned she may have divulged his instructions to Mr Campbell and his other co-accused.<sup>104</sup>

## Corruption in the Drug Squad and Ms Gobbo's interactions with the Major Drug Investigation Division

In 2001, an investigation known as Operation Hemi found longstanding corrupt practices in the Victoria Police Drug Squad. This led then Chief Commissioner Christine Nixon, APM to commission the *Review of the Victoria Police Drug Squad* (Purton Review) which was finalised later that year.<sup>105</sup>

The Purton Review identified concerns about the internal workings of the Drug Squad, including its management and structure. In early 2002, the Ceja Taskforce was established in the Victoria Police Ethical Standards Department (ESD) to investigate the Drug Squad's corrupt activities.

The Drug Squad was later disbanded and replaced with the Major Drug Investigation Division (MDID). Although Ms Nixon's intention was to staff the MDID with officers who were not part of the former Drug Squad so as to end corruption, some former Drug Squad officers were transferred to the newly established MDID due to industrial relations issues.<sup>106</sup>

### Meetings with the Ethical Standards Department

In 2002 and 2003, Ms Gobbo spoke to investigators attached to the ESD. She spoke primarily to then Detective Inspector Peter De Santo, who was involved in the Ceja Taskforce.<sup>107</sup>

Mr De Santo told the Commission that, in around 2002, he had several interactions with Ms Gobbo when she was acting for Mr Mokbel. At the time, Mr De Santo was investigating police officers involved in targeting Mr Mokbel as part of the Taskforce Kayak. It was alleged that those police officers had engaged in corruption.<sup>108</sup> Taskforce Kayak is explained in further detail below.

In his evidence to the Commission, Mr De Santo said that Ms Gobbo, who had become aware of the investigation, would seek information from him.

Mr De Santo perceived that she:

*... saw that Kayak [Taskforce] had charged Mokbel and others, that there was corruption within Kayak; that if [he] proved that corruption by way of conviction she was able to leverage off those convictions in order to taint the evidence that they were going to give in the trials against Mokbel and others.*<sup>109</sup>

### First meetings with Mr Paul Dale

On 17 June 2002, Mr Paul Dale was promoted to Detective Sergeant in the MDID. He told the Commission that he first met Ms Gobbo in 2002 in a professional capacity.<sup>110</sup> She made a bail application for an individual who had been charged with drug trafficking and Mr Dale was the informant in that matter.<sup>111</sup>

In 2003, Mr Dale found out that Ms Gobbo was speaking to Mr De Santo about corruption within the disbanded Drug Squad.<sup>112</sup> In his evidence to the Commission, Mr Dale said he saw this as a delaying tactic to enable her clients, such as Mr Williams and Mr Mokbel, to get bail.<sup>113</sup>

Mr Dale added that as Ms Gobbo had represented many accused persons charged by the MDID, he encountered her regularly. He said that it was clear that she was a 'go to' lawyer for people charged with major drug trafficking offences.<sup>114</sup>

Mr Dale stated that they began to develop a more social relationship after they met at a Victoria Police function and that he began to recommend her to those whom the MDID had arrested.<sup>115</sup> In a conversation with the Commission, Ms Gobbo denied that Mr Dale referred accused persons to her.<sup>116</sup>

Mr Dale and Ms Gobbo developed a personal relationship in 2003 or 2004 including, at least at one time, an intimate relationship.<sup>117</sup>

## **Registration and use of Mr Terry Hodson as a human source**

The Drug Squad's Taskforce Kayak commenced in mid-October 2000, targeting large-scale drug traffickers including Mr Mokbel and Mr Rabie (Rob) Karam. One of the Taskforce's many ongoing investigations focused on the Hodson family. Mr Terrence (Terry) Hodson was a career criminal well known to police. As earlier attempts to target him had been unsuccessful, investigators now concentrated on his children, Mr Andrew Hodson and Ms Mandy Leonard.

As part of that operation, the Hodson children were arrested for trafficking 1,500 ecstasy tablets. Mr Terry Hodson was also arrested by then Detective Senior Constable David Miechel, an officer in Mr Dale's team.<sup>118</sup>

Following these arrests, Mr Miechel and Mr Strawhorn cultivated Mr Terry Hodson as a human source, using the charges against his children as leverage.<sup>119</sup> A few weeks after Mr Terry Hodson's arrest, Mr Miechel recruited and registered him as a human source.

Mr Terry Hodson was a prolific human source. He provided information on numerous high-profile targets, leading the MDID to many successful investigations and arrests in 2002 and 2003.<sup>120</sup>

Ms Gobbo had previously acted for Mr Terry Hodson's son, Mr Andrew Hodson, in relation to a bail application in 2002.<sup>121</sup>

Then Detective Senior Constable Cameron Davey of the Homicide Squad conducted an interview with Ms Gobbo in July 2004. In the IR submitted later, he noted that Ms Gobbo said she was well aware of Mr Terry Hodson's status as a human source. When representing someone else charged by Mr Miechel, Ms Gobbo said that she had obtained police notes, surveillance logs and possibly some IRs that suggested a human source was involved. By February 2002, she was aware that the human source was Mr Terry Hodson due to her association with Mr Mokbel. She also knew Mr Terry Hodson was the human source in relation to another of her clients.<sup>122</sup>

## **Ms Gobbo and the Dublin Street burglary**

In June 2003, the MDID launched Operation Galop, targeting large-scale manufacturing and trafficking of ecstasy tablets. On 27 September 2003, a 'drug house' in Dublin Street, Oakleigh was burgled. Police arrested Mr Miechel and Mr Terry Hodson near the scene. Others arrested on drug charges in the fallout from the burglary included Mr Azzam Ahmed, Ms Abby Haynes and Ms Colleen O'Reilly.

The ESD attended the scene on the night of the arrests because Mr Miechel was a serving police officer.<sup>123</sup> Mr Miechel and Mr Terry Hodson were both later released without being charged.<sup>124</sup>

Victoria Police set up Operation Nutation to investigate the burglary. Then Detective Senior Sergeant Andrew (Murray) Gregor of the ESD was the principal investigator and informant. Early in the investigation, the ESD identified that Mr Terry Hodson's cooperation could be useful.<sup>125</sup>

On 29 September 2003, the ESD decided that Mr De Santo would approach Mr Terry Hodson via his son, Mr Andrew Hodson, and Ms Gobbo. Later that day, Ms Gobbo telephoned Mr De Santo and said that Mr Terry and Mr Andrew Hodson were to attend her chambers the next day, and that Mr Andrew Hodson had told her that his father was ‘very scared’ of police.<sup>126</sup>

On 3 October 2003, Mr Gregor met with Mr Terry and Mr Andrew Hodson. According to Mr Gregor, Mr De Santo arranged the meeting to ascertain whether Mr Terry Hodson would cooperate and provide a statement.<sup>127</sup> Mr Gregor told the Commission that, during the meeting, Mr Terry Hodson said that a police sergeant had been involved in the burglary, and ‘intimated’ that this was Mr Dale.<sup>128</sup> Mr Gregor also said that Mr Terry Hodson claimed Mr Dale and Mr Miechel had threatened him and his family.<sup>129</sup>

Mr De Santo told the Commission that on the following day, 4 October 2003, Mr Terry Hodson called him and said that contact had been made by the ‘three striper’, who told him that they should ‘stick together’ and that there was ‘no need to get into bed with anyone’. Mr Terry Hodson also told Mr De Santo that the ‘three striper’ was sleeping with the ‘blonde lady’.<sup>130</sup> In his evidence to the Commission, Mr De Santo confirmed his view that the ‘three striper’ was Mr Dale and the ‘blonde lady’ was Ms Gobbo.<sup>131</sup>

Mr Gregor said that, on 6 October 2003, he, along with Mr De Santo, met with Mr Terry Hodson, who agreed to assist police and attend an interview.<sup>132</sup>

On 16 October 2003, Mr Terry Hodson called Mr Gregor and told him that he met with Ms Gobbo and that she was ‘feeling him out’ and trying to obtain information from him to pass on to Mr Dale.<sup>133</sup>

The following day, Mr Gregor spoke with Mr Terry Hodson on the phone and they discussed a further meeting between Mr Terry Hodson and Ms Gobbo that had occurred the previous day.<sup>134</sup> Mr Terry Hodson said that Ms Gobbo had told him that she had seen Mr Dale recently and that Mr Dale was ‘sticking by’ Mr Miechel.<sup>135</sup>

On 25 October 2003, Mr Gregor met with Mr Terry Hodson and obtained a signed statement from him.<sup>136</sup> He also gave him a covert recording device, which he was to use if he met with Mr Dale. Mr Gregor encouraged him to meet with Ms Gobbo to gather information against Mr Dale in relation to the burglary.

Mr Gregor said he encouraged Mr Terry Hodson to speak to Ms Gobbo because he knew that Ms Gobbo and Mr Dale were in contact. He said that it did not cross his mind that Ms Gobbo may have acted as Mr Dale’s lawyer, though he suspected that she might have given him informal or ‘off the record’ advice. According to Mr Gregor, Ms Gobbo had never held herself out as Mr Dale’s lawyer.<sup>137</sup>

On 6 November 2003, Mr Gregor again met with Mr Terry Hodson, together with then Detective Senior Sergeant Ian Snare.<sup>138</sup> During this discussion, Mr Terry Hodson recounted an earlier meeting with Ms Gobbo. He told Mr Gregor that she said:

- she met with Mr Dale on 30 October 2003 and he seemed physically ill and paranoid
- she thought Mr Dale was involved in the Dublin Street burglary
- Mr Miechel and Mr Dale could be doing things without her knowledge
- Mr Dale had not asked her for legal advice
- she had heard a rumour that Mr Miechel had made a statement to ESD
- Mr Dale was paranoid that Mr Miechel was cooperating with ESD.<sup>139</sup>

## Ms Gobbo as Mr Paul Dale's legal adviser

In his evidence to the Commission, Mr Dale said of his relationship with Ms Gobbo that there was a 'crossover of professional and personal'. He explained:

*... a number of those occasions where we met either as a result of either I contacting her or however it happened, those went from speaking at a café, bar, whatever, over lunch, dinner, whatever happens to be to too many drinks and a lot of things were said and she certainly told me a lot of things that you wouldn't expect her to tell about her clients.<sup>140</sup>*

He said that Ms Gobbo was at times his legal adviser and they had conversations that he considered were legally privileged.<sup>141</sup>

On 5 December 2003, Mr Dale, Mr Miechel and Mr Terry Hodson were arrested in relation to the Dublin Street burglary. Mr Dale's charge was based on information provided by Mr Terry Hodson. Mr Dale contacted Ms Gobbo because he viewed her as his best chance of obtaining bail.<sup>142</sup>

In evidence to the Commission, Mr Dale said that he could not recall the details of their conversation but that he sought her out previously for legal advice in preparation for being arrested, and that because she was aware of his legal situation and circumstances, she was his 'go to' lawyer.<sup>143</sup>

He understood that Ms Gobbo could not represent him because she was acting for others who had been charged in relation to the burglary.<sup>144</sup> In a statement to the Commission, Mr Dale said that he discussed the conflict with Ms Gobbo, 'who maintained that she could still assist me in a semi-formal manner and we agreed I would run most things by her when I needed her expert legal advice in regards to drug trafficking charges that I was facing'.<sup>145</sup> He said he was in regular contact with her to seek legal advice and it was his belief these conversations were all confidential.<sup>146</sup>

Mr Dale said that in the lead up to his bail application, he believed that Ms Gobbo would assist his solicitor, Mr Tony Hargreaves, with the application.<sup>147</sup> Mr Dale also told the Commission that Ms Gobbo and Mr Hargreaves had advised him not to make a bail application at that time, so he did not pursue it.<sup>148</sup>

In relation to the arrest of Mr Dale, Ms Gobbo noted in her court book that Mr Gregor arrested Mr Dale, and that 'either Miechel or Hodson has rolled'.<sup>149</sup> She also noted that she had read a statement made in relation to the matter, and the contents of it was too detailed to be made up.<sup>150</sup>

On 7 December 2003, Ms Gobbo visited Mr Dale in prison.<sup>151</sup> According to Mr Dale, he gave her some handwritten notes about matters relevant to his bail application and instructed her to hand those notes to Mr Hargreaves.<sup>152</sup>

Mr Dale said that he was advised he could only be represented by Mr Hargreaves and a specific counsel, who was not Ms Gobbo, if he wanted to receive funding from The Police Association for the matter.<sup>153</sup> Despite discussions about engaging alternative counsel, Mr Dale told the Commission that he had still considered that Ms Gobbo was acting for him because they continued to meet and discuss his legal matters:

*I still believed she was acting for me, because I kept continually meeting with her and discussing criminal matters, my issues, my matters. When I say she's acting for me, you're right, she couldn't act at court for me, I guess, but I was still seeking her out for advice.<sup>154</sup>*

Ms Gobbo's diary records that, on 14 December 2003, she visited Mr Dale in prison in a professional capacity.<sup>155</sup> She made notes that indicate they discussed Mr Dale's case, and that as a result Ms Gobbo was to speak to various people.<sup>156</sup>

On 15 December 2003, Mr Dale was released on bail.

## The Hodsons murders

On 15 or 16 May 2004, Mr Terry Hodson and his wife, Mrs Christine Hodson, were murdered in their home in Kew. Mr Terry Hodson's plea in relation to the Dublin Street burglary was scheduled to be heard at the Supreme Court of Victoria on 19 August 2004.<sup>157</sup> He had orally agreed to give evidence against Mr Dale and Mr Miechel and had been advised by police that this assistance would substantially reduce his sentence.<sup>158</sup>

The committal hearing for Mr Dale and Mr Miechel was scheduled for 4 October 2004.

Mr Charlie Bezzina, then Senior Sergeant in the Homicide Squad, attended the scene and was in charge of the investigation.

Mr De Santo also attended the scene.<sup>159</sup> Mr De Santo told the Commission that Ms Gobbo contacted him; that she told him Mr Andrew Hodson believed his parents had been murdered; and that she wanted to give Mr De Santo's telephone number to Mr Jim Valos, Mr Andrew Hodson's solicitor. Mr De Santo agreed to her providing his telephone number directly to Mr Andrew Hodson.<sup>160</sup>

Mr De Santo said that Mr Andrew Hodson then called him and told him that he was at his parents' house, that they had been murdered and that he believed that Mr Dale was involved. He said that it was he who had called the police. He wanted Mr De Santo to come to the house.<sup>161</sup>

On 1 July 2004, Ms Gobbo attended a meeting with Mr Bezzina and Mr Davey at the Homicide Squad offices at St Kilda Road Police Station, to discuss the Hodson murders. She was interviewed as a potential witness, but the interview was video recorded, something usually reserved for suspects. Although they discussed a range of matters, the resulting IR showed that she did not supply any information of value to the investigation.<sup>162</sup>

Ms Gobbo told Mr Bezzina and Mr Davey that she was aware an IR identifying Mr Terry Hodson as a human source was circulating within the criminal community for several months prior to his murder.<sup>163</sup>

Mr Bezzina demonstrated a willingness to receive further information from Ms Gobbo in the following exchange from that interview:

*MR BEZZINA: Well, that's about where we're at and down the track if—and I don't want you to put yourself in any position where you shouldn't be but because of the people that you come in contact with...*

*MS GOBBO: Yeah.*

*MR BEZZINA: ...and things you're obviously going to hear and, as I said, putting ESD aside and everybody else, if you come across information you think we should be aware of to try and solve it, that's all I'm—you know, if you can give us a call.*

*MS GOBBO: As long as I'm not video-taped, Charlie.*

*MR BEZZINA: Yeah, no. No, well, you're right. So all I want is a phone call to say well, if we need a push in the right direction, that's what I ask and the end of the day there's someone out there who's callous enough to commit the murder in the way it was committed. And if they had an issue with Terry that's all one thing but then to take out Christine.<sup>164</sup>*

In a statement to the Commission, Mr Bezzina recalled that Ms Gobbo could have been identified as a potential witness to the Hodson murders due to her association with Mr Mokbel, as Victoria Police had identified evidence linking Mr Mokbel to the murders.<sup>165</sup> Mr Bezzina told the Commission that at the time of the interview, he was unaware of Ms Gobbo's personal relationship with Mr Dale.<sup>166</sup>

## Contact with Purana Taskforce

### ‘Our door is always open’: Victoria Police

As Ms Gobbo’s legal career continued, she became more entrenched in her role as a legal adviser to organised crime figures. In 2003, she received threats from a close associate of Mr Williams following her representation of members of the Moran family, perceived by Mr Williams and Mr Mokbel as rivals.<sup>167</sup>

On 21 July 2003, Ms Gobbo represented Mr Lewis Moran in a successful application for bail.<sup>168</sup> In the days following that hearing, she was threatened by Mr Veniamin.<sup>169</sup> Ms Gobbo said Mr Veniamin went to her apartment building and confronted her about this perceived disloyalty, including calling her a ‘dog’.<sup>170</sup>

On 22 September 2003, Ms Gobbo again appeared for Mr Moran in relation to a variation of bail.<sup>171</sup> Afterwards, on the steps of the Melbourne Magistrates’ Court, Ms Gobbo said she was approached by Mr Philip Swindells, at that time a Detective Senior Sergeant in the Purana Taskforce.<sup>172</sup> Ms Gobbo stated that Mr Swindells told her the police were aware of Mr Veniamin’s threats and that she should contact police if she wanted to discuss the situation.<sup>173</sup>

In his evidence to the Commission, Mr Swindells said that Ms Gobbo declined to make a formal report due to her fear of reprisal. She told him she had made a statutory declaration detailing the threats and placed it in a safe, so that if she were killed, Victoria Police would know who was responsible.<sup>174</sup>

Between 2003 and 2004, Ms Gobbo had numerous discussions with Mr Bateson of the Purana Taskforce, about assisting Victoria Police and about her safety concerns.<sup>175</sup> Mr Bateson told the Commission that, after a hearing in 2004 concerning her client, Mr McGrath, Ms Gobbo told him that she was concerned for her welfare if it were to become known that she was representing this client. In a statement to the Commission, Mr Bateson said he told Ms Gobbo ‘our door was always open if she needed assistance’.<sup>176</sup>

### The crack in the dam wall of silence: contact with Purana Taskforce

Victoria Police knew of Ms Gobbo’s knowledge of and connection to Melbourne’s organised crime networks. Ms Gobbo told the Commission that she had come to know ‘who’s who in the zoo ... and [had] a great deal of knowledge about the intricacies of the drug trade in Melbourne’.<sup>177</sup> It became apparent to her over time that officers were aware that she possessed this in-depth knowledge of gangland identities.<sup>178</sup>

By 2003, many murders that had occurred in the context of the gangland wars remained unsolved.

The Purana Taskforce attempted to dismantle the criminal networks by gathering intelligence and targeting their weakest and most susceptible members. It considered that this method would mean that those arrested and charged would be more likely to cooperate with police and provide evidence against their co-accused, or against those higher up in the criminal network.<sup>179</sup> In evidence to the Commission, Mr Swindells said that the Purana Taskforce was keen to encourage these criminals to cooperate with police.<sup>180</sup>

From 2003, Ms Gobbo was representing Mr McGrath, who had been charged in relation to the murders of Mr Jason Moran, Mr Barbaro, and Mr Marshall.

Purana Taskforce investigators met with Mr McGrath while he was in prison, as he had shown a willingness to assist police. They hoped to obtain information from him about a series of murders. In turn, Mr McGrath wanted to negotiate a plea deal in relation to his charges. In colloquial police terminology, they hoped he would ‘roll’.

Mr McGrath complied and provided a number of statements against other criminal identities, becoming the first of a number of significant ‘roll over’ witnesses for the Purana Taskforce.<sup>181</sup> Ms Gobbo later asserted that he was the ‘crack in the [dam] wall of silence that led to a flood’.<sup>182</sup>

In June 2004, Mr Bateson attended prison several times to meet with and take statements from Mr McGrath. The following month, Mr Bateson and Mr Mark Hatt, then a Detective Senior Constable in the Purana Taskforce, attended prison to give Mr McGrath draft versions of those statements. Mr McGrath said that he was largely happy with their contents but asked that Ms Gobbo review and ‘sign off’ on them.<sup>183</sup> Mr Bateson arranged this with Ms Gobbo.<sup>184</sup>

On 10 July 2004, Mr Hatt attended Ms Gobbo’s chambers with the statements. She reviewed them and made some comments, including that she was sceptical of her client’s assertions about the murder of Mr Marshall.<sup>185</sup>

The next day, Ms Gobbo visited Mr McGrath in prison.<sup>186</sup> The following day, Mr Bateson and Mr Hatt visited him to revise his statements.<sup>187</sup> Mr McGrath altered his statement as to whether he believed he and his co-accused were going to Mr Marshall’s home to collect a debt rather than to kill him and whether Mr McGrath was to be paid.<sup>188</sup>

Due to her representation of Mr McGrath at this time, Ms Gobbo was in regular contact with key Purana Taskforce investigators.<sup>189</sup> This contact continued into 2005 in relation to a range of matters not limited to Mr McGrath, prior to her formal registration as a human source.

## **Ms Gobbo’s health issues**

On 24 July 2004, Ms Gobbo was hospitalised after suffering a stroke.<sup>190</sup> This caused left-sided paralysis and temporary loss of speech. She had been taken to hospital by her client and close friend, Mr Ahmed, who was an associate of Mr Mokbel.<sup>191</sup> She said that, while she was in hospital, the Mokbel family and many of their associates visited her.<sup>192</sup>

She later underwent heart surgery, after a hole in her heart was identified.<sup>193</sup> In the ensuing years, she claimed to experience chronic pain, likely a result of her stroke.<sup>194</sup>

## **Ongoing contact with Mr Stuart Bateson**

On 1 March 2005, the committal proceedings of Mr Williams, Mr Andrews (a pseudonym) and Mr Thomas (a pseudonym) for the murders of Mr Jason Moran, Mr Barbaro and Mr Marshall took place. Mr McGrath was a key witness. Victoria Police argued a public interest immunity (PII) claim before the Chief Magistrate to prevent the disclosure of their notes identifying that Ms Gobbo was acting for Mr McGrath.<sup>195</sup> Mr Bateson had made the redactions to the notes after Ms Gobbo had expressed concern for her safety, fearing that Mr Williams and others might find out that she had acted for and not stopped Mr McGrath from assisting police.<sup>196</sup> The Chief Magistrate allowed the PII claim.<sup>197</sup>

On 23 March 2005, Ms Gobbo phoned Mr Bateson to thank him for ensuring that her name was not mentioned during the committal proceeding.<sup>198</sup> She raised concerns about various lawyers who acted for individuals involved in the gangland wars. Mr Bateson was interested in gathering intelligence about these lawyers, as the Purana Taskforce thought that they were part of criminal enterprises and were facilitating criminal activity.<sup>199</sup>

Mr Bateson and Ms Gobbo later had several phone conversations and meetings.<sup>200</sup> Many related to Operation Pedal, an investigation into money laundering allegations about Solicitor 2 (a pseudonym). In a discussion on 21 July 2005, Ms Gobbo suggested that Solicitor 2 should be questioned about the source of client funds.<sup>201</sup>

During these conversations, they also discussed her clients, including Mr Mokbel and Mr George Williams.<sup>202</sup>

Ms Gobbo continued to press for Victoria Police to conceal her role in providing legal advice to Mr McGrath. On 22 May 2005, she called Mr Bateson to say she was worried about her safety if Mr Hatt was cross-examined about taking Mr McGrath's statement in the Mark Moran murder as this could reveal that she had represented Mr McGrath.<sup>203</sup> Ms Gobbo expressed similar concerns for her safety in a telephone call to Mr Bateson on 1 September 2005. She was concerned that Solicitor 2, who was representing Mr Carl Williams in relation to the murder of Mr Moran, would receive unedited notes revealing Ms Gobbo's representation of Mr McGrath through the disclosure process. Mr Bateson assured her that Victoria Police would resist this.<sup>204</sup>

Ms Gobbo also appeared to be motivated in speaking to Mr Bateson by her personal dislike and jealousy of Solicitor 2, who had effectively usurped Ms Gobbo in providing legal advice to Mr Mokbel.<sup>205</sup>

## Further contact with the Major Drug Investigation Division

### Knowledge and interest in Ms Gobbo

By mid-2004, the MDID was receiving information that Ms Gobbo's involvement with her clients went beyond a professional relationship and that she may be willing to share information with Victoria Police about these clients.<sup>206</sup>

During a meeting on 10 August 2004, attended by then Detective Senior Sergeant James (Jim) O'Brien, Detective Sergeant Steve Mansell, then Detective Senior Constable Paul Rowe, Officer Sandy White (a pseudonym) and other MDID officers, the possibility of applying to intercept Ms Gobbo's telephone was discussed.<sup>207</sup>

It is clear that around this time, Mr White, who later went on to register Ms Gobbo as a human source, considered that Ms Gobbo may have information about organised crime due to her high-profile association with major criminals that could be of assistance to police.<sup>208</sup> After Ms Gobbo's stroke a month earlier, he thought that she might be 'vulnerable to an approach'.<sup>209</sup>

On 26 August 2004, the MDID produced a profile of Ms Gobbo, which referred to her criminal history and her association with criminal figures.<sup>210</sup>

### Arrest of Mr Bickley (a pseudonym)

On 15 August 2005, Mr Bickley was arrested in relation to serious drug offending arising from Operation Quills, an investigation into an aspect of the Mokbel drug operation that the MDID had been running since 2004.<sup>211</sup> Mr Mokbel asked Ms Gobbo to act for Mr Bickley.<sup>212</sup>

On 31 August 2005, Ms Gobbo called Mr Rowe about Mr Bickley's bail application, which was listed for hearing that day.<sup>213</sup> Ms Gobbo said that she did not want to represent Mr Bickley, but she felt compelled to do so as Mr Mokbel was pressuring her. She also told Mr Rowe it was not in Mr Bickley's best interests for her to represent him and that she had a conflict of interest as it appeared that Mr Bickley could provide evidence about Mr Mokbel's involvement in criminal activities.<sup>214</sup> It appeared obvious to Mr Rowe that Mr Mokbel was paying Mr Bickley's legal fees and pressuring her to look after Mr Mokbel's rather than Mr Bickley's interests.<sup>215</sup>

Mr Rowe suggested that he and Mr Mansell would meet Ms Gobbo at court to discuss the matter in person.<sup>216</sup> Mr Rowe told the Commission that police had long suspected Mr Mokbel was controlling his associates' legal representation and that Ms Gobbo may herself have been involved in some level of criminality.<sup>217</sup>

At 9.30am on the same day, Mr Mansell and Mr Rowe spoke to Ms Gobbo at the Melbourne Magistrates' Court.<sup>218</sup> Mr Rowe said that she was open and candid in the details she provided during this conversation.<sup>219</sup>

Mr Rowe's evidence to the Commission was that:

- Ms Gobbo discussed her association with Mr Mokbel at length, including that he used her to gather information to benefit him and his associates.<sup>220</sup>
- She was forced to represent Mr Mokbel's associates in a way that suited Mr Mokbel's interests, rather than those of her other clients.<sup>221</sup>
- She was concerned that her continued representation of Mr Mokbel was affecting her reputation within the criminal justice system and that she may be committing criminal offences in assisting him.<sup>222</sup>
- This arrangement with Mr Mokbel was putting her under a lot of pressure and causing her stress, which she was concerned was affecting her health.<sup>223</sup>
- Towards the end of their conversation, Mr Mansell said to her something like 'you should get on board', and she responded to the effect, 'if anyone finds out I'd end up dead'.<sup>224</sup>

In his evidence to the Commission, Mr Rowe said:

*She was 100 per cent looking for a way out of that environment where she felt compelled to do these things on behalf of people that, let's face it, were involved in serious organised crime for many, many years, homicides, large-scale drug trafficking and—don't get me wrong, I'm not saying she doesn't have a level of responsibility for her own behaviour, but she was under enormous pressure and looking for a way out, a hand of friendship.*<sup>225</sup>

He also agreed that Ms Gobbo's deciding to 'get on board' was 'a way out' that Victoria Police could offer her but 'ultimately that decision was up to her'.<sup>226</sup>

Later that afternoon, Mr Rowe and Mr Mansell had a further conversation with Ms Gobbo.<sup>227</sup> Mr Rowe, in a statement to the Commission regarding that conversation, said that:

- Ms Gobbo seemed to be 'venting to get a lot of information off her chest', particularly in relation to Mr Mokbel.
- She said that she felt conflicted in relation to Mr Bickley, as Mr Mokbel expected her to ensure he did not cooperate with police, which she thought was against his interests.
- She said that she viewed aligning herself with the police as a way out of her arrangement with Mr Mokbel.
- They discussed the process of cooperating with police, to which Ms Gobbo said something to the effect that 'she would be killed' if people found out and she wanted assurances that she would be looked after if she did give information to police.
- He and Mr Mansell told her that, if she did cooperate, she would be managed by other officers who were 'specialists'.
- By the end of the conversation, he felt that Ms Gobbo had already made up her mind to cooperate with police. He said that neither he nor Mr Mansell pressured her to do so.<sup>228</sup>

Mr Rowe and Mr Mansell reported this conversation to Mr O'Brien.<sup>229</sup> Mr O'Brien told the Commission that, on this conversation being reported to him, he either advised Mr Mansell and Mr Rowe to contact the SDU, or he spoke directly to someone from the SDU.<sup>230</sup>

As described below, the SDU was a newly established unit that specialised in managing high-risk human sources. Mr O'Brien said that he referred Ms Gobbo to the SDU as, when Ms Gobbo indicated a willingness to assist police, it was proper procedure for her to be sent to that unit as the MDID no longer played any role in assessing, registering or handling human sources.<sup>231</sup>

## 2005 TO 2009: HUMAN SOURCE AND WITNESS

An overview of Ms Gobbo's interaction with Victoria Police, including as a registered human source in 2005–09, is outlined in Figure 6.3 and discussed further below.

**Figure 6.3: Timeline of Ms Gobbo's use as a human source, 2005–09**

### 2005

**16 September:** Ms Gobbo meets with the Source Development Unit (SDU) for the first time. The unit registers her as a human source (for a third time, unbeknown to them) with the number '21803838', commonly shortened to '3838'. A series of assessment meetings are conducted between September to November.

**15 November:** An application for formal approval of Ms Gobbo's use as a human source is submitted. As part of the process, the SDU completes a risk assessment and notes that the overall risk of registering her as a human source is 'high' but concludes the value of the information she could supply outweighs the risks.

### 2006

**22 April:** Mr Cooper (a pseudonym), a client of Ms Gobbo, is arrested based on detailed information she provided to the SDU. Despite being told by her handlers not to attend, Ms Gobbo insists on attending his police interview on the night of his arrest. She provides legal advice and encourages him to cooperate with police. As a result, Mr Antonios (Tony) Mokbel and many of his associates are ultimately convicted of serious criminal offences.

**26 April:** The SDU completes a second risk assessment that identifies new risks to Ms Gobbo's safety, including that she had informed on a number of people who could pose a risk to her, and that she had assisted a number of 'high level criminals' in cooperating with police.

**27 April:** Then Superintendent Anthony (Tony) Biggin conducts an audit of Ms Gobbo's SDU file. He identifies no issues of concern.

**17 May:** Then Assistant Commissioner Simon Overland, APM and SDU officers meet to discuss winding down Ms Gobbo's use as a human source. They agree there is a need for an 'exit strategy'.

### 2007

**March:** The Briars Taskforce is established to investigate the murder of Mr Shane Chartres-Abbott. The Petra Taskforce is established to investigate the murders of Mr Terrence (Terry) Hodson and Mrs Christine Hodson. Ms Gobbo is asked to assist with both investigations.

**5 June:** Ms Gobbo provides the SDU with a bill of lading and other documents that had been given to her by a client, Mr Rabie (Rob) Karam. This may have led to the seizure of a large quantity of ecstasy by law enforcement authorities, and the prosecution of several individuals, commonly known as the 'Tomato Tins' prosecution.

**22 June:** Ms Gobbo passes on information from Mr Domenic (Mick) Gatto to the SDU regarding his associate, Mr Faruk Orman, who had just been arrested for the murder of Mr Victor Peirce.

**19 July:** Ms Gobbo attends an Office of Police Integrity (OPI) examination by the Honourable Gerald Edward (Tony) Fitzgerald, AC, QC regarding the leaking of information reports (IRs) that revealed Mr Terry Hodson was a human source.

**17 August:** Ms Gobbo attends a further examination at the OPI, where Mr Fitzgerald suggests she told 'untruths' at the previous hearing. She is encouraged to seek legal advice before giving further evidence. Ms Gobbo never returns to give evidence.

## 2008

**14 January:** Briars Taskforce investigators, then Detective Inspector Stephen (Steve) Waddell and then Detective Senior Sergeant Ronald (Ron) Iddles, OAM, APM interview Ms Gobbo about Mr Chartres-Abbott's murder.

**6 February:** Due to mounting concerns about the number of police officers who have become aware of the identity of '3838', Ms Gobbo's human source registration number is changed to '11792958' commonly shortened to '2958'.

**26 February–5 March:** Ms Gobbo is interviewed a number of times by Petra Taskforce investigators then Detective Senior Sergeant Solon (Sol) Solomon and then Detective Senior Constable Cameron Davey about the murder of the Hodsons.

**16 April:** Ms Gobbo's car is set on fire. The suspect is one of her clients.

**17 November:** Ms Gobbo is interviewed for the fourth time by Petra Taskforce investigators after they receive information that she is in possession of false phones linked to then Detective Sergeant Paul Dale around the time of the Hodson murders.

**30 November:** Mr Dale calls Ms Gobbo and asks to meet. She informs the SDU and Petra Taskforce investigators.

**7 December:** Ms Gobbo meets Mr Dale and covertly records the meeting.

**11 December:** After listening to the recording, Petra investigators tell Ms Gobbo that Mr Dale cannot be charged or convicted without her evidence. She is asked to become a witness against him.

**30 December:** The SDU completes a 'SWOT' analysis assessing the strengths, weaknesses, opportunities and threats of Ms Gobbo becoming a witness for Petra Taskforce against Mr Dale.

## 2009

**7 January:** Ms Gobbo signs her witness statement in relation to Mr Dale.

**13 January:** Ms Gobbo is deregistered as a human source.

**13 February:** Mr Dale and Mr Rodney Collins are charged with the Hodson murders.

**25–27 May:** Mr Waddell and Mr Iddles travel to Bali to take a statement from Ms Gobbo regarding the Chartres-Abbott murder. That statement is never signed as Mr Waddell and Mr Iddles become concerned about the implications of Ms Gobbo giving evidence.

## The Source Development Unit

### Human source management reform and the establishment of a dedicated source unit

As indicated above, serious corruption within the Drug Squad was identified in late 2000.<sup>232</sup> A review of the Drug Squad, the Purton Review, recommended reform of human source management processes.

As part of these reforms, on 27 July 2003, Victoria Police initiated a project, *Review and Develop Best Practice Human Source Management Policy*. A recommendation of that project led to a trial of a new unit, known initially as the DSU and later the SDU. After the pilot program was completed, the SDU was established on a permanent basis.<sup>233</sup>

Part of the SDU's purpose was to identify, recruit and register high-risk human sources.<sup>234</sup> It was envisaged that members of this unit, known as handlers and controllers, would recruit these sources and obtain information from them.<sup>235</sup> For the first time, investigators would be separated from contact with and the management of human sources, a concept known as the 'sterile corridor', largely to better protect the human source.<sup>236</sup>

Other reforms involved establishing 'clearly defined procedures' to better manage interactions with police officers and human sources.<sup>237</sup> Reports prepared by the SDU included:

- An Informer Contact Report (ICR) that was prepared after a handler communicated (either by phone, email or in person) with a human source.
- An IR that was prepared from records of physical meetings and the ICR, extracting usable intelligence that was then assessed and disseminated to investigators.<sup>238</sup> These reports were 'sanitised' so that the provenance of the information, including the identity of the human source, was completely removed from the documents.<sup>239</sup>

A Source Management Log (SML), also known as a 'Controller's Log', was kept by the controller and summarised a human source's activities, as well as the supervision and management protocols in relation to that source.<sup>240</sup>

### First meeting with the handlers

On 8 September 2005, Mr Rowe attended a meeting with then Detective Acting Superintendent Robert Hill, Mr White, Mr Mansell and other SDU officers.<sup>241</sup> Mr Rowe's diary records that the outcome of the meeting was that the SDU was to meet with Ms Gobbo and assess her suitability as a human source.<sup>242</sup>

On 16 September 2005, Mr Rowe and Mr Mansell collected Ms Gobbo and took her to a private meeting room where she met with officers from the SDU for the first time. Officer Peter Smith (a pseudonym) wrote an ICR that summarised the meeting.<sup>243</sup> The matters they discussed in this meeting are outlined below. This meeting was also recorded, despite Mr White assuring Ms Gobbo that it would not be.<sup>244</sup>

Ms Gobbo raised concerns that, if revealed as a human source, she would be 'judged as a lawyer, not just as a person assisting police'.<sup>245</sup> She said her motivation for becoming a human source was that she 'had had enough of [the] stressful lifestyle dealing with [those] people' and she did not 'know a way out', including how to get out of her arrangement with the Mokbels.<sup>246</sup>

Ms Gobbo referred to her 2004 stroke, describing it as a 'very big scare'. She added that she had initially changed her lifestyle but had since 'slipped' into a worse one and now wanted to stop. She believed if the Mokbels were arrested and jailed, she could escape their clutches.<sup>247</sup>

When discussing Ms Gobbo's clients and associates, Mr White made no secret of the SDU's eagerness to obtain intelligence regarding the Mokbels. He began with, 'Tell us everything you know about Tony Mokbel'.<sup>248</sup> She replied, 'How many weeks have you got?'.<sup>249</sup>

During this meeting, Ms Gobbo discussed Mr Mokbel and his associates, including Mr Bickley and Mr Cooper (a pseudonym) at length.<sup>250</sup>

She referred to 'a client' who ultimately became an important prosecution witness and said that she checked this person's statement and edited it before the witness signed it. Ms Gobbo said she would be in serious trouble if people like the Mokbels found out.<sup>251</sup> She also said that the stress of this contributed to her stroke.<sup>252</sup>

Her handler commented in the ICR that his 'initial impression is that, at the very least, this [human source] can definitely be of high value in relation to current intelligence on Mokbel family and associates'.<sup>253</sup>

In her evidence to the Commission, Ms Gobbo said she formed the belief that, if she did not cooperate with police, she would be charged with something.<sup>254</sup> She added that she felt as though she 'couldn't walk away or would have difficulty walking away', and that if she did walk away, she was scared of what might happen if she did not meet their expectations.<sup>255</sup>

Four face-to-face assessment meetings took place between Ms Gobbo and the SDU between September and November 2005, when she was registered as a human source with the number '21803838', commonly shortened to '3838'.<sup>256</sup>

## Risk assessment

On 15 November 2005, her handler drafted a risk assessment of Ms Gobbo. At that time, Victoria Police policy for registering a human source required such an assessment.<sup>257</sup> The risk to her was rated as 'high' with a number of specified risks identified, including that she:

- was a criminal defence barrister, and well known in the legal fraternity
- was acting for several members of the Mokbel criminal syndicate
- had previously spoken to other police officers, including the MDID and the Purana Taskforce.<sup>258</sup>

The risk to Victoria Police was also considered 'high', in particular because of her 'occupation and particular position'. The assessment noted, 'If compromised, the handling of this Source would come under extreme scrutiny', which could ultimately 'cause embarrassment and criticism of the Force'.<sup>259</sup>

The following description in that risk assessment was assessed as a 'moderate' risk:

*Within a short time, the Source has provided credible and valuable intelligence to police. The Source is well positioned to obtain tactically viable intelligence in relation to the criminal activities of the MOKBEL cartel. Intelligence supplied by the Source is considered accurate, however, on occasion the information may be obtained via third parties who may not be directly involved in the matters reported on. This may cause concern regarding the accuracy of information supplied.*<sup>260</sup>

The risk to public harm was also assessed as 'moderate':

*The Source displays to Handlers a high degree of a feeling of moral duty to uphold the law. Whereas this position must be constantly [scrutinised], it appears unlikely that the Source would be openly involved in activities that would have a negative impact on her position, and thus the general community.*<sup>261</sup>

On 23 November 2005, Mr Black (a pseudonym), who was acting as the SDU controller at the time, completed the risk assessment with the overall risk assessed as 'high'.<sup>262</sup> He noted, however, that her effective use had the 'potential to impede major crime and reduce the illicit drug trade and that failure to use Ms Gobbo would have the opposite effect'.<sup>263</sup> He recommended that the SDU manage Ms Gobbo as a human source.

## Victoria Police's approach to managing Ms Gobbo

During the SDU's early management of Ms Gobbo as a human source, she had one dedicated source handler.<sup>264</sup> Over time, it became apparent that she was a 'labour intensive' human source; it was an 'immensely challenging undertaking' to manage her; and too much work for one handler to manage alone.<sup>265</sup>

Consequently, Mr White determined that a number of handlers would have responsibility for Ms Gobbo on a rotating basis.<sup>266</sup> In all, Ms Gobbo had six handlers.<sup>267</sup> This was primarily due to the number of contacts between the handlers and Ms Gobbo.<sup>268</sup> She interacted with them almost daily, often phoning them many times a day.<sup>269</sup> On occasions she contacted them more than 15 times in one day.<sup>270</sup> These calls were not just during regular working hours but often late at night and on public holidays and weekends.<sup>271</sup> The handlers also met with Ms Gobbo face-to-face, often for meetings lasting more than five hours.<sup>272</sup>

The topics covered during these conversations were wide-ranging. As well as discussing the activities of her clients and other associates, Ms Gobbo regularly discussed her health and general wellbeing, including her mental health, the stress and pressure she was under, and her various physical ailments.

Ms Gobbo did not like her handlers to rotate. She described it as 'frustrating ... to change from one person to someone else and to be repeating myself'.<sup>273</sup>

### Information provided by Ms Gobbo and Victoria Police records

During her meetings and calls with handlers, Ms Gobbo provided a significant amount of information, which her handlers recorded. Between 16 September 2005 and 13 January 2009, 172 ICRs were generated by the SDU. The information she provided to Victoria Police also resulted in the compilation of 517 IRs, which were disseminated to various parts of Victoria Police, including the Purana Taskforce, the ESD and the MDID. Additionally, information was disseminated verbally to investigators such as Mr O'Brien, with some of those conversations recorded in diaries. The Commission has been unable to ascertain the precise number of these verbal disseminations.

Due to the large volume of information Ms Gobbo provided, the handlers fell behind in their record keeping, including ICRs and official diaries.<sup>274</sup> Often, they wrote notes and summaries of meetings months after they occurred.<sup>275</sup> Ms Gobbo disputed the accuracy of some ICRs and diaries when shown them by the Commission.<sup>276</sup>

The evidence before the Commission suggests that she provided her handlers with information relating to approximately 520 people mentioned in the SDU documents produced during this period.<sup>277</sup>

The intelligence Ms Gobbo provided to Victoria Police related to both her social relationships and her client relationships, and the line between these relationships was blurred. In his evidence to the Commission, Mr White said that Ms Gobbo was valuable as a human source as she had a huge social network of individuals involved in organised crime about whom she could provide intelligence.<sup>278</sup>

The SDU was not aware of all of Ms Gobbo's clients, although she would on occasion tell them for whom she was acting.<sup>279</sup> In his evidence to the Commission, Mr White said that it became apparent as time progressed that Ms Gobbo was providing information about her clients and SDU officers told her on 'numerous occasions' that they did not want any information that could be privileged.<sup>280</sup> He considered any conflict of interest issues to be Ms Gobbo's own responsibility to manage.<sup>281</sup> He conceded that it would have been beneficial to have kept a list of those for whom she was acting.<sup>282</sup>

Ms Gobbo's handlers tasked her to further her social relationships with clients in order to gather more intelligence about their activities.<sup>283</sup> She also took it upon herself to develop these relationships and offered ways to elicit information for Victoria Police. For example, Ms Gobbo offered to handle the RSVP list for the party of Mr Cooper, who was a well-known associate of the Mokbels, and to take photos at the event in order to collect contact details and images of people of interest to police.<sup>284</sup>

Over the period that Ms Gobbo was registered as a human source with the SDU, she was acting for, and providing information about, individuals under investigation by several Victoria Police taskforces, including Purana, Petra and Briars.

Ms Gobbo's handlers routinely asked her to provide information about her clients' car registrations, phone numbers, addresses, nicknames and financial affairs. She was regularly tasked by handlers to ascertain the movements of her clients, including Mr Mokbel and Mr Karam.<sup>285</sup>

She also provided significant information that related to operations targeting Mr Mokbel's criminal enterprise from his associates, such as Mr Thomas, Mr Cooper and Mr Karam. During one of her early meetings with the SDU on 22 September 2005, she told them that Mr Thomas and Mr Cooper would both have sufficient information about Mr Mokbel to put him away for a long time.<sup>286</sup>

## Ms Gobbo's informing on her clients

By 2006, Ms Gobbo had provided significant information to Victoria Police about individuals involved in criminal activity, which resulted in several arrests.

During conversations with her handlers, Ms Gobbo provided wide-ranging information about:

- the criminal activities of her clients
- how Victoria Police could encourage her clients to roll and cooperate with police
- defence tactics she proposed using in relation to her clients
- the relative strengths of her clients' cases
- the mobile phone numbers and vehicles of targets, including those of her clients
- addresses that targets, including clients, were known to frequent
- code names
- code words used in communication.<sup>287</sup>

The specifics of Ms Gobbo's informing are detailed in Chapter 7. The following summaries of notable case studies are set out below to illustrate Ms Gobbo's most significant period of informing on clients.

### Mr Cooper (a pseudonym)

Mr Cooper was a client of Ms Gobbo at various times between 2002 and 2007. He was a key target of Victoria Police due to his close business association with Mr Mokbel.

After Ms Gobbo's early indications that she could provide information about Mr Cooper and his activities, the SDU tasked her to do so. Ms Gobbo said that, with the SDU's encouragement, she spent more time with Mr Cooper and they developed a social relationship.<sup>288</sup> She frequently met him for dinner.<sup>289</sup> He said that he believed that she was his 'best friend'.<sup>290</sup> Ms Gobbo said that over time they began discussing his criminal activities.<sup>291</sup>

Around Christmas 2005, Ms Gobbo told the SDU that she thought Mr Cooper was manufacturing amphetamine or was about to start production.<sup>292</sup> In early 2006, Ms Gobbo provided her handlers with information regarding his activities sourcing precursor chemicals and manufacturing amphetamine.<sup>293</sup> On 16 March 2006, Ms Gobbo gave her handler the approximate location of his laboratory.<sup>294</sup>

In early 2006, as Victoria Police investigated Mr Cooper, Ms Gobbo provided the SDU with advice about how police could encourage him to roll on others in the Mokbel criminal enterprise.<sup>295</sup> She discussed targeting him financially and using his fear of the Mokbels as leverage.<sup>296</sup> She also advised on how to achieve his cooperation, on which officers he preferred, and that she believed he would listen to her advice once arrested.<sup>297</sup>

Prior to Mr Cooper's arrest, Ms Gobbo told SDU officers she planned to attend the police station on the night of his arrest.<sup>298</sup> The SDU attempted to dissuade her.<sup>299</sup> When Mr Cooper was arrested, as expected he asked for Ms Gobbo to attend his police interview as his legal adviser. Ms Gobbo obliged. She advised him that it was in his interests to assist police.<sup>300</sup>

Mr Cooper went on to cooperate with Victoria Police and make statements against other members of the Mokbel syndicate. He was ultimately sentenced to 10 years' imprisonment, with a non-parole period of seven years.

## Mr Tony Mokbel

Mr Mokbel was one of Ms Gobbo's most high-profile clients. By early 2002, Ms Gobbo was acting for him.<sup>301</sup> According to Ms Gobbo, her motivation to become a human source was to rid herself of 'the Mokbel cartel' as 'she was frustrated at the Mokbels' capacity to use lawyers to control others around them'<sup>302</sup> and 'sickened [by] the amount of crime they were getting away with'.<sup>303</sup>

As noted above, Mr Mokbel was a primary target for the Purana Taskforce and, consequently, a key individual about whom the SDU wanted intelligence from Ms Gobbo. She delivered in spades, providing a wealth of information about him, his family and his associates.

In December 2005, Mr Mokbel was on trial for narcotics offences in relation to Operation Plutonium. Ms Gobbo was acting as junior counsel. She provided information to the SDU about the strength of the case, including her opinion that he had 'no defence' and that his senior counsel wanted him to plead guilty but he was 'too stubborn'.<sup>304</sup> During the trial, Ms Gobbo continued to provide information to the SDU concerning defence tactics, including the names of possible defence witnesses from whom she had taken statements and the likelihood of Mr Mokbel giving evidence in the trial.<sup>305</sup> She also provided information as to Mr Mokbel's views about his jury and the fact that he did not want its composition to change.<sup>306</sup>

On 17 March 2006, Ms Gobbo told her handlers that she suspected Mr Mokbel was planning some 'unknown criminality', as he had asked her twice not to contact him that weekend.<sup>307</sup>

Soon after, Mr Mokbel absconded and was convicted in his absence.<sup>308</sup> After he was later captured in Greece, Ms Gobbo also provided information to Victoria Police on strategies he was employing to challenge extradition and to defend and delay those proceedings.<sup>309</sup>

On 3 July 2012, Mr Mokbel was sentenced to 30 years' imprisonment, with a non-parole period of 22 years.<sup>310</sup> In 2017, Mr Mokbel launched an appeal against his conviction, citing Ms Gobbo's involvement with police.

## Mr Rob Karam

Another notable example of the intelligence provided by Ms Gobbo related to Mr Karam, an associate of Mr Mokbel who was charged with large-scale drug importations. On 5 June 2007, Ms Gobbo sent a message to her SDU handlers, advising them that Mr Karam had asked her to hold documents for safekeeping.<sup>311</sup>

At a meeting later that night, she provided the photocopied documents to the SDU and said that they 'relate to shipping containers being imported' by an associate of Mr Karam.<sup>312</sup>

Later, she helped the SDU translate one of the documents, a bill of lading, from Italian into English.<sup>313</sup> She noted that it referred to the importation of tinned tomatoes from Italy and listed shipment details such as the ship name, container number, port of origin and departure date.<sup>314</sup>

Inside those cans of tomatoes authorities later uncovered what was then the world's largest seizure of ecstasy. Mr Karam was convicted after a trial. In 2016, Mr Karam launched an appeal against his conviction, citing Ms Gobbo's involvement with police.<sup>315</sup>

## **Mr Thomas (a pseudonym)**

Mr Thomas was an associate of the Mokbels' and Williams' crime syndicates. Ms Gobbo acted for him on multiple occasions between 2002 and 2008.

On 16 August 2004, he was arrested and charged with the murders of Mr Barbaro and Mr Moran.<sup>316</sup> Mr McGrath, a co-accused in the murders and a client of Ms Gobbo, made statements implicating Mr Thomas and agreed to give evidence against him.<sup>317</sup>

On several occasions, Ms Gobbo discussed Mr Thomas' legal position, and her strategies to encourage him to assist police, with her handlers.<sup>318</sup>

Following lengthy negotiations, Mr Thomas entered into a formal agreement with police to cooperate and assist the authorities, in exchange for the prosecution pursuing only one charge of murder against him and submitting that he should receive a discounted sentence.<sup>319</sup> He was convicted of the murder of Mr Moran and sentenced to 23 years' imprisonment with a non-parole period of 12 years.<sup>320</sup>

Mr Thomas then gave statements to police implicating several people in criminal activities.<sup>321</sup>

## **Mr Faruk Orman**

Mr Faruk Orman was a close associate of Mr Domenic (Mick) Gatto. In her evidence to the Commission, Ms Gobbo said that she knew Victoria Police had a plan to identify those in Mr Gatto's circle who they might turn into a human source, settling on Mr Orman.<sup>322</sup>

Ms Gobbo represented Mr Orman after he was charged with the murder of Mr Victor Peirce. Mr Thomas, whom Ms Gobbo had previously represented, was a key witness against Mr Orman, and the case against him substantially depended on Mr Thomas' testimony.<sup>323</sup> Unknown to Mr Orman, Ms Gobbo encouraged Mr Thomas to give evidence against Mr Orman.<sup>324</sup>

Mr Orman pleaded not guilty but was convicted of murder and sentenced to 20 years' imprisonment, with a non-parole period of 14 years. In 2010 and 2011, he unsuccessfully appealed to the Court of Appeal of the Supreme Court of Victoria and the High Court of Australia.

In February 2019, after the public revelation the previous year of Ms Gobbo as a human source (described further below), Mr Orman filed a petition of mercy with the Victorian Attorney-General, who referred the matter to the Court of Appeal. In July 2019, the Director of Public Prosecutions (DPP) conceded that the circumstances amounted to a substantial miscarriage of justice, and that the conviction should be set aside.

On 26 July 2019, the Court allowed Mr Orman's appeal and acquitted him.

## Victoria Police concerns regarding Ms Gobbo as a human source

### Reward application

In January and February 2006, Ms Gobbo incurred three speeding tickets.<sup>325</sup> She asked the SDU to pay them. On 17 March 2006, her handler said that this might cause her role as a human source to be exposed.<sup>326</sup> Ms Gobbo said her main concern was that she had recently accrued a large number of demerit points and was close to having her licence suspended.<sup>327</sup> On 28 March 2006, SDU officers prepared a reward application to have the fines withdrawn.<sup>328</sup>

The application outlined the assistance Ms Gobbo provided, referring to her registration number '3838' and her name. It also noted that she was supplying extremely valuable information in relation to the Purana Taskforce and Operation Posse.<sup>329</sup> The application was given to Superintendent Mark Porter as the Local Informer Registrar, the Human Source Management Unit (HSMU) and then the Human Source Rewards Committee, which approved payments for expenses and rewards in relation to human sources.<sup>330</sup>

On 26 April 2006, the Victoria Police Payments Committee, consisting of Mr Simon Overland, APM then Commander Dannye Moloney and then Detective Superintendent Blayney, met regarding the application.<sup>331</sup> On 27 April 2006, the SDU told Ms Gobbo that the speeding fines had been withdrawn but that this would not occur again.<sup>332</sup> The application was formally approved on 12 May 2006.<sup>333</sup>

### Another assessment and an audit of Ms Gobbo

After the arrests of Mr Cooper and others in April 2006, serious concerns emerged within Victoria Police about the potential revelation of Ms Gobbo's identity and her safety. Court proceedings were underway against several individuals about whom she had provided intelligence and the Office of Police Integrity (OPI) was seeking to examine her.

On or around 19 April 2006, Mr Moloney directed then Superintendent Anthony (Tony) Biggin to conduct an audit of the SDU's human source records relating to Ms Gobbo.<sup>334</sup> Mr Biggin told the Commission that the audit was a 'broad over-viewing audit' rather than an in-depth one.<sup>335</sup>

On 26 April 2006, the day before the audit was to take place, her handler prepared a second risk assessment, which updated the initial risk assessment of 15 November 2005.<sup>336</sup> This was prepared because further information was identified as escalating the risk of Ms Gobbo being compromised. The new risks included that she had informed against a number of people who could pose a risk to her, that she had assisted a number of 'high level criminals' in cooperating with police and that her phone was being intercepted by another agency.<sup>337</sup> Mr White determined that the risk to Ms Gobbo was still high but that she remained 'strategically and tactically viable'.<sup>338</sup>

Mr Biggin undertook the audit on 27 April 2006.<sup>339</sup> He attended the SDU, and spoke to Mr White and some of the handlers.<sup>340</sup> In completing his audit, Mr Biggin noted in his diary 'no issues identified'.<sup>341</sup> He prepared a report in the form of an Issue Cover Sheet, which examined compliance with human source policy, provided a risk assessment and made general observations before providing a recommendation in relation to Ms Gobbo's continued use by Victoria Police.<sup>342</sup> Mr Biggin reported that Ms Gobbo was a 'valuable asset' to Victoria Police, and that the relationship should continue. He also recommended that the SDU continue to manage Ms Gobbo.<sup>343</sup>

## Meetings about the termination process

On 17 May 2006, Mr Overland and SDU officers met about the need to develop an 'exit strategy' for Ms Gobbo.<sup>344</sup> Mr White told the Commission that the SDU considered that it had a continuing 'duty of care' to Ms Gobbo and her safety and welfare.<sup>345</sup>

Ms Gobbo's potential exposure was a growing concern for the SDU.<sup>346</sup> They put her into 'caretaker mode' or 'babysitting mode'.<sup>347</sup> They told her that they did not want further information, and that if she provided it, they would not act on it.<sup>348</sup>

Despite having discussions about terminating Ms Gobbo's use as a human source, the SDU continued to receive a significant amount of information from her.<sup>349</sup>

The SDU also became aware that the OPI were considering examining her in Operation Khadi. The examination related to alleged corruption of a police officer, Mr John Brown (a pseudonym). Ms Gobbo was linked to this operation as she was representing and associating socially with Mr Ahmed, who Mr John Brown had arrested. Ms Gobbo had told a prosecutor that Mr John Brown had stolen \$5,000 from Mr Ahmed's car on the night of his arrest.<sup>350</sup> She later told her handlers about the allegation.<sup>351</sup>

On 24 July 2006, Mr Swindells and then Detective Inspector Lindsay Attrill of the ESD visited Ms Gobbo regarding her allegations.<sup>352</sup> Ms Gobbo raised concerns about subpoenas being issued, and about being called to give evidence at the OPI.<sup>353</sup> She contacted her handler after this meeting in a distressed state, telling him that it appeared her role as a human source was more widely known than she had thought.<sup>354</sup> The handler told her that the SDU were attempting to 'head off' any OPI hearing.<sup>355</sup>

On 28 July 2006, her handlers said that she was no longer to be involved in the Operation Khadi investigation. They told her that no statement would be taken, and that she would not be brought before the OPI.<sup>356</sup>

## 'Babysitting' Ms Gobbo

Early in 2007, the SDU held further discussions, internally and with other Victoria Police officers about winding down the use of Ms Gobbo as a human source. For example, officers Mr White and Mr Ryan spoke about 'easing her out of the picture'.<sup>357</sup>

In his evidence to the Commission, Officer Fox (a pseudonym), who took over as Ms Gobbo's handler in June 2007, said that part of his brief was to assist in ending her relationship with Victoria Police.<sup>358</sup>

Mr Fox gave evidence to the Commission that, at this time, the SDU's intention was not to task Ms Gobbo to provide information that investigators could use.<sup>359</sup> She would continue to pass on information she heard in her 'social circle'.<sup>360</sup> That information was risk assessed by the SDU before it was released. Mr Fox told the Commission that if that information came from Ms Gobbo's professional relationships, it was not released.<sup>361</sup>

Notwithstanding this evidence, it is apparent that the SDU did task Ms Gobbo on a number of occasions in relation to the Briars Taskforce (discussed further below).<sup>362</sup>

By early 2007, Ms Gobbo was expressing frustration to her SDU handlers about not being tasked.<sup>363</sup> She continued to volunteer intelligence to them, including significant intelligence that they felt they could not ignore.<sup>364</sup>

On 2 May 2007, she attended a dinner with officers Mr O'Brien, Mr White, Mr Green and Officer Anderson (a pseudonym) at the Sebel Heritage Golf Course.<sup>365</sup> Mr O'Brien presented her with a silver pen. The dinner and pen were intended as a gesture to thank her for the assistance she had provided to the Purana Taskforce and to be part of the process of 'winding down' her role as a human source.<sup>366</sup>

On 4 May 2007, Mr White met with a psychologist who the SDU had arranged for Ms Gobbo. They discussed Ms Gobbo's 'exit strategy', noting the 'hole' that would be left in her life should her contact with police cease.<sup>367</sup>

In June 2007, Ms Gobbo told her handler that she wanted to end her relationship with the SDU.<sup>368</sup> She said that she had spent the previous night vomiting and considered this to be an internal reaction to her stress.<sup>369</sup>

## Threats to Ms Gobbo

Throughout 2006 and 2007, Ms Gobbo told Victoria Police she was receiving threatening text messages. In response, the Purana Taskforce established Operation Gosford.

On 6 February 2008, Ms Gobbo's human source number was changed to '11792958', commonly shortened to '2958'. This change was because many police officers knew she was human source '3838' and there was a risk her identity could be revealed through 'loose conversation'.<sup>370</sup>

On 16 April 2008, Ms Gobbo's car was set on fire in Clarendon Street, South Melbourne. The suspect was a client.<sup>371</sup> Subsequently, other barristers at her chambers raised concerns about her inappropriate personal and professional relationships with her clients, other barristers' clients and police officers.<sup>372</sup> Later in 2008, Ms Gobbo was asked to leave those chambers.<sup>373</sup>

Ms Gobbo continued to receive threats to her life in 2009. For example, on 26 May 2009, she received several death threats via text message.<sup>374</sup>

## Ms Gobbo's road to becoming a witness

In March 2007, two joint Victoria Police and OPI taskforces were established.

- The Briars Taskforce sought to investigate the unsolved murder of Mr Chartres-Abbott, referred to in media reports as the 'vampire gigolo'. Mr Overland established this taskforce as a joint investigation between the ESD and OPI. The Briars Taskforce Board of Management included then Assistant Commissioner Thomas (Luke) Cornelius, APM of the ESD, Mr Overland and Mr Graham Ashton, AM, APM, then Assistant Director of the OPI.<sup>375</sup> Superintendent Rodney (Rod) Wilson led the Briars Taskforce.<sup>376</sup>
- The Petra Taskforce sought to investigate the unsolved murders of Mr Terry Hodson and his wife Mrs Christine Hodson.<sup>377</sup> Mr Overland led the Petra Taskforce Board of Management, which also included Mr Cornelius and Mr Ashton.<sup>378</sup> Mr Ryan headed the Petra Taskforce.<sup>379</sup>

It became apparent to investigators that Ms Gobbo had highly valuable connections and information relevant to both taskforces.<sup>380</sup>

## Discussions about Ms Gobbo's future

On 6 August 2007, Mr Overland, Mr Biggin, Mr White, Mr Blayney and Mr Ryan attended a meeting to discuss Ms Gobbo's role. Mr White recorded in his diary that Mr Overland was told of discussions about three options for Ms Gobbo's ongoing management:

- deactivate her as a human source
- use her as a witness
- continue to manage her as a human source, but not task her.<sup>381</sup>

Mr White recorded that the meeting attendees discussed the difficulty of deactivating Ms Gobbo as a human source because of the need to communicate with her during the court proceedings for those on whom she had informed.<sup>382</sup> He also noted that she could not be a witness, as this would compromise her status as a human source.<sup>383</sup>

The meeting attendees determined that they would continue to manage Ms Gobbo as a human source with no tasking and that Mr Biggin would conduct a risk assessment of any intelligence she provided prior to police acting on or disseminating that intelligence.<sup>384</sup>

In his evidence to the Commission, Mr Overland could not recall this meeting, but said he expected that if the handlers had concerns about the use of Ms Gobbo, they would have raised those concerns.<sup>385</sup>

## **Briars Taskforce**

Ms Gobbo was on the radar of the Briars Taskforce as she was identified on telephone intercepts of a person of interest in the investigation, former Victoria Police officer Mr David Waters.<sup>386</sup>

Notwithstanding that Ms Gobbo was in ‘babysitting mode’ and not to be tasked at this time, her connection to Mr Waters was not lost upon investigators.<sup>387</sup> She was linked to him through her friendship with Mr Campbell, and had associated with Mr Waters at various places.<sup>388</sup> She had also represented Mr Waters in a previous matter.<sup>389</sup> Mr White and Briars Taskforce investigator, then Detective Senior Sergeant Ronald (Ron) Iddles, OAM, APM, discussed the viability of tasking her.<sup>390</sup>

Subsequently, Ms Gobbo was tasked to obtain information from Mr Waters and reported some conversations to her handlers.<sup>391</sup>

By the end of October 2007, Ms Gobbo knew that Mr Waters was considering engaging her as his lawyer.<sup>392</sup> On 29 October 2007, she reported to her handler that Mr Waters had discussed aspects of the investigation with her, including that his solicitor had told him that Mr Iddles wanted to interview him and that if interviewed, he might read out a statement and not answer questions.<sup>393</sup>

On 7 November 2007, Mr Waters sent Ms Gobbo an email, with the subject line ‘confidential’, attaching the statement that he proposed to read in his record of interview.<sup>394</sup> That day, Ms Gobbo told her handlers that, in her opinion, the statement was not detailed enough and that she had advised Mr Waters of this. She said she understood she was not to assist Mr Waters to write the statement. This information was provided to Mr Iddles.<sup>395</sup>

On 14 January 2008, Briars Taskforce investigators then Detective Inspector Stephen (Steve) Waddell and Mr Iddles visited Ms Gobbo in her chambers, where they interviewed her about the murder of Mr Chartres-Abbott. She provided details about matters relevant to the investigation.<sup>396</sup> They later determined that, given her knowledge, they should get a statement from her.<sup>397</sup> That was not done until 2009, and is described in further detail below.

## **Petra Taskforce**

The Petra Taskforce investigation gained momentum when Mr Carl Williams began assisting police in relation to the Hodson murders. This worried Ms Gobbo. In early 2007, she told her handlers she was concerned that Mr Williams might ‘set her up’ or implicate her in criminal activity.<sup>398</sup>

Mr Williams later made a statement that implicated Mr Dale and referred to Ms Gobbo acting as a conduit between him and Mr Dale, passing messages and setting up meetings.<sup>399</sup> Ms Gobbo became a person of interest in the investigation as Petra Taskforce investigators considered that she could corroborate Mr Williams’ allegations, including that Mr Dale had contacted him to secure a hitman to murder Mr Terry Hodson.<sup>400</sup>

On 9 May 2007, Ms Gobbo left a message for her handler to the effect that she had discovered that Mr Williams had made a statement naming her as an associate of Mr Dale. She said that the handlers, who were supposed to be looking out for her, failed to tell her this.<sup>401</sup>

## Initial interviews with Petra Taskforce investigators

In 2008, Mr Solomon and Mr Davey from Petra Taskforce interviewed Ms Gobbo about the Hodson murders.<sup>402</sup> Neither officer knew she was a human source assisting Victoria Police.<sup>403</sup>

The first formal interview occurred on 26 February 2008.<sup>404</sup>

The interview was not completed that day, and continued on 28 February 2008.<sup>405</sup> On 5 March 2008, she took part in another interview.<sup>406</sup>

## Office of Police Integrity examinations in relation to the Hodson murders

In July and August 2007, Ms Gobbo was called to an OPI hearing relating to the Hodson murders.<sup>407</sup> The purpose was to question Ms Gobbo about her knowledge of the leaked IR that identified Mr Hodson as a human source (also known as 'IR44'), and the allegation that she was a conduit between Mr Mokbel, Mr Williams and Mr Dale in relation to the leaking of that IR. Those examinations were undertaken by the Honourable Gerald Edward (Tony) Fitzgerald, AC, QC assisted by barrister, Mr Garry Livermore.<sup>408</sup>

In the lead up to the examinations, on 17 July 2007, SDU officers met with Ms Gobbo and discussed her options in relation to answering questions at the hearing that could reveal she was a human source.<sup>409</sup> They determined that the best option would be to 'influence' the questions she was asked to ensure her role as a human source was not exposed.<sup>410</sup>

On 18 July 2007, her handler told Ms Gobbo that protections had been put in place to avoid her identity being revealed during the examination.<sup>411</sup> This included that she would not be asked if she had spoken to anyone about receiving the summons to attend the OPI hearing.<sup>412</sup> The OPI had served Ms Gobbo with a confidentiality notice, along with the witness summons. These notices provided that it was an offence to discuss the existence of the summons or the subject matter with anyone except in limited circumstances, such as to obtain legal advice.<sup>413</sup> Her handler also told Ms Gobbo that if she felt threatened by a question, she could call a 'time out' and Mr Ryan, who was leading the Petra Taskforce at the time, would be there to deal with the issue.<sup>414</sup>

On 19 July 2007, Ms Gobbo attended the OPI examination.<sup>415</sup> Mr Ryan attended but watched from a separate room.<sup>416</sup> During a break, Ms Gobbo telephoned her handler, and again after the examination. She expressed her unhappiness with the line of questioning, complaining that the questions were open-ended and risked exposing her role as a human source.<sup>417</sup>

Ms Gobbo was called to another OPI hearing on 17 August 2007.<sup>418</sup> Mr Ryan was again present in a separate room.<sup>419</sup> At the outset of the hearing, Mr Fitzgerald told her that he believed she had not told the whole truth in her previous examination and had in fact told some 'untruths'.<sup>420</sup> Mr Fitzgerald and Mr Livermore both questioned Ms Gobbo about whether she had spoken to anyone else about her previous attendance at the OPI hearing.<sup>421</sup> Ms Gobbo told them that she did not think she could answer.<sup>422</sup> She then requested and was granted a break.

During that break, she spoke to Mr Ryan, who told her to get a lawyer.<sup>423</sup> When the hearing resumed, Ms Gobbo said that she wanted to seek legal advice. Mr Fitzgerald adjourned her evidence to allow her to do so.<sup>424</sup> Ms Gobbo was not subsequently called back to the OPI to continue her examination.

Mr Fitzgerald, in his statement to the Commission, said he had no recollection of Ms Gobbo being a human source and that he would have remembered had he been told.<sup>425</sup>

## Further interviews with Petra Taskforce investigators

On 17 November 2008, Ms Gobbo attended the Petra Taskforce offices. Investigators asked her to attend as they had information that she was in possession of ‘bodgy’ phones linked to Mr Dale around the time of the Hodson murders. After the interview, then Detective Senior Sergeant Shane O’Connell, who was by then heading the Petra Taskforce, told Mr White that Ms Gobbo had told her interviewers that she:

- was aware of a corrupt relationship between Mr Dale and Mr Williams
- had been a conduit between them prior to the Hodson murders
- had used ‘bodgy phones’ to communicate with Mr Dale, who had also used ‘bodgy’ phones.<sup>426</sup>

Mr O’Connell also told Mr White that Ms Gobbo had cried and volunteered information, referred to having to ‘defend these blokes day in day out, they are morally bankrupt’, said that she was acting in a legally correct manner, that her head was full of information and asked Petra Taskforce investigator Mr Davey ‘if that was you, what would you do?’<sup>427</sup>

After the interview, Ms Gobbo told her handlers that Petra Taskforce investigators had requested a witness statement.<sup>428</sup> In a separate conversation she told them that Petra Taskforce investigators wanted her to give evidence to corroborate Mr Williams’ assertions about his relationship with Mr Dale.<sup>429</sup> She said that she did not want to be a witness due to concerns about her personal safety and the risk that her use as a human source would be revealed in cross-examination.<sup>430</sup> In the ICR recording the conversation, her handler noted the potential for this to jeopardise future prosecutions and lead to claims that convictions were unsafe due to Ms Gobbo’s involvement.<sup>431</sup>

On 30 November 2008, Ms Gobbo received a call from Mr Dale, who asked her to meet. She reported this to her handlers and to Petra Taskforce investigators.<sup>432</sup> On 3 December 2008, she met with Mr Davey and Mr O’Connell, who said that they wished to use her as a witness, both to close an evidentiary gap—the relationship between Mr Dale and Mr Williams—and because she was credible compared to Mr Williams.<sup>433</sup>

Ms Gobbo met with Mr Dale on 7 December 2008 and covertly recorded that meeting. Petra Taskforce investigators determined after listening to the recording that Mr Dale had provided information that was important to the investigation.<sup>434</sup> They formed the view that Ms Gobbo would be an integral witness in the case against Mr Dale.<sup>435</sup>

On 11 December 2008, Petra Taskforce investigators met with Ms Gobbo and told her that Mr Dale could not be charged or convicted without her evidence.<sup>436</sup>

## Putting a ‘barrier/break’ in the relationship

In early December 2008, Mr Overland was considering whether Ms Gobbo should transition from a human source to a witness.<sup>437</sup>

This was a significant decision—it is only in rare circumstances that human sources are used as witnesses. That is because there are grave risks in doing so, particularly to the safety of sources: their identities can be exposed during court processes, including to those against whom they have informed.<sup>438</sup>

Mr Overland said that it was now apparent to him that Ms Gobbo could no longer be managed as a source. He considered that, if she were transitioned to a witness, she would be better protected as she could be subject to legislative and other protections, apparently a reference to the *Witness Protection Act 1991* (Vic).<sup>439</sup>

The SDU had experienced difficulties in terminating Ms Gobbo’s role as a human source, due to concerns about her safety, their ongoing duty of care to her, and her continued desire to provide intelligence to them.<sup>440</sup> Ending the relationship was difficult as, despite their efforts, she continued to engage with them.<sup>441</sup>

In his evidence to the Commission, Mr White considered that it was not the role of the SDU to manage Petra Taskforce witnesses. If the SDU continued to manage her, there was a risk of SDU officers being called to give evidence (for example, in relation to evidentiary matters) and her work as a source being revealed.<sup>442</sup>

On 5 December 2008, Mr Overland met with SDU officers to discuss Ms Gobbo assisting the Petra Taskforce, possibly as a witness.<sup>443</sup> During this meeting, Mr White raised the SDU's concerns about Ms Gobbo transitioning from human source to witness.<sup>444</sup> In his evidence to the Commission, Mr White recalled Mr Overland indicating that while he understood the SDU position, Ms Gobbo was potentially useful in the very serious corruption investigation of Mr Dale.<sup>445</sup> At this time, Mr Overland believed that she would likely enter witness protection, and would be adequately protected.<sup>446</sup>

## Ms Gobbo's SWOT analysis

The SDU continued to raise concerns about Ms Gobbo becoming a witness in the Dale prosecution.<sup>447</sup> On 30 December 2008, Mr Moloney advised Mr Biggin that she was to sign a statement the next day.<sup>448</sup> Mr Biggin directed Mr Black to complete a 'strengths, weaknesses, opportunities, threats' (SWOT) analysis regarding Ms Gobbo becoming a witness.<sup>449</sup> Mr Biggin said that his aim was to create a record of having raised these issues with his superiors.<sup>450</sup>

The SWOT analysis documented substantial risks to both Ms Gobbo and Victoria Police if she were to become a witness.<sup>451</sup> These included the exposure of her long-term relationship with Victoria Police as a human source, the possibility of an OPI or government review into the legal and ethical implications of having used a serving barrister as a human source, and the potential for prosecutions on foot to be jeopardised.<sup>452</sup>

Mr Biggin prepared and signed an Issue Cover Sheet (a Victoria Police internal briefing note), attaching the SWOT analysis, and provided it to Mr Porter, with a recommendation that it be given to Mr Moloney, who was a member of the Petra Taskforce.<sup>453</sup> Mr Moloney noted on the Issue Cover Sheet that it was to be provided to Mr Overland for the attention of the Petra Taskforce Board of Management.<sup>454</sup>

## Meetings with the Petra Taskforce about Ms Gobbo's witness statement

On 1 and 2 January 2009, Mr Davey and Mr Solomon met with Ms Gobbo and took a statement from her, which she did not sign.<sup>455</sup>

When speaking later with her handler, she said she wanted financial compensation to become a witness, noting 'this evidence is gold but it comes at a price'.<sup>456</sup> She signed the statement on 7 January 2009.<sup>457</sup>

## Deregistration as a human source

On 12 January 2009, Ms Gobbo met with SDU officers, telling them she had signed the statement because she 'got all the promises' she wanted from Mr O'Connell.<sup>458</sup>

On 13 January 2009, Ms Gobbo was deregistered as a human source and formally transitioned to her role as 'Witness F' in the prosecution of Mr Dale for the Hodson murders. Mr Dale was charged with the murders in February 2009.<sup>459</sup>

As Ms Gobbo had transitioned to a witness, the Petra Taskforce took over the role of managing her.<sup>460</sup> Compared to relationships with her SDU handlers, Ms Gobbo's relationships with Petra Taskforce handlers were more difficult. Efforts were made to convince Ms Gobbo to join the Witness Protection Program.<sup>461</sup>

## Briars Taskforce: the Bali statement

The Briars Taskforce investigations had come to a standstill in late 2008 due to a lack of leads.<sup>462</sup> In early 2009, a potential witness came forward and the taskforce was reconvened.<sup>463</sup>

Investigators from the Briars Taskforce wanted a statement from Ms Gobbo in relation to Mr Waters' possible involvement in the murder of Mr Chartres-Abbott.<sup>464</sup> In May 2009, Mr Iddles and Mr Waddell visited her in Bali where she was holidaying after her deregistration as a human source.<sup>465</sup> They took that statement over several days.<sup>466</sup>

The statement was not signed, as both Mr Iddles and Mr Waddell held concerns that Ms Gobbo could not independently recall her meetings or interactions with Mr Waters without reviewing the more contemporaneous ICRs prepared by the SDU. They noticed she appeared to have changed aspects of what she told them in 2008.<sup>467</sup> It also appeared to them that her role as a human source was likely to be exposed if the statement was used in criminal proceedings.<sup>468</sup>

## 2010 TO 2018: CIVIL LITIGATION, REVIEWS AND COURT PROCEEDINGS

An overview of the civil litigation between Ms Gobbo and Victoria Police, the three confidential external reviews into the use of Ms Gobbo as a human source and the court proceedings that followed is outlined in Figure 6.4 and discussed further below.

**Figure 6.4: Timeline of civil litigation, reviews into the use of Ms Gobbo as a human source and court proceedings, 2009 to 2018**

### 2009

**7 September:** Ms Gobbo writes to then Chief Commissioner Simon Overland, APM threatening legal proceedings and noting 'the difficulties' that Victoria Police may encounter if her assistance to police from 2005–09 is disclosed.

**28 September:** Ms Gobbo writes to Mr Overland for the second time, expressing frustration at Victoria Police's response and again notes the assistance she has given.

### 2010

**21 January:** Ms Gobbo writes to Mr Overland for the third time.

**27 January:** Mr Paul Dale's lawyers serve a subpoena on Victoria Police for documents concerning Ms Gobbo and any agreement for Victoria Police to provide inducements to her to give evidence against him.

**8 February:** Ms Gobbo's lawyers write to the Victorian Government Solicitor's Office regarding the subpoena and threaten legal action.

**10 March:** Mr Dale's lawyer requests Ms Gobbo's human source file from Victoria Police.

**19 April:** Mr Carl Williams is killed in prison after the media reported that he was assisting police in relation to gangland murders.

**29 April:** Ms Gobbo files proceedings in the Supreme Court of Victoria against Victoria Police claiming that the conduct of Victoria Police for failing to keep her safe as a witness has detrimentally affected her health and ruined her career, causing her economic loss; specifically, loss of earnings as a barrister.

**7 June:** The charges against Mr Dale and Mr Rodney Collins are withdrawn for the Hodson murders.

**11 August:** Ms Gobbo reaches a settlement with Victoria Police, which includes terms that she will not be called as a witness or be contacted by Victoria Police again.

## 2011

**15 February:** Mr Dale is charged with Commonwealth offences alleging that he gave false evidence before the Australian Crime Commission in 2007 and 2008. The Commonwealth Director of Public Prosecutions (CDPP) wants to call Ms Gobbo as a witness.

**4 October:** Barrister Mr Gerard Maguire provides legal advice to Victoria Police that it may be required to disclose to Mr Dale's lawyers material relating to Ms Gobbo's dealings with the SDU. He also raises concerns about potential miscarriages of justice in other cases caused by Ms Gobbo informing on her clients.

**Early November:** The CDPP reviews documents about Ms Gobbo's role as a human source and provides advice that Victoria Police will have to disclose documents regarding Ms Gobbo to Mr Dale.

**3 November:** Mr Findlay (Fin) McRae, Executive Director of Legal Services, then Assistant Commissioner Graham Ashton, AM, APM and then Acting Deputy Commissioner Timothy (Tim) Cartwright, APM meet to discuss Mr Maguire's advice. The decisions made during this meeting result in actions such as Mr Ashton advising the CDPP that Victoria Police does not want Ms Gobbo used as a witness, the CDPP withdrawing charges against Mr Dale, and a review of Ms Gobbo's use as a human source.

**9 November:** Ms Gobbo is advised she is not to be a witness in the proceedings against Mr Dale. Consequently, the CDPP withdraws a number of charges against him.

## 2012

**19 March:** Victoria Police engages former Chief Commissioner Neil Comrie, AO, APM to undertake a confidential review of its use of Ms Gobbo as a human source (Comrie Review). Superintendent Stephen (Steve) Gleeson is appointed to support Mr Comrie in his investigations.

**22 June:** Mr Gleeson prepares a report on issues that arose during his investigations, but were outside the scope of the terms of reference, such as the manner in which Ms Gobbo was used as a human source to inform on clients. This report is later provided to the Office of Police Integrity.

**30 July:** The Comrie Review makes 27 recommendations, including improved supervision and more robust risk assessment processes for high-risk human sources.

## 2014

**31 March:** The *Herald Sun* publishes an article entitled 'Underworld lawyer a secret police informer', alleging Victoria Police had recruited a lawyer to inform on gangland identities. Victoria Police obtain suppression orders to stop publication of the article. The application was withdrawn after the *Herald Sun* agreed to remove certain paragraphs.

**1 April:** Mr McRae, then Assistant Commissioner Stephen Leane, Professional Standards Command and Assistant Commissioner Stephen Fontana, Crime Command, meet with the Commissioner of the Independent Broad-based Anti-corruption Commission (IBAC), Mr Stephen O'Bryan, QC to notify IBAC of issues related to Ms Gobbo. Mr McRae and Mr Leane also meet with the then Director of Prosecutions, Mr John Champion, SC.

**10 April:** Chief Commissioner Mr Kenneth (Ken) Lay, AO writes to Mr O'Bryan requesting that IBAC takes primacy of an investigation into possible media leaks regarding Ms Gobbo and that it conducts a review of Victoria Police's implementation of the recommendations contained in the Comrie Review.

**21 May:** An investigation by IBAC is commenced regarding the use of Ms Gobbo as a human source (Kellam Report).

**July–October 2014:** Mr Gobbo writes to senior Victoria Police officers to express her frustrations and seeks a reward for her assistance to police.

## 2015

**6 February:** The Kellam Report makes 16 recommendations and its report identifies nine individuals who had received, or possibly received, legal assistance from Ms Gobbo while she was informing on them to Victoria Police. It recommends the Director of Public Prosecutions (DPP) reviews the relevant cases to determine whether miscarriages of justice had occurred due to the conduct of Ms Gobbo and Victoria Police. A copy of the Kellam Report is provided to the DPP.

**7 July:** Ms Gobbo writes to Mr Fontana, setting out why she believes that she is entitled to a reward for her assistance to Victoria Police.

## 2016

**5 February:** The DPP delivers a report regarding affected prosecutions regarding some of the cases identified in the Kellam Report (Champion Report).

**March:** The DPP writes to then Chief Commissioner Mr Ashton advising that he intends to disclose to the individuals identified in the Champion Report that their case may have been affected by the use of a lawyer as a human source.

**10 June:** The Chief Commissioner commences proceedings to prevent the DPP from making the disclosure to the potentially affected individuals. Ms Gobbo later joins the proceedings.

**November–March:** The matter is heard before Justice Ginnane in the Supreme Court of Victoria in closed court, without notice to the potentially affected individuals and suppression orders are made.

## 2017

**June:** Justice Ginnane dismisses the Supreme Court proceedings, deciding that disclosure should be made to the affected individuals. The decision is subject to a non-publication order.

**September:** The Court of Appeal of the Supreme Court of Victoria hears the Chief Commissioner's and Ms Gobbo's appeals in closed court, without notice to the affected individuals and subject to suppression orders.

**21 November:** The Court of Appeal upholds Justice Ginnane's decision and revokes the grant of special leave of appeal. A non-publication order is made.

## 2018

**5 November:** After granting special leave to appeal on 9 May 2018, the High Court of Australia hears the appeals of the Chief Commissioner and Ms Gobbo, again in closed court, without notice to the affected individuals and subject to suppression orders. It revokes its grants of special leave. Suppression orders are made but the parties are permitted to notify Commonwealth and Victorian Government entities.

**3 December:** The High Court's reasons and orders, with Ms Gobbo's name pseudonymised, are published but suppression orders as to Ms Gobbo's identity as a human source remain in place.

**3 December:** The Victorian Premier, The Hon Daniel Andrews, MP announces he will establish a royal commission.

**13 December:** The Commission's Letters Patent are issued.

## Ms Gobbo tries to withdraw as a witness

Throughout the latter half of 2009, Victoria Police continued to negotiate unsuccessfully with Ms Gobbo regarding her entrance into the Witness Protection Program.<sup>469</sup> On behalf of Victoria Police, then Deputy Commissioner Kieran Walshe wrote to Ms Gobbo several times about her entry into the program.<sup>470</sup>

On 7 September 2009, Ms Gobbo wrote to Mr Overland, who had become Chief Commissioner earlier that year, threatening legal proceedings. She referred to the information and assistance she had been giving to Victoria Police and stated:

*I need not remind you of the difficulties that Victoria Police may encounter if some or any of my past assistance comes out in the prosecution of Dale.*<sup>471</sup>

Mr Walshe responded to that letter on 14 September 2009 on behalf of Victoria Police.<sup>472</sup>

On 28 September 2009, Ms Gobbo wrote to Mr Overland for the second time expressing her disappointment in the Victoria Police response and the difficulties for the organisation if her past assistance was disclosed:

*For the record I note your apology. However, the tone and content of your letter was deeply upsetting and offensive, and particularly disappointing in the context of my very lengthy period of (and continuing) unprecedented assistance given voluntarily and without reward, to your organisation.*<sup>473</sup>

Negotiations between Ms Gobbo and Victoria Police continued. On 21 January 2010, Ms Gobbo wrote to Mr Overland for the third time expressing her frustrations:

*As a former Deputy Commissioner for Crime, I am sure that I need not remind you of the difficulties that Victoria Police will encounter if some or any of my past assistance is disclosed in the course of the prosecution of Dale. As matters currently stand, such disclosure would appear to be inevitable. Leaving aside the impact such disclosure will have on me personally (including but not limited to my future safety), the difficulties Victoria Police will encounter will extend well beyond the obvious embarrassment and damage that will be done to the Dale prosecution.*

*I have for many months now repeatedly stated that the best way to avoid jeopardising the Dale prosecution is to ensure that evidentiary protections afforded under the Witness Protection Act be granted to me. It alarms me greatly that with Dale's Committal scheduled to commence in less than 7 weeks time, and in circumstances where Dale is anticipated to serve subpoenas on Monday 25 January 2010, Victoria Police is still to determine the issue of my participation in the Witness Protection Program. I can only hope that this issue is resolved before Dale files and serves his subpoenas, after which time it will simply be too late.*

...

*In one final attempt to avoid what I suspect will otherwise be an irreparable and intractable situation for all parties, I am imploring you to please read the enclosed correspondence, particularly in light of the incredible sacrifices I have made for Victoria Police in circumstances where I have asked for nothing other than for the organisation to honour the representations and assurances that have been made to me. Further, I beseech you to reconsider the stance that has been adopted by Victoria Police to date and do so appealing to your professionalism, decency, humanity and conscience.*

*Will you meet with me?*<sup>474</sup>

On 27 January 2010, Mr Dale served a subpoena on the Chief Commissioner, requiring production of documents concerning Ms Gobbo and any agreement for Victoria Police to induce her to give evidence against him.<sup>475</sup>

During this time, Ms Gobbo's legal representatives made known to Victoria Police that they were contemplating civil action for the compensation she said had been promised.<sup>476</sup> Ms Gobbo and her legal representatives became aware of the subpoena and that it was directed towards assistance Ms Gobbo provided to Victoria Police 'in investigations other than that of Mr Dale'.<sup>477</sup> Her lawyers wrote to the Victorian Government Solicitor's Office (VGSO), the legal representatives for the Chief Commissioner, on 8 February 2010. The correspondence noted that Ms Gobbo was concerned about her safety because, if Victoria Police claimed PII on the grounds of informer privilege in answer to the subpoena, this would effectively label her as a human source.<sup>478</sup> The correspondence stated that Victoria Police would be held liable for harm, loss and damage suffered arising from the production of documents in answer to the subpoena.<sup>479</sup>

In late February 2010, Ms Gobbo's lawyers notified the Office of Public Prosecutions (OPP) that she was too unwell to give evidence.<sup>480</sup> Her legal representatives also sent a letter to the VGSO demanding that Victoria Police provide her with the compensation she had been promised.<sup>481</sup>

Mr Dale's legal representatives continued to seek documents relevant to Ms Gobbo during this period.<sup>482</sup>

On 10 March 2010, Mr Hargreaves, Mr Dale's solicitor, enquired about the existence of a human source file for Ms Gobbo. As Victoria Police had claimed PII in respect of some material, he had surmised from that claim that she must have been a human source.<sup>483</sup>

On 12 March 2010, Ms Gobbo's legal representatives sought to have her excused from the witness summons due to her ill health. While refusing to set the summons aside, the magistrate adjourned her evidence until 17 June 2010.<sup>484</sup>

## Murder of Mr Carl Williams

On 19 April 2010, Mr Williams was murdered in Barwon prison. Ms Gobbo subsequently offered to assist police with the investigation. She told Detective Sergeant Stuart Bailey of the Homicide Squad on several occasions that she was attempting to meet and obtain information from a third party about the Williams murder.<sup>485</sup> Mr Bailey and other officers were concerned that this would jeopardise her safety as her identity as a human source was already at risk of exposure.<sup>486</sup>

On 7 June 2010, the charges of murder against Mr Dale and Mr Rodney Collins were formally withdrawn at the Melbourne Magistrates' Court.

## Ms Gobbo starts civil litigation against Victoria Police

On 29 April 2010, Ms Gobbo filed proceedings in the Supreme Court against the State of Victoria, Mr Overland and former Chief Commissioner Christine Nixon, APM.<sup>487</sup> Ms Gobbo claimed that the conduct of Victoria Police had detrimentally affected her health and ruined her career, causing economic loss; specifically, loss of earnings and capacity to earn income as a barrister.<sup>488</sup>

Ms Gobbo's claim related only to the police engagement with her as a prospective witness for the Petra Taskforce in prosecution of Mr Dale. It did not address her engagement with Victoria Police as a human source.

On 11 August 2010, Ms Gobbo signed terms of settlement with Victoria Police.<sup>489</sup> The financial settlement only referred to Ms Gobbo's status as a witness in the proceeding against Mr Dale and did not refer to her history as a registered human source. The settlement included a term that Victoria Police would not call Ms Gobbo to give evidence in any proceedings and officers from the Petra Taskforce would not contact her.

Despite agreeing to and signing those terms of settlement, on 12 August 2010 Ms Gobbo contacted then Detective Senior Constable Angela Hantsis:

*Hi Ang, until permitted contact with me again, I just wanted to say thank you for your wise words to [Mr Cooper] who passed on your message. I've just been re-diagnosed with stress related cancer (reappeared since March surgery) and I intend to do as you suggested, to 'look after myself' I made the mistake of trusting people I respected highly stupidly thinking they actually cared. It really hurts to be used and taken advantage of especially when serious illness results. I truly thank you for your kind thoughts conveyed by [Mr Cooper] I understand that you'd be there to offer the support I so badly required if you were allowed contact.<sup>490</sup>*

On 12 August 2010, Mr Overland directed that Petra Taskforce investigators were not to contact Ms Gobbo. He also directed that, if Ms Gobbo contacted officers, under no circumstances was any information, intelligence or evidence to be solicited or taken from her.<sup>491</sup> Mr Overland said he gave this direction after he became aware that Ms Gobbo remained in contact with Victoria Police.<sup>492</sup>

On 29 August 2010, standard operating procedures relating to contact with Ms Gobbo (referred to as 'Witness F') were issued and noted:

*The following options may apply to information received from Witness F:*

- *Information may not be acted on for reasons which may jeopardise Witness F safety or security, issues of identification etc will be major considerations ...*
- *The SDU Detective Inspector to advise Witness F that information received may or may not be acted upon*
- *Information after sanitisation may be re directed to appropriate investigative units*
- *Information is not to be sourced to Witness F*
- *Investigators are to be advised that information has been received from a person who cannot be identified.<sup>493</sup>*

After 30 August 2010, Ms Gobbo spoke to then Detective Inspector John O'Connor, her designated point of contact at Victoria Police, on numerous occasions.<sup>494</sup> She gave him information regarding individuals including Mr Williams.<sup>495</sup> Then Superintendent Peter Lardner and Mr Pope, then an Assistant Commissioner, provided advice to Mr O'Connor's immediate supervisor, then Superintendent Paul Sheridan, that information from her should be received but she was not to be tasked to follow up this information.<sup>496</sup>

## Driver Taskforce and second prosecution of Mr Paul Dale

### Commonwealth Director of Public Prosecutions charges against Mr Paul Dale

Following the death of Mr Williams, Petra Taskforce was disbanded and the murder charges against Mr Dale and Mr Collins were withdrawn. The Driver Taskforce was established to investigate the circumstances surrounding the death of Mr Williams.

Mr Solomon had submitted a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP) recommending charges against Mr Dale for offences against the *Australian Crime Commission Act 2002* (Cth). After reviewing the brief of evidence, the CDPP indicated that they considered the case against Mr Dale to be strong, and recommended charges be brought against him.<sup>497</sup>

On 15 February 2011, Mr Dale was charged with 12 offences alleging that he gave false evidence before the Australian Crime Commission (ACC) in 2007 and 2008. Then Detective Senior Sergeant Boris Buick was the informant in relation to the charges and liaised with Ms Gobbo.

There were complications in calling Ms Gobbo as a witness in the CDPP prosecution. Agreement still had not been reached between Ms Gobbo and Victoria Police about her entering witness protection. There was also the term in the settlement agreement that Victoria Police no longer proposed to call Ms Gobbo to give evidence in any proceeding.

### Problems with calling Ms Gobbo as a witness

Through his dealings with Ms Gobbo in 2011, Mr Buick was aware that the complications of calling Ms Gobbo as a witness extended beyond her involvement with Mr Dale. During their meetings, Ms Gobbo told Mr Buick about aspects of her history as a human source with the SDU, including her involvement in representing and informing on clients such as Mr Mokbel, Mr Cooper, Mr Thomas, Mr Orman and Mr Karam.

For example, on 16 February 2011, Mr Buick met with Ms Gobbo to inform her of the prosecution against Mr Dale. During the conversation she referred to Mr Orman's case, in which Mr Buick was the informant, claiming credit for his conviction:

*MS GOBBO: ... The High Court matter you went up to Canberra for last week, you know how that happened.*

*MR BUICK: Well, I know, you've said that the other day. I ---*

*MS GOBBO: Go and ask ---*

*MR BUICK: I thought that was my—I thought that was my hard work.*

*MS GOBBO: No. You go and ask the right people Boris—it was a very well hidden thing, that's why [Officers Sandy White, Green and Peter Smith] are exceptionally good ... detectives. However, one would have thought that after you do all of that, someone shakes your hand and says, 'Thank you'.*

*MR BUICK: you got ... convicted for me.*

*MS GOBBO: You know. You don't need me to say it for the tape.*

*MR BUICK: No, I was going to shake your hand if you said yes.<sup>498</sup>*

The CDDP continued to seek to use Ms Gobbo as a witness in the Dale prosecution.

On 24 August 2011 during a meeting between Ms Gobbo, CDDP representatives and Mr Buick, Ms Gobbo raised matters that would make it difficult for her to give evidence. These included an oblique reference to the Tomato Tins prosecution.<sup>499</sup> After the meeting, Ms Gobbo had a further conversation with Mr Buick:

*MR BUICK: Can you just tell me, though, 'cause ---*

*MS GOBBO: Yeah.*

*MR BUICK: --- I'm not as clever as, you know, the rest of you. What's the current prosecution that is—is the issue?*

*MS GOBBO: World's biggest ever importation of ecstasy.*

*MR BUICK: And who's up on that?*

*MS GOBBO: Higgs, Karam, Barbaro. The highest level of organised crime dealers.*

*MR BUICK: So they've all ---*

*MS GOBBO: Now, you—I can tell you, you—you, but the ACC, and VicPol and the AFP didn't have a clue about that. I had the shipping documents. I got my hands on them and that's how you found the world's biggest ever single seizure of ecstasy in the world. Now you think I'm going to risk those people finding out—no fucking way.<sup>500</sup>*

On 26 August 2011, Mr Buick spoke further with Ms Gobbo about the Tomato Tins prosecution. She explained her interaction with, and the information she provided to, the SDU during that period. She stated that Victoria Police had fed the information to the Australian Customs and Border Protection Service in order for the AFP to believe it had, of its own accord, located the shipping container containing the drugs. Ms Gobbo referred to her representation of Mr Karam at the time of the importation when she was also informing against him to police. She said she would not put herself in a situation where she might be asked questions about such matters in the witness box.<sup>501</sup>

## Maguire advice

Mr Buick was concerned that Ms Gobbo's role as a human source might be exposed as a result of material produced in response to the subpoenas Mr Dale's lawyers filed.<sup>502</sup> On around 31 August 2011, Victoria Police obtained urgent legal advice from barrister Gerard Maguire.<sup>503</sup> In 2009, Mr Maguire had provided advice to the Briars Taskforce regarding whether Ms Gobbo's statement would have to be disclosed to Mr Dale during his murder trial.<sup>504</sup> In preparing that advice, Mr Maguire was told that Ms Gobbo was a registered human source but was not given many details.<sup>505</sup> This time Mr Maguire reviewed the SML kept by the SDU in respect of Ms Gobbo.<sup>506</sup> On 4 October 2011 he provided his advice.<sup>507</sup>

Mr Maguire advised that Victoria Police may be required to disclose some material relating to Ms Gobbo's dealings with the SDU to Mr Dale's lawyers. If Victoria Police was to make a PII claim to prevent this disclosure, it could be unsuccessful. That was because, when a court determines whether a PII claim should be upheld, it will balance the competing interests of protecting a human source with the public interest in disclosing the material. This material

could assist Mr Dale's defence that he and Ms Gobbo had a lawyer-client relationship when she taped their conversation; it would affect her credit in claiming that they were not in a lawyer-client relationship.<sup>508</sup>

Mr Maguire also noted that, if disclosure was made, it was likely that Mr Dale's lawyers would seek further material demonstrating Ms Gobbo's informing on others for whom she was acting, such as Mr Mokbel. If these people became aware of her role as a human source, they might challenge their convictions on the basis that they were unlawfully obtained.<sup>509</sup>

Once it was confirmed that Ms Gobbo's role would need to be disclosed to the court for the PII argument, Victoria Police took steps to withdraw Ms Gobbo as a witness in the Commonwealth trial due to the significant risk to her safety.<sup>510</sup>

## Victoria Police tries to withdraw Ms Gobbo as a witness

On 21 October 2011, Mr Buick met with officers of the Driver Taskforce Steering Committee to discuss the Dale prosecution and the consequences of Ms Gobbo being called as a witness and being cross-examined.<sup>511</sup>

That afternoon, Ms Gobbo met with Mr Buick and Detective Sergeant Jason Lebusque.<sup>512</sup>

During their conversation, Mr Buick said 'it was possible' that Victoria Police would ask the CDPP not to proceed with the prosecution, because the examination of Ms Gobbo, or Victoria Police's production of documents relating to her, might jeopardise other prosecutions.<sup>513</sup>

Ms Gobbo asked why this was only being considered in 2011 when she had been raising these issues for years. She continued:

*... I've always said the problem's going to be the police, not in terms of my safety 'cause I'll be dead but in terms of people jumping up and down about their convictions. I've said that for years. But isn't this all based on the assumption that if somebody asks me a question, it comes out?'<sup>514</sup>*

## Commonwealth Director of Public Prosecutions identifies issues with disclosure

In early November 2011, officers of the Driver Taskforce organised for representatives of the CDPP to review documents about Ms Gobbo's role as a human source.<sup>515</sup> The CDPP considered that Mr Dale was likely to mount a defence that Ms Gobbo was acting as his legal adviser at the time of the recording.<sup>516</sup> The CDPP advised that, given this defence, the prosecution would be required to produce documents including those relating to:

- instances where she encouraged Mr Dale or others to believe that their communications were protected by legal professional privilege
- information indicating she was a perpetrator or party to criminal activity
- information indicating that Ms Gobbo lied to investigators or police handlers.<sup>517</sup>

Following that advice, Mr Graham Ashton, then Assistant Commissioner, Crime, requested that the CDPP only proceed with charges that did not rely on the evidence of Ms Gobbo.<sup>518</sup>

The CDPP asked for further information, which was prepared by SDU officers on 6 November 2011.<sup>519</sup> The document provided a brief history and scope of Ms Gobbo's informing between 2005 and 2009 and the number of cases it could have adversely impacted.<sup>520</sup> The document included a list of 164 criminals, solicitors or former Victoria Police officers about whom Ms Gobbo had provided information, including Mr Mokbel and his associates, Mr Karam and his associates, and Mr Orman.

## Mr Graham Ashton withdraws Ms Gobbo as a witness

On 7 November 2011, Mr Sheridan provided this document outlining Ms Gobbo's role as a human source to Mr Ashton with a cover note stating:

*Exposure of Witness F activities within Victoria Police as contained within this summary will have significant impact upon Victoria Police operations, past and present.*<sup>521</sup>

In his evidence to the Commission, Mr Ashton said he was 'shocked' when he read the document on 7 November 2011.<sup>522</sup> After receiving it, Mr Ashton determined that it was untenable for Ms Gobbo to proceed as a witness in the Commonwealth prosecution of Mr Dale.<sup>523</sup> The next day, Mr Ashton advised the CDPP that Ms Gobbo was to be withdrawn as a witness because there were concerns for her safety.<sup>524</sup> The CDPP withdrew her as a witness, and a number of charges against Mr Dale that relied on her testimony were withdrawn.<sup>525</sup>

Although Ms Gobbo was informed on 9 November 2011 that she was not to be called as a witness, she continued to offer to make statements in relation to the Hodson murders, including writing to then DPP, Mr John Champion, SC.<sup>526</sup> The initial letters in 2011 were written by Mr Alex Lewenberg, her then solicitor, and referred only to his 'client' without explicitly identifying Ms Gobbo.<sup>527</sup>

Mr Champion, who did not know that the 'client' was Ms Gobbo, exchanged several letters with Mr Lewenberg, who indicated that his client was willing to assist law enforcement authorities in relation to the Hodson murders in exchange for a reward.<sup>528</sup> Later, in a letter dated 27 February 2012, Mr Lewenberg referred to Ms Gobbo by name.<sup>529</sup>

## The Comrie Review

On 19 March 2012, Victoria Police engaged former Chief Commissioner of Victoria Police, Neil Comrie, AO, APM, to undertake a confidential review of Victoria Police's use of Ms Gobbo as a human source.<sup>530</sup>

The catalyst for the review had been a meeting on 3 November 2011 between Mr McRae, Mr Ashton and Mr Cartwright to discuss Mr Maguire's recent advice.<sup>531</sup>

Mr Comrie's report, the 'Comrie Review', was completed in July 2012 and identified a number of issues relating to Victoria Police's use of Ms Gobbo as a human source, including that risk assessment processes used for Ms Gobbo were 'grossly inadequate', control measures were not complied with, authorisation processes were not as robust as they ought to have been, and supervision and management were unsatisfactory.<sup>532</sup>

Victoria Police started two operations as a result of the Comrie Review: Operation Loricated and Operation Bendigo. These aimed to address issues of concern arising from the Comrie Review and the use of Ms Gobbo as a human source.

After the Comrie Review, between June 2012 and 2014, Mr McRae met with the DPP a number of times to discuss Ms Gobbo and the implications arising from the information she provided to Victoria Police.<sup>533</sup>

The Comrie Review is discussed in further detail in Chapter 11.

## Closure of Source Development Unit

After an internal review, Victoria Police determined in 2013 to close the SDU. In February 2013, SDU officers were informed of this decision.<sup>534</sup>

The Commission heard evidence that there were a wide range of factors involved in the decision, only one of which was the SDU's management of Ms Gobbo.<sup>535</sup> Victoria Police and the SDU handlers disagree as to the reasons for the closure. This matter is discussed further in Chapter 8.

## 'Lawyer X' story breaks

On 31 March 2014, the *Herald Sun* published an article entitled 'Underworld Lawyer a Secret Police Informer'.<sup>536</sup> The article alleged that Victoria Police had recruited a 'prominent underworld lawyer' to inform on criminal figures running Melbourne's drug trade. It further alleged that this human source, referred to only as 'Lawyer X', had given Victoria Police 'unprecedented access to information on some of Australia's biggest drug barons and hitmen, including alleged corrupt police and others involved in Melbourne's gangland war'.

While the article did not name Ms Gobbo, Victoria Police sought a suppression order to prevent its publication.<sup>537</sup> Ultimately, the application was withdrawn after the *Herald Sun* agreed not to publish certain paragraphs of the article.<sup>538</sup>

Victoria Police had concerns for Ms Gobbo's safety.<sup>539</sup> It considered that the media reporting in relation to 'Lawyer X' was directly linked to threats subsequently made to Ms Gobbo.<sup>540</sup> Officers from Victoria Police met with Ms Gobbo in April 2014.<sup>541</sup> She continued to refuse to enter witness protection.<sup>542</sup>

On 1 April 2014, senior Victoria Police officers attended Independent Broad-based Anti-corruption Commission (IBAC) to discuss the matters raised in the media article.<sup>543</sup>

## The Kellam Report

On 10 April 2014, Victoria Police formally notified IBAC regarding the use of Ms Gobbo as a human source.<sup>544</sup> Chief Commissioner Kenneth (Ken) Lay, AO wrote to then IBAC Commissioner Stephen O'Bryan, QC stating that he considered that an independent body should investigate the allegations of police misconduct.<sup>545</sup>

As a result, the Honourable Murray Kellam AO, QC, on behalf of IBAC, undertook a confidential inquiry into the conduct of current and former Victoria Police officers identified in the Comrie Review in relation to their management of Ms Gobbo as a human source. He examined Victoria Police's human source management policies and practices at the time that Ms Gobbo was registered as a human source between 2005 and 2009 and also considered the cases of nine individuals who received, or possibly received, legal assistance from Ms Gobbo while she was informing on them to Victoria Police.<sup>546</sup> All nine were convicted of serious criminal offences.

On 6 February 2015, Mr Kellam produced his report, the 'Kellam Report', and made 16 recommendations. He recommended that the Chief Commissioner provide a copy of the report and any relevant material to the DPP, so that they could consider whether any prosecutions that may have been obtained in breach of legal professional privilege or confidentiality had resulted in a miscarriage of justice due to the use of Ms Gobbo as a human source.<sup>547</sup>

The Kellam Report is discussed in further detail in Chapter 11.

## The Champion Report

A copy of the Kellam Report was provided to then DPP, Mr Champion, to consider whether any relevant prosecutions may have been obtained in breach of legal professional privilege or confidentiality and resulted in miscarriages of justice.<sup>548</sup>

On 5 February 2016, the DPP produced his confidential report and concluded that he was obliged to disclose the possibility of miscarriages of justice to six of the nine individuals who were identified in the Kellam Report, all of whom Ms Gobbo had represented and the DPP had prosecuted.<sup>549</sup>

## Court proceedings

In March 2016, Mr Champion wrote to then Chief Commissioner Graham Ashton, enclosing a copy of the draft disclosure letter he intended to send to the six individuals named in the Kellam Report and one other individual whom the DPP had later identified as being potentially affected.<sup>550</sup>

Subsequently, Mr Champion corresponded a number of times with then Deputy Commissioner Shane Patton, Specialist Operations.<sup>551</sup> Victoria Police was of the view that the disclosures proposed by the DPP, which would lead to Ms Gobbo being identified, would have 'potentially catastrophic consequences for her safety and for the safety of her family'.<sup>552</sup>

In June 2016, the Chief Commissioner initiated proceedings in the Supreme Court to stop the DPP from making these disclosures.<sup>553</sup> The hearings were held in closed court, without notice to the seven individuals, and were subject to suppression orders.

Ms Gobbo supported the Chief Commissioner's attempts to stop her identity and role as a human source from being revealed. In November 2016, she filed her own proceeding to restrain the DPP from making the disclosures.<sup>554</sup> The applications were heard together before Justice Ginnane between November 2016 and March 2017, over 18 hearing days. In June 2017, Justice Ginnane dismissed the proceedings, and issued a non-publication order over the proceedings.<sup>555</sup>

In July 2017, the Chief Commissioner and Ms Gobbo appealed the decision to the Court of Appeal, which also dismissed both appeals, again without notice to the seven individuals and with suppression orders.<sup>556</sup>

On 9 May 2018, the High Court granted special leave to appeal. It heard the appeals on 5 November 2018, without notice to the seven individuals and with suppression orders in place. In a unanimous decision, the seven members of the High Court revoked the grants of special leave. The High Court's decision upheld the decisions of the Victorian courts permitting the DPP to make the disclosures to the seven individuals.<sup>557</sup>

The decision of the High Court was made available to Commonwealth and Victorian authorities but was not made public until 3 December 2018. Ms Gobbo's name was suppressed by court order until 1 March 2019 following the resolution of further proceedings to protect her identity, as discussed in Chapter 1 of this final report.

## The establishment of the Commission

On 3 December 2018, the day the High Court's decision was made public, the Victorian Government announced that it would establish a royal commission to independently inquire into Victoria Police's use of Ms Gobbo as a human source.

This Commission was formally established by Letters Patent issued by the Governor of Victoria on 13 December 2018. The establishment of the Commission and the conduct of its inquiry are discussed in Chapters 1 and 3 of this final report.

# Endnotes

- 1 The Commission sought a statement from Mr Wilson, but he declined to provide one.
- 2 When individuals own property in 'tenants in common' arrangements, each of them owns a separate share of the property.
- 3 Exhibit RC0020 Statement of Mr Michael Holding, 27 March 2019, 2 [13]; Transcript of Mr Michael Holding, 29 March 2019, 536.
- 4 Transcript of Ms Nicola Gobbo, 4 February 2020, 12999.
- 5 Exhibit RC0020 Statement of Mr Michael Holding, 27 March 2019, 2 [13]–[14].
- 6 Exhibit RC0029 Day book and diary of Inspector Trevor Ashton, 3 September 1993, 4; Exhibit RC0028 Statement of Inspector Trevor Ashton, 21 March 2019, 2 [9]; Transcript of Detective Senior Sergeant Peter Trichias, 29 March 2019, 556; Transcript of Mr Michael Holding, 29 March 2019, 537–8; Transcript of Inspector Trevor Ashton, 29 March 2019, 573.
- 7 Exhibit RC0029 Day book and diary of Inspector Trevor Ashton, 3 September 1993, 4.
- 8 Transcript of Sergeant Trevor Ashton, 29 March 2019, 576; Exhibit RC0028 Statement of Inspector Trevor Ashton, 29 March 2019, 2 [11].
- 9 Transcript of Sergeant Trevor Ashton, 29 March 2019, 578.
- 10 Transcript of Sergeant Trevor Ashton, 29 March 2019, 578.
- 11 Exhibit RC0021 Letter of commendation to Mr Michael Holding, 8 December 1993.
- 12 Exhibit RC0022 Print out of charges, 7 September 1993.
- 13 Exhibit RC0020 Statement of Mr Michael Holding, 29 March 2019, 2 [19].
- 14 Exhibit RC0020 Statement of Mr Michael Holding, 29 March 2019, 3 [21].
- 15 Exhibit RC0020 Statement of Mr Michael Holding, 29 March 2019, 3 [23].
- 16 Exhibit RC0020 Statement of Mr Michael Holding, 29 March 2019, 3 [20]; Transcript of Mr Michael Holding, 29 March 2019, 541.
- 17 Transcript of Mr James (Jim) O'Brien, 4 September 2019, 5562.
- 18 Exhibit RC0028 Statement of Inspector Trevor Ashton, 21 March 2019, 3 [19].
- 19 Exhibit RC0054 Statement of Detective Senior Sergeant Tim Argall, 27 March 2019, 3 [14].
- 20 Exhibit RC0052 Statement of Detective Senior Sergeant Rodney Arthur, 26 March 2019, [5], [7], 2 [9].
- 21 Exhibit RC0052 Statement of Detective Senior Sergeant Rodney Arthur, 26 March 2019, 2 [11].
- 22 Exhibit RC0052 Statement of Detective Senior Sergeant Rodney Arthur, 26 March 2019, 1 [7].
- 23 Transcript of Ms Nicola Gobbo, 4 February 2020, 13006; Exhibit RC0030 Registration of Human Source, July 1995.
- 24 Exhibit RC0030 Registration of Human Source, July 1995.
- 25 Exhibit RC0028 Statement of Inspector Trevor Ashton, 21 March 2019, 3 [23].
- 26 Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 316.
- 27 Exhibit RC0030 Registration of Human Source, July 1995; Exhibit RC0056 Application to authorise Covert Investigation Unit, 19 February 1996, 2.
- 28 Exhibit RC0028 Statement of Inspector Trevor Ashton, 21 March 2019, 3 [25]; Exhibit RC0025 Statement of Mr John Gibson, 27 March 2019, 2 [9].
- 29 Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 317.
- 30 Exhibit RC0028 Statement of Inspector Trevor Ashton, 21 March 2019, 3 [24]–[27], 4 [32].
- 31 Police used contact reports and information reports to document their discussions with human sources and the information provided by them: Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 317.
- 32 Exhibit RC0070 Operation Scorn Progress Report, 22 February 1996.
- 33 Exhibit RC0070 Operation Scorn Progress Report, 22 February 1996.
- 34 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 10 [3.28].
- 35 Exhibit RC0019 Certificate of Admission, 7 April 1997.
- 36 Exhibit RC0012 Affidavit Verifying Articles, 26 February 1996.
- 37 Exhibit RC0015 Affidavit to the Board of Examiners, 4 February 1997, 2.
- 38 Exhibit RC0015 Affidavit to the Board of Examiners, 4 February 1997, 2.

- 39 Chris Winneke, Andrew Woods and Megan Tittensor, `Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 9 [44]–[45].
- 40 An informant is a police officer in charge of an investigation. They have a range of responsibilities including commencing proceedings against an accused person and signing the charge sheet.
- 41 Chris Winneke, Andrew Woods and Megan Tittensor, `Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 9 [46].
- 42 Chris Winneke, Andrew Woods and Megan Tittensor, `Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 9 [46].
- 43 Chris Winneke, Andrew Woods and Megan Tittensor, `Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 9 [47].
- 44 Chris Winneke, Andrew Woods and Megan Tittensor, `Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 9–10 [47]–[48].
- 45 Chris Winneke, Andrew Woods and Megan Tittensor, `Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 10 [50].
- 46 Exhibit RC0273 Court Book of Ms Nicola Gobbo, 26 November 1998, 22.
- 47 Exhibit RC1831 A Return of Prisoners Convicted at the Sittings of the County Court Held at Melbourne and Sentenced on 13 October 1999, 1; Exhibit RC1891 Transcript of Proceedings, *R v Dragan Arnautovic* (County Court of Victoria, Judge Crossley, 13 October 1999) 6; Victoria Police, 'Criminal History Report for Dragan Arnautovic', 10 December 2019, 3, produced by Victoria Police in response to a Commission Notice to Produce.
- 48 Exhibit RC1729 Letter from 'Solicitor 1' to Mr Greene, 8 December 1997, 1; Transcript of Mr Wayne Strawhorn, 30 April 2019, 1074, 1082.
- 49 Exhibit RC0080 Statement of Mr Wayne Strawhorn, 18 April 2019, 2–4 [11].
- 50 Exhibit RC0789 Transcript of conversation between Ms Gobbo and the Commission, 13 June 2019, 46; Transcript of Ms Nicola Gobbo, 4 February 2020, 13028–9.
- 51 Exhibit RC0083 Fax from the OPP to Mr Wayne Strawhorn enclosing letter from 'Solicitor 1', 17 December 1997, 4–9.
- 52 Exhibit RC0095 Ms Nicola Gobbo diary, 2 February 1998.
- 53 Exhibit RC0095 Ms Nicola Gobbo diary, 2 February 1998.
- 54 Transcript of Ms Nicola Gobbo, 4 February 2020, 13009–12.
- 55 Exhibit RC0793 Letter from Australian Federal Police lawyers to Commission, 22 November 2019.
- 56 Exhibit RC0063 Mr Jeff Pope diary, 27 April 1999; Exhibit RC0064 Statement of Mr 'Kruger', 28 March 2019, 4 [24].
- 57 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 14 [3.53].
- 58 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 13 [3.52].
- 59 Transcript of Unnamed, 16 April 2019, 990.
- 60 Exhibit RC0064 Statement of Officer 'Kruger', 26 March 2019, 5 [28]; Exhibit RC0057 Statement of Mr Jeffrey (Jeff) Pope, 1 April 2019, 3 [11].
- 61 Exhibit RC0057 Statement of Mr Jeffrey (Jeff) Pope, 1 April 2019, 3 [11].
- 62 Exhibit RC0033 Asset Recovery Unit Information Report, 12 May 1999.
- 63 Exhibit RC0034 Informer Registration Application, 13 May 1998; Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 334.
- 64 Exhibit RC0035 Asset Recovery Unit Information Report, 28 May 1999.
- 65 Exhibit RC0034a Informer registration application for Ms Nicola Gobbo, 13 May 1999.
- 66 Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 334.
- 67 Exhibit RC0032 Statement of Gavan Segrave, 22 March 2019, 5 [14]–[15].
- 68 Exhibit RC0037 Asset Recovery Unit Information Report, 28 May 1999; Exhibit RC0040 Asset Recovery Unit Information Report, 14 June 1999; Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 339.
- 69 Exhibit RC0038 Asset Recovery Unit Information Report, 28 May 1998.
- 70 Exhibit RC0038 Asset Recovery Unit Information Report, 28 May 1998.
- 71 Exhibit RC1412 Statement of 'Member 1', 1 May 2019, 3 [8].
- 72 Transcript of Ms Nicola Gobbo, 11 April 2019, 889–90.
- 73 Exhibit RC0063 Mr Jeff Pope diary, 26 May 1999 – 7 June 1999, 5–6; Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 338.

- 74 Exhibit RC0039 Asset Recovery Unit Information Report, 14 June 1999; Exhibit RC0041 Asset Recovery Unit Information Report, 14 June 1999.
- 75 Exhibit RC0042 Asset Recovery Unit Information Report, 14 June 1999; Exhibit RC0043 Asset Recovery Unit Information Report, 14 June 1999.
- 76 Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 339.
- 77 Exhibit RC0046 Asset Recovery Unit Information Report, 15 June 1999; Transcript of Mr Jeffrey (Jeff) Pope, 2 April 2019, 779–80.
- 78 Transcript of Mr Jeffrey (Jeff) Pope, 2 April 2019, 780.
- 79 Exhibit RC0047 Asset Recovery Unit Information Report, 27 June 1999. If a restraining order is placed over a property, it will prevent the owner from selling that property.
- 80 Transcript of Mr Jeffrey (Jeff) Pope, 2 April 2019, 781–2.
- 81 Transcript of Mr Jeffrey (Jeff) Pope, 2 April 2019, 781–2.
- 82 Exhibit RC0049 Asset Recovery Unit Information Report, 5 October 1999.
- 83 Exhibit RC0057 Statement of Mr Jeffrey (Jeff) Pope, 1 April 2019, 5 [23]; Transcript of Mr Jeffrey (Jeff) Pope, 2 April 2019, 787.
- 84 Transcript of Mr Stephen Campbell, 21 May 2019, 2100.
- 85 Transcript of Mr Stephen Campbell, 21 May 2019, 2106–7.
- 86 Transcript of Mr Stephen Campbell, 21 May 2019, 2106.
- 87 Transcript of Mr Stephen Campbell, 21 May 2019, 2106–7.
- 88 Transcript of Ms Nicola Gobbo, 11 April 2019, 948.
- 89 Transcript of Ms Nicola Gobbo, 11 April 2019, 949.
- 90 Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 341.
- 91 Exhibit RC0050 Recommendation to reclassify Ms Nicola Gobbo inactive, 3 January 2000.
- 92 The Dedicated Source Unit changed its name to the Source Development Unit on 29 May 2006: Victoria Police, ‘Dedicated Source Unit Monthly Report’, May 2006, 1, produced by Victoria Police in response to a Commission Notice to Produce.
- 93 Exhibit RC0251 Statement of Mr Philip Swindells, 6 May 2019, 6 [32].
- 94 Exhibit RC0310 Statement of Mr Gavan Ryan, 13 June 2019, 3 [16].
- 95 Exhibit RC0310 Statement of Mr Gavan Ryan, 13 June 2019, 4 [17].
- 96 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 6 [28].
- 97 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 16 [3.69].
- 98 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, [6].
- 99 Transcript of Commander Stuart Bateson, 2 July 2019, 3341, 3365.
- 100 Transcript of Mr Stephen Campbell, 21 May 2019, 2113.
- 101 Transcript of Mr Stephen Campbell, 21 May 2019, 2114–16.
- 102 Transcript of Mr Stephen Campbell, 21 May 2019, 2117–18, 2121.
- 103 Transcript of Mr Stephen Campbell, 21 May 2019, 2121.
- 104 Transcript of ‘Person 12’, 22 May 2019, 2156–7.
- 105 Exhibit RC0108 Review of the Victoria Police Drug Squad—Steering Committee Endorsed Final Report, November 2001.
- 106 Exhibit RC0920 Statement of Ms Christine Nixon, 30 October 2019, 6–7 [34]; Transcript of Ms Christine Nixon, 18 December 2019, 11600.
- 107 Transcript of Mr Peter De Santo, 9 May 2019, 1495.
- 108 Transcript of Mr Peter De Santo, 10 May 2019, 1543.
- 109 Transcript of Mr Peter De Santo, 10 May 2019, 1532.
- 110 Exhibit RC0154 Statement of Mr Paul Dale, 20 May 2019, 1–2 [15].
- 111 Exhibit RC0221 Mr Paul Dale Diary, 13 November 2002.
- 112 Exhibit RC0154 Statement of Mr Paul Dale, 20 May 2019, 4 [44]; Transcript of Mr Paul Dale, 17 June 2019, 2371.
- 113 Transcript of Mr Paul Dale, 17 June 2019, 2372.
- 114 Exhibit RC0154 Statement of Mr Paul Dale, 20 May 2019, 1–2 [15].
- 115 Exhibit RC0154 Statement of Mr Paul Dale, 20 May 2019, 3 [36].
- 116 Exhibit RC0789 Transcript of Ms Nicola Gobbo, 13 June 2019, 13–14.

- 117 Exhibit RC0154 Statement of Mr Paul Dale, 20 May 2019, 3 [38]; Exhibit RC0789 Transcript of Ms Nicola Gobbo, 13 June 2019, 16–17.
- 118 Exhibit RC0232 Summary of Evidence OPP v Paul Dale, undated, 2–3.
- 119 Exhibit RC0232 Summary of Evidence OPP v Paul Dale, undated, 3.
- 120 Exhibit RC0154 Statement of Mr Paul Dale, 20 May 2019, 2 [18].
- 121 Transcript of Mr Peter De Santo, 10 May 2019, 1563; Exhibit RC0789b Transcript of Ms Nicola Gobbo, 13 June 2019, 37; Exhibit RC0105 Information Report IR088, 1 July 2004.
- 122 Exhibit RC0105 Information Report IR088, 1 July 2004.
- 123 Transcript of Mr Andrew Murray Gregor, 17 May 2019, 1985.
- 124 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 2 [13].
- 125 Transcript of Mr Andrew Murray Gregor, 17 May 2019, 1987.
- 126 Exhibit RC0232 Summary of Evidence OPP v Paul Dale, undated, 44; Transcript of Mr Peter De Santo, 10 May 2019, 1566.
- 127 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 3 [16]–[17].
- 128 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 3 [16]–[17].
- 129 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 3 [16]–[17].
- 130 Exhibit RC0097 Statement of Mr Peter De Santo, 7 May 2019, 11.
- 131 Transcript of Mr Peter De Santo, 10 May 2019, 1582–3.
- 132 Exhibit RC0131 Statement of Mr Andrew Murray Gregor, 11 August 2004, 2.
- 133 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 3 [20].
- 134 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 4 [22].
- 135 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 4 [23].
- 136 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 4 [24].
- 137 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 4 [26].
- 138 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 5 [31].
- 139 Exhibit RC0129 Statement of Mr Andrew Murray Gregor, 14 May 2019, 5 [31].
- 140 Transcript of Mr Paul Dale, 17 June 2019, 2375.
- 141 Exhibit RC0154b Statement of Mr Paul Dale, 20 May 2019, 6 [80].
- 142 Exhibit RC0154b Statement of Mr Paul Dale, 20 May 2019, 5 [63].
- 143 Transcript of Mr Paul Dale, 21 June 2019, 2740.
- 144 Transcript of Mr Paul Dale, 21 June 2019, 2771.
- 145 Exhibit RC0154b Statement of Mr Paul Dale, 20 May 2019, 5 [72].
- 146 Exhibit RC0154b Statement of Mr Paul Dale, 20 May 2019, 5 [73].
- 147 Transcript of Mr Paul Dale, 21 June 2019, 2741.
- 148 Transcript of Mr Paul Dale, 21 June 2019, 2742.
- 149 Ms Gobbo recorded notes of appearances and interviews with her clients in notebooks known as ‘court books’.
- 150 Exhibit RC0240 Ms Nicola Gobbo Court Book, 4 December 2003.
- 151 Exhibit RC1359 Prisoners visited by Ms Nicola Gobbo, 7 December 2003, 15.
- 152 Transcript of Mr Paul Dale, 21 June 2019, 2743.
- 153 Transcript of Mr Paul Dale, 21 June 2019, 2745.
- 154 Transcript of Mr Paul Dale, 21 June 2019, 2745–6.
- 155 Exhibit RC0241 Ms Nicola Gobbo Court Book, 14 December 2003.
- 156 Exhibit RC0241 Ms Nicola Gobbo Court Book, 14 December 2003.
- 157 Exhibit RC0131 Statement of Mr Andrew Murray Gregor, 11 August 2004, 4.
- 158 Exhibit RC0131 Statement of Mr Andrew Murray Gregor, 11 August 2004, 4.
- 159 Transcript of Mr Charlie Bezzina, 14 May 2019, 1638.
- 160 Exhibit RC0097 Statement of Mr Peter De Santo, 7 May 2019, 3 [16].
- 161 Exhibit RC0097 Statement of Mr Peter De Santo, 7 May 2019, 3 [16].

- 162 Exhibit RC0105 Information Report IR088, 1 July 2004.
- 163 Known as IR 44: Exhibit RC0104b Transcript of OPI proceedings interview between Mr Charlie Bezzina, Mr Cameron Davey and Ms Nicola Gobbo, 1 July 2004, 40–5.
- 164 Exhibit RC0104b Transcript of OPI proceedings interview between Mr Charlie Bezzina, Mr Cameron Davey and Ms Nicola Gobbo, 1 July 2004, 57.
- 165 Exhibit RC0102a Statement of Charlie Bezzina, 17 April 2019, 2 [9].
- 166 Transcript of Mr Charlie Bezzina, 14 May 2019, 1643.
- 167 Exhibit RC0281 ICR3838 (017), 2 February 2006, 142; Exhibit RC0282 Transcript of conversation between Officer ‘Peter Smith’, Officer ‘Malachite’ and Ms Gobbo, 2 February 2006, 38.
- 168 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, 2 [7]; Exhibit RC1898 OPP Prism Database concerning appearances by Ms Nicola Gobbo, 21 July 2003, 37.
- 169 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, 2 [8]; Exhibit RC1798 Telephone log of Mr Thomas, 21 January 2020, 19–28; Exhibit RC0251 Statement of Mr Philip Swindells, 6 May 2019, 6 [30]; Exhibit RC0787 Transcript of Ms Nicola Gobbo, 20 March 2019, 195–6.
- 170 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, 2 [8].
- 171 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 17 [3.78]; Exhibit RC1898 OPP Prism Database concerning appearances by Ms Nicola Gobbo, 22 September 2003, 37.
- 172 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, 2 [9]; Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 16–17 [3.75].
- 173 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 16–17 [3.75].
- 174 Transcript of Mr Philip Swindells, 27 June 2019, 3072.
- 175 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, 3 [10]–[11]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 17 [3.79].
- 176 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 9 [51].
- 177 Transcript of Ms Nicola Gobbo, 6 February 2020, 13292.
- 178 Transcript of Ms Nicola Gobbo, 6 February 2020, 13292.
- 179 Transcript of Mr Simon Overland, 16 December 2019, 11334–5.
- 180 Transcript of Mr Philip Swindells, 27 June 2019, 3034.
- 181 Transcript of Mr Dannye Moloney, 20 February 2020, 14558; Exhibit RC1433 Letter from Nicola Gobbo to Stephen Fontana, 30 June 2015, 4.
- 182 Exhibit RC1433 Letter from Nicola Gobbo to Stephen Fontana, 30 June 2015, 4.
- 183 Transcript of Commander Stuart Bateson, 2 July 2019, 3388.
- 184 Transcript of Commander Stuart Bateson, 2 July 2019, 3388.
- 185 See Exhibit RC0262 Statement of Acting Inspector Mark Hatt, 17 June 2019, 3 [19]; Transcript of Commander Stuart Bateson, 2 July 2019, 3388.
- 186 Exhibit RC0273 Ms Nicola Gobbo Court Book, 11 July 2004, 65.
- 187 See Exhibit RC0262 Statement of Acting Inspector Mark Hatt, 17 June 2019, 3 [19]; Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 10 [57]; Exhibit RC0252 Purana Chronology, undated, 9.
- 188 Transcript of Commander Stuart Bateson, 2 July 2019, 3388. Mr McGrath's statement was signed on 13 July 2004: Exhibit RC0252 Purana Chronology, undated, 9.
- 189 Exhibit RC0272 Commander Stuart Bateson day book, 10 July 2004, 1; Exhibit RC0252 Purana Chronology prepared by Commander Stuart Bateson, 11 July 2004, 9.
- 190 Transcript of Ms Nicola Gobbo, 6 February 2020, 13271.
- 191 Transcript of Ms Nicola Gobbo, 6 February 2020, 13270; Transcript of Mr Gavan Ryan, 15 August 2019, 4649.
- 192 Transcript of Ms Nicola Gobbo, 6 February 2020, 13270.
- 193 Exhibit RC0267 Transcript of meeting between Ms Nicola Gobbo, Officer ‘Sandy White’ and Officer ‘Peter Smith’, 16 September 2005, 120; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, [12].
- 194 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, [62].
- 195 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 11 [68].
- 196 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 11 [68].

- 197 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 11 [68].
- 198 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 11–12 [69]; Exhibit RC0252 Purana Chronology, undated, 18.
- 199 Transcript of Commander Stuart Bateson, 2 July 2019, 3340.
- 200 Exhibit RC0252 Purana Chronology, undated, 18–24.
- 201 Transcript of Ms Nicola Gobbo, 6 February 2020, 13301.
- 202 Exhibit RC0252 Purana Chronology, undated, 18–24; Exhibit RC0272 Commander Stuart Bateson diary, 29 June 2005, 33.
- 203 Exhibit RC0252 Purana Chronology, undated, 20; Exhibit RC0272 Mr Stuart Bateson diary, 22 May 2005, 19.
- 204 Exhibit RC0252 Purana Chronology, undated, 23.
- 205 Transcript of Ms Nicola Gobbo, 6 February 2020, 13295–7.
- 206 Exhibit RC0464 Statement of Mr James (Jim) O'Brien, 14 June 2019, 9 [40]; Transcript of Mr James (Jim) O'Brien, 3 September, 5475.
- 207 Exhibit RC0465 Mr James O'Brien diary, 10 August 2004.
- 208 Transcript of Officer 'Sandy White', 31 July 2019, 3643–5; Transcript of Mr James (Jim) O'Brien, 4 September 2019, 5485.
- 209 Transcript of Officer 'Sandy White', 31 July 2019, 3643.
- 210 Exhibit RC1162 Major Drug Investigation Division profile of Ms Nicola Gobbo, 26 August 2004, 4.
- 211 Exhibit RC0560d Inspector Dale Flynn diary, 15 August 2005, 4.
- 212 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [18]–[20]; Transcript of Ms Nicola Gobbo, 6 February 2020, 13303.
- 213 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 2 [12].
- 214 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [14].
- 215 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [20]; Transcript of Detective Sergeant Paul Rowe, 28 June 2019, 3250.
- 216 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [15].
- 217 Transcript of Detective Sergeant Paul Rowe, 28 June 2019, 3250–1.
- 218 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [18].
- 219 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [20]; Transcript of Detective Sergeant Paul Rowe, 28 June 2019, 3252–3.
- 220 Transcript of Detective Sergeant Paul Rowe, 28 June 2019, 3252.
- 221 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [20].
- 222 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [20]; Transcript of Detective Sergeant Paul Rowe, 28 June 2019, 3253.
- 223 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [20]; Transcript of Detective Sergeant Paul Rowe, 28 June 2019, 3253.
- 224 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 3 [21]; Transcript of Detective Sergeant Paul Rowe, 28 June 2019, 3253.
- 225 Transcript of Detective Sergeant Paul Rowe, 28 June 2019, 3254.
- 226 Transcript of Detective Sergeant Paul Rowe, 28 June 2019, 3254.
- 227 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 4–5 [27]–[29].
- 228 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 4–5 [27]–[29], 5 [30]–[32].
- 229 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 5 [34]; Exhibit RC0933 Mr James O'Brien diary, 31 August 2005, 92.
- 230 Exhibit RC0464 Statement of Mr James (Jim) O'Brien, 14 June 2019, 10 [45].
- 231 Exhibit RC0464 Statement of Mr James (Jim) O'Brien, 14 June 2019, 10–11 [46].
- 232 Transcript of Ms Christine Nixon, 18 December 2019, 11576.
- 233 The Dedicated Source Unit changed its name to the Source Development Unit on 29 May 2006: Victoria Police, 'Dedicated Source Unit Monthly Report', May 2006, produced by Victoria Police in response to a Commission Notice to Produce, 1.
- 234 Exhibit RC0276 Review & Develop Best Practice Human Source Management Policy, 2004, 15.
- 235 Exhibit RC0278 Report on the Findings of Dedicated Source Unit Pilot, 1 November 2004 – 30 April 2005, 44.
- 236 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 46 [5.10]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 56, 4.

- 237 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 34, 11 [40].
- 238 Exhibit RC0275b Statement of Officer 'Sandy White', undated, 22 [89], 23 [94]–[95].
- 239 Exhibit RC0275b Statement of Officer 'Sandy White', undated, 23 [95].
- 240 Transcript of Officer 'Black', 14 March 2019, 46.
- 241 Exhibit RC0284 SML3838, 8 September 2005, 1.
- 242 Exhibit RC1381 Detective Sergeant Paul Rowe diary, 8 September 2005; Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 6 [41].
- 243 Exhibit RC0281 ICR3838 (001), 16 September 2005, 1.
- 244 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Peter Smith', 16 September 2005, 12.
- 245 Exhibit RC0281 ICR3838 (001), 16 September 2005, 1.
- 246 Exhibit RC0281 ICR3838 (001), 16 September 2005, 1.
- 247 Exhibit RC0281 ICR3838 (001), 16 September 2005, 2.
- 248 Transcript of Officer 'Sandy White', 1 August 2019, 3732; Exhibit RC1433 Letter from Nicola Gobbo to Stephen Fontana, 30 June 2015, 4.
- 249 Exhibit RC0281 ICR3838 (001), 16 September 2005, 3.
- 250 Exhibit RC0281 ICR3838 (001), 16 September 2005, 1–6.
- 251 Exhibit RC0281 ICR3838 (001), 16 September 2005, 2; Exhibit RC0267 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Peter Smith', 16 September 2005, 24.
- 252 Exhibit RC0281 ICR3838 (001), 16 September 2005, 2.
- 253 Exhibit RC0281 ICR3838 (001), 16 September 2005, 6.
- 254 Transcript of Ms Nicola Gobbo, 6 February 2020, 13324.
- 255 Transcript of Ms Nicola Gobbo, 6 February 2020, 13324–5.
- 256 Exhibit RC0622 Statement of Officer 'Black', 5 June 2019, 26 [60].
- 257 Exhibit RC0622 Statement of Officer 'Black', 5 June 2019, 13–14 [49].
- 258 Exhibit RC0285 Risk Assessment Relating to Ms Nicola Gobbo, 15 November 2005, 1.
- 259 Exhibit RC0285 Risk Assessment Relating to Ms Nicola Gobbo, 15 November 2005, 6.
- 260 Exhibit RC0285 Risk Assessment Relating to Ms Nicola Gobbo, 15 November 2005, 4.
- 261 Exhibit RC0285 Risk Assessment Relating to Ms Nicola Gobbo, 15 November 2005, 6.
- 262 Exhibit RC0285 Risk Assessment Relating to Ms Nicola Gobbo, 15 November 2005, 7.
- 263 Exhibit RC0285 Risk Assessment Relating to Ms Nicola Gobbo, 15 November 2005, 7.
- 264 Exhibit RC0275 Statement of Officer 'Sandy White', undated, 19 [76].
- 265 Transcript of Officer 'Fox', 13 September 2019, 6298; Exhibit RC0275 Statement of Officer 'Sandy White', undated, 19 [76].
- 266 Exhibit RC0275 Statement of Officer 'Sandy White', undated, 19 [77].
- 267 Transcript of Officer 'Fox', 13 September 2019, 6298.
- 268 Transcript of Officer 'Fox', 13 September 2019, 6298.
- 269 Transcript of Officer 'Peter Smith', 11 September 2019, 6065.
- 270 Transcript of Officer 'Peter Smith', 11 September 2019, 6065.
- 271 Transcript of Officer 'Fox', 13 September 2019, 6298.
- 272 Transcript of Officer 'Fox', 13 September 2019, 6298.
- 273 Transcript of Ms Nicola Gobbo, 6 February 2020, 13329.
- 274 Transcript of Officer 'Sandy White', 31 July 2019, 3632.
- 275 Transcript of Ms Nicola Gobbo, 5 February 2020, 13186.
- 276 Transcript of Ms Nicola Gobbo, 5 February 2020, 13186; Transcript of Ms Nicola Gobbo, 7 February 2020, 13425.
- 277 These are in the Loricated database, which was established pursuant to one of the recommendations of the Comrie Review. This database reconstructed Ms Gobbo's human source file.
- 278 Transcript of Officer 'Sandy White', 31 July 2019, 3603, 3643.
- 279 Transcript of Ms Nicola Gobbo, 11 February 2020, 13680.
- 280 Transcript of Officer 'Sandy White', 31 July 2019, 3603.

- 281 Transcript of Officer 'Sandy White', 31 July 2019, 3614. This was echoed by Officer 'Black': Transcript of Officer 'Black', 23 October 2019, 8126.
- 282 Transcript of Officer 'Sandy White', 1 August 2019, 3735.
- 283 See, eg, the tasking in relation to Mr Karam: Exhibit RC0281 ICR3838 (015), 12 January 2006, 119.
- 284 Exhibit RC0282 Transcript of conversation with Ms Gobbo, Officer 'Sandy White' and Officer 'Peter Smith', 6 February 2006, 146.
- 285 Transcript of Officer 'Sandy White', 13 December 2019, 11232; Transcript of Ms Nicola Gobbo, 11 February 2020, 13804; Transcript of Detective Senior Constable Liza Burrows, 15 May 2019, 1855.
- 286 Transcript of Officer 'Sandy White', 13 December 2019, 11232; Transcript of Ms Nicola Gobbo, 11 February 2020, 13804; Transcript of Detective Senior Constable Liza Burrows, 15 May 2019, 1855.
- 287 Exhibit RC0281 ICR3838 (012), 13 December 2005, 85; Exhibit RC0281 ICR3838 (004), 1 October 2005, 24; Exhibit RC0281 ICR3838 (002), 21 September 2005, 9.
- 288 Transcript of Mr 'Cooper', 31 October 2019, 8686–7. See also Transcript of Nicola Gobbo, 6 February 2020, 13331.
- 289 Transcript of Mr 'Cooper', 31 October 2019, 8686–7. See also Transcript of Nicola Gobbo, 6 February 2020, 13331.
- 290 Transcript of Mr 'Cooper', 31 October 2019, 8687.
- 291 Transcript of Ms Nicola Gobbo, 6 February 2020, 13330–1.
- 292 Transcript of Officer 'Sandy White', 21 August 2019, 5066.
- 293 Exhibit RC0281 ICR3838 (015), 3 January 2006, 110; Exhibit RC0281 ICR3838 (015), 4 January 2006, 110; Exhibit RC0281 ICR3838 (017), 6 February 2006, 143–4.
- 294 Exhibit RC0281 ICR3838 (023), 16 March 2006, 190.
- 295 Exhibit RC0281 ICR3838 (028), 18 April 2006, 250.
- 296 Exhibit RC0281 ICR3838 (017) 2 February 2006, 142; Exhibit RC0281 ICR3838 (019), 22 February 2006, 161; Exhibit RC0281 ICR3838 (028), 18 April 2006, 250.
- 297 Transcript of Ms Nicola Gobbo, 6 February 2020, 13333; Exhibit RC0281 ICR3838 (028), 18 April 2006, 250; Exhibit RC0281 ICR3838 (028), 18 April 2006, 250.
- 298 Exhibit RC0281 ICR3838 (028), 22 April 2006, 259–60.
- 299 Transcript of Officer 'Sandy White', 5 August 2019, 3891.
- 300 Transcript of Inspector Dale Flynn, 30 September 2019, 6827.
- 301 *R v Mokbel* [2012] VSC 86, [74]; Exhibit RC0281 ICR3838 (003), 26 September 2005, 14; Exhibit RC1922 Clause 1—list of persons for whom informant 3838 acted as legal representative in proceedings prosecuted by the CDPP between 1 January 1995 and 12 January 2009, undated.
- 302 *AB & EF v CD* [2017] VSC 350, [17].
- 303 Exhibit RC0281 ICR2958 (014), 18 April 2008, 187.
- 304 Exhibit RC0281 ICR3838 (015), 12 January 2006, 117.
- 305 Exhibit RC0281 ICR3838 (019), 18 February 2006, 157; Exhibit RC0281 ICR3838 (020), 28 February 2006, 173.
- 306 Exhibit RC0281 ICR3838 (019), 23 February 2006, 164.
- 307 Exhibit RC0281 ICR3838 (023), 17 March 2006, 194.
- 308 *R v Mokbel* [2006] VSC 119, [7].
- 309 Exhibit RC0281 ICR3838 (082), 6 June 2007, 883; Exhibit RC0281 ICR3838 (082), 10 June 2007, 886; Exhibit RC0281 ICR3838 (083), 15 June 2007, 896.
- 310 *R v A Mokbel* (sentence) [2012] VSC 255.
- 311 Exhibit RC0281 ICR3838 (082), 5 June 2007, 876–7; Victoria Police, 'Audio Summary of Meeting 38', 5 June 2007, 2 [13]–[14], produced by Victoria Police in response to a Commission Notice to Produce.
- 312 Exhibit RC0281 ICR3838 (082), 5 June 2007, 876.
- 313 Exhibit RC0281 ICR3838 (082), 5 June 2007, 876–7; Victoria Police, 'Audio Summary of Meeting 38', 5 June 2007, 2 [13]–[14], produced by Victoria Police in response to a Commission Notice to Produce.
- 314 Exhibit RC0281 ICR3838 (082), 5 June 2007, 877; Victoria Police, 'Audio Summary of Meeting 38', 5 June 2007, 2 [13]–[14], produced by Victoria Police in response to a Commission Notice to Produce.
- 315 Supreme Court of Victoria, 'Application for Leave to Appeal Against Conviction', *R v Karam*, 22 July 2016, produced by the Supreme Court of Victoria in response to a Commission Notice to Produce.
- 316 Exhibit RC0264 Statement of Detective Senior Sergeant Nigel L'Estrange, 11 June 2019, 2 [10].

- 317 Transcript of Commander Stuart Bateson, 20 November 2019, 9569–70; Transcript of Mr Andrew Allen, 26 June 2019, 2975.
- 318 Exhibit RC0281 ICR3838 (028), 23 April 2006, 261; Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer ‘Sandy White’, Officer ‘Peter Smith’, Officer ‘Green’, 20 April 2006, 163; Exhibit RC0281 ICR3838 (031), 5 May 2006, 287; Exhibit RC0281 ICR3838 (020), 24 February 2006, 165.
- 319 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 15 [89]–[92].
- 320 Exhibit RC1746 OPP Memorandum from Mr David Bosso to Mr John Champion SC Re: Thomas, 30 August 2012, 2.
- 321 See, eg, Exhibit RC0650 Statement of Mr ‘Thomas’ (extract), 19 July 2006, 110; Exhibit RC0651 Statement of Mr ‘Thomas’, 2 May 2008 (extract); Exhibit RC0330 Statement of Mr ‘Thomas’, 19 July 2006.
- 322 Transcript of Ms Nicola Gobbo, 7 February 2020, 13469.
- 323 *Orman v The Queen* (2019) 59 VR 511, 512–3 [8] (Maxwell P, Niall and Emerton JJA).
- 324 *Orman v The Queen* (2019) 59 VR 511, 512–3 [8] (Maxwell P, Niall and Emerton JJA).
- 325 Exhibit RC0281 ICR3838 (016), 23 January 2006, 129; Exhibit RC0343 Request for Informer Reward, Infringement Notices, 3 February 2006, 6–7.
- 326 Exhibit RC0281 ICR3838 (023), 17 March 2006, 194.
- 327 Exhibit RC0281 ICR3838 (023), 17 March 2006, 194.
- 328 Exhibit RC0343 Request for Informer Reward signed by Handler, Controller, Officer in Charge and Local Informant Registrar, 11 April 2006, 6–7.
- 329 Exhibit RC0343 Request for Informer Reward, signed 28 March 2006, 11 April 2006, 2.
- 330 Exhibit RC0292 Officer ‘Sandy White’ diary, 11 April 2006, 19; Exhibit RC0284 SML3838, 11 April 2006, 26. The Local Informer Registrar was responsible for maintaining, managing, and auditing the local informer registration system. Mr Porter held the positions of Local Informer Registrar, and the higher rank of Central Informer Registrar when he first joined the SDU: Transcript of Mr Mark Porter, 18 September 2019, 6491.
- 331 Exhibit RC0818d Letter from Paul Walshe to Assistant Commissioner Noel Ashby, 11 May 2006, 81; Transcript of Mr John (Jack) Blayney, 3 December 2019, 10216.
- 332 Exhibit RC0281 ICR3838 (030), 27 April 2006, 274; Exhibit RC0284 SML3838, 27 April 2006, 29.
- 333 Exhibit RC0818 Letter from Mr Paul Walshe to Mr Noel Ashby, 11 May 2006, 81–4.
- 334 Transcript of Mr Anthony Biggin, 9 October 2019, 7518, 7528; Exhibit RC0292 Officer ‘Sandy White’ diary, 19 April 2006, 29.
- 335 Transcript of Mr Anthony Biggin, 9 October 2019, 7523–4.
- 336 Exhibit RC0286 Informer Registration, Part C Risk Assessment, 20–26 April 2006.
- 337 Exhibit RC0286 Informer Registration, Part C Risk Assessment, 20–26 April 2006.
- 338 Exhibit RC0285b Risk Assessment Relating to Ms Nicola Gobbo, 20 April 2006, 3.
- 339 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7527.
- 340 Exhibit RC0277 Issue cover sheet, Audit conducted of human source 21803838 records, 28 April 2006.
- 341 Exhibit RC0578 Mr Anthony (Tony) Biggin diary, 23 April 2006, 21.
- 342 Exhibit RC0277 Issue cover sheet, Audit conducted of human source 21803838 records, 28 April 2006.
- 343 Exhibit RC0277 Issue cover sheet, Audit conducted of human source 21803838 records, 28 April 2006, 3.
- 344 Exhibit RC0284 SML3838, 17 May 2006, 32; Exhibit RC0292 Officer ‘Sandy White’ diary, 17 May 2006, 106; Exhibit RC0486 Officer ‘Peter Smith’ diary, 17 May 2006, 163.
- 345 Transcript of Officer ‘Sandy White’, 8 August 2019, 4167.
- 346 Exhibit RC0591 Diary of Officer ‘Black’, 24 July 2006, 144.
- 347 Transcript of Officer ‘Sandy White’, 31 July 2019, 3619.
- 348 Transcript of Officer ‘Sandy White’, 31 July 2019, 3620.
- 349 See Exhibit RC0281 ICR2958.
- 350 Exhibit RC0826 Operation Khadi Final Report, 23 November 2006, 1–2.
- 351 Exhibit RC0281 ICR3838 (024), 24 March 2006, 207.
- 352 Exhibit RC1380 Mr Philip Swindells diary, 24 July 2006, 3.
- 353 Subpoenas are documents issued by the court at the request of a party to litigation, compelling another party to produce documents or give evidence.
- 354 Exhibit RC0281 ICR3838 (039), 24 July 2006, 366–7; Exhibit RC0284 SML3838, 24 July 2006, 41–2; Exhibit RC0292 Officer ‘Sandy White’ diary, 24 July 2006, 5, 10; Exhibit RC0591 Diary Entry of Officer ‘Black’, 24 July 2006, 2.

- 355 Exhibit RC0281 ICR3838 (039), 24 July 2006, 366.
- 356 Exhibit RC0281 ICR3838 (039), 28 July 2006, 372.
- 357 Exhibit RC0312 Mr Gavan Ryan diary, 11 December 2006, 141.
- 358 Transcript of Officer 'Fox', 13 September 2019, 6293–4.
- 359 Transcript of Officer 'Fox', 13 September 2019, 6294.
- 360 Transcript of Officer 'Fox', 13 September 2019, 6294.
- 361 Transcript of Officer 'Fox', 13 September 2019, 6294.
- 362 Transcript of Officer 'Fox', 13 September 2019, 6460; Exhibit RC0305 Officer 'Sandy White' diary, 26 July 2007, 11.
- 363 A Monthly Source Review occurred on 5 March 2007.
- 364 Transcript of Officer 'Sandy White', 31 July 2019, 3621.
- 365 Exhibit RC0464b Statement of Mr James (Jim) O'Brien, 14 June 2019, 52 [274].
- 366 Exhibit RC0464b Statement of Mr James (Jim) O'Brien, 14 June 2019, 52 [274].
- 367 Exhibit RC0305 Officer 'Sandy White' diary, 4 May 2007, 12.
- 368 Transcript of Officer 'Fox', 13 September 2019, 6293.
- 369 Transcript of Officer 'Fox', 13 September 2019, 6293; Exhibit RC0281 ICR3838 (039), 16 June 2008, 904.
- 370 Exhibit RC0577d Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 20 [100]; Transcript of Mr Anthony (Tony) Biggin, 10 October 2019, 7621; Exhibit RC0284 SML, 28 February 2007, 137.
- 371 Exhibit RC0281 ICR2958 (016), 24 April 2008, 217.
- 372 Exhibit RC0977b Statement of Mr Robert Richter, 25 November 2019, 1 [3].
- 373 Exhibit RC0977b Statement of Mr Robert Richter, 25 November 2019, 1 [4].
- 374 Transcript of Mr Stephen (Steve) Waddell, 13 February 2020, 14043.
- 375 Exhibit RC856b Statement of Chief Commissioner Graham Ashton, 30 August 2019, 7 [65].
- 376 Exhibit RC0295 Running Sheet for Operation 'CLONK'/'BRIARS', 2 October 2010, 1; Exhibit RC0874 Mr Luke Cornelius Chronology of Briars contacts with Messrs Linnell and Ashby, 3 October 2007.
- 377 Exhibit RC0915 Statement of Mr Simon Overland, 19 September 2019, 8 [39].
- 378 Exhibit RC0295 Running Sheet for Operation 'CLONK'/'BRIARS', 2 October 2010, 5.
- 379 Exhibit RC0310b(i) Statement of Gavan Ryan, 13 June 2019, [72].
- 380 Exhibit RC0284 SML3838, 20 July 2007, 118.
- 381 Exhibit RC0337b Diary of Officer 'Sandy White', 6 August 2007.
- 382 Exhibit RC0337b Diary of Officer 'Sandy White', 6 August 2007.
- 383 Exhibit RC0915 Statement of Mr Simon Overland, 19 September 2019, 25 [133]; Exhibit RC337b Diary Extracts of Officer 'Sandy White', 5 August 2007, 1.
- 384 Exhibit RC0337b Diary of Officer 'Sandy White', 6 August 2007.
- 385 Transcript of Mr Simon Overland, 19 December 2019, 11780–2.
- 386 Transcript of Mr Stephen Waddell, 13 February 2020, 14017.
- 387 Exhibit RC0284 SML3838, 25 May 2007, 111; Transcript of Mr Stephen Waddell, 13 February 2020, 14032.
- 388 Exhibit RC0260 Unsigned statement of Ms Nicola Gobbo, 21 May 2009.
- 389 Exhibit RC1196 Statement of Mr Stephen Waddell, 17 September 2019, [42].
- 390 Exhibit RC0305 Officer 'Sandy White' diary, 10 September 2007, 12.
- 391 Exhibit RC0825b Statement of Mr Rodney Wilson, 19 November 2019, 6 [32]; Exhibit RC0284 SML3838, 6 September 2007, 123; Exhibit RC0281 ICR3838 (101), 19 September 2007, 1233–4.
- 392 Exhibit RC0281 ICR3838 (107), 29 October 2007, 1325–6.
- 393 Exhibit RC0281 ICR3838 (107), 29 October 2007, 1325–6.
- 394 Exhibit RC1267 Email from Mr David Waters to Ms Nicola Gobbo with attached statement, 7 November 2007.
- 395 Exhibit RC0281 ICR3838 (109), 7 November 2007, 1367–8; Transcript of Ms Nicola Gobbo, 11 February 2020, 13737.
- 396 Exhibit RC1196 Statement of Mr Stephen (Steve) Waddell, 17 September 2019, 4 [19].
- 397 Exhibit RC1196 Statement of Mr Stephen (Steve) Waddell, 17 September 2019, 6–7 [33]–[34].

- 398 Exhibit RC0281 ICR3838 (067), 19 February 2007, 644; Exhibit RC0281 ICR3838 (067), 20 February 2007, 645–6; Exhibit RC0281 ICR3838 (067), 21 February 2007, 648; Exhibit RC0281 ICR3838 (067), 22 February 2007, 650; Exhibit RC0281 ICR3838 (067), 23 February 2007, 653–4; Exhibit RC0281 ICR3838 (068), 27 February 2007, 661; Exhibit RC0281 ICR3838 (068), 1 March 2007, 664; Exhibit RC0281 ICR3838 (069), 7 March 2007, 679; Exhibit RC0281 ICR3838 (070), 13 March 2007, 693; Exhibit RC0281 ICR3838 (070), 14 March 2007, 707; Exhibit RC0281 ICR3838 (075), 16 April 2007, 793; Exhibit RC0281 ICR3838 (076), 27 April 2008, 811–12; Exhibit RC0281 ICR3838 (077), 29 April 2007, 817; Exhibit RC0281 ICR3838 (078), 7 May 2007, 828; Exhibit RC0281 ICR3838 (080), 25 June 2007, 935; Exhibit RC0284 SML3838, 2 May 2007, 109; Exhibit RC0284 SML3838, 6 May 2007, 109; Exhibit RC0284 SML3838, 9 May 2007, 110.
- 399 Exhibit RC0247b Statement of Mr Carl Williams, undated, 8–9.
- 400 Exhibit RC0898 Statement of Assistant Commissioner Luke Cornelius, 20 September 2019, 7 [45].
- 401 Exhibit RC0281 ICR3838 (082), 9 May 2007, 830–1.
- 402 Exhibit RC0326 Statement of Detective Sergeant Solon (Sol) Solomon, 15 January 2019, 5.
- 403 Exhibit RC0329 Statement of Mr Cameron Davey, 13 May 2019, 4 [14]; Exhibit RC0326 Statement of Detective Sergeant Solon (Sol) Solomon, 15 January 2019.
- 404 Exhibit RC0284 SML2958, 26 February 2008, 6.
- 405 Exhibit RC0882 Officer ‘Wolf’ diary, 28 February 2008, 27; Exhibit RC0281 ICR2958 (006), 28 February 2008, 68.
- 406 Exhibit RC0281 ICR2958 (007), 4 March 2008, 76.
- 407 Exhibit RC0313 Bundle of documents regarding Ms Nicola Gobbo’s evidence at Office of Police Integrity Hearing, 11 July 2007, 9–17.
- 408 Exhibit RC0318 Transcript of examination of Ms Nicola Gobbo, OPI hearing, 19 July 2007.
- 409 Exhibit RC0281 ICR3838 (090), 17 July 2007, 1024–7.
- 410 Exhibit RC0281 ICR3838 (090), 17 July 2007, 1025.
- 411 Exhibit RC0281 ICR3838 (091), 18 July 2007, 1031.
- 412 Exhibit RC0281 ICR3838 (091), 18 July 2007, 1031.
- 413 *Police Regulation Act 1958* (Vic) s 86KA.
- 414 Exhibit RC0281 ICR3838 (091), 18 July 2007, 1031.
- 415 Exhibit RC0318 Transcript of examination of Ms Nicola Gobbo, OPI hearing, 19 July 2007.
- 416 Exhibit RC0310 Statement of Mr Gavan Ryan, 13 June 2019, 13 [82]; Exhibit RC0312 Mr Gavan Ryan diary, 19 July 2007, 131.
- 417 Exhibit RC0281 ICR3838 (091), 19 July 2007, 1034, 1036.
- 418 Exhibit RC0281 ICR3838 (094), 14 August 2007, 1087.
- 419 Exhibit RC0310 Statement of Mr Gavan Ryan, 13 June 2019, 14 [86]; Exhibit RC0312 Mr Gavan Ryan diary, 17 August 2007, 144.
- 420 Exhibit RC0320 Transcript of examination of Ms Nicola Gobbo, OPI hearing, 17 July 2007, 2.
- 421 Exhibit RC0320 Transcript of examination of Ms Nicola Gobbo, OPI hearing, 17 July 2007, 4–5.
- 422 Exhibit RC0320 Transcript of examination of Ms Nicola Gobbo, OPI hearing, 17 July 2007, 5.
- 423 Exhibit RC0310 Statement of Mr Gavan Ryan, 13 June 2019, 14 [86].
- 424 Exhibit RC0320 Transcript of examination of Ms Nicola Gobbo, OPI hearing, 17 July 2007, 7.
- 425 Exhibit RC0989 Statement of Mr Gerald Fitzgerald, 20 December 2019.
- 426 Exhibit RC0284 SML2958, 17 November 2008, 55.
- 427 Exhibit RC0284 SML2958, 17 November 2008, 56–7.
- 428 Exhibit RC0284 SML2958, 17 November 2008, 55.
- 429 Exhibit RC0281 ICR2958 (047), 3 December 2008, 749.
- 430 Exhibit RC0281 ICR2958 (048), 5 December 2008, 757.
- 431 Exhibit RC0281 ICR2958 (048), 5 December 2008, 757.
- 432 Exhibit RC1305 Statement of Mr Shane O’Connell, 5 December 2019, 7 [44]; Exhibit RC0281 ICR2958 (047), 30 November 2008, 722.
- 433 Exhibit RC0281 ICR2958 (047), 3 December 2008, 749.
- 434 Exhibit RC1305 Statement of Mr Shane O’Connell, 5 December 2019, 10 [58].
- 435 Exhibit RC0284 SML2958, 11 December 2008, 58.
- 436 Exhibit RC0281 ICR2958 (048), 11 December 2008, 765–6; Exhibit RC0284 SML2958, 11 December 2008, 59.
- 437 Transcript of Mr Simon Overland, 19 December 2019, 11820–3.

- 438 Transcript of Mr Danye Moloney, 20 February 2020, 14594–5.
- 439 Exhibit RC0915 Statement of Mr Simon Overland, 19 September 2019, 35 [174].
- 440 Transcript of Officer ‘Sandy White’, 15 August 2019, 4669; Transcript of Mr Anthony (Tony) Biggin, 9 September 2019, 7587.
- 441 Transcript of Mr Anthony (Tony) Biggin, 9 September 2019, 7587.
- 442 Transcript of Officer ‘Sandy White’, 19 August 2019, 4868–9.
- 443 Exhibit RC0578 Diary Entry of Mr Anthony (Tony) Biggin, 5 December 2003, 691; Exhibit RC0578 Mr Anthony (Tony) Biggin diary summary, 5 December 2008, 22; Exhibit RC0622 Statement of Officer ‘Black’, 5 June 2019, 41–5 [112]; Exhibit RC0622 Statement of Officer ‘Black’, 5 June 2019, 41–5 [112]; Transcript of Mr Anthony (Tony) Biggin, 10 October 2019, 7628, 7631; Transcript of Mr Simon Overland, 19 December 2019, 11825.
- 444 Transcript of Officer ‘Sandy White’, 19 August 2019, 4860–2.
- 445 Exhibit RC0275d Statement of Officer ‘Sandy White’, 22 May 2019, 30. See also Exhibit RC0915 Statement of Simon Overland, 19 September 2019, [178].
- 446 Exhibit RC0915 Statement of Mr Simon Overland, 19 September 2019, [174].
- 447 Exhibit RC0591 Officer ‘Black’ diary, 30 December 2008, 617.
- 448 Exhibit RC0578 Mr Anthony (Tony) Biggin diary, 30 December 2008, 700.
- 449 Transcript of Mr Anthony (Tony) Biggin, 10 October 2019, 7635–8.
- 450 Transcript of Mr Anthony (Tony) Biggin, 10 October 2019, 7636.
- 451 Exhibit RC0518 Covert Support Division briefing note with audit trail, including SWOT analysis, 530.
- 452 Exhibit RC0518 Covert Support Division briefing note with audit trail, including SWOT analysis, 533.
- 453 Exhibit RC0518 Covert Support Division briefing note with audit trail, including SWOT analysis.
- 454 Exhibit RC1084 Mr Simon Overland Petra Taskforce Folder 2, 2 January 2009, 530.
- 455 Transcript of Mr Shane O’Connell, 21 February 2020, 14780; Exhibit RC0362 Statement of Detective Sergeant Solon (Sol) Solomon, 15 January 2019, 8.
- 456 Exhibit RC0281 ICR2958 (051), 2 January 2009, 802.
- 457 Exhibit RC0229 Statement of Ms Nicola Gobbo, 7 January 2009; Transcript of Mr Shane O’Connell, 21 February 2020, 14786–8.
- 458 Exhibit RC0281 ICR2958 (053), 12 January 2009, 824.
- 459 Exhibit RC0520 Human Source Deactivation Form, 13 January 2009, 24–5.
- 460 Exhibit RC0584 Email chain involving Mr Anthony (Tony) Biggin, Officer ‘Black’, Officer ‘Richards’, Mr Andrew Glow and Officer ‘Sandy White’, 8 January 2009.
- 461 Exhibit RC0281 ICR2958 (053), 12 January 2009, 827.
- 462 Exhibit RC1196 Statement of Mr Stephen Waddell, 17 September 2019, 6 [31].
- 463 Exhibit RC1196 Statement of Mr Stephen Waddell, 17 September 2019, 6 [31]; Exhibit RC1006 Petra Taskforce Weekly Update with handwritten notes of Mr Luke Cornelius, 16 March 2009, 26–33.
- 464 Exhibit RC1196 Statement of Mr Stephen Waddell, 17 September 2019, 6 [33].
- 465 Exhibit RC1206 Statement of Mr Ronald (Ron) Iddles, 3 June 2019, [7]–[9].
- 466 Exhibit RC1196 Statement of Mr Stephen Waddell, 17 September 2019, 8 [41].
- 467 Exhibit RC1196 Statement of Mr Stephen Waddell, 17 September 2019, 8 [41]; Exhibit RC1206b Statement of Mr Ron Iddles, 4 [21]; Transcript of Mr Stephen Waddell, 13 February 2020, 14055–6; Transcript of Mr Ronald (Ron) Iddles, 14 February 2020, 14150–1.
- 468 Exhibit RC1206 Statement of Ronald (Ron) Iddles, 3 June 2019, 3–4 [17]–[18].
- 469 Exhibit RC1067 Statement of Mr Finlay (Fin) McRae, 13 November 2019, [3.22].
- 470 Exhibit RC1718 Letter from Mr Kieran Walshe to Ms Nicola Gobbo, 4 June 2009; Exhibit RC1033b Letter to Witness F from Mr Kieran Walshe, 26 August 2009.
- 471 Exhibit RC0947 Letter to Mr Simon Overland from Ms Nicola Gobbo, 7 September 2009.
- 472 Exhibit RC1037 Letter from Mr Kieran Walshe to Ms Nicola Gobbo, 14 September 2009.
- 473 Exhibit RC0948 Letter from Ms Nicola Gobbo to Mr Simon Overland, 28 September 2009.
- 474 Exhibit RC0949 Letter from Ms Nicola Gobbo to Mr Simon Overland, 21 January 2010.
- 475 Exhibit RC1067 Statement of Mr Findlay (Fin) McRae, 13 November 2019, 18 [3.48]; Exhibit RC1894 Subpoena issued on behalf of Mr Paul Dale to Chief Commissioner of Victoria Police, 27 January 2010.
- 476 Exhibit RC1067 Statement of Mr Findlay (Fin) McRae, 13 November 2019, [3.51].

- 477 Exhibit RC1728 Letter from Piper Alderman to VGSO, 8 February 2010.
- 478 Informer privilege is a ground—reason—that police can use to refuse to hand over documents in answer to a subpoena. The basis of this ground is that the identity of an informer should not be revealed.
- 479 Exhibit RC1728 Letter from Piper Alderman to VGSO, 8 February 2010.
- 480 Exhibit RC1725 Letter from OPP to Piper Alderman contained on file of Assistant Commissioner Luke Cornelius, 26 February 2010.
- 481 Exhibit RC1067 Statement of Mr Findlay (Fin) McRae, 13 November 2019, 19 [3.51]; Victoria Police, ‘Email from Isabel Parsons to Findlay (Fin) McRae’, 26 February 2010, produced by Victoria Police in response to a Commission Notice to Produce; Exhibit RC1726 Letter from Piper Alderman to VGSO, 26 February 2010.
- 482 Exhibit RC1351 Letter to Mr Greg Elms from Mr Tony Hargreaves, 1 March 2010.
- 483 Exhibit RC1355 Email from Ron Gipp to Phillip Dodgson, 10 March 2010.
- 484 Exhibit RC1305 Statement of Mr Shane O’Connell, 5 December 2019, 32 [204]–[206].
- 485 Exhibit RC1189 Statement of Steve Smith, undated, 13 [75]; Exhibit RC1696 Email from Steve Smith to Luke Cornelius and Emmett Dunne, 6 May 2010.
- 486 Exhibit RC1696 Email from Steve Smith to Luke Cornelius and Emmett Dunne, 6 May 2010.
- 487 Exhibit RC0950 Statement of Claim, Nicola Gobbo v State of Victoria & Ors, 29 April 2010.
- 488 Exhibit RC1085 Letter of Advice from Victorian Government Solicitor’s Office to Superintendent Lardner, 21 May 2010, 21 May 2010, 4 [12]–[13]; Exhibit RC0950 Statement of Claim, Nicola Gobbo v State of Victoria & Ors, 29 April 2010.
- 489 Exhibit RC1828 Terms of Settlement signed by Gobbo and Ryan, 11 August 2010.
- 490 Exhibit RC1094 Email chain involving Angela Hantsis, David Jones, Doug Fryer, Shane O’Connell, Graham Evans, Peter Lardner, Andrew Bona, Michael Roberts and John O’Connor, 12 August 2010.
- 491 Exhibit RC0951 Memo from Mr Overland to Mr Pope, 16 August 2010.
- 492 Transcript of Mr Simon Overland, 19 December 2019, 11904.
- 493 Exhibit RC0441b SDU Standard Operating Procedure Contact with ‘Witness F’ (Ms Nicola Gobbo), 29 August 2010, 2.
- 494 Exhibit RC0795 Statement of Superintendent John O’Connor, 11 October 2019, 4 [27].
- 495 Exhibit RC0795 Statement of Superintendent John O’Connor, 11 October 2019, 7 [44].
- 496 Exhibit RC0795 Statement of Superintendent John O’Connor, 11 October 2019, 7 [45].
- 497 Exhibit RC0326 Statement of Detective Sergeant Solon (Sol) Solomon, 15 January 2019, 18–19.
- 498 Exhibit RC0679 Consolidated transcripts of tapes of conversations between Mr Boris Buick and Ms Nicola Gobbo, 15 February 2011–9 November 2011, 75.
- 499 Exhibit RC0679 Transcript of conversation between Ms Nicola Gobbo, Mr Boris Buick, Mr Jason Lebusque and CDPP, 24 August 2011, 118.
- 500 Exhibit RC0679 Consolidated transcripts of tapes of conversations between Mr Boris Buick and Ms Nicola Gobbo, 15 February 2011–9 November 2011, 24 August 2011, 118.
- 501 Exhibit RC0679 Consolidated transcripts of tapes of conversations between Boris Buick and Nicola Gobbo 15 February 2011–9 November 2011, 26 August 2011, 17–22, 35–6; Transcript of Inspector Boris Buick, 1 November 2019, 8849–51.
- 502 Exhibit RC0636 Statement of Inspector Boris Buick, 10 May 2019, [56].
- 503 Exhibit RC0636 Statement of Inspector Boris Buick, 10 May 2019, [58].
- 504 Exhibit RC1039 Briars Taskforce Update, 21 September 2009.
- 505 Exhibit RC0962 Statement of Mr Gerard Maguire, 8 August 2019, 10 [48]–[50].
- 506 Exhibit RC0962 Statement of Mr Gerard Maguire, 8 August 2019, [69].
- 507 Exhibit RC1099 Memorandum of Advice—Buick v Dale—Gerald Maguire, 4 October 2011 with handwritten mark ups of Mr Findlay McRae, 4 October 2011, 2–4 [8]–[17], 12 [54].
- 508 Exhibit RC1099 Memorandum of Advice—Buick v Dale—Gerald Maguire, 4 October 2011 with handwritten mark ups of Mr Findlay McRae, 4 October 2011, 10–11 [48]–[50].
- 509 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 75, 12 [54].
- 510 Exhibit RC1255 Statement of Mr Doug Fryer, 7 October 2019, 15 [86].
- 511 Exhibit RC1307 Driver Taskforce Steering Committee minutes, 21 October 2011.
- 512 Exhibit RC0679 Transcript of conversation between Ms Nicola Gobbo, Mr Boris Buick and Mr Jason Lebusque, 21 October 2011.
- 513 Exhibit RC0679 Transcript of conversation between Ms Nicola Gobbo, Mr Boris Buick and Mr Jason Lebusque, 21 October 2011, 6.
- 514 Exhibit RC0679 Transcript of conversation between Ms Nicola Gobbo, Mr Boris Buick and Mr Jason Lebusque, 21 October 2011, 13.

- 515 Exhibit RC0795 Statement of Superintendent John O'Connor, 11 October 2019, [121].
- 516 Exhibit RC0698 Email from Ms Krista Breckweg to Mr Boris Buick and Mr Paul Sheridan, 4 November 2011.
- 517 Exhibit RC0698 Email from Ms Krista Breckweg to Mr Boris Buick and Mr Paul Sheridan, 4 November 2011.
- 518 Exhibit RC0646 Operation Purana Update, email from Mr Graham Ashton to Mr Shane Kirne, copied to Mr Jeff Pope, Mr Boris Buick, Ms Krista Breckweg, 4 November 2011.
- 519 Exhibit RC0795 Statement of Superintendent John O'Connor, 11 October 2019, [127].
- 520 Exhibit RC0347 Memorandum from Mr Paul Sheridan to Mr Graham Ashton attaching 'Summary Witness F as requested by the CDP' by Mr John O'Connor, 6–7 November 2011.
- 521 Exhibit RC0347 Memorandum from Mr Paul Sheridan to Mr Graham Ashton attaching 'Summary Witness F as requested by the CDP' by Mr John O'Connor, 6–7 November 2011.
- 522 Transcript of Chief Commissioner Graham Ashton, 11 Dec 2019, 10870.
- 523 Exhibit RC0856 Statement of Chief Commissioner Graham Ashton, 30 August 2019, 20 [176].
- 524 Exhibit RC0856 Statement of Chief Commissioner Graham Ashton, 30 August 2019, 20 [177]–[178].
- 525 Exhibit RC0856 Statement of Chief Commissioner Graham Ashton, 30 August 2019, 20 [180]–[183]; Victoria Police, 'Filenote of Mr Findlay McRae', 8 November 2011, produced by Victoria Police in response to a Commission Notice to Produce.
- 526 Exhibit RC1096 Statement of Ms Kerri Judd, Director of Public Prosecutions, 8 November 2019, 1 [5]–[6], 2–3 [13]–[17].
- 527 Exhibit RC1096 Statement of Ms Kerri Judd, Director of Public Prosecutions, 8 November 2019, 1–2, [5]–[9].
- 528 Exhibit RC1096 Statement of Ms Kerri Judd, Director of Public Prosecutions, 8 November 2019, 1–2, [5]–[8], [16]–[17].
- 529 Exhibit RC1096 Statement of Ms Kerri Judd, Director of Public Prosecutions, 8 November 2019, 1–2, [5]–[8], [18].
- 530 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 47 [5.17].
- 531 Exhibit RC1067 Statement of Mr Findlay (Fin) McRae, 13 November 2019, 31 [6.1], 30 [5.13].
- 532 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012), 26, 28, 42, 45, 47.
- 533 Exhibit RC1096 Statement of Ms Kerri Judd, Director of Public Prosecutions, 8 November 2019, 5 [27]; Exhibit RC1067 Statement of Findlay McRae, 13 November 2019, 38 [7.7]; Exhibit RC1815 File note of Mr Findlay McRae of meeting with DPP and OPP, 28 August 2013.
- 534 Exhibit RC1255 Statement of Mr Douglas (Doug) Fryer, 7 October 2019, 19 [105].
- 535 See Exhibit RC1306 Further statement of Mr Jeffrey (Jeff) Pope, 21 January 2020, 14–27 [60]–[88]; Exhibit RC0835 Statement of Detective Superintendent Paul Sheridan, 12 November 2019, 8–9 [46]–[52]; Exhibit RC1166 Statement of Detective Superintendent Paul Sheridan, 12 December 2019; Exhibit RC0795 Statement of Superintendent John O'Connor, 11 October 2019, 23–8 [129]–[157].
- 536 Anthony Dowsley, 'Underworld Lawyer a Secret Police Informer', *Herald Sun* (Melbourne, 31 March 2014) 1.
- 537 Exhibit RC1096b Information provided by Ms Kerri Judd, Director of Public Prosecutions, 8 November 2019, 7 [44]–[45].
- 538 Exhibit RC1067 Statement of Mr Findlay (Fin) McRae, 13 November 2019, 38 [7.13].
- 539 Exhibit RC1404 Statement of Assistant Commissioner Stephen Fontana, 29 November 2019, [26].
- 540 Exhibit RC1067 Statement of Mr Findlay (Fin) McRae, 13 November 2019, 42 [7.21].
- 541 Exhibit RC1404 Statement of Assistant Commissioner Stephen Fontana, 29 November 2019, [36].
- 542 Exhibit RC1404 Statement of Assistant Commissioner Stephen Fontana, 29 November 2019, [39].
- 543 Exhibit RC1067 Statement of Mr Findlay McRae, 13 November 2019, 39 [7.14].
- 544 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 61, [1].
- 545 Exhibit RC1711 Letter from Mr Kenneth (Ken) Lay to Mr Stephen O'Bryan, 10 April 2014, 361.
- 546 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 61, [4].
- 547 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 91 (Recommendation 12).
- 548 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 6 [28].
- 549 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 35 [217], 36 [214].
- 550 *AB & EF v CD* [2017] VSC 350, [56] (Ginnane J).
- 551 *AB & EF v CD* [2017] VSC 350, [58]–[59] (Ginnane J).
- 552 Responsive submission, Victoria Police, 24 August 2020, [147.4], [147.12].

553 *AB & EF v CD* [2017] VSC 350; *EF v CD* [2017] VSC 351 (Ginnane J).

554 *AB & EF v CD* [2017] VSC 350, [10]; *EF v CD* [2017] VSC 351, [3]–[4] (Ginnane J).

555 *AB & EF v CD* [2017] VSC 350, [422]; *EF v CD* [2017] VSC 351, [38] (Ginnane J).

556 *AB v CD & EF* [2017] VSCA 338 (Ferguson CJ, Osborn and McLeish JJA).

557 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 5 [13] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

# Appendix A: Letters Patent

**ELIZABETH THE SECOND, BY THE GRACE OF GOD  
QUEEN OF AUSTRALIA AND HER OTHER REALMS AND TERRITORIES,  
HEAD OF THE COMMONWEALTH:**

I, the Honourable Linda Dessau AC, the Governor of the State of Victoria, with the advice of the Premier, under section 5 of the *Inquiries Act 2014* and all other enabling powers, appoint you

the Honourable Margaret Anne McMurdo AC as Commissioner and Chairperson, and Malcolm Arthur Hyde AO APM as Commissioner

to constitute a Royal Commission to inquire into and report on the matters specified in the terms of reference.

## BACKGROUND

- The reasons for decision of the High Court of Australia, the Victorian Court of Appeal and the Supreme Court of Victoria in *AB v CD*, *EF v CD* have detailed the conduct of Victoria Police in relation to the informant known as '3838', who was a criminal defence barrister recruited by Victoria Police to provide information about various members of the criminal fraternity, including those involved in the Melbourne 'gangland wars', some of whom were 3838's clients, between 2005 and 2009.
- There are appeal proceedings currently underway brought by three persons whose convictions are alleged to have been affected by the conduct of 3838, and it is anticipated that more cases may be affected, and further proceedings may be commenced.
- A case review was prepared by the former Chief Commissioner Neil Comrie into Victoria Police's handling of 3838, in particular the application of policies, control measures and supervisory practices relevant to their handling, and recommended that Victoria Police review all matters associated with 3838 to ensure all issues of significance were identified and appropriate actions taken.
- An independent inquiry by the Independent Broad-based Anti-corruption Commission, conducted by the Hon Murray Kellam AO QC in 2015, into human source management at Victoria Police found that Victoria Police had failed to act in accordance with appropriate policies and guidelines in their recruitment, handling and management of 3838, and found negligence of a high order and made recommendations for the future recruitment, handling and management of human sources.

- The former Director of Public Prosecutions, the Hon John Champion, conducted an internal investigation into the DPP's handling of the affected matters and found no evidence of inappropriate conduct on the part of the DPP or OPP, and found that those offices had no knowledge of the identity of 3838 or the use of 3838 as a human source by Victoria Police.

AND WHEREAS it is anticipated that you will, in the conduct of your inquiry:

- A. seek not to prejudice any ongoing investigations or judicial proceedings or exercise any of its coercive or investigative powers in a manner which would be in contempt of court;
- B. not unnecessarily duplicate the investigations or recommendations of inquiries or investigations previously conducted in these or related matters:
  - i. that are described in the background above or that otherwise come to your attention during the course of your inquiry; and
  - ii. insofar as they are relevant to the terms of reference for your inquiry;
- C. work co-operatively, as appropriate, with other inquiries or investigations into Victoria Police's handling of 3838 to avoid unnecessary duplication;
- D. have regard to:
  - i. the existence of related judicial proceedings;
  - ii. the possibility of further proceedings being commenced by other affected persons;
  - iii. the safety of 3838 and other persons affected by the matters raised in this inquiry; and
- E. promptly bring to the attention of the Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions any information or documents that you consider relevant to their functions, including their continuing duty of disclosure.

TERMS OF REFERENCE

You are appointed to inquire into and report on:

1. The number of, and extent to which, cases may have been affected by the conduct of 3838 as a human source.
2. The conduct of current and former members of Victoria Police in their recruitment, handling and management of 3838 as a human source.

3. The current adequacy and effectiveness of Victoria Police's processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, including:
  - a. whether Victoria Police's practices continue to comply with the recommendations of the Kellam report; and
  - b. whether the current practices of Victoria Police in relation to such sources are otherwise appropriate.
4. The current use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege, subject to section 123 of the *Inquiries Act 2014*, including:
  - a. the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of such human sources to prosecuting authorities; and
  - b. whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the Office of Public Prosecutions prosecutes indictable matters on behalf of the Director of Public Prosecutions, when the investigation has involved human source material.
5. Recommended measures that may be taken to address any systemic or other failures in Victoria Police's processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, and in the use of such human source information in the broader criminal justice system, including how those failures may be avoided in future.
6. Any other matters necessary to satisfactorily resolve the matters set out in paragraphs 1-5.

You are required to report your findings and any recommendations to the Governor in relation to the specified matter [1] at first instance, and by 1 July 2019 or such other date as agreed between the Commission and the Government.

You are required to report your findings and any recommendations to the Governor in relation to the remaining matters as soon as possible thereafter, and no later than 1 December 2019 or such other date to be agreed between the Commission and the Government.

#### CONDUCT OF THE INQUIRY

You are directed to conduct your inquiry in accordance with section 12 of the *Inquiries Act 2014*.

You may also consult with experts and engage persons to provide relevant advice and assistance.

You are authorised to incur expenses and financial obligations to be met from the Consolidated Fund up to \$7,500,000.00 in conducting this inquiry.

These letters patent are issued under the Public Seal of the State.



WITNESS

Her Excellency the Honourable Linda Dessau, Companion of the Order of Australia, Governor of the State of Victoria in the Commonwealth of Australia at Melbourne this 13<sup>th</sup> day of December two thousand and eighteen.

By Her Excellency's Command

The Honourable Daniel Andrews MP  
Premier of Victoria

Entered on the record by me in the Register of Patents Book No<sup>47</sup> Page No<sup>25</sup> on the 13<sup>th</sup> day of December 2018

Secretary, Department of Premier and Cabinet

# Appendix B: Amendments to Letters Patent

**ELIZABETH THE SECOND, BY THE GRACE OF GOD  
QUEEN OF AUSTRALIA AND HER OTHER REALMS AND TERRITORIES,  
HEAD OF THE COMMONWEALTH:**

I, the Honourable Linda Dessau AC, the Governor of the State of Victoria, with the advice of the Premier, under section 5 of the *Inquiries Act 2014*, section 41A of the *Interpretation of Legislation Act 1984* and all other enabling powers, amend the Letters Patent entered into the Register of Patents Book No. 47 Page No. 25 on 13 December 2018 establishing the Royal Commission into the Management of Police Informants by:

1. **Removing** Malcolm Arthur Hyde AO APM as Commissioner
  
2. In the first paragraph under the heading 'Background', after the words 'in relation to the informant known as 3838' **insert** –
 

', and referred to hereafter as EF,'
  
3. In all subsequent paragraphs, for the word '3838' wherever appearing **substitute** –
 

'EF'
  
4. In the first paragraph under the heading 'Background', after the sentence ending with the words 'between 2005 and 2009.' **insert** –
 

'Victoria Police has since disclosed that EF was first registered as an informant in 1995 (using different informant numbers from time to time). It is also possible that EF provided information to Victoria Police while not registered as an informant.'
  
5. In paragraph 2 under the heading 'Terms of Reference', after the words 'members of Victoria Police in their' **insert** –
 

'disclosures about and'
  
6. For paragraph 5 under the heading 'Terms of Reference' **substitute** –
 

'5. Recommend measures that may be taken to address:

- a. the use of any other human sources who are, or have been, subject to legal obligations of confidentiality or privilege and who come to your attention during the course of your inquiry; and
- b. any systemic or other failures in Victoria Police's processes for its disclosures about and recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, and in the use of such human source information in the broader criminal justice system, including how those failures may be avoided in future.'

These amended letters patent are issued under the Public Seal of the State.

WITNESS



Her Excellency the Honourable  
Linda Dessau, Companion of the  
Order of Australia, Governor of  
the State of Victoria in the  
Commonwealth of Australia at  
Melbourne this *7<sup>th</sup>* day of  
February two thousand and  
nineteen.

By Her Excellency's Command

The Honourable Daniel Andrews MP  
Premier of Victoria

Entered on the record by me in the Register of Patents Book No *47* Page No *34* on the *7<sup>th</sup>* day of February 2019

Secretary, Department of Premier and Cabinet

# Appendix C: List of public submissions

In February 2019, the Commission invited members of the public and organisations to make written submissions relevant to the Commission's terms of reference. Submissions received by the Commission were treated as public, anonymous or confidential.

While the Commission's preference was to make submissions publicly available, there are various reasons why this was not always possible, including the author's preference for the treatment of their submission; the need to protect the safety of the author or other individuals; and legal reasons such as restrictions on the publication of information subject to a public interest immunity claim or court suppression orders.

In total, the Commission received 157 submissions. Of those, 65 were treated as public submissions and are listed in the table below. Some of these were published to the Commission's website.

The remaining 92 submissions were treated as anonymous or confidential. The Commission was unable to consider submissions that did not fall within the scope of the terms of reference. As such, these submissions are not listed in the table below.

Submission number	Name of submitter
Submission 002	Mr Christos Matheas
Submission 003	Mr Dale O'Sullivan
Submission 004	Mr Jan Visser
Submission 006	Dr Olivia Ljubanovic
Submission 007	Mr Dragan Arnautovic
Submission 008	Community Advocacy Alliance Incorporated
Submission 011	Mr Antony (Dritan) Fezollari
Submission 012	Mr David Ryan
Submission 021	Mr Peter Lalor
Submission 023	Emeritus Professor Adrian Evans et al
Submission 024	Mr Brendan Moss
Submission 026	Mr Thomas Maule
Submission 039	Mr Andrew Hodson and Ms Mandy Leonard
Submission 040	Mr Robert Hynninen
Submission 041	Mr Faruk Orman
Submission 042	Mr David Horin
Submission 046	Mr Rohan Brown
Submission 054	Mr Zlate Cvetanovski
Submission 058	Mr Pasquale Barbaro

Submission number	Name of submitter
Submission 059	Dr Craig Minogue
Submission 061	Mr John Glascott
Submission 062	Mr Gerrit Schorel-Hlavka
Submission 063	Mr Tony Kellaris
Submission 064	Mr Sean Sonnet
Submission 067	Mr William (Bill) Robertson
Submission 074	Mr Anastasios Papadopoulos
Submission 079	Mr Paul Dale
Submission 082	Mr Peter S
Submission 083	Mr John Patrick Ford
Submission 085	Mr Francesco Madafferi
Submission 087	Mr Salvatore Agresta
Submission 090	Mr Jamie Sumner
Submission 091	Victorian Bar
Submission 097	Criminal Bar Association, Victoria
Submission 098	International Commission of Jurists, Victoria
Submission 099	Law Institute of Victoria
Submission 100	Mr Raymond Hoser
Submission 101	Australasian Institute of Policing
Submission 102	Deakin Law Clinic
Submission 104	Ms Kimberley Risson
Submission 108	Mr John Quail
Submission 109	Mr Manfred Ulrich Kobert
Submission 111	Victorian Equal Opportunity and Human Rights Commission
Submission 112	Victoria Legal Aid
Submission 114	Mr Stephen Gavanoas
Submission 116	Victorian Legal Services Board and Commissioner
Submission 117	Adjunct Professor Colleen Lewis
Submission 123	Mr Stephen Asling
Submission 128	Mr Giovanni Polimeni
Submission 130	Professor Clive Harfield
Submission 138	Mr Anthony (Tony) Smart
Submission 139	Dr James Saleam

Submission number	Name of submitter
Submission 140	Mr Brody McDonald
Submission 142	Director of Public Prosecutions, Victoria
Submission 143	Commonwealth Director of Public Prosecutions
Submission 144	Victoria Police
Submission 145	Victoria Legal Aid
Submission 146	Law Institute of Victoria
Submission 147	Criminal Bar Association, Victoria
Submission 149	Mr Stephen Macras
Submission 150	Mr Denys Goldthorpe
Submission 154	Supreme Court of Victoria
Submission 155	Mr Matt Tomas
Submission 156	The Honourable Douglas Drummond, QC
Submission 157	Independent Broad-based Anti-corruption Commission

# Appendix D: List of responsive submissions

Section 12 of the *Inquiries Act 2014* (Vic) (Inquiries Act) enables a royal commission to conduct its inquiry in any manner it considers appropriate, subject to the requirements of procedural fairness, its Letters Patent and the Act.

Section 36 of the Inquiries Act requires that when a royal commission proposes to make a finding that is adverse to a person, it has to be satisfied that the person:

- is aware of the matters on which the proposed finding is based
- has had an opportunity, at any time during the inquiry, to respond to those matters.

A royal commission must consider a person's response (if any) before making a finding that is adverse to the person, and must fairly set out the person's response in its report.

## TERMS OF REFERENCE 1-2

In June 2020, Counsel Assisting the Commission produced written submissions to the Commission in relation to terms of reference 1 and 2.<sup>1</sup> In those submissions, Counsel proposed findings they considered were open to the Commissioner to make. They also detailed their examination of 124 cases that may have been affected by Victoria Police's use of Ms Nicola Gobbo as a human source.

To acquit its obligations under sections 12 and 36 of the Inquiries Act, the Commission provided affected people and organisations with copies or relevant extracts of Counsel Assisting submissions and invited them to make submissions to the Commission in response (known as 'responsive submissions').

After publishing Counsel Assisting submissions and responsive submissions to its website, the Commission also invited further submissions from:

- members of the public who considered that they may be adversely affected by those submissions
- organisations and people who had already made a responsive submission, to respond to submissions made by others.

In September 2020, Counsel Assisting produced reply submissions to address some key issues raised in responsive submissions.<sup>2</sup> The Commission received further submissions from affected people and organisations in response to those reply submissions.

The Commission received 45 responsive submissions in relation to terms of reference 1 and 2, two of which were treated as confidential and were unable to be published to the Commission's website or listed below. The remaining 43 responsive submissions are listed in the table below.

Submission	Date of submission
Australian Criminal Intelligence Commission	7 August 2020
Director of Public Prosecutions and the Office of Public Prosecutions, Victoria	7 August 2020
Director of Public Prosecutions and the Office of Public Prosecutions, Victoria	11 September 2020
Independent Broad-based Anti-corruption Commission	15 September 2020
Mr Alan Saric	7 August 2020
Mr Alan Woodhead	7 August 2020
Mr Antonios (Tony) Mokbel (annexure)	13 August 2020
Mr Antonios (Tony) Mokbel	14 August 2020
Mr Cameron Davey	7 September 2020
Mr Carmelo Falanga	7 August 2020
Ms Christine Nixon, APM	30 August 2020
Mr Francesco Madafferi	6 August 2020
Mr Giovanni Polimeni	6 August 2020
Mr Graham Ashton, AM, APM	7 August 2020
Mr Jeffrey (Jeff) Pope	8 September 2020
Mr John Higgs	7 August 2020
Ms Nicola Gobbo	14 August 2020
Ms Nicola Gobbo	8 September 2020
Mr Paul Dale	21 July 2020
Mr Paul Mullett, APM and Mr Noel Ashby, APM	29 July 2020
Mr Paul Mullett, APM and Mr Noel Ashby, APM	7 September 2020
Officer Pearce (a pseudonym)	7 August 2020
Mr Peter Lalor	21 July 2020
Officer Richards (a pseudonym)	6 August 2020
Mr Salvatore Agresta	6 August 2020
Mr Shane O'Connell	9 October 2020
Mr Simon Overland, APM	18 August 2020
Mr Simon Overland, APM	28 August 2020
Mr Simon Overland, APM	7 September 2020
Mr Simon Overland, APM <sup>3</sup>	9 October 2020

Submission	Date of submission
<b>Mr Simon Overland, APM (response to Solicitors Assisting)<sup>4</sup></b>	9 October 2020
<b>Mr Solon (Sol) Solomon</b>	7 September 2020
<b>Six former officers of the Source Development Unit:</b> <ul style="list-style-type: none"> <li>• Officer Black (a pseudonym)</li> <li>• Officer Fox (a pseudonym)</li> <li>• Officer Green (a pseudonym)</li> <li>• Officer Peter Smith (a pseudonym)</li> <li>• Officer Sandy White (a pseudonym)</li> <li>• Officer Wolf (a pseudonym)</li> </ul>	7 August 2020
<b>Six former officers of the Source Development Unit:</b> <ul style="list-style-type: none"> <li>• Officer Black (a pseudonym)</li> <li>• Officer Fox (a pseudonym)</li> <li>• Officer Green (a pseudonym)</li> <li>• Officer Peter Smith (a pseudonym)</li> <li>• Officer Sandy White (a pseudonym)</li> <li>• Officer Wolf (a pseudonym)</li> </ul>	2 September 2020 <sup>5</sup>
<b>Victoria Police (specified former and current officers):</b> <ul style="list-style-type: none"> <li>• Commander Stuart Bateson</li> <li>• Mr Anthony (Tony) Biggin</li> <li>• Inspector Dale Flynn</li> <li>• Superintendent Jason Kelly</li> <li>• Mr James (Jim) O'Brien</li> <li>• Detective Sergeant Paul Rowe</li> <li>• Mr Gavan Ryan<sup>6</sup></li> </ul>	17 August 2020
<b>Victoria Police<sup>7</sup></b>	24 August 2020 <sup>8</sup>
<b>Victoria Police (annexure: specified individual officers):</b> <ul style="list-style-type: none"> <li>• Detective Inspector Martin Allison</li> <li>• Mr Lindsay Attrill</li> <li>• Mr Graham Brown</li> <li>• Inspector Boris Buick</li> <li>• Mr Timothy (Tim) Cartwright, APM</li> <li>• Assistant Commissioner Thomas (Luke) Cornelius, APM</li> <li>• Mr Douglas (Doug) Cowlshaw</li> <li>• Inspector Andrew Glow</li> <li>• Acting Inspector Mark Hatt</li> <li>• Detective Sergeant Craig Hayes</li> <li>• Assistant Commissioner Robert Hill</li> <li>• Sergeant Tim Johns</li> <li>• Acting Senior Sergeant Michelle Kerley</li> <li>• Mr Findlay (Fin) McRae</li> <li>• Mr Dannye Moloney</li> <li>• Mr Shane O'Connell</li> <li>• Superintendent John O'Connor</li> <li>• Superintendent Mark Porter</li> <li>• Detective Superintendent Paul Sheridan</li> <li>• Detective Inspector Steven Smith</li> <li>• Mr Stephen (Steve) Waddell</li> <li>• Mr Rodney (Rod) Wilson<sup>9</sup></li> </ul>	24 August 2020 <sup>10</sup>
<b>Victoria Police (McGrath statement)<sup>11</sup></b>	31 August 2020

Submission	Date of submission
<b>Victoria Police (specified former and current officers):</b> <ul style="list-style-type: none"> <li>• Commander Stuart Bateson</li> <li>• Mr Anthony (Tony) Biggin</li> <li>• Inspector Dale Flynn</li> <li>• Superintendent Jason Kelly</li> <li>• Mr James (Jim) O'Brien</li> <li>• Detective Sergeant Paul Rowe</li> <li>• Mr Gavan Ryan</li> </ul>	8 September 2020
<b>Victoria Police (six former officers of the Source Development Unit)<sup>12</sup></b>	8 September 2020
<b>Victoria Police<sup>13</sup></b>	6 October 2020
<b>Victoria Police (specified former and current officers):</b> <ul style="list-style-type: none"> <li>• Commander Stuart Bateson</li> <li>• Mr Anthony (Tony) Biggin</li> <li>• Inspector Dale Flynn</li> <li>• Inspector Mark Hatt</li> <li>• Mr James (Jim) O'Brien</li> <li>• Detective Sergeant Paul Rowe</li> <li>• Mr Gavan Ryan<sup>14</sup></li> </ul>	9 October 2020
<b>Victorian Government Solicitor's Office</b>	8 September 2020

## TERMS OF REFERENCE 3-6

In September 2020, the Commission provided Victoria Police and The Police Association with relevant extracts of the Commission's draft final report that may have been considered adverse to their interests and invited them to make responsive submissions. The Commission also provided the Director of Public Prosecutions and the Office of Public Prosecutions with relevant extracts of the Commission's draft final report and invited them to respond.

The Commission received four responsive submissions in relation to terms of reference 3–6, as listed in the table below.

<b>Director of Public Prosecutions, Victoria</b>	15 September 2020
<b>The Police Association of Victoria</b>	11 September 2020
<b>Victoria Police</b>	20 September 2020
<b>Victoria Police</b>	28 September 2020

# Endnotes

- 1 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020).
- 2 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020).
- 3 This submission was made in response to Counsel Assisting reply submissions.
- 4 This submission was made in response to a letter to Mr Overland from Solicitors Assisting the Commission dated 1 October 2020.
- 5 This submission is dated 2 September 2020 but was provided to the Commission on 7 September 2020.
- 6 Victoria Police refers to this submission as its 'Tranche 1 submissions' dated 17 August 2020.
- 7 Victoria Police refers to this submission as its 'Tranche 2 submissions' dated 25 August 2020.
- 8 This submission is dated 24 August 2020 but was provided to the Commission on 25 August 2020.
- 9 This submission was annexed to Victoria Police's 'Tranche 2 submissions' and was made on behalf of the 22 current and former officers of Victoria Police listed.
- 10 This submission is dated 24 August 2020 but was provided to the Commission on 25 August 2020.
- 11 This submission was made on behalf of Victoria Police and relevant individuals in relation to the Thomas Case Study in Counsel Assisting submissions. It addresses a statement made by Mr McGrath (a pseudonym), a person referred to in the Thomas Case Study.
- 12 This submission was made by Victoria Police in response to the submissions of six former officers of the Source Development Unit.
- 13 This submission was made by Victoria Police in response to Counsel Assisting reply submissions.
- 14 This submission was made by Victoria Police on behalf of the individual former and current officers of Victoria Police who filed 'Tranche 1' submissions (save for Superintendent Jason Kelly) and Inspector Mark Hatt. It was made in response to Counsel Assisting reply submissions.

# Appendix E: List of witnesses at the Commission's hearings

During its inquiry, the Commission held 129 days of hearings and heard evidence from 82 witnesses in public and private hearings. The Commission held private hearings or closed parts of its hearings to protect the safety of certain witnesses and affected persons.

The names of witnesses who appeared at public hearings are listed below. These hearings, or parts of the hearings, were open to the public and streamed on the Commission's website. Transcripts and exhibits from the Commission's public hearings were also published on the website.

Some witnesses were assigned pseudonyms to protect the sensitivity of information, the witness' safety or reputation, or because the Commissioner considered it appropriate to do so pursuant to section 26 of the *Inquiries Act 2014* (Vic).

For Victoria Police officers, the list below gives either their role at the time of their appearance at the hearing(s), their rank at the time they left Victoria Police and/or the capacity in which they were called as a witness before the Commission, unless their role is the subject of a non-publication order.

Witness	Role	Hearing date(s)
<b>Officer Black (a pseudonym)</b>	Former handler and acting controller, Victoria Police	14 March, 22–25 October and 29 October 2019
<b>Mr Neil Paterson, APM</b>	Assistant Commissioner, Victoria Police	27–29 March and 9 May 2019
<b>Mr Trevor Ashton</b>	Inspector, Victoria Police	29 March 2019
<b>Mr John Gibson</b>	Former Detective Sergeant, Victoria Police	29 March 2019
<b>Mr Michael Holding</b>	Former Senior Constable, Victoria Police	29 March 2019
<b>Mr Peter Trichias</b>	Detective Senior Sergeant, Victoria Police	29 March, 20 June and 25–27 June 2019
<b>Mr Timothy (Tim) Argall</b>	Detective Senior Sergeant, Victoria Police	1 April and 18 June 2019
<b>Mr Rodney Arthur</b>	Detective Senior Sergeant, Victoria Police	1 April 2019
<b>Mr Gavan Segrave</b>	Detective Inspector, Victoria Police	1 April 2019
<b>Mr Jeffrey (Jeff) Pope</b>	Former Assistant Commissioner, Victoria Police	1–2 April 2019, 19 February 2020
<b>Officer Kruger (a pseudonym)</b>	Former officer, Victoria Police	2 April and 8 May 2019
<b>Confidential witness</b>	Former officer, Victoria Police	16 April 2019
<b>Mr Mark Bowden</b>	Former Detective Senior Sergeant, Victoria Police	16 April 2019
<b>Mr Wayne Strawhorn</b>	Former Detective Senior Sergeant, Victoria Police	30 April–1 May 2019
<b>Mr Martin Allison</b>	Inspector, Victoria Police	1 May 2019
<b>Mr Steven Martin</b>	Former Detective Sergeant, Victoria Police	1 May 2019
<b>Mr Christopher Notman</b>	Former Inspector, Victoria Police	1 May 2019

Witness	Role	Hearing date(s)
Mr David Bartlett	Detective Senior Constable, Victoria Police	2 May 2019
Confidential witness	Registered general practitioner	8 May 2019
Mr Peter De Santo	Former Commander, Victoria Police	9–10 May 2019
Mr Charlie Bezzina	Former Detective Senior Sergeant, Victoria Police	14 May 2019
Mr Terry Purton	Former Commander, Victoria Police	14 May 2019
Ms Liza Burrows	Detective Senior Constable, Victoria Police	15 May 2019
Mr Robert Hill	Assistant Commissioner, Victoria Police	15 May 2019
Mr Wayne Cheesman	Inspector, Victoria Police	16 May 2019
Mr Kevin Sheridan	Superintendent, Victoria Police	16 May 2019
Mr George Tapai	Former Inspector, Victoria Police	16 May 2019
Mr Andrew (Murray) Gregor	Former Detective Senior Sergeant, Victoria Police	17 May 2019
Mr Stephen Campbell	Former Detective Senior Constable, Victoria Police	21 May 2019
Person 12 (a pseudonym)	Former client of Ms Nicola Gobbo	21–22 May 2019
Mr Paul Dale	Former Detective Sergeant, Victoria Police	22 May, 17 June, 21 June and 25 June 2019
Mr David Miechel	Former Detective Senior Constable, Victoria Police	22 May 2019
Mr Jason Kelly	Superintendent, Victoria Police	19–20 June 2019
Mr Scott Mahony	Superintendent, Victoria Police	19 June 2019
Mr Andrew Allen, APM	Former Superintendent, Victoria Police	26 June 2019
Mr Mark Hatt	Acting Inspector, Victoria Police	27–28 June 2019
Mr Philip Swindells	Former Inspector, Victoria Police	27 June 2019
Mr Nigel L'Estrange	Detective Senior Sergeant, Victoria Police	28 June 2019
Mr Paul Rowe	Detective Sergeant, Victoria Police	28 June, 1 July, 12–13 November and 19 November 2019
Mr Stuart Bateson	Commander, Victoria Police	1–2 July, 19–22 November, 28 November and 2 December 2019
Officer Sandy White (a pseudonym)	Former controller, Victoria Police	30–31 July, 1–2 August, 5–8 August, 15–16 August, 19–23 August, 2–3 September and 5 September 2019
Mr Gavan Ryan	Former Detective Inspector, Victoria Police	9 and 13–15 August 2019
Officer Paige (a pseudonym)	Former officer, Victoria Police	13 August 2019
Mr James (Jim) O'Brien	Former Detective Inspector, Victoria Police	3–6 and 9–10 September 2019
Officer Peter Smith (a pseudonym)	Former handler, Victoria Police	10–12 September 2019

Witness	Role	Hearing date(s)
<b>Officer Fox (a pseudonym)</b>	Former handler, Victoria Police	12–13 and 18 September 2019
<b>Mr Mark Porter</b>	Superintendent, Victoria Police	18–20 September 2019
<b>Mr Dale Flynn</b>	Inspector, Victoria Police	20 September and 30 September– 4 October 2019
<b>Officer Green (a pseudonym)</b>	Former handler, Victoria Police	4 and 8 October 2019
<b>Mr Anthony (Tony) Biggin</b>	Former Superintendent, Victoria Police	9–11 October 2019
<b>Officer Richards (a pseudonym)</b>	Former handler and acting controller, Victoria Police	11 and 21–22 October 2019
<b>Mr Boris Buick</b>	Inspector, Victoria Police	29–30 October, 1 November and 11–12 November 2019
<b>Mr Cooper (a pseudonym)</b>	Former client of Ms Nicola Gobbo	31 October 2019 and 24 January 2020
<b>Mr Craig Hayes</b>	Detective Sergeant, Victoria Police	12 November 2019
<b>Mr Bickley (a pseudonym)</b>	Former client of Ms Nicola Gobbo	18 November 2019
<b>Mr John O'Connor</b>	Superintendent, Victoria Police	27 November 2019
<b>Mr Dean McWhirter</b>	Assistant Commissioner, Victoria Police	2 December 2019
<b>Mr John (Jack) Blayney, APM</b>	Assistant Commissioner, Victoria Police	2–3 December 2019
<b>Mr Douglas (Doug) Cowlshaw</b>	Former Inspector, Victoria Police	3 December 2019
<b>Mr Rodney (Rod) Wilson</b>	Former Superintendent, Victoria Police	4–5 December 2019
<b>Mr Paul Sheridan</b>	Detective Superintendent, Victoria Police	5 December 2019, 7 February and 12 February 2020
<b>Mr Graham Ashton, AM, APM</b>	Chief Commissioner, Victoria Police	9–11 December 2019
<b>Mr Thomas (Luke) Cornelius, APM</b>	Assistant Commissioner, Victoria Police	12 December 2019, 23–24 January and 29–30 January 2020
<b>Sir Kenneth (Ken) Jones, QPM</b>	Former Deputy Commissioner, Victoria Police	13 December 2019
<b>Mr Simon Overland, APM</b>	Former Chief Commissioner, Victoria Police	16–20 December 2019 and 21–23 January 2020
<b>Ms Christine Nixon, APM</b>	Former Chief Commissioner, Victoria Police	18 December 2019
<b>Mr Findlay (Fin) McRae</b>	Executive Director of Legal Services, Victoria Police	30–31 January and 3–5 February 2020
<b>Ms Nicola Gobbo</b>	Former barrister and human source	4–7 and 11 February 2020
<b>Mr Kenneth (Ken) Lay, AO, APM</b>	Former Chief Commissioner, Victoria Police	10 February 2020
<b>Mr Thomas (a pseudonym)</b>	Former client of Ms Nicola Gobbo	10 February 2020
<b>Mr Paul Hollowood</b>	Superintendent, Victoria Police	12 February 2020
<b>Mr Steven (Steve) Smith</b>	Detective Inspector, Victoria Police	12–13 February 2020
<b>Mr Stephen (Steve) Waddell</b>	Former Inspector, Victoria Police	13 February 2020

Witness	Role	Hearing date(s)
<b>Mr Ronald (Ron) Iddles, OAM, APM</b>	Former Detective Senior Sergeant, Victoria Police	13–14 February 2020
<b>Mr Timothy (Tim) Cartwright, APM</b>	Former Acting Chief Commissioner, Victoria Police	14 and 18 February 2020
<b>Mr Stephen (Steve) Leane, APM</b>	Former Assistant Commissioner, Victoria Police	18 February 2020
<b>Mr Shane O’Connell</b>	Former Detective Senior Sergeant, Victoria Police	18 and 21 February 2020
<b>Mr Tim Johns</b>	Sergeant, Victoria Police	20 February 2020
<b>Mr Dannye Moloney, APM</b>	Former Assistant Commissioner, Victoria Police	20 February 2020
<b>Mr John Nolan</b>	Commander, Victoria Police	21 February 2020
<b>Ms Wendy Steendam, APM</b>	Deputy Commissioner, Victoria Police	7 May 2020
<b>Sir Jonathan (Jon) Murphy, QPM, DL</b>	Professor, Advanced Policing Studies, Liverpool John Moores University, United Kingdom	13 May 2020

# Appendix F: List of parties with leave to appear

The Commission's hearings were held between 15 February 2019 and 13 May 2020.

People or organisations (or their legal representatives) who wanted to take part in those hearings had to apply to the Commission for 'leave to appear'.

In some cases, the Commission granted 'standing leave', enabling parties to participate in most of the Commission's hearings. In other cases, the Commission granted specific leave, enabling parties to participate in parts of the Commission's hearings (for example, on certain hearing days, in relation to certain witnesses, or as part of certain directions hearings). In some cases, the Commission also granted parties leave to cross-examine specific witnesses.

The Commission received 182 applications for leave to appear, relating to 72 individuals. Of these, the Commission granted 63 parties leave to appear. These parties are listed below.

## PARTIES WITH STANDING LEAVE

<b>Mr Graham Ashton, AM, APM</b>	Represented by Corrs Chambers Westgarth Counsel: Mr Andrew Coleman, SC, Mr Tim Game, SC, Mr Peter Silver
<b>Australian Criminal Intelligence Commission</b>	Represented by the Australian Government Solicitor Counsel: Ms Sashi Maharaj, QC
<b>Australian Federal Police</b>	Represented by Clayton Utz
<b>Commonwealth Director of Public Prosecutions</b>	Represented by the Australian Government Solicitor Counsel: Ms Anna Mitchelmore, SC, Ms Catherine Fitzgerald, Mr Daniel Holding, Ms Astrid Haban-Beer, Ms Rosalind Avis
<b>Director of Public Prosecutions and the Office of Public Prosecutions (Victoria)</b>	Represented by the Office of Public Prosecutions Counsel: Mr Christopher Caleo, QC, Mr Patrick Doyle, Ms Kateena O'Gorman
<b>Former officers of the Source Development Unit – Officers Black, Fox, Green, Peter Smith, Sandy White and Wolf (pseudonyms)</b>	Represented by Tony Hargreaves & Partners Counsel: Mr Geoffrey Chettle, Ms Lucy Thies
<b>Ms Nicola Gobbo</b>	Represented by MinterEllison Counsel: Mr Peter W Collinson, QC, Mr Rishi Nathwani
<b>State of Victoria</b>	Represented by Gilbert + Tobin Counsel: Dr Catherine Button, SC, Mr Christopher McDermott, Mr Timothy Goodwin, Mr Liam Brown, Mr Graeme Hill
<b>Victoria Police</b>	Represented by Corrs Chambers Westgarth Counsel: Mr Saul Holt, QC, Mr Justin Hannebery, QC, Ms Renee Enbom, SC, Ms Karen Argiropoulos

## PARTIES WITH SPECIFIC LEAVE

<b>Mr Salvatore Agresta</b>	Represented by Condello Lawyers
<b>Mr Stephen Asling</b>	Represented by Stary Norton Halphen <sup>1</sup> Counsel: Mr Matthew Goldberg
<b>Mr Andrews (a pseudonym)</b>	Represented by Moray & Agnew Lawyers Counsel: Mr Christopher Tran
<b>Mr Dragan Arnautovic</b>	Represented by Patrick W Dwyer Lawyers
<b>Mr Noel Ashby, APM</b>	Represented by Stephens Lawyers & Consultants Counsel: Ms Julie Condon, QC, Ms Ruth Shann
<b>Australian Broadcasting Corporation</b>	Represented by Macpherson Kelley Counsel: Mr Sandy Dawson, SC
<b>Mr Pasquale Barbaro</b>	Represented by Theo Magazis & Associates Counsel: Mr Christopher Wareham
<b>Mr Cooper (a pseudonym)</b>	Represented by Fayman Lawyers Counsel: Mr Malcolm H Thomas, Ms Emily Clark
<b>Mr Zlate Cvetanovski</b>	Represented by Galbally Parker
<b>Mr Paul Dale</b>	Represented by Gordon Legal Counsel: Mr Geoffrey Steward
<b>Department of Home Affairs</b>	Represented by Australian Government Solicitor Counsel: Ms Shanta Martin
<b>Mr Jacques El-Hage</b>	Represented by Sarah Tricarico Lawyers
<b>Mr Carmelo Falanga</b>	Represented by Sarah Tricarico Lawyers
<b>Mr Kevin Farrugia</b>	Represented by Sarah Tricarico Lawyers
<b>Mr Evangelos Goussis</b>	Represented by James Harris Lawyers Counsel: Dr Mark Gumbleton, Mr Adam Chernok
<b>Mr Gregory (a pseudonym)</b>	Represented by Chris McLennan & Co Barristers and Solicitors Counsel: Mr Christopher Terry
<b>Herald and Weekly Times Pty Ltd, Nationwide News Pty Ltd, Nine Network Australia Pty Ltd, The Age Company Ltd, Seven Network (Operation) Pty Ltd</b>	Represented by Macpherson Kelley
<b>Mr John Higgs</b>	Represented by Stephen Andrianakis & Associates Counsel: Ms Caitlin Dwyer
<b>Mr Andrew Hodson and Ms Mandy Leonard</b>	Represented by Robinson Gill Lawyers Counsel: Dr Kristine P Hanscombe, QC and Ms Kate Bowshell
<b>Mr Ronald (Ron) Iddles, OAM, APM</b>	Represented by Galbally & O'Bryan Lawyers Counsel: Mr Robert Richter, QC
<b>Mr David Ilic</b>	Represented by Garde Wilson Lawyers
<b>Mr Rabie (Rob) Karam</b>	Represented by Garde Wilson Lawyers
<b>Mr Peter Lalor</b>	Represented by Kenna Teasdale Lawyers Counsel: Mr Geoffrey Steward

<sup>1</sup> While Mr Asling was represented by Stary Norton Halphen at the time he was granted leave to appear, he was later represented by Melasecca Kelly Zayler in relation to other Commission processes.

<b>Mr Francesco Madafferi</b>	Represented by Condello Lawyers Counsel: Ms Lucy Kirwan
<b>Mr Antonios (Tony) Mokbel</b>	Represented by Sarah Tricarico Lawyers Counsel: Mr Richard Maidment, QC
<b>Mr Horty Mokbel</b>	Represented by Sarah Tricarico Lawyers
<b>Mr Kabalan Mokbel</b>	Represented by Sarah Tricarico Lawyers
<b>Mr Milad Mokbel</b>	Represented by Sarah Tricarico Lawyers
<b>Ms Zaharoula Mokbel</b>	Represented by Sarah Tricarico Lawyers
<b>Mr Paul Mullett, APM</b>	Represented by Stephens Lawyers & Consultants Counsel: Ms Julie Condon, QC, Ms Ruth Shann
<b>Mr Shane O'Connell</b>	Represented by Corrs Chambers Westgarth Counsel: Ms Siobhan Kelly, Ms Holly Jager
<b>Mr Faruk Orman</b>	Represented by Robinson Gill Lawyers Counsel: Ms Stephanie Wallace, Ms Carly Lloyd
<b>Mr Simon Overland, APM</b>	Represented by Corrs Chambers Westgarth Counsel: Mr Jeffery Gleeson, QC, Ms Georgie Coleman
<b>Person 12 (a pseudonym)</b>	Represented by Furstenberg Law
<b>Mr Jeffrey (Jeff) Pope</b>	Represented by Arnold Bloch Leibler Counsel: Mr Murugan Thangaraj, SC
<b>Officer Richards (a pseudonym)</b>	Represented by Kenna Teasdale Lawyers Counsel: Mr Andrew Purcell
<b>Mr Pasquale John Sergi</b>	Represented by May Lawyers Counsel: Mr Lachlan Molesworth
<b>Mr Solon (Sol) Solomon</b>	Represented by Sparke Helmore Lawyers
<b>Mr Wayne Strawhorn</b>	Represented by Galbally & O'Bryan Lawyers Counsel: Mr Peter Morrissey, SC
<b>Mr Thomas (a pseudonym)</b>	Represented by Pica Criminal Lawyers Counsel: Mr Jason Pizer, QC, Mr Ashley Halphen
<b>Mr David Tricarico</b>	Represented by Sarah Tricarico Lawyers
<b>Victorian Government Solicitor's Office</b>	Represented by Victorian Government Solicitor's Office
<b>Victorian Legal Services Board and Commissioner</b>	Represented by Colin Biggers & Paisley Lawyers
<b>Mr Saverio Zirilli</b>	Represented by Nicholas James Lawyers Counsel: Mr Adam Chernok

# Appendix G: List of stakeholders consulted by the Commission

The Commission greatly benefited from consultations with 97 agencies and experts who shared their views and experience on matters related to the terms of reference.

Six of these consultations were informal or were treated confidentially. The remaining 91 consultations are listed in the tables below.

## LAW ENFORCEMENT, INTELLIGENCE AND JUSTICE AGENCIES AND COURTS: AUSTRALIAN JURISDICTIONS

Australian Criminal Intelligence Commission
Australian Federal Police
Australian Security Intelligence Organisation
Department of Justice and Community Safety, Victoria
New South Wales Crime Commission
New South Wales Police
Northern Territory Police
Queensland Police
South Australia Police
Supreme Court of Victoria
Tasmania Police
Victoria Police
Western Australia Police

## LAW ENFORCEMENT, INTELLIGENCE AND JUSTICE AGENCIES: INTERNATIONAL JURISDICTIONS

Criminal Cases Review Commission, United Kingdom
Drug Enforcement Administration, United States
Home Office, United Kingdom
International Association of Chiefs of Police, United States
Metropolitan Police, United Kingdom
National Crime Agency, United Kingdom

New Zealand Police

Police Scotland

Police Service of Northern Ireland

Royal Canadian Mounted Police

## PROSECUTING AUTHORITIES: AUSTRALIAN AND INTERNATIONAL JURISDICTIONS

Commonwealth Director of Public Prosecutions

Crown Office and Procurator Fiscal Service, Scotland

Crown Prosecution Service, United Kingdom

Director of Public Prosecutions, Victoria

Office of Public Prosecutions, Victoria

Office of the Director of Public Prosecutions, Australian Capital Territory

Office of the Director of Public Prosecutions, New South Wales

Office of the Director of Public Prosecutions, Queensland

Office of the Director of Public Prosecutions, South Australia

Office of the Director of Public Prosecutions, Tasmania

Office of the Director of Public Prosecutions for Western Australia

## BAR ASSOCIATIONS

Australian Bar Association

Australian Capital Territory Bar Association

Bar Association of Queensland

Criminal Bar Association, Victoria

New South Wales Bar Association

Northern Territory Bar Association

Victorian Bar

## LAW SOCIETIES, INSTITUTES AND COUNCILS

Law Council of Australia

Law Institute of Victoria

Law Society of New South Wales

Law Society of South Australia

## LEGAL PROFESSION BODIES

Legal Profession Board of Tasmania

Legal Profession Conduct Commissioner, South Australia

Legal Services Commission, Queensland

Legal Services Council

Office of the Legal Services Commissioner, New South Wales

Victorian Legal Admissions Board

Victorian Legal Services Board + Commissioner

## POLICE OVERSIGHT, INTEGRITY AND ANTI-CORRUPTION AGENCIES: AUSTRALIAN AND INTERNATIONAL JURISDICTIONS

Australian Commission for Law Enforcement Integrity

Civilian Review and Complaints Commission for the Royal Canadian Mounted Police

Commonwealth Ombudsman

Corruption and Crime Commission, Western Australia

Crime and Corruption Commission, Queensland

Her Majesty's Crown Prosecution Service Inspectorate, United Kingdom

Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, United Kingdom

Her Majesty's Inspectorate of Constabulary in Scotland

Independent Broad-based Anti-Corruption Commission, Victoria

Independent Commission Against Corruption Northern Territory

Independent Commissioner Against Corruption, South Australia

Independent Office for Police Conduct, United Kingdom

Independent Police Conduct Authority, New Zealand

Integrity Commission, Tasmania

Investigatory Powers Commissioner's Office, United Kingdom

Law Enforcement Conduct Commission, New South Wales

Office of the Independent Police Review Director, Canada

Office of the Victorian Information Commissioner

Ombudsman Northern Territory

Police Ombudsman for Northern Ireland

Public Interest Monitor, Victoria

Victorian Inspectorate

Victorian Ombudsman

## ACADEMICS, RESEARCH INSTITUTES AND EXPERTS: AUSTRALIAN AND INTERNATIONAL JURISDICTIONS

Dr Adrian James, Liverpool John Moores University

Professor Alexandra Natapoff, University of California

Emeritus Professor Arie Freiberg, Monash University

Australian New Zealand Policing Advisory Agency

Adjunct Associate Professor Dr Charl Crous, APM

College of Policing, United Kingdom

Mr Garry Dobson

Dr John Buckley

Professor Sir Jonathan (Jon) Murphy, QPM, DL, Liverpool John Moores University

Associate Professor Pamela Henry, Edith Cowan University

Mr Peter Collins

Dr Thomas Smith, University of the West of England

## OTHER VICTORIAN STAKEHOLDERS

Police Registration and Services Board, Victoria

Victoria Legal Aid

Victorian Equal Opportunity and Human Rights Commission

Victorian Government Solicitor's Office

# Appendix H: List of people who worked with the Commission

The Honourable Margaret McMurdo, AC was Commissioner and Chairperson of the Commission. From December 2018 until February 2019, she was supported by Mr Malcolm Hyde, AO, APM as Commissioner.

## THE COMMISSION

Many people were employed by or worked with the Commission at various times between 13 December 2018 and 30 November 2020. Those who agreed to be named in this final report are listed below.

Name	Position	Time period
Ms Heather Ameen	Executive Assistant	December 2018 to March 2020
Ms Kathryn Bannon	Director, Office of the Commissioner	December 2018 to June 2020
Ms Selena Bateman	Senior Policy and Research Officer	July 2020 to November 2020
Ms Sophie Brown	Senior Policy and Research Officer	April 2019 to May 2020
Mr David Butler	Director, Operations	December 2018 to November 2019
Ms Sally Cameron	Executive Assistant	December 2018 to October 2020
Ms Jaina Cao	Senior Policy and Research Officer	February 2020 to July 2020
Mr Mark Carmody	Business Services Officer	February 2019 to November 2020
Mr Tony Gaylard	Project Manager, Policy and Research	September 2019 to February 2020
Ms Sophie Halewood	Principal Policy and Research Officer	February 2019 to December 2019
Ms Christine Howlett	Special Adviser	February 2019 to January 2020
Ms Saba Kapur	Public Enquiries and Hearings Officer	February 2019 to November 2020
Ms Kylie Kilgour	Chief Executive Officer	December 2018 to November 2020
Mr Anthony Lawrie	Special Adviser, Policy and Research	June 2020 to November 2020
Ms Jessica Low	Director, Policy and Research	January 2019 to November 2020
Ms Clare Malone	Project Director	December 2018 to September 2020
Mr John Maloney	Consultant, Policy and Research	May 2020 to November 2020
Ms Tracey Matters	Director, Media and Communications	December 2018 to November 2020
Ms Sophie Nevell	Strategic Adviser, Policy and Research	July 2020 to October 2020
Ms Mary Polis	Consultant, Policy and Research	March 2020 to November 2020
Mr Craig Pollitt	Senior Intelligence Analyst	April 2019 to November 2020
Mr Neil Robertson	Consultant, Policy and Research	September 2020 to November 2020
Ms Joanna Rolfe	Principal Policy and Research Officer	January 2019 to November 2020
Ms Hana Shahkhan	Senior Policy and Research Officer	March 2019 to June 2020
Ms Rachel Skillington	Senior Policy and Research Officer	April 2019 to February 2020
Ms Lena Sokolic	Senior Policy and Research Officer	April 2019 to March 2020
Mr Michael Stanton	Consultant	April 2020 to November 2020
Mr Michael Stefanovic, AM	Director, Investigations	March 2019 to October 2020
Ms Catherine Tobin	Principal Policy and Research Officer	March 2019 to May 2020
Ms Kirstie Twigg	Assistant Director, Policy and Research	February 2019 to June 2020
Mr Oliver Way	Chief Procurement Officer/Director, Operations	December 2018 to November 2020
Ms Amanda Wilczynski	Principal Policy and Research Officer	January 2020 to September 2020
Ms Helen Wilson	Senior Investigator	April 2019 to July 2020

## COUNSEL ASSISTING THE COMMISSION

Name	Position	Time period
Mr Chris Winneke, QC	Counsel Assisting	January 2019 to October 2020
Ms Penelope Neskovcin, QC	Counsel Assisting	January 2019 to November 2020
Ms Megan Tittensor, QC	Counsel Assisting	January 2019 to October 2020
Mr Andrew Woods	Counsel Assisting	January 2019 to October 2020
Mr Sandip Mukerjea	Counsel Assisting	January 2019 to November 2020
Mr Michael Allen	Counsel Assisting	March 2019 to June 2020
Mr Israel Cowen	Counsel Assisting	April 2019 to June 2020
Ms Natalie Kaye	Counsel Assisting	April 2019 to June 2020

## SOLICITORS ASSISTING THE COMMISSION

The Commission was supported by its solicitors from the firm Holding Redlich, Melbourne.

Name	Position	Time period
Ms Alicia Cox	Paralegal	April 2019 to September 2019
Ms Alana Giles	Senior Associate	January 2019 to July 2020
Ms Tamara Gugger	Paralegal	August 2019 to November 2020
Ms Jyoti Haikerwal	Graduate	August 2019 to February 2020
Ms Kylie Hall	Special Counsel	January 2019 to November 2020
Ms Gemma Hannah	Lawyer	January 2019 to November 2020
Mr Caleb Hooke	Paralegal	April 2019 to November 2019
Ms Nicola Horrell	Executive Assistant	January 2019 to April 2019
Ms Isabelle Kiss	Paralegal	June 2019 to November 2020
Ms Rana Kurban	Paralegal	May 2019 to October 2020
Ms Trisha Lingard	Associate	January 2019 to November 2020
Mr Benjamin Mann	Paralegal	May 2019 to June 2020
Mr Michael Manoria	Lawyer	September 2019 to November 2020
Mr Harrison Morley	Paralegal	March 2019 to November 2020
Ms Jessica Nelson	Paralegal	March 2019 to August 2019
Mr Alexander Norrish	Lawyer	March 2019 to November 2020
Mr Daniel O'Connor	Lawyer	January 2019 to November 2020
Ms Mikaela Ogier-Luxa	Paralegal	September 2019 to June 2020
Mr Liam Price	Paralegal	September 2019 to February 2020
Ms Lucy Prowse	Associate	January 2019 to March 2020
Mr Howard Rapke	Managing Partner	January 2019 to November 2020
Ms Tess Simpson	Paralegal	January 2019 to January 2020
Ms Katerina Stevenson	Associate	January 2019 to November 2020
Mr Damian Terbiler	Paralegal	May 2019 to September 2019
Ms Alexandra Tighe	Partner	January 2019 to November 2020
Ms Sophie Timms	Paralegal	January 2019 to January 2020
Ms Nicci Urwin	Senior Legal Assistant	April 2019 to November 2020
Ms Rhiannon Zarro	Lawyer	January 2019 to November 2020

## KEY SUPPLIERS

The Commission thanks its key suppliers.

ASG Group
Caraniche at Work
Complete Office Supplies
Console Concepts
Deloitte Australia
Epiq Australia
Finsbury Green
Graham Nicholas
Holding Redlich
Isentia
Kapish Services
Logical Services
Luminary
RSM Australia
Shearwater Solutions
Single Digital Presence
The Information Access Group
The Streaming Guys
Woo Design Group







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**Royal Commission  
into the Management of Police Informants**

# Final Report

## Volume II

NOVEMBER 2020

**Royal Commission  
into the Management of Police Informants**

**Final Report**  
Volume II

**The Honourable Margaret McMurdo, AC**  
Commissioner

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**ORDERED TO BE PUBLISHED**

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# 7

## The potential effects of Ms Nicola Gobbo's conduct as a human source

### INTRODUCTION

This Commission was established following revelations that Victoria Police had used Ms Nicola Gobbo, a criminal defence barrister, as a human source.

The High Court of Australia in *AB v CD*<sup>1</sup> characterised Ms Gobbo's actions, in 'purporting to act as counsel' for people while 'covertly informing against them', as 'fundamental and appalling breaches of [her] obligations as counsel to her clients and of [her] duties to the Court'. It went on to find that Victoria Police was likewise 'guilty of reprehensible conduct', having 'knowingly' encouraged Ms Gobbo to do as she did and 'sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law'. The Court found that, as a result, 'the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system'.<sup>2</sup>

Understanding how many cases may have been 'corrupted' by the conduct of Ms Gobbo and Victoria Police was an important part of the Commission's task. Term of reference 1 required the Commission to inquire into, and report on, the number of cases that may have been affected by the conduct of Ms Gobbo as a human source, and the extent to which those cases may have been affected. This chapter addresses that term of reference.

The Commission focused on cases potentially affected by Ms Gobbo's conduct as a human source between 1998, a year after her admission to legal practice; and 2013, when she ceased practising. Further, the Commission focused on cases within this period where convictions or findings of guilt may have been affected by Ms Gobbo's conduct. This included cases where she acted as a lawyer, as well as cases where she did not act, but that may nonetheless have been affected by her conduct.<sup>3</sup>

Ms Gobbo was very busy in this period and her conduct related to a great many people and a large number of proceedings. Counsel Assisting undertook a detailed review of cases in this period and submitted that an astounding '1,011 persons may have been affected by the conduct of Ms Gobbo as a human source in the criminal justice system'.<sup>4</sup> After reviewing those submissions, testing the methodology applied and considering the relevant responsive submissions received, the Commission accepts that the cases of 1,011 people may have been affected by Ms Gobbo's conduct as a human source.

Notwithstanding the Commission's focus on cases resulting in convictions or findings of guilt, it is important to acknowledge that Ms Gobbo's conduct may have also affected people who were not ultimately convicted or found guilty of a crime. For example, some people were investigated, charged or prosecuted in part through the use of Ms Gobbo as a human source, and sometimes while she purported to act for them, but they were not ultimately convicted or found guilty. Some of these people told the Commission they were aggrieved by Ms Gobbo's conduct. In some cases, they had retained her to provide independent legal assistance, but likely did not receive it, owing to her conflicting interests. To this extent, they may have had their rights infringed in the very same way as others whom the Commission has determined are potentially affected by her conduct—the only difference being that they were not found guilty or convicted of a crime.<sup>5</sup> For practical reasons, and in keeping with the parameters set for this inquiry, it was appropriate and necessary for the Commission to constrain its review of cases that 'may have been affected' to cases that resulted in convictions or findings of guilt. This should not, however, be taken as a denial of the legitimate grievances of other people affected by Ms Gobbo's use as a human source.

It is also important to acknowledge that the repercussions of Ms Gobbo's conduct as a human source were not caused solely by what she did or failed to do, but also by the actions and inactions of Victoria Police officers, and by the institutional shortcomings within Victoria Police that allowed her improper and unethical conduct to commence, continue, escalate and flourish over many years. In this way, term of reference 1 intersected with term of reference 2, which focused on the conduct of current and former Victoria Police officers in their disclosures about, and the recruitment, handling and management of, Ms Gobbo as a human source. This chapter touches on the conduct of some Victoria Police officers because it is relevant to cases that may have been affected. Chapters 8 and 9 examine the conduct of Victoria Police officers, and the broader organisational context of their conduct, in more detail.

To provide a full account of Ms Gobbo's actions, the Commission had to do more than set out the potential effects on convicted persons and their proceedings. The magnitude and duration of her conduct was such that it has harmed the wider Victorian criminal justice system—not just Victoria Police, but also the legal profession, the Victorian Office of Public Prosecutions (OPP), the Victorian Director of Public Prosecutions (DPP), and the legal processes at the heart of our democracy—along with community confidence in that system. The ripple effects of this conduct will continue to emerge, and continue to be felt, over coming years.

Having considered the available evidence, the Commission has concluded that Ms Gobbo's conduct should be referred to a Special Investigator, to determine whether there is sufficient evidence to establish the commission of any criminal offence or offences.

## THE NATURE AND SIGNIFICANCE OF THE COMMISSION'S INQUIRY INTO POTENTIALLY AFFECTED CASES

The nature and scope of the Commission's inquiry into the conduct of Ms Gobbo as a human source, and the identification of cases potentially affected by her use, was set by its terms of reference.

Counsel Assisting observed in their submissions to the Commission:

*[T]he purpose of the first term of reference ... is to give the Government, the public, and the relevant affected persons a general appreciation of the breadth and depth of the impact of the use of Ms Gobbo as a source on cases in the criminal justice system over the extended period that she practised as a lawyer. In the submission of Counsel Assisting, it is not the function of the Commission to determine in which cases and for what precise reasons substantial miscarriages of justice occurred; that is a matter which is properly the preserve solely of the courts. Indeed, the Commission can give no remedy; its report amounts to an opinion. It would also be inappropriate and impracticable for the Commission to engage in the depth or comprehensiveness of analysis of cases that would be required of an appellant in preparing an application for leave to appeal against conviction before the Court of Appeal.<sup>6</sup>*

The Commission accepts this submission. The utility of the Commission's work to publicly expose the nature and extent of Ms Gobbo's conduct, and identify policy reforms to ensure it is not repeated, would be undermined if the Commission's findings risked prejudicing future legal proceedings. The Commission's Letters Patent also required it to take care not to prejudice any ongoing investigations or court proceedings.

The Commission has no judicial power and does not and cannot reach a conclusion about the legal consequences for any particular case. That is a matter for the courts. As discussed in Chapters 2 and 5, however, there are important legal principles that have informed the Commission's approach to examining Ms Gobbo's conduct. The principles that are of particular relevance to this chapter are as follows.

The right to a fair trial is at the very core of our criminal justice system and our democracy. Imposing criminal sanctions may be the greatest power that the state holds over individual citizens. As a result of such sanctions, a person may be deprived of basic rights and liberties and publicly exposed as having violated society's shared norms. That is why, in our democracy, criminal guilt is not determined by the executive, but by the judicial arm of government in independent courts, applying the rule of law. The process for establishing criminal guilt, the criminal trial, must be, and must be seen to be, fair and transparent, and must give an accused person a meaningful opportunity to understand the case against them and to defend themselves. Equally, when someone pleads guilty to criminal offending, thereby exposing themselves to criminal sanctions, it is essential that they are acting on a proper understanding of all relevant evidence for and against them.

Equally important is the right to legal representation. Legal practitioners play a vital role in supporting the integrity of the criminal justice system and ensuring that their clients, no matter how notorious or unpopular, are dealt with according to the law. Legal representation is particularly important for those accused of serious or complex offences as they may be subject to lengthy periods of imprisonment.

Lawyers help clients understand the case against them, identify gaps in the prosecution case and make an effective defence. If clients are found guilty, their lawyers make submissions on their behalf at a sentencing hearing. It is therefore critical that accused persons, no matter who they are, have access to competent, independent and confidential legal assistance. In turn, the lawyers who act for them must comply with their professional duties—not only to their clients, but also to the court and the administration of justice.

Lawyers who prosecute crimes on behalf of the state must also act independently and in accordance with their professional obligations. At trial, for example, a prosecutor's role is not to secure a conviction at all costs. It is to ensure that the whole case is presented to the court, so that a judge or jury is in the best possible position to determine whether the prosecution has established the case 'beyond reasonable doubt'.<sup>7</sup> Consistent with that position, a prosecutor has duties to conduct a case fairly and to call all relevant and credible witnesses, even if those witnesses are helpful to the defence. Police officers and prosecutors also have important duties of disclosure to ensure that the court and the accused person have a complete picture of all relevant evidence, including evidence unhelpful to the prosecution case.<sup>8</sup> This is discussed further in Chapter 14.

Fiercely protecting the integrity of the processes by which criminal guilt is determined ensures that the criminal justice system operates as our democracy intends, and that the power to prosecute, convict and punish crimes is exercised according to law. As a majority of the High Court observed in *Moti v The Queen*:

*[T]wo fundamental policy considerations affect abuse of process in criminal proceedings. First, 'the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike'. Secondly, 'unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice'. Public confidence in this context refers to the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes. The concept of abuse of process extends to a use of the courts' processes in a way that is inconsistent with those fundamental requirements.*<sup>9</sup>

Similarly, the observations of Chief Justice Kiefel, Justice Bell and Justice Nettle in *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* are particularly applicable to events leading to this inquiry:

*[T]here is, too, a fundamental social concern to ensure that the end of a criminal prosecution does not justify the adoption of any and every means for securing a conviction and, therefore, a recognition that in rare and exceptional cases where a defect in process is so profound as to offend the integrity and functions of the court as such, it is necessary that proceedings be stayed [that is, stopped] in order to prevent the administration of justice falling into disrepute.*<sup>10</sup>

The courts and the community are rightly concerned when the criminal justice system is undermined, especially when this is done knowingly by a barrister, who, as an officer of the court, has an essential role to uphold the law and the administration of justice.

## THE RANGE OF POTENTIALLY AFFECTED CASES

As noted above, the Commission considers that 1,011 people may have criminal convictions or findings of guilt affected by Ms Gobbo's conduct as a human source.<sup>11</sup>

Many of these people will have long since moved on with their lives; they may value their privacy, and may not wish to now relive events that led to their conviction or sentence, nor challenge them in the courts. For those who do seek to appeal, the courts may—depending on the evidence before them in each case—ultimately find that no substantial miscarriage of justice has occurred in their cases. The Commission decided, however, consistent with term of reference 1, to cast a wide net in reporting on whether a case may have been affected, so that the people potentially affected can determine for themselves, knowing the role Ms Gobbo played as a human source, whether to obtain legal advice.

## The ways in which cases may have been affected

The figure of 1,011 people resulted from Counsel Assisting applying a methodology to capture, as far as possible, the complete range of people whose convictions may have been affected by Ms Gobbo’s conduct as a human source.

To identify cases, Counsel Assisting applied different categories of conduct relating to Ms Gobbo and Victoria Police.

### Categories of conduct: Ms Gobbo

Although Ms Gobbo’s conduct varied considerably between individual cases and periods, Counsel Assisting grouped it into two broad categories:

- Categories 1A and 1B: Conflict of interest
- Categories 2A and 2B: Tainted evidence.<sup>12</sup>

Category 1A applied to cases where Ms Gobbo acted for an accused person (for example, by legally advising that person or appearing in court on their behalf) without disclosing her status as a human source. Category 1B encompassed the scenario in Category 1A, with the additional feature that Ms Gobbo provided information about the person to police, or otherwise assisted or attempted to assist in their prosecution, either before or while acting as their lawyer, and all without disclosing this to them.

Category 2A applied to cases whether Ms Gobbo did or did not act as an accused person’s lawyer, but evidence relied on in prosecuting them may have been improperly or illegally obtained through Ms Gobbo’s use as a human source. Category 2B encompassed the scenario in 2A, with the variation that she *did* also act for the person concerned, without disclosing to them her status as a human source.

Table 7.1 below summarises these categories of conduct. Some people’s cases may have been affected by multiple categories.

**Table 7.1: Categories of conduct—Ms Gobbo**

Category 1: Conflict of interest	Category 2: Tainted evidence
<b>1A:</b> Ms Gobbo acted for an accused person and did not disclose her status as a human source.	<b>2A:</b> Evidence relied upon in prosecuting the accused person may have been improperly or illegally obtained as a result of the use of Ms Gobbo as a human source by Victoria Police.
<b>1B:</b> Category 1A, plus:  Ms Gobbo provided information to Victoria Police in relation to the accused person, and/or otherwise assisted or attempted to assist in their prosecution, before and/or during the period she acted for them, and did not disclose this.	<b>2B:</b> Category 2A, plus:  Ms Gobbo acted for the accused person and did not disclose her status as a human source.

These categories are deliberately broad and cover a wide range of different circumstances. For example, the improper acquisition of evidence (that is, Category 2: Tainted evidence) in one instance might arise from Ms Gobbo passing on to police potentially privileged or confidential information given to her by a client. In another instance, it might be constituted by her directly influencing the production of that evidence, such as when she edited clients’ statements to police that contained incriminating information about other people.

## Categories of conduct: Victoria Police

Counsel Assisting devised equivalent categories of conduct for current and former officers of Victoria Police:

- Categories 3A and 3B: Conflict of interest
- Categories 4A and 4B: Tainted evidence.<sup>13</sup>

Category 3A applied to cases where police failed to clarify or discharge their obligations to disclose Ms Gobbo's role as a human source to the accused person, the prosecution and the courts. Category 3B encompassed the scenario in 3A, together with the additional feature that Ms Gobbo provided information about the person to police before or while she acted as their lawyer.

Category 4A encompassed cases where evidence relied upon in prosecuting an accused person may have been improperly or illegally obtained by Ms Gobbo's use as a human source, and police did not take steps to clarify or discharge their disclosure obligations. Category 4B encompassed the scenario in 4A, together with the additional feature that Ms Gobbo was acting for the accused person. These categories are set out in Table 7.2. As noted above, the conduct of Victoria Police and its officers is the focus of Chapters 8 and 9.

**Table 7.2: Categories of conduct—Victoria Police**

Category 3: Conflict of interest	Category 4: Tainted evidence
<b>3A:</b> Ms Gobbo acted for an accused person and Victoria Police did not disclose her status as a human source.	<b>4A:</b> Evidence relied upon in prosecuting the accused person may have been illegally or improperly obtained as a result of the use of Ms Gobbo as a human source by Victoria Police.
<b>3B:</b> Category 3A, plus:  Ms Gobbo provided information to Victoria Police in relation to the accused person, and/or otherwise assisted (or attempted to assist) in the prosecution of the accused person, before and/or during the period she acted for the accused person, and Victoria Police did not disclose this.	<b>4B:</b> Category 4A, plus:  Ms Gobbo acted for the accused person and Victoria Police did not disclose her status as a human source.

All of the categories in Table 7.2 also involve a failure of Victoria Police to take steps to have potential issues, such as public interest immunity (PII), considered by the DPP or the Victorian Government Solicitor's Office, and then possibly a court.

## Underlying principles

Chapter 5 sets out the underlying principles that informed the analysis and identification of potentially affected cases, including why conflicting interests and tainted evidence might have the potential to affect cases.

In summary, if the interests of an accused person are compromised—for example, because their lawyer is not competent and independent, or because the evidence against them was obtained unlawfully or improperly, or because they were not made aware of facts about that evidence that should have been disclosed to them and might have allowed them to challenge it—this may bear on the fairness of their trial or sentencing, and undermine a conviction or finding of guilt.

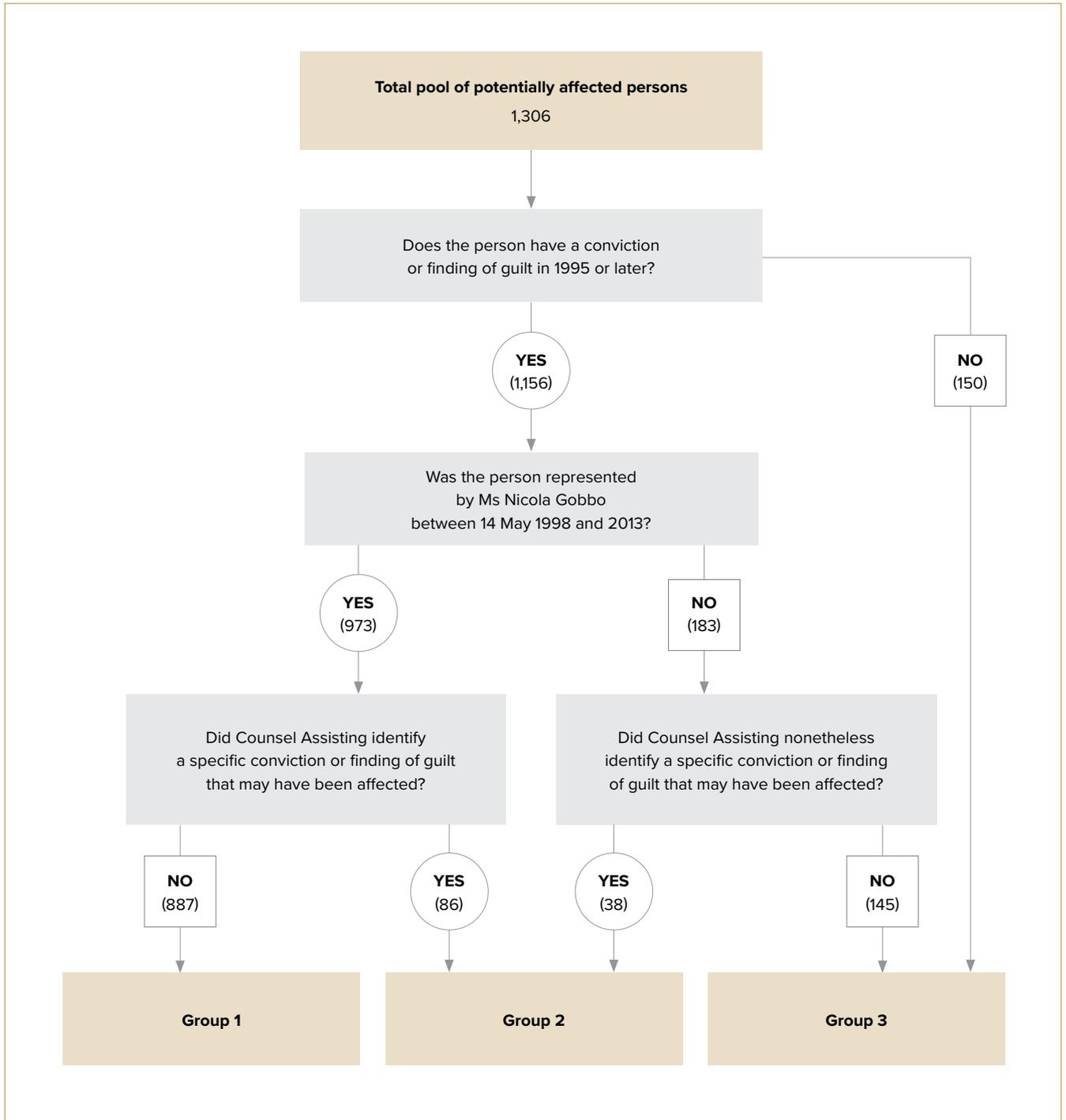
## Identifying potentially affected cases

Informed by the categories of conduct outlined above, Counsel Assisting conducted an in-depth, multi-stage review to determine the range of cases potentially affected by Ms Gobbo's conduct. The details of the methodology adopted by Counsel Assisting, and the steps taken at each stage of the review, are set out in detail in their submissions.<sup>14</sup>

Figure 7.1 represents the five-step approach of Counsel Assisting in identifying affected cases.<sup>15</sup> Of note:

- 'Group 1' are people who are not the subject of case studies by Counsel Assisting, but whom they considered may nonetheless be affected.
- 'Group 2' are people who are the subject of a case study in Counsel Assisting submissions.
- 'Group 3' are people who were not considered to be potentially affected, because they did not have a conviction or finding of guilt within the relevant time period, or because there was no evidence before the Commission to indicate Ms Gobbo may have affected their case.

Figure 7.1: Methodology of Counsel Assisting to identify potentially affected cases<sup>16</sup>



In summary, the first step was to find out who Ms Gobbo’s clients were. Counsel Assisting reviewed Ms Gobbo’s financial records; court records listing cases in which she appeared; and records of the OPP, Commonwealth Director of Public Prosecutions (CDPP), Victoria Legal Aid, Victoria Police and Corrections Victoria. Counsel Assisting also reviewed statements and evidence given to the Commission. They identified 1,306 people whom Ms Gobbo may have represented.

They next established that 1,156 of those 1,306 people had convictions or findings of guilt recorded between 1995 and 2013, when she ceased to practise as a lawyer.

Ms Gobbo was admitted as a legal practitioner on 7 April 1997. She met with agents of the Australian Federal Police (AFP) on 14 May 1998 and discussed, among other matters, her willingness to act as a human source. This was the first occasion Counsel Assisting identified where Ms Gobbo may have acted as a human source after her admission to legal practice. Unlike Victoria Police, however, the AFP did not at this or any time register Ms Gobbo as a human source.

Counsel Assisting identified 973 people with convictions or findings of guilt for whom Ms Gobbo acted between 14 May 1998 and 16 August 2013.

### Case studies of Counsel Assisting

For 86 of the 973 people identified, Counsel Assisting, having regard to the evidence and materials before the Commission, were able to draw a more specific nexus between a case or cases in which those people were convicted or found guilty, and Ms Gobbo’s representation of them, to support the conclusion that their cases may have been affected by Ms Gobbo’s conduct.

As noted earlier in this chapter, it is not only Ms Gobbo’s clients whose cases may have been affected by her conduct. The Commission discovered that her informing as a lawyer may have resulted in improperly or illegally obtained evidence tainting a further 38 individuals’ cases in which she was not involved as a lawyer.

Counsel Assisting then assembled individual case studies demonstrating how the convictions and findings of guilt of these 124 people (86 represented by Ms Gobbo, 38 in related proceedings) may have been affected by Ms Gobbo’s conduct (collectively, the Group 2 cases).<sup>17</sup>

The Commission explored the methodology used by Counsel Assisting to determine the number of cases affected and largely agrees with their conclusions. Having regard to the underlying facts, the Commission has occasionally reached a slightly different view as to *how* some of these cases may have been affected by Ms Gobbo’s conduct—that is, as to which of the categories of conduct 1A/B, 2A/B, 3A/B and 4A/B applied to these cases.

Table 7.3 sets out the number of people with case studies who fit into each category. It also demonstrates how the conclusions of the Commission differ from the conclusions of Counsel Assisting in some minor respects. In particular, it shows that the Commission identified additional instances where category 1B, 2B, 3B and 4B applied. Note that the same person may fall into multiple categories.

**Table 7.3: Difference between Counsel Assisting’s findings and the Commission’s findings relating to categories of conduct**

Category	Categories relating to Ms Gobbo’s conduct				Categories relating to Victoria Police’s conduct			
	1A	1B	2A	2B	3A	3B	4A	4B
<b>Total number of persons (out of 124) whose convictions or findings of guilt fell into each category, as found by Counsel Assisting</b>	86	85	71	36	86	86	71	67
<b>Additional instances where category applied as identified by the Commission</b>	0	+1	0	+5	0	+2	0	+5

## People represented by Ms Gobbo who were not the subject of case studies by Counsel Assisting

As indicated in Figure 7.1 above, only 86 of these 973 identified people with convictions or findings of guilt for whom Ms Gobbo acted in the relevant period were the subject of their own case study in Counsel Assisting submissions (Group 2 cases). Therefore, it is necessary to explain why the cases of the remaining 887 people may have been affected (Group 1 cases).

The decision of the Court of Appeal of the Supreme Court of Queensland in *R v Szabo*<sup>18</sup> is helpful. In that case, the Court set aside a conviction and ordered a re-trial, accepting that there had been a miscarriage of justice, even though the prosecution case was strong and the defence barrister had competently represented his client. This was because the defence barrister had not disclosed to his client that he had been in an intimate relationship with the prosecutor, and there was a reasonable possibility of the relationship being renewed (as it in fact was, a few months after the trial). Mr Szabo gave evidence that, had he known of the relationship, he would have been concerned about his barrister's ability to defend him professionally and would have sought a different barrister.

The Court of Appeal noted that barristers play a vital role in the administration of justice, providing fearless independent representation of their clients. A fair-minded, informed observer knowing those facts would, the Court concluded, have a reasonable suspicion as to whether the defence barrister had acted with the necessary independence.<sup>19</sup> The defence barrister, by not disclosing to his client his intimate relationship with the prosecutor, had brought about a miscarriage of justice.

As Counsel Assisting rightly pointed out, a court could conclude by analogy that an observer, knowing Ms Gobbo was a human source and had not disclosed this to her client, might reasonably suspect that she could not and did not provide that client with the fearless and independent representation to which they were entitled. On that basis, a court may well conclude that there had been a substantial miscarriage of justice.

Counsel Assisting submitted:

*... it is highly unlikely that an accused person would sensibly maintain such representation with the knowledge of a possible or actual open and active channel of communication between their legal representation and the police, regardless of the nature of the charge or stage of the proceeding. This is especially so in the criminal context in which these cases arise, where the liberty of the subject is at stake.*

*Accordingly, in circumstances where the legal representative for an accused person is a registered or ostensible human source for police, a perceived collusion ... would occur, revealing a 'seriously unfair contest', which invariably undermines public confidence in the administration of justice.*

*... the above effect on public confidence in the administration of justice:*

- arises whether or not Ms Gobbo in fact passed on any information about the client or the case or otherwise assisted (or attempted to assist) the prosecution; and*
- could, depending on the circumstances, constitute a substantial miscarriage of justice sufficient to require any conviction to be set aside ...<sup>20</sup>*

As pointed out in some responsive submissions, *Szabo* has not been relevantly considered by the Court of Appeal of the Supreme Court of Victoria or by the High Court.<sup>21</sup> These courts may well take a different view of the applicable legal principles and dismiss an appeal brought solely on this basis. Nonetheless, the Commission cannot exclude the real possibility that 973 people (that is, the 86 people who were represented by Ms Gobbo and the subject of Counsel Assisting's specific case studies, and a remaining 887 people represented by Ms Gobbo between

14 May 1998 and 16 August 2013) have cases that were affected, in the sense described in *Szabo*, by Ms Gobbo's conduct while acting as their lawyer and as a human source for Victoria Police.

As noted earlier, many of these individuals may not wish to challenge their convictions, given so much time has passed. They may have moved on with their lives, value their privacy, or consider even a successful appeal, by no means a certainty, to be of little practical use to them. Importantly, however, they now know what they should have known when Ms Gobbo was their lawyer. They also know that this Commission considers the legitimacy of their conviction or finding of guilt may be affected by the conduct of Ms Gobbo.

## Review of the potentially affected cases

The 1,011 people whom the Commission considers may have been affected by Ms Gobbo's conduct comprise those in the 124 case studies discussed in Counsel Assisting submissions and summarised in Table 7.3, and a further 887 people who did not know that when Ms Gobbo was providing them with legal representation, she was also providing information to police.

Counsel Assisting submissions about these cases comprise two volumes:

- Volume 2 of their submissions, published by the Commission with necessary redactions, sets out case studies for Mr Thomas (a pseudonym) and Mr Cooper (a pseudonym), whose cases are explored later in this chapter.
- Volume 3 of their submissions sets out an analysis of the remaining 122 people the subject of specific case studies by Counsel Assisting. The Commission applied 37 pseudonyms to the case studies before they were published, for reputational or other reasons. Ten case studies were not published by the Commission for privacy or security reasons.

To ensure procedural fairness, the Commission attempted to provide the 124 case studies to the people concerned before the publication of Counsel Assisting submissions and this final report. Prior to publication, the Commission was able to provide individual case studies to all but 16 of the people concerned, though the cases were redacted to reflect PII claims by Victoria Police. Of these:

- One person did not wish to receive the case study, as he wanted to forget this time in his life.<sup>22</sup> The Commission published his case study as part of Counsel Assisting submissions with a pseudonym applied.
- One person was deceased.<sup>23</sup> The Commission published his case study as part of Counsel Assisting submissions.
- 14 people could not be found, despite the Commission's extensive efforts to locate them:
  - For nine of these people, where it was considered necessary to protect their identity, the Commission published their case studies using pseudonyms.<sup>24</sup>
  - For three of these people, the Commission did not consider it necessary or appropriate to publish their case studies.
  - For two of these people, the Commission considered it was appropriate to publish their case studies without pseudonyms.<sup>25</sup>

A list of all the case studies published as part of Counsel Assisting submissions is at Appendix A.

Apart from those people who have made enquiries, the Commission did not directly contact the remaining 887 people to inform them that their convictions or findings of guilt may have been tainted in the broad sense discussed in *Szabo*. The Commission did, however, provide their names to Victoria Police, which has ongoing obligations of disclosure, as discussed in Chapter 9 and 14 and mentioned earlier in this chapter. The Commission also published a statement on its website inviting those who believed they may be one of these 887 individuals to contact the Commission, and arranged for Corrections Victoria to place notices in Victorian prisons.

That so many convictions—many concerning allegations of violence or homicide, large-scale drug trafficking and organised crime—may have been marred by Ms Gobbo's conduct is staggering. The following sections of this chapter shed light on how and why this may have occurred, exploring some examples of Ms Gobbo's conduct in particular cases.

## 1993 TO 1999: EARLY PATTERNS OF CONDUCT

In this section, the Commission outlines Ms Gobbo's conduct from her first engagement with police from 1993 to 1999.

As discussed in Chapter 1, when the Commission's Letters Patent were prepared, it was understood that the Commission's inquiry would be directed at Ms Gobbo's use as a human source between 2005 and 2009.<sup>26</sup> Following its establishment, the Commission received information regarding Victoria Police's wider use of Ms Gobbo as a human source, including that she had first been registered as a human source in 1995.<sup>27</sup>

In 1995, Ms Gobbo was a young law student without the professional obligations of a lawyer. It is significant, however, that even then she associated with suspected criminals and was inclined to provide information to police. In 1999, after she was admitted as a legal practitioner, she was registered as a human source for the second time.<sup>28</sup>

The scale and complexity of Ms Gobbo's conduct increased over time. Compared with what Counsel Assisting referred to as the 'industrial scale' informing that took place following her third registration in 2005, her earlier conduct was certainly more limited.<sup>29</sup> This earlier conduct, however, does reveal some emerging patterns that in the following years would become far more entrenched and destructive for her, both personally and professionally, and for the criminal justice system.

### Mr Brian Wilson

As outlined in Chapter 6, Ms Gobbo first had contact with Victoria Police in 1993, when she was 20 years old. She was living in Rathdowne Street, Carlton with her then partner, Mr Brian Wilson. Following reports of drug trafficking connected with their address, Victoria Police set up Operation Yak. On 3 September 1993, police executed a search warrant at the property.<sup>30</sup> During the search, police found amphetamine and cannabis in Ms Gobbo's bedroom.<sup>31</sup> Ms Gobbo told then Sergeant Trevor Ashton that there were drugs hidden behind a vent in the laundry.<sup>32</sup> She was charged with use and possession of cannabis and amphetamine,<sup>33</sup> pleaded guilty and received a non-custodial sentence without a conviction. Mr Wilson was charged with trafficking, use and possession of a drug of dependence, and received a suspended sentence.<sup>34</sup>

Throughout 1994 and 1995, Ms Gobbo maintained contact with Victoria Police.<sup>35</sup> On a number of occasions, she met with Mr Ashton, then Constable Tim Argall and then Senior Constable Rodney Arthur, including at the Melbourne Cricket Ground<sup>36</sup> where she worked part-time, and in the court precinct in Melbourne's CBD.<sup>37</sup>

On 3 April 1995, Victoria Police executed a further search warrant at the Rathdowne Street address, and as a result, Mr Wilson, but not Ms Gobbo, was ultimately convicted of further drug offences.<sup>38</sup> In July 1995, Mr Ashton and Mr Argall registered Ms Gobbo as a human source, evidently because of information she had provided against Mr Wilson.<sup>39</sup> She subsequently met with officers of the Victoria Police Special Response Squad and continued to provide information about Mr Wilson in the latter half of 1995.<sup>40</sup>

Evidence before the Commission pointed to the perspectives of Ms Gobbo and Victoria Police officers during this period. For example, then Sergeant Michael Holding, who was present during the execution of the first search warrant and interviewed Ms Gobbo, recalled that she was 'very confident and opinionated', and, in his view, she 'thought the process was like a game'.<sup>41</sup> In registering Ms Gobbo as a human source in 1995, Mr Ashton and

Mr Argall recorded that she was ‘quite reliable and seeking a career as a solicitor’.<sup>42</sup> By February 1996, Victoria Police had launched Operation Scorn, concerning other criminal allegations against Mr Wilson. That operation was cancelled in March 1996. In a report explaining its cancellation, then Detective Senior Sergeant Jack Blayney noted that Ms Gobbo was ‘making arrangements and not liaising—loose cannon’.<sup>43</sup> It seems that even in these early days, Victoria Police recognised both Ms Gobbo’s distinctive potential as a useful human source and her problematic personal traits.

Ms Gobbo’s claimed recollection of these events offered further insights. She was admitted to the legal profession in April 1997.<sup>44</sup> As part of her application for admission, she was required to set out in an affidavit (a sworn or affirmed statement) any previous misconduct to be considered by the Board of Examiners. The affidavit Ms Gobbo swore on 4 February 1997 was misleading in some respects. For instance, she described Mr Wilson as a ‘friend’ who had offered to move into the Rathdowne Street property to assist her with the mortgage, when in fact they were then co-owners of the property and intimate partners.<sup>45</sup> She described being ‘embarrassed’ and ‘shocked’ at the illicit drugs being found during the execution of the first search warrant, when in fact she was clearly aware of them, even directing police to them.<sup>46</sup> She described using cannabis recreationally on two occasions, not mentioning her use of amphetamine.<sup>47</sup> Finally, she implied that she was guilty of possession and use of the drugs found at her home only by virtue of the ‘deeming provisions’ of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (that is, because she owned the house where they were found and because of the amounts found, the Act ‘deemed’ her responsible) rather than because she was personally in possession and control of the drugs, knew of their location, and had pleaded guilty to using and possessing them.<sup>48</sup> In her evidence and submissions to the Commission, Ms Gobbo accepted that her affidavit was misleading, but denied that she intended to mislead.<sup>49</sup> Her position is set out in more detail below.

The Commission made contact with Mr Wilson, who now lives outside Australia, but he ultimately declined to provide a statement or give an account of these events to the Commission.

## Ms Gobbo’s ongoing contact with state and federal police

Ms Gobbo’s relationship with Victoria Police continued after her admission to the legal profession. By November 1997, she was working with Law Firm 1 (a pseudonym). The firm acted for at least three of 10 people charged as a result of a Victoria Police Drug Squad investigation during this period, and Ms Gobbo acted for two of these people.<sup>50</sup>

Between December 1997 and July 1998, Ms Gobbo had a number of meetings with the informant (the police officer giving evidence in relation to these charges), Officer Kruger (a pseudonym).<sup>51</sup> At some point she told him that a partner of Law Firm 1, Solicitor 1 (a pseudonym), was engaging in fraudulent activity.<sup>52</sup> In July 1998, she met with Mr Kruger and then Detective Senior Constable Christopher Lim, another Drug Squad officer, to explain these allegations. Among other matters, she suggested police investigate Solicitor 1’s shareholdings and properties, and Law Firm 1’s trust account; gave details of alleged money laundering at Law Firm 1; and suggested Solicitor 1 was funding a client’s defence because that client was ‘important to him’.<sup>53</sup>

The Commission was told that Ms Gobbo had indicated that she was holding drugs for that client.<sup>54</sup> The Commission was also told that after the meeting, some held the view that it was not appropriate for Ms Gobbo to be used as a human source as she was assessed as being too ‘overt’ in her desire to provide information to police. It was noted that she was a solicitor, and someone who was known to have inappropriate relationships with police.<sup>55</sup>

During the same period, Ms Gobbo sought meetings with AFP agents. On 13 May 1998, she contacted the AFP in Melbourne asking about their ‘recruiting details’.<sup>56</sup> She had previously interacted with AFP agents through Operation Virus, an investigation into alleged tax evasion by Mr Horty Mokbel, for whom Law Firm 1 acted.<sup>57</sup> The next day, she met with two agents. Though the AFP advised the Commission that Ms Gobbo did not provide any substantial information at this meeting, she did allude to information that she *could* provide, and expressed concerns about

protecting her identity in official records.<sup>58</sup> The AFP agents considered Ms Gobbo to be untrustworthy and suspected that she was trying to elicit information from them.<sup>59</sup> As noted, 14 May 1998 is a significant date in calculating the number of cases potentially affected by Ms Gobbo's conduct as a human source: it is the first occasion the Commission has identified after her admission to legal practice when she offered to act as a human source.

On 30 June 1998, Ms Gobbo met with two other AFP agents whom she knew through Operation Phlange, an AFP investigation into Law Firm 1's alleged money laundering. The meeting came about because she approached the two agents, suggesting that she may have information of interest.<sup>60</sup> Another meeting appears to have taken place on 7 July 1998. On Ms Gobbo's evidence, several more meetings took place, though the AFP was able to confirm only the two meetings. These meetings seem to have related chiefly to Ms Gobbo's allegations against Solicitor 1.<sup>61</sup>

Eventually, Ms Gobbo's attempts to establish a relationship with police based on her information about Solicitor 1 appeared to succeed. On 13 May 1999, after meetings within the Victoria Police Asset Recovery Squad, then Victoria Police Detective Senior Constable Jeffrey (Jeff) Pope applied to register Ms Gobbo as a human source. On 26 May 1999, the application was approved.<sup>62</sup> Ms Gobbo continued to meet with police after this (her second) registration.<sup>63</sup> Ultimately, her allegations against Solicitor 1 did not result in any charges, and she was deregistered as a human source in 2000.<sup>64</sup>

## Emerging tendencies

Patterns of behaviour are discernible even at this early stage of Ms Gobbo's involvement with police. She was willing to inform to law enforcement authorities about those who trusted her: her personal partner, her employer and her clients. Her motivation was in part self-protective. It was clearly in her interests to assist police with their investigation into Mr Wilson so that she would be dealt with leniently; and if her belief in Solicitor 1's unlawful or unethical conduct is taken at face value, coming forward with information about this matter may have ensured she was not implicated in any charges.

Yet police officers from this period noticed that Ms Gobbo was not just willing to assist, but conspicuously eager to do so. Indeed, she appeared 'overt' and 'confident' in her disclosures. She did more than simply respond to police inquiries; she cultivated or engineered opportunities to meet with and communicate information to police. She seemed to relish her social contact with them. She sought to do more than neutrally communicate information, often enthusiastically and proactively suggesting areas and people to investigate.

Ms Gobbo appeared to display a flippant disregard for her professional responsibilities when gaining admission to legal practice in 1997, by downplaying her past offending. In her first years of practice, she provided information to police about her client, and made accusations against her employer (who as stated above was never charged). The provision of information to police about her client may have represented a breach of legal professional privilege, her duty of confidentiality and her duty to the court. Those duties, owed by a lawyer to their clients, are discussed more fully in Chapters 2, 4 and 5. Further, the information Ms Gobbo provided had the potential to be used in prosecuting her own client (occurred in some later instances, discussed below). Her covert relationship with police was also apt to weaken the position of her clients in the eyes of those police who knew of it.

In her evidence to the Commission, Ms Gobbo gave the following account, which, though it related to a later period, shed light on her earlier behaviour:

**COUNSEL ASSISTING:** *You wanted to be a part of it, you wanted to ingratiate yourself with these people, do you accept that?*

**MS GOBBO:** *Yeah, I—looking back I wanted to belong, I wanted to be the, the, um, the holder of every bit of information about every drug trafficker up and down the supply chain. Um, and*

*income wise those people were the worst people to, um, work for because they paid their QC[s] and everybody else was left waiting, but it was mostly my, um, pathetic as it sounds, my, um, inability to say no and my, um, my need to be, I guess to be wanted or to be valued or feel valued.*

*COUNSEL ASSISTING: Right. And you were prepared, those feelings were stronger than your obligations or what you regarded as your obligations, or understood your obligations to the courts and to the people you were representing [to be], those important legal obligations?*

*MS GOBBO: Well they were obviously compromised.<sup>65</sup>*

In a submission to the Commission, Ms Gobbo elaborated on this need to ‘feel valued’ and be ‘the holder of every bit of information’.<sup>66</sup> For example, she drew attention to the death of her father when she was young, which she felt made her long for the approval of older, especially male figures,<sup>67</sup> and to her ‘Type A’ personality,<sup>68</sup> which drove her to want to be the best human source she could be.<sup>69</sup>

Ms Gobbo contested some of the inferences that the Commission has drawn above. For example, she accepted in evidence before the Commission that her affidavit to the Board of Examiners when gaining admission to legal practice ‘wasn’t ... the full story’, and that in hindsight, it was misleading in some respects.<sup>70</sup> She maintained in submissions to the Commission, however, that she did not intend to mislead the Board of Examiners.<sup>71</sup> She pointed to the absence of evidence before the Commission about what she may have said to the Board of Examiners when she appeared before them as part of her application for admission<sup>72</sup> and to the fact that her focus was on making clear that she was no longer using drugs.<sup>73</sup> She claimed she was unable to recall the circumstances in which the affidavit was drafted, and did not personally draft it;<sup>74</sup> and that she was following the advice of her lawyer at the time in swearing to its contents.<sup>75</sup> She also said that she was unaware that she was registered as a human source in 1995 and 1999.<sup>76</sup>

The Commission accepts that Ms Gobbo may have been unaware of her registrations as a human source in 1995 and 1999, as other evidence to the Commission established that human sources during this period were not necessarily informed that they were registered. She was, however, aware of the substance of her relationship with police, and the potentially conflicting interests of her colleagues and clients. As to the affidavit, as every prospective lawyer knows, a person who swears or affirms an affidavit attests to the truth of its contents. In isolation, some of the discrepancies in the affidavit might be considered minor. Viewed collectively, in the context of Ms Gobbo’s behaviour during that time, the compelling inference is that the affidavit was deliberately misleading.

The Commission is not persuaded that Ms Gobbo’s upbringing and personality satisfactorily explain or excuse conduct that was intentional and persisted over a number of years. Whatever the motivations, her conduct, even at this early stage, was unethical and apt to undermine the administration of justice. As the case studies that follow demonstrate, these early tendencies—a proactive and energetic interest in informing against her clients and others; a corresponding disregard for her professional and ethical obligations and the interests of her clients; a willingness to deceive her clients, colleagues and others; the pursuit of ill-defined relationships with both police officers and those allegedly involved in criminal conduct—all played a very substantial role in Ms Gobbo’s potentially adverse effect on a large number of cases. That is so regardless of the traits or circumstances that might have engendered them.

Ms Gobbo could not inform on her clients without the assistance of the Victoria Police officers to whom she informed. During this period, they too displayed negative patterns of conduct that would continue in the future. There was an ambivalence: a vacillation between on the one hand, recognising the dangers of using Ms Gobbo as a human source (given that she was a young female lawyer exhibiting unusual behaviours), and on the other hand recognising the novelty of the situation and the potential value of what she offered. Not only was she ‘seeking a career as a solicitor’; her uncle, Sir James Gobbo, AC, CVO, QC, was a respected judge of the Supreme Court of Victoria from 1978 to 1994, and later served as Governor of Victoria. That connection was not lost on Victoria Police—for example, Mr Arthur recalled that, around the time of their meetings with Ms Gobbo in 1994 and 1995, Mr Ashton mentioned that Ms Gobbo’s ‘father’ was a judge.<sup>77</sup> It is reasonable to suppose that the notion that Ms Gobbo was connected to the legal establishment made her a unique and compelling contact for Victoria Police.

Although some state and federal police officers in this early period held concerns about using Ms Gobbo as a human source, this did not stop other Victoria Police officers from doing so at this stage or in the years that followed.

## 2002 TO 2009: MS GOBBO'S INVOLVEMENT WITH THE PURANA TASKFORCE AND BEYOND

In this section, the Commission outlines Ms Gobbo's conduct and her engagement with police from 2002 to 2009. It focuses on seven case studies that exemplify how cases may have been affected by Victoria Police's use of Ms Gobbo as a human source over this period:

- Mr McGrath (a pseudonym)
- Mr Thomas (a pseudonym)
- Mr Faruk Orman
- Mr Cooper (a pseudonym)
- Mr Zlate Cvetanovski
- Mr Antonios (Tony) Mokbel
- the 'Tomato Tins' drug-trafficking syndicate cases.

It is necessary to first set out some of the factual context for these case studies.

### Murders of Mr Jason Moran, Mr Pasquale Barbaro and Mr Michael Marshall

In 2003, Victoria Police established the Purana Taskforce as a response to the so-called 'gangland wars'—a sustained period of violence, including murders, associated with rival organised crime groups in Melbourne. Purana Taskforce's core function was to target and disable these criminal groups and their drug-trafficking activities.<sup>78</sup> As public concern about gangland violence grew, so did pressure on Victoria Police. The taskforce became a well-resourced and critically important aspect of Victoria Police operations.<sup>79</sup>

Mr Jason Moran and Mr Pasquale Barbaro were murdered on 21 June 2003 (Moran/Barbaro murders). Their murders—occurring as they did in public, and in the presence of children following an Auskick football clinic—galvanised public concerns about, and Victoria Police's resolve to deal with, the gangland wars.<sup>80</sup> Victoria Police alleged that Mr Moran and Mr Barbaro were murdered by Mr Andrews (a pseudonym) and Mr McGrath, who were recruited and directed by Mr Carl Williams, with the assistance of Mr Thomas.<sup>81</sup>

On 25 October 2003, Mr Michael Marshall was also murdered (Marshall murder). The police case was that Mr Williams had directed this murder too, and that it was carried out by Mr Andrews and Mr McGrath.<sup>82</sup> As it happened, police were conducting surveillance on Mr Andrews and Mr McGrath in relation to another investigation. The police listening device that had been installed in their car recorded the murder taking place. As a result, Mr Andrews and Mr McGrath were in custody by the end of the day, with an overwhelming police case against them.<sup>83</sup>

By this time, Ms Gobbo had developed professional as well as personal and social relationships with prominent organised crime figures in Melbourne, including members of the Williams and Mokbel families. Her handwritten diaries, which the Commission obtained, showed that she regularly socialised with the Mokbel family. For example, she attended birthday celebrations for Mr Tony Mokbel and Mr Horthy Mokbel,<sup>84</sup> and her diary recorded multiple occasions in January 2003 alone when she dined with Mr Tony Mokbel, Mr Horthy Mokbel and Mr Milad Mokbel.<sup>85</sup>

She also socialised regularly with members of the Williams family, having met Mr Williams through Mr Tony Mokbel.<sup>86</sup> She appeared for Mr Williams in 2003 and 2004, and for his father, Mr George Williams, in 2005.<sup>87</sup>

Through these connections, Ms Gobbo was uniquely familiar with the people alleged to have been involved in the Moran/Barbaro and Marshall murders. For instance, she met Mr Thomas, who became a key prosecution witness, through the Mokbel family in 2001<sup>88</sup> and first acted for him in a bail application the following year.<sup>89</sup> Characteristically, it appears that Ms Gobbo's relationship with Mr Thomas was also a social one. Her diary recorded a lunch together, and listed the birthdays of his family members.<sup>90</sup> In his statement to the Commission, Mr Thomas said that he would have dinner with Ms Gobbo once or twice a week.<sup>91</sup>

The Purana Taskforce hoped to persuade associates of criminal networks who were arrested and charged with serious offences to provide information or evidence about their activities or against their associates, in exchange for prosecution support for a reduced sentence.<sup>92</sup> Such a strategy carries inherent risks, not least of which is ensuring that the information or evidence obtained is reliable and can be used in criminal proceedings. Those risks were compounded when the Purana Taskforce subsequently used Ms Gobbo as a means to pursue this strategy.

## **Case study: Ms Gobbo's representation of Mr McGrath (a pseudonym)**

Victoria Police's case against Mr McGrath was that he participated in the Moran/Barbaro and Marshall murders at the behest of Mr Williams.<sup>93</sup> As to the Marshall murder, Victoria Police alleged that Mr McGrath drove Mr Andrews—who carried out the killing—to and from Mr Marshall's house.<sup>94</sup>

Soon after being taken into custody on 25 October 2003, and in light of the overwhelming evidence against him, Mr McGrath expressed to police his potential willingness to provide information about the murder.<sup>95</sup>

Ms Gobbo first represented Mr McGrath in November 2003, when police applied to question him in relation to the Moran/Barbaro murders.<sup>96</sup> He subsequently provided information implicating Mr Williams, Mr Andrews and others in the Moran/Barbaro and Marshall murders.<sup>97</sup>

Victoria Police wanted more and better information, which Mr McGrath was reluctant to provide unless he was protected from prosecution for the Marshall murder. Ms Gobbo directly assisted Victoria Police to secure Mr McGrath's ultimate cooperation. She met with him on numerous occasions to advise him of the police position. She kept Victoria Police informed of his evolving attitude towards assisting them and when he eventually agreed to make statements against his co-offenders, she helped to finalise them.

### **From stalemate to cooperation**

On 7 December 2003, Ms Gobbo informed Mr McGrath that Victoria Police had advised that they may offer him a 'deal' by way of a more lenient sentence if he gave information about others involved in his criminal activities.<sup>98</sup> At a committal hearing for Mr Andrews and Mr McGrath the following March, Ms Gobbo discussed Mr McGrath's continued police cooperation with then Detective Sergeant Stuart Bateson from the Purana Taskforce. Mr Bateson advised that Mr McGrath should compile a 'can say' statement for the prosecutors (an unsigned statement outlining evidence he would be able to give). Ms Gobbo assured Mr Bateson that she would discuss this with Mr McGrath.<sup>99</sup> At a meeting with prosecutors three days later, Mr Bateson reported that Ms Gobbo was speaking to Mr McGrath, who was considering his position.<sup>100</sup>

On 5 April 2004, Mr Bateson met with Mr McGrath and then spoke with Ms Gobbo about Mr McGrath providing a 'can say' statement. Her court book (legal notebook) recorded:

*Need details otherwise no use; needs to become a valuable witness; spoken to bosses who have spoken to [the DPP]; ... full disclosure re Marshall's murder and Jason [Moran]'s murder; no direct knowledge re any other murders.<sup>101</sup>*

The following day, Ms Gobbo conveyed Mr Bateson's position to Mr McGrath. They discussed the further information Mr McGrath could provide, and his reluctance to do so without an indemnity for the Marshall murder.<sup>102</sup> Ms Gobbo's diary also noted a further meeting on 20 May 2004, where Mr McGrath said that he had 'no choice' without a complete indemnity. The diary also notes what may have been her advice: 'need to make a decision to stop or move forward'.<sup>103</sup>

In June 2004, Mr Williams was arrested, charged and remanded in relation to alleged offending not involving the murders of Mr Marshall, Mr Barbaro and Mr Moran.<sup>104</sup> In evidence before the Commission, Mr Bateson said that this finally triggered Mr McGrath's cooperation with Victoria Police, as he felt safer with Mr Williams now in custody.<sup>105</sup> In any event, Mr McGrath ultimately decided to provide further assistance to Victoria Police and between 22 and 30 June 2004, gave numerous police statements about the Moran/Barbaro and Marshall murders, and the murder of Mr Mark Moran on 15 June 2000.<sup>106</sup>

## Finalising Mr McGrath's statements

Purana Taskforce still considered aspects of Mr McGrath's statements unsatisfactory. For example, Mr McGrath initially maintained in his instructions to Ms Gobbo and in early drafts of his statements that he only came to understand shortly before the Marshall murder that he and Mr Andrews were being sent to kill him and that he had believed they were collecting a debt. This was a significant point, since the police case was that Mr Williams had engaged Mr McGrath and Mr Andrews to carry out the killing. If that were so, Mr McGrath would have known why he was going to Mr Marshall's house.<sup>107</sup> For Mr McGrath to claim he did not know of the killing beforehand was also self-serving and tended to undermine his credibility.

Mr Bateson recalled in evidence before the Commission that Ms Gobbo had doubts about the truthfulness of this aspect of Mr McGrath's initial statements.<sup>108</sup> These doubts were made known to other police officers. For example, at a meeting of the Purana Taskforce on 12 July 2004, then Detective Superintendent Terry Purton recorded the following, with 'NG' clearly referring to Ms Gobbo: '[Statements] shown to Gobbo—1 thing to change—didn't know it's going to be a murder—NG that's ridiculous'.<sup>109</sup> Following a meeting between Mr McGrath and Mr Bateson on 11 July 2004, Ms Gobbo contacted Mr Bateson, whose day book (police notebook) records the phrase: 'will be truthful';<sup>110</sup> Mr Bateson was apparently going to write 'more forthcoming' but changed his mind.<sup>111</sup>

In his evidence to the Commission, Mr Bateson accepted Counsel Assisting's suggestion that the note referred to Ms Gobbo 'saying ... that she's spoken to [Mr McGrath] and, if you come and see him now he'll be more truthful'.<sup>112</sup> Having been advised of Mr McGrath's preparedness to be more truthful, Victoria Police subsequently met with him to revise his statements.<sup>113</sup> In a submission, Mr Bateson said this was not unusual; that it is common for defence lawyers to advise their clients, who have become prosecution witnesses, to be honest in their witness statements so that they receive the largest possible sentencing discount.<sup>114</sup>

Ms Gobbo had even more direct involvement in finalising Mr McGrath's statements. Police officers took statements from Mr McGrath in late June 2004 and returned to him in July 2004 with written drafts.<sup>115</sup> He indicated that he would not sign them unless they had been reviewed by Ms Gobbo.<sup>116</sup> Then Detective Senior Constable Mark Hatt visited Ms Gobbo in her chambers on 10 July 2004 with copies of Mr McGrath's statements.<sup>117</sup> She suggested

various revisions and contacted Mr Bateson and another officer expressing doubts about Mr McGrath's account of his prior knowledge of the Marshall murder. She then reviewed and approved Mr McGrath's statements on 12 July 2004.<sup>118</sup>

Ultimately, Mr McGrath signed finalised versions of the statements on 13 July 2004.<sup>119</sup> Notably, his statement about the Marshall murder indicated for the first time that he knew beforehand that he was going to Mr Marshall's home to kill him, consistent with the police handlers case that Mr Williams was the instigator of the murders.

## The significance of Mr McGrath's cooperation and Ms Gobbo's role

Mr McGrath's statements were significant, as he was the first witness targeted by the Purana Taskforce to provide evidence against a major gangland figure. Mr McGrath's evidence was valuable to investigating and prosecuting others involved in the Moran/Barbaro and Marshall murders, some of whom were also represented by Ms Gobbo at the very time she was assisting her client Mr McGrath, and Victoria Police, in finalising his statements against them.<sup>120</sup> This is discussed further below.

Ms Gobbo would later describe Mr McGrath as the 'crack in the [dam] ... wall of silence that led to a flood'.<sup>121</sup> As events transpired, her characterisation appeared largely accurate and certainly indicated her understanding of the significance of her conduct in encouraging him to 'roll'—that is, to give evidence against his criminal associates in exchange for a reduced sentence. So too do transcripts of her conversations with her handlers in 2005, when she was again registered as a human source. Recalling her role in the preparation of Mr McGrath's statements, she told one of her police handlers, Officer Sandy White (a pseudonym):

*And, God, that was a horrendous time 'cause Carl [Williams] and George [Williams] were on my back with Tony [Mokbel] saying, you know, 'Make sure [Mr McGrath] doesn't roll, make sure he doesn't roll.' And of course, as history shows, I did exactly the opposite which is why I have so much to fear about that all being found out 'cause if police diary notes actually get revealed ... one of the things it will show is that they came to my office—and I saw the statements before they got signed—I altered the statements ...*<sup>122</sup>

In evidence before the Commission, some Victoria Police officers challenged the notion that Ms Gobbo played a crucial role in persuading Mr McGrath to cooperate. Mr Hatt considered that Mr McGrath was always willing to cooperate, as 'the evidence against him was overwhelming at that stage'.<sup>123</sup> Mr Bateson likewise considered that the evidence against Mr McGrath and the circumstances of his arrest made it inevitable that he would roll.<sup>124</sup> He also considered the arrest of Mr Williams to be a decisive factor in Mr McGrath's decision to cooperate.<sup>125</sup>

Various submissions to the Commission also challenged the notion that Ms Gobbo's role in working with Victoria Police to finalise Mr McGrath's statements was improper. For example, Mr Bateson contended that Ms Gobbo simply did what any lawyer would have done: identified the issues in the statements; advised Mr McGrath to be honest; and took instructions. He denied that Ms Gobbo marked up the documents or directed police to make changes.<sup>126</sup> More broadly, it was suggested that it was commonplace for lawyers in Ms Gobbo's position to speak frankly with police about their clients, including as to any doubts they had regarding their client's version of events. Further, it was suggested that it was in Mr McGrath's interests that his statements be made more plausible, to ensure that he could negotiate the best possible plea deal with police.<sup>127</sup>

It suffices to say that Ms Gobbo's conduct seemed in large part motivated by her desire to work with police. It was not unequivocally geared towards advancing Mr McGrath's interests by providing independent legal advice. She made revisions to Mr McGrath's evidence, in the presence of police, without taking instructions from Mr McGrath. If such behaviour was commonplace among lawyers at that time, it should not have been.

The real vice, however, is that her role was concealed. For example, Mr McGrath had maintained, consistently and until the day before signing his statements, that he did not know ahead of the killing that he was going to Mr Marshall's home to kill him rather than to collect a drug debt.<sup>128</sup> Advised by Ms Gobbo, he then changed his account which strengthened the police case. The changes, wrought at Ms Gobbo's behest to improve his credibility and better his prospects of a more lenient sentence, were potentially relevant to Mr McGrath's truthfulness and reliability as a witness.

Had Ms Gobbo's full role in working with Mr McGrath to finalise his statements been disclosed to those people he incriminated, this may have significantly and favourably changed their legal position. In going on to act for those incriminated by Mr McGrath, the fact that Ms Gobbo's role in assisting Mr McGrath was concealed, including from Mr Thomas, meant that she was hopelessly conflicted and unable to give and be seen to give them independent legal advice.

## Case study: Ms Gobbo's representation of Mr Thomas (a pseudonym)

The Victoria Police case against Mr Thomas was that he was involved in the Moran/Barbaro murders, including by providing weapons, information and an alibi for Mr Williams.<sup>129</sup> It relied substantially on Mr McGrath's evidence.<sup>130</sup> Mr Thomas, like Mr McGrath, ultimately agreed to cooperate with police, providing information about and evidence against his criminal associates.<sup>131</sup>

Ms Gobbo acted for and advised Mr Thomas at various times between 2002<sup>132</sup> and 2008,<sup>133</sup> including in bail and pre-trial proceedings in connection with the Moran/Barbaro murders.<sup>134</sup> She accompanied him as his lawyer to meetings and negotiations with Victoria Police about what he might tell them and what he might receive in exchange. She also provided him with legal advice during periods where other lawyers were acting for him in court proceedings.<sup>135</sup> She regularly met and spoke with him over this time, sometimes as a lawyer and sometimes socially.<sup>136</sup> Mr Thomas stated in evidence to the Commission that he 'trusted Gobbo completely'.<sup>137</sup>

### Problems at the outset

Once Ms Gobbo had worked with Mr McGrath to provide statements incriminating his alleged co-offenders, including Mr Thomas, her continued legal representation of Mr Thomas became deeply problematic.<sup>138</sup> It should have been clear to Ms Gobbo that Mr McGrath's and Mr Thomas' interests were so incompatible that her representation of them both generated a serious conflict of interest. That alone should have prevented her from acting for Mr Thomas after he was charged with the Moran/Barbaro murders.

On 28 July 2004, just over two weeks after Mr McGrath's statements were finalised, and prompted by the content of these statements, Victoria Police approached Mr Thomas to encourage him to cooperate.<sup>139</sup> On 16 August 2004, police arrested him and charged him with the Moran/Barbaro murders, relying on Mr McGrath's statements.<sup>140</sup> After his arrest, Mr Thomas asked to speak with Ms Gobbo. Police facilitated his request. Ms Gobbo acted as his lawyer after his first police interview and subsequently.<sup>141</sup>

Given that she was involved in the making of Mr McGrath's statements, it was unethical for Ms Gobbo to then act for Mr Thomas. But that did not stop her from consistently downplaying the magnitude of her conflict of interest.

In 2017, in her evidence to the Supreme Court proceedings in *AB & EF v CD*, Ms Gobbo said that she 'wasn't part of [Mr McGrath's] statement-making process' and 'didn't know what the content of his statements was'.<sup>142</sup> Asked about this before the Commission, Ms Gobbo maintained that she 'didn't make the statements with' Mr McGrath and 'hadn't read them before he signed them'.<sup>143</sup>

It is true, as various Victoria Police officers and Ms Gobbo submitted, that there is no evidence from Mr McGrath or Mr Thomas as to whether either or both of them consented to her acting for the other.<sup>144</sup> It is possible that once Mr McGrath gave his statements to Victoria Police, he did not care whether she then acted for Mr Thomas. It is also possible that Mr Thomas wanted to know what Mr McGrath was up to and was therefore happy for Ms Gobbo to act for them both to achieve that end. Even accepting these possibilities—and the fact, emphasised by Mr Bateson<sup>145</sup> and Ms Gobbo,<sup>146</sup> that at this time many Victorian criminal lawyers, including senior barristers, may have had ‘rubbery’ views as to conflicts of interest when it came to high fee-paying clients—Ms Gobbo was walking an ethical tightrope.

Ms Gobbo was involved in the making of Mr McGrath’s statements and must have understood their importance to Victoria Police’s case against Mr Thomas. She had numerous discussions with both police and Mr McGrath about the information he would include in his statements. She said she made corrections and comments on draft versions and facilitated amendments to increase the forensic value of the statements to police. The DPP commenced proceedings against Mr Thomas by a process called ‘direct presentment’. The effect of that process was to deprive him and his co-accused of the ordinary step of a committal hearing in the Magistrates’ Court. Ms Gobbo successfully acted for him to ensure that a committal hearing did take place. Doing so required her to understand the evidence against Mr Thomas, including that of Mr McGrath.<sup>147</sup>

As an experienced criminal lawyer, Ms Gobbo must have been aware of the conflict inherent in her representation of both Mr Thomas and Mr McGrath. If further support for that conclusion is needed, in conversations with the Victoria Police Source Development Unit (SDU) in September 2005, she spoke about her direct role in editing Mr McGrath’s statements and her fear that this information may become public.<sup>148</sup> She repeated this in meetings with the SDU in April 2006<sup>149</sup> and May 2007,<sup>150</sup> with then Detective Senior Sergeant Shane O’Connell in February 2009,<sup>151</sup> and with then Detective Senior Sergeant Boris Buick in September 2011.<sup>152</sup> She also emphasised the significance of her role in persuading Mr McGrath to roll when later seeking a reward from Victoria Police for her work as a human source.<sup>153</sup>

Ms Gobbo’s attempts to downplay this conflict, including before this Commission, by contending that she at all times acted in the best interests of both clients,<sup>154</sup> are unpersuasive. She knew that Mr McGrath implicated Mr Thomas in his statements, which she helped to create. Even if they had both consented to her acting for them as Mr Bateson and Victoria Police suggest, it is unlikely that Mr Thomas did so in full knowledge of her clandestine role in assisting with Mr McGrath’s statements. In any case, as discussed below, she failed in her duty as an officer of the court to ensure the court and other defence counsel were informed of her active role in working with Mr McGrath to improve his evidence.

## **The impacts of Ms Gobbo’s conflicting interests**

Ms Gobbo’s conflicted position worsened as Mr Thomas’ case progressed. From 17 to 27 September 2004, she appeared for him at hearings in the Supreme Court arising from applications for disclosure.<sup>155</sup> Mr Peter Faris, QC represented Mr Thomas’ co-accused, Mr Williams (who had by this time been charged in relation to the Moran/Barbaro murders).<sup>156</sup> Mr Faris questioned Mr Bateson to establish if there were earlier drafts of Mr McGrath’s statements or other documents relating to his decision to cooperate with police. Mr Bateson denied that there were any.<sup>157</sup> Ms Gobbo, knowing the true position, did not cross-examine Mr Bateson.<sup>158</sup>

Ms Gobbo’s self-serving decision not to cross-examine Mr Bateson at the disclosure hearings was no doubt unsurprising to Mr Bateson or to others who now know her duplicitous character. It demonstrated that her ability to represent Mr Thomas’ interests was irreparably compromised, given her earlier representation of Mr McGrath. Her cooperation with Mr Bateson, in ensuring Mr Faris did not get the information he was seeking and to which he was entitled, had an adverse impact—not just on the defences of Mr Thomas and Mr Williams, but also on the capacity of Mr Faris and the Court to perform their functions in the administration of justice.

Mr Colin Lovitt, QC, not Ms Gobbo, appeared for Mr Thomas at his subsequent committal hearing, although he retained Ms Gobbo to write a detailed memorandum to assist Mr Lovitt.<sup>159</sup> She stated in that memorandum that it was inappropriate for her to appear at the committal proceeding because she had previously acted for Mr McGrath but she would continue to maintain a brief (act for Mr Thomas).<sup>160</sup> She did not disclose, however, that she had secured Mr McGrath's cooperation and worked with him to change his account to make it more plausible. Even if she felt she could not disclose these details in her capacity as a lawyer, she should have immediately ceased acting for Mr Thomas. Further, Mr Lovitt was equipped only with the limited and redacted notes provided by Victoria Police at the disclosure hearings, which did not refer to Ms Gobbo's role in the development of Mr McGrath's statements to bolster the police case.<sup>161</sup>

Just as she was conflicted from appearing for Mr Thomas at his committal, she was equally conflicted from giving him (through Mr Lovitt) legal advice about the committal. Her failure to fully disclose in that advice key information helpful to Mr Thomas' defence clearly shows that she did not give him the independent informed advice he should have received. As a result, Mr Lovitt cross-examined Mr McGrath on behalf of Mr Thomas over five days, but without knowing this critical information.<sup>162</sup>

When asked at the committal whether there were any drafts of Mr McGrath's statements prior to the one he signed on 13 July 2004, Mr Bateson responded, 'The only draft is, or the only difference that we have recorded is the addresses that we have deleted out of the statements.'<sup>163</sup>

Mr Bateson's conduct in relation to these events is the subject of further discussion in Chapter 8. It was not for Victoria Police officers to unilaterally decide, on the basis of safety or other concerns, whether, and to what extent, they should comply with obligations to disclose relevant documents or truthfully and fully answer questions in court.

As Counsel Assisting submitted, this episode was the foundation stone for future cover-ups—not just of Ms Gobbo's identity but of what she did while ostensibly acting as a lawyer.<sup>164</sup> For her part, Ms Gobbo ought to have understood her obligations as a barrister to avoid conflicts of interest.

In submissions to the Commission, Ms Gobbo contended that, at least at that time, there was a culture of disregarding, or taking a relaxed approach to such obligations,<sup>165</sup> and that others, including Mr Lovitt, were aware of her conflict and did not intervene.<sup>166</sup> Even if Ms Gobbo's conduct was endorsed or tolerated, or was symptomatic of wider practices at the time, that does not excuse it. Ms Gobbo was responsible for maintaining ethical and professional standards in her own practice. She should have known that the appropriate response to a conflict of this magnitude was to cease acting for Mr Thomas—not simply to cease appearing for him in court. Further, even if Mr Lovitt knew or suspected that Ms Gobbo was conflicted in representing Mr Thomas, there is no evidence to suggest that he understood the extent of her involvement in drafting Mr McGrath's statements, let alone the extent of her relationship with Victoria Police.

## The Source Development Unit

Ms Gobbo's activities may have taken a heavy toll on her, as on 24 July 2004, aged only 31, she suffered a stroke.<sup>167</sup> While hospitalised, she contacted Mr Bateson and advised him of her condition.<sup>168</sup> Mr White, who was then with the Major Drug Investigation Division (MDID) but was preparing to lead the pilot of the new SDU scheduled to commence in November 2004, gave evidence to the Commission that it was around this time that he first considered recruiting Ms Gobbo as a human source.<sup>169</sup>

Previously, most human sources were recruited after they had committed criminal offences and were facing a prison sentence; police then persuaded them to cooperate by appealing to their self-interest in a reduced sentence. The SDU, however, was keen to recruit a different type of human source. Mr White considered that Ms Gobbo,

a criminal lawyer who socialised with her clients and police, could meet the SDU's needs to combat the gangland wars. He also thought that her stroke might make her vulnerable and more susceptible to recruitment.<sup>170</sup> In August 2004, the MDID created a profile on Ms Gobbo.<sup>171</sup>

Meanwhile, Ms Gobbo's relationship with Mr Bateson became closer. On 23 March 2005, she phoned to thank him for ensuring that her name was not mentioned during Mr Thomas' committal hearing.<sup>172</sup> On 19 May 2005, she told Mr Bateson that she had information of interest. They met on 23 May 2005, the first occasion on which she provided him with information of a kind expected from a human source. It concerned Mr Carl Williams, Mr George Williams, Mr Tony Mokbel and Mr Mokbel's solicitor, Solicitor 2 (a pseudonym).<sup>173</sup> It was the first of several such meetings between June and August 2005.<sup>174</sup>

### **Ms Gobbo's third registration as a human source**

On 16 September 2005, Ms Gobbo met with the newly formed SDU for the first time. She spoke about her role in cementing Mr McGrath's cooperation with police and her fear that others, including Mr Carl Williams and Mr Tony Mokbel, would become aware of it.<sup>175</sup> Ms Gobbo stated that she had been in discussions with Mr Bateson and told him that she had 'made the decision about 12 months ago to assist police'.<sup>176</sup> That comment was consistent with her behaviour in the years and months leading up to September 2005.

The process to register Ms Gobbo as a human source for the third time began after the meeting in September 2005. It did not mark a sudden change in her relationship with Victoria Police. Rather, it was the culmination of relationships with police officers that had been developing for some time, and of a pattern of conduct that stretched back to her law student years. On occasions before her third registration, she had certainly in substance acted as a human source. For that reason, the Commission rejects the contention advanced by Victoria Police and some of its officers in their responsive submissions—that Ms Gobbo's conduct before her third period of registration as a human source, including in relation to Mr McGrath and Mr Thomas, is of no relevance to the Commission's inquiry.<sup>177</sup>

Almost immediately upon her registration, Ms Gobbo began providing her SDU handlers with information about Mr Thomas and others, including information of a potentially privileged and confidential nature.<sup>178</sup> Over the next nine months, while a registered human source for Victoria Police, she encouraged Mr Thomas, purportedly as his lawyer, to plead guilty and to agree to provide intelligence to police in exchange for a reduced sentence on less serious charges.

### **Ms Gobbo acts as a 'go-between' and an advocate for the Purana Taskforce**

In February 2006, after Ms Gobbo told her SDU handlers and Purana Taskforce officer Mr Bateson that Mr Thomas may be willing to plead guilty and give evidence against his co-accused, she organised a meeting with him, Mr Bateson, Mr Hatt and her instructing solicitor, Mr Jim Valos.<sup>179</sup> At the meeting, she told Mr Bateson that Mr Thomas would be willing to talk to police in relation to the Moran/Barbaro murders and several other matters of interest to the Purana Taskforce.<sup>180</sup>

From February 2006, Mr Thomas and Purana Taskforce officers had several meetings. At the first on 22 February 2006, Mr Thomas indicated that he was 'fucked up' and did not 'want to do gaol'.<sup>181</sup> Then Detective Inspector James (Jim) O'Brien said that if his information proved truthful, police could 'put the best case we've got to the OPP', who would in turn propose a plea agreement. He could then decide whether to cooperate, including by making statements. Mr Bateson added that he would be expected to cooperate to the fullest extent: 'You're fully in or, we're not interested in half way'.<sup>182</sup>

Further discussions between the Purana Taskforce and Mr Thomas ensued. He was at first extremely hesitant, not least because he feared reprisals against himself and others. Ms Gobbo played an important role in easing his initial reluctance. She kept her handlers informed of his mental state and attitude to assisting them. For example, after the first Purana Taskforce meeting with him, Ms Gobbo told her handler that Mr Thomas needed a push to 'roll over and assist police',<sup>183</sup> that he had asked her to tell Mr Carl Williams that he was going to 'roll over'; and that he had an agreement with Mr Williams that, in certain circumstances, he was allowed to do so.<sup>184</sup> She advised her handlers that a 'heavy handed approach to [Thomas] would not work well',<sup>185</sup> and that he was 'feeling depressed'.<sup>186</sup> On 19 March 2006, Ms Gobbo informed them of her conference with Mr Thomas in custody the previous day, in which he said that he was '99' per cent 'likely to make a statement to assist' the Purana Taskforce.<sup>187</sup> Mr Thomas would have expected his lawyer to be providing confidential advice about his legal options.

Despite Ms Gobbo's evidence that her conduct was nothing more than what would be expected from a lawyer negotiating a plea agreement,<sup>188</sup> she was clearly representing the interests of the Purana Taskforce rather than providing independent advice in her discussions with Mr Thomas. For example, on 8 March 2006, she told her handlers that she had given him legal advice to the effect that 'just giving up Carl Williams will not be enough', and that he would need to tell the Purana Taskforce 'everything'.<sup>189</sup> For his part, Mr Thomas gave evidence to the Commission that Ms Gobbo, over about two weeks during this period, convinced him to assist police; he said that he was 'getting nagged by' her and that she was telling him that there was 'no way out of it'—that he had to 'make a statement and do a deal'.<sup>190</sup>

At a meeting between Mr Bateson, Mr O'Brien and Mr Thomas on 23 March 2006, Mr Thomas provided information about the Moran/Barbaro and Marshall murders,<sup>191</sup> the involvement of the Mokbels, Mr Carl Williams, Mr Cooper and others in the manufacture and trafficking of illicit drugs;<sup>192</sup> the involvement of former police officer Mr Paul Dale with Mr Williams;<sup>193</sup> and other shootings and homicides.<sup>194</sup> Mr Thomas confirmed that 'Nicola's the one who convinced' him to cooperate.<sup>195</sup>

The Purana Taskforce recognised Ms Gobbo's value in securing its objectives. On 19 April 2006, Mr Bateson and Mr O'Brien met with then Detective Inspector Gavan Ryan. Mr Bateson's notes record the substance of that meeting: 'Resolved—Nil further approach from us at this stage. Supply transcripts to 3838 with edits and have her approach [Mr Thomas]'.<sup>196</sup>

The Purana Taskforce was now conducting its negotiations with Mr Thomas through Ms Gobbo, who would be given the transcripts of their meetings with Mr Thomas.<sup>197</sup> Again, as some of the responsive submissions point out, this in itself was not necessarily improper or even unusual in police dealings between an accused person and their lawyer.<sup>198</sup> Negotiations like these between police and a lawyer acting for an accused person often result in an outcome that is in the best interests of the accused person. But that outcome cannot be achieved when the lawyer is covertly working as an agent of police rather than solely in the interests of their client. The conduct of current and former police officers in these events is explored more fully in Chapter 8.

## Police recognition of Ms Gobbo's conflict of interest

There was some concern within the Purana Taskforce and the SDU about using Ms Gobbo in negotiations with Mr Thomas. For instance, in February 2006, Ms Gobbo's SDU handlers told her to minimise contact with him, apparently recognising the risks in view of her previous involvement with Mr McGrath and her ongoing associations with Mr Williams, the Mokbels and others affected by Mr Thomas' potential cooperation.<sup>199</sup> They may have also recognised the broader ethical concerns raised by her representation of multiple parties with conflicting interests. If they did not, they should have.

Even Mr Bateson, in discussions with Mr Thomas, appears to have expressed some concern about Ms Gobbo. In evidence before the Commission, Mr Bateson placed some reliance on a conversation with Mr Thomas in which he suggested Mr Thomas may be 'better off with independent legal representation' and that Ms Gobbo and her

instructing solicitor were ‘involved with a lot of other people’.<sup>200</sup> Mr Bateson claimed he said this ‘because Ms Gobbo was acting for a lot of people in or related to [Carl] Williams’ criminal enterprise’ and was ‘registered as a human source’. He noted, ‘I thought it better for [Mr Thomas] to have a barrister who had no such involvement’.<sup>201</sup>

That was undoubtedly true but a gross understatement and too little far too late. It is risible to suggest that the Purana Taskforce could extricate itself from its role in this extraordinary ethical impasse by hinting to Mr Thomas that Ms Gobbo was ‘involved with a lot of other people’.

In any case, Mr Bateson subsequently vouched for Ms Gobbo’s honesty. In a meeting with Mr Bateson on 23 March 2006, Mr Thomas said his ‘gut feeling’ was that Ms Gobbo would ‘rather help’ police rather ‘than help what’s going on out there’.<sup>202</sup> Mr Bateson’s response was to say he thought Ms Gobbo was an ‘honest’ barrister.<sup>203</sup> In June 2006, Mr Bateson again assured Mr Thomas he could trust Ms Gobbo and that she was honest.<sup>204</sup> Mr Bateson’s conduct and responsive submission are discussed further in Chapter 8.

As planned, the Purana Taskforce provided the SDU with the 23 March 2006 transcript of their conversation with Mr Thomas, which was in turn shown to Ms Gobbo. She met with Mr White and her SDU handlers, Officer Green (a pseudonym) and Officer Peter Smith (a pseudonym) and read aloud from the transcript. They laughed about Mr Thomas’ ‘gut feeling’ that she would rather help the police.<sup>205</sup> Later in this meeting when discussing circumstances surrounding Mr Thomas, Mr Cooper (discussed in detail below) and others, Ms Gobbo notoriously announced, ‘The general ethics of all of this is fucked.’<sup>206</sup>

The conduct of Victoria Police is the focus of Chapter 8, but in analysing the effect of Ms Gobbo’s conduct on Mr Thomas’ case, it is clear that whatever ethical misgivings some individual police officers held were overcome by the perceived benefits of using Ms Gobbo to obtain valuable intelligence for the Purana Taskforce to break the criminal syndicates behind the gangland wars.

Victoria Police had identified the ethical dilemma but closed their eyes to it and subsequently facilitated and encouraged it. As Mr White said to Ms Gobbo at the meeting on 20 April 2006: ‘... if anybody can get [Mr Thomas] to tell the truth it will be you. Now, is that in his own interests? We don’t know enough about it. You would know a lot more about that’.<sup>207</sup>

This ambivalence on the part of some individual officers involved with Ms Gobbo continued over the years: sometimes recognising the practical, ethical and safety hazards of using her as a human source, sometimes paying lip service to them, but ultimately disregarding them to continue to use her as a human source where this suited Victoria Police’s objectives.

### **Ms Gobbo’s role in relation to Mr Thomas: familiar patterns, repeated and amplified**

Despite Mr Thomas’ initial willingness to assist, negotiations with Purana reached a stalemate and police needed Ms Gobbo’s assistance to get him ‘over the line’.<sup>208</sup> On 5 May 2006, she told her handler that she thought that if Mr Thomas was aware of Mr Cooper’s decision in April 2006 to cooperate with police—the circumstances of which are set out below—then Mr Thomas would do likewise.<sup>209</sup> Mr Thomas did subsequently learn that Mr Cooper had rolled<sup>210</sup> and by the end of June 2006, Mr Thomas had resolved to plead guilty and provide statements to the Purana Taskforce,<sup>211</sup> which Mr Bateson prepared over the following month.<sup>212</sup>

As with Mr McGrath, Ms Gobbo played a significant role in finalising Mr Thomas’ statements, with several of the troubling hallmarks in Mr McGrath’s case repeated and amplified. For example, on 9 and 10 July 2006, she suggested to her handler matters that officers should raise when interviewing Mr Thomas. Informer Contact Reports (ICRs) prepared by SDU officers at this time record her suggestion that Mr Bateson should ‘bring up the subject of money’, because Mr Thomas ‘will know about money and be able to explain the finances of Carl Williams if [interviewing] members mention appropriately’. One of Mr Thomas’ subsequent statements indeed concerned assets related to unlawful activities.<sup>213</sup>

Again, as with Mr McGrath, investigators were initially concerned that Mr Thomas was not being entirely truthful about some homicides and Mr Bateson arranged for Ms Gobbo to meet with him.<sup>214</sup> Following a conference on 13 July 2006, Ms Gobbo reported that Mr Thomas was 'up to 80' per cent truth but had been dishonest about one murder.<sup>215</sup> By 15 July 2006, she had reported to her handlers that the Purana Taskforce was now content with his cooperation.<sup>216</sup>

In addition, Ms Gobbo played an active role in reviewing Mr Thomas' draft statements; and again, the nature and extent of her involvement was concealed from her client. She reviewed hard copies of his statements and hand marked proposed edits.<sup>217</sup> It is not possible to ascertain the impact of those edits on the final statements, because Victoria Police was unable to produce either the previous drafts or her hard-copy revisions. There are indications that the revisions were substantive: her handler, Mr Smith, was told in a meeting with then Detective Sergeant Dale Flynn that she had 'supplied a lot of details re Thomas' statements'.<sup>218</sup> In a 2008 SDU meeting with Mr White, Mr Green and another officer, she said:

*I edited it. I went to Purana secretly one night and edited all his statements. I corrected them. But no-one ever knows about that. That would never come out. Even Thomas doesn't know I did that.*<sup>219</sup>

In contrast, Mr Bateson claimed that the only edits she made to Mr Thomas' statements were to grammar.<sup>220</sup> Ms Gobbo's boasting admission, recorded by her handlers relatively contemporaneously, seems more probable.<sup>221</sup>

In exchange for Mr Thomas' cooperation, prosecutors brought only one charge against him, the murder of Mr Jason Moran, and agreed to submit to the court that he should receive a discounted sentence. Prosecutors accepted that Mr Barbaro was an 'unintended victim' of the 'hit' on Mr Moran.<sup>222</sup>

In sentencing Mr Thomas on 27 September 2006, the Supreme Court took into account his cooperation with police, noting that he had then made some 14 statements, which were 'undoubtedly important and highly relevant... [and] wide ranging'; and that he had provided, and agreed to continue providing, 'extensive, important and effective cooperation relating to the highest level of violent drug-related and organised crime'.<sup>223</sup> The Court also noted that Mr Bateson characterised Mr Thomas' evidence as 'exceedingly valuable', 'extensive and comprehensive', that it 'related to numerous organised crime figures', 'revealed high scale organised crime, violence and drug dealing', and was 'of extreme importance to Victoria Police'.<sup>224</sup> The Court did not know of Ms Gobbo's egregious conduct in purporting to act for Mr Thomas while a registered human source.

There are of course many instances where accused persons, on the sound advice of their independent lawyers, choose to cooperate with the authorities, usually to better their position on sentence. Sometimes they are also remorseful and wish to reform. Such cooperation often endangers the safety of those cooperating and of people close to them, as the criminals they implicate could seek revenge and attempt to deter others from assisting police. Cooperation of this kind is of great assistance to police, the criminal justice system and the wider community. The courts actively encourage this course, taking both the cooperation itself and the resulting safety risks into account as a significant moderating factor when sentencing. It is completely orthodox, indeed often essential, for the lawyers of accused persons to advise and encourage them to cooperate with the authorities where this is in their best interests and to explore such options for the client with investigating police officers and the prosecution.

Ms Gobbo's conduct, however, went very far outside the appropriate role of an independent lawyer acting in her client's best interests. She deliberately disclosed to Purana Taskforce investigators potentially confidential and privileged information concerning Mr Thomas, his personal circumstances and his case. Her conflicted position as both human source and Mr Thomas' lawyer meant that it was impossible for her to give him independent legal advice in his best interests as she was also actively advancing the agenda of the Purana Taskforce. Her position was further conflicted by her also acting for Mr McGrath, a key witness against Mr Thomas, and her concealment from Mr Thomas of the nature and extent of her involvement in finalising Mr McGrath's evidence. Had Mr Thomas and

his other lawyers known these matters, he would have received independent, informed legal advice and may have made different decisions as to his guilty plea and his cooperation with the Purana Taskforce.

### **Some effects of Ms Gobbo's conduct on her wider obligations**

Ms Gobbo's conduct in respect of Mr Thomas was not limited to the potential violation of her obligations to him. In concealing her conflicted position, her relationship with Victoria Police, and materials that ought to have been disclosed to the courts, she potentially violated her obligations to the other legal practitioners involved and to the administration of justice.

Despite her many and varied conflicts, Ms Gobbo attempted to act for Mr Thomas at his sentencing hearing for the murder of Mr Jason Moran. The trial of his co-accused, Mr Williams, was to commence in August 2006 before Justice King. Ms Gobbo had previously acted for Mr Williams, including in relation to the Moran/Barbaro and Marshall murders and Mr Williams vigorously objected to Ms Gobbo appearing for Mr Thomas. He formally but unsuccessfully complained to Justice King and to the Victorian Legal Services Board and Commissioner (VLSB+C), which referred the complaint to the Victorian Bar Ethics Committee to investigate.<sup>225</sup>

Mr Faris, on behalf of Mr Williams, told Ms Gobbo that he would seek an injunction to restrain her from acting for Mr Thomas.<sup>226</sup> Only then did she withdraw from representing Mr Thomas at his sentencing hearing. Instead of taking this opportunity to extricate herself from a damningly conflicted position, she continued to act for him, informing her handlers and Mr Bateson that, although not appearing in court, she would continue to assist and advise him in preparing his plea.<sup>227</sup>

Her duplicity continued when she provided a memorandum to Mr Thomas' new barrister, Mr Duncan Allen, QC, on 12 August 2006. She misleadingly informed Mr Allen that Mr Williams' complaint arose from the fact that she had appeared as junior counsel (that is, accompanied by a more senior barrister) for Mr Williams and his father in a drug-trafficking committal hearing two years earlier.<sup>228</sup> She stressed that she had been cleared of any conflict of interest by the Victorian Bar Ethics Committee but given Mr Faris' position, she said that she had decided it was in Mr Thomas' best interests that she not appear at his sentencing hearing.<sup>229</sup>

Another matter in the memorandum to Mr Allen raises concerns. During the final stages of negotiations with police in April 2006, Mr Thomas asked Ms Gobbo to contact Mr Lovitt, who had acted for him at his committal hearing. Mr Thomas wanted to know Mr Lovitt's view of his prospects of success.<sup>230</sup>

In her memorandum to Mr Allen, Ms Gobbo stated that Mr Lovitt had:

*... made it clear to [Mr Thomas] he thought he would have real problems at trial, not because [Mr Andrews] was a witness of amazing credibility, nor because he could say that much about [Mr Thomas], but due to the prejudice and risk of standing trial jointly with Carl Williams.<sup>231</sup>*

Mr Lovitt told the Commission that, even following the committal hearing, he considered Mr Thomas to have a reasonable chance of being acquitted (found not guilty) at trial.<sup>232</sup> He said he had never contemplated advising Mr Thomas to consider pleading guilty to murder or negotiating a plea deal.<sup>233</sup> At no stage, however, was Mr Lovitt asked for his opinion about the strength of the case against Mr Thomas.<sup>234</sup> He heard later that Mr Thomas had been told that his (Mr Lovitt's) view was that Mr Thomas would not have a chance of defending the charges. This angered him because it was a lie.<sup>235</sup>

This further calls into question the conduct of Ms Gobbo.<sup>236</sup> It seems that Mr Lovitt was not asked to speak with or advise Mr Thomas about his prospects at trial and Ms Gobbo appears to have deliberately misled Mr Allen in this respect. It also seems that Mr Thomas did not receive the benefit of knowing that, even after committal, Mr Lovitt considered he had real prospects of successfully defending the murder charge.

Ms Gobbo's by now customary lack of candour continued when, on 25 September 2006, she submitted a response to Mr Williams' complaint to the Victorian Bar Ethics Committee, all with the knowledge of her handlers and the Purana Taskforce.<sup>237</sup> Her response said that the Purana Taskforce was investigating Mr Williams' recent conduct towards her, denied having acted for Mr Williams or Mr McGrath in any relevant proceeding, claimed to have disclosed to the court all those for whom she had previously acted and claimed to have an ethics ruling from a QC. She invited the Committee to make enquiries to support her claims with the Purana Taskforce.<sup>238</sup>

As in her affidavit to the Board of Examiners seeking admission as a lawyer nearly a decade earlier, Ms Gobbo demonstrated her propensity for self-serving half-truths and dishonesty when dealing with legal profession processes designed to ensure that lawyers maintain appropriately high ethical standards.

## Case study: Ms Gobbo's representation of Mr Faruk Orman

As part of Mr Thomas' assistance to Victoria Police, he gave evidence in numerous prosecution cases, including that of Mr Faruk Orman for the murder of Mr Victor Peirce, which took place on 1 May 2002, when Mr Orman was 20 years old.<sup>239</sup>

The case against Mr Orman was that he acted as the 'getaway driver' for the killer, Mr Andrew Veniamin.<sup>240</sup> On 29 September 2009, Mr Orman was convicted and sentenced to 20 years' imprisonment with a non-parole period of 14 years.<sup>241</sup> On 26 July 2019, the Court of Appeal overturned his conviction and entered a verdict of acquittal after the DPP conceded that Ms Gobbo's conduct when she was Mr Orman's lawyer had caused a substantial miscarriage of justice.<sup>242</sup>

Figure 7.2 illustrates Ms Gobbo's conduct in relation to Mr Orman. It highlights the conflict she had with Mr Thomas and the kinds of information she gave to Victoria Police about Mr Orman.<sup>243</sup>

### Figure 7.2: Ms Gobbo's involvement in providing information relating to Mr Faruk Orman

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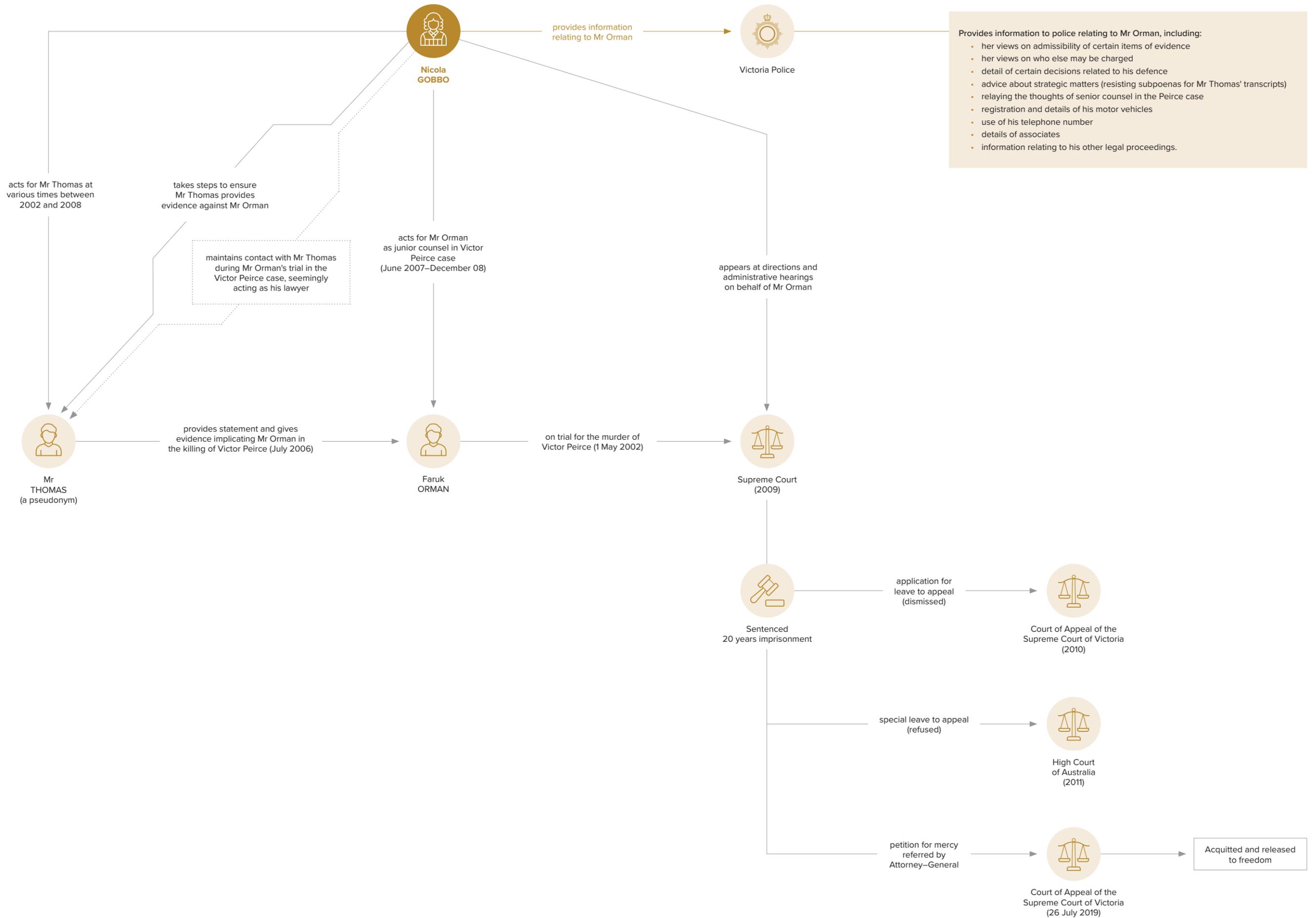
## Ms Gobbo's association with Mr Domenic (Mick) Gatto

Ms Gobbo had a long association with Mr Orman, acting for him at various times between 2002 and 2008.<sup>244</sup> Mr Orman was an associate of Mr Domenic (Mick) Gatto and her involvement with Mr Orman was an extension of her longstanding relationship with Mr Gatto.

By 2007, the Purana Taskforce had turned its attention to the so-called 'Carlton Crew', a criminal group that it believed was headed by Mr Gatto.<sup>245</sup> In 2004, the Purana Taskforce had charged Mr Gatto with murder after he fatally shot Mr Andrew Veniamin.<sup>246</sup> Mr Gatto argued self-defence at trial and was found not guilty.<sup>247</sup> Though not specifically tasked to do so, in 2006 Ms Gobbo began cultivating a relationship with Mr Gatto and providing information to the Purana Taskforce and her SDU handlers about him and his associates.<sup>248</sup> In June 2006, she reported to her handlers that he had recommended others in his 'circle' to use her as a barrister.<sup>249</sup> Ms Gobbo also spent time with Mr Orman in a social context through her relationship with Mr Gatto. For example, in March 2007, all three 'celebrated' the three-year anniversary of Mr Veniamin's killing.<sup>250</sup> In the latter part of 2007, by Ms Gobbo's account, her relationship with Mr Gatto had become very close.<sup>251</sup>

Given this background, it is unsurprising that when Mr Orman was arrested and charged on 22 June 2007 for the murder of Mr Peirce, he asked for Ms Gobbo as his lawyer<sup>252</sup> and Mr Gatto (according to Ms Gobbo) paid his legal fees.<sup>253</sup>

Figure 7.2: Ms Gobbo's involvement in providing information relating to Mr Faruk Orman



## Ms Gobbo again acts as an instrument for the Purana Taskforce

Ms Gobbo recognised that acting as Mr Orman’s lawyer provided opportunities to assist the Purana Taskforce. She told the Commission that she knew the Taskforce wanted to identify those in Mr Gatto’s circle whom they could pressure into rolling against him.<sup>254</sup> The basis of the prosecution of Mr Orman turned in large measure on the evidence of Mr Thomas.<sup>255</sup> Ms Gobbo must have known that by positioning herself in Mr Orman’s defence team, she could monitor the trial to ensure that her role in securing Mr Thomas’ cooperation, and her broader role as a human source—critically useful information to Mr Orman’s defence—were not disclosed as they should have been. It was a repetition of her deceptive and unethical behaviour in Mr Thomas’ case.

Ironically, Ms Gobbo’s initial role in Mr Orman’s case was to request disclosure of materials held by the prosecution and to evaluate the strength of the case against him.<sup>256</sup> Mr Robert Richter, QC was briefed to act for Mr Orman at his committal hearing and trial, with Ms Gobbo as his junior counsel.<sup>257</sup> Mr Richter informed the Commission that the defence was required to explore the nature and origin of Mr Thomas’ evidence, and any weaknesses in it that might bear on Mr Thomas’ credibility.<sup>258</sup>

Unknown to Mr Richter and Mr Orman, Ms Gobbo’s past relationship with Mr Thomas and her role in facilitating his evidence against Mr Orman meant that she was utterly conflicted.<sup>259</sup> She knew of crucial material that could have undermined Mr Thomas’ credibility but, with the assistance of her handlers and Purana investigators, kept it secret to protect her own position. Indeed, she was still acting for Mr Thomas when she began acting for Mr Orman.

Corrections Victoria records show that Ms Gobbo conducted regular professional visits to Mr Thomas after he was sentenced in September 2006 until 11 June 2007, just days before Mr Orman was arrested and charged.<sup>260</sup> Their relationship continued well beyond that point. In November 2007, she reported to her handler that Mr Thomas was ‘down’ and was contemplating withdrawing from his undertaking to give evidence against Mr Orman.<sup>261</sup> She suggested that Mr Thomas needed a visit from the Purana Taskforce to ‘put him straight, otherwise he was going to give it all in’.<sup>262</sup> Mr Hatt and Mr Bateson, apparently acting on that information, visited Mr Thomas on numerous occasions.<sup>263</sup> He clearly regained his resolve, and gave evidence at Mr Orman’s trial.

The instructing solicitor in the prosecution of Mr Orman, Ms Vicky Prapas, wisely raised concerns with prosecuting counsel in February 2008 about Ms Gobbo’s previous representation of Mr Thomas, including in the ‘negotiations surrounding [Thomas’] indemnity and guilty plea’.<sup>264</sup> Ms Prapas was not apprised of Ms Gobbo’s extensive involvement as a human source with Victoria Police or of the true nature of her involvement with Mr McGrath and Mr Thomas; but there was sufficient detail, even on the public record, to cause Ms Prapas concern about the ethics of Ms Gobbo acting for Mr Orman given her past relationship with Mr Thomas.

Following Ms Prapas’ enquiry, Ms Gobbo appears to have ceased representing Mr Orman *in court* in relation to his committal proceedings, but her involvement with him as a lawyer continued. For example, Mr Richter recalled that she assisted him both before and after the committal hearing,<sup>265</sup> and her financial records, among other sources, recorded that she appeared for Mr Orman at mentions and directions hearings in August,<sup>266</sup> November<sup>267</sup> and December 2008,<sup>268</sup> in the lead up to his trial. As in other instances, she did not cure her glaring conflicts of interest by acting as Mr Orman’s lawyer only behind the scenes and not in contested public court hearings.

While acting for Mr Orman, Ms Gobbo was simultaneously communicating with her handlers and the Purana Taskforce about Mr Orman’s defence.<sup>269</sup> She was clearly anxious to ensure that prosecution disclosures to the defence did not expose her role as a human source or the extent of her involvement with Mr Thomas. Disclosures made by Victoria Police included transcripts of Mr Thomas’ conversations with Purana Taskforce officers but with redactions wherever Ms Gobbo featured.<sup>270</sup> Even though she was not named, Ms Gobbo remained extremely apprehensive that these disclosures—or Mr Thomas’ testimony—might expose her.

For example, on 21 February 2008, Ms Gobbo told her handler that before he gave his evidence he had 'to be told that he needs to claim legal professional privilege' if asked about her involvement with him.<sup>271</sup> The notes of another handler of 7 March 2008 record that Ms Gobbo reiterated those concerns, and that she was 'worried about a transcript which is on the brief in which her name has been blacked out 70–80 times'.<sup>272</sup> Those notes also record: 'RICHTER has asked why her name appears in the brief and she has been able to explain herself, but the material that has been blacked out will cause her problems if revealed'.<sup>273</sup>

Ms Gobbo told the same handler that Mr Richter intended to ask Victoria Police to justify the redactions in the records produced, which again concerned her.<sup>274</sup> Her handlers assured her that Mr Thomas would be briefed about the need to answer questions in such a way as to not expose privileged matters;<sup>275</sup> more broadly, she was assured that the proceedings would be monitored and she would be apprised of any issues affecting her.<sup>276</sup> It is not clear on the evidence before the Commission whether police in fact gave Mr Thomas these directions about giving evidence.<sup>277</sup>

Similarly, after the committal hearing, Ms Gobbo reported to her handlers that Mr Richter intended to subpoena transcripts of what Mr Thomas had said in another hearing, which in her view exposed a great many lies and contradictions in his statements to Victoria Police. She advised that these subpoenas must be resisted.<sup>278</sup> She also advised police regarding one statement of Mr Thomas where she referred to Mr Orman's concern about e-tag records and photographs of the 'getaway' vehicle driven by Mr Orman, noting that this was not in Mr Orman's brief of evidence. She advised police that they should try to obtain that evidence.<sup>279</sup>

Meanwhile, the legitimate efforts on Mr Orman's behalf to obtain statements, transcripts and other material relating to Mr Thomas were met with resistance from Victoria Police.<sup>280</sup> Purana Taskforce officers had prepared Mr Thomas not to answer questions about the circumstances leading to his rolling.<sup>281</sup> The officers agreed that if need be, they could make a PII claim over the material sought.<sup>282</sup> There is no doubt that, whether motivated by a misguided understanding of the laws of disclosure, a desire to preserve Ms Gobbo's safety, sinister motives intended to undermine the administration of justice, or a combination of these, the objective was to conceal Ms Gobbo's part in encouraging Mr Thomas to become a police witness against Mr Orman and her role as a human source more generally.

## **Mr Orman's conviction and subsequent acquittal**

With the benefit of hindsight, Mr Richter shared his concerns with the Commission about Ms Gobbo's conduct in the Orman trial. He recalled, for example, that Mr Thomas made two statements to the effect that Mr Orman had made admissions to him while at a particular address where Mr Thomas was living at the time. Mr Thomas confirmed this in his evidence at the committal hearing. The defence obtained evidence that Mr Thomas could not have been living at that address at the relevant times.<sup>283</sup> Ms Gobbo was privy to this information. In his evidence at trial, for the first time Mr Thomas recalled that he was not living at this address but somewhere else at the relevant times, under-cutting the basis of the planned defence attack on his credibility.<sup>284</sup> The defence had also obtained evidence suggesting that Mr Orman's vehicle could not have driven along the route Mr Thomas described. Before the defence could call that evidence, the prosecution provided the defence with evidence (including photographs and e-tag records) demonstrating that it was possible for Mr Orman's vehicle to travel along the route described by Mr Thomas.<sup>285</sup> Ms Gobbo had advised Victoria Police to obtain evidence of that very kind.<sup>286</sup>

Mr Richter told the Commission of his concerns, at the trial and since, that Victoria Police unlawfully obtained information about Mr Orman's defence and coached Mr Thomas in his evidence.

In a statement to the Commission, Mr Richter explained:

*To me, the Orman trial was always a source of deep misgivings and ruminations involving speculation about gross and possibly criminal breaches of duty and misconduct by a number of people. It came as a shattering revelation to me that Ms Gobbo, acting in concert with her handlers and others procured a corruption of our system of justice which resulted in a young man spending 12 years, thus far, in prison. I was aware that Orman had been terribly treated in prison because he refused a police/prosecution deal which would involve him creating evidence against Dom[e]nic Gatto. What I and Orman didn't know was that his Junior Counsel was a police informer seeking to manipulate him and was deceiving and sabotaging his Senior Counsel's efforts to defend him.<sup>287</sup>*

Ms Gobbo's conversations with her handlers set out above provide powerful support for Mr Richter's misgivings. More than 10 years after his conviction, the DPP conceded in Mr Orman's appeal that a substantial miscarriage of justice had occurred<sup>288</sup> because:

- Ms Gobbo had represented Mr Thomas from as early as October 2002 and intermittently until August 2008
- the 'murder case against Mr Orman substantially depended [on Mr Thomas]'
- Ms Gobbo had been engaged by Mr Orman in October 2006 and had acted for him intermittently until at least December 2008
- at a time when she was engaged to act on behalf of Mr Orman, Ms Gobbo improperly took active steps to ensure that [Mr Thomas] gave evidence against Mr Orman in the murder trial'.<sup>289</sup>

In unanimously accepting those concessions, allowing the appeal, quashing Mr Orman's conviction and directing a verdict of acquittal, the Court of Appeal noted that Ms Gobbo's conduct was a 'fundamental breach of her duties to Mr Orman and to the Court'. It went on: 'Ms Gobbo's conduct subverted Mr Orman's right to a fair trial, and went to the very foundations of the system of criminal trial. There was, accordingly, a substantial miscarriage of justice'.<sup>290</sup>

Mr Orman's story shows that Ms Gobbo was determined to inform on her high-profile clients to please Victoria Police. Her handlers had some insight into the impropriety of this and sometimes half-heartedly sought to distance her from them and from the activities of the Purana Taskforce, reminding her that she was not 'tasked into Gatto' and even suggesting the winding-up of her relationship with the SDU.<sup>291</sup> She persisted, insisting that she wanted to 'help solve crimes' and police soon acquiesced in this.<sup>292</sup> She did not merely do what Victoria Police officers requested of her; rather, she proactively forewarned them of forensic issues, suggested strategies and volunteered information. Evidently, she was largely able to dictate the scope and parameters of her dual role as both lawyer and human source.

Mr Orman's experience starkly demonstrates the consequences of the conduct of Ms Gobbo and Victoria Police officers. His wrongful conviction was the result of a 'chain reaction' of misconduct, from Ms Gobbo's involvement with Mr McGrath in his implication of Mr Thomas, through to her role in ensuring Mr Thomas became a police witness, and her registration as a human source.

The consequences for Mr Orman were dire. He thought his junior barrister was fearlessly and fairly representing his interests. Instead, she was actively undermining his defence to the police. He was charged on the basis of evidence tainted by her previous misconduct, which neither she nor the police disclosed to him. Had she done her duty as his barrister and had Mr Orman been given a fair trial according to law, he may well have been acquitted in 2009. Mr Orman spent 12 years of his young life in prison. The damage wrought by his unjust trial, not just to him and his family, but to Victoria's criminal justice system, is significant.

## Case study: Ms Gobbo's representation of Mr Cooper (a pseudonym)

The relevant proceedings against Mr Cooper comprised four matters,<sup>293</sup> all involving serious drug offending and ultimately determined together as part of consolidated plea and sentencing hearings in February 2007.<sup>294</sup> Most significantly, he pleaded guilty to large-scale trafficking offences connected with the manufacture and distribution of methylamphetamine carried out in association with members of the Mokbel family.<sup>295</sup> His connection with the Mokbel family made Mr Cooper of particular interest to the Purana Taskforce, which had established Operation Posse to dismantle the criminal enterprise of the Mokbels and their associates.<sup>296</sup>

Ms Gobbo's professional association with Mr Cooper commenced five years earlier, in 2002, when she acted for him in a number of matters.<sup>297</sup> As was typical of Ms Gobbo's relationships with her clients, their relationship also had a social dimension.<sup>298</sup> Ms Gobbo and her handlers believed that Mr Cooper was romantically interested in her<sup>299</sup> and they made full use of this.<sup>300</sup>

### Ms Gobbo's role in relation to Mr Cooper

Through Operation Posse, Purana Taskforce hoped that Mr Cooper would roll and provide information and evidence about his associates, especially the Mokbels. Ms Gobbo played a pivotal and early role in realising these hopes. Operation Posse's Investigation Plan recorded that its objectives were to 'utilise the continuing information provided by Registered Human Sources', such as Ms Gobbo, and to target Mr Cooper's activities in relation to Mr Tony Mokbel.<sup>301</sup> Ms Gobbo was tasked to do this shortly after her registration as a human source in September 2005.<sup>302</sup>

Mr Flynn accepted in his evidence to the Commission that Purana Taskforce officers were 'keen to task [and] get as much information from Ms Gobbo as possible'.<sup>303</sup> To that end, they made specific requests for information about Mr Cooper, often through Ms Gobbo's handlers, who in turn would communicate those requests to Ms Gobbo and feed her responses back to the taskforce.<sup>304</sup> Indeed, Ms Gobbo's handlers repeatedly told her to inform them immediately of any contact with Mr Cooper.<sup>305</sup> At this time, Ms Gobbo's role in Operation Posse was discussed and, at least implicitly, sanctioned at meetings of senior Victoria Police officers (detailed further in Chapter 8).

Ms Gobbo accepted in evidence to the Commission that she was aware of Victoria Police's objective to get Mr Cooper 'to roll and cooperate with police'.<sup>306</sup> From September 2005, Ms Gobbo provided extensive and valuable information to police about Mr Cooper's circumstances and activities. This included his financial affairs;<sup>307</sup> his association with other suspects or persons of interest, particularly members of the Mokbel family;<sup>308</sup> his movements and travel;<sup>309</sup> and his personal particulars such as personal and family mobile phone numbers,<sup>310</sup> residential address<sup>311</sup> and motor vehicle details.<sup>312</sup>

She also provided information about Mr Cooper's drug-related activities. For example, in December 2005, Ms Gobbo told her handlers that Mr Milad Mokbel had precursors for the production of drugs; that Mr Cooper had offered to manufacture drugs for him subject to receiving other materials;<sup>313</sup> and subsequently, that the production was to commence shortly.<sup>314</sup>

The frequency and level of detail of Ms Gobbo's information about Mr Cooper's drug-related activities increased over time. Her handlers' records between January and April 2006 often referred to her alerting them to Mr Cooper's suspicion that he was under police surveillance;<sup>315</sup> and advising them when she knew or believed that he was delivering drugs, collecting money for drugs, obtaining materials to 'cook' drugs, 'cooking' drugs or about to do so, and even advising them to follow him at particular times when he would be engaged in these activities.<sup>316</sup>

Critically, she conveyed to Victoria Police officers information about the location and features of Mr Cooper's drug laboratory in Strathmore.<sup>317</sup> The Purana Taskforce then discovered the location of the laboratory, commenced surveillance and obtained a search warrant.<sup>318</sup> Mr Cooper was arrested at these premises on 22 April 2006. Mr O'Brien described the discovery of the Strathmore laboratory as a 'significant breakthrough', conceding, 'I do not know whether we would have located this lab without [Ms Gobbo's] information'.<sup>319</sup> Mr Flynn described this information as 'crucial', and rightly attributed Mr Cooper's arrest to Ms Gobbo's assistance. Again, the responsive submissions of Victoria Police and its officers are discussed in Chapter 8.<sup>320</sup>

Ms Gobbo was able to assist Victoria Police in this way because, throughout this period, Mr Cooper believed she was both his legal representative and 'basically [his] best friend'.<sup>321</sup> At the time of his arrest for the Strathmore offending in April 2006, Mr Cooper was already on bail for two separate episodes of previous drug trafficking, in which Ms Gobbo was acting for him.<sup>322</sup> A stark example of Ms Gobbo's duplicity offered by Counsel Assisting was that on the morning of 13 April 2006, she met with her handlers, telling them that she was 'frustrated that police had not achieved any arrests and have not found any of [Mr Cooper's] clandestine laboratories'.<sup>323</sup> That afternoon she met with Mr Cooper and her instructing solicitor to discuss Mr Cooper's ongoing court proceedings.<sup>324</sup>

Ms Gobbo cultivated her personal relationship with Mr Cooper while informing on him to police. For example, in 2006 she helped to organise and attended a party he hosted, and used this opportunity to provide information to assist the Purana Taskforce. She took on responsibility for the party RSVPs in order to provide personal details of attendees of interest to the Taskforce.<sup>325</sup> She took photographs during the party with a camera her handlers obtained from Purana Taskforce, and later identified those she photographed to her handlers.<sup>326</sup>

Ms Gobbo was again not merely informing as a passive onlooker. She was proactive and inventive in proposing ways to get more information from Mr Cooper and about him to assist police. She suggested early on to her handlers that he might be inclined to cooperate with police. Indeed, she proposed engineering a scenario where Mr Flynn would accidentally see her and Mr Cooper at dinner, prompting a discussion about his cooperation.<sup>327</sup> After Mr Cooper's party, she suggested that her handlers fit her with a hidden micro-recorder so that her conversations with Mr Cooper could be accurately and covertly recorded.<sup>328</sup> While neither proposal was acted upon, both seem to have been considered.<sup>329</sup>

Ms Gobbo suggested strategies to police that might persuade Mr Cooper to roll. In February 2006, she reported that he was financially 'vulnerable' because he was owed a lot of money, and that he could be 'targeted financially',<sup>330</sup> advising her handlers that if Mr Cooper 'has no money he may talk'.<sup>331</sup> In April 2006, she advised her handlers that he may roll if he believed that the Mokbels had also been arrested.<sup>332</sup> She also told them that he 'has respect' for Mr Flynn, and suggested that Mr Flynn, rather than other officers, should lead negotiations with him about his cooperation.<sup>333</sup>

When Mr Cooper was arrested on 22 April 2006, Ms Gobbo's handler, Mr Smith, observed that she seemed happy with the outcome and asked: 'Who's next?'<sup>334</sup> Even if this was not meant seriously, it demonstrates a disturbing flippancy.

## **Mr Cooper's arrest and cooperation**

The circumstances surrounding Mr Cooper's arrest and its aftermath are a high point of Ms Gobbo's duplicity, and demonstrate the irreconcilable conflict between her dual roles of human source and lawyer to a person she was manipulating and informing on for the benefit of Victoria Police.

In the afternoon of 22 April 2006, Mr Cooper was arrested at the Strathmore laboratory that Ms Gobbo had helped police to locate.<sup>335</sup> Mr Cooper immediately asked to contact Ms Gobbo and police permitted him to do so.<sup>336</sup> While Ms Gobbo was on her way to the St Kilda Road Police Station, Mr Cooper gave a 'no comment' interview.<sup>337</sup> After arriving Ms Gobbo spoke with Mr Cooper for up to an hour before leaving the station

and immediately contacting her SDU handler to divulge what Mr Cooper must have thought was a privileged and confidential discussion with his lawyer.<sup>338</sup> She told her handler, for example, that Mr Cooper was wondering how police knew of the location of the lab and that he had not started 'cooking' before police arrived.<sup>339</sup>

In the early evening, police explained why they considered it to be in Mr Cooper's best interests to cooperate.<sup>340</sup> Mr Flynn later asked Ms Gobbo to return to the station.<sup>341</sup> She arrived at 7.15 pm and met with Mr O'Brien, who advised her that they had put a proposal to Mr Cooper to elicit his cooperation.<sup>342</sup> She then met with Mr Cooper in the presence of police officers. At no stage did police or Ms Gobbo advise Mr Cooper of the true relationship between Ms Gobbo and Victoria Police.<sup>343</sup>

What followed, according to Ms Gobbo, was that Mr Cooper became upset, took Ms Gobbo by the hand, told her that he loved her, and said repeatedly that he 'can't do this' (cooperate) and that he would not do so unless she told him he should. She asked him to think about certain close family members and advised him to cooperate.<sup>344</sup> Reflecting on this occasion later, she said that he had 'needed a bit of a push' to roll, and that she had obliged.<sup>345</sup>

Mr Cooper accepted Ms Gobbo's advice and cooperated with police. He immediately made admissions about his own conduct and also provided information about others, including members of the Mokbel family.<sup>346</sup> In the days that followed, he provided further information about his associates and participated in conversations that were covertly recorded by Victoria Police.<sup>347</sup>

As Victoria Police planned how to best use Mr Cooper, they began preparing him to make written statements. Simultaneously, Ms Gobbo was conferring with Mr Cooper and reporting the details back to her handlers.<sup>348</sup> She encouraged and reassured him as to the correctness of his decision to cooperate.<sup>349</sup> She provided suggestions to her handlers about suitable topics for conversations between Mr Cooper and Mr Milad Mokbel.<sup>350</sup> She managed her communications, and those of Mr Cooper, with his family members and associates to conceal his assistance to police.<sup>351</sup> She continued to act as his lawyer and appeared at a filing hearing in relation to his charges on 26 April 2006.<sup>352</sup>

In the months thereafter, Mr Cooper made many statements for Victoria Police, with Ms Gobbo continuing to play an active role. For example, she met with Purana Taskforce officers to discuss the statement-taking strategy, and regularly attended statement-taking 'sessions' with Mr Cooper, providing him with continuing moral support and encouragement.<sup>353</sup> She commented on aspects of his statements.<sup>354</sup> She exploited their relationship to 'value add' to his statements; for example, telling police that he knew more than he initially let on about an associate, Mr Cvetanovski.<sup>355</sup> She also advised Mr Cooper how to make his evidence 'bullet proof from cross-examination'.<sup>356</sup>

The effects of Mr Cooper's cooperation were far-reaching. In sentencing him in February 2007, the County Court of Victoria noted that his assistance had 'disclosed wide scale criminal activity at a very high level', and allowed police to act against '30 or 31 different people, the majority of whom ... [were] entrenched in the heart of the Melbourne underworld'. At that stage, Mr Cooper had made around 30 statements to police.<sup>357</sup> He would ultimately make over 40 statements implicating dozens of people in criminal activity.<sup>358</sup> Of these, Counsel Assisting identified 26 people whose cases resulted in convictions based on Mr Cooper's evidence.<sup>359</sup> On the material before it, the Commission accepts this aspect of Counsel Assisting's submissions. One such individual was Mr Cvetanovski, whose appeal is discussed further below.<sup>360</sup>

Four of the people implicated by Mr Cooper decided to cooperate with police.<sup>361</sup>

## Ms Gobbo's perspective

Ms Gobbo submitted that there is no evidence that she did anything to encourage Mr Cooper to commit drug offences. She told the Commission that she simply inquired about his criminal activity and that this did not amount to aiding or abetting him.<sup>362</sup>

Ms Gobbo submitted that generally, in relaying information to Victoria Police about Mr Cooper prior to his arrest, she did not breach her legal professional privilege duties or duties of confidence.<sup>363</sup> To support this proposition, Ms Gobbo pointed to two factors:

- First, she submitted that it is not obvious when she was receiving information from Mr Cooper as his lawyer, as opposed to his friend. This blurring of the personal and the professional made it difficult to determine which pieces of information are privileged and which are not.<sup>364</sup>
- Second, she submitted that legal professional privilege does not attach to information about ongoing criminality or in furtherance of a crime. Therefore, the information related to new drug manufacturing that Mr Cooper was engaged in would not have been covered by legal professional privilege.<sup>365</sup> This argument is made even stronger, Ms Gobbo submitted, because of the imminent danger to 'safety of primary school children' due to the location Mr Cooper was operating in and his possession of a firearm.<sup>366</sup>

Ms Gobbo accepts that it was an inexcusable breach of her duties where she did relay information to her handlers that she received from Mr Cooper as his lawyer and not as his friend, and where that information did not relate to an ongoing crime.<sup>367</sup>

The Commission does not wish to prejudice any future proceedings by giving its opinion as to which precise pieces of information are privileged and which are not. The Commission notes, however, that in general the relationship between a lawyer and a client is one based on trust and confidence. This trust is eroded when a person's lawyer is acting as an agent for police. The absence of clarity as to whether Ms Gobbo was at times acting as Mr Cooper's lawyer or simply advising him as a friend does not excuse her wrongful conduct. Rather, it is a dimension of her pattern of conduct that she failed to maintain clear boundaries between her personal and professional life.

As is made clear throughout this chapter, the boundaries of many of Ms Gobbo's relationships with her clients were similarly blurred. Among other issues, this may have led to situations where she regarded a particular interaction or conversation as personal, while her client/friend understood it as an extension of her role as lawyer.<sup>368</sup> And while the rules of legal professional responsibility accept that it is generally appropriate to disclose a client's plans to commit future crime, once the lawyer does so they must immediately cease to act for the client. Ms Gobbo, however, continued to act for her clients while informing against them—that is, while acting as an agent of the police. The Commission notes that Ms Gobbo told her handlers that some of her clients, for example Mr Rabie (Rob) Karam and Mr Harty Mokbel, asked Ms Gobbo to attend meetings to add an air of legitimacy, especially if they feared they were under surveillance.<sup>369</sup> This seems to have been to allow them to challenge any surveillance evidence by contending that the meeting was covered by legal professional privilege. Ms Gobbo's submissions suggest an ongoing lack of insight into and remorse for her conduct in blurring her personal and professional relationships.

In any event, Ms Gobbo also accepted that she breached her professional duties to Mr Cooper by attending the police station after he was arrested. She conceded that Mr Cooper was not given the benefit of an independent lawyer representing him on this occasion.<sup>370</sup> The Commission accepts this concession.

Despite this, Ms Gobbo submitted that her advice to Mr Cooper was appropriate, what most independent legal practitioners would have given, and ultimately in Mr Cooper's best interests.<sup>371</sup> Ms Gobbo also points to Mr Cooper having had the benefit of other independent legal advice in other parts of his proceeding.<sup>372</sup> This last point largely ignores the influence Ms Gobbo had as the only lawyer who attended on Mr Cooper upon his arrest in April 2006 and that those who later gave him independent legal advice either did not know this or that she had informed on him to police leading to his most recent arrest.

Regarding the influence she had on Mr Cooper when he was arrested, Ms Gobbo submitted that her actions were not key in Mr Cooper's decision to cooperate. She contended that Mr Cooper would always have cooperated with police citing, among other things, the nature of his offending,<sup>373</sup> the prospect of a reduced sentence,<sup>374</sup> a 'frank' discussion with Mr Flynn about favourable conditions,<sup>375</sup> the lessened influence of Mr Tony Mokbel (after he fled to Greece)<sup>376</sup> and previous indications that he would be willing to assist authorities.<sup>377</sup> None of this mitigates the extent of Ms Gobbo's conduct; her submissions again magnify her lack of insight and remorse.

As previously stated, Ms Gobbo reported to her handlers that Mr Cooper 'needed a bit of a push' to roll, and that she had obliged. Ms Gobbo submitted that this statement to handlers should be viewed in context of her tendency to exaggerate and her desire to impress her handler, Mr White.<sup>378</sup>

Finally, Ms Gobbo submitted her reservations as to Mr Cooper's reliability, stating he is 'not a trustworthy, reliable witness' and was involved in serious criminal offending.<sup>379</sup>

### Mr Cooper's perspective

Notwithstanding Ms Gobbo's reservations about Mr Cooper's reliability, Mr Cooper's understanding of these events is instructive. As noted above, he regarded Ms Gobbo as his 'best friend' and placed a 'significant amount of trust' in her as his lawyer. He agreed with her assessment that she gave him a 'push' to cooperate. He gave the following evidence before the Commission:

*COUNSEL ASSISTING: Reflecting on those events, what influence did Nicola Gobbo have on your decision, firstly, to plead guilty?*

...

*I am concentrating here on the Posse charges ...*

*MR COOPER: Yep. No, she was significant. I wouldn't have done it on the night. I gave a no comment interview and we would have tied it up there. Had she not come in... the rest of it wouldn't have happened. The night would not have transpired like that.*

...

*COUNSEL ASSISTING: ... What about the decision to become a prosecution witness once the Posse charges had been made against you? What influence in your view did Nicola Gobbo have in relation to your decision to become a prosecution witness?*

*MR COOPER: One hundred per cent.*

*COMMISSIONER: Just before you go on to that, can I take you back to the pleas, the plea you would have made to the Posse charge. Now, had you known that Nicola Gobbo was your—had informed to police about what had happened when she was your lawyer, would that have made any difference to the plea you entered of guilty to the Posse charge?*

*MR COOPER: Yes, yep. I would have been irate about that, that not only that she'd helped set me up and I would have done everything in my power to have that reversed or have a mistrial or whatever the case may be.*

...

*COUNSEL ASSISTING: We were talking about your decision to plead and I was then asking you about what influence in your view Ms Gobbo had in relation to your decision to become a prosecution witness?*

*MR COOPER: Well you see by the transcripts, pretty much everything. By her presence that's what turned me around.*

...

*COUNSEL ASSISTING: And what influence—I'm sure it's difficult to dissect these things because there were numerous people saying numerous things to you on the evening, but what influence did Victoria Police members have in relation to your decision, firstly, to plead guilty and, secondly, to roll and become a prosecution witness?*

*MR COOPER: It wouldn't have been something I done. I didn't do it the first two times. I wouldn't have done the third time unless I was given that advice by my barrister.*

*COUNSEL ASSISTING: So Victoria Police alone in your view wouldn't have got you there?*

*MR COOPER: No.*

*COUNSEL ASSISTING: Were you told at any time by Victoria Police members or Nicola Gobbo that you had options for other legal representation?*

*MR COOPER: No.*

*COUNSEL ASSISTING: So there was that caution—sorry, go ahead?*

*MR COOPER: It didn't occur to me. She was my barrister and I trusted her wholeheartedly.*

*COUNSEL ASSISTING: And no one ever told you not to use her?*

*MR COOPER: No.<sup>380</sup>*

Mr Cooper later confirmed that he would 'absolutely' have sought independent legal advice had he known the true facts about Ms Gobbo's involvement with Victoria Police, and would 'absolutely not' have allowed Ms Gobbo to continue to act for him.<sup>381</sup>

He also gave evidence that Ms Gobbo continued to exert an influence over him beyond the evening of 22 April 2006 and indeed over the course of his cooperation with police:

*COUNSEL ASSISTING: Mr Flynn's evidence before the Commission was that one of the ways Nicola Gobbo assisted the police was to communicate with you in order to give you a sense of comfort and reassurance so that you'd be encouraged to continue to cooperate with the police after 22 April. Does that accord with your recollection?*

*MR COOPER: Absolutely, yes.*

*COUNSEL ASSISTING: And are we talking here about just those handful of days after your arrest where you're undertaking these particular activities or are we talking right into the future where you were giving evidence well into 2011 and onwards I think?*

*MR COOPER: It was basically while the statements were being made.*

...

*And she would come to the prison to see me and keep telling me to stay the course up to 2007.<sup>382</sup>*

Asked to reflect on Ms Gobbo's actions given her position as his lawyer, Mr Cooper said:

*Well, that's just another—that's just—that's something for you guys to answer. That's just out of my league. That's just crazy, you know. You know, how does a barrister, how does a barrister inform on their client? You know, how does that even happen? You know, it's so unjust. I can't understand it, you know.*<sup>383</sup>

When asked how he felt he had been affected by the conduct of Victoria Police and Ms Gobbo, he said:

*I feel so violated. There's nothing excusing the fact I did the crime and I understand that and I own it, but ultimately I just feel that there's a system and the system's been abused and this is all we've got, you know, and I honestly, I believe in the system and it just can't be, it shouldn't be violated like that, it just shouldn't be.*<sup>384</sup>

Mr Cooper's words evoke his understandable sense of betrayal and shock that a person he trusted as his friend and lawyer would work together with police to relentlessly undermine and violate the criminal justice system.

Ms Gobbo's betrayal of Mr Cooper is disgraceful. She exploited the trust that he placed in her, both as his lawyer and his close friend, to manipulate him. She breached his trust by persuading him, clearly against his own interests, to provide her with information about his offending and his criminal associates, which she readily and proactively divulged to police. This information was apparently intended to be confidential and was potentially subject to legal professional privilege.

Over many months, Ms Gobbo led Mr Cooper to believe that she was his lawyer, friend and confidant when, in truth, she was participating in a sophisticated, premeditated deception to assist Victoria Police. It is difficult to conceive of a more comprehensive abandonment of a lawyer's responsibilities than to inform on a client to police; to not discourage a client on bail for serious drug offences from committing further like offences; to orchestrate the arrest of the client with police; to then act for the client after arrest, encouraging them to confess and implicate others and putting their safety and that of their family at risk; and to then ensure that this information was not disclosed, as it should have been, to the prosecution, the client, the courts and lawyers dealing with the scores of resulting charges against other individuals.

The evidence before the Commission as to the insight of Ms Gobbo and her handlers into these events suggests both an appreciation of the impropriety involved and an inability or unwillingness to grapple with it. On one occasion when she and her handler and her controller discussed the implications of what she was doing with respect to Mr Cooper, she said:

*... the whole [Mr Cooper] stuff thing is gunna cause a big problem. You know, I don't—I would not ever ask someone like him what they're doing, ever. I would never be exposed to it, he'd never tell me about it and I would never ask. And if he tried to tell me or started a conversation about it I'd cut him off. It's one thing to make assumptions about what people are doing, but it's another thing to be standing up in a court saying, 'This person has done this and hasn't done that,' and whatever ...*

*... The [Mr Cooper] thing is gunna cause me big drama, because I can ask him anything and he'll tell me, but I don't wanna know his stuff. I mean, I—it might be useful to you but I don't wanna know it from the point of view of ...*<sup>385</sup>

Mr White then suggested that she could 'withdraw from representing him' because of 'a conflict like that', 'for the greater good of telling us'.<sup>386</sup> Ms Gobbo replied:

*MS GOBBO: Oh, that's, true, but why on earth would I do that?*

*MR SMITH: Does he pay?*

*MS GOBBO: He actually does pay, yeah, his solicitor does. Mm.*<sup>387</sup>

Later, before Mr Cooper's arrest, her handlers again raised the issue of her conflict. They received a telling response:

*MR GREEN: I have got a—a bit of a concern, though. If [Cooper] was to get arrested...*

*MS GOBBO: Yeah.*

*MR GREEN: ... he's going to be calling you, isn't he?*

*MS GOBBO: Yes. He will not call anyone else.*

*MR GREEN: How's that going to work?*

*MS GOBBO: What do you mean?*

*MR GREEN: Well, how are you going to be able to represent him?*

*MS GOBBO: What do you mean?*

*MR GREEN: Well, won't there be a conflict of interest there?*

*MS GOBBO: What conflict? He'll be pleading guilty. What difference does it make?*<sup>388</sup>

Ms Gobbo's conversation with her handler and controller in the days leading up to Mr Cooper's arrest was particularly illuminating:

*MR WHITE: ... [Mr Cooper] will be afforded every opportunity to speak to a solicitor and ..... obviously that's gonna be you and everything will just go on as it normally would.*

*MS GOBBO: Mm.*

*MR WHITE: He would have an expectation that you'd represent him.*

*MS GOBBO: Yes.*<sup>389</sup>

...

*MR WHITE: How does that work?*

*MS GOBBO: If?*

*MR WHITE: If you represent him whilst at the same time you've been instrumental in his apprehension.*

*MS GOBBO: Yeah ... that's one of the things that keeps me up at night.*

*MR WHITE: Have you got a plan how you're gunna manage that or—*

*MS GOBBO: What's the big deal? You're not gunna tell him ...*

*MR WHITE: No, we're not but ...*

*MS GOBBO: Nor am I. I don't really feel like being dead this month ...*

*MR WHITE: Yeah, see, I'm not—I'm not thinking that you're gunna be compromised. I'm just wondering ...*

*MS GOBBO: How I'm gunna deal with it myself.*

*MR WHITE: Ethically ...*

*MR GREEN: Or practically.*

*MR WHITE: It's the same—it's the same issue because he's not gunna find out I suppose but ...*

*MS GOBBO: Morally [is] what you're asking.*

*MR WHITE: Yeah, and it's a problem more for you than us but ...*

*MS GOBBO: You don't care.*

*MR WHITE: Well ...*

*MS GOBBO: Like, you care about what I'm thinking but you don't care about [it] from his point of view. True?*

*MR WHITE: Well, we care about the position that we are putting you in. Granted you're the—you're the master of your own destiny ...<sup>390</sup>*

...

*MR WHITE: Look, purely a technical point of view, if—if you talk to [Mr Cooper] and give him legal advice before he's interviewed and he makes a confession—and I'm speaking theoretically here, right.*

*MS GOBBO: Yeah.*

*MR WHITE: OK. I'm not saying this is gunna happen.*

*MS GOBBO: Mm'hm.*

*MR WHITE: But wouldn't—wouldn't it be the case down the track that a defence barrister could argue, well, the advice that he got prior to participating in the record of interview was not impartial because it was done on behalf of the police by a person that was acting for the police.*

*MS GOBBO: Who in the fuck is gunna say that?*

*MR WHITE: It's a theoretical question, right. It's not—I'm trying to ...*

*MS GOBBO: ... anybody say that? Why would anyone say that?*

*MR WHITE: No-one's gonna say that but I'm trying to understand what—the conflict of interest area is not something that we ever deal with, all right, for you and it's—I mean, some people could put up an argument that a person who is a barrister perhaps could never help the police and still represent the person that she's helping the police with. So I'm just trying to get my head around this. Could you—maybe it's even pointless talking about it because you might actually think I'm going ...*

*MS GOBBO: Probably but what's the real point?*

*MR WHITE: Forget it. I'm just—...*

*MS GOBBO: No, no, no, what's the real point?*

*MR SMITH: Just the general ethics of the whole situation.*

*MS GOBBO: The general ethics of all of this is fucked.<sup>391</sup>*

These exchanges suggest that Ms Gobbo and her handlers knew that what they were doing was unethical and unprofessional but were unwilling to stop. As a lawyer, Ms Gobbo must have known her behaviour was wrong and sometimes articulated this, conceding, for example, that her activities with Mr Cooper 'keep her up at night'. But at other times she seemed to try to justify her behaviour by self-interested allusions to Mr Cooper paying his legal bills, fears for her safety, or ironic pretences of ignorance ('What conflict? ... What difference does it make?'). Her handlers and controllers seemed unable or unwilling to confront her directly and set firm boundaries. Instead, they sought to protect their position by tentatively approaching discussions on the topic as a 'purely technical' point; or as an issue for Ms Gobbo to navigate alone, outside their control or responsibility ('Have you got a plan[?]; '[I]t's a problem more for you than us'; '[Y]ou're the master of your own destiny'). Their exchanges suggest they were enabling each other to avoid confronting the problem they jointly created.

In her evidence to the Commission, Ms Gobbo finally accepted publicly that she was aware of the objectives of Operation Posse in relation to Mr Cooper;<sup>392</sup> that she worked with Victoria Police to achieve those objectives by insinuating herself into his life to inform to police about his legal issues, activities, vulnerabilities and associates;<sup>393</sup> and that this was 'improper',<sup>394</sup> 'wrong'<sup>395</sup> and 'a huge ethical problem'.<sup>396</sup> She expressed guilt about the events of 22 April 2006, volunteering that her conduct 'potentially' had a tendency to pervert the course of justice and that, on that occasion, she effectively acted as an agent of police.<sup>397</sup> She accepted too that acting for Mr Cooper after he was charged was wrong.<sup>398</sup> Astoundingly, she did not accept that her shameful conduct disentitled her to the legal fees she charged him, saying 'I did... what I said I was going to do' for him.<sup>399</sup>

Despite that denial of responsibility and the passage of time, past clients who wrongly believed she was acting in their best interests rather than in the interests of Victoria Police may yet bring civil claims relating to legal fees paid to Ms Gobbo, as the ripple effects of her conduct as a human source for Victoria Police continue to reverberate throughout the justice system.

## Case study: Ms Gobbo's representation of Mr Zlate Cvetanovski

As referred to above, Counsel Assisting rightly identified 26 people who may have received convictions based upon Mr Cooper's evidence, one of whom was Mr Cvetanovski.

On 26 April 2006, Mr Cvetanovski was arrested as part of Operation Posse and Ms Gobbo acted as his lawyer.<sup>400</sup> In April 2008, he was charged with trafficking a large commercial quantity of methylamphetamine.<sup>401</sup> The prosecution case alleged that he was involved with Mr Cooper in manufacturing methylamphetamine in Preston and Strathmore as part of the 'Mokbel crime syndicate'.<sup>402</sup> In July 2011, Mr Cvetanovski was convicted by a jury verdict on this trafficking charge.<sup>403</sup> The evidence of Mr Cooper was central to this case, with the trial judge stating, 'Clearly [Mr Cooper's] evidence was the pivotal evidence in the trial and the jury could not have convicted [Mr Cvetanovski] if they did not accept his evidence beyond reasonable doubt'.<sup>404</sup>

On 13 April 2012, Mr Cvetanovski was sentenced to 10 years' imprisonment on this trafficking charge.<sup>405</sup>

In 2017, Mr Cvetanovski commenced an appeal against his conviction, arguing that there was a substantial miscarriage of justice in his case because Ms Gobbo's role as a human source was not disclosed to him. Mr Cvetanovski argued that this non-disclosure meant he was unable to challenge the admissibility of evidence, unable to properly test Mr Cooper's evidence, and he was unaware of Ms Gobbo's breach of professional duties owed to him as his lawyer.<sup>406</sup>

After serving nearly a decade in prison, Mr Cvetanovski was released on bail in May 2020 pending the outcome of his appeal.<sup>407</sup> On 30 October 2020, the Court of Appeal allowed his appeal, set aside his conviction and entered a judgement of acquittal.<sup>408</sup>

In their reasoning, the Court of Appeal described Ms Gobbo's involvement with Mr Cooper as follows:

*At the time of [Mr Cvetanovski's] arrest in April 2006, Ms Nicola Gobbo (then a member of the Victorian Bar) acted as his legal adviser. At that time, unbeknown to [Mr Cvetanovski], Ms Gobbo was a registered police informer; was acting as Mr Cooper's legal adviser; and had persuaded Mr Cooper to co-operate with police and incriminate [him].*

*Throughout 2006, Ms Gobbo had an extremely close personal relationship with Mr Cooper. She provided him with moral support, conducted welfare checks and made requests to Victoria Police to look after him.*

*In the course of 2006, Ms Gobbo and Victoria Police provided various forms of financial assistance to Mr Cooper whilst he was in custody. This included regular payments into his prison canteen fund, as well as one-off payments to him.<sup>409</sup>*

The DPP conceded that the failure to disclose information about the payments made to Mr Cooper by Victoria Police and Ms Gobbo resulted in the jury being unable to make a proper assessment of Mr Cooper's credibility. Mr Cvetanovski was unable to properly interrogate Mr Cooper, relevant police officers or Ms Gobbo about the nature, circumstances and extent of the payments or to undertake further investigations and conduct further cross-examination.<sup>410</sup>

At 30 October 2020, Mr Cvetanovski was appealing his other drug and deception convictions on grounds concerning Ms Gobbo's involvement in his case.

Counsel Assisting submitted that Ms Gobbo's improper conduct went beyond her involvement with Mr Cooper. They submitted that Ms Gobbo provided extensive information about Mr Cvetanovski to Victoria Police.<sup>411</sup> One noteworthy example is when Ms Gobbo provided Mr Cvetanovski's phone number to her handler

on 8 September 2006.<sup>412</sup> This was put in an Information Report and then the fact that Ms Gobbo provided this information to police was relied upon in an application to intercept Mr Cvetanovski's phone.<sup>413</sup> A warrant was granted on 18 December 2006<sup>414</sup> and the resulting evidence was used (in part) in successfully prosecuting Mr Cvetanovski for offences related to fraudulent loan applications.<sup>415</sup> Counsel Assisting rightly submitted that intelligence from Ms Gobbo was used by police in successfully applying for at least five search warrants and at least one other telephone intercept warrant targeting Mr Cvetanovski.<sup>416</sup>

Giving Victoria Police Mr Cvetanovski's phone number is a neat example of how Ms Gobbo's conduct enabled police to gather valuable evidence and the resulting detrimental impact on the interests of her clients.

## Case study: Ms Gobbo's representation of Mr Tony Mokbel

Ms Gobbo and Mr Mokbel first met in the 1990s when she was acting for Law Firm 1.<sup>417</sup> Ironically, she was called as a prosecution witness against him when he was charged for giving false evidence in support of his brother, Mr Horthy Mokbel's application for bail.<sup>418</sup>

Ms Gobbo began representing and advising Mr Mokbel around January 2002.<sup>419</sup> At various times between 2002 and 2006 she met with him and appeared for him in court.<sup>420</sup> In 2006, she was his junior counsel in a trial concerning cocaine importation offences.<sup>421</sup> Though she did not appear for him in court after this, she continued to give him legal advice and he regarded her as his lawyer.<sup>422</sup>

As was Ms Gobbo's custom, her relationship with Mr Mokbel and other members of his family was personal as well as professional. The DPP submitted that Ms Gobbo's blurring of her professional and personal relationships makes it difficult to determine the existence and duration of any lawyer–client relationships Ms Gobbo had, including with Mr Mokbel.<sup>423</sup> The Commission acknowledges this difficulty but for each of these case studies in this report, has sought to confine findings about such matters to those that are supported by the evidence it has received.

Operation Plutonium, relating to the importation of cocaine, was one of four police operations that culminated in Mr Mokbel being convicted or pleading guilty to drug-related offending.<sup>424</sup> The others were:

- *Operation Orbital*—AFP investigation concerning incitement to import
- *Operation Quills*—Victoria Police investigation concerning the purchasing of chemicals and drug manufacturing equipment, to manufacture MDMA
- *Operation Magnum*—Victoria Police investigation concerning the large-scale manufacture and distribution of MDMA.<sup>425</sup>

During the Operation Plutonium trial in March 2006, Mr Mokbel absconded and fled Australia.<sup>426</sup> He was convicted in his absence and later apprehended in Greece and extradited to Australia in May 2008 to serve his sentence.<sup>427</sup>

In April 2011, Mr Mokbel pleaded guilty to charges arising from Operations Orbital, Magnum and Quills.<sup>428</sup> On 3 July 2012, he was sentenced to 30 years' imprisonment with a non-parole period of 22 years.<sup>429</sup>

Mr Mokbel was the subject of other investigations for criminal and particularly drug-related activities, including Operations Matchless, Landslip, Kayak and Spake. He pleaded guilty to charges arising out of Operations Orbital, Magnum and Quills, in large part because doing so resulted in his prosecutions arising from the other operations being discontinued.<sup>430</sup>

Ms Gobbo provided Victoria Police with information about Mr Mokbel before and after her third registration as a human source in September 2005. For example, Mr Bateson recorded in his diary that from May to August 2005, she provided intelligence about Mr Mokbel's relationship with his solicitor, Solicitor 2. In effect, she alleged that Solicitor 2 was complicit in some of Mr Mokbel's criminal activities and in facilitating his culpable

communications with associates including Mr Williams.<sup>431</sup> Ms Gobbo also told police that Mr Mokbel was pressuring her to ensure that others she was acting for during this time did not cooperate with police so as to avoid any detriment to Mr Mokbel.<sup>432</sup>

Ms Gobbo claimed that part of her motive in becoming a human source was to distance herself from Mr Mokbel and his 'crew' and to undermine their interests.<sup>433</sup> She said she wanted Mr Mokbel to be 'in a position to never get bail'.<sup>434</sup> Reflecting on these motivations at a later time, she told her handlers that she was frustrated at the influence Mokbel and his crew were able to wield and their ability to 'get away with' criminal activities.<sup>435</sup>

From the time that she was registered as a human source, she provided extensive information to Victoria Police, such as Mr Mokbel's addresses,<sup>436</sup> contact numbers,<sup>437</sup> vehicles,<sup>438</sup> code names,<sup>439</sup> code words, and other information and details about him his family and his associates.<sup>440</sup> She gave her opinion as to whether his associates, some of whom were also her clients, were likely to cooperate with police.<sup>441</sup> She also provided extensive information about Mr Mokbel's finances,<sup>442</sup> particularly to the Purana Taskforce, which sought to target the Mokbel family's assets to undermine the cartel.<sup>443</sup> When she acted for him at the Plutonium trial, she gave police her views about Mr Mokbel's prospects of acquittal,<sup>444</sup> his attitude to pleading guilty,<sup>445</sup> and defence strategies, including names of potential witnesses<sup>446</sup> and whether Mr Mokbel was likely to give evidence.<sup>447</sup>

When Mr Mokbel fled Australia, Ms Gobbo remained in contact with him and his family and shared details of that contact with police.<sup>448</sup> She assisted Mr Mokbel with his extradition proceedings,<sup>449</sup> at the same time feeding police information about those proceedings, which police then used against Mr Mokbel.<sup>450</sup> She provided Victoria Police with information about the AFP investigations relating to Mr Mokbel before they could acquire it through legitimate channels.<sup>451</sup> At the same time, she was acting for numerous people who, with her assistance, gave information or evidence against Mr Mokbel.<sup>452</sup>

Ms Gobbo's conduct likely violated her professional legal obligations to Mr Mokbel. Her claim that she was motivated to assist police because she was affronted by Mr Mokbel's criminal activities is no excuse for her behaviour. There are very confined circumstances in which a breach of legal professional privilege or confidentiality might be warranted, such as where the breach is necessary to prevent serious harm to someone. As noted, if a lawyer felt compelled for legitimate legal reasons to breach privilege or confidentiality and to report behaviour to the authorities, the lawyer would need to immediately cease acting for the client, not continue as Ms Gobbo did as a human source providing information against them.

Our society does not tolerate criminal behaviour but provides that those charged with criminal offences are innocent until proven guilty beyond reasonable doubt after a fair trial according to law. Those practising as criminal lawyers, through training and experience, understand the ethical obligations and boundaries that ensure they can act in their clients' best interests while meeting their responsibilities to the court and the administration of justice.

The criminal justice system could not function if lawyers took on the role of deciding if clients deserved to be informed on to police, in breach of their professional obligations to those clients and the administration of justice. If Ms Gobbo felt unable to cope with Mr Mokbel's alleged criminal activities, the appropriate course was to stop acting for him. Despite the excuses offered, she could have easily used her significant health issues as a circuit breaker to cease acting for Mr Mokbel and other high profile criminal clients, taken an extended break and rebuilt a career in a different area of law or in a different location. This would have required some hard work and courage but Ms Gobbo was not short of either. It would have been easier, less stressful and safer than the duplicitous and dangerous course upon which she embarked over many years.

There are indications that sometimes Ms Gobbo's motive in informing on Mr Mokbel may have been more personal than she claimed. Ms Gobbo stated that in around October 2004, he began spending more time with Solicitor 2 and less time with her, and she was unhappy about this.<sup>453</sup> She began providing information to police about Solicitor 2 at this time.<sup>454</sup> Mr Bateson told the Commission that he considered her motives to be partly due to her ill will towards Solicitor 2.<sup>455</sup> Ms Gobbo, true to form, continued to provide information about Solicitor 2 even when

representing Solicitor 2 after they were charged with various offences.<sup>456</sup> That Ms Gobbo's conduct as a human source might have been motivated in part by personal dislike of another legal practitioner suggests a particularly troubling character flaw. Once again, her improper conduct not only affected her clients, but also other members of the profession.

Given Mr Mokbel's current appeal, and the Commission's obligation not to prejudice any judicial proceedings, this case study is necessarily succinct, even though his proceedings—and Ms Gobbo's involvement in them—are somewhat complex.

Figure 7.3 provides an overview of the various police operations targeting Mr Mokbel, the role Ms Gobbo played and the kinds of information she provided to Victoria Police.<sup>457</sup>

### **Figure 7.3: Ms Gobbo's involvement in providing information relating to Mr Antonios (Tony) Mokbel**

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## **Case study: Ms Gobbo's involvement in the 'Tomato Tins' drug-trafficking syndicate cases**

Ms Gobbo's involvement with the so-called 'Tomato Tins' drug-trafficking syndicate serves as a further example of the wide-ranging consequences of her improper conduct towards the latter period of her work as a human source.

Between February 2008 and August 2012, 33 people were arrested and charged with drug-related offences as part of three connected police operations:

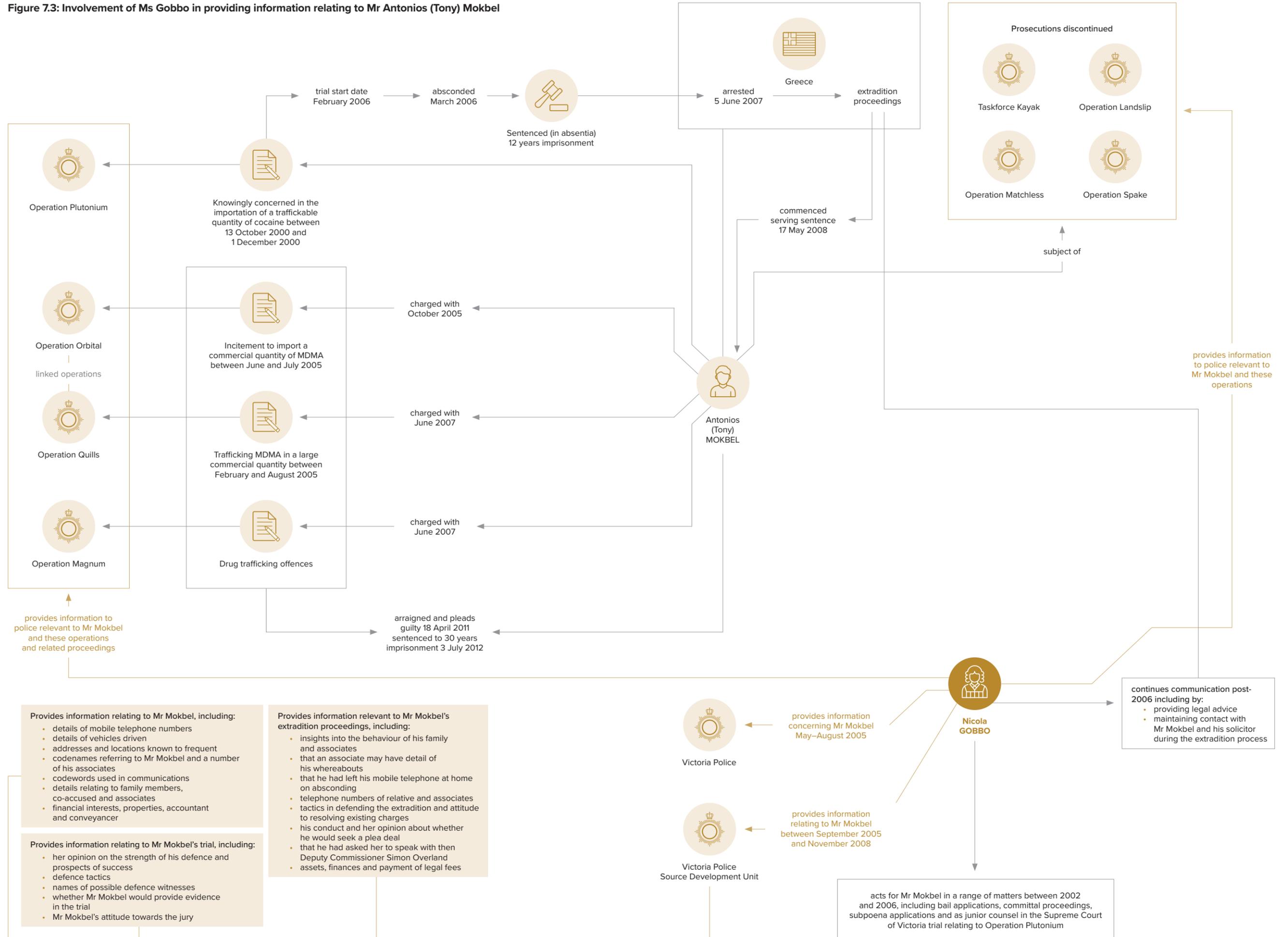
- *Operation Bootham Moko*—AFP operation that targeted a conspiracy to import a very large quantity of MDMA hidden in tomato tins shipped from Italy to Australia<sup>458</sup>
- *Operation Inca*—joint operation between Victoria Police, the AFP, the then Australian Crime Commission, Australian Customs and the Australian Taxation Office targeting drug and money-laundering offences<sup>459</sup>
- *Operation Cardinia*—AFP investigation into MDMA trafficking.<sup>460</sup>

On 28 June 2007, a large quantity of MDMA was intercepted by Australian authorities.<sup>461</sup> It was at the time the largest shipment of MDMA ever seized worldwide.<sup>462</sup> Numerous people were arrested, charged and convicted through Operation Bootham Moko, including Mr Pasquale Barbaro, who was found to be at the 'apex' and 'centre' of the attempted importation;<sup>463</sup> Mr Karam, who was said to lead a group that attempted to take possession of the ecstasy tablets supplied and Mr Barbaro's 'major wholesale customer';<sup>464</sup> and six other associates of Mr Barbaro and Mr Karam.<sup>465</sup>

Operations Bootham Moko, Inca and Cardinia, and the offending they targeted, had various causal and evidentiary connections. It is important to note that the offending targeted by Operations Inca and Cardinia occurred after the failure of the Tomato Tins conspiracy and the seizure of the MDMA; that at least some of it was seemingly prompted by a desire—particularly on Mr Barbaro's part—to recoup losses and repay debts incurred through the failure of the importation;<sup>466</sup> and that this offending was detected and prosecuted partly through the inroads made during Operation Bootham Moko.<sup>467</sup>

Figure 7.4 provides an overview of the people charged in the Tomato Tins proceedings, and specifically which operation they were charged under.<sup>468</sup>

Figure 7.3: Involvement of Ms Gobbo in providing information relating to Mr Antonios (Tony) Mokbel



## Figure 7.4: Involvement of Ms Gobbo with people charged in the ‘Tomato Tins’ drug-trafficking syndicate, June 2007 to August 2008

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Ms Gobbo provided information to Victoria Police from and about people targeted by these operations. This was because she was acting for several of them. She also acted for people charged on the basis of evidence that she helped police obtain, despite acknowledging that doing so would leave her ‘morally, ethically and legally conflicted’.<sup>469</sup> The cases of at least 32 people arising out of these operations may have been affected by her improper conduct.<sup>470</sup>

### Ms Gobbo’s representation of Mr Rob Karam

Ms Gobbo’s representation of Mr Rabie (Rob) Karam was particularly noteworthy. She had a long association with him, beginning in 2005.<sup>471</sup> At times between then and 2007, she acted for him in relation to other federal drug charges, and she was junior counsel at his trial in 2007.<sup>472</sup> According to her, their relationship was also social and personal, and Mr Karam had grown ‘used to her being around and [would] start talking about other things’.<sup>473</sup>

She evidently used that closeness to the advantage of police. She began providing information about him to police from the beginning of her third period of registration as a human source, including while appearing for him at trial.<sup>474</sup> She provided information about him earlier in the context of Operation Posse, given his association with Mr Cooper and the Mokbels.<sup>475</sup> The information she provided, the value of which is disputed by the AFP,<sup>476</sup> included:

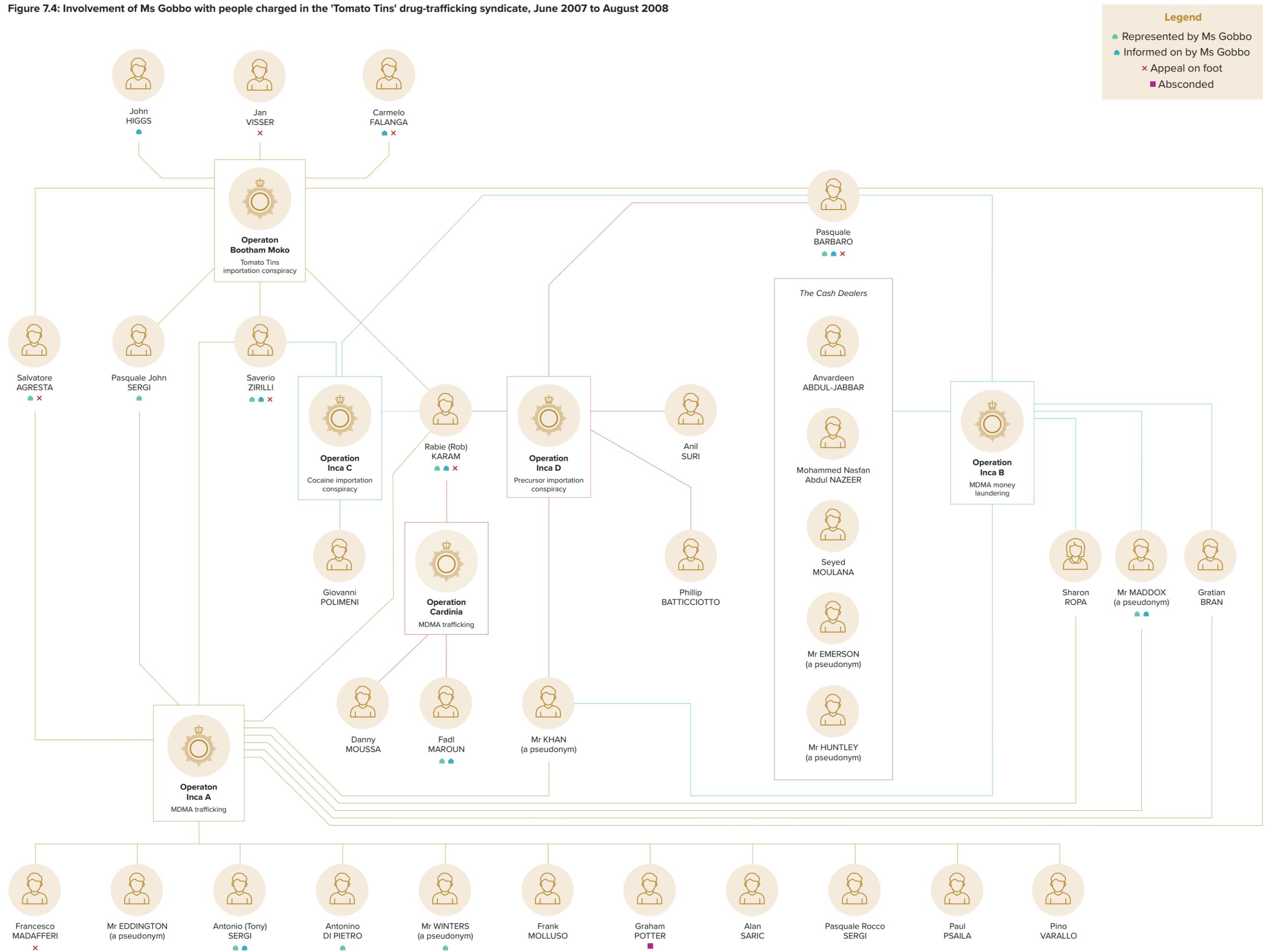
- details of the shipment of the MDMA from Italy, both before and after it took place<sup>477</sup>
- details of meetings associated with the shipment,<sup>478</sup> including meetings attended by Mr Karam, Mr Barbaro and others, over the course of several days while they were staying at the Pacific International Apartments in Melbourne<sup>479</sup>
- telephone numbers of Mr Karam and others<sup>480</sup>
- ongoing intelligence permitting the operations to continue undetected by their targets.<sup>481</sup>

As early as March 2006, she relayed information to her handlers about Mr Karam’s intention to participate in a drug shipment from Italy.<sup>482</sup> Later that year, she provided information about Mr Karam’s interactions with an Italian national concerning a future importation of ecstasy.<sup>483</sup>

On 5 June 2007, during Mr Karam’s trial, Ms Gobbo gave Victoria Police photocopies of documents Mr Karam had given her for safekeeping, explaining that they related to ‘shipping containers being imported’ by an associate.<sup>484</sup> One of the documents was a bill of lading, a legal document issued by someone sending goods by sea to the shipper, listing the type and quantity of the goods and other details. The bill referred to tinned tomatoes being imported from Italy and included the name of the vessel, the container number, the port of origin and the departure date. The MDMA was in the tomato tins. Ms Gobbo also helped her handlers translate the document from Italian to English.<sup>485</sup>

After receiving this information, Victoria Police devised a plan to disclose the information about the container to various other law enforcement agencies, such as the AFP, without revealing that Ms Gobbo was the source of that information.<sup>486</sup> Further, Victoria Police gave Ms Gobbo tasks connected to the importation, which she was pleased to accept.<sup>487</sup> For example, a day after the shipment was intercepted, they asked her to find out whether Mr Karam was suspicious about police involvement,<sup>488</sup> and to provide ongoing updates about his movements and their communications.<sup>489</sup> In July 2007, Ms Gobbo set up a meeting with Mr Karam and his alleged co-conspirator, Mr John Higgs, so that police could record them discussing the shipment.<sup>490</sup> She was also tasked with misleading Mr Karam so as to conceal the surveillance and the interception of the shipment.<sup>491</sup> Remarkably, Victoria Police continued tasking Ms Gobbo, even after telling her that they would not do so and saying they wanted her to take a passive role.<sup>492</sup>

Figure 7.4: Involvement of Ms Gobbo with people charged in the 'Tomato Tins' drug-trafficking syndicate, June 2007 to August 2008



The bill of lading was not the only information Ms Gobbo volunteered to Victoria Police at this time. For example, in addition to giving them the shipping documents, she also provided the identities and contact details of Mr Karam's associates,<sup>493</sup> including Mr Barbaro,<sup>494</sup> and details of a consignee for the shipment.<sup>495</sup> She provided contact details from Mr Karam's phone, which she searched when he left it charging in her chambers.<sup>496</sup> She also reported on conversations about the tomato tins that she overheard when in Mr Karam's company.<sup>497</sup> Significantly, on 28 June 2007 she told her handlers that Mr Karam and Mr Higgs were going to visit their co-conspirators who were booked to stay for a week at the Pacific International Apartments in Melbourne.<sup>498</sup>

Operation Bootham Moko was led not by Victoria Police but by the AFP. Nonetheless, Victoria Police and Ms Gobbo considered that her role was important to its success. For example, in a meeting with her in December 2008, Mr White stated that, if not for her, the tomato tins would never have come under suspicion.<sup>499</sup> In seeking financial compensation from Victoria Police years later, Ms Gobbo listed the Tomato Tins proceedings among the most significant work she had done as a human source.<sup>500</sup> In August 2008, when most arrests for these operations occurred, she asked her handlers why she was not getting any credit, a common theme throughout her long dealings with police as a human source.<sup>501</sup>

Ms Gobbo and Victoria Police were plainly aware that she would be conflicted in representing others arrested and charged as part of Operations Bootham Moko, Inca and Cardinia. Yet, true to form, she acted for at least 10 of the 33 people subsequently arrested. One such person was Mr Barbaro.

### **Ms Gobbo's representation of Mr Pasquale Barbaro**

Even before representing Mr Barbaro, Ms Gobbo gave information about him to police. For example, she indicated that he was controlling the importation,<sup>502</sup> identified him from a surveillance photograph<sup>503</sup> and told police about meetings he was attending.<sup>504</sup> The surveillance on the Pacific International Apartments may have played a role in Mr Barbaro becoming a person of interest to police.<sup>505</sup> It is possible that the information Ms Gobbo provided to police about the planned stay of Mr Karam and his associates at the apartments played a role in the decision to monitor those apartments.<sup>506</sup> The AFP claimed that the information Ms Gobbo provided to Victoria Police was not used to support applications for listening device warrants, other than the interception of the Tomato Tins shipment, which the AFP now understands is alleged to have occurred in part due to the provision of the bill of lading to Victoria Police.<sup>507</sup> However, it may be as Counsel Assisting suggest,<sup>508</sup> that they were not fully aware of Ms Gobbo's role.<sup>509</sup> It is not possible on the information before the Commission to resolve this issue; it may, in any event, be an issue that arises in ongoing or future legal proceedings. Once she was representing Mr Barbaro, Ms Gobbo wasted no time in providing Victoria Police with information about him; including, for example, in relation to overheard conversations about firearms and money at his residence.<sup>510</sup>

It appears that Mr Barbaro remained unaware of any role Ms Gobbo may have had in bringing him or his activities to the attention of police.<sup>511</sup> As mentioned above, he was convicted not only in relation to the tomato tins importation, but also separate and subsequent offending that appears to have been prompted by the financial failure of that importation.<sup>512</sup>

## Other potentially affected people

Nine others convicted of involvement in these activities fall into similar circumstances as Mr Barbaro.<sup>513</sup> There are two additional people, Mr Higgs and Mr Francesco Madafferi, where the question of whether Ms Gobbo represented them is contested.

Counsel Assisting submitted that Ms Gobbo visited Mr Higgs on two occasions after he was arrested but concluded that she probably did not represent him.<sup>514</sup> Mr Higgs, however, submitted that Ms Gobbo represented him while she was an employee solicitor with Solicitor 1.<sup>515</sup> Counsel Assisting acknowledged Mr Madafferi's submission that she represented him but was unable to find documentary evidence to support this.<sup>516</sup>

On the material it has received, the Commission is unable to conclude whether Ms Gobbo represented Mr Higgs or Mr Madafferi. The Commission also notes that this may be an issue in dispute in current or future court proceedings.<sup>517</sup>

Beyond the people for whom she acted and/or informed on to police, up to 20 others charged through Operations Bootham Moko, Inca and Cardinia, although not represented by her at any stage, may have been convicted in large part on evidence she procured or helped to procure.<sup>518</sup> If an appeal court was satisfied that the procurement of that evidence was improper or unlawful, and it should not have been relied on or resulted in an unfair trial, it is possible that their cases may also be affected by Ms Gobbo's conduct as a human source.

## THE WIDER IMPLICATIONS OF MS GOBBO'S CONDUCT

Consistent with term of reference 1, in this chapter the Commission has focused primarily on the potential effect of Ms Gobbo's conduct on particular legal proceedings. Term of reference 6, however, empowered the Commission to consider other matters necessary to satisfactorily resolve matters in the other terms of reference.

The Commission's inquiry has shed light on the actions of Ms Gobbo, and their possible consequences for individual cases. It is also important for the Commission to consider the cumulative impact and broader repercussions of this improper conduct. At its worst, it was a sustained and systemic violation of individual rights and of the criminal justice system. Conduct of this kind has the potential to effect lasting harm, not just on individuals, but on the culture, practices and institutions that allow the courts and the criminal justice system to function fairly as an essential part of democratic government.

In the following sections, the Commission considers some of the wider implications of Ms Gobbo's conduct in relation to:

- her clients and related proceedings
- the wider justice system
- the legal profession
- Victoria Police.

The broader effects of Victoria Police's conduct and the systemic factors that gave rise to it are considered in Chapters 8 and 9.

## The effect of Ms Gobbo's conduct on her clients and related proceedings

This chapter has set out how Ms Gobbo's conduct has potentially affected a large number of legal proceedings. It is important to consider, in practical terms, what this might mean. The cases of Mr Orman and Mr Cvetanovski, because they have already been the subject of a successful appeal, are useful examples. Ms Gobbo's conduct resulted in them each spending about a decade of their lives in prison, having been convicted at trials marred by substantial miscarriages of justice. Others who may ultimately succeed in appeals against conviction could still be in prison as this report is published, serving lengthy sentences based on convictions after unfair trials. That long-term loss of liberty is something for which monetary damages can never truly compensate.

In the cases of both Mr Orman and Mr Cvetanovski, it was open to the Court of Appeal to order a re-trial but the prosecutor fairly conceded that this would be unjust given the time they had spent in prison and the Court accepted those concessions. The lengthy passage of time since their trials meant not only that they had already served a great deal of the sentence imposed, but also that there may be difficulties in preparing evidence for any re-trial. Trials commonly rely on witnesses and, in turn, on memories. The events described in this chapter occurred years, sometimes decades ago. Memories may have faded, and witnesses may have disappeared or died. Records, too, may have been destroyed. As a result, the opportunity for the state to try someone fairly may be permanently lost. These issues are likely to arise in other potentially affected cases.

Even where re-trials are possible, that course is not without great cost. A re-trial means once again marshalling the time and resources of prosecutors, defence lawyers, courts, judges and jurors. It requires witnesses, and sometimes victims of alleged offending, to once again give evidence—and as part of that, to relive what may be painful or difficult memories, and to be subject to cross-examination and potentially to public and media attention. This in turn impacts the lives of victims, witnesses, accused persons and their families.

The same factors that may make a re-trial problematic also pose a challenge for people seeking to appeal their convictions. A person who wishes to appeal against their conviction or finding of guilt must offer an evidentiary basis to support their appeal. In some cases, that may prove difficult. Again, memories fade, witnesses become unavailable and records may have been lost or destroyed—or may not have been kept in the first place (whether to conceal misconduct or for more prosaic reasons). It may simply be difficult to establish—years later, and having regard to complex and nuanced circumstances—that were it not for Ms Gobbo's misconduct, a person would not have been convicted. The appeals process may not operate in every case to remedy the effects of Ms Gobbo's conduct.

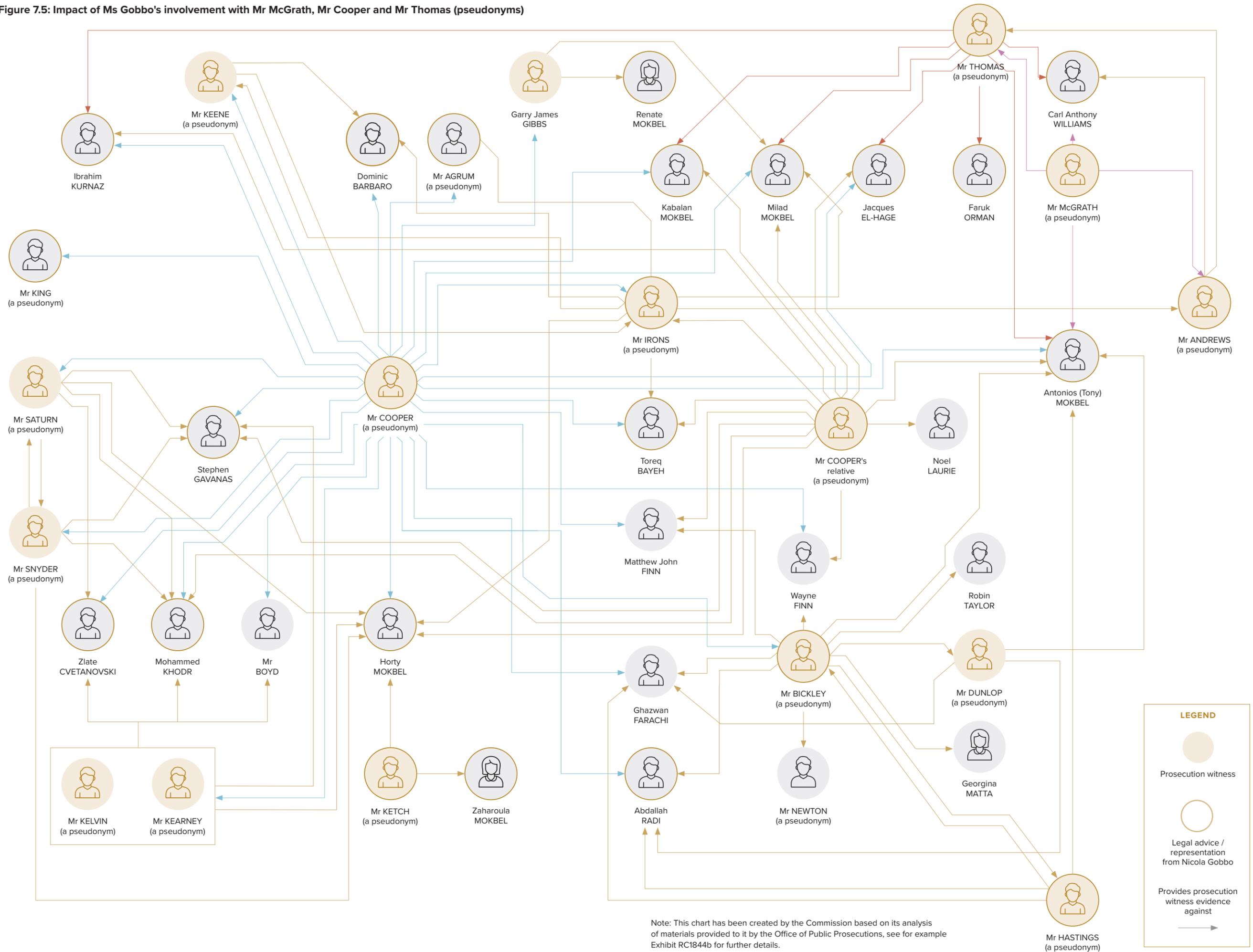
Further, an emphasis on individual cases can distract from the cumulative impact of Ms Gobbo's misconduct. Reference has been made in this chapter to the chain reaction of Ms Gobbo's misconduct; that is, the way her conduct and that of Victoria Police, acting in concert, persuaded one person to give information about their associates leading to the prosecution of another for whom Ms Gobbo then acted and persuaded to cooperate with police and implicate others, and so on. Figure 7.5 illustrates this effect and uses different coloured lines to demonstrate who Mr McGrath, Mr Cooper and Mr Thomas (pseudonyms) provided evidence against.<sup>519</sup>

### Figure 7.5: Impact of Ms Gobbo's involvement with Mr McGrath, Mr Cooper and Mr Thomas (pseudonyms)

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There are also those, some of whom made submissions to the Commission, who may have been affected by the conduct of Ms Gobbo as a human source in that they were investigated or charged but were never convicted. These people may have suffered considerable resulting stress, financial and reputational loss,<sup>520</sup> and sometimes periods of imprisonment on remand.<sup>521</sup> There are some who believe that legitimate criminal investigations, such as the murders of Mr Terrence (Terry) Hodson, Mrs Christine Hodson and Mr Shane Chartres-Abbott were derailed

Figure 7.5: Impact of Ms Gobbo's involvement with Mr McGrath, Mr Cooper and Mr Thomas (pseudonyms)



Note: This chart has been created by the Commission based on its analysis of materials provided to it by the Office of Public Prosecutions, see for example Exhibit RC1844b for further details.

because of Ms Gobbo's conduct as a human source, with concerning impacts for families of victims as well as for the conscientious investigators who were unaware of Ms Gobbo's clandestine informing to other parts of Victoria Police.<sup>522</sup> While acknowledging these cases, for the reasons explained earlier in this chapter, the Commission has not included them in its inquiry into the number of, and extent to which, cases may have been affected by the conduct of Ms Gobbo as a human source.

In short, where cases may be affected by Ms Gobbo's conduct, these potential effects may be very damaging; and the damage done may be irreparable.

## **The effect of Ms Gobbo's conduct on the justice system**

The case studies in this chapter are replete with examples of Ms Gobbo's conduct in her dual role as a legal practitioner and human source adversely affecting both legal processes, and the work of other people within the criminal justice system. For example, Ms Gobbo's collusion with police in acting for Mr Thomas hindered Mr Lovitt's efforts to act in Mr Thomas' interests at his committal and to advise Mr Thomas of his prospects at trial. Later, Ms Gobbo's relationship with police undermined Mr Richter's efforts to represent Mr Orman.

Ms Gobbo concealed her activities as a human source, and her role in obtaining evidence, not only from her fellow defence counsel but also from prosecutors and the courts. That in turn frustrated the ability of prosecutors to fulfil their obligations to accused persons, including the fundamental duty to provide them with all relevant evidence, and the ability of courts to ensure the fairness of legal proceedings, properly apprised of the relevant issues.

As has been addressed, Ms Gobbo's conduct potentially affected not just trials, but bail hearings, committals, mentions and other proceedings. These are time-consuming, resource-intensive, sometimes complex, critically important processes by which justice is administered. They lead to decisions about the liberty of people accused of crimes, the evidence that will be admitted and excluded at trials, the charges that people will face and the defences that will be open to them. When these processes are subverted, the criminal justice system is corrupted and the resulting loss may not be calculable or compensable.

The legal process, and the interactions between people representing different parts of that process, rely to some extent on good faith. For example, a court assumes that the prosecution has complied with its duty of disclosure and provided all relevant evidence to the defence. Even when the defence challenges that assumption, courts are not inquisitorial bodies and their powers, as well as their time and resources, are constrained. They depend on legal practitioners as officers of the court to put the integrity of the legal process above their clients' interests and certainly their own. Equally, lawyers themselves must be able to trust that other practitioners follow their professional obligations. The criminal justice system relies on the lawful and ethical conduct of legal practitioners. Ms Gobbo's gross breaches of her professional obligations undermined the administration of justice and resulted in unfair convictions. This has severely shaken public confidence in the integrity of Victoria's criminal justice system.

## **The effect of Ms Gobbo's conduct on the legal profession**

Ms Gobbo's conduct has also harmed the legal profession institutionally. As noted in Chapters 2, 4, 5 and 15, legal practitioners are subject to professional and ethical rules and obligations, including when appearing in court, over and above the ordinary laws that bind all of us.

Those rules include the obligation to avoid conflicts of interest; to preserve and protect legal professional privilege; and particular duties to the court and to other legal practitioners. As outlined below, Ms Gobbo's conduct resulted in her being struck off the Supreme Court's Roll of Legal Practitioners.

When the Commission first commenced its work, Ms Gobbo, although not holding a practising certificate since 2013–14, concerningly remained on the Roll of Legal Practitioners despite the High Court’s condemnation of her conduct in December 2018.<sup>523</sup> The Commission therefore intended to refer the matter to the VLSB+C for consideration.

As Counsel Assisting note in their submissions, Ms Gobbo’s conduct included providing police with information about a solicitor while acting for that solicitor<sup>524</sup> and withholding information from or providing misleading information to other barristers, including Mr Allen, Mr Richter and Mr Lovitt. She also made incomplete or misleading representations to the Board of Examiners and the Victorian Bar Ethics Committee.

On 7 October 2020 the VLSB+C informed the Commission that, almost two years after the High Court’s damning assessment of Ms Gobbo’s conduct, they had applied to the Supreme Court to have her name removed from the Roll. Ms Gobbo consented to this on the basis of an agreed statement of facts. On 20 October 2020 the Supreme Court made an order striking her off the Roll of Legal Practitioners.<sup>525</sup>

The Commission was subsequently advised that Ms Gobbo remains on the Roll of ‘retired’ barristers administered by the Victorian Bar Council and they are unable to remove her due to Ms Gobbo objecting to this course in 2013 and their constitutional limitations to remove her without her consent. The Commission was informed a constitutional amendment proposed in 2019 that would have allowed her name to be removed was not passed.<sup>526</sup> The Commission considers that the Victorian Bar Council should urgently reconsider this matter.

Conduct of this kind damages the legal profession in several ways. Practitioners are expected to act in accordance with their obligations to the courts, their clients and one another. Bodies such as the VLSB+C and the Victorian Bar have powers and responsibilities aimed at ensuring that barristers and legal practitioners observe their obligations. Barristers can face consequences, including losing their right to practise law, and where an offence has been committed, criminal sanctions for breaching these obligations. But these mechanisms have limitations. Barristers are sole practitioners (that is, they practise independently) and their conduct can be difficult to oversee in the absence of trust and good faith, as Ms Gobbo’s case plainly demonstrates.

The potential for improvements to aspects of legal profession regulation following the revelation of Ms Gobbo’s conduct is discussed in Chapter 15. Most people interact with the justice system, with which they are often unfamiliar, through their legal practitioners. They rely on their lawyer, and in litigation particularly their barrister, to advise and guide them through a largely unknown and sometimes frightening process. Those charged with criminal offences and their families are often facing a difficult, stressful and potentially life-changing situation. They must be able to trust their lawyers completely, knowing they will give them competent and independent advice, explain unfamiliar aspects of the legal process, act in their best interests, and keep their confidence. If a client withholds information from their lawyer because they perceive they cannot trust them, the lawyer will be unable to act in their best interests and the system of justice would become dysfunctional.

Fortunately, the public can be assured that aberrant conduct like Ms Gobbo’s is rare in the Australian legal system and almost all lawyers astutely adhere to their professional obligations to their clients. That is of little comfort to those who have been affected by Ms Gobbo’s conduct and suffered as a result of her serious violation of trust. Her conduct has also had a wider, systemic effect. It has unquestionably undermined community confidence in barristers and the legal profession generally, particularly in Victoria. Those accused of crimes, often the most marginalised in our communities—among them young people, Aboriginal and Torres Strait Islander people, those living in poverty, those suffering from acute substance dependence and those with mental health problems—may be reluctant to seek legal representation or to speak frankly to their lawyers for fear that what they say would not be kept confidential. It would also be unfortunate if those who all too often make unwarranted criticisms of the legal profession or the justice system found vindication for their misguided attitudes in Ms Gobbo’s conduct. The standing of the legal profession and community confidence in lawyers and the entire criminal justice system has been diminished as a result of Ms Gobbo’s duplicitous conduct as a human source and criminal law practitioner.

## The effect of Ms Gobbo's conduct on Victoria Police

The Commission acknowledges the vast majority of Victoria Police officers, some of whom gave evidence, statements or submissions, are true to their oaths and affirmations of office. They recognise that police corruption is not only misusing police power for personal gain; it includes the neglect of due process to achieve a desirable result on the basis that the end justifies the means. They have all been adversely affected by Ms Gobbo's conduct as a human source for Victoria Police.

Institutionally, too, the standing of Victoria Police and community confidence in it has been undermined by Ms Gobbo's informing. As noted in Chapter 2, a recent Roy Morgan poll showed that the Victorian public's confidence in the police was seriously diminished, with many respondents citing the events surrounding Ms Gobbo's use as a human source.

Notwithstanding the acutely inappropriate nature of the relationship that developed between Victoria Police and Ms Gobbo, a degree of professional good faith between police and legal practitioners is essential to the operation of the criminal justice system. Defence counsel, practitioners and the courts need to know that police will conscientiously adhere to their disclosure obligations and answer questions concerning disclosure and other matters both in and out of court candidly and fully. Ms Gobbo's conduct has undermined the confidence of defence counsel, prosecutors and the courts in officers of Victoria Police.

## CONCLUSIONS AND RECOMMENDATIONS

Ms Gobbo's conduct as a human source while practising as a criminal lawyer was extraordinarily wide-ranging and sustained. It demonstrated a disregard for the most basic legal professional and ethical standards of independence, integrity and the avoidance of conflicts of interest, and it potentially affected 1,011 people, as set out in Box 7.1.

### BOX 7.1: POTENTIALLY AFFECTED CASES

On the evidence before the Commission, the Commission is satisfied that **1,011** people have cases that may have been affected by Victoria Police's use of Ms Gobbo as a human source.

Those 1,011 people comprise **973** people for whom Ms Gobbo acted following her admission to legal practice, and a further **38** people for whom she did not act but whose cases may have been affected by her use as a human source.

As to the 973 people for whom Ms Gobbo acted, the Commission is satisfied that:

- their cases may have been affected in the manner identified by the Queensland Court of Appeal in *R v Szabo*,<sup>527</sup> that is, they were deprived of the opportunity to be represented by an independent lawyer acting in their best interests rather than in the interests of police
- the cases of at least 86 of the 973 people may have been additionally affected by a conflict of interest and/or the tainting of evidence arising from Ms Gobbo's use as a human source.

As to the additional 38 people for whom Ms Gobbo did not act, the Commission is satisfied that their cases may have been affected by the tainting of evidence arising from her use as a human source.

The Commission's findings do not exclude the possibility that other cases may have been affected by Victoria Police's use of Ms Gobbo as a human source.

This might seem an impossibly large number of cases affected. The case studies and wider discussions in this chapter, however, illustrate the cascading effects of Ms Gobbo's misconduct.

She purported to act as a criminal defence lawyer when she was a human source acting for Victoria Police, and did not disclose this to her clients, other accused persons, the DPP or courts. She provided information to police about many clients for whom she was acting, and often their families and associates. She did so without their knowledge, in circumstances where they expected such information to be privileged and confidential. Police used this intelligence in investigating, charging and prosecuting Ms Gobbo's clients and on occasions against others who were not her clients, and neither Victoria Police nor Ms Gobbo disclosed its irregular provenance. Incredibly, she sometimes went on to act for these newly accused persons, shamelessly charging them fees and ostensibly defending them in proceedings that may not have come about but for her conduct. At times she also informed on them and encouraged them to cooperate with police.

In this way, Ms Gobbo's conduct compounded over years, enveloping an ever-widening group of people and potentially affecting a growing number of convictions and findings of guilt.

Ms Gobbo's representation of all of these people was contrary both to their interests and her obligations. It has potentially corrupted legal proceedings, including criminal trials. It was at different times during this Commission and in responsive submissions suggested or implied that her conduct, or that of Victoria Police, was immaterial or excusable because the case against some accused persons was strong and/or the charges they faced were grave. That view ignores the rule of law, a fundamental premise of our criminal justice system and our democracy. Everyone, no matter how heinous the alleged crime or unpopular the accused person, is entitled to a fair trial according to law and is innocent until proven guilty by the prosecution beyond reasonable doubt. If an accused person is convicted after a trial where the prosecution has been corrupted by the conduct of a lawyer who was informing to police on her clients, any resulting conviction or finding of guilt, no matter how strong the prosecution case, is at risk of being set aside on the basis of a substantial miscarriage of justice.

The integrity of the criminal justice system, and public confidence in that system, must be upheld even in times of media and public concern about levels of violent and dangerous crime, and no matter what the charges or against whom they are brought. The rule of law requires nothing less. As the High Court recognised in *AB v CD*,<sup>528</sup> Ms Gobbo's conduct has 'debased fundamental premises of the criminal justice system'. The High Court recognised that conduct of this kind does not just have the potential to affect individual rights. It debases and damages the justice system itself. It diminishes public confidence in that system, and it renders its processes vulnerable to doubt, criticism and challenge. Australia's legal system has no tolerance for an 'end-justifies-means' approach to the criminal process.

The Commission again emphasises that the potential impacts of Ms Gobbo's conduct are not merely a result of her own actions and inactions. These impacts arose by virtue of her conduct in combination with that of current and former officers of Victoria Police. This is discussed further in Chapters 8 and 9.

On the material before it, including responsive submissions, the Commission is satisfied that Ms Gobbo's conduct should be further investigated, and a determination made as to whether there is sufficient evidence to establish the commission of a criminal offence or offences.

The Commission recommends in Chapter 17 that the Victorian Government establishes a Special Investigator with powers to investigate the conduct of Ms Gobbo and relevant conduct of current and former Victoria Police officers. The rationale for establishing a Special Investigator is discussed further in Chapter 17. In short, since it is inappropriate for Victoria Police to conduct this investigation, and the Independent Broad-based Anti-corruption Commission lacks the power to investigate Ms Gobbo's conduct in its entirety, this course will best ensure her conduct is comprehensively and independently investigated to determine if there is sufficient evidence to bring a criminal charge or charges.

The Commission also recommends that the Victorian Bar Council considers the removal of Ms Gobbo's name from the Bar Roll. As Ms Gobbo has already been removed from the Supreme Court Roll of Legal Practitioners, the removal of her name from the Bar Roll would have no practical effect but it would have powerful symbolic significance. It would help restore community confidence in the Victorian legal profession and particularly the Victorian Bar.

The Commission's investigative and public reporting role in exposing Ms Gobbo's misconduct, although not judicial, is a powerful one. The Commission has elicited a very considerable body of evidence during its extensive, largely public hearings and through the many tendered statements and exhibits, from Ms Gobbo herself, from numerous people for whom she acted, from her former colleagues in the legal profession, and from current and former officers of Victoria Police who had dealings with her. In combination, this evidence has shone a bright light on the extraordinary reach of her once hidden misconduct. Much of this evidence concerned matters previously unknown to the public and to the many people whose cases may be potentially affected. The work of the Commission will allow the community to better understand these events, empower those whose convictions or findings of guilt may be affected to make informed decisions as to any future action they may take, and provide government, the legal profession and Victoria Police with policy and practice recommendations to best ensure such events are never repeated.

#### RECOMMENDATION 1

That the Victorian Government, immediately after it has established the Special Investigator proposed in Recommendation 92, refers the conduct of Ms Nicola Gobbo to the Special Investigator to investigate whether there is sufficient evidence to establish the commission of a criminal offence or offences connected with her conduct as a human source for Victoria Police.

If the Special Investigator considers that there is sufficient evidence to establish the commission of a criminal offence or offences, they should prepare a brief of evidence for the Victorian Director of Public Prosecutions to determine whether to prosecute.

#### RECOMMENDATION 2

That the Victorian Bar Council, within three months, considers removing Ms Nicola Gobbo from the Victorian Bar Roll, including by any necessary amendment to the Victorian Bar Constitution.

# Endnotes

- 1 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). This case concerned the disclosure of information about Ms Gobbo's role as a human source to people whose cases may have been affected. This case is discussed in Chapter 1.
- 2 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 3 The term 'acting' encompasses conduct undertaken in Ms Gobbo's capacity as a legal practitioner, including, for example, representing an individual in court proceedings, providing written or oral advice, or otherwise acting on that person's instructions.
- 4 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 20 [90].
- 5 See, eg, Responsive submission, Mr Paul Dale, 21 July 2020; Responsive submission, Mr Paul Mullett and Mr Noel Ashby, 29 July 2020; Submission 155 Mr Matt Tomas.
- 6 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 18 [86].
- 7 In a criminal trial, for an accused person to be found guilty, it is necessary for the prosecution to prove their guilt 'beyond reasonable doubt'.
- 8 See, eg, *Cvetanovski v The Queen* [2020] VSCA 272, [9], citing *Roberts v The Queen* [2020] VSCA 58, [56].
- 9 *Moti v The Queen* (2011) 245 CLR 456, 478 [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); cited in *AB v CD & EF* [2017] VSCA 338, [63] (Ferguson CJ, Osborn and McLeish JJA). See also Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 35 [158].
- 10 *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 93 ALJR 1, 25 [106]. See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 36 [159].
- 11 The last recorded instance found by the Commission of Ms Gobbo representing a client was on 16 August 2013. See also Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 20 [90].
- 12 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 56–8 [245]–[254].
- 13 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 105–7 [458]–[471].
- 14 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, Annexure A, 118–31 [1]–[35].
- 15 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, Annexure A, 118–31 [1]–[35].
- 16 Based on Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into Management of Police Informants* (26 June 2020) vol 1, Annexure A, 118–31 [1]–[35].
- 17 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, ch 7, 11; vol 3.
- 18 *R v Szabo* [2001] 2 Qd R 214.
- 19 It is common in various areas of Australian law for a question to be determined having regard to the view of a hypothetical member of the public. As the Court notes in *Szabo*, it is a basic principle of the criminal justice system that justice must not only be done but be seen to be done. In that context, the view of an informed, fair-minded member of the public takes on a particular importance. The relevant legal principles are further discussed in Chapter 5.
- 20 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 54 [234]–[236].
- 21 See, eg, Responsive submission, Ms Nicola Gobbo, 14 August 2020, 51–2 [164]–[166].
- 22 Mr Saturn (a pseudonym).
- 23 Mr Chafic Issa.
- 24 Mr Boyd, Mr Eddington, Mr Emerson, Mr Huntley, Mr Maddox, Mr Joyce, Mr Newton, Mr Parrish and Mr Shannon (all pseudonyms).
- 25 Mr Fady Ahmad and Mr Giuseppe Mannella.

- 26 The period from 2005 to 2009 was the focus of the court proceedings that led to the establishment of the Commission: see, eg, *AB & EF v CD* [2017] VSC 350, [15] (Ginnane J).
- 27 The information was provided to the Commission in response to a Notice to Produce issued by the Commission to Victoria Police on 23 January 2019: see also Exhibit RC0030 Registration of Human Source, July 1995.
- 28 Exhibit RC0034 Informer Registration Application, 13 May 1999; Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 334.
- 29 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 55 [238].
- 30 Exhibit RC0020 Statement of Mr Michael Holding, 27 March 2019, 2 [13]–[14]; Exhibit RC0028 Statement of Acting Superintendent Trevor Ashton, 21 March 2019, 2 [9].
- 31 Exhibit RC0028 Statement of Acting Superintendent Trevor Ashton, 21 March 2019, 2 [11].
- 32 Transcript of Sergeant Trevor Ashton, 29 March 2019, 578.
- 33 Exhibit RC0022 Print out of charges, 7 September 1993; Exhibit RC0028 Statement of Acting Superintendent Trevor Ashton, 21 March 2019, 2 [13].
- 34 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 8 [3.13]–[3.14].
- 35 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 6–7 [23]–[30].
- 36 Exhibit RC0028 Statement of Acting Superintendent Trevor Ashton, 21 March 2019, 3 [19]; Exhibit RC0054 Statement of Detective Senior Sergeant Tim Argall, 27 March 2019, 3–4 [14]–[17].
- 37 Exhibit RC0052 Statement of Detective Senior Sergeant Rodney Arthur, 26 March 2019, 1 [5], [7], 2 [9].
- 38 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 8 [3.17].
- 39 Exhibit RC0030 Registration of Human Source, July 1995.
- 40 Exhibit RC0028 Statement of Acting Superintendent Trevor Ashton, 21 March 2019, 3 [24]–[27], 4 [32]; Exhibit RC0025 Statement of Mr John Gibson, 27 March 2019, 2 [9].
- 41 Exhibit RC0020 Statement of Mr Michael Holding, 27 March 2019, 3 [23]; Transcript of Mr Michael Holding, 29 March 2019, 541–2.
- 42 Exhibit RC0030 Registration of Human Source, July 1995, 1.
- 43 Exhibit RC0070 Operation Scorn Progress Report, 22 February 1996.
- 44 Exhibit RC0019 Certificate of Admission, 7 April 1997.
- 45 Exhibit RC0015 Affidavit to the Board of Examiners, 4 February 1997, 2 [8].
- 46 Exhibit RC0015 Affidavit to the Board of Examiners, 4 February 1997, 2 [10].
- 47 Exhibit RC0015 Affidavit to the Board of Examiners, 4 February 1997, 3 [13]–[14]; Exhibit RC0787 Transcript of conversation between Ms Nicola Gobbo and the Commission, 20 March 2019, 248–9.
- 48 Exhibit RC0015 Affidavit to the Board of Examiners, 4 February 1997, 2 [11].
- 49 See generally, Responsive submission, Ms Nicola Gobbo, 14 August 2020, ch 7.
- 50 See generally, Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 9–11 [44]–[54].
- 51 Transcript of Officer 'Kruger', 2 April 2019, 834–6.
- 52 Transcript of Officer 'Kruger', 2 April 2019, 835–6.
- 53 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 9–10 [47].
- 54 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 10 [49].
- 55 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 10 [50].
- 56 Exhibit RC0793b Letter from Australian Federal Police lawyers to the Commission, 22 November 2019, 2 [9].
- 57 Exhibit RC0793b Letter from Australian Federal Police lawyers to the Commission, 22 November 2019, 1 [1]–[4].
- 58 Exhibit RC0793b Letter from Australian Federal Police lawyers to the Commission, 22 November 2019, 1–2 [10].
- 59 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 12–3, [60]–[66]; Exhibit RC0793 Letter from Australian Federal Police lawyers to Commission, 22 November 2019, 1–2 [1]–[11].
- 60 Exhibit RC0793b Letter from Australian Federal Police lawyers to Commission, 22 November 2019, 3–4 [29]–[30].

- 61 See Exhibit RC0273 Ms Nicola Gobbo diary and court book, 7 July 1998, 8, 29; 30 September 1998, 16; 21 October 1998; 9 November 1998, 92, 97–100; Exhibit RC1712 Letter from Australian Federal Police lawyers to the Commission, 27 May 2020, 2 [4]–[4.2(d)]; Transcript of Ms Nicola Gobbo, 4 February 2020, 13014–21.
- 62 Exhibit RC0034 Informer Registration Application, 26 May 1999; Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 334.
- 63 See, eg, Exhibit RC0033 Asset Recovery Unit Information Report FEIR1056, 28 May 1999; Exhibit RC0035 Asset Unit Information Report FEIR1058, 28 May 1999; Exhibit RC0036 Asset Recovery Unit Information Report FEIR1059, 28 May 1999; Exhibit RC0037 Asset Recovery Unit Information Report FEIR1060, 28 May 1999; RC0038 Asset Recovery Unit Information Report FEIR1062, 28 May 1999; RC0039 Asset Recovery Unit Information Report FEIR1065, 14 June 1999; RC0040 Asset Recovery Unit Information Report FEIR1067, 14 June 1999; RC0041 Asset Recovery Unit Information Report FEIR1068, 14 June 1999; RC0042 Asset Recovery Unit Information Report FEIR1069, 14 June 1999; RC0043 Asset Recovery Unit Information Report FEIR1071, 14 June 1999; Exhibit RC0044 Asset Recovery Unit Information Report FEIR1075, 15 June 1999; Exhibit RC0045 Asset Recovery Unit Information Report FEIR1076, 15 June 1999; Exhibit RC0046 Asset Recovery Unit Information Report FEIR1077, 15 June 1999; Exhibit RC0047 Asset Recovery Unit Information Report un-numbered, 27 June 1999; Exhibit RC0048 Asset Recovery Unit Information Report FEIR1079, 27 June 1999; Exhibit RC0049 Asset Recovery Unit Information Report un-numbered, 5 October 1999.
- 64 Exhibit RC0057 Statement of Mr Jeffrey (Jeff) Pope, 1 April 2019, 5 [23]; Exhibit RC0050 Recommendation to reclassify Ms Nicola Gobbo, 3 January 2000.
- 65 Transcript of Ms Nicola Gobbo, 6 February 2020, 13288.
- 66 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 89 [313], 90 [317].
- 67 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 71–3 [252]–[255], 75 [261], 83 [297(v)].
- 68 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 73 [256], 74 [257], 95 [324(c)].
- 69 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 74 [257]–[258].
- 70 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 122 [391]; Transcript of Ms Nicola Gobbo, 4 February 2020, 13004.
- 71 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 122 [392].
- 72 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 122–3 [393], 123 [394].
- 73 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 124 [398], 125 [404], 126 [409]–[411].
- 74 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 123–4 [395]–[397], 124 [402]; Transcript of Ms Nicola Gobbo, 11 February 2020, 13723; Transcript of Ms Nicola Gobbo, 4 February, 13003.
- 75 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 125 [404].
- 76 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 88 [308].
- 77 Exhibit RC0052 Statement of Detective Senior Sergeant Rodney Arthur, 26 March 2019, 1 [7]. Mr Ashton may have incorrectly identified the family member but knew of a legal familial connection.
- 78 Exhibit RC0915b Statement of Mr Simon Overland, 10 [52]–[55].
- 79 Exhibit RC0915b Statement of Mr Simon Overland, 10 [52].
- 80 See comments of Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 89 [411].
- 81 *R v Williams* [2007] VSC 131 [18]–[30].
- 82 *R v Williams* [2007] VSC 131 [29].
- 83 Exhibit RC0269b Statement of Commander Stuart Bateson, 7 May 2019, 6 [30]–[32]; Exhibit RC0264b Statement of Detective Senior Sergeant Nigel L'Estrange, 11 June 2019, 2 [8]; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 108 [496]–[497].
- 84 See, eg, Exhibit RC0273 Ms Nicola Gobbo diary and court book, 13 September 2003, 21.
- 85 Exhibit RC0273 Ms Nicola Gobbo diary and court book, 16–19, 23 January 2003, 1–2.
- 86 Exhibit RC0229 Statement of Ms Nicola Gobbo, 7 January 2009, 3.
- 87 Exhibit RC0229 Statement of Ms Nicola Gobbo, 7 January 2009, 4.
- 88 Exhibit RC1175 Statement of Mr 'Thomas', undated, 1 [1]; Transcript of Mr 'Thomas', 10 February 2020, 13579.
- 89 Exhibit RC1898 Office of Public Prosecutions Victoria, 'Ms Nicola Gobbo data from PRISM case database', 9 October 2002, 36; Exhibit RC0273 Ms Nicola Gobbo diary and court book, 9 October 2002, 12.
- 90 See, eg, lunch entry: Exhibit RC0273 Ms Nicola Gobbo diary and court book, 13 September 2003, 21.
- 91 Exhibit RC1175 Statement of Mr 'Thomas', undated, 2 [4].
- 92 Transcript of Mr Simon Overland, 16 December 2019, 11334–5.

- 93 *R v Williams* [2007] VSC 131 [18]–[30].
- 94 *R v Williams* [2007] VSC 131 [29].
- 95 Exhibit RC0636 Statement of Inspector Boris Buick, 10 May 2019, 4 [10]; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', Royal Commission into the Management of Police Informants (26 June 2020) vol 2, 89 [412].
- 96 Under section 464B of the *Crimes Act 1958* (Vic), such applications are necessary to facilitate the questioning of persons already being held in relation to another matter; in this case, of course, Mr McGrath was being held in relation to the Marshall murder. For Ms Nicola Gobbo's representation of Mr McGrath see Exhibit RC0636 Statement of Inspector Boris Buick, 10 May 2019, 4 [11]; Exhibit RC0273 Ms Nicola Gobbo diary and court book, 3 November 2003, 69.
- 97 Transcript of Commander Stuart Bateson, 2 July 2019, 3357–8.
- 98 Exhibit RC0273 Ms Nicola Gobbo diary and court book, 7 December 2003, 105.
- 99 Exhibit RC0269b Statement of Commander Stuart Bateson, 7 May 2019, 8 [41], [42], [44]; Exhibit RC0272 Mr Stuart Bateson diary and day book, 22 March 2004, 48. A 'can say' statement is an unsigned statement containing evidence that a witness could give in the event of a plea deal.
- 100 Exhibit RC0269b Statement of Commander Stuart Bateson, 7 May 2019, 8 [44]; Exhibit RC0249b Mr Andrew Allen diary, March 2004, 3; Exhibit RC0248b Statement of Mr Andrew Allen, 11 June 2019, 2 [12(a)]; Exhibit RC0272 Mr Stuart Bateson diary and day book, March 2004, 56.
- 101 Exhibit RC0273 Ms Nicola Gobbo diary and court book, 5 April 2004, 162; see generally Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 5 April 2004, 6.
- 102 Exhibit RC0273 Ms Nicola Gobbo diary and court book, 6 April 2004, 164.
- 103 Exhibit RC0273 Ms Nicola Gobbo diary and court book, 20 May 2004, 33.
- 104 Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, June 2004, 6; Transcript of Mr Simon Overland, 16 December 2019, 11334.
- 105 Transcript of Commander Stuart Bateson, 2 July 2019, 3371; see also Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, June 2004, 6.
- 106 Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 22–3, 25, 29, 30 June 2004, 7–8; Exhibit RC1876 Extract of Transcript of Committal Hearing, *R v Williams*, 9 March 2005, 778–9.
- 107 Exhibit RC0272 Mr Stuart Bateson diary and day book, 10 July 2004, 2; see also Exhibit RC0273 Ms Nicola Gobbo diary and court book, 11 July 2004, 65; Exhibit RC0252 Purana Chronology prepared by Commander Stuart Bateson, 10 July 2004, 8–9.
- 108 Transcript of Commander Stuart Bateson, 19 November 2019, 9552–3.
- 109 Exhibit RC0109 Mr Terry Purton diary, 12 July 2004, 2; see also Transcript of Mr Terry Purton, 14 May 2019, 1704–6.
- 110 Exhibit RC0272 Mr Stuart Bateson diary and day book, 11 July 2004, 2.
- 111 Transcript of Commander Stuart Bateson, 19 November 2019, 9553.
- 112 Transcript of Commander Stuart Bateson, 19 November 2019, 9553.
- 113 Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 12 July 2004, 9.
- 114 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 55–6 [16.25]–[16.28].
- 115 See earlier description of Mr 'McGrath's' assistance between 22 June 2004 and 30 June 2004.
- 116 Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 9 July 2004, 8; see also Ms Gobbo's description of Mr McGrath's stance in Exhibit RC0497d Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Green', 20 April 2006, 171–2.
- 117 Exhibit RC0262 Statement of Acting Inspector Mark Hatt, 17 June 2019, 3 [19]; see also Ms Gobbo's description of this meeting in Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Anderson', 21 May 2007, 180; Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 137–8 [648].
- 118 Transcript of Commander Stuart Bateson, 19 November 2019, 9554; Exhibit RC0269b Statement of Commander Bateson, 7 May 2019, 10 [57]; Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 12 July 2004, 9; Exhibit RC0272 Mr Stuart Bateson diary and day book, 12 July 2004, 108–9.
- 119 Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 13 July 2004, 9; Transcript of Commander Stuart Bateson, 20 November 2019, 9569.
- 120 Exhibit RC1844, Office of Public Prosecutions Victoria, 'Annexure A—Witnesses and Related Accused Matter Outcomes', 29 May 2020, 6.
- 121 Exhibit RC1433 Letter from Ms Nicola Gobbo to Mr Stephen Fontana, 30 June 2015, 4.

- 122 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Peter Smith', 26 September 2005, 228; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 136 [646].
- 123 Transcript of Acting Inspector Mark Hatt, 27 June 2019, 3131.
- 124 Transcript of Commander Stuart Bateson, 2 July 2019, 3369.
- 125 Transcript of Commander Stuart Bateson, 2 July 2019, 3371.
- 126 Responsive Submission, Victoria Police (specified former and current officers), 17 August 2020, [16].
- 127 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 134 [442], 154–6 [483]–[492], 167 [515].
- 128 Note the difference in Ms Gobbo's notes on 3 November 2003 and 11 July 2004: Exhibit RC0273 Ms Nicola court book, 3 November 2003, 69; Exhibit RC0273 Ms Nicola Gobbo diary and court book, 11 July 2004, 65. Note also, Mr Bateson's account on 11 July 2004 and 12 July 2004: Exhibit RC0252 Purana Chronology prepared by Commander Stuart Bateson, 11–12 July 2004, 9.
- 129 Exhibit RC1846 Office of Public Prosecutions Victoria, 'Opening of Plea—Mr Thomas', *Williams v DPP*, undated, 1–2 [3].
- 130 Transcript of Mr Andrew Allen, 26 June 2019, 2975.
- 131 See summary made by Counsel Assisting in: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 251–2 [1085].
- 132 Exhibit RC1898 Office of Public Prosecutions Victoria, 'Ms Nicola Gobbo data from PRISM case database', 9 October 2002, 36.
- 133 *Orman v The Queen* (2019) 59 VR 511, 512–13 [8] (Maxwell P, Niall and Emerton JJA).
- 134 See, eg, Exhibit RC1898 Office of Public Prosecutions Victoria, 'Ms Nicola Gobbo data from PRISM case database', 8 September 2005, 55; Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 12 [72].
- 135 See discussion of Mr Gobbo's memorandum to Mr Colin Lovitt, further below.
- 136 See, eg, entry detailing coffee with Mr Thomas: Exhibit RC0144 Ms Nicola Gobbo diary, 18 March 2004, 16.
- 137 Exhibit RC1176 Statement of Mr 'Thomas', 6 February 2020, 3 [13].
- 138 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020) 41 [95]; 43 [113], 64 [228], 95 [340].
- 139 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 10 [60]–[61]; Exhibit RC0252 Purana Chronology prepared by Commander Stuart Bateson, 28 July 2004, 11.
- 140 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 11 [63]; Exhibit RC0252 Purana Chronology prepared by Commander Stuart Bateson, 16 August 2004, 11.
- 141 Exhibit RC0264 Statement of Detective Senior Sergeant Nigel L'Estrange, 11 June 2019, 4 [11].
- 142 Exhibit RC1177 Transcript of Proceedings, *AB & EF v CD* (Supreme Court of Victoria, Ginnane J, 1 March 2017), 373–4.
- 143 Transcript of Ms Nicola Gobbo, 7 February 2020, 13412–13.
- 144 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 35–6 [13.8], 50 [14.66], 71 [17.93], 155 [28.120], 170 [28.200]; Responsive submission, Ms Nicola Gobbo, 14 August 2020, 168 [520], 170 [526], 182 [568], 185 [583].
- 145 Transcript of Commander Stuart Bateson, 2 July 2019, 3399.
- 146 Exhibit RC0281 ICR3838 (069) 5 March 2007, 675–6; Transcript of Ms Nicola Gobbo, 11 February 2020, 13752.
- 147 Exhibit RC1886 Transcript of proceedings, *R v Williams* (Supreme Court of Victoria, Teague J, 7 December 2004), 48–51.
- 148 Exhibit RC0267 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith', Mr Paul Rowe and Mr Steve Mansell, 16 September 2005, 19–24.
- 149 Exhibit RC0497 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith', Officer 'Green', 20 April 2006, 170–2.
- 150 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Anderson', 21 May 2007, 180; Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 137–8 [648].
- 151 Exhibit RC1352 Transcript of meeting between Mr Shane O'Connell and Ms Nicola Gobbo, 1 February 2009, 86.
- 152 Exhibit RC0679 Transcript of meeting between Ms Nicola Gobbo and Mr Boris Buick, 14 September 2011, 9–13.
- 153 Exhibit RC1433 Letter from Ms Nicola Gobbo to Mr Stephen Fontana, 30 June 2015, 4.
- 154 Transcript of Ms Nicola Gobbo, 6 February 2020, 13286; Transcript of Ms Nicola Gobbo, 7 February 2020, 13403.
- 155 Exhibit RC1568 Ms Nicola Gobbo fee book 01, 21 January 2005, 84; Exhibit RC0273 Ms Nicola Gobbo diary and court book, 17 September 2004; 42; Exhibit RC0273 Ms Nicola Gobbo diary and court book, 23 September 2004, 43; Exhibit RC0273 Ms Nicola Gobbo diary and court book, 27 September 2004, 44.

- 156 Exhibit RC1886 Transcript of Proceedings, R v Williams (Supreme Court of Victoria, Teague J, 17 September 2004); Exhibit RC0773 Transcript of Proceedings, R v Williams (Supreme Court of Victoria, Teague J, 23 September 2004).
- 157 Exhibit RC0773 Transcript of Proceedings, R v Williams (Supreme Court of Victoria, Teague J, 23 September 2004), 14–16.
- 158 Exhibit RC0773 Transcript of Proceedings, R v Williams (Supreme Court of Victoria, Teague J, 23 September 2004), 23; Transcript of Ms Nicola Gobbo, 6 February 2020, 13277–8.
- 159 See Exhibit RC1163 Memorandum from Valos Black & Associates to Colin Lovitt, 18 February 2005.
- 160 Exhibit RC1163 Memorandum from Valos Black & Associates to Colin Lovitt, 18 February 2005, 10.
- 161 Exhibit RC1163 Memorandum from Valos Black & Associates to Colin Lovitt, 18 February 2005, 4.
- 162 See, eg, Magistrates' Court of Victoria, 'Transcript of R v Williams' (Chief Magistrate Gray, 7 March 2005) 578–80 (Mr Colin Lovitt), produced by the Office of Public Prosecutions Victoria in response to a Commission request for information; Transcript of Commander Stuart Bateson, 2 July 2019, 3425.
- 163 Exhibit RC1875 Transcript of R v Williams (Magistrates' Court of Victoria, Chief Magistrate Gray, 9 March 2005) 824 (Mr Stuart Bateson).
- 164 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 171 [770]–[771].
- 165 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 18–19 [77]–[78], 155–67 [496]–[513], 181 [563].
- 166 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 168–70 [520]–[527], 172–9 [536]–[559]; Responsive submission, Ms Nicola Gobbo, 8 September 2020, 17–18 [826].
- 167 Transcript of Ms Nicola Gobbo, 4 February 2020, 13054.
- 168 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 10 [59]; Exhibit RC0252 Purana Chronology prepared by Commander Stuart Bateson, 27 July 2004, 10.
- 169 Transcript of Mr Sandy White, 31 July 2019, 3643–4, 3645.
- 170 Transcript of Officer 'Sandy White', 31 July 2019, 3645.
- 171 Exhibit RC1162 Major Drug Investigation Division profile of Ms Nicola Gobbo, 26 August 2004.
- 172 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 11–12 [69]; RC0252 Purana Chronology prepared by Commander Stuart Bateson, 23 March 2005, 18.
- 173 Exhibit RC0252 Purana Chronology prepared by Commander Stuart Bateson, 23 May 2005, 20; Exhibit RC0272 Mr Stuart Bateson diary and day book, 23 May 2005, 19–21; Transcript of Ms Nicola Gobbo, 6 February 2020, 13297–8.
- 174 For example, meetings were held on 4 June 2005, 29 June 2005, 21 July 2005 and 23 August 2005: Exhibit RC0252 Purana Chronology prepared by Commander Stuart Bateson, various dates, 20–3.
- 175 Exhibit RC0267 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith', Mr Paul Rowe and Mr Steve Mansell, 16 September 2005, 19.
- 176 Exhibit RC0281 ICR3838 (001), 16 September 2005, 2.
- 177 See, eg, Responsive submission, Victoria Police, 24 August 2020, 92 [49.4]; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 41 [14.29].
- 178 See, eg, Exhibit RC0281 ICR3838 (002), 20–1 September 2005, 11–2; Exhibit RC0281 ICR3838 (003), 22–6 September 2005, 16.
- 179 Exhibit RC0281 ICR3838 (018), 16 February 2006, 155; see indication that Ms Gobbo had spoken to Mr Bateson about Mr Thomas 'rolling over': Exhibit RC0281 ICR3838 (019), 17 February 2006, 157.
- 180 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 13 [78]; Exhibit RC0272 Mr Stuart Bateson diary and day book, 19 February 2006, 91; Exhibit RC0312 Mr Gavan Ryan diary, 19 February 2006, 3; Exhibit RC0281 ICR3838 (018), 19 February 2006, 158.
- 181 Exhibit RC0475 Transcript of meeting between 'Mr Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 22 February 2006, 31.
- 182 Exhibit RC0475 Transcript of meeting between 'Mr Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 22 February 2006, 31.
- 183 Exhibit RC0281 ICR3838 (020), 24 February 2006, 165.
- 184 Exhibit RC0281 ICR3838 (020), 27 February 2006, 171.
- 185 Exhibit RC0281 ICR3838 (020), 28 February 2006, 172.
- 186 Exhibit RC0281 ICR3838 (021), 8 March 2006, 180.
- 187 Exhibit RC0281 ICR3838 (023), 19 March 2006, 196.
- 188 Transcript of Ms Nicola Gobbo, 7 February 2020, 13402–3.
- 189 Exhibit RC0281 ICR3838 (021), 8 March 2006, 180.
- 190 Exhibit RC1395 Transcript of Proceedings, The Police v Antonios Sajih Mokbel, Milad Mokbel and Jacques El-Hage, 18 June 2009, 510; Transcript of Mr 'Thomas', 10 February 2020, 13602.

- 191 Exhibit RC0476 Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 1–36, 63–70; see also Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 192–3 [883].
- 192 Exhibit RC0476 Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 1–76, 80–1; see also Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 192–3 [883].
- 193 Exhibit RC0476 Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 47–9, 73–6; see also Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 192–3 [883].
- 194 Exhibit RC0476 Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 60–3; see also Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 192–3 [883].
- 195 Exhibit RC0476 Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 81.
- 196 Exhibit RC0272 Mr Stuart Bateson diary and day book, 19 April 2006, 113. The number '3838' was Ms Gobbo's human source registration number at the time.
- 197 Exhibit RC0281 ICR3838 (028), 20 April 2006, 255.
- 198 See, eg, Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 126 [23.175]–[23.176], 146–150 [28.31]–[28.70], 170 [28.203]–[28.204], 315 [52.222]–[52.223].
- 199 Exhibit RC0281 ICR3838 (019), 19 February 2006, 159; Exhibit RC0281 ICR3838 (019), 23 February 2006, 163.
- 200 Exhibit RC0772 Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 15 March 2006, 11.
- 201 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 14 [83].
- 202 Exhibit RC0476 Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 82.
- 203 Exhibit RC0476 Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 82.
- 204 Exhibit RC0479 Transcript of meeting between Mr 'Thomas', Mr Stuart Bateson and Mr Michelle Kerley, 22 June 2006, 49–50.
- 205 Exhibit RC0496 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Green', 20 April 2006, 149–50.
- 206 Exhibit RC0492 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Green', 20 April 2006, 273.
- 207 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Green', 20 April 2006, 162; see also Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 201 [918].
- 208 See Ms Gobbo's description of the stalemate in Exhibit RC0281 ICR3838 (025), 5 April 2006, 226.
- 209 Exhibit RC0281 ICR3838 (031), 5 May 2006, 288.
- 210 Exhibit RC0281 ICR3838 (032), 22 May 2006, 305.
- 211 See the difference in his reluctance to give evidence in Exhibit RC0478 Transcript of meeting between Mr 'Thomas', Mr Stuart Bateson and Ms Michelle Kerley, 16 June 2006, 10 and his willingness to do so in Exhibit RC0272 Mr Stuart Bateson diary and day book, 21 June 2006, 128; Exhibit RC0281 ICR3838 (036) 21 June 2006, 338.
- 212 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 251–2 [1805].
- 213 Exhibit RC0281 ICR3838 (037), 9 July 2006, 352; Exhibit RC0281 ICR3838 (037), 10 July 2006, 352; Exhibit RC0786 Contact with Mr Thomas, 23 July 2006, 2.
- 214 Exhibit RC0281 ICR3838 (037), 11 July 2006, 353.
- 215 Exhibit RC0281 ICR3838 (038), 13 July 2006, 358.
- 216 Exhibit RC0281 ICR3838 (038), 15 July 2006, 359.
- 217 Transcript of Commander Stuart Bateson, 22 November 2019, 9851–2, 9858–60.
- 218 Exhibit RC0281 ICR3838 (038), 19 July 2006, 361.
- 219 Exhibit RC0282 Transcript of Ms Nicola Gobbo, Officer 'Green' and Officer 'Sandy White', 4 August 2008, 239.
- 220 Transcript of Commander Stuart Bateson, 22 November 2019, 9855–6.
- 221 These events are considered further in Chapter 8.
- 222 Exhibit RC1861 Extract of Reasons for Sentence, R v Mr 'Thomas' [2006], 1 [2].
- 223 Exhibit RC1861 Extract of Reasons for Sentence, R v Mr 'Thomas' [2006], 2 [5], 11 [44], 12 [47].

- 224 Exhibit RC1861 Extract of Reasons for Sentence, *R v Mr 'Thomas'* [2006], 2–3 [6].
- 225 Then called the Legal Services Commissioner. Exhibit RC0177 Legal Services Commissioner front page of file regarding Mr Carl Williams, 15 August 2006; Exhibit RC0202 Letter from Victorian Bar Ethics Committee to Carl Williams, 4 October 2006; Exhibit RC0205 Legal Services Commissioner Closure Report relating to Ms Nicola Gobbo, 17 October 2006; Exhibit RC0281 ICR3838 (040), 2 August 2008, 379. Mr Williams' complaint to the Legal Services Commissioner was referred to the Victorian Bar Ethics Committee to investigate. This is discussed in Chapter 15.
- 226 Exhibit RC0281 ICR3838 (040), 7 August 2006, 385.
- 227 Exhibit RC0281 ICR3838 (040), 7 August 2006, 385.
- 228 Exhibit RC1740 Memorandum from Ms Nicola Gobbo to Mr Duncan Allen, 12 August 2006, 9.
- 229 Exhibit RC1740 Memorandum from Ms Nicola Gobbo to Mr Duncan Allen, 12 August 2006, 9–10.
- 230 Exhibit RC0281 ICR3838 (028), 23 April 2006, 261.
- 231 Exhibit RC1740 Memorandum from Ms Nicola Gobbo to Mr Duncan Allen, 12 August 2006, 5.
- 232 Exhibit RC0783 Statement of Mr Colin Lovitt, 14 November 2019, 3–4.
- 233 Exhibit RC0783 Statement of Mr Colin Lovitt, 14 November 2019, 5.
- 234 Exhibit RC0783 Statement of Mr Colin Lovitt, 14 November 2019, 5.
- 235 Exhibit RC0783 Statement of Mr Colin Lovitt, 14 November 2019, 5.
- 236 See also Exhibit RC0281 ICR3838 (036), 19 June 2006, 336.
- 237 Exhibit RC0197 Letter from Ms Nicola Gobbo to Ethics and Investigations, Victorian Bar, 25 September 2006; Exhibit RC0281 ICR3838 (045), 18 September 2006, 2.
- 238 Exhibit RC0197 Letter from Ms Nicola Gobbo to Ethics and Investigations, Victorian Bar, 25 September 2006, 1 [1], [3], 2–3 [6].
- 239 Exhibit RC1844, Office of Public Prosecutions Victoria, 'Annexure A—Witnesses and Related Accused Matter Outcomes', 29 May 2020, 5–6; Exhibit RC0464b Statement of Mr James (Jim) O'Brien (long), 14 June 2019, 11 [50]; see also Victoria Police, 'Mr Faruk Orman Criminal History Report', 14 December 2019, 1, produced by Victoria Police in response to a Commission Notice to Produce.
- 240 Exhibit RC1745 Office of Public Prosecutions memorandum, 22 December 2009, 2.
- 241 *Orman v The Queen* (2019) 59 VR 511, 512 [1] (Maxwell P, Niall and Emerton JJA).
- 242 *Orman v The Queen* (2019) 59 VR 511, 512–13 [8], [12], 514 [16] (Maxwell P, Niall and Emerton JJA).
- 243 Figure 7.2 based on Mr Faruk Orman case study in Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 549–59.
- 244 See, eg, Exhibit RC1898 Office of Public Prosecutions Victoria, 'Ms Nicola Gobbo data from PRISM case database', 2 June 2003, 21; Exhibit RC1898 Office of Public Prosecutions Victoria, 'Ms Nicola Gobbo data from PRISM case database', 29 October 2007, 69; Exhibit RC1898 Office of Public Prosecutions Victoria, 'Ms Nicola Gobbo data from PRISM case database', 29 February 2008, 67; Exhibit RC1898 Office of Public Prosecutions Victoria, 'Ms Nicola Gobbo data from PRISM case database', 17 June 2008, 71; Exhibit RC1898 Office of Public Prosecutions Victoria, 'Ms Nicola Gobbo data from PRISM case database', 13 August 2008, 69; see also *Orman v The Queen* (2019) 59 VR 511, 512–13 [8] (Maxwell P, Niall and Emerton JJA).
- 245 Exhibit RC0636 Statement of Inspector Boris Buick, 10 May 2019, 4 [8]; Transcript of Inspector Boris Buick, 29 October 2019, 8495.
- 246 Exhibit RC0636 Statement of Inspector Boris Buick, 10 May 2019, 5 [13]; Exhibit RC0252 Purana Chronology prepared by Commander Stuart Bateson, 23 March 2004, 5.
- 247 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 8 [43]; 'Gatto Acquitted Of Underworld Killing', *The Age* (online, 16 June 2005) <<https://theage.com.au/national/gatto-acquitted-of-underworld-killing-20050616-ge0cuh.html>>.
- 248 See, eg, Exhibit RC0281 ICR3838 (025), 5 April 2006, 223.
- 249 Exhibit RC0281 ICR3838 (034), 9 June 2006, 323.
- 250 Exhibit RC0281 ICR3838 (071), 24 March 2007, 729. The relevant ICR entry incorrectly refers to this event as occurring on 24 March 2006.
- 251 Exhibit RC0281 ICR3838 (112), 24 November 2007, 1449.
- 252 Exhibit RC0281 ICR3838 (85), 22 June 2007, 926; Exhibit RC0636 Statement of Inspector Boris Buick, 10 May 2019, 6 [23].
- 253 Exhibit RC0281 ICR3838 (103), 3 October 2007, 1262; see also Exhibit RC0281 ICR3838 (049), 19 October 2006, 502.
- 254 Transcript of Ms Nicola Gobbo, 7 February 2020, 13469.
- 255 Office of Public Prosecutions Victoria, 'Summary of Evidence', *R v Faruk Orman*, 23 July 2010, 2, 31–46, produced by the Office of Public Prosecutions Victoria in response to a Commission request for information. See also the Director of Public Prosecution's description that the murder case against Mr Orman 'substantially depended' on Mr Thomas' evidence: *Orman v The Queen* (2019) 59 VR 511, 512–13 [8] (Maxwell P, Niall and Emerton JJA).

- 256 Exhibit RC1819 Office of Public Prosecutions file note, 'Faruk Orman Special Mention', 29 October 2007; Exhibit RC0661 Office of Public Prosecutions file note, 'Police v Faruk Orman', 19 November 2007; Exhibit RC0662 Letter from Inspector Boris Buick to Melbourne Magistrates' Court, 19 November 2007.
- 257 Exhibit RC0977 Statement of Mr Robert Richter, 25 November 2019, 2 [6].
- 258 Exhibit RC0977 Statement of Mr Robert Richter, 25 November 2019, 3–4 [12].
- 259 Exhibit RC0977 Statement of Mr Robert Richter, 25 November 2019, 4 [15], 4–5 [16], 5 [17]; Exhibit RC0281 ICR3838 (092), 26 July 2007, 1067.
- 260 Exhibit RC1359 Prisoners visited by Ms Nicola Gobbo archive report, September–November 2006, 25; Exhibit RC1359 Prisoners visited by Ms Nicola Gobbo archive report, 22 December 2006, 26; Exhibit RC1359 Prisoners visited by Ms Nicola Gobbo archive report, 29 March 2007, 26; Exhibit RC1359 Prisoners visited by Ms Nicola Gobbo archive report, 6 April 2007, 26; Exhibit RC1359 Prisoners visited by Ms Nicola Gobbo archive report, 11 June 2007, 26.
- 261 Exhibit RC0281 ICR3838 (109), 9 November 2007, 1381.
- 262 Exhibit RC0281 ICR3838 (109), 9 November 2007, 1381.
- 263 Exhibit RC0272 Mr Stuart Bateson diary and day book, 14, 16, 26 November 2007, 20 December 2007, 15 January 2008, 80–1, 84, 93, 94.
- 264 Exhibit RC0675 Memorandum from Ms Vicky Prapas to Geoff Horgan SC, 13 February 2008, 2.
- 265 Exhibit RC0977 Statement of Mr Robert Richter, 25 November 2019, 5–6 [19], 6 [23].
- 266 See, eg, Exhibit RC1898 Office of Public Prosecutions Victoria, 'Ms Nicola Gobbo data from PRISM case database', 28 August 2008, 71.
- 267 Exhibit RC1568 Ms Nicola Gobbo fee book 02, 17 November 2008, 25.
- 268 Exhibit RC1568 Ms Nicola Gobbo fee book 02, 10 December 2008, 26.
- 269 See, eg, defence forensic considerations: Exhibit RC0281 ICR3838 (104), 11 October 2007, 1289–90; defence tactics regarding whether or not to apply for bail: Exhibit RC0281 ICR3838 (105), 18 October 2007, 1309.
- 270 See discussion of redactions of transcript material at Exhibit RC0281 ICR2958 (007), 7 March 2008, 80–1.
- 271 Exhibit RC0281 ICR2958 (004), 21 February 2008, 55.
- 272 Exhibit RC0281 ICR2958 (007), 7 March 2008, 80–1; Exhibit RC0284 SML2598, 7 March 2008, 11.
- 273 Exhibit RC0284 SML2598, 7 March 2008, 11.
- 274 Exhibit RC0281 ICR2958 (007), 7 March 2008, 80–1.
- 275 Exhibit RC0281 ICR2958 (007), 8 March 2008, 82–3.
- 276 Exhibit RC0281 ICR2958 (008), 11 March 2008, 91; see also Exhibit RC0284 SML2958, 11 March 2008, 13.
- 277 Exhibit RC0882 Officer 'Wolf' diary, 8 March 2008, 14; Exhibit RC0882 Officer 'Wolf' diary, 10 March 2008, 24; see generally Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 718–23 [2894]–[2914].
- 278 Exhibit RC0281 ICR2958 (008), 12 March 2008, 93–4; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 722–3 [2913].
- 279 Exhibit RC0281 ICR2958 (008), 12 March 2008, 94; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 725 [2913].
- 280 Exhibit RC0977 Statement of Mr Robert Richter, 25 November 2019, 4 [13]–[14].
- 281 Exhibit RC0882 Diary of Officer 'Wolf', 8 March 2008, 14–15; Exhibit RC0882 Diary of Officer 'Wolf', 10 March 2008, 23–4.
- 282 Exhibit RC0284 SML2958, 11 March 2008, 13.
- 283 Exhibit RC0977 Statement of Mr Robert Richter, 25 November 2019, 6 [20].
- 284 Exhibit RC0977 Statement of Mr Robert Richter, 25 November 2019, 7 [26].
- 285 Exhibit RC0977 Statement of Mr Robert Richter, 25 November 2019, 8 [30]; Transcript of Inspector Boris Buick, 1 November 2019, 8810.
- 286 Ms Gobbo suggested to her handlers they obtain photographs and e-tag records: Exhibit RC0281 ICR2958 (008), 12 March 2008, 94.
- 287 Exhibit RC0977 Statement of Mr Robert Richter, 25 November 2019, 8 [32].
- 288 *Orman v The Queen* (2019) 59 VR 511, 513 [9] (Maxwell P, Niall and Emerton JJA).
- 289 *Orman v The Queen* (2019) 59 VR 511, 512–13 [8]–[9] (Maxwell P, Niall and Emerton JJA).
- 290 *Orman v The Queen* (2019) 59 VR 511, 513 [11]–[12] (Maxwell P, Niall and Emerton JJA).

- 291 Exhibit RC0281 ICR3838 (111), 20 November 2007, 1432–3; see also Exhibit RC0281 ICR3838 (069) 7 March 2007, 680.
- 292 Exhibit RC0281 ICR3838 (111), 20 November 2007, 1432.
- 293 Referred to in the submissions of Counsel Assisting as the 'Landslip Case', the 'Matchless Case', the 'Cannabis Case' and the 'Posse Case'.
- 294 Exhibit RC0665 Reasons for Sentence, R v Mr 'Cooper', February 2007, 1 [1].
- 295 The 'Landslip Case', the 'Matchless Case' and the 'Posse Case'.
- 296 Exhibit RC0314 Operation Posse: Operational Assessment into the Mokbel Criminal Cartel, April 2005, 5.
- 297 Exhibit RC1568 Ms Nicola Gobbo fee book 01, 1 November 2002, 56; Exhibit RC1568 Ms Nicola Gobbo fee book 01, 25 November 2002, 57; Exhibit RC1177 Transcript of Proceedings, AB & EF v CD (Supreme Court of Victoria, Ginnane J, 27 February 2017), 230 (Dr Sue McNicol); Transcript of Mr Cooper, 31 October 2019, 8664.
- 298 See, eg, Transcript of Mr 'Cooper', 31 October 2019, 8686.
- 299 See, eg, Exhibit RC0281 ICR3838 (017), 9 February 2006, 148; Exhibit RC0281 ICR3838 (018), 14 February 2006, 153; Exhibit RC0281 ICR3838 (019), 22 February 2006, 161; Exhibit RC0281 ICR3838 (023), 21 March 2006, 201; Exhibit RC0281 ICR3838 (027), 16 April 2006, 246; Transcript of Mr Cooper, 31 October 2019, 8686–7.
- 300 Transcript of Mr 'Cooper', 31 October 2019, 8686–7; Transcript of Ms Nicola Gobbo, 6 February 2020, 13331–2; Exhibit RC0281 ICR3838 (027), 13 April 2006, 241; Exhibit RC1177 Transcript of Proceedings, AB & EF v CD (Supreme Court of Victoria, Ginnane J, 27 February 2017), 253 (Dr Sue McNicol)
- 301 Exhibit RC0467 Investigation Plan for Operation Posse, 17 November 2005, 3–4. See also Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 307–8 [1367].
- 302 Exhibit RC0281 ICR3838 (005), 3 October 2005, 25; Exhibit RC0281 ICR3838 (007), 28 October 2005, 45; Exhibit RC0281 ICR3838 (011), 9 December 2005, 79; Exhibit RC0281 ICR3838 (013), 22 December 2005, 94–5; Exhibit RC0281 ICR3838 (014), 25 December 2005, 99; Exhibit RC0281 ICR3838 (014), 30 December 2005, 105; Exhibit RC0281 ICR3838 (014), 31 December 2005, 106.
- 303 Transcript of Inspector Dale Flynn, 4 October 2019, 7230.
- 304 See Exhibit RC0464 Statement of Mr James (Jim) O'Brien (long), 14 June 2019, 13 [59], 15 [66], 16 [72]–[73], 19 [88]–[90]; Exhibit RC0281 ICR3838 (024), 25 March 2006, 213 ('... as per request of D/S/S O'Brien'); Exhibit RC0281 ICR3838 (024), 30 March 2006, 218 ('D/S/S O'Brien ... Requesting details of when ...').
- 305 Exhibit RC0281 ICR3838 (013), 22 December 2005, 94–5; Exhibit RC0281 ICR3838 (014), 31 December 2005, 106.
- 306 Transcript of Ms Nicola Gobbo, 6 February 2020, 13315–6.
- 307 See, eg, Exhibit RC0281 ICR3838 (016), 22 January 2006, 129; Exhibit RC0281 ICR3838 (017), 1 February 2006, 140.
- 308 See, eg, Exhibit RC0281 ICR3838 (015), 5 January 2006, 112; Exhibit RC0281 ICR3838 (017), 9 February 2006, 147; Exhibit RC0283 Information Report IRSID 373, 17 February 2006; Exhibit RC0283, Information Report IRSID 374, 17 February 2006.
- 309 See, eg, Exhibit RC0281 ICR3838 (016), 15 January 2006, 123; Exhibit RC0281 ICR3838 (016), 25 January 2006, 133; Exhibit RC0281 ICR3838 (025), 6 April 2006, 227.
- 310 See, eg, Exhibit RC0283, Information Report IRSID 342, 12 January 2006; Exhibit RC0283, Information Report IRSID 372, 17 February 2006; Exhibit RC0283, Information Report IRSID 444, 1 March 2006; Exhibit RC0281 ICR3838 (023), 16 March 2006, 192; Exhibit RC0283 Information Report IRSID 509, 24 April 2006.
- 311 Exhibit RC0281 ICR3838 (018), 13 February 2006, 150.
- 312 See, eg, Exhibit RC0281 ICR3838 019, 21 February 2006, 160; Exhibit RC0281 ICR3838 (020), 25 February 2006, 168; Exhibit RC0283 Information Report IRSID 425, 26 February 2006; Exhibit RC0283 Information Report IRSID 452, 4 March 2006; Exhibit RC0283 Information Report IRSID 513, 11 March 2006.
- 313 Exhibit RC0281 ICR3838 (011), 9 December 2005, 78.
- 314 Exhibit RC0281 ICR3838 (014), 26 December 2005, 100; Exhibit RC0283 Information Report, IRSID 533, 26 December 2005; Exhibit RC0281 ICR3838 (014), 29 December 2005, 103, 105; Exhibit RC0283 Information Report IRSID 536, 29 December 2005.
- 315 Exhibit RC0281 ICR3838 (015), 3–4 January 2006, 110.
- 316 See, eg, Exhibit RC0281 ICR3838 (015), 4 January 2006, 110; Exhibit RC0281 ICR3838 (017), 6 February 2006, 143–4; Exhibit RC0281 ICR3838 (020), 24 February 2006, 166–7; Exhibit RC0281 ICR3838 (022), 14 March 2006, 187; Exhibit RC0281 ICR3838 (025), 7 April 2006, 227.
- 317 Exhibit RC0281 ICR3838 (027), 14 April 2006, 243–4; Exhibit RC0283 Information Report IRSID 847, 14 April 2006.
- 318 Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 7 [39]–[41]; Exhibit RC0733 Affidavit for search warrant of Mr Dale Flynn, 21 April 2006, 7; Transcript of Inspector Dale Flynn, 30 September 2019, 6794–5.
- 319 Exhibit RC0464 Statement of Mr James (Jim) O'Brien, 14 June 2019, 57 [307].
- 320 Transcript of Inspector Dale Flynn, 1 October 2019, 6881; Transcript of Inspector Dale Flynn, 3 October 2019, 7183.

- 321 Transcript of Mr 'Cooper', 31 October 2019, 8667.
- 322 Such as the 'Landslip case' and the 'Matchless case'.
- 323 Exhibit RC0281 ICR3838 (026), 13 April 2006, 239.
- 324 Exhibit RC0281 ICR3838 (027), 13 April 2006, 241.
- 325 Exhibit RC0281 ICR3838 (017), 2 February 2006, 143; Exhibit RC0281 ICR3838 (019), 23 February 2006, 163; Exhibit RC0281 ICR3838 (021), 4 March 2006, 176.
- 326 Exhibit RC0281 ICR3838 (022), 10 March 2006, 183; Exhibit RC0281 ICR3838 (023), 20 March 2006, 198–9.
- 327 Exhibit RC0281 ICR3838 (004), 1 October 2005, 21.
- 328 Exhibit RC0281 ICR3838 (023), 16 March 2006, 191.
- 329 Exhibit RC0284 SML3838, 13 October 2005, 4; Exhibit RC0281 ICR3838 (023), 16 March 2006, 191.
- 330 Exhibit RC0281 ICR3838 (017), 2 February 2006, 142.
- 331 Exhibit RC0281 ICR3838 (019), 22 February 2006, 161.
- 332 Exhibit RC0281 ICR3838 (028), 18 April 2006, 250.
- 333 Exhibit RC0281 ICR3838 (028), 18 April 2006, 250.
- 334 Exhibit RC0281 ICR3838 (028), 22 April 2006, 259; Transcript of Ms Nicola Gobbo, 6 February 2006, 13341–2.
- 335 Exhibit RC0665 Reasons for Sentence, R v Mr 'Cooper', February 2007, 3 [14].
- 336 Exhibit RC0281 ICR3838 (028), 22 April 2006, 259.
- 337 Record of interview between 'Mr Cooper', Ms Anne Farer and Inspector Dale Flynn, 22 April 2006, 1–5, produced by Victoria Police in response to a Commission Notice to Produce; Transcript of Inspector Dale Flynn, 30 September 2019, 6800.
- 338 Exhibit RC0560 Inspector Dale Flynn diary, 22 April 2006, 266.
- 339 Exhibit RC0281 ICR3838 (028), 22 April 2006, 259.
- 340 Transcript of Inspector Dale Flynn, 30 September 2019, 6818–19, 6822–3.
- 341 Transcript of Inspector Dale Flynn, 30 September 2019, 6819–20.
- 342 Exhibit RC0464 Statement of Mr James (Jim) O'Brien (long), 14 June 2019, 34 [174]; Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 10 [52]–[53]; Transcript of Ms Nicola Gobbo, 6 February 2020, 13347.
- 343 Transcript of Inspector Dale Flynn, 30 September 2019, 6854.
- 344 Exhibit RC0546 Transcript of meeting between Ms Nicola Gobbo, Officer 'Peter Smith' and Officer 'Green', 22 April 2006, 179–83; Exhibit RC0282 Transcript of conversation between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Peter Smith', 9 June 2006, 180–2; Exhibit RC0679 Transcript of conversation between Ms Nicola Gobbo and Inspector Boris Buick, 27 September 2011, 26–7; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 433–4 [1831.19.3]–[1831.19.4].
- 345 Exhibit RC0282 Transcript of conversation between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Peter Smith', 23 April 2006, 31–2; Transcript of Ms Nicola Gobbo, 6 February 2020, 13349–50.
- 346 See Victoria Police, 'Record of interview between Mr Dale Flynn, Mr Paul Rowe and 'Mr Cooper'', 22 April 2006, produced by Victoria Police in response to a Commission Notice to Produce.
- 347 Exhibit RC0464 Statement of Mr James (Jim) O'Brien, 14 June 2019, 35 [179]; Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 10 [55], 11 [56]; Transcript of Inspector Dale Flynn, 1 October 2019, 6881–2.
- 348 Exhibit RC0281 ICR3838 (028), 23 April 2006, 263; Exhibit RC0281 ICR3838 (028), 24 April 2006, 264; Exhibit RC0281 ICR3838 (028), 24 April 2006, 266; Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 10 [55].
- 349 Transcript of Inspector Dale Flynn, 1 October 2006, 6875–6, 6889, 6891.
- 350 Exhibit RC0281 ICR3838 (028), 23 April 2006, 262–3; Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 11 [58]; Transcript of Inspector Dale Flynn, 1 October 2006, 6888.
- 351 Exhibit RC0281 ICR3838 (029), 25 April 2006, 268; Transcript of Inspector Dale Flynn, 1 October 2006, 6898–9.
- 352 Exhibit RC1177 Transcript of Proceedings, AB & EF v CD (Supreme Court of Victoria, Ginnane J, 27 February 2017), 311 (Dr Sue McNicol).
- 353 See, eg, Meeting on 14 May 2006: Exhibit RC0281 ICR3838 (031), 14 May 2006, 297–8; Transcript of Inspector Dale Flynn, 1 October 2019, 6940–1; Meeting on 21 May 2006: Exhibit RC0281 ICR3838 (032), 21 May 2006, 304; Transcript of Inspector Dale Flynn, 2 October 2019, 7006–10.
- 354 Exhibit RC0281 ICR3838 (034), 9 June 2006, 325; Exhibit RC0554 Transcript of conversation between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Green', 9 June 2006, 292; Transcript of Mr Cooper, 31 October 2019, 8727; Transcript of 'Mr Cooper', 31 October 2019, 8724.

- 355 Exhibit RC0281 ICR3838 (031), 5 May 2006, 287.
- 356 Exhibit RC0281 ICR3838 (031), 15 May 2006, 298.
- 357 Exhibit RC0665 Reasons for Sentence, R v Mr 'Cooper', February 2007, 7 [31].
- 358 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 489–94 [1939].
- 359 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 494–7 [1940]; vol 3, 248 [49], 306 [6].
- 360 See also *Cvetanovski v The Queen* [2020] VSCA 126.
- 361 Namely Mr Bickley (a pseudonym), Mr Kearney (a pseudonym), Mr Kelvin (a pseudonym) and a relative of Mr Cooper (a pseudonym): see Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 497–8 [1942].
- 362 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 198–202 [636]–[645].
- 363 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 193 [608], 195 [619].
- 364 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 192 [604]–[605].
- 365 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 192 [606], 193 [607], 214 [688].
- 366 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 191 [603].
- 367 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 214 [687].
- 368 Responsive submission, Ms Nicola Gobbo, 8 September 2020, 8 [797].
- 369 Exhibit RC0281 ICR3838 (067), 19 February 2007, 641, 642–3.
- 370 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 195 [619].
- 371 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 196 [624]–[625], 197 [628], 202 [649].
- 372 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 196 [626].
- 373 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 204 [657].
- 374 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 203 [653], 207 [663].
- 375 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 207 [661]–[663], 207–8 [664], 208 [665].
- 376 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 203 [654]–[655], 204 [656], 207 [662].
- 377 When Mr Cooper was arrested prior to April 2006: see Responsive submission, Ms Nicola Gobbo, 14 August 2020, 203 [652]; and before Ms Gobbo arrived at the police station on 22 April 2006: Responsive submission, Ms Nicola Gobbo, 14 August 2020, 204 [658], 204–6 [659], 206 [660].
- 378 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 209 [667].
- 379 Responsive submission, Ms Nicola Gobbo, 14 August 2020, 202 [650].
- 380 Transcript of Mr 'Cooper', 31 October 2019, 8716–18.
- 381 Transcript of Mr 'Cooper', 31 October 2019, 8745.
- 382 Transcript of Mr 'Cooper', 31 October 2019, 8719.
- 383 Transcript of Mr 'Cooper', 31 October 2019, 8716.
- 384 Transcript of Mr 'Cooper', 31 October 2019, 8746.
- 385 Exhibit RC0626 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith', and Officer 'Black', 28 October 2005, 142.
- 386 Exhibit RC0626 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith', and Officer 'Black', 28 October 2005, 143.
- 387 Exhibit RC0626 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith', and Officer 'Black', 28 October 2005, 143.
- 388 Exhibit RC0282 Transcript of conversation between Ms Nicola Gobbo, Officer 'Green' and Officer 'Sandy White', 9 March 2006, 106–7; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 422 [1819].
- 389 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Peter Smith', Officer 'Green' and Officer 'Sandy White', 20 April 2006, 257.
- 390 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Peter Smith', Officer 'Green' and Officer 'Sandy White', 20 April 2006, 257–9.
- 391 Exhibit RC0492 Transcript of meeting between Ms Nicola Gobbo, Officer 'Peter Smith', Officer 'Green' and Officer 'Sandy White', 20 April 2006, 272–3.

- 392 Transcript of Ms Nicola Gobbo, 6 February 2020, 13315–16.
- 393 Transcript of Ms Nicola Gobbo, 6 February 2020, 13331–3.
- 394 Transcript of Ms Nicola Gobbo, 6 February 2020, 13337.
- 395 Transcript of Ms Nicola Gobbo, 11 February 2020, 13802–3.
- 396 Transcript of Ms Nicola Gobbo, 6 February 2020, 13339.
- 397 Transcript of Ms Nicola Gobbo, 6 February 2020, 13338–9, 13803.
- 398 Transcript of Ms Nicola Gobbo, 11 February 2020, 13803.
- 399 Transcript of Ms Nicola Gobbo, 7 February 2020, 13454.
- 400 *Cvetanovski v The Queen* [2020] VSCA 272 [1], [3].
- 401 Exhibit RC0281 ICR2958 (014), 15 April 2008, 165; *Cvetanovski v The Queen* [2020] VSCA 272 [1].
- 402 County Court of Victoria, ‘Reasons of sentence of DPP v Cvetanovski’ (County Court of Victoria, Montgomery J, 13 April 2012), [7] produced by Office of Public Prosecutions Victoria in response to a Commission request for information.
- 403 County Court of Victoria, ‘Reasons of sentence of DPP v Cvetanovski’ (County Court of Victoria, Montgomery J, 13 April 2012), [2], produced by the Office of Public Prosecutions Victoria in response to a Commission Notice to Produce.
- 404 County Court of Victoria, ‘Reasons of sentence of DPP v Cvetanovski’ (County Court of Victoria, Montgomery J, 13 April 2012), [42], produced by the Office of Public Prosecutions Victoria in response to a Commission Notice to Produce. See also *Cvetanovski v The Queen* [2020] VSCA 272, [1]–[2].
- 405 On the same day Mr Cvetanovski was also sentenced to deception charges relating to Operation Waugh; this brought his total effective sentence to 11 years’ imprisonment with a non-parole period of 9 years: see Exhibit RC1862 DPP v Cvetanovski (County Court of Victoria, Montgomery J, 13 April 2012), [65]–[66]. In addition, Mr Cvetanovski was later convicted of other drug and deception charges relating to Operations Coverdrive and Mouse. This brought his global sentence to 13 years’ imprisonment, see *DPP v Cvetanovski* [2014] VCC 71, [60].
- 406 *Cvetanovski v The Queen* [2020] VSCA 126 [11].
- 407 *Cvetanovski v The Queen* [2020] VSCA 126.
- 408 *Cvetanovski v The Queen* [2020] VSCA 272.
- 409 *Cvetanovski v The Queen* [2020] VSCA 272 [3]–[5].
- 410 *Cvetanovski v The Queen* [2020] VSCA 272 [7]–[8].
- 411 See case study of Mr Cvetanovski: Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 129–51.
- 412 Exhibit RC0281 ICR3838 (044), 8 September 2006, 418.
- 413 Exhibit RC0283 Information Report IRSID 845, 8 September 2006; Victoria Police, ‘Affidavit of Detective Senior Sergeant Russell Fletcher’, 15 December 2006, 9 [35], produced by Victoria Police in response to a Commission Notice to Produce. This affidavit does not refer to Ms Gobbo by name but by her human source number ‘3838’.
- 414 Administrative Appeal Tribunal, ‘Warrant D02871-01’, 18 December 2006, produced by Victoria Police in response to a Commission Notice to Produce.
- 415 Office of Public Prosecutions Victoria, ‘Crown Summary for Case Conference, R v Alexandra Cvetanovski & Zlate Cvetanovski’, February 2008, 5–7, produced by the Office of Public Prosecution Victoria in response to a Commission request for information; Office of Public Prosecutions Victoria, ‘Summary of Prosecution Opening, R v Cvetanovski’, 16 February 2012, [40], produced by the Office of Public Prosecution Victoria in response to a Commission request for information.
- 416 Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 138 [27]–[29], 145–6 [47]–[49].
- 417 Exhibit RC0281 ICR3838 (001), 16 September 2005, 4.
- 418 Exhibit RC0793 Letter from Solicitors representing Australian Federal Police to the Commission, 22 November 2019, 1 [6].
- 419 Exhibit RC1359 Prisoners visited by Ms Nicola Gobbo archive report, 8 January 2002, 8. Mr Mokbel is referred to as ‘Anthony Mokbel’ in this document.
- 420 See, eg, Exhibit RC1568 Ms Nicola Gobbo fee book 01, 31 March 2003, 61; Exhibit RC1568 Ms Nicola Gobbo fee book 01, 18 March 2004, 72; Exhibit RC1568 Ms Nicola Gobbo fee book 01, 29 November 2004, 83; Exhibit RC1568 Ms Nicola Gobbo fee book 01, 1 December 2005, 93, Exhibit RC1568 Ms Nicola Gobbo fee book 01, 23 March 2006, 95.
- 421 Exhibit RC1568 Ms Nicola Gobbo fee book 01, 23 March 2006, 95.
- 422 Particularly in relation to the extradition proceedings: see, eg, Exhibit RC1568 Ms Nicola Gobbo fee book 02, 25 July 2007, 7; Submission 030 Anonymous, Attachment 1, 24 [58].

- 423 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 7 August 2020, 27–8, [77]–[81].
- 424 *R v Mokbel* [2006] VSC 119; Commonwealth Director of Public Prosecutions, 'Summary of Prosecution Opening, R v Antonios Mokbel', 28 August 2005, 5, produced by the Commonwealth Director of Public Prosecutions in response to a Commission request for information.
- 425 *R v A Mokbel (sentence)* [2012] VSC 255 [33]–[45].
- 426 *R v Mokbel* [2006] VSC 119, [6]–[7]; *R v Mokbel* [2012] VSC 255 [30].
- 427 *R v Mokbel* [2006] VSC 119, [115]; Office of Public Prosecutions, 'Chronology of Procedural History in summary of Prosecution Opening, R v Antonios Mokbel', 23 May 2012, 36, produced by the Office of Public Prosecutions in response to a Commission request for information.
- 428 *R v A Mokbel (sentence)* [2012] VSC 255 [1]–[2].
- 429 *R v A Mokbel (sentence)* [2012] VSC 255 [94].
- 430 *R v A Mokbel (sentence)* [2012] VSC 255 [2]; Exhibit RC1909 Letter from the Office of Public Prosecutions to Solicitors Assisting the Commission, 29 May 2019.
- 431 Exhibit RC0272 Mr Stuart Bateson diary and day book, 23 May 2005, 19; Exhibit RC0272 Mr Stuart Bateson diary and day book, 29 June 2005, 33; Exhibit RC0272 Mr Stuart Bateson diary and day book, 23 August 2005, 49.
- 432 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 4 [28].
- 433 Exhibit RC0281 ICR3838 (001), 16 September 2005, 6; Exhibit RC0285 Risk Assessment relating to Ms Gobbo, 15 November 2005, 2; Responsive submission, Ms Nicola Gobbo, 14 August 2020, 90 [318].
- 434 Exhibit RC0281 ICR3838 (001), 16 September 2005, 5.
- 435 Exhibit RC0281 ICR2958 (014), 18 April 2008, 187.
- 436 See, eg, Exhibit RC0283 Information Report IRSID 269, 29 September 2005.
- 437 Exhibit RC0281 ICR3838 (002), 20 September 2005, 9; Exhibit RC0281 ICR3838 (005), 3 October 2005, 26; Exhibit RC0281 ICR3838 (010), 1 December 2005, 70; Exhibit RC0281 ICR3838 (023), 20 March 2006, 197; Exhibit RC0281 ICR3838 (085), 27 June 2006, 944; Exhibit RC0281 ICR2958 (010), 21 March 2008, 117.
- 438 Exhibit RC0283 Information Report IRSID 269, 29 September 2005; Exhibit RC0283 Information Report IRSID 272, 29 September 2005, 2; Exhibit RC0281 ICR3838 (003), 26 September 2005, 14.
- 439 Exhibit RC0281 ICR3838 (012), 13 December 2005, 85; Exhibit RC0281 ICR3838 (004), 1 October 2005, 24.
- 440 See, eg, in relation to Ms Danielle McGuire: Exhibit RC0281 ICR3838 (007), 28 October 2005, 43; Exhibit RC0281 ICR3838 (083), 14 June 2007, 893; in relation to Mr Milad Mokbel: Exhibit RC0281 ICR3838 (020), 25 February 2006, 167; Exhibit RC0281 ICR3838 (027), 16 April 2006, 247; in relation to Mr Horthy Mokbel: Exhibit RC0281 ICR3838 (016), 19 January 2006, 127; in relation to Mr 'Bickley': Exhibit RC0281 ICR3838 (008), 4 November 2005, 52; Exhibit RC0281 ICR3838 (012), 13 December 2005, 84.
- 441 Exhibit RC0281 ICR3838 (002), 21 September 2005, 10; Exhibit RC0486C Officer 'Peter Smith' diary, 20 October 2005, 3–4; Exhibit RC0281 ICR3838 (064), 29 January 2007, 618.
- 442 See, eg, information concerning money Mr Mokbel owed others: Exhibit RC0281 ICR3838 (001), 16 September 2007, 5; Exhibit RC0281 ICR3838 (004), 1 October 2005, 23–4; information concerning Mr Mokbel's living expenses and assets: Exhibit RC0283 Information Report IRSID 336, 27 December 2005; Exhibit RC0283 Information Report IRSID 356, 21 January 2006; Exhibit RC0283 Information Report IRSID 696, 23 August 2006; Exhibit RC0283 Information Report IRSID 725, 16 April 2006; Exhibit RC0283 Information Report IRSID 740, 1 June 2006; information about Mr Mokbel's accountant: Exhibit RC0281 ICR3838 (008), 4 November 2005, 53; information about Mr Mokbel's conveyancer: Exhibit RC0281 ICR3838 (092), 24 July 2007, 1057.
- 443 See, eg, Exhibit RC0467 Investigation Plan for Operation Posse, 17 November 2005, 4.
- 444 Exhibit RC0281 ICR3838 (020), 28 February 2006, 173; Exhibit RC0281 ICR3838 (021), 3 March 2006, 175.
- 445 Exhibit RC0281 ICR3838 (015), 12 January 2006, 117.
- 446 Exhibit RC0281 ICR3838 (019), 18 February 2006, 157.
- 447 Exhibit RC0281 ICR3838 (020), 28 February 2006, 173.
- 448 See, eg, Exhibit RC0281 ICR3838 (023), 20 March 2006, 197; Exhibit RC0281 ICR3838 (023), 21 March 2006, 202; Exhibit RC0281 ICR3838 (023), 22 March 2006, 203–4; Exhibit RC0281 ICR3838 (023), 23 March 2006, 206.
- 449 Exhibit RC1568 Ms Nicola Gobbo fee book 02, 25 July 2007, 7.
- 450 See for details on defence tactics: Exhibit RC0281 ICR3838 (082), 6 June 2007, 883; Exhibit RC0281 ICR3838 (082), 10 June 2007, 886; Exhibit RC0281 ICR3838 (083), 12 June 2007, 889; Exhibit RC0281 ICR3838 (083), 15 June 2007, 895–6; Exhibit RC0281 ICR3838 (084), 18 June 2007, 914; Exhibit RC0281 ICR3838 (96), 22 August 2007, 1130.
- 451 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 23 [163].

- 452 See, eg, Mr 'Bickley': Exhibit RC0281 ICR3838 (082), 7 June 2007, 885; Exhibit RC0281 ICR3838 (084), 21 June 2007, 924; Exhibit RC0281 ICR3838 (085), 23 June 2007, 934; Mr Cooper: Exhibit RC0281 ICR3838 (084), 20 June 2007, 917–18; Exhibit RC0281 ICR3838 (085), 23 June 2007, 930.
- 453 Exhibit RC0282 Transcript of meeting between Officer 'Peter Smith', Officer 'Malachite' and Ms Nicola Gobbo, 2 February 2006, 74–5; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 85–6 [395]–[396]; Transcript of Ms Nicola Gobbo, 6 February 2020, 13294–7.
- 454 Exhibit RC0272 Mr Stuart Bateson diary and day book, 29 April 2005, 10; see also Transcript of Commander Stuart Bateson, 2 July 2019, 3432.
- 455 Transcript of Commander Stuart Bateson, 20 November 2020, 9651–2.
- 456 See, eg, information regarding defence tactics: Exhibit RC0281 ICR3838 (033), 31 May 2006, 313; Phone numbers utilised by Solicitor 2: Exhibit RC0281 ICR3838 (054), 21 November 2006, 563.
- 457 Figure 7.3 based on Mr Antonios (Tony) Mokbel case study: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 442–78.
- 458 Exhibit RC1906 Attachment B to Letter from Australian Government Solicitor on behalf of the Commonwealth Director of Public Prosecutions to Solicitors Assisting the Royal Commission, 5 June 2019, 1; Exhibit RC1908 Letter from solicitors representing Australian Federal Police to Solicitors Assisting the Commission, 29 July 2019, 2 [8](b).
- 459 Exhibit RC1906 Attachment B to Letter from Australian Government Solicitor on behalf of the Commonwealth Director of Public Prosecutions to Solicitors Assisting the Commission, 5 June 2019, 1–3; Exhibit RC1908 Letter from solicitors representing AFP to Solicitors Assisting the Royal Commission, 29 July 2019, 2 [8(c)].
- 460 Exhibit RC1906 Attachment B to Letter from Australian Government Solicitor on behalf of the Commonwealth Director of Public Prosecutions to Solicitors Assisting the Royal Commission, 5 June 2019, 1–3.
- 461 *DPP v Barbaro & Zirilli* [2012] VSC 47 [12]–[13].
- 462 Exhibit RC1433 Letter from Ms Nicola Gobbo to Assistant Commissioner Stephen Fontana, 30 June 2015, 2; Damien Murphy et al, 'World's Biggest Ecstasy Bust', *Sydney Morning Herald* (online, 9 August 2008) <[www.smh.com.au/national/worlds-biggest-ecstasy-bust-20080809-gdsprz.html](http://www.smh.com.au/national/worlds-biggest-ecstasy-bust-20080809-gdsprz.html)>.
- 463 *DPP v Barbaro & Zirilli* [2012] VSC 47 [22].
- 464 *DPP v Rob Karam* [2015] VCC 855 [6].
- 465 Mr Salvatore Agresta, Mr Carmelo Falanga, Mr John Higgs, Mr Pasquale John Sergi, Mr Jan Visser and Mr Saverio Zirilli.
- 466 Commonwealth Director of Public Prosecutions, 'Prosecution Plea Summary, CDPP v Pasquale Barbaro & Saverio Zirilli,' 17 January 2012, 3–5, 55, 82–3, produced by the Commonwealth Director of Public Prosecutions in response to a Commission request for information; Supreme Court of Victoria, 'Transcript of R v Pasquale Barbaro & Zirilli' (Supreme Court of Victoria, King J, 20 January 2012) 119 [4] – [14], produced by the Commonwealth Director of Public Prosecutions in response to a Commission request for information; Commonwealth Director of Public Prosecutions, 'Prosecution Opening for Plea Hearing, R v Rob Karam', 14 January 2015, 10 [27], produced by the Commonwealth Director of Public Prosecutions in response to a Commission request for information.
- 467 See, eg, description of the evidence against the defendants being '80 to 85% of the "spoken word/text transmissions" with the balance of the evidence consisting of search and seizure and physical surveillance': *CDPP v P. Barbaro & Ors (Criminal)* [2009] VMC 26, 2 [8].
- 468 Figure 7.4 based on case study of 'Tomato Tins' syndicate: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 670–839.
- 469 Exhibit RC0281 ICR2958 (037), 1 September 2008, 575.
- 470 See comments made by Counsel Assisting regarding the implementation of the methodology in respect to this group of people: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 670 [1]. Please note that one individual, Mr Graham Potter, absconded prior to sentencing.
- 471 Exhibit RC0281 ICR3838 (008), 12 November 2005, 57.
- 472 Exhibit RC1568 Ms Nicola Gobbo fee book 01, 21 November 2005, 92; Exhibit RC0281 ICR3838 (016), 25 January 2006, 133; Exhibit RC1568 Ms Nicola Gobbo fee book 01, 20 March 2006, 94; Exhibit RC1568 Ms Nicola Gobbo fee book 02, 15 May 2007, 4; Exhibit RC1568 Ms Nicola Gobbo fee book 02, 25 May 2007, 1 June 2007, 8 June 2007, 15 June 2007, 22 June 2007, 5; Exhibit RC0284 SML3838, 14 June 2007, 113; Exhibit RC1568 Ms Nicola Gobbo fee book 02, 29 June 2007, 6 July 2007, 6; Exhibit RC0281 ICR3838 (029), 29 August 2006, 409.
- 473 Exhibit RC0281 ICR3838 (087), 3 July 2007, 973.
- 474 Exhibit RC0281 ICR3838 (002), 21 September 2005, 12; Exhibit RC0283 Information Report IRSID 277, 7 October 2005.

- 475 See, eg, Exhibit RC0283 Information Report IRSID 277, 7 October 2005; Exhibit RC0283 Information Report IRSID 326, 19 December 2005; Exhibit RC0109C Diary of Mr Terry Purton, 31 January 2006, 4; Exhibit RC0283 Information Report IRSID 349, 20 January 2006; Exhibit RC0283 Information Report IRSID 527, undated
- 476 Exhibit RC1904 Email from Clayton Utz to Solicitors Assisting the Royal Commission, 1 August 2019.
- 477 Exhibit RC0281 ICR3838 (086), 29 June 2007, 949–50, 952, 956; Exhibit RC0281 ICR3838 (088), 4 July 2007, 983.
- 478 For example on 31 June 2007: Exhibit RC0432 Officer 'Sandy White' diary, 31 June 2007, 153.
- 479 Exhibit RC0281 ICR3838 (086) 28 June 2007, 947.
- 480 See, eg, Mr Karam: Exhibit RC0281 ICR3838 (002), 21 September 2005, 12; Exhibit RC0281 ICR3838 (020), 25 February 2006, 167; Exhibit RC0281 ICR3838 (073), 7 April 2007, 772; Exhibit RC0281 ICR3838 (093), 31 July 2007, 1075; Mr Higgs: Exhibit RC0281 ICR3838 (044), 5 September 2006, 416; Exhibit RC0281 ICR3838 (086), 29 June 2007, 950; Mr Antonio Sergi: Exhibit RC0281 ICR3838 (018), 16 February 2006, 155.
- 481 See, eg, providing information about Mr Karam's concerns about surveillance: Exhibit RC0281 ICR3838 (011), 7 December 2005, 76; directive to provide 'immediate' updated to relation to Mr Karam's comments about the container and movements: Exhibit RC0281 ICR3838 (088), 4 July 2007, 983; Exhibit RC0281 ICR3838 (088), 5 July 2007, 989; Exhibit RC0281 ICR3838 (096), 22 August 2007, 1127.
- 482 Exhibit RC0281 ICR3838 (022), 14 March 2006, 187; Exhibit RC283 Information Report IRSID 529, 14 March 2006.
- 483 Exhibit RC0281 ICR3838 (052), 8 November 2006, 546; Exhibit RC0281 ICR3838 (054), 29 November 2006, 568.
- 484 Exhibit RC0281 ICR3838 (082), 5 June 2007, 876–7.
- 485 Exhibit RC0281 ICR3838 (082), 5 June 2007, 877; Exhibit RC0303 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Fox', Officer 'Anderson', 5 June 2007, 50.
- 486 See notation in an information contact report that Officer 'Sandy White' may 'have worked out a way to deal with this container without compromise to [Ms Gobbo]': Exhibit RC0281 ICR3838 (083), 15 June 2007, 897; put simply, this plan was to cause the Australian Federal Police to believe that Customs officials had identified the container by their own means: Exhibit RC0281 ICR3838 (086), 30 June 2007, 959; Exhibit RC0281 ICR3838 (087), 3 July 2007, 973. See also Exhibit RC0426 Officer 'Sandy White' diary, 19 June 2007; Exhibit RC0427 Officer 'Sandy White' diary, 20 June 2007.
- 487 Exhibit RC0281 ICR3838 (095), 6 July 2007, 994; Exhibit RC0281 ICR3838 (095), 16 August 2007, 1103.
- 488 Exhibit RC0281 ICR3838 (086), 29 June 2007, 952, 956.
- 489 Exhibit RC0281 ICR3838 (088), 4 July 2007, 983; Exhibit RC0281 ICR3838 (088), 5 July 2007, 989; Exhibit RC0281 ICR3838 (096), 22 August 2007, 1127; Exhibit RC0281 ICR3838 (088), 5 July 2007, 989.
- 490 Exhibit RC0281 ICR3838 (091), 18 July 2007, 1031–2; Exhibit RC0281 ICR3838 (091), 22 July 2007, 1043.
- 491 Exhibit RC0281 ICR3838 (088), 10 July 2007, 1000.
- 492 Exhibit RC0281 ICR2958 (039), 16 September 2008, 618, 620; Exhibit RC0281 ICR2958 (048), 4 December 2008, 753.
- 493 See, eg, Contact details for Mr John Higgs: Exhibit RC0281 ICR3838 (044), 5 September 2006, 416; Exhibit RC0281 ICR3838 (119), 10 January 2008, 1560; Contact details for Mr Antonio (Tony) Sergi: Exhibit RC0281 ICR3838 (018), 16 February 2006, 155.
- 494 Exhibit RC0281 ICR3838 (088), 5 July 2007, 989; Exhibit RC0432 Officer 'Sandy White' diary, 31 June 2007, 153.
- 495 Exhibit RC0281 ICR3838 (080), 24 May 2007, 853.
- 496 Exhibit RC0281 ICR3838 (080), 24 May 2007, 852; Exhibit RC0281 ICR3838 (080), 25 May 2007, 856.
- 497 See, eg, Exhibit RC0281 ICR3838 (086), 29 June 2007, 949–50.
- 498 Exhibit RC0281 ICR3838 (086), 28 June 2007, 947.
- 499 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith', 16 December 2008, 37.
- 500 Exhibit RC1433 Letter from Nicola Gobbo to Stephen Fontana, 30 June 2015, 7.
- 501 Exhibit RC0281 ICR2958 (031), 8 August 2008, 544.
- 502 Exhibit RC0601 Officer 'Richards' diary, 5 July 2007, 177.
- 503 Exhibit RC0281 ICR3838 (088), 5 July 2007, 989.
- 504 See, eg, Exhibit RC0432 Officer 'Sandy White' diary, 31 June 2007, 153.
- 505 See comments made by Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 693–4 [88].
- 506 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 681–3 [38]–[41].
- 507 Exhibit RC1908 Letter from solicitors representing Australian Federal Police to Solicitors Assisting the Royal Commission, 29 July 2019,

- 508 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 682 [40].
- 509 See Exhibit RC0281 ICR3838 (083), 15 June 2007, 897; Exhibit RC0426 Officer 'Sandy White' diary, 19 June 2007, 121–2; Exhibit RC0427 Officer 'Sandy White' diary, 20 June 2007, 126–8; Exhibit RC0281 ICR3838 (086), 30 June 2007, 959; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 680 [31].
- 510 Exhibit RC0281 ICR2958 (037), 5 September 2008, 583; Exhibit RC0281 ICR2958 (037), 6 September 2008, 586.
- 511 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 695 [93].
- 512 *DPP v Barbaro & Zirilli* [2012] VSC 47.
- 513 Mr Rabie (Rob) Karam, Mr Saverio Zirilli, Mr Salvatore Agresta, Mr Pasquale John Sergi, Mr Antonio Sergi, Mr Antonino Di Pietro, Mr 'Maddox', Mr Fadl Maroun and Mr 'Winters'.
- 514 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 721 [227].
- 515 Responsive submission, Mr John Higgs, 7 August 2020, 1 [1]–[3], 2 [4].
- 516 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 3, 770 [488]–[489]; see also Submission 085 Mr Francesco Madaffferri.
- 517 Adam Cooper, 'Jailed Gobbo Client Wants to Know If Other Lawyer Was Also Informer', *The Age*, (online, 10 September 2020) <[www.theage.com.au/national/victoria/gobbo-client-madaffferri-wants-to-know-if-other-lawyer-was-also-informer-20200910-p55ufg.html](http://www.theage.com.au/national/victoria/gobbo-client-madaffferri-wants-to-know-if-other-lawyer-was-also-informer-20200910-p55ufg.html)>.
- 518 Such as Mr Jan (John) Visser, Mr Carmelo Falanga, Mr Pino Varallo, Ms Sharon Ropa, Mr Giovanni Polimeni, Mr Paul Psaila, Mr Pasquale Rocco Sergi, Mr Gratian Bran, Mr Alan Saric, Mr Frank Molluso, Mr 'Eddington', Mr Danny Moussa, Mr Phillip Batticiotto, Mr 'Khan', Mr Anil Suri, Mr Anvardeen Abdul Jabbar, Mr 'Emerson', Mr 'Huntley', Mr Seyed Moulana and Mr Mohammed Nasfan Abdul Nazzar.
- 519 Figure 7.5 based on Exhibit RC1844, Office of Public Prosecutions Victoria, 'Annexure A–Witnesses and Related Accused Matter Outcomes', 29 May 2020; various presentments and indictments provided to the Commission by prosecutorial agencies.
- 520 For example, former Victoria Police officers Mr David Waters, Mr Noel Ashby, Mr Peter Lalor and Mr Paul Mullett.
- 521 Such as Mr Paul Dale: see Submission 079 Mr Paul Dale; Responsive submission, Mr Paul Dale, 21 July 2020. See also Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, ch 14–20.
- 522 See, eg, Submission 039 Mr Andrew Hodson and Ms Mandy Leonard; Responsive submission, Mr Cameron Davey, 7 September 2020; Responsive submission, Mr Solon (Sol) Solomon, 7 September 2020; Submission 021 Mr Peter Lalor; Responsive submission, Mr Peter Lalor, 21 July 2020; Responsive submission, Mr Paul Mullett and Mr Noel Ashby, 29 July 2020; Responsive submission, Mr Paul Mullett and Mr Noel Ashby, 7 September 2020.
- 523 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 524 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, ch 9; vol 3, 251–61.
- 525 *Victorian Legal Services Board v Gobbo* [2020] VSC 692.
- 526 Email from the Victorian Bar to the Commission, 22 October 2020.
- 527 *R v Szabo* [2001] 2 Qd R 214.
- 528 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

# 8

## The conduct of Victoria Police officers

### INTRODUCTION

The conduct of Ms Nicola Gobbo was not the only cause of the calamitous events that led to the establishment of this Commission. They could not have occurred without the complicity of Victoria Police officers, who authorised and facilitated her use as a human source to inform on her own clients.

It is a grave thing when a lawyer loses their ethical bearings and betrays their clients and the administration of justice. It is even more shocking when police officers who are sworn to uphold and enforce the law enable conduct that the Court of Appeal of the Supreme Court of Victoria recently considered ‘might prove to be one of the greatest scandals of our time in relation to the workings of the criminal justice system’<sup>1</sup>

Term of reference 2 required the Commission to inquire into and report on the conduct of current and former Victoria Police officers in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source.

In Chapter 6, the Commission sets out Victoria Police’s interactions with Ms Gobbo between the early 1990s, when officers charged her with drug offences and went on to register her as a human source for the first time; and 2018, when the organisation’s use of her as a human source for the third time was revealed to the Victorian public.

Chapter 7 discusses the potential effects of Ms Gobbo’s conduct on criminal convictions and findings of guilt, concluding that as many as 1,011 people may have been affected by her improper and duplicitous actions.

In accordance with term of reference 2, this chapter examines the conduct of individual Victoria Police officers

involved in these events. It should be read in conjunction with Chapters 6 and 7, and with Chapter 9, which takes a broader view of police conduct and the organisational conditions, structures, cultures and processes that contributed to and facilitated the actions of individual officers.

The chapter first outlines Ms Gobbo's initial involvement with Victoria Police, including her first and second registrations as a human source. It goes on to detail Ms Gobbo's involvement with the Purana Taskforce, her third registration by the Source Development Unit (SDU), her extensive informing between 2005 and 2009, and some case studies that exemplify the myriad ways in which police conduct fell short of expected ethical and professional standards. It describes Victoria Police's growing appreciation over time of the risks involved in using Ms Gobbo as a human source, and the series of missed opportunities to properly intervene and prevent further damage to the criminal justice system.

Finally, the chapter sets out the sequence of events that led ultimately to the revelation of Victoria Police's use of Ms Gobbo as a human source, including its attempts to transition her to a witness in two high-profile police operations; settlement of her civil litigation against Victoria Police; delays in obtaining and responding to legal advice on the possible consequences of its actions; and unsuccessful attempts to prevent the events from coming to light.

Many of the facts relevant to Ms Gobbo's use as a human source are contested by Victoria Police, numerous current and former officers, and Ms Gobbo herself. Given the volume of contested material, the Commission's time limitations and the size of this final report, it has not been possible, nor is it necessary or desirable, for the Commission to resolve every contested matter. This chapter draws on Counsel Assisting submissions, responsive submissions and other evidence gathered during the inquiry in making its findings and conclusions. In line with the Commission's obligations under the *Inquiries Act 2014 (Vic)*, where it has made an adverse finding against any person, it has fairly considered and set out the person's response. All Counsel Assisting and responsive submissions were also published on the Commission's website.<sup>2</sup>

It is difficult to say with absolute certainty who bears ultimate responsibility, and in what measure, for Victoria Police's mismanagement of Ms Gobbo as a human source and the resulting damage to Victoria's criminal justice system. This is due to a combination of factors, including the passage of time since the events occurred; the large number of police officers involved; the prolific nature of Ms Gobbo's informing; the disaggregation of responsibility across different areas of Victoria Police and the organisation's prevailing 'need to know' culture; and, as noted above, because so many officers and Ms Gobbo contest the facts around what happened and why.

The evidence does, however, identify many instances when Victoria Police officers failed to meet the Commission's expectations regarding the proper discharge of their duties and obligations as police officers. Those expectations were that all officers with knowledge of Ms Gobbo's management and use as a human source, especially those with direct, supervisory or leadership responsibilities, had an obligation to take all steps necessary to ensure that police conduct was not improper and did not interfere with accused persons' right to a fair trial—and where there was a possibility of that occurring, to ensure that either appropriate disclosure was made, or that public interest immunity (PII) claims were properly put to the courts.

It is no answer to criticism for police officers, particularly those in senior, supervisory roles, to say that responsibility lay elsewhere or that matters were outside of their chain of command. Once they knew of the grave risks of the situation and the questionable conduct of both Ms Gobbo and other police officers, they were obliged to either address it, or satisfy themselves that others were appropriately doing so.

The Commission has concluded that the conduct of relevant current and former Victoria Police officers should be referred to the proposed Special Investigator to consider whether there is sufficient evidence to bring criminal charges against them, and/or disciplinary charges in the case of current Victoria Police officers.

## LEGAL AND ETHICAL DUTIES OF VICTORIA POLICE OFFICERS

Victoria Police officers have a suite of legal and ethical duties and obligations derived from their oath or affirmation, legislation and the common law. These are outlined in greater detail in Chapter 5 and summarised below.

Before they commence service, every police officer must take an oath or make an affirmation, promising to:

- well and truly serve without favour or affection, malice or ill-will
- keep and preserve the peace
- prevent, to the best of their abilities, all offences
- discharge all of the duties legally imposed on the officer faithfully and according to law.<sup>3</sup>

The common law also recognises that police have broad duties to prevent and detect crime and to keep the peace.<sup>4</sup>

As noted in Chapters 2, 5 and 14, in criminal proceedings, police are bound by the prosecution's duty to disclose all relevant information to an accused person, including information that might help the accused person or weaken the prosecution's case against them. Even if an accused person is convicted, that duty continues to apply. If police do not wish to disclose information on the basis that it is subject to PII, they must apply to the court for an order authorising non-disclosure.<sup>5</sup>

Improper conduct and breaches of duties by police officers may fall under the *Victoria Police Act 2013* (Vic) (Victoria Police Act) and the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic). Police officers who breach their professional duties may be investigated by Victoria Police or the Independent Broad-based Anti-corruption Commission (IBAC),<sup>6</sup> and may face internal disciplinary measures or in some cases, criminal prosecution. Since 1 January 2008, Victoria Police and its officers have also been bound by the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>7</sup>

The obligations imposed on police reflect the crucial role they perform, the very significant powers they are given to perform it, and the grave consequences that may follow if they abuse those powers or fail to perform their role according to law.

As discussed in Chapter 5, it is not for the Commission to make determinative findings about whether criminal or disciplinary offences have been committed by Victoria Police officers. That is a matter for the courts and other authorities empowered to make such findings. Given the Commission's terms of reference, it is, however, appropriate and indeed necessary to examine and comment on the potentially improper conduct of Victoria Police and its officers. Indeed, this follows from term of reference 2, which, as set out above, required the Commission to report on relevant conduct of current and former Victoria Police officers.

Further, term of reference 1 required the Commission to report on cases potentially affected by the use of Ms Gobbo as a human source. As noted in Chapter 7, the Commission has focused on cases where convictions or findings of guilt may have been affected. Since the conduct of Victoria Police officers, including any potential breaches of their duties, are capable of undermining a conviction or finding of guilt, it has in many cases been necessary to consider what police officers did or may have done in using Ms Gobbo as a human source, in order to reach a view about whether and how a case may have been affected.

## INITIAL INVOLVEMENT WITH MS GOBBO: FIRST AND SECOND REGISTRATIONS

Between 1993 and 1999, Ms Gobbo had contact with Victoria Police as a law student and then as a lawyer, the circumstances of which are outlined in Chapters 6 and 7.

As discussed in those chapters, during this period Ms Gobbo was registered as a human source by Victoria Police on two occasions:

- in 1995, in relation to information that she was providing to police about the alleged criminal activities of Mr Brian Wilson<sup>8</sup>
- in 1999, in relation to information that she was providing to police about the alleged criminal activities of her former employer, Solicitor 1 (a pseudonym).<sup>9</sup>

The Commission is not of the view that there was improper conduct on the part of officers involved in these early registrations, particularly given the rudimentary policy framework that Victoria Police had in place for the management of human sources at the time. As discussed in Chapter 7, however, there were some negative patterns of conduct that would continue into the future.

During this period, signs emerged that cast doubt on the wisdom of using Ms Gobbo as a human source. Officers of both Victoria Police and the Australian Federal Police (AFP) told the Commission that they considered Ms Gobbo might not be suitable for this role, despite her enthusiasm.<sup>10</sup> For example:

- In 1996, then Detective Senior Sergeant John (Jack) Blayney, APM cancelled a plan to have Ms Gobbo introduce an undercover operative to her former de facto partner, Mr Wilson (a target of Operation Scorn), as she was a 'loose cannon'.<sup>11</sup>
- In 1998, Ms Gobbo suggested she had information for the AFP, but the agents assessed her as 'untrustworthy' and seeking to elicit information from them.<sup>12</sup>
- In 1998, a Victoria Police Drug Squad officer thought Ms Gobbo was unsuitable as a human source given her overt desire to provide information, her inappropriate relationships with police officers and the possibility that she may inform on clients.<sup>13</sup>

The SDU had no such reservations in registering Ms Gobbo in 2005, her third registration as a human source. Those Victoria Police officers who worked with her as a human source at this later time claimed they did not know about her informing activities in the 1990s and the Commission has found no evidence to contradict that claim.<sup>14</sup>

## THE GANGLAND WARS

Power struggles between Melbourne organised crime groups escalated between 2000 and 2003, resulting in a spate of murders that Victoria Police struggled to solve. These violent conflicts, known as the 'gangland wars', were often cited in evidence before the Commission as explaining police motivations in later registering Ms Gobbo as a human source in 2005.

Victoria Police criminal investigation practice at the time was 'siloes', with its investigative arm split into three Divisions: Major Drug Investigation Division (MDID); Serious Crime Investigation Division; and Violent Crime Investigation Division.<sup>15</sup> This saw each division approach every murder individually, without drawing connections between the crimes. They had little intelligence about factions or the key members of warring crime groups.<sup>16</sup>

With the appointment of Mr Simon Overland, APM as Assistant Commissioner, Crime, in February 2003,<sup>17</sup> Victoria Police adopted a fresh approach. They began to ‘join the dots’ and identify how the murders were connected to factional wars over the lucrative distribution of illegal drugs.<sup>18</sup> The Purana Taskforce was established in May 2003 to take a more holistic, more sophisticated approach.

In June 2003, Mr Jason Moran and Mr Pasquale Barbaro were murdered in broad daylight after an Auskick football clinic in front of young children (Moran/Barbaro murders). This highlighted the brutality of the gangland wars, and intensified government and community pressure for police to stop the violence.<sup>19</sup>

The Purana Taskforce received additional resources to support its investigations. The Taskforce hoped to dismantle organised criminal networks by using intelligence to target their weakest members, arrest and charge them, and encourage them to co-operate with police by giving evidence against their criminal associates, including those higher up the chain.<sup>20</sup>

## REFORMS TO HUMAN SOURCE MANAGEMENT POLICY AND PRACTICE

At around the same time, Victoria Police took steps to reform its human source management model, after a series of reviews highlighted endemic corruption in its Drug Squad, including inappropriate management of human sources.<sup>21</sup>

In August 2001, then Chief Commissioner of Victoria Police, Christine Nixon, APM commissioned a comprehensive review of the Drug Squad, overseen by Detective Superintendent Terry Purton. In December 2001, Mr Purton delivered a report titled *Review of the Victoria Police Drug Squad* (Purton Review).<sup>22</sup> One recommendation of the Purton Review was to establish an organisation-wide human source management policy with heightened management, oversight and more stringent record keeping.

A 2008 report by the Office of Police Integrity (OPI) examined events involving a former barrister giving information to Victoria Police officers as part of an investigation called Operation Clarendon, which was established in 2002. The OPI report concluded that Victoria Police had been slow to implement the Purton Review recommendations, noting presciently that Operation Clarendon was an:

*... important reminder of the need for police to be ever vigilant when approached by manipulative individuals ... purporting... to provide high level assistance for no reward.*<sup>23</sup>

In 2003, the Chief Commissioner issued a new human source management policy as a consequence of the Purton Review and related events.<sup>24</sup>

In the same year, under the leadership of Mr Overland, Victoria Police’s Crime Department identified the need to develop best practice in the management of human sources<sup>25</sup> and initiated the project entitled, *Review and Develop Best Practice Human Source Management Policy*.<sup>26</sup> Mr Overland, a senior and experienced officer with legal qualifications, sat on the Steering Committee and therefore understood the challenges and issues surrounding the management of human sources, particularly those who were deemed high-risk.<sup>27</sup>

In his evidence to the Commission, Mr Overland acknowledged that the use of human sources in relation to serious organised crime figures was ‘invariably legally and ethically complex’ and required fine judgements and balancing of competing legal and ethical principles.<sup>28</sup> He noted that the ‘type of person who has knowledge relevant to the identification and prosecution of serious crime is invariably ethically, morally and spiritually compromised’.<sup>29</sup>

The review initiated by Mr Overland resulted in a report containing 20 recommendations, including a recommendation for a six-month trial of a specialised ‘Dedicated Source Unit’ (DSU) to recruit and manage high-risk human sources using highly trained officers.<sup>30</sup> Following the trial, the DSU was established permanently and went on to register Ms Gobbo as a human source in 2005.<sup>31</sup> Its name was later changed to the SDU. In this chapter, the Commission refers to both as the ‘SDU’.

When Ms Gobbo was registered as a human source in 2005, the SDU’s policies were new and untested. There were also issues with the management structure, as both the SDU (responsible for operations) and the Human Source Management Unit (HSMU) (responsible for policy and compliance monitoring, including monitoring of the SDU) reported to the same Superintendent.<sup>32</sup> Further, the SDU had no full time Inspector despite its high-risk work.<sup>33</sup> From 1 July 2006, this management structure issue was addressed, but the SDU still had no full time Inspector.<sup>34</sup> These structural and resourcing issues and their implications for the conduct of officers who registered and managed Ms Gobbo as a human source are discussed in Chapter 9.

## FURTHER INVOLVEMENT WITH MS GOBBO: THIRD REGISTRATION

Before Ms Gobbo was registered as a human source in 2005, she and Victoria Police officers first tested the waters. By then, she was already in frequent contact with officers of the Purana Taskforce.<sup>35</sup>

Media attention surrounding Ms Gobbo’s successful bail application for Mr Lewis Moran in July 2003 attracted the wrath of his rival, Mr Carl Williams, for whom she had also acted.<sup>36</sup> Mr Williams thought her acting for Mr Moran was disloyal, and his offsider, Mr Andrew Veniamin, confronted her and called her a ‘dog’.<sup>37</sup>

When Ms Gobbo next appeared for Mr Moran in September 2003, then Detective Senior Sergeant Philip Swindells from the Purana Taskforce, knowing about these threats, invited her to contact police if she wanted to discuss her situation.<sup>38</sup> He told the Commission that he wanted her to know that she could comfortably speak to the Purana Taskforce and that they could assist and investigate.<sup>39</sup>

Between 2003 and 2004, Ms Gobbo had numerous discussions with then Detective Sergeant Stuart Bateson of the Purana Taskforce about assisting Victoria Police and about her safety concerns. Mr Bateson told the Commission that, after a hearing in 2004 concerning her client, Mr McGrath (a pseudonym), Ms Gobbo told him that she was concerned for her welfare if it were to become known that she was representing Mr McGrath.<sup>40</sup> In June 2004, Mr Bateson reminded her that Victoria Police’s ‘door was always open’ if she needed assistance.<sup>41</sup>

Ms Gobbo had a stroke in July 2004.<sup>42</sup> Around this time, Officer Sandy White (a pseudonym), then with the MDID but who later became Ms Gobbo’s SDU controller, thought she may have useful intelligence about organised crime.<sup>43</sup> After Ms Gobbo’s stroke, he thought she might be ‘vulnerable to an approach’.<sup>44</sup> This aligned with the SDU’s strategic, targeted recruitment of human sources.<sup>45</sup>

Victoria Police had several motivations for registering Ms Gobbo as a human source. Mr White said that he thought Ms Gobbo was a potentially valuable human source given her social associations with criminals.<sup>46</sup> Then Superintendent Anthony (Tony) Biggin recalled Mr White saying this was an attempt to gather the information she was supplying to multiple police into a single location.<sup>47</sup>

As then Deputy Commissioner Graham Ashton, AM, APM said in the course of giving evidence to the Kellam inquiry, the Victoria Police executive group was under ‘considerable pressure’ at the time to stop the gangland wars, murders and drug trade fuelling them. He explained:

*... this human source comes on board that could potentially solve a bunch of ... murders or prevent others ... and this glittering prize ... sometimes diverts you from the necessary sense of steps.<sup>48</sup>*

## The actions of Source Development Unit officers

At the time of Ms Gobbo's registration as a human source in September 2005, the SDU was a new group of enthusiastic, well regarded officers keen to prove that Victoria Police's investment in them was worth it.<sup>49</sup> Several officers had travelled overseas to research best practice in human source management.<sup>50</sup>

Ms Gobbo, a lawyer with a penchant for informing, was personally and professionally close to the organised crime figures she represented. She had grown disillusioned with their behaviour, especially after her stroke and the murders of Mr Terrence (Terry) Hodson and his wife Christine (Hodson murders). When she offered to become a human source in 2005, Victoria Police was happy to accept.

The SDU soon learned that Ms Gobbo had valuable information.<sup>51</sup> Her initial risk assessment, prepared by police as part of the 2005 registration, recorded that she represented members of the Mokbel crime syndicate headed by Mr Antonios (Tony) Mokbel.<sup>52</sup>

In his evidence to the Commission, one of Ms Gobbo's SDU handlers agreed that they frequently discussed the Mokbels, as the SDU wanted this information for the Purana Taskforce.<sup>53</sup> This was clear from her first meeting with the SDU:

*MR WHITE: So where do we start?*

*MS GOBBO: Well, you—I guess you can start.*

*MR WHITE: I can say then tell me everything you know about Tony Mokbel.<sup>54</sup>*

One of Ms Gobbo's handlers told the Commission that he often asked human sources this type of question to assess the source.<sup>55</sup> If, as they claimed in evidence to the Commission, SDU officers were careful not to elicit privileged information, this opening question showed gross carelessness. It was apt to elicit the very information they said they wished to avoid.<sup>56</sup> It set the tone for their many future interactions.

From the outset, the risks arising from the information Ms Gobbo provided were obvious. She raised disclosure issues with the SDU in their first meeting in September 2005.<sup>57</sup> For example she was concerned that her identity could be disclosed in response to a subpoena, and that if she were revealed as a human source she would be 'judged as a lawyer, not just as a person assisting police'.<sup>58</sup>

As outlined in Chapters 6 and 9, the initial SDU risk assessment prepared by experienced officers did not identify the most obvious of risks—that information about Ms Gobbo's past, current or future clients could breach legal professional privilege or client confidentiality and, if used in later prosecutions, may have to be disclosed to the Victorian Director of Public Prosecutions (DPP), the court and the accused person. Nor did the initial risk assessment raise the need for legal advice, despite the circumstances 'crying out' for it.<sup>59</sup>

Former officers of the SDU told the Commission in evidence and responsive submissions that they did not think it necessary to get legal advice at the time, as they expected to obtain information only about Ms Gobbo's criminal associates, not her clients, and would not obtain information subject to legal professional privilege.<sup>60</sup>

The Commission considers that this was a foolishly optimistic hope and was inconsistent with the questions SDU officers asked Ms Gobbo in the first meeting. The most likely reason they did not seek legal advice, especially as she went on to provide information about her clients, some of which was subject to legal obligations of confidentiality or privilege, was that they feared the advice would be either not to register her or constrain what she could provide. With the benefit of hindsight, both Victoria Police and former SDU officers accept that legal advice should have been sought.<sup>61</sup>

This inaction was repeated at the managerial level when Mr White briefed then Acting Superintendent Douglas (Doug) Cowlshaw, the SDU's Officer in Charge (OIC), in October 2005 about Ms Gobbo's registration as a human source.<sup>62</sup> Mr Cowlshaw knew she was a barrister and likely to provide information about Purana Taskforce targets, but did not take steps to obtain legal advice or examine the obvious risks inherent in the situation.<sup>63</sup> Nor did he raise such matters when Ms Gobbo's acting controller delivered Ms Gobbo's SDU risk assessment to him on 23 November 2005.<sup>64</sup>

Mr Cowlshaw submitted that while he did not shy away from his responsibilities, he did not recall receiving or seeing the risk assessment. He said the evidence did not support the conclusion that he received it and read it; and consequently, there is no basis to find that he failed to identify the risks that Ms Gobbo's use posed.<sup>65</sup>

The Commission is satisfied that the contemporaneous record suggests that it is more likely that Mr Cowlshaw did receive and read the risk assessment. The Commission recognises, however, that Mr Cowlshaw's failure to take the steps outlined above must be viewed in the context of the workload difficulties he faced due to the lack of a dedicated Inspector for the SDU.<sup>66</sup>

## The involvement of senior officers

Higher ranked officers also knew that Ms Gobbo might have information to assist the Purana Taskforce.

On 12 September 2005, then Detective Senior Sergeant James (Jim) O'Brien, who was in charge of the MDID, recorded in his diary speaking with Mr Overland about Ms Gobbo<sup>67</sup> and 'opportunities' regarding an investigation into Mr Tony Mokbel and his associates (Operation Quills).<sup>68</sup>

In evidence to the Commission, Mr O'Brien indicated he did not recall the details, but thought the discussion was probably about information Ms Gobbo had provided two MDID officers, then Detective Sergeant Steve Mansell and then Detective Senior Constable Paul Rowe, who both spoke with Ms Gobbo leading up to her 2005 registration as a human source.<sup>69</sup>

Mr Overland's diary entry of the meeting does not include any reference to Ms Gobbo. He told the Commission he did not believe he was told of her registration as a human source until after she was registered.<sup>70</sup>

Given that memories fade with time, Mr O'Brien's contemporaneous diary notes are likely to provide the most reliable evidence. The Commission is satisfied Mr O'Brien probably did discuss Ms Gobbo's registration with Mr Overland on 12 September 2005. Both he and Mr Overland should have identified at this early stage the grave risks involved in, and the need to carefully consider, the extraordinary step of registering a criminal defence barrister as a human source.

Even if Mr Overland was not aware of the intention to recruit Ms Gobbo, he accepts he knew of her registration soon after it occurred.<sup>71</sup> The Commission considers that he should immediately have obtained legal advice on her proposed use, noting his:

- senior rank and legal qualifications<sup>72</sup>
- awareness of past police failures in handling human sources,<sup>73</sup> the inherent risks of managing human sources generally and his oversight of the recent reforms in this area<sup>74</sup>
- diary note from a 26 September 2005 meeting of the Purana Taskforce executive management team (chaired by Mr Overland), discussing Ms Gobbo’s registration as a human source and noting the need to carefully manage her<sup>75</sup>
- approval of an investigation plan targeting the Mokbel syndicate, with an objective to ‘utilise the continuing information provided by registered human sources’,<sup>76</sup> while knowing that Ms Gobbo had represented members of the Mokbel syndicate (including Mr Tony Mokbel)<sup>77</sup>
- evidence to the Commission that, when he heard of Ms Gobbo’s registration, he immediately identified issues of concern, including the potential for miscarriages of justice.<sup>78</sup>

Despite all of this, Mr Overland said in his evidence to the Commission he was ‘conscious not to intervene ... [and] didn’t think it was appropriate’, as the SDU, which managed Ms Gobbo as a human source, was outside his chain of command.<sup>79</sup> He assumed the SDU would handle it and that proper disclosure and PII claims would be made to the court (to obtain authority for the non-disclosure of Ms Gobbo’s status as a source), if appropriate.<sup>80</sup> Mr Overland raised similar matters in submissions to the Commission.<sup>81</sup>

Having considered Mr Overland’s contentions, the Commission is of the view that the most likely reason that he did not obtain legal advice was that he feared it would limit the information he hoped to obtain from Ms Gobbo to help solve the gangland wars.

## USE OF MS GOBBO AS A HUMAN SOURCE

Many Victoria Police officers in the Purana Taskforce and the SDU were involved in Ms Gobbo’s use and management as a human source.

Figure 8.1 sets out the key Purana Taskforce officers from 2003 to 2010.

### Figure 8.1: Purana Taskforce key officers, 2003 to 2010

← Figure on foldout

During Ms Gobbo’s third registration as a human source, from September 2005 to January 2009, she was managed by a number of different SDU officers. Figure 8.2 sets out a timeline of the SDU officers during the period of Ms Gobbo’s third registration as a human source.

### Figure 8.2: Source Development Unit officers who managed Ms Gobbo as a human source, September 2005 to January 2009

Figure on foldout →

As discussed in Chapter 7, the conduct of Ms Gobbo and Victoria Police may have affected the cases of 1,011 individuals. This chapter uses case studies of Mr McGrath, Mr Thomas (a pseudonym) and Mr Cooper (a pseudonym), to illustrate the conduct of Victoria Police officers.

Figure 8.1: Purana Taskforce key officers, 2003 to 2010

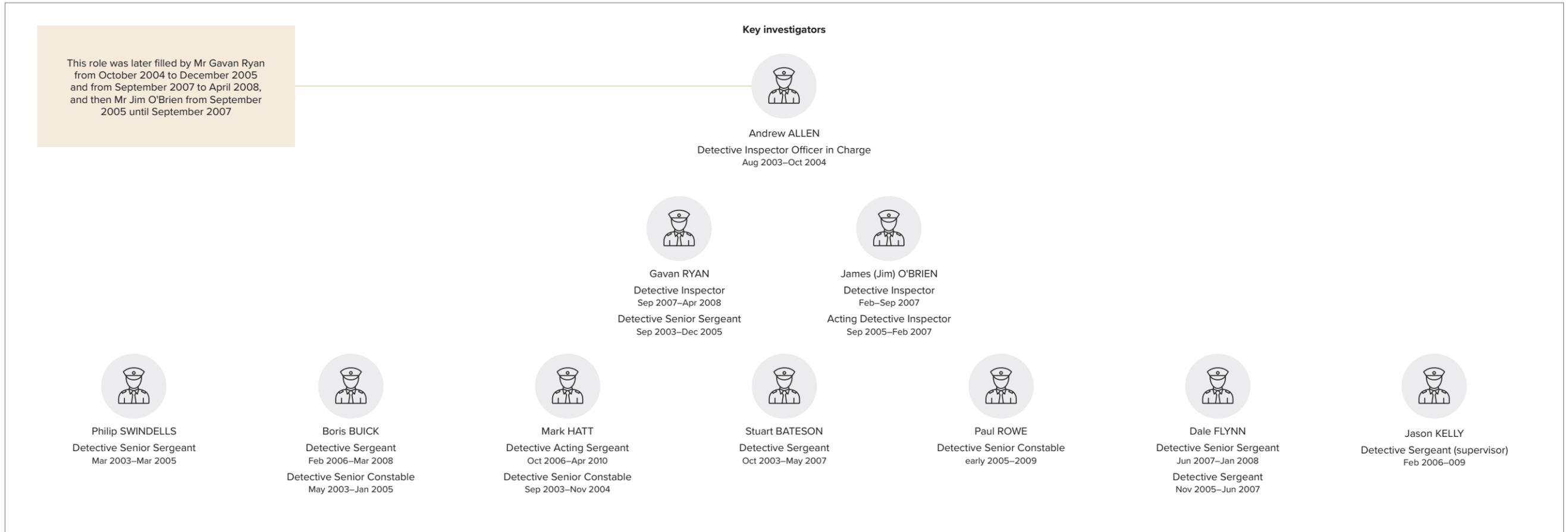
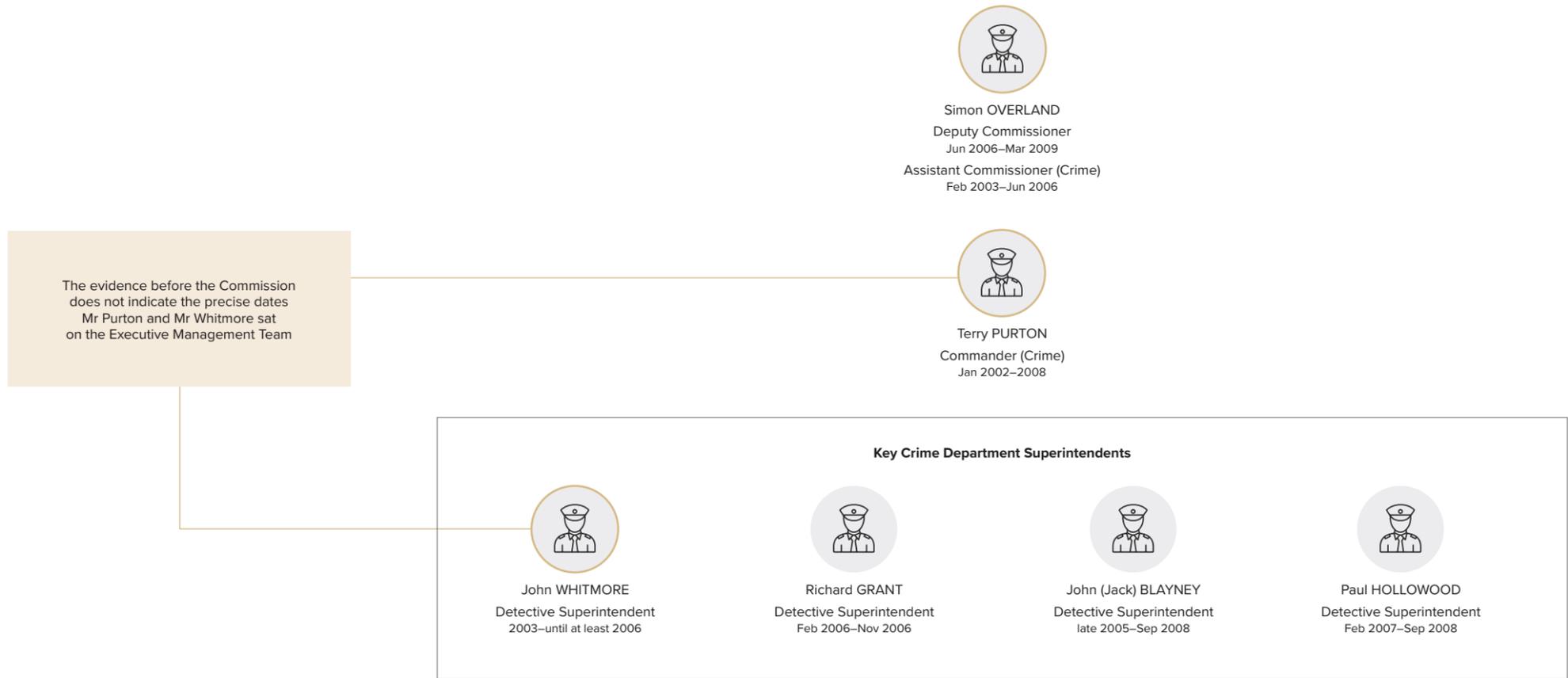
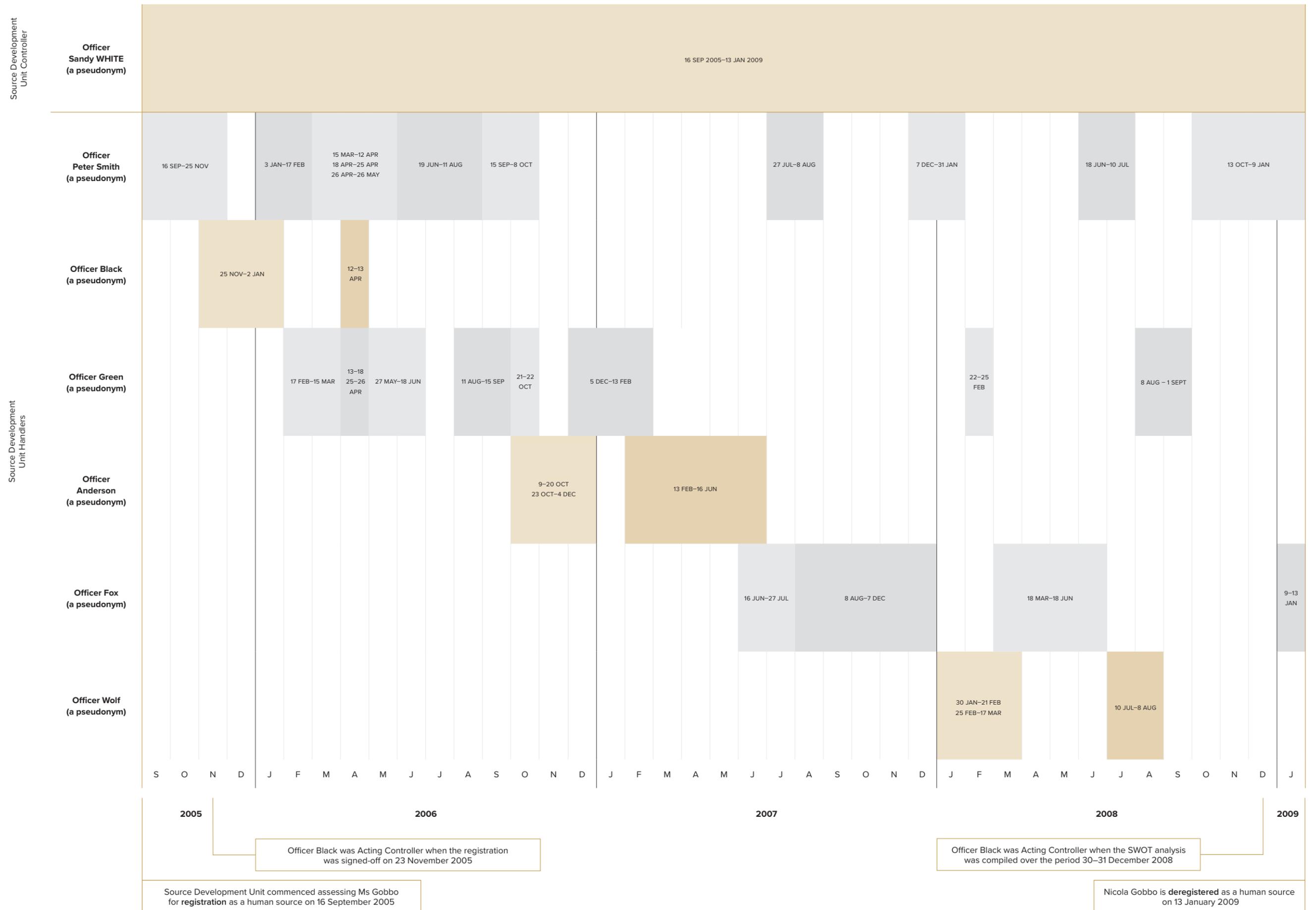


Figure 8.2: Source Development Unit officers who managed Ms Gobbo as a human source, September 2005 to January 2009



In the *AB v CD* decision, the High Court of Australia found:

*... Victoria Police were guilty of reprehensible conduct in knowingly encouraging [Ms Gobbo] to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will.<sup>82</sup>*

The case studies invoke the Sir Walter Scott quote, ‘Oh, what a tangled web we weave, when first we practice to deceive!’<sup>83</sup> They demonstrate patterns of behaviour and manifold problems that quickly became an increasingly complex web of deception.

Later in the chapter, further case studies arising from Operation Khadi and the Petra and Briars Taskforces illustrate Victoria Police’s disclosure failures and its efforts to conceal Ms Gobbo’s role. The common thread is that many current and former police officers seem to have failed to properly manage the situation and to meet all of their duties and obligations.

The evidence before the Commission, consistent with the High Court’s assessment quoted above, supports the conclusion that the conduct of Victoria Police officers and of Victoria Police as an institution, fell short of expected standards by:

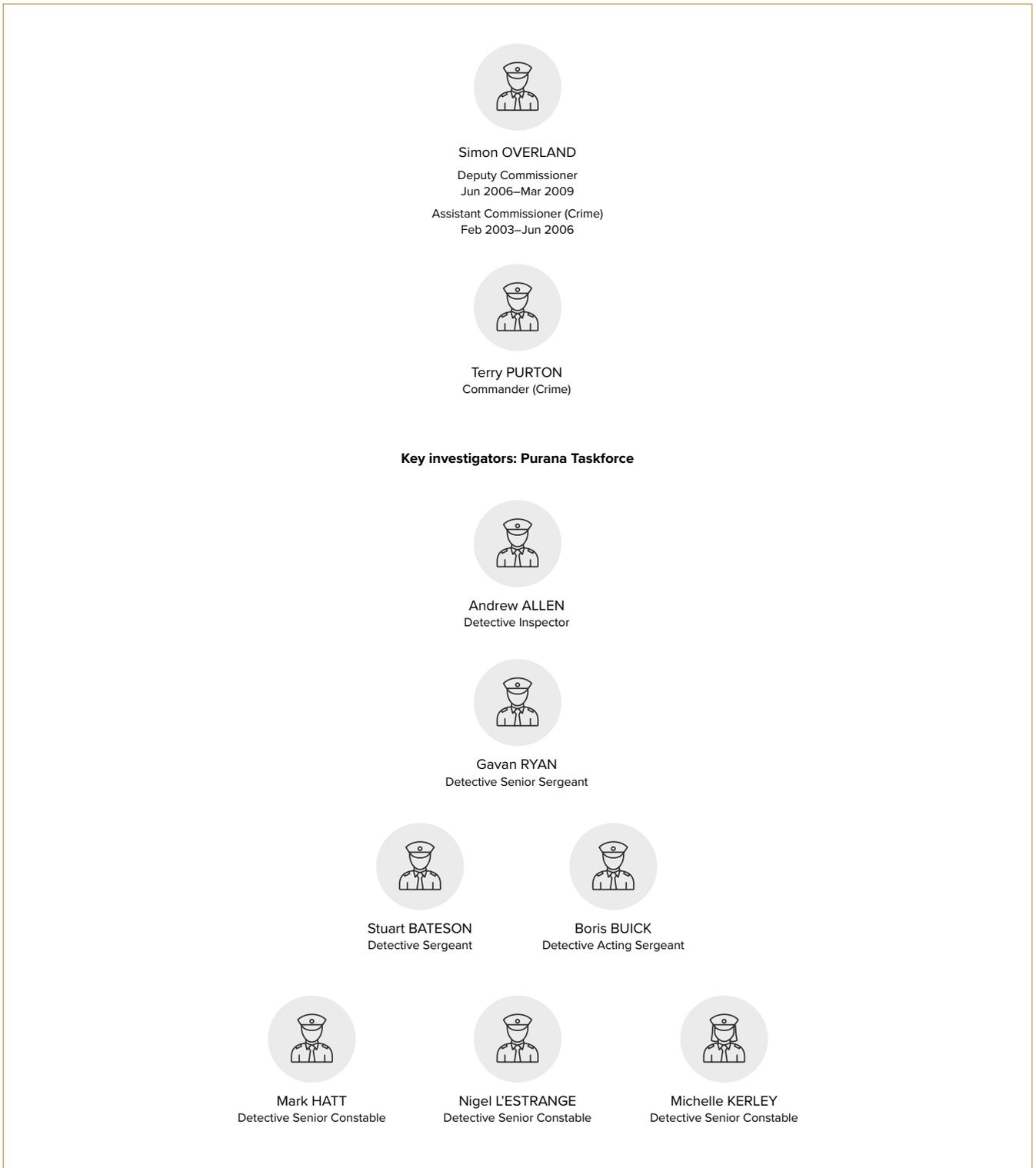
- encouraging Ms Gobbo to act as counsel for an accused person, or at least condoning it, knowing that she was a human source and therefore not providing them with independent legal representation
- encouraging Ms Gobbo to act as counsel for an accused person, or at least condoning it, while knowing she was covertly informing or had covertly informed against them
- encouraging Ms Gobbo to act as counsel for an accused person, or at least condoning it, when she had provided information that assisted police to obtain incriminating evidence against them
- failing to disclose to an accused person, either directly or through the DPP or the Victorian Government Solicitor’s Office (VGSO), the existence of information or evidence that might have enabled them to challenge the admissibility of prosecution evidence on the basis it may have been improperly or illegally obtained
- failing to take appropriate steps to ensure that any PII claim concerning the disclosable evidence was determined by a court.<sup>84</sup>

## Case study: Mr McGrath (a pseudonym)

The details of Mr McGrath’s case, and the role of Ms Gobbo as a human source in this case, are set out in Chapter 7. This chapter examines those events with an emphasis on the role of current and former police officers.

Figure 8.3 outlines the key Victoria Police officers involved in Mr McGrath’s case.

**Figure 8.3: Mr McGrath (a pseudonym) case study—key Victoria Police officers, 2003–05**



The events relevant to Mr McGrath's case preceded Ms Gobbo's registration as a human source in 2005, but fall squarely within the Commission's terms of reference because:

- Ms Gobbo was effectively acting as a human source and developed a human source-like relationship with Mr Bateson<sup>85</sup>
- Mr McGrath's decision to plead guilty and implicate his criminal associates, colloquially known as 'rolling', was a significant breakthrough in solving the gangland murders,<sup>86</sup> setting off the domino effect police were seeking
- it provided the template for Victoria Police's relationship with Ms Gobbo.

The first element of that template was that key parts of Victoria Police—investigators, senior officers and the SDU—knew of Ms Gobbo's conflicted role as Mr McGrath's lawyer while providing intelligence to police. Purana Taskforce investigators Mr Bateson, Mr Gavan Ryan and Mr Andrew Allen had contact with Ms Gobbo as Mr McGrath edged closer to rolling.<sup>87</sup> In turn, the Purana Taskforce kept senior officers Mr Overland, Mr Purton and Superintendent John Whitmore updated on Mr McGrath's statement-making and Ms Gobbo's assistance.<sup>88</sup> At her first meeting with the SDU, Ms Gobbo told them she assisted Purana Taskforce in rolling Mr McGrath and impressed upon them the need to conceal this for her safety.<sup>89</sup>

The second element was Victoria Police's simplistic solution to the ethical dilemma: several officers told the Commission that Ms Gobbo's conflicts of interest were her responsibility, not theirs.<sup>90</sup> In Mr McGrath's case, Victoria Police did nothing to address Ms Gobbo's conflicts in:

- representing Mr McGrath and assisting him to become a prosecution witness against another client, Mr Williams, in relation to the murder of Mr Michael Marshall (Marshall murder)
- assisting Mr McGrath to make a statement implicating Mr Thomas in the Moran/Barbaro murders and then representing Mr Thomas in relation to those murders.

The third and most significant element of the template was Victoria Police's concealment of the true nature of Ms Gobbo's involvement in rolling Mr McGrath. They failed to adequately disclose to those incriminated by Mr McGrath's statements, the prosecution or the court, her role in assisting Mr McGrath to refine significant aspects of his statement about the Marshall murder, implicating Mr Williams and Mr Andrews (a pseudonym). This put those people whom Mr McGrath incriminated (Mr Thomas, Mr Williams and Mr Andrews) at a significant forensic disadvantage. The concealment of Ms Gobbo's involvement potentially rendered their convictions unfair. It appears that Victoria Police officers breached their disclosure obligations to instead make good on their assurances to protect Ms Gobbo's identity and her safety.

## Events leading to Mr McGrath rolling

Chapter 7 details the circumstances surrounding Mr McGrath rolling. The key events relevant to Victoria Police officers' conduct include:

- In late June 2004, Mr McGrath, represented by Ms Gobbo, agreed to plead guilty and assist police by providing statements in relation to the Moran/Barbaro and Marshall murders.<sup>91</sup>
- On 9 July 2004, Mr Bateson gave Mr McGrath, among other statements, a copy of his statement about the Marshall murder to review, but Mr McGrath would not sign the statements until Ms Gobbo had reviewed them.<sup>92</sup>
- On 10 July 2004, Mr Bateson recorded in his day book that Ms Gobbo read Mr McGrath's draft statement in the Marshall murder case and expressed scepticism about claims that he had thought it was going to be a debt collection not a premeditated murder, and that he was not paid for the job.<sup>93</sup>

- On 11 July 2004, Mr Bateson arranged for Ms Gobbo to visit Mr McGrath in prison; he later recorded in his day book 'will be truthful' after he spoke to Ms Gobbo, referring to Mr McGrath and his statement about the Marshall murder.<sup>94</sup>
- On 12 July 2004, the Purana Taskforce executive management team, including Mr Overland, was updated on the weekend's events, including Ms Gobbo's view that elements of Mr McGrath's statements were 'ridiculous' and would be changed.<sup>95</sup>
- On 13 July 2004, Mr McGrath signed his statement, now recording that it was a premeditated murder not a debt collection gone wrong.<sup>96</sup>

### **Failure to adequately disclose Ms Gobbo's role regarding Mr McGrath's statements**

As relevant Victoria Police officers would or should have appreciated, knowledge of the above matters was relevant to the defence of those incriminated by Mr McGrath's statements. These matters went to Mr McGrath's credibility as a prosecution witness.<sup>97</sup>

Ms Gobbo and the Victoria Police officers involved emphasised that she did nothing more than encourage Mr McGrath to tell the truth. However, they would or should have appreciated that, after Ms Gobbo's intervention, he changed his account of the motivation for the Marshall murder, with the effect of bolstering the police case. In turn, he received a more favourable sentence. Even if Mr McGrath's refined statement was truthful, police should have disclosed to the defence the process by which it was achieved.

Police avoided disclosing this helpful information to the defence, the prosecution or the court. Specifically:

- In hearings in the Supreme Court of Victoria regarding disclosure, Mr Bateson, in answer to questioning as to whether there were any other statements made by Mr McGrath, said no other signed or unsigned statements existed 'relevant to these charges'.<sup>98</sup>
- Mr Bateson also gave evidence that he had no documents regarding negotiations or discussions leading to Mr McGrath becoming a prosecution witness and did not believe any existed.<sup>99</sup>
- Ms Gobbo, who was representing Mr Thomas as junior counsel in these disclosure hearings, declined to cross-examine Mr Bateson,<sup>100</sup> telling the Commission she had a 'huge conflict' in being unable to reveal what she knew about Mr McGrath's draft statements 'for fear of the consequences'.<sup>101</sup>
- During the committal proceedings for both the Marshall and Moran/Barbaro murders, Mr Thomas' barrister, Mr Colin Lovitt, QC asked Mr Bateson if the drafts of any of Mr McGrath's statements were altered prior to him signing them on 13 July 2004. Mr Bateson responded, 'the only draft is, or the only difference that we have recorded is the addresses that we have deleted out of the statements'.<sup>102</sup>
- Counsel Assisting submitted that Mr Bateson's day book pages for 10 and 11 July 2004, which revealed the substance of Ms Gobbo's involvement in Mr McGrath changing his statement, were not submitted to the court for determination of a PII claim.<sup>103</sup> As discussed below, this is heavily disputed by Mr Bateson.
- At Mr Thomas' subsequent hearing, Ms Gobbo did not expose Mr McGrath's credibility issues regarding the process of taking his statements, which would have exposed the flaws in the prosecution case and supported his bail application. Mr Bateson, who had filed an affidavit opposing the bail application and was present in court, must have felt comfortable that she would not cross-examine him on these significant issues.<sup>104</sup>

Some of these matters are discussed further below.

During committal proceedings in relation to the Moran/Barbaro and Marshall murders, references to Ms Gobbo were redacted from investigator materials disclosed to the defence following a successful PII claim. It may be true, as Mr Bateson and Victoria Police contend, that the notes in Mr Bateson's day book and other materials were redacted pursuant to proper process. As a matter of law, that ruling is binding unless overturned on appeal.

Counsel Assisting submitted that critical pages from Mr Bateson's day book—outlining his discussions with Ms Gobbo between 10 and 11 July 2004 and her role in finalising Mr McGrath's statement—were not disclosed to the court as part of the PII claim. They asserted that, had the Chief Magistrate been given those pages, he would not have remained silent when Mr Bateson gave evidence.<sup>105</sup> Victoria Police and Mr Bateson strongly contend to the contrary.<sup>106</sup>

The Commission could not fairly resolve this dispute, given the absence of original transcripts and that the issue largely arose after Mr Bateson's evidence had concluded and the Commission therefore did not hear from him directly on the matter. It is one of a number of such disputes that may need to be investigated further.

Following Mr Bateson's evidence to the Commission on 20 November 2019, and contrary to evidence he gave at the committal proceedings, Victoria Police belatedly produced a draft of Mr McGrath's statement about the Marshall murder. Its metadata suggested it was most likely created on 9 July 2004 and was probably the draft shown to Ms Gobbo on 10 July 2004. The changes between this and the final version signed on 13 July 2004 were material, focused on Mr McGrath's shifting belief around the purpose of going to Mr Marshall's home: to collect a debt or to kill him.<sup>107</sup> Neither Victoria Police nor Ms Gobbo thought Mr McGrath had been truthful on these matters. This should have been disclosed to the defence.

Mr Bateson asserted there was no basis to find he was being dishonest in stating there were no prior drafts of Mr McGrath's statements.<sup>108</sup> Mr Bateson may well have answered honestly in a technical sense, given Victoria Police's statement-taking processes at the time. But Mr Bateson knew or should have known when he gave evidence at these relevant proceedings that on or around 9 July 2004, there was an earlier draft statement that materially changed following Ms Gobbo's involvement (or at least that aspects of the statement had been materially altered) and this was never disclosed to the prosecution or defence.

Victoria Police asserted that Counsel Assisting ignored that Mr Thomas and Mr Williams knew of Mr McGrath's prior inconsistent statement regarding the intention to murder Mr Marshall and cross-examined him on this point.<sup>109</sup> As Counsel Assisting submitted, however, the real issue of concern was the concealment of the circumstances leading to the material changes to Mr McGrath's draft statement between 9 and 13 July 2004 and Ms Gobbo's role in that process.<sup>110</sup> It was helpful to the defence to know why and how Mr McGrath changed his position, given he had a powerful incentive to say what he thought police wanted to hear.<sup>111</sup>

More broadly, Mr Bateson gave evidence to the Commission that Ms Gobbo's identity was concealed because of safety concerns should it have become known that she acted for Mr McGrath in this way.<sup>112</sup> The Commission accepts these concerns were real, amplified by the gangland murders, Mr Veniamin's recent threats and the Hodson murders. But safety concerns do not provide an excuse for flouting the duties of pre-trial disclosure.

## Summary of conduct

The Commission is satisfied that the Victoria Police officers who knew of Ms Gobbo's role in relation to the preparation of Mr McGrath's statements, and knew that they were not disclosed to the defence, engaged in conduct that may have undermined the administration of justice.

It is no answer to a lack of individual responsibility and accountability to say, as Victoria Police and individual officers submitted based on the evidence of Assistant Commissioner Kevin Casey, that communication outside the chain of command (an officer raising issues beyond that officer's immediate supervisor) was not the system at the time.<sup>113</sup> Nor is it an answer to say that any conflict of interest was a matter for Ms Gobbo. Every police officer, not just the informant in the proceedings, was bound by their oath or affirmation to discharge their duties, including their duty of disclosure, faithfully and according to law.<sup>114</sup>

Similarly, it is not an answer to say that concern for Ms Gobbo's safety necessitated concealing her role. If Victoria Police's concerns for her safety required them to keep her role secret even from the court, it should have counselled her to not represent Mr McGrath or be further involved in the murder proceedings. If she would not take that direction, legal advice should have been obtained or the matter discussed with the DPP.

Had the true nature of Ms Gobbo's involvement with Mr McGrath been disclosed, the events giving rise to this Commission would probably not have occurred. Disclosure would have likely prompted Mr Thomas to seek a new lawyer and Ms Gobbo's other clients would likely not have considered her part of their crew or continued to retain her services.

The conduct of Victoria Police and Ms Gobbo in Mr McGrath's case began the web of deceit that grew more complex over time. The need to conceal her assistance to police to protect her safety clouded officers' decisions and allowed them to rationalise their conduct. As Ms Gobbo made plain in her first meeting with the SDU, protection like that provided by the Purana Taskforce in Mr McGrath's case was a condition of her becoming a human source:

*And I still live in fear of that coming out because all it's gonna take is for some Supreme Court judge to release police diary notes where it's me that they're meeting and it's me that they're speaking to, it's me editing, like, the statements before they get sworn and served, that sort of stuff.*

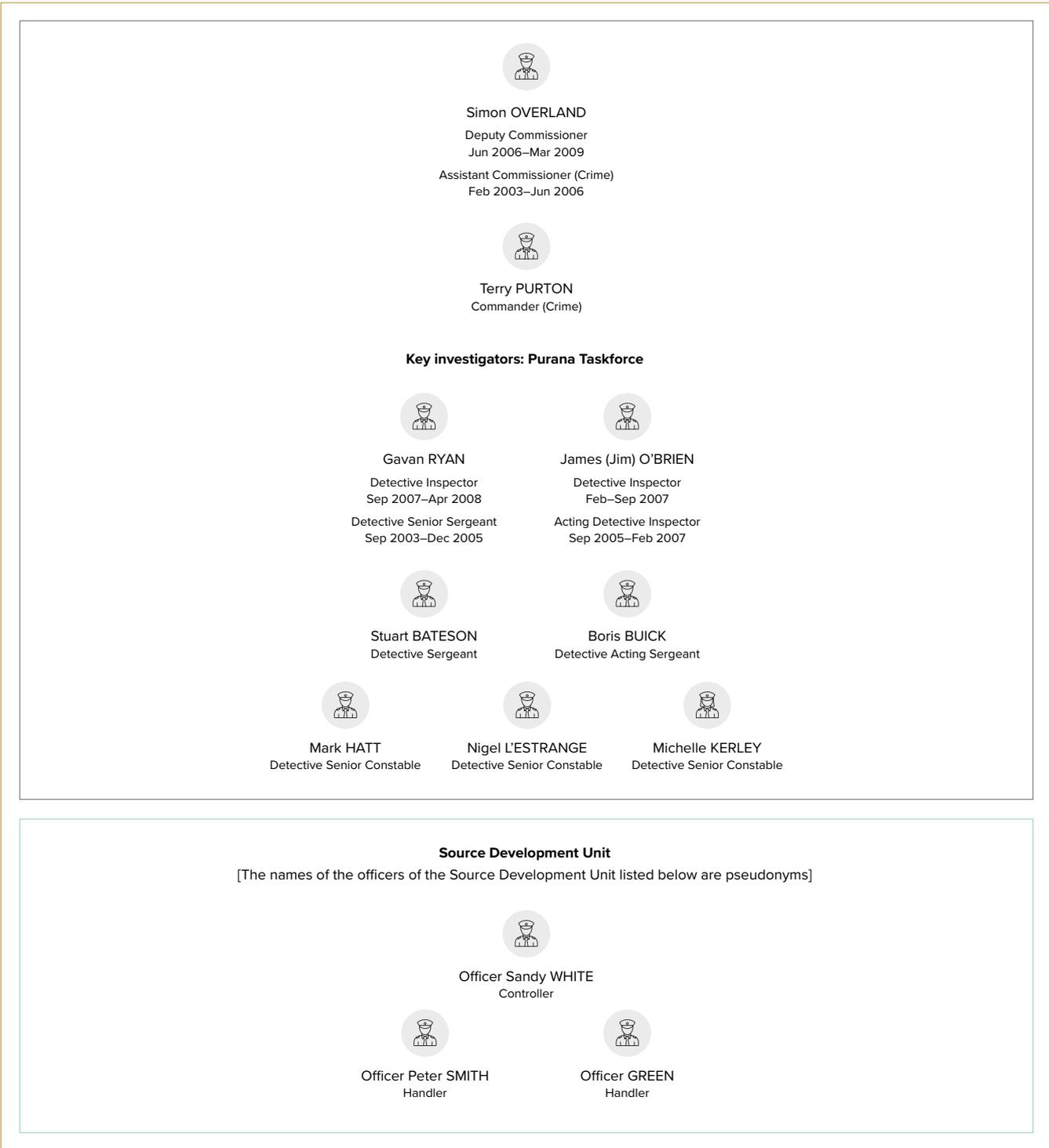
...

*... I know the police protected me in the Magistrates' Court with the first round of subpoenas, but now we're at Supreme Court stage ... and a judge might rule differently to a magistrate. If that happens, I'm—I'm—I'm fucked.<sup>115</sup>*

## Case study: Mr Thomas (a pseudonym)

The details of Mr Thomas’ case study, and the role of Ms Gobbo as a human source, are set out in Chapter 7. This chapter examines those events with an emphasis on the role of current and former police officers. Figure 8.4 outlines the key Victoria Police officers involved in Mr Thomas’ case.

**Figure 8.4: Mr Thomas (a pseudonym) case study—key Victoria Police officers, 2004–06**



## Conflict of interest from the outset

On 16 August 2004, Mr Thomas was arrested and charged with the 2003 Moran/Barbaro murders, based largely on a statement from Mr McGrath.<sup>116</sup> Despite knowing that Ms Gobbo acted for Mr McGrath and refined his statements, the Purana Taskforce facilitated Mr Thomas' request to speak to Ms Gobbo<sup>117</sup> and, with police support, she continued to act for him.<sup>118</sup>

The Commission accepts Counsel Assisting's contention that Ms Gobbo should not have represented anyone being investigated as a result of Mr McGrath's statements.<sup>119</sup> Ms Gobbo accepted in her evidence to the Commission that in acting for Mr Thomas, she 'obviously' 'had a huge conflict' and that she did not act in his best interests 'for fear of the consequences'.<sup>120</sup>

Responsive submissions of Ms Gobbo and several current and former Victoria Police officers emphasised that Mr Thomas knew of, and may have perceived advantage in, her prior representation of Mr McGrath.<sup>121</sup> The Commission notes that Counsel Assisting, in their reply submissions, accepted it was publicly known to many people that Ms Gobbo had previously represented Mr McGrath; however, only Ms Gobbo and some police officers knew of her involvement in the material changes to Mr McGrath's statement.<sup>122</sup>

The Commission considered the evidence and responsive submissions from former officers of the Purana Taskforce asserting that they either did not appreciate Ms Gobbo's conflict of interest or did not believe her conflicts were their responsibility, given that their superior officers and later the SDU were aware of the situation.<sup>123</sup>

Victoria Police submitted that this misguided attitude (that conflicts were Ms Gobbo's to manage) was due largely to systemic failings in Victoria Police training, leadership and governance.<sup>124</sup> Systemic failures, however, do not absolve individual officers, especially those directly responsible or in senior, supervisory positions, from failing to discharge their disclosure duties or to address conflicts that could detrimentally affect the administration of justice.

Systemic and organisational issues relevant to the conduct of Victoria Police officers involved in Ms Gobbo's use as a human source are discussed in Chapter 9.

## Ms Gobbo's representation of Mr Thomas

From her September 2005 registration as a human source, Ms Gobbo, at various times, acted both as Mr Thomas' purported lawyer and as an agent of Victoria Police encouraging him to roll. Police officers did nothing effective to discourage this deception, at times appearing to encourage it.

As set out in Chapter 7, during this period Mr Thomas' name was mentioned 160 times in Informer Contact Reports (ICRs) detailing information that Ms Gobbo passed on to the SDU. She provided information including:

- that Mr Thomas and Mr Cooper 'would both have sufficient information about Mokbel to put him away for a long time'<sup>125</sup>
- Mr Thomas' attitude towards rolling, and the advice she would give him<sup>126</sup>
- Mr Thomas' criminal associations, prior drug activities and those who could incriminate him<sup>127</sup>
- advice on how police could best encourage or manipulate Mr Thomas to roll.<sup>128</sup>

Victoria Police and Ms Gobbo were wandering into a legal and ethical minefield. Her SDU handlers advised Ms Gobbo not to get too close to Mr Thomas.<sup>129</sup> For example, a February 2006 ICR recorded:

*Source advised [by Mr Green] to stay away from [Thomas] and him assisting police as it will draw attention to her in her current position with Tony Mokbel trial etc etc previously acting for [McGrath].<sup>130</sup>*

Ms Gobbo found excuses to continue acting for Mr Thomas: that she felt ‘obliged’;<sup>131</sup> that she was unable to suggest alternative lawyers; and that he needed a ‘push to roll over and assist police’.<sup>132</sup> Former SDU officers accepted these excuses, along with the information she provided about Mr Thomas. The obvious risks to his defence were ignored.<sup>133</sup>

Counsel Assisting submitted that Victoria Police officers were, at the very least, remiss in not seeking legal advice given the novel, complex and fraught situation of a criminal defence barrister informing on her clients to police. They noted that around this time, the Purana Taskforce obtained legal advice when legal professional privilege issues arose in Operation Primi, investigating the 6 February 2006 murder of lawyer Mr Mario Condello.<sup>134</sup>

Responsive submissions asserted that legal advice was not readily obtainable by the Purana Taskforce; that the single example cited by Counsel Assisting did not prove otherwise; and that the Taskforce had no embedded legal resources and rarely sought legal advice on operational matters.<sup>135</sup> Submissions noted that, in any case, Mr O’Brien did not always identify the issues, a pre-requisite for seeking advice, and assumed that the SDU would manage this.<sup>136</sup>

The Commission is satisfied that this was an obviously risky situation: the officers involved could and should have obtained legal advice, but chose not to, partly to protect Ms Gobbo, but partly because they feared the advice may be not to use Ms Gobbo as a human source at all, or only with the most stringent safeguards. The Commission notes that the Purana Taskforce could access internal and external legal advice when warranted, as the Operation Primi example shows, and that Victoria Police had a Legal Services Department and access to the VGSO at this time.

This pattern—SDU officers not obtaining legal advice and instead telling Ms Gobbo to exercise caution, her ignoring those instructions, and then all parties acting together to conceal her role as a human source—became a familiar theme. No current or former Victoria Police officer who was aware of what Ms Gobbo was doing took effective steps to stop her duplicity, or reveal her true role to her clients, other defence lawyers, the DPP or the courts.

## Concealing Ms Gobbo’s dual role

The SDU was concerned that investigators’ diary entries could reveal Ms Gobbo’s identity if they were disclosed. When Mr White took this up with the Purana Taskforce, Mr Bateson told him he knew Ms Gobbo was a human source and was aware of the ‘issues’.<sup>137</sup> The following week, according to Mr White’s diary, he raised the issue with Mr O’Brien, who agreed to monitor and ‘sanitise’ (deidentify) Mr Bateson’s notes.<sup>138</sup>

In responsive submissions, Mr O’Brien acknowledged that Mr White’s diary appeared to record a conversation between Mr O’Brien and one of Ms Gobbo’s handlers, not between Mr O’Brien and Mr White. He contended it is unsatisfactory that neither person who participated in the conversation, was asked about it by the Commission.<sup>139</sup> On the evidence, the Commission cannot definitively determine this matter; however, Mr White’s contemporaneous note, although hearsay, concerningly suggests investigators’ notes may have been sanitised.

Counsel Assisting pointed to several instances to support their views that Mr Bateson deceptively sanitised his notes by referring to Ms Gobbo as ‘Informer 3838’ when she was not providing intelligence as a human source but as acting as Mr Thomas’ lawyer. They contended that the consequence of Mr Bateson referring to Ms Gobbo as a human source in his notes enabled a PII claim ‘without a likely call for explanation’.<sup>140</sup> For example, on 21 April 2006, Mr Bateson wrote ‘Nicola Gobbo’ and ‘3838’ in consecutive diary entries made only hours apart. The reference to ‘Ms Gobbo’ by name related to a public appearance in court.<sup>141</sup> Later that night, Mr Bateson spoke to Ms Gobbo about Mr Thomas’ possible interest in a plea deal, this time recording her human source number, even though she was acting as Mr Thomas’ lawyer, not as a human source.<sup>142</sup>

Mr Bateson said he mistakenly referred to Ms Gobbo by her human source number on a number of occasions, not by way of deliberate deception.<sup>143</sup> In responsive submissions, Mr Bateson contended that he did not have a consistent

approach to the use of ‘Ms Gobbo’ and ‘3838’.<sup>144</sup> Further, he submitted that the evidence did not indicate that he was involved in concealing diary entries from the defence.<sup>145</sup>

The Commission finds it unlikely that Mr Bateson, an experienced investigator who clearly compiled his notes with great care, referred to Ms Gobbo in those different ways by mere happenstance. Rather, it seems likely that he referred to Ms Gobbo by her registration number ‘3838’ to disguise and avoid having to disclose her dual role as human source and Mr Thomas’ purported lawyer.

## The knowledge of senior officers

Senior officers were kept updated on the progress to roll Mr Thomas. On 19 February 2006, Ms Gobbo told Mr Bateson that Mr Thomas may want to assist police. This was quickly relayed up the chain of command to Mr Bateson’s supervisor, Mr Ryan, who interrupted Mr O’Brien, Mr Overland and Mr Geoff Horgan, QC, then of the Victorian Office of Public Prosecutions (OPP), on a Sunday to share the news. Updates to senior officers continued over the following days as events developed.<sup>146</sup>

## Purana Taskforce vouch for Ms Gobbo’s honesty

Purana Taskforce officers visited Mr Thomas several times in prison to discuss his situation.

On 15 March 2006, Mr Thomas asked Mr Bateson and Mr O’Brien for their opinion of his legal team. Victoria Police asserted that the following exchange demonstrates their efforts to ensure he had independent representation:

*MR THOMAS: Do I keep the solicitors?*

*MR BATESON: Well look I’m not sure, it’s up to you.*

*MR THOMAS: Jim’s, I’ve got heaps of confidence in Jim. Nicola’s good but she has to give something, I can’t, you know what I mean?*

*MR BATESON: I personally think that you’re better off with independent um legal representation.*

*MR THOMAS: That’s what I mean.*

*MR BATESON: That’s what I personally think. Now I can’t tell you to change solicitors, um, or anything because as far as I know they’re both very good. But what I’m saying is that they’re involved with a lot of other people.<sup>147</sup>*

Officers of the Purana Taskforce met with Mr Thomas again on 23 March 2006. He gave Mr Bateson and Mr O’Brien information about several gangland murders, and about police corruption and drug offending involving the Mokbels and Mr Williams. Mr Bateson said police would review his information and confer with prosecutors.<sup>148</sup> Mr Thomas repeated his misgivings about Ms Gobbo:

*MR THOMAS: ... you have got to answer this one for me, Nicola and Jim would like to convince me, because Nicola knows right, really I shouldn’t be doing fucking 34 years for nothing, cos she knows a fair bit about it and she’s the one that convinced me to come in as well and Jim Valos, Jim Valos always has. Forget Jim now. I want to ask you, one sec, I want to ask you a question, right Nicola’s the one who convinced me ... I don’t know but I trust her, who can I get to put it all together for me?*

*MR BATESON: Look, I reckon Jim Valos is an honest solicitor.*

...

*MR BATESON: And I believe Nicola is ultimately honest too.*

*MR THOMAS: She is but I don't think she'll sell me out to 'em.*

*MR BATESON: Well I don't think she will either.*

*MR THOMAS: I'll be honest with you. I've got a gut feeling she'd rather help you than help what's going on out there.*

*MR BATESON: Well I don't know about that but I think she's honest mate.*

*MR THOMAS: Can I ask this question? If, whatever happens, I need someone I can trust right. Nicola's the one, like they come in (indecipherable) they were convincing me that ... after what happened.*

*MR O'BRIEN: I think it'd be advantageous for you to have someone independent.<sup>149</sup>*

...

*MR BATESON: Well, I mean from my point of view, I think Nicola is an honest barrister.<sup>150</sup>*

Mr Bateson contended that he could not direct Mr Thomas to seek alternative representation because it was not his role or responsibility to do so, and telling him not to use Ms Gobbo may have placed her safety at risk.<sup>151</sup> Mr Bateson also gave evidence, reiterated in responsive submissions, that he thought Ms Gobbo's actions did not exclude her from being honest; that he did not know that she was informing on Mr Thomas or other clients at this time;<sup>152</sup> that she would give Mr Thomas good advice; and that Mr Thomas' only concern was keeping his potential cooperation confidential.<sup>153</sup>

Mr Bateson, knew, however, that Ms Gobbo was dishonest in her dealings with Mr Thomas and could not give him independent legal advice, in that she was a human source and she did not disclose to Mr Thomas the true nature of her assistance to Mr McGrath. This is supported by the later jovial reaction of Ms Gobbo and SDU officers when Ms Gobbo read aloud the transcript of Mr Bateson vouching for her honesty, as discussed further below.<sup>154</sup>

The Commission considers that it would or should have been obvious to Mr Bateson that Mr Thomas' concerns about Ms Gobbo were not limited to keeping his cooperation secret. He was charged with a double murder and was considering implicating leading organised crime figures in serious offences. If he did so, his life and the safety of those close to him would be jeopardised indefinitely. Before making this decision, he understandably wanted (and needed) independent legal advice as to the strength of the case against him and his chance of acquittal. Ms Gobbo, hopelessly conflicted, could not and did not provide that independent advice.

Mr Thomas' queries about Ms Gobbo as his lawyer provided a perfect opportunity for Mr Bateson and Mr O'Brien to steer him to an independent lawyer. After Mr O'Brien's ineffective attempt to do so, Mr Bateson vouched for Ms Gobbo's honesty when he must have known this was untrue. It seems to have been a short-term convenient untruth to help police end the gangland wars.

## A missed opportunity to resolve conflicts of interest

Any uncertainty about the propriety of Ms Gobbo acting for Mr Thomas should have dissolved when Mr Bateson attended Supreme Court hearings on 28 and 30 March 2006. The judge made it clear that Solicitor 2 (a pseudonym) could not continue to act for Mr Williams due to a conflict, having earlier represented his co-accused Mr Andrews, by then also a prosecution witness.<sup>155</sup> Ms Gobbo's representation of first Mr McGrath and then Mr Thomas in the circumstances outlined earlier was analogous, if not worse. At around this time, Mr Bateson attended meetings with police lawyers and the OPP but did not tell them of the extent of Ms Gobbo's conflict.<sup>156</sup>

Mr Bateson told the Commission that, at that time, conflicts were common among the small cadre of barristers who acted for organised criminals and submitted that Ms Gobbo's conflicts were well-known and were for the courts, DPP and legal fraternity to manage.<sup>157</sup>

Mr Bateson contended that he was unaware of the impropriety of Ms Gobbo representing Mr Thomas, who in any case knew of her earlier representation of Mr McGrath.<sup>158</sup> The Commission does not accept this. Mr Thomas did not know about her role in the changes to Mr McGrath's statements and, as Mr Bateson knew, Ms Gobbo would and could not put Mr Thomas' interests before her own as this would require disclosing her role in the changes to Mr McGrath's statement regarding the Marshall murder.

The Commission considers, however, that an investigator of Mr Bateson's ability and experience with a knowledge of Ms Gobbo's duplicitous role should have appreciated that her providing Mr Thomas with legal advice was apt to interfere with the administration of justice. The Commission considers that Mr Bateson's failure to recommend that Mr Thomas find a lawyer other than Ms Gobbo and to raise her conflict with the OPP or Victoria Police lawyers was not solely to protect Ms Gobbo's identity and safety; it also suited the Purana Taskforce's objectives.<sup>159</sup>

## Ms Gobbo as an agent of the Purana Taskforce

Mr Thomas did not roll as quickly as the Purana Taskforce hoped. In early April 2006, Ms Gobbo reported to her handler that things were at an impasse.<sup>160</sup> Mr O'Brien, Mr Ryan and Mr Bateson met on 19 April 2006 and decided to stop dealing directly with Mr Thomas; they would instead provide confidential transcripts of their discussions with Mr Thomas to Ms Gobbo and she would work on him. Mr O'Brien delivered the transcripts to Ms Gobbo's controller and handlers.<sup>161</sup>

On 20 April 2006, Ms Gobbo met with SDU officers and read the transcript. They laughed when Ms Gobbo read aloud that Mr Bateson had vouched for her honesty and that Mr Thomas had a gut feeling, accurate as it turned out, that she would rather help police than 'what's going on out there'.<sup>162</sup> Ms Gobbo commented on the irony of Mr Bateson not being able to tell Mr Thomas that she 'got Mr McGrath over the line'.<sup>163</sup> Her SDU handler, Mr Peter Smith (a pseudonym), told Ms Gobbo that the Purana Taskforce would not deal with Mr Thomas unless he started 'telling more the truth', and Mr White added:

*... if anybody can get him to tell the truth it will be you. Now, is that in his own interests? We don't know enough about it. You would know a lot more about that...*

*... don't read anything more [into] this than the fact that from an investigator's point of view, there is an opportunity to get the truth out of [Mr Thomas]. Clearly they're not getting it now and [inaudible] is insufficient for them to even consider running any further with it but they need to explore it as far as they can and if you can help them to do that, all well and good.<sup>164</sup>*

Current and former police officers told the Commission in evidence and responsive submissions that Ms Gobbo was not tasked as a human source in relation to these transcripts; rather, they were given to her as Mr Thomas' lawyer as there was uncertainty about who was the solicitor on the record. Further they submitted that, there was no evidence about how she was to, or did, use the transcripts to encourage Mr Thomas to make admissions, plead guilty or implicate associates.<sup>165</sup>

The Commission is satisfied that officers gave the transcripts to Ms Gobbo in her role as a human source, noting that:

- Mr Bateson's relevant diary entry referred to '3838'<sup>166</sup>
- the Source Management Log (SML) on 19 April 2006 recorded 'Request for HS to speak to Thomas re truthfulness of statements being made by same',<sup>167</sup> suggesting that the Purana Taskforce wanted Ms Gobbo to get Mr Thomas to change his account<sup>168</sup>
- transcripts were provided to Ms Gobbo through the SDU, whose role was to handle human sources<sup>169</sup>
- legal material was ordinarily provided to a person's instructing solicitor; any uncertainty around whether lawyer, Mr Jim Valos, was still acting could have been resolved with a phone call<sup>170</sup>
- Mr Thomas was not told that Ms Gobbo had reviewed this transcript.<sup>171</sup>

## Mr Thomas becomes a witness for the Purana Taskforce

On 6 July 2006, police began taking Mr Thomas' statements. He eventually made around 20 statements implicating organised crime figures.<sup>172</sup> Following the pattern of behaviour established for Mr McGrath:

- statements were taken on a computer, with the Purana Taskforce saving changes over the original so that there were no prior drafts to be disclosed to the defence, despite Mr Thomas' credibility potentially being at issue<sup>173</sup>
- Ms Gobbo's involvement was not adequately disclosed to the prosecution, defence and courts<sup>174</sup>
- Ms Gobbo told the SDU officers the questions that the Purana Taskforce should ask Mr Thomas, and they told the Taskforce<sup>175</sup>
- Ms Gobbo met with Mr Thomas when the Purana Taskforce was concerned about his truthfulness, and later reported to the SDU, he was 'up to 80' per cent truthful<sup>176</sup>
- Ms Gobbo went to the police station to review Mr Thomas' statements.<sup>177</sup>

What Ms Gobbo did when she read the first statement is the subject of some contention. Mr Thomas' statement on the murder of Mr Paul Kallipolitis was taken by then Detective Senior Sergeant Boris Buick. Mr Buick knew about Ms Gobbo's role in revising Mr McGrath's statements and that she was a human source.<sup>178</sup> His day book noted 'the [Thomas] statements are being checked by Ms Gobbo'.<sup>179</sup>

A copy of the extract from Mr Buick's day book was originally produced to the Commission. Counsel Assisting subsequently called for his original diary, which contained two significant Post-it notes not previously provided. One, in Mr Bateson's handwriting, went to Ms Gobbo's role:

*Boris,*

*Here is the statement. It has some red pen on it. These alterations were made by Nicola last night. If you don't have this format let me know and I will email to you.*

*Regards,*

*Stu.*<sup>180</sup>

Mr Bateson gave evidence that Ms Gobbo only made changes to grammar in Mr Thomas' statements.<sup>181</sup> Ms Gobbo later admitted to her handlers that she 'amended some slightly'.<sup>182</sup> She said to her handler that:

*MS GOBBO: I edited it. I went to Purana secretly one night and edited all his statements. I corrected them. But no-one ever knows about that. That would never come out. Even [Mr Thomas] doesn't know I did that.*

*MR GREEN: Mm.*

*MS GOBBO: He could never reveal it 'cause he doesn't know about it. And they were very good the way they did it because the detective that I did it with is not a witness so it can never come out with people just telling the truth.<sup>183</sup>*

As outlined in Chapter 7, the Commission considers that Ms Gobbo's admission, recorded by her handlers relatively contemporaneously, suggests that the changes were unlikely to have been limited to grammar. Furthermore, it seems that the Purana Taskforce held draft statements in both hard copy and electronic form, which were not disclosed to the defence when requested. It is also concerning that someone in Victoria Police appears to have removed a Post-it note referring to Ms Gobbo before copying Mr Buick's diary extract and producing it to the Commission. It raises doubts as to whether Victoria Police has provided all relevant requested material to the Commission.

## The views of Victoria Police officers

Victoria Police and some of its current and former officers submitted that Ms Gobbo always acted in Mr Thomas' best interests, so that he received an outstandingly lenient sentence.<sup>184</sup> That suggests, despite the High Court decision, that they still may not understand their culpability. It is true that Mr Thomas was ultimately sentenced only for one murder and received a lenient sentence but he and those closest to him must live with the lifelong threat of deadly reprisal, irrespective of the favourable outcome.

A brief overview of the conduct of relevant Victoria Police officers and responsive submissions is set out below together with the Commission's findings.

### Mr Simon Overland

Between 2005 and 2007, Mr Overland was Assistant Commissioner, Crime<sup>185</sup> and then a Deputy Commissioner.<sup>186</sup> He oversaw the Purana Taskforce's work as Chair of the Taskforce's executive management team and was heavily involved in its work; was aware of Ms Gobbo's representation of Mr McGrath;<sup>187</sup> knew she was providing information in relation to Operation Posse<sup>188</sup> and associates of Mr Tony Mokbel;<sup>189</sup> and was informed about police dealings with Mr Thomas.<sup>190</sup> He told the Commission that he appreciated the legal and ethical issues associated with Ms Gobbo's use as a human source,<sup>191</sup> and that he gave a strict direction that she could not continue to act for people if she was providing information about them.<sup>192</sup>

Mr Overland's responsive submissions disputed Counsel Assisting's contentions, including that he knew Ms Gobbo was informing on Mr Thomas, that he should have ensured legal advice was obtained about disclosure and that he should have inquired into and discovered Ms Gobbo's role.<sup>193</sup> He claimed Counsel Assisting ignored the legitimate role defence lawyers can and do play regarding prosecution witnesses.<sup>194</sup>

For the reasons outlined in Counsel Assisting submissions, the Commission is satisfied that Mr Overland knew or should have known that Ms Gobbo was acting for Mr Thomas and that this required legal advice and the most expert management if it was to continue without interfering in the administration of justice.<sup>195</sup> Reasons include:

- Mr Overland's interest in, and receipt of updates about, the work of the Purana Taskforce
- his knowledge of Mr Williams' complaints about Ms Gobbo's conflict in representing Mr Thomas<sup>196</sup>
- his interest in Mr Thomas rolling.<sup>197</sup>

Counsel Assisting submissions conceded that there is no direct evidence that Mr Overland was aware Ms Gobbo was informing on Mr Thomas.<sup>198</sup> They asserted with some cogency, however, that such awareness can be inferred; for example, because he knew that Mr Thomas' lawyer was a human source serving the interests of the Purana Taskforce.<sup>199</sup>

Ultimately, the Commission considers it unnecessary to determine whether Mr Overland knew the details of Ms Gobbo's role as a human source informing on Mr Thomas—given he appreciated the risks posed by her use as a human source, he seems to have failed in his duty by leaving the management of these issues to the SDU. If legal advice was not to be obtained, he should have satisfied himself that Ms Gobbo's use as a human source was being intensely supervised, to ensure that the risks to her safety and to Victoria Police and the administration of justice were minimised.

### **Mr Jim O'Brien**

Mr O'Brien was the OIC of the Purana Taskforce from mid-September 2005.<sup>200</sup> He knew that Ms Gobbo was acting for Mr Thomas<sup>201</sup> and was also a registered human source providing information to police about him, among other matters.<sup>202</sup>

In responsive submissions, Mr O'Brien stated he only became aware that Ms Gobbo was providing some information about Mr Thomas on or around 23 March 2006. He contended that, although she spoke to her handlers from time to time about Mr Thomas, this was generally not disseminated to Mr O'Brien, although there were three occasions when this did occur.<sup>203</sup> Mr O'Brien conceded that this should not have happened.<sup>204</sup> He submitted that his training in and understanding of disclosure obligations was limited and, as an Inspector, ensuring disclosure obligations were met was not his job; and further that the SDU was responsible for managing conflicts.<sup>205</sup>

The Commission accepts, as outlined in Counsel Assisting submissions, that Mr O'Brien received information about Mr Thomas originating from Ms Gobbo in February and March 2006.<sup>206</sup> Despite Mr O'Brien's contentions, the Commission is satisfied that given his experience, seniority and knowledge of Ms Gobbo's role in relation to Mr Thomas, he should have either addressed or raised with a superior officer or colleagues in the relevant functional areas any risks and issues associated with Ms Gobbo's conflicts of interest and with police compliance with their disclosure obligations.

### **Mr Gavan Ryan**

Mr Ryan joined the Purana Taskforce as a Detective Senior Sergeant in 2003, and later rose to the rank of Detective Inspector.<sup>207</sup> He was aware of Ms Gobbo's role in relation to Mr McGrath's statements,<sup>208</sup> and by at least December 2005 that Ms Gobbo was a registered human source.<sup>209</sup> In February 2006, he briefed Mr Overland, Mr O'Brien and Mr Horgan on the possibility that Mr Thomas may roll.<sup>210</sup> He was placed in charge of Mr Thomas when he decided to roll.<sup>211</sup>

In responsive submissions, Mr Ryan contended that it is not open for the Commission to find that Ms Gobbo made changes to Mr McGrath's statements, or that he knew she had done so. He contended Ms Gobbo was not informing on Mr Thomas while acting for him, and if she was, he did not know. He also contended that police were not using Ms Gobbo to encourage Mr Thomas to plead, and that there is insufficient evidence to conclude Mr Ryan knew Ms Gobbo was so encouraging him if that were the case.<sup>212</sup>

The Commission remains satisfied that given his knowledge of Ms Gobbo's role in relation to Mr Thomas and Mr McGrath, his participation in briefing senior officers on those matters, the importance of Mr Thomas rolling to Purana Taskforce's broader strategy, combined with his experience and senior, supervisory role within the Taskforce, Mr Ryan knew or should have known of the key events and risks relating to Victoria Police's use and management of Ms Gobbo as a human source in relation to Mr Thomas.

### **Mr Stuart Bateson**

Mr Bateson transferred to the Purana Taskforce from the Homicide Squad in October 2003. He reported to Mr Ryan, leading a crew of detectives initially focused on Mr Williams' criminal enterprise, the Moran/Barbaro murders and the murder of other individuals including Mr Mark Moran.<sup>213</sup> He was aware that Ms Gobbo was a lawyer acting for Mr Thomas<sup>214</sup> and was a human source providing information about Mr Thomas.<sup>215</sup>

Mr Bateson's responsive submissions in relation to evidence he gave in 2004 and 2005 about Mr McGrath's statements; barristers' conflicts of interest; the 'sanitising' of notes; assurances given to Mr Thomas regarding Ms Gobbo's honesty; and the provision of transcripts to Ms Gobbo; are dealt with above.

### **Mr Sandy White (a pseudonym) and officers of the Source Development Unit**

Responsive submissions took issue with key elements of Counsel Assisting's submissions. Former SDU officers submitted that Ms Gobbo acted as Mr Thomas' lawyer and her intention was to get him the best possible sentence discount, which she achieved.<sup>216</sup> They also contended she was not 'informing' on Mr Thomas, but providing information to the SDU about her movement and activities relevant to her safety.<sup>217</sup> They asserted that providing the transcript of Purana Taskforce's discussions with Mr Thomas to Ms Gobbo was only a matter of convenience in that their scheduled meeting with Ms Gobbo provided an opportunity to deliver the transcript. They also asserted there is no basis to find that Mr White was involved in or had knowledge of any efforts by police to encourage or allow Ms Gobbo to advise Mr Thomas to roll.<sup>218</sup>

Counsel Assisting reply submissions set out further ways in which the SDU did not treat Ms Gobbo simply as Mr Thomas' lawyer.<sup>219</sup>

## **Summary of conduct**

After considering the competing submissions and other evidence, the Commission has concluded that Victoria Police officers with knowledge of Ms Gobbo's use and management as a human source, especially those with supervisory and leadership responsibilities, seem, in Mr Thomas' case, to have failed in their obligation to take all necessary steps to ensure that:

- her use and management did not interfere with accused persons' right to a fair trial
- where there was potential interference with that right, appropriate disclosure was made
- any PII claims were considered by the DPP, the VGSO and if necessary, a court.<sup>220</sup>

The Commission concludes that, between 16 September 2005 and around June 2007, Mr O'Brien, Mr Ryan and Mr Bateson from the Purana Taskforce, Mr Overland, who had ultimate responsibility for the Purana Taskforce, and Mr White, as head of the SDU, knew or should have known that:

- Ms Gobbo was a barrister and human source actively pursuing the Purana Taskforce
- she had, as Mr McGrath's legal representative, encouraged him to refine his statements so that he appeared more truthful, with the effect of bolstering his credit as a witness, strengthening the police case, and improving his chances of a reduced sentence
- she was informing on Mr Thomas while purporting to act as his lawyer
- Mr Thomas was charged with murder and was facing a potential sentence of life imprisonment
- Mr Thomas was entitled to independent legal representation
- Ms Gobbo had a conflict of interest between her role as a human source for Victoria Police and legal representative of Mr Thomas
- she encouraged Mr Thomas to make admissions, enter a plea of guilty and implicate his associates, in circumstances where she was a police agent and Victoria Police used, or at least allowed, her to do this.

The Commission finds that, notwithstanding that the officers named above knew or should have known these matters, they allowed Ms Gobbo to represent Mr Thomas without obtaining legal advice to ensure the propriety of this approach.

The Commission considers that their conduct may have constituted:

- a breach of discipline under section 125 of the Victoria Police Act, or its predecessor, as conduct that was likely to bring Victoria Police into disrepute or diminish public confidence in it, or disgraceful or improper conduct, or negligent or careless conduct in the discharge of each of their duties; and/or
- misconduct under section 166 of the Victoria Police Act, as conduct that was likely to bring Victoria Police into disrepute or diminish public confidence in it, or disgraceful or improper conduct.

While the relevant conduct occurred before the commencement of the Victoria Police Act, the disciplinary and misconduct procedure under this Act seems to apply to any current Victoria Police officers who committed disciplinary offences under the former *Police Regulation Act 1958* (Vic) but were not investigated under that Act.<sup>221</sup>

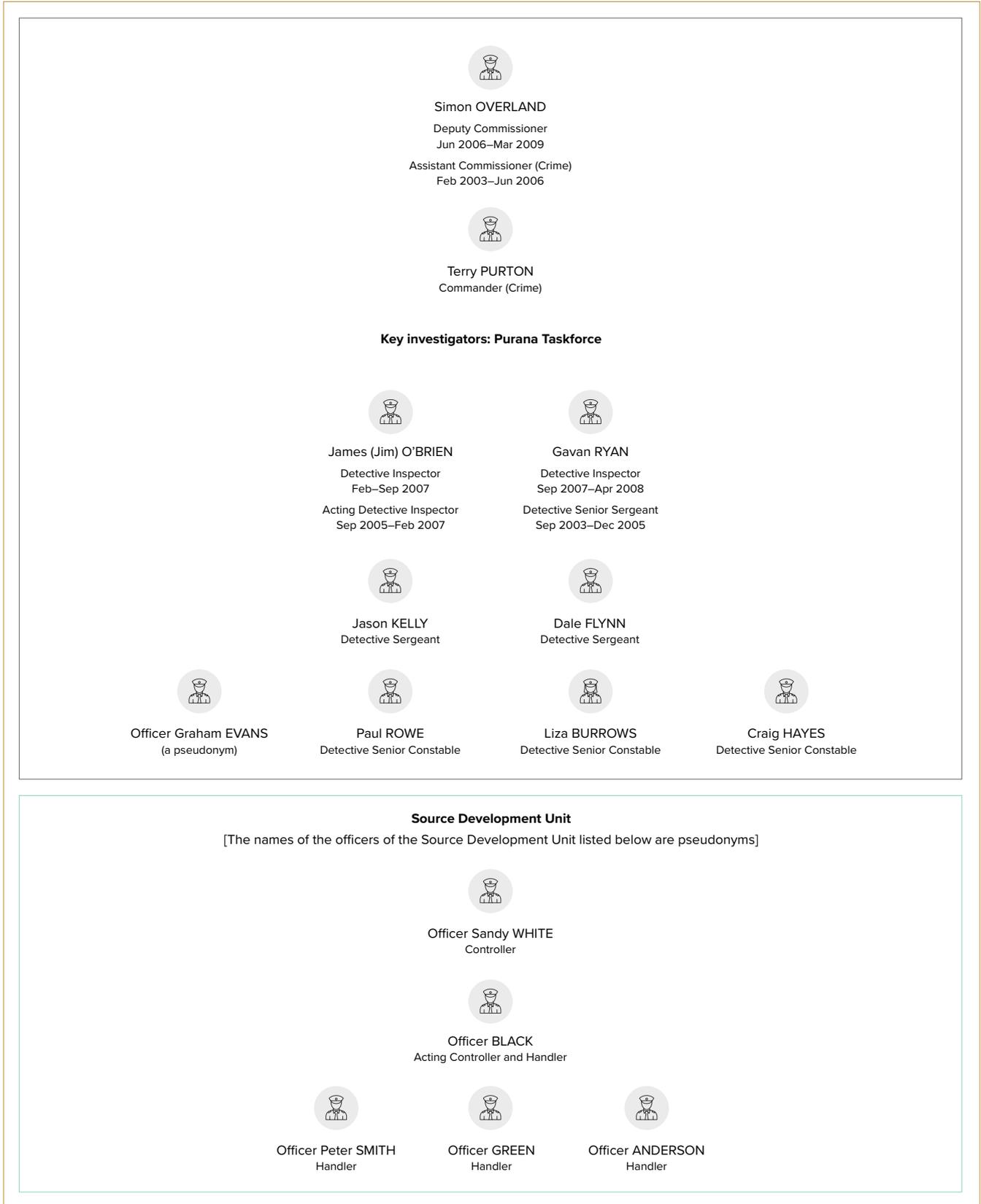
Although these matters occurred more than a decade ago, it is critical that serving and future police officers have moral clarity about their duties and obligations as police officers. Abuses of those obligations, even in the context of extreme pressure from the community to solve dangerous crimes, cannot be tolerated. If detected, even years later, they will be exposed. The Commission recognises, however, that these officers' actions must be viewed in the context of the admitted institutional responsibility of Victoria Police for the use of Ms Gobbo as a human source, and that they may have otherwise been of good character with impressive police service records.

Nonetheless, in Chapter 17 the Commission recommends the appointment of a Special Investigator to investigate these matters to determine if there is sufficient evidence to lay disciplinary charges against relevant serving police officers.

## Case study: Mr Cooper (a pseudonym)

While there were elements of opportunism in Mr McGrath’s and Mr Thomas’ cooperation with police, in the case of Mr Cooper it was carefully planned. Figure 8.5 outlines the key Victoria Police officers involved in Mr Cooper’s case study.

**Figure 8.5: Mr Cooper (a pseudonym) case study—key Victoria Police officers, 2003–09**



In 2005, the Purana Taskforce began Operation Posse, which targeted the Mokbel crime syndicate. Ms Gobbo was central to Operation Posse's plans, given her knowledge of and ability to provide intelligence about the Mokbels.<sup>222</sup>

In his evidence to the Commission, Mr O'Brien confirmed that Operation Posse's investigation objective was to utilise information provided by human sources, including Ms Gobbo:

*COUNSEL ASSISTING: The goal [of Operation Posse] is then identified as being the identification, investigation and complete dismantling of the Mokbel family criminal organisation?*

*MR O'BRIEN: That's correct.*

*COUNSEL ASSISTING: ... the objectives [of Operation Posse were] to utilise the continuing information provided by registered human sources?*

*MR O'BRIEN: Yes.*

*COUNSEL ASSISTING: Primarily that was Ms Gobbo in respect of Operation Posse, is that right?*

*MR O'BRIEN: Yes, some of the information, yes.*

...

*COUNSEL ASSISTING: One of the objectives was to use Ms Gobbo to achieve the goals of Operation Posse?*

*MR O'BRIEN: Yes.*<sup>223</sup>

Additionally, a key step was targeting Mr Cooper's activities in relation to Mr Mokbel.<sup>224</sup>

Victoria Police and Ms Gobbo repeated the now familiar pattern of conflicts of interest and non-disclosure, but this time Ms Gobbo was even more intimately involved in informing on her client, close friend and confidant, Mr Cooper. Officers put aside any misgivings at the prospect of rolling Mr Cooper and arresting the Mokbels, and it seemed a spectacular success. By mid-2006, Mr Cooper had provided over 40 statements that helped police to charge, and ultimately convict, 26 people.

The details of Mr Cooper's case, outlined in Chapter 7, are only repeated here to the extent necessary to examine police conduct. In summary:

- Ms Gobbo acted as Mr Cooper's lawyer at various times between 2002 and 2007 when he was facing various major drug manufacturing charges.<sup>225</sup>
- She began informing on him immediately upon her registration as a human source, stating at her first meeting with the SDU that he had enough information to bring down Mr Tony Mokbel.<sup>226</sup>
- At or around the time of her registration, police officers including Mr White and Mr Smith of the SDU, Mr Rowe and Mr Mansell of the MDID, and Mr O'Brien, Mr Rowe and Mr Dale Flynn of the Purana Taskforce, knew he was her ongoing client.<sup>227</sup>
- She provided the SDU, and through them Purana's Operation Posse, with information about Mr Cooper's background, circumstances and activities, including phone numbers, associates, places frequented, residential address and finances.<sup>228</sup> The SDU tasked Ms Gobbo on Operation Posse's behalf to obtain specific information from him,<sup>229</sup> including his drug manufacturing activities.<sup>230</sup> She told them about the types and amounts of chemicals used, profit margins and the dates of 'cooks'. Much of the information was passed on to Operation Posse investigators.<sup>231</sup>

- As she often did with clients, Ms Gobbo had a personal and social relationship with Mr Cooper. Her handlers exploited this and encouraged her to get even closer.<sup>232</sup> She organised a party for him and used a police camera to photograph attendees,<sup>233</sup> identifying attendees for her handlers.<sup>234</sup>
- She provided insights into how police could get him to roll,<sup>235</sup> such as targeting him financially,<sup>236</sup> taking a ‘soft’ approach<sup>237</sup> and making him think the Mokbels had been arrested.<sup>238</sup> These tactics were passed on to Mr O’Brien of the Purana Taskforce.<sup>239</sup>
- She told police the location of Mr Cooper’s clandestine drug laboratory in Strathmore,<sup>240</sup> leading to his arrest on a third set of serious charges and ultimately resulting in him becoming a prosecution witness.

## The knowledge of senior officers

Senior officers learned of Ms Gobbo’s potential value to Operation Posse. On 26 September 2005, Mr Overland attended a weekly Purana Taskforce executive management meeting and recorded in his diary that Ms Gobbo needed to be very carefully managed, and that Mr Purton was to be fully involved.<sup>241</sup> The next day, Mr Purton updated Mr Overland on the information Ms Gobbo gave the SDU in her debriefing, including that Mr Cooper may ‘roll over’. They also discussed the investigation strategy and the need to ensure she was not compromised.<sup>242</sup>

Mr Overland received regular updates as Operation Posse focused more on Mr Cooper. On 19 April 2006, Mr Overland and Mr O’Brien spoke to the then DPP, Mr Paul Coghlan, QC, regarding the possibility of adjourning Mr Cooper’s guilty pleas for offences for which he was on bail. Mr Overland told Mr Coghlan this was part of a ‘much bigger picture’.<sup>243</sup> This ‘bigger picture’ may have involved the tactic, discussed by Ms Gobbo and the SDU, to keep Mr Cooper on bail so that he could commit, and be arrested for, further serious drug offences, giving police greater leverage to roll him.<sup>244</sup>

Mr Cooper was arrested on 22 April 2006, based on information Ms Gobbo provided. Mr Overland was advised of Mr Cooper’s arrest within the hour.<sup>245</sup>

Even though Ms Gobbo and the SDU, with the encouragement of the Purana Taskforce under the supervision of Mr Overland, were knowing participants in this plan, no-one in Victoria Police obtained legal advice about its propriety. A likely conclusion is that they did not do so, not only because they wanted to protect Ms Gobbo’s identity and safety, but also because they feared legal advice might disrupt their plans.

## Concerns about the propriety of Ms Gobbo continuing to act for Mr Cooper

From early on, SDU officers had concerns about issues of conflicts of interest and legal professional privilege, and suggested Ms Gobbo stop representing Mr Cooper. The following exchange on 28 October 2005 between the SDU and Ms Gobbo is illustrative:

*MS GOBBO: So you—that’s why you don’t ask as a lawyer. I know you might say it’s turning a blind eye to it, but you don’t ask, and you specifically don’t let them tell you. The [Mr Cooper] thing is gunna cause me big drama, because I can ask him anything and he’ll tell me, but I don’t wanna know his stuff. I mean, I—it might be useful to you but I don’t wanna know it from the point of view of - - -*

*MR WHITE: Well, you could - - -*

*MS GOBBO: Pardon?*

*MR WHITE: - - - you could withdraw from representing him because ... of a conflict like that - - -*

*MS GOBBO: ...*

*MR WHITE: - - - for the greater good of telling us.*

*MS GOBBO: Oh, that's, true, but why on earth would I do that?*

*MR PETER SMITH: Does he pay?*

*MS GOBBO: He actually does pay, yeah, his solicitor does. Mm.<sup>246</sup>*

The SDU officers knew that Ms Gobbo could not act in Mr Cooper's best interests as his lawyer while informing on him to police.<sup>247</sup> What became equally clear was that Ms Gobbo had no intention of ceasing to act for him. Despite this legal and ethical maze, the SDU pressed on, perhaps keen to prove itself as an elite unit providing valuable intelligence needed to end the gangland wars and bring down the Mokbels.

The SDU officers' concerns grew as Mr Cooper's arrest drew closer. On 9 March 2006, the following exchange took place:

*MR GREEN: I have got a—a bit of a concern, though. If [Mr Cooper] was to get arrested - - -*

*MS GOBBO: Yeah.*

*MR GREEN: - - - he's going to be calling you, isn't he?*

*MS GOBBO: Yes. He will not call anyone else.*

*MR GREEN: How's that going to work?*

*MS GOBBO: What do you mean?*

*MR GREEN: Well, how are you going to be able to represent him?*

*MS GOBBO: What do you mean?*

*MR GREEN: Well, won't there be a conflict of interest there?*

*MS GOBBO: What conflict? He'll be pleading guilty. What difference does it make?<sup>248</sup>*

Two days prior to Mr Cooper's arrest, Ms Gobbo met with the SDU officers and confirmed he would call her for legal advice. Mr White asked, 'how does that work ... if you represent him whilst at the same time you've been instrumental in his apprehension?'<sup>249</sup> Ms Gobbo thought it no 'big deal' as after all, neither she nor the SDU would tell Mr Cooper the truth. Mr White opined, 'it's more a problem for you than us', before the following exchange:

*MR WHITE: Look, purely a technical point of view, if—if you talk to [Mr Cooper] and give him legal advice before he's interviewed and he makes a confession—and I'm speaking theoretically here, right.*

*MS GOBBO: Yeah.*

*MR WHITE: O.K. I'm not saying this is gunna happen.*

*MS GOBBO: Mm'hm.*

*MR WHITE: But wouldn't—wouldn't it be the case down the track that a defence barrister could argue, well, the advice that he got prior to participating in the record of interview was not impartial because it was done on behalf of the police by a person that was acting for the police.*

*MS GOBBO: Who in the fuck is gonna say that?*

*MR WHITE: It's a theoretical question, right. It's not—I'm trying to ....*

*MS GOBBO: ... anybody say that? Why would anyone say that?*

*MR WHITE: No-one's gonna say that but I'm trying to understand what—the conflict of interest area is not something that we ever deal with, all right, for you and it's—I mean, some people could put up an argument that a person who is a barrister perhaps could never help the police and still represent the person that she's helping the police with. So I'm just trying to get my head around this. Could you—maybe it's even pointless talking about it because you might actually think I'm going ...*

*MS GOBBO: Probably but what's the real point?*

*MR WHITE: Forget it. I'm just - - -*

*MS GOBBO: No, no, no, what's the real point?*

*MR PETER SMITH: Just the general ethics of the whole situation.*

*MS GOBBO: The general ethics of all of this is fucked.<sup>250</sup>*

Mr White, understandably concerned about the situation, wrongly stated the deception was more a problem for Ms Gobbo than for police.

In responsive submissions, former officers of the SDU asserted that this conversation was taken out of context;<sup>251</sup> however, as outlined in Chapter 7, the Commission considers that the above exchanges suggest that Ms Gobbo and her handlers knew that what they were doing was unethical and unprofessional but they were unwilling to stop.

The next day, the SDU briefed Mr O'Brien of the Purana Taskforce.<sup>252</sup> In responsive submissions, Mr O'Brien contended that the SDU did not raise with him the issues discussed with Ms Gobbo.<sup>253</sup> Mr O'Brien submitted that the sole piece of evidence relied on by Counsel Assisting was a diary entry of Mr Smith indicating that Mr O'Brien had been updated about the conversation with Ms Gobbo.<sup>254</sup> Additionally, he said that there was no other entry in his diary or the SML to corroborate this; that he was not made aware of the discussion; and that the SDU did not raise the issues with him more generally.<sup>255</sup>

## **Mr Cooper arrested and rolls with the assistance of Ms Gobbo**

On 22 April 2006, Victoria Police arrested Mr Cooper at his Strathmore drug laboratory. The case against him appeared overwhelming and he was facing a very lengthy prison sentence.

Details surrounding Mr Cooper's arrest relevant to police conduct included:

- Ms Gobbo had prior notice of the arrest and the SDU thought she would attend the police station to provide advice to Mr Cooper.
- After he arrived at the police station, Mr Flynn and then Detective Sergeant Jason Kelly facilitated his request to speak with Ms Gobbo.
- As she drove to the station, she asked her handler, with some hubris, 'who's next?'

- She met with Mr Cooper privately for over an hour and afterwards reported their conversation to her SDU handler.
- Mr O'Brien and Mr Flynn tried to convince Mr Cooper to cooperate. Ms Gobbo returned later that evening when he asked for his lawyer.
- According to Ms Gobbo, Mr Cooper became emotional, and for almost two hours, she and Mr Flynn encouraged him to cooperate with police. Once he agreed, he was interviewed by Mr Flynn and Mr Rowe from 9.00pm until about 11.30pm.
- Later that night, Ms Gobbo met her SDU handlers and said she 'pushed him over the line' and had also looked after his interests and asked why no-one was thanking her.<sup>256</sup>

The deception of Mr Cooper continued beyond his arrest, as police continued to investigate the Mokbel syndicate. While using Mr Cooper to gather evidence, they remained in contact with Ms Gobbo. She told them about her conversations with Mr Cooper and managed communications to prevent others learning that she had helped him roll.<sup>257</sup> For the rest of the year, she helped keep him content to ensure his ongoing assistance to police. She described this as a 'hand-holding' process involving regular visits, phone calls and financial assistance.<sup>258</sup> Mr Cooper told the Commission Ms Gobbo provided reassurance that he was doing the right thing and should see it through.<sup>259</sup> They also discussed his statements, although Mr Cooper said Ms Gobbo did not influence their content.<sup>260</sup>

## The views of Victoria Police officers

A brief overview of the views of relevant officers is set out below. The limitations around the Commission's ability to resolve all contested matters identified in Mr Thomas' case study also apply here.

### Mr Simon Overland

Mr Overland told the Commission that while he was aware of the centrality of Mr Cooper and Ms Gobbo to Operation Posse, he did not believe he knew that Ms Gobbo was acting for Mr Cooper prior to his 22 April 2006 arrest.<sup>261</sup> More broadly, he said he believed Ms Gobbo was not informing in breach of her professional obligations.<sup>262</sup>

The Commission is satisfied, however, consistent with Counsel Assisting submissions, that sometime between September 2005 and March 2006, he knew, or should have known, that Ms Gobbo was both representing and informing on Mr Cooper.<sup>263</sup>

For example, Mr Overland knew of and permitted Ms Gobbo's registration as a human source to target the Mokbel syndicate, knowing she represented several of its members, including Mr Tony Mokbel. He approved the Operation Posse investigation plan and was aware of the strategy to roll Mr Cooper.<sup>264</sup> He was aware of the risks associated with a criminal defence barrister acting as a human source, stating that he told Mr Biggin to manage Ms Gobbo carefully and investigators to ensure she did not inform on clients.<sup>265</sup> He was aware Ms Gobbo was informing on Mr Cooper.<sup>266</sup> He oversaw and was closely engaged in the work of Purana Taskforce and Operation Posse, receiving regular briefings from officers who knew Ms Gobbo was informing on Mr Cooper while representing him.<sup>267</sup>

The Commission considers that, as Ms Gobbo's use was a high risk to her safety and to Victoria Police and the administration of justice, having not obtained legal advice, it was incumbent upon Mr Overland to ensure that those very high risks were satisfactorily ameliorated. It seems unlikely that Mr Overland would have been so imprudent as to not keep abreast of Mr Cooper's progress in becoming a prosecution witness, given the strategy adopted to use him and Ms Gobbo to dismantle the Mokbel syndicate.

### Mr Jim O'Brien

From the time Mr O'Brien became the Purana Taskforce's OIC in mid-September 2005, there was a significant focus on rolling Mr Cooper and the SDU gave Mr O'Brien information provided by Ms Gobbo.<sup>268</sup> This continued during January to April 2006, when he was aware Ms Gobbo was both representing and informing on Mr Cooper.<sup>269</sup> He was involved in the arrest of Mr Cooper on 22 April 2006 and in the events that followed at the police station.<sup>270</sup>

In responsive submissions, Mr O'Brien contended he did not identify a conflict in Ms Gobbo acting for Mr Cooper for previous offending while informing on him in relation to new offending.<sup>271</sup> He submitted that, while Purana Taskforce used background information provided by Ms Gobbo through the SDU, they did not want or need her advice on how to roll Mr Cooper,<sup>272</sup> and the deal police offered him was far better than the alternative.<sup>273</sup> He also submitted that he did not know Ms Gobbo would, and did not task her to, advise Mr Cooper; and further, that while troubled by her attendance, he thought the ethical issues were hers to deal with.<sup>274</sup>

The Commission considers Mr O'Brien most likely knew or at least should have known of Ms Gobbo's grave conflict issues in acting for, informing on, continuing to act for and continuing to inform on Mr Cooper. He was a very experienced detective, well versed in the fundamentals of the criminal justice system, who could be expected to have some understanding of conflicts.<sup>275</sup> He would have known a lawyer informing on a current or former client was unique and there is evidence that more junior officers raised concerns with him.<sup>276</sup>

### Mr Dale Flynn

Prior to commencing with Purana Taskforce in November 2005, Mr Flynn was a Detective Sergeant at the MDID,<sup>277</sup> where he was involved in Mr Cooper's earlier arrest and had dealings with Ms Gobbo as Mr Cooper's lawyer.<sup>278</sup> Mr Flynn was aware that Ms Gobbo was a human source and informing on Mr Cooper while acting for him.<sup>279</sup> He was the investigation leader in Mr Cooper's arrest on 22 April 2006.<sup>280</sup> As outlined above, Mr Flynn was closely involved in events following Mr Cooper's arrest. He knew that she had told police of the crime that led to his arrest.<sup>281</sup>

In his evidence to the Commission, Mr Flynn, to his credit, accepted that Mr Cooper's arrest could have been handled better and that mistakes were made. He described Ms Gobbo's attendance at the police station on the afternoon and evening of 22 April 2006 as 'complex'. He also agreed, at least with the benefit of hindsight, that he could and should have considered other courses of action: raising his concerns with Ms Gobbo, disclosing the matters directly to Mr Cooper, and raising the matter with superior officers or seeking legal advice.<sup>282</sup>

In responsive submissions, however, Mr Flynn asserted that:

- he was unaware the SDU officers and Ms Gobbo concluded the general ethics of the situation 'were fucked'
- he understood the SDU would manage conflicts
- he could not tell Mr Cooper about Ms Gobbo's status as this would have put her life at risk and violated the terms of her registration
- he could not interfere with Mr Cooper's right to choose his own lawyer
- he complied with Victoria Police directions on protecting human sources.<sup>283</sup>

Some details around when Mr Flynn became aware that Ms Gobbo was a human source and when she was informing on Mr Cooper were contested. It was submitted that he did not understand the conflict issues, was not involved in a plan to have Ms Gobbo roll Mr Cooper, and lacked the training and experience to understand the seriousness of the situation as it unfolded or the options available. He also said that he reasonably placed faith in Ms Gobbo to adhere to her professional obligations, in the SDU to manage conflicts and filter intelligence, and in Mr O'Brien to provide assurance of propriety.<sup>284</sup>

While accepting there is some merit in these submissions, the Commission considers that, as Ms Gobbo's use as a human source was so obviously improper, and her conflict so great, given his professional experience in the criminal justice system, Mr Flynn knew or should have known that Ms Gobbo was breaching her professional obligations and that Mr Cooper was not getting independent advice.

The Commission does not accept the submission that Mr Flynn could not refuse Mr Cooper's request for Ms Gobbo as legal counsel,<sup>285</sup> and could not undermine his superior, Mr O'Brien.<sup>286</sup> Those matters certainly made his position more difficult, but given his rank, experience and knowledge of the extraordinary situation he was experiencing, he should not have encouraged or enabled Ms Gobbo to act as she did.

### **Mr Tony Biggin**

Between 16 September 2005 and 22 April 2006, Mr Biggin was Superintendent, Covert Support Division. After 1 July 2006, the SDU reported to him.<sup>287</sup> Mr Biggin learned Ms Gobbo was a human source around October 2005 and thought this was unusual.<sup>288</sup> He suspected in early 2006 that Ms Gobbo was providing information about Mr Cooper.<sup>289</sup> Mr Biggin attended the Strathmore drug laboratory when Mr Cooper was arrested<sup>290</sup> and was later briefed at the police station by Mr O'Brien, Mr Ryan, and Mr Flynn.<sup>291</sup> He thought Ms Gobbo's attendance was normal barrister–client contact, a view that he accepted was naïve.<sup>292</sup>

In responsive submissions, Mr Biggin contended that he knew very little about Ms Gobbo's conduct in relation to Mr Cooper, did not know she was acting for him prior to his arrest, did not know she was providing information to police that led to his arrest, and had no appreciation of the conflict of interest that Ms Gobbo was in when she attended to provide advice to Mr Cooper on 22 April 2006.<sup>293</sup> With the benefit of hindsight, Mr Biggin accepted that there was a potential for conflict associated with the use of a practising barrister as a human source with the clients and personal contacts Ms Gobbo had.<sup>294</sup>

The Commission considers that Mr Biggin was aware Ms Gobbo was acting for Mr Cooper for some months prior to Mr Cooper's arrest on 22 April 2006.<sup>295</sup> The Commission infers that Mr Biggin was probably aware that Ms Gobbo was providing information and/or assistance to Operation Posse in relation to Mr Cooper after his 16 February 2006 meeting with Mr Overland about the need to protect Ms Gobbo.<sup>296</sup> In any case, from the time he conducted his SDU file audit (discussed below) on 27 April 2006, Mr Biggin should have been or made himself aware of Ms Gobbo's extraordinary role as Mr Cooper's legal representative and an agent for Victoria Police.

### **Mr Paul Rowe**

Mr Rowe, then Detective Senior Constable in the MDID, was involved in August 2005 discussions with Ms Gobbo that led to her third registration as a human source. He knew Ms Gobbo was acting for Mr Cooper and informing on him from mid-September 2005.<sup>297</sup> He, along with Mr Flynn, interviewed Mr Cooper on 22 April 2006 after he agreed to assist police,<sup>298</sup> saw Ms Gobbo attend the police station to advise Mr Cooper<sup>299</sup> and was involved in ongoing operations in the days after Mr Cooper's arrest.<sup>300</sup>

In responsive submissions, Mr Rowe asserted that it is not open on the evidence to find that he understood Ms Gobbo's conflict between her role as a human source and as Mr Cooper's legal representative.<sup>301</sup>

Mr Rowe was actively involved in the Cooper matter, but he was a relatively junior officer no doubt expecting guidance from his superior officers. Even so, he indicated he was aware of obvious risks, including risks of conflicts of interest, in using Ms Gobbo as a human source.<sup>302</sup> The Commission accepts that Mr Rowe understood that Ms Gobbo was in an impermissible position of conflict, but ignored it and instead prioritised the investigation of criminal offending as part of Operation Posse.

### **Officers of the Source Development Unit**

Former SDU officers commonly asserted that they had a narrow understanding of conflicts of interest, in that they:

- understood Ms Gobbo should not act for people she had informed on, and discharged their obligations by telling her not to
- did not perceive that informing on current clients about ongoing criminal activity gave rise to a conflict of interest
- did not perceive a problem with Ms Gobbo informing on Mr Tony Mokbel while advising him on his federal charges, as they avoided legal professional privilege issues.<sup>303</sup>

Responsive submissions of the former SDU officers contended that they sought to understand these conflict issues by discussing them with Ms Gobbo.<sup>304</sup> The Commission considers this was an unsatisfactory response. If these experienced officers were uncertain, they were obliged to seek proper advice from their superiors and informed independent lawyers, not from Ms Gobbo.<sup>305</sup> This imperative became more compelling over time, as appreciation of the risks to the administration of justice must or should have grown.

It was submitted that officers did not want Ms Gobbo to advise Mr Cooper after his arrest but did not know how to stop her, and further, that they had raised their concerns about the admissibility of Mr Cooper's confessions with investigators. In the SDU's view, it was the investigators' responsibility to determine whether Ms Gobbo would be allowed to see Mr Cooper.<sup>306</sup> The SDU officers nevertheless asserted that they believed Ms Gobbo was acting in Mr Cooper's interests in that he received the 'best deal of the century in terms of a sentence'.<sup>307</sup>

The Commission is satisfied that SDU officers, led by Mr White, knew from around the time of Mr Cooper's 22 April 2006 arrest of Ms Gobbo's involvement in it, and its potential impact on his and other convictions.<sup>308</sup> They could and should have taken action to avoid these impacts.

The various roles of the SDU officers, and their knowledge of Ms Gobbo's role acting for, and informing on, Mr Cooper, are set out in Box 8.1.

**BOX 8.1: OFFICERS OF THE SOURCE DEVELOPMENT UNIT****Officer Sandy White (a pseudonym)**

As Ms Gobbo's controller, Mr White was aware from September 2005 to April 2006 that Ms Gobbo was acting for, and informing on, Mr Cooper. He had discussions with Ms Gobbo about legal and ethical difficulties that would arise should she continue to act for Mr Cooper, but knew that, despite the risks, she would represent him after his arrest.<sup>309</sup>

**Officer Peter Smith (a pseudonym)**

Mr Smith was one of Ms Gobbo's handlers from September 2005 to April 2006. He received considerable information from Ms Gobbo, including in relation to Mr Cooper. He knew that she was acting for,<sup>310</sup> and informing on, Mr Cooper, that she would represent him upon his arrest, and that this carried risks.<sup>311</sup> He advised her of Mr Cooper's arrest on 22 April 2006.<sup>312</sup>

**Officer Green (a pseudonym)**

Mr Green was Ms Gobbo's handler between September 2005 and April 2006 and received considerable information from her, including about Mr Cooper.<sup>313</sup> He knew that she was acting for Mr Cooper throughout this period and that she would act for him upon his April 2006 arrest, and that this carried risks.<sup>314</sup> On the night of his arrest, she told Mr Green and Mr Smith that she had pushed Mr Cooper 'over the line',<sup>315</sup> and that she 'looked after his interests'.<sup>316</sup>

**Officer Black (a pseudonym)**

Mr Black was Ms Gobbo's handler or co-handler between 16 September 2005 and 22 April 2006, receiving considerable information from Ms Gobbo, including in relation to Mr Cooper.<sup>317</sup> He tasked her in relation to Mr Cooper, and was involved in the 28 October 2005 meeting with Ms Gobbo where difficulties with her acting for Mr Cooper while informing on him were raised.<sup>318</sup>

**Summary of conduct**

Counsel Assisting submitted that some police officers fell short of their obligations to take all necessary steps to ensure the proper use and management of Ms Gobbo in relation to Mr Cooper's case.<sup>319</sup>

On the evidence, the Commission finds that at various times between 16 September 2005 and 22 April 2006, Mr Overland, Mr O'Brien, Mr Flynn, Mr Biggin, Mr Rowe, and officers of the SDU, Mr White, Mr Smith, Mr Black, and Mr Green, knew or should have known that:

- Ms Gobbo was a criminal defence barrister and human source
- she was informing on Mr Cooper while purporting to act for him
- she had a conflict of interest between her role as a human source for Victoria Police and legal representative of Mr Cooper
- it was her informing on him that led to police obtaining evidence against Mr Cooper and arresting him on 22 April 2006
- Victoria Police used or allowed her to encourage Mr Cooper to implicate his associates.

The Commission finds that the conduct of each of the above current and former officers of Victoria Police may have constituted:

- a breach of discipline under section 125 of the Victoria Police Act, as conduct that was likely to bring Victoria Police into disrepute or diminish public confidence in it, or disgraceful or improper conduct, or negligent or careless conduct in the discharge of each of their duties; and/or
- misconduct under section 166 of the Victoria Police Act, as conduct that was likely to bring Victoria Police into disrepute or diminish public confidence in it, or disgraceful or improper conduct.

The Commission has noted the potential application of the Victoria Police Act to matters preceding its commencement and the importance for disciplinary matters to be investigated in the earlier section of this chapter dealing with Mr Thomas. The same observations apply in relation to officers involved with Mr Cooper.

## VICTORIA POLICE'S UNDERSTANDING OF RISK

This section examines the evolving understanding within Victoria Police of the safety, ethical and administration of justice risks posed by the ongoing use and management of Ms Gobbo as a human source.

The problems with Ms Gobbo's use as a human source became better understood and more widely known within Victoria Police over time. The conduct of police officers in the cases of Mr McGrath, Mr Thomas and Mr Cooper cannot be excused, but can to a degree be understood given the contextual factors at play early on, including:

- the pressure to solve the gangland wars
- an SDU eager to succeed
- a complex, enthusiastic and prolific human source
- an organisation that possibly lacked the skills to deal with the grave risks of using a human source like Ms Gobbo
- poor training and procedures around matters such as disclosure and conflicts of interest.

These excuses become less convincing as police became increasingly aware of the risks of using Ms Gobbo. They nonetheless persisted in their plan, without ensuring that they properly mitigated those risks.

### Risks to safety

Safety concerns underpinned Victoria Police's 'golden rule' to never reveal the identity of a human source.<sup>320</sup> While protecting the identity of human sources is both legitimate and necessary, evidence before the Commission indicates that Victoria Police officers used the golden rule to justify not obtaining legal advice about using a criminal defence barrister as a human source, an extraordinary situation they knew or should have known to be problematic, and to justify not complying with their obligations to disclose relevant evidence to accused persons.

For Ms Gobbo, safety was critical to her becoming a human source. Initial police approaches followed threats against her.<sup>321</sup> Once registered, Ms Gobbo regularly reminded the SDU officers managing her of the risks she faced. At their first meeting, she raised the exemplary protection Purana Taskforce had provided in Mr McGrath's case.<sup>322</sup> Later, when police action risked exposing her as a human source, she made comments such as, 'I'll kill myself now' and 'I don't feel like being dead today'.<sup>323</sup>

## Threats against Ms Gobbo escalate

The Victoria Police officers involved with Ms Gobbo knew that the risks to her safety were escalating as time went on.

In early May 2006, Ms Gobbo told the SDU that Mr Harty Mokbel grabbed her by the throat and accused her of being a human source. She thought Mr Mokbel was satisfied with her protests of innocence.<sup>324</sup>

From August 2006, Ms Gobbo told SDU handlers of concerns about Mr Williams and his wife, Ms Roberta Williams. These began when Mr Williams made complaints about Ms Gobbo representing Mr Thomas. She said that Mr and Ms Williams were accusing her of being a 'dog' and that they boasted they would harm her.<sup>325</sup>

On 7 December 2006, Ms Gobbo received, by text message, the first of 16 anonymous threats:

*UR FUCKEN DEAD YOU PRO*

*U FUCKEN BITCH YOU MOLE U FUCKEN PROSTITUTE UR DEAD.*<sup>326</sup>

In response, Mr Overland directed the Purana Taskforce to ask the SDU if she could be moved out of her role as a human source.<sup>327</sup>

Mr Ryan spoke with SDU officer, Mr White, who said he had already begun 'easing her out'.<sup>328</sup> Mr White advised Mr Ryan that the steps included no longer tasking Ms Gobbo or disseminating her intelligence, and starting a reward process.<sup>329</sup> SDU officers noted Ms Gobbo's health declining; she had lost 36 kilograms and they were trying to connect her with a psychologist.<sup>330</sup> Nonetheless, they continued to receive information from her and pass it on to investigators.<sup>331</sup>

## Operation Gosford

In February 2007, Victoria Police established Operation Gosford to investigate continuing threats to Ms Gobbo,<sup>332</sup> and together with the SDU, put in place covert measures to protect her. Not all Gosford investigators knew of Ms Gobbo's history as a human source. She continued receiving abusive texts; for example:

*KEEP UR MOUTH SHUT SLUT. FUCKEN DOG*

*U Fucken Police Informing Dog Shut UR Fucken Mouth.*<sup>333</sup>

Mr Ryan told the Commission that in around September 2007, he repeatedly suggested to the SDU that they deregister Ms Gobbo as a human source as he feared she would inevitably be murdered.<sup>334</sup> In October 2007, she reported receiving a sympathy card addressed to 'Dog Nicola Gobbo' and containing two bullets and the message:

*JUST FOR YOU DOG 1 IN THE HEAD 2 IN THE HEART YOU WONT SEE YOU BIRTHDAY  
NEXT MONTH*

*YOU KEEP TALKING TO THE PIGS.*<sup>335</sup>

In March 2008, at lunch with Mr Domenic (Mick) Gatto and his associates, she learned of rumours, supposedly coming from Mr Williams and Mr Milad Mokbel, that she was a registered human source working for the Purana Taskforce. The following month, she reported that Mr Tony Mokbel had phoned a solicitor, 'beside himself with anger', asking if rumours that she was a 'dog' were true.<sup>336</sup>

Later that month, Ms Gobbo was out for dinner in South Melbourne when her car was fire-bombed.<sup>337</sup> The SDU thought the Mokbels were responsible and that this presented an opportunity for her to sever ties with them. They did not, however, see it as an opportunity to deregister her as a human source.<sup>338</sup> The SDU believed it was managing her exposure risks in upcoming court processes.<sup>339</sup>

The Commission is satisfied that the relevant SDU officers were genuinely concerned about Ms Gobbo's safety but considers that their response to these concerns was wanting. They dealt with these rapidly escalating and concerning risks to Ms Gobbo's safety through their ongoing risk assessments and mitigation practices consisting of 'monthly source reviews'. There was no formal risk mitigation process established, aside from the recommendation arising from these reviews, which was generally to the effect that Ms Gobbo's management continued to be essential.<sup>340</sup>

In responsive submissions, the former SDU officers asserted it was not Ms Gobbo's registration as a human source that placed her in grave danger, but her associations with criminals. They noted that those who choose to become human sources necessarily place themselves in danger, and further, that Ms Gobbo's failure to follow instructions contributed to the dangerous position she was in. They submitted that every significant incident relevant to risk was documented in the ICRs and summarised in the SML, and that the SDU provided Ms Gobbo with a panic alarm so they could monitor her location. They also submitted that, as Ms Gobbo was kept alive, the risk mitigation was not 'lamentably inadequate' as contended by Counsel Assisting'.<sup>341</sup>

### **The failure to mitigate and assess risk**

The Commission considers that the circumstances in which Victoria Police recruited, handled and managed Ms Gobbo as a human source placed her in grave danger of being murdered or seriously injured. The SDU's approach to risk assessment and risk mitigation as evidenced by the formulaic entries in the monthly source reviews was inadequate in the circumstances.

The Commission acknowledges that Mr Overland had raised the prospect of an 'exit strategy' for Ms Gobbo with the SDU from May 2006 and revisited this when he learned of serious threats against her later that year. The Commission also appreciates that any overt police protection may have inflamed what were then only rumours of her informing.

Mr Overland's position, however, that threats to Ms Gobbo were unfortunately not unusual, and in any case a matter for the SDU and Mr Moloney to manage,<sup>342</sup> appears most unsatisfactory, particularly after the arson attack on her car. While Mr Moloney undoubtedly had responsibilities for Ms Gobbo's welfare, Mr Overland's submissions must however take account of his July 2005 instruction that Mr Moloney would not be briefed on sensitive elements of Purana Taskforce investigations involving the SDU.<sup>343</sup> As outlined in Chapter 9, this meant Mr Moloney was not briefed on various operational matters involving Ms Gobbo, including the way she was being used as a human source. With this came an increased responsibility for Mr Overland to manage known risks to Ms Gobbo.<sup>344</sup>

In the Commission's view, Mr Overland's reaction to Ms Gobbo's safety after her car was set on fire appears inadequate; the incident should have been reported to the Chief Commissioner with a full briefing on Ms Gobbo's use by Victoria Police as a human source.

## Risks to the administration of justice

While several officers told the Commission that conflicts and other ethical dilemmas were Ms Gobbo's to manage, they soon learned she was incapable of self-regulation.

Ms Gobbo persistently ignored SDU advice not to inform on past or present clients or represent those charged as a result of her earlier assistance to police. Examples include:

- The case of Mr Ketch (a pseudonym), whom she represented following his arrest by the Purana Taskforce, despite providing past and ongoing intelligence about him, which the SDU passed on to the Taskforce.<sup>345</sup>
- The 'Tomato Tins' drug syndicate cases, where she represented at least 10 of 33 persons charged with offences arising out of various police operations, in circumstances where she had provided information to Victoria Police about a number of them and the importation more broadly.<sup>346</sup>
- Mr Gatto, whom she represented at an examination while also providing information about him to the SDU.<sup>347</sup>

Ms Gobbo told the SDU that refusing to act for clients, given her connections with them and their associates, would arouse suspicion and could jeopardise her safety.<sup>348</sup>

In responsive submissions, SDU officers cited Ms Zaharoula Mokbel's case to show they were limited in what they could do to prevent Ms Gobbo's conflicts.<sup>349</sup> Later in Ms Gobbo's registration period, they said she was told that acting for certain people would be a 'relationship ending event'.<sup>350</sup> Mr White, in his responsive submissions, said that, in Ms Mokbel's case, he could not threaten to expose Ms Gobbo as his overriding concern was to ensure she was not compromised and as a consequence, killed.<sup>351</sup>

Ms Gobbo also spoke openly on more than one occasion with the SDU about breaching legal professional privilege and her unethical behaviour. In July 2006, Ms Gobbo told her handlers and controller that 'repeatedly I've chucked ethics out the window, I've chucked legal professional privilege out the window'.<sup>352</sup> Meeting with her handlers that same month, she said 'Legal professional privilege between the crooks and me just went out the window' and it 'became too hard for me—not saying I can tell you this, but can't tell you this ....'<sup>353</sup>

Time and again, conversations between Ms Gobbo and her handlers record the SDU protesting faintly and then accepting and acting on information she provided. Having failed to obtain the legal advice they should have at the outset, they then failed to ensure potentially privileged and confidential information was not acted on and was either destroyed or securely and separately stored. Consistent with their police oaths and affirmations, they should have taken firm steps to stop these ethical pitfalls and protect the administration of justice.

As noted above, prior to Mr Cooper's arrest, Mr White asked Ms Gobbo whether a defence barrister could argue, 'the advice he got prior to participating in the record of interview was not impartial because it was done on behalf of the police by a person that was acting for the police'. Ms Gobbo raised similar concerns with her handlers in July of that year:

*... I think, 'God, if some clever barrister worked this out, what a field day they'd have.' This would be an amazing test case.*<sup>354</sup>

At an SDU meeting on 24 July 2006, Mr Black, one of Ms Gobbo's many handlers, presciently wrote in his diary 'Future 3838? v Royal Commission'.<sup>355</sup> In his evidence to this Commission, Mr Black said that around this time there were public calls, unrelated to Ms Gobbo, for a royal commission into alleged Victoria Police corruption.<sup>356</sup> He could not recall whether he spoke specifically about a royal commission or just an inquiry of some sort, but he may have said 'this will be subject to a review'<sup>357</sup> to investigate allegations of improper conduct, particularly about Mr Cooper.<sup>358</sup>

In responsive submissions, the former SDU officers contended that there is no basis to suggest that they were aware of improper behaviour warranting a royal commission.<sup>359</sup> The only mention of a royal commission was in Mr Black's diary entry. Mr Richards (a pseudonym) told the Commission it was 'totally incorrect' to suggest that there was a consciousness among the SDU officers that they had been doing the wrong thing in the way they were managing Ms Gobbo.<sup>360</sup> Additionally, Mr Black said that he had raised the possibility of a 'review' but had not necessarily verbalised the words 'royal commission'.<sup>361</sup>

Given that memories are fallible and that this conversation occurred more than a decade ago, the Commission places considerable weight on Mr Black's contemporaneous diary note. The SDU officers were thorough and largely accurate record keepers. The Commission also notes the collegiality of the SDU and their willingness to frankly share and discuss challenges, opportunities, concerns and problems with each other.<sup>362</sup>

On the basis of Mr Black's note and his generally supportive recollection, the Commission finds it probable that the SDU discussed the possibility of a royal commission arising from Ms Gobbo continuing to represent clients while informing on them, especially Mr Cooper. Consequently, the Commission is satisfied that SDU officers who attended the meeting on 24 July 2006 likely knew, at least from this date, that Victoria Police's use of Ms Gobbo as a human source may involve impropriety of sufficient magnitude to warrant a royal commission, or other review.

The following exchange on 3 July 2007 between Ms Gobbo and her controller in relation to the Tomato Tins drug syndicate cases demonstrates the SDU's growing appreciation of and concern about risks to the administration of justice:

*MR WHITE: All right. It's really important for all of us that you don't represent anyone.*

*MS GOBBO: Mm.*

*MR WHITE: I'd hate to think that ultimately a conviction could be overturned because there was an allegation or suggestion or a bloody inquiry in relation to whether he got completely unbiased uncompromised defence.*

*MS GOBBO: Who's ever going to know about that?*

*MR WHITE: Well - - -*

*MS GOBBO: And there's already 20 people in that category.*

*MR WHITE: I know, I know.*

*MS GOBBO: Sorry.*

*MR WHITE: Don't think we haven't thought about this day in and day out.<sup>363</sup>*

In late 2008, the SDU officers, with the endorsement of their superior officers, documented risks associated with a plan to transition Ms Gobbo to become a witness in the Hodson murders case. The resulting strengths, weaknesses, opportunities, threats (SWOT) analysis<sup>364</sup> is discussed in detail below, but identified risks including that:

- Ms Gobbo's long-term relationship with Victoria Police as a human source would be exposed
- there could be an OPI or government review into the legal and/or ethical implications of having used Ms Gobbo, a serving barrister, as a human source
- successful appeals could overturn convictions.<sup>365</sup>

There is some contention around the fate of the SWOT analysis. It is sufficient to note that the Commission is satisfied that Mr Overland received, read and spoke to it at least at a high level at the Petra Taskforce Board of Management meeting of 5 January 2009.

The issues in the SWOT analysis were again raised with senior officers later in 2009, when there was interest in Ms Gobbo becoming a witness for the Briars Taskforce investigating the murder of Mr Shane Chartres-Abbott (the Chartres-Abbott murder).

It was not until 2011, however, that Victoria Police's attention was unavoidably drawn to the risks posed to the administration of justice by Ms Gobbo's use as a human source. As outlined below, Victoria Police obtained legal advice from barrister Mr Gerard Maguire stating that elements of Ms Gobbo's history as a human source may not be protected by PII, and if so they may need to be disclosed.<sup>366</sup> Critically, it advised that if others, such as Mr Tony Mokbel, became aware of her past role, they might challenge their convictions on the basis they were unlawfully obtained.<sup>367</sup>

Victoria Police was from this point on notice about the significant risks to the administration of justice created by the organisation's use of Ms Gobbo as a human source.

## MISSED OPPORTUNITIES

From 2006, there was a series of missed opportunities for Victoria Police officers to take steps to remedy the increasing risks presented by its use of Ms Gobbo as a human source. These are discussed below.

### The audits of Ms Gobbo's human source file

Audits undertaken by Mr Biggin and then Superintendent Lucinda Nolan in 2006 were a missed opportunity for Victoria Police to take control of Ms Gobbo's use as a human source.

On or around 19 April 2006, then Commander Dannye Moloney directed Mr Biggin to audit Ms Gobbo's human source file.<sup>368</sup> Mr Biggin was well-placed to do this, given his knowledge of the human source management reform work preceding the SDU's establishment.<sup>369</sup> He also knew Ms Gobbo from his MDID experience<sup>370</sup> and was aware she was a human source.<sup>371</sup>

There was uncertainty around the audit's purpose. Mr White thought it was to provide independent oversight of Ms Gobbo's management, including whether she was 'too high risk'.<sup>372</sup> Mr Biggin considered it a 'broad over-viewing audit' rather than a full audit of the human source file.<sup>373</sup>

Mr Biggin conducted the audit on 27 April 2006. He spoke to Ms Gobbo's controller and handlers and prepared a report recommending that Victoria Police continue its relationship with Ms Gobbo, whom he described as a 'valuable asset' who continued to provide 'excellent information' with 'successful outcomes'.<sup>374</sup> He observed that Ms Gobbo's profile was a risk to her and Victoria Police; that the initial purpose of her assistance to police had been achieved; that her further deployment would need to be carefully planned; and that the number of people within Victoria Police aware of her status was concerning.<sup>375</sup>

Mr Biggin told the Commission that he was not aware Ms Gobbo was providing information about Mr Cooper or other serious criminal activity until he conducted his audit.<sup>376</sup> This was despite knowing she was a human source, his awareness of Operation Posse, the thought having crossed his mind that she may have been providing information used by Operation Posse, and his discussion with Mr Overland about the need to protect Ms Gobbo.<sup>377</sup> Mr Biggin conceded that he should have recommended obtaining legal advice about Ms Gobbo's use as a human source.<sup>378</sup>

In responsive submissions, Mr Biggin reiterated that there was no evidence to demonstrate he was alive to the issues associated with the use of a defence barrister as a human source, or that he knew Ms Gobbo was providing information to Operation Posse, leading to Mr Cooper's arrest. He submitted that his mistake, in not obtaining legal advice, was an honest one.<sup>379</sup>

In conducting his audit, Mr Biggin should have identified the extremely high risk of impropriety arising from Victoria Police's use of Ms Gobbo, a criminal defence barrister, as a human source, and recommended that legal advice be urgently sought on this matter as a first step in understanding the propriety of the situation. The failure to do so was one of many lost opportunities to obtain informed legal advice about this extraordinary situation.

A month later, Ms Nolan was directed to conduct a 'procedural, ethical and value for money' audit of human source files at the SDU.<sup>380</sup> Ms Nolan's audit report on 'File 3838' stated, 'Audit completed by Superintendent Biggin'.<sup>381</sup> It is curious that only one file—Ms Gobbo's—was excluded from Ms Nolan's audit. Both Mr Moloney and Mr Biggin rejected any suggestion that they attempted to conceal the file from her.<sup>382</sup> Perhaps it was nothing more sinister than an attempt to limit the number of people aware of Ms Gobbo's use as a human source so as to protect her safety. Had Ms Nolan discovered 3838's identity, occupation and activities, she should have identified the extreme risk and need for urgent legal advice. Whatever the reason for excluding Ms Gobbo's file from her audit, this was another significant missed opportunity to remedy the situation.

## Deactivation strategy

As noted above, when Ms Gobbo received death threats in late 2006, Mr White told the Purana Taskforce that processes were in train to 'ease out' Ms Gobbo.<sup>383</sup> A monthly source review prepared by the SDU and dated 5 March 2007 recorded Ms Gobbo's frustration at not being tasked,<sup>384</sup> but Mr Biggin and the SDU were intent on deregistering her.<sup>385</sup> As part of this process, the SDU and Mr O'Brien hosted a dinner in her honour on 2 May 2007 and presented her with a silver pen for her assistance to the Purana Taskforce.<sup>386</sup> The SDU sought advice on her exit plan from a psychologist.<sup>387</sup>

As the SDU was urging deactivation, both the Petra and Briars Taskforces showed a growing interest in Ms Gobbo. The Petra Taskforce's interest was twofold; it considered she was valuable both as a witness with potential to corroborate Mr Williams' statement implicating former police officer, Mr Paul Dale, in the Hodson murders; and as a person of interest possibly involved in disseminating leaked police documents to Mr Tony Mokbel, thought to be connected to the murders.<sup>388</sup> Briars Taskforce investigators were interested in Ms Gobbo's association with former Victoria Police officer Mr David Waters, believing she could assist them with the Chartres-Abbott murder investigation.<sup>389</sup>

Mr Biggin and Mr White discussed deactivating Ms Gobbo as a human source further with Mr Overland<sup>390</sup> but by the 28 May 2007 monthly source review, the SDU's planned and partially implemented exit strategy was off the table.<sup>391</sup>

Ms Gobbo continued to provide intelligence that the SDU officers felt they could not ignore. On 5 June 2007, she gave her handlers documents entrusted to her by her client, Mr Rabie (Rob) Karam. As discussed in Chapter 7, these documents related to a shipping container of canned tomatoes holding what was then the world's largest importation of ecstasy.<sup>392</sup> Ms Gobbo was also getting closer to Mr Gatto, upon whom the Purana Taskforce was focusing increasing attention.<sup>393</sup>

Abandoning the SDU's deactivation strategy to continue capitalising on the information held and provided by Ms Gobbo was another missed opportunity for Victoria Police.

## Absence of legal advice

On 17 July 2007, Mr O'Brien provided a Purana Taskforce briefing to Mr Overland, Mr Blayney and another officer. Mr Blayney raised the need to seek legal advice on the use of Ms Gobbo as a human source.<sup>394</sup> Extraordinarily, on the evidence before the Commission, this was the first time a senior officer considered seeking such advice.

Mr Blayney told the Commission that over time, he realised that Ms Gobbo was '3838' and was becoming more concerned about the legal complexities arising from her use as a human source. He considered it could potentially corrupt the court system, with tainted evidence resulting in unfairness to accused persons.<sup>395</sup> He raised the need for legal advice in an effort to understand whether anything needed to be done to address such issues.<sup>396</sup>

On 24 July 2007, representatives of the SDU and the Crime Department met to discuss Mr Blayney's query about legal advice. Mr Blayney's notes of the meeting included, 'Legal issues—considered not appropriate at this stage—poss explore precedents'.<sup>397</sup> Mr Biggin's notes also included, 'Legal opinion from Judge'.<sup>398</sup> In his notes, Mr White wrote, 'Agreed value of HS as source is outweighed by repercussions and risk to same' and agreed in his evidence to the Commission that the need for legal advice would have been discussed.<sup>399</sup> Mr Overland recalled, without the benefit of notes, that he saw little point in hypothetical advice and that any issues would be addressed via normal discovery processes (that is, the prosecution's pre-trial disclosure duties).<sup>400</sup>

Mr Blayney told the Commission that he walked away from that meeting with the view that legal advice had been obtained and the SDU was acting in accordance with it in relation to Ms Gobbo's management, although he could not recall whether he was told this or inferred it from the SDU's briefing on risk management.<sup>401</sup>

The Commission is satisfied that the decision at the meeting on 24 July 2007 not to obtain legal advice, given that those who attended likely discussed concerns about the legality, propriety and consequences of Ms Gobbo's use as a human source, was another missed opportunity for Victoria Police and those officers to rectify past wrongs and avoid future ones. Such legal advice could have been readily obtained within Victoria Police or through the VGSO.<sup>402</sup>

The Commission was told the reluctance to seek legal advice was, at least in part, because Victoria Police feared that lawyers giving advice might gossip, revealing Ms Gobbo as a human source and jeopardising her safety.<sup>403</sup>

The Commission accepts that this was certainly a factor. Another real possibility is that those within Victoria Police who decided not to get legal advice feared it might bring unwelcome news. On the available evidence, however, it is not possible to reach a concluded view on this matter.

## Operation Khadi and the Office of Police Integrity

On 5 June 2006, Mr Thomas (Luke) Cornelius, APM, then Assistant Commissioner at the Ethical Standards Department (ESD), and Mr Ashton, then Assistant Director at the OPI, signed a joint agency agreement related to Operation Khadi, established to investigate misconduct allegations at Brighton Police Station.<sup>404</sup> Ms Gobbo had several connections to Operation Khadi; she had associations with targets and made allegations of theft from a client against an officer based at Brighton.<sup>405</sup>

Operation Khadi investigators planned to summons Ms Gobbo to give evidence in an OPI examination and to monitor her phone calls to obtain more information.<sup>406</sup> The OPI had already planned to examine her about the 2004 Hodson murders, discussed below.<sup>407</sup>

The telephone intercept applications needed approval from officers including Mr Biggin. As Ms Gobbo was a human source, he told investigators to talk to Mr Overland or Mr Moloney before taking this further.<sup>408</sup>

The details related to these events are contentious. On 6 June 2006, Mr Cornelius and Mr Overland met with Superintendent Phillip Masters (responsible for the ESD surveillance) and Detective Superintendent Rodney (Rod) Wilson, also from the ESD. Evidence before the Commission—including Mr Wilson’s and Mr Master’s diary entries and information conveyed to and recorded by Mr White at the SDU—suggests that Mr Overland told them Ms Gobbo was a human source and they discussed whether they would have her examined by the OPI.<sup>409</sup>

Mr Cornelius accepted that the meeting took place and Ms Gobbo’s planned appearance before the OPI may have been discussed, but was adamant that he was not told she was a human source.<sup>410</sup> Mr Cornelius said this would have struck him as extraordinary and he would have appreciated the implications.<sup>411</sup> The diary entries suggesting otherwise, he believed, conflated two meetings; the first involving him and relating to the OPI examination, and the second where Mr Overland told Mr Wilson that Ms Gobbo was a human source.<sup>412</sup>

In responsive submissions, Mr Cornelius rejected the accuracy of the contemporaneous written records. He suggested it was speculative of Counsel Assisting in their submissions to infer that an entry by Mr Masters on 6 June 2006 at 7.30 am, which recorded that he spoke to Mr Cornelius about ‘problems’ with Operation Khadi, referred to Ms Gobbo.<sup>413</sup> Additionally, it was submitted that the written records of the meeting were inaccurate, and Mr Wilson’s diary entry ‘created a cascade of incorrect records that created an assumption that [Mr] Cornelius knew the extent of Ms Gobbo’s informer status’.<sup>414</sup> Mr Cornelius emphasised his evidence about the possible conflation of two conversations<sup>415</sup> and noted Mr Wilson’s evidence that he remembered Mr Overland briefing him separately about Ms Gobbo being a human source.<sup>416</sup> He also rejected Mr White’s entry in the SML and his diary.<sup>417</sup> Mr Wilson recalled that he was the only one present when Mr Overland told him that Ms Gobbo was a human source.<sup>418</sup>

Given the passage of time and the vagaries of memory, the Commission places greater weight on contemporaneous written records than on contrary unsupported recollections, even Mr Cornelius’ adamant assertions about the diary notes. After carefully considering all the evidence and his submissions, however, the Commission considers that, given the written records, it was more likely his memory and evidence was coloured by hindsight and that he inaccurately reconstructed the events of 6 June 2006 to explain his failure to seek legal advice at this time.

The Commission finds that it is more probable than not that Mr Overland made plain to all present at the meeting on 6 June 2006, including Mr Cornelius and Mr Masters, that Ms Gobbo was a human source for Victoria Police.

At around this time, the SDU assured a distressed Ms Gobbo they were trying to ‘head off’ her being questioned at an OPI examination.<sup>419</sup> As a first step, Mr Swindells (then at ESD) and his colleague, Inspector Lindsay Attrill, were to interview her about matters of interest to investigators.<sup>420</sup> In arranging this, Mr White provided Mr Wilson and Mr Attrill intelligence provided by Ms Gobbo, including confidential and privileged information provided by her client, Mr Azzam (Adam) Ahmed.<sup>421</sup>

OPI investigators did not want the ESD to meet with Ms Gobbo, as it would remove the element of surprise in their planned examination.<sup>422</sup> An agreed list of questions was settled as a compromise, and the meeting took place on 24 July 2006. Ms Gobbo told ESD that in providing them with information obtained as a result of her acting for Mr Ahmed, she had ‘thrown privilege out the door’.<sup>423</sup> In his statement to the Commission, Mr Attrill said he believed that he and Mr Swindells discussed the problem of her providing privileged material with Mr Wilson and that this was one of the reasons why the ESD investigation should have had nothing more to do with Ms Gobbo. In his evidence to the Commission, Mr Wilson agreed that Ms Gobbo providing privileged information to ESD should have rang some alarm bells.<sup>424</sup>

Mr Attrill and Mr Wilson submitted that the information Ms Gobbo provided about Mr Ahmed was neither confidential nor privileged.<sup>425</sup> Mr Wilson also submitted that there was no evidence that Mr Attrill raised concerns about legal professional privilege with him, and rather, that the concerns raised by Mr Attrill and the reason the ESD decided to withdraw her from the investigation related to safety concerns, as set out in the information report (IR) submitted by Mr Attrill.<sup>426</sup>

Mr Wilson was then a Superintendent in the ESD. Once aware that Ms Gobbo may have been passing on information from her clients to police that was, at least arguably, confidential or privileged, he should have sought legal advice or at least taken steps to ensure that all police officers, including the SDU and investigators, were properly supervised so that they did not use the information in potentially improper, unlawful or unethical ways. This was another significant missed opportunity.

Mr Biggin told Mr White on 26 July 2006 that he had spoken with Mr Overland, who said he would talk to Mr Ashton the following day to request that the OPI take no further action in relation to Ms Gobbo as part of Operation Khadi.<sup>427</sup> Again, Mr Wilson's and Mr White's contemporaneous diary notes conflict with Mr Cornelius' recollection as to whether he was briefed on this approach.<sup>428</sup> Again, the Commission prefers the written record, which is also consistent with Ms Gobbo's having no further involvement in Operation Khadi.

On 27 July 2006, Mr Overland and Mr Cornelius met with Mr Ashton. Neither Mr Overland nor Mr Cornelius made any diary entries or other records. Mr Ashton's notes only recorded information about another operation, Operation Air. In evidence to the Commission, Mr Ashton said this suggested that other matters such as Operation Khadi were not discussed, a view that he put more forcefully in his responsive submissions, where he also contended that he did not have the authority to unilaterally determine whether to call Ms Gobbo to an OPI hearing.<sup>429</sup>

Mr Ashton also indicated that he could not recall Mr Overland telling him that Ms Gobbo was a human source.<sup>430</sup> But nor could he explain why, after this point, Ms Gobbo was no longer a focus of Operation Khadi.<sup>431</sup> Mr Cornelius' memory accorded with Mr Ashton's—Operation Khadi was not discussed, and Mr Overland did not disclose Ms Gobbo's status as a human source.<sup>432</sup> Mr Overland could not recollect any details, but said that if he did raise with Mr Ashton the possibility of OPI not examining Ms Gobbo, it would have been on the basis that it was a matter for the OPI to determine.<sup>433</sup>

Submissions made on behalf of Mr Cornelius contended that Counsel Assisting, in their submissions, ignored several pieces of key evidence to assert that Mr Cornelius became aware of Ms Gobbo's status as a human source during Operation Khadi. Submissions pointed to other evidence, such as Mr Ashton's diary entry of the meeting, which referred only to Operation Air and not to either Operation Khadi or the OPI hearings; and Mr Ashton's evidence to the Commission that this entry was a complete record of the topics discussed at the meeting.<sup>434</sup>

Notwithstanding this evidence, and taking into account Counsel Assisting reply submissions, the Commission considers it probable, given Mr Overland's and Mr Cornelius' debriefings to their teams and subsequent actions at the time, that it was agreed or understood at the meeting that Ms Gobbo would not be examined by the OPI in relation to Operation Khadi, given her status as a human source, but would be examined in relation to the Hodson murders.<sup>435</sup> The SDU promptly informed Ms Gobbo that she would not be further involved in Operation Khadi, and she was neither examined nor asked to provide a statement.<sup>436</sup> The Commission notes, however, that the OPI's 2007 Operation Khadi report mentioned Ms Gobbo's name over 100 times and she seemed relevant to many areas of the investigation.<sup>437</sup>

As explained earlier, the Commission found that Mr Cornelius probably became aware that Ms Gobbo was a human source for Victoria Police in June 2006. The Commission considers Mr Cornelius' submissions regarding his knowledge of the extent of Ms Gobbo's informing are misconceived. As Assistant Commissioner, ESD, Mr Cornelius should have insisted on Victoria Police obtaining legal advice and implementing measures to ensure that its use of Ms Gobbo as a human source, and disclosures about it, were ethical and lawful.

The Commission also finds it troubling that Victoria Police's intervention in this matter may have hampered the OPI's independent investigation of the matters arising in Operation Khadi—matters in which Ms Gobbo appears to have been an active protagonist. The OPI decision not to examine Ms Gobbo also represented a missed opportunity to scrutinise her role as a human source, understand the arising ethical and legal implications, remedy any past improprieties and damage to the criminal justice system, and prevent future damage.

## INADEQUATE DISCLOSURE

As discussed in Chapters 5, 7 and 14 of this final report, in criminal proceedings, police—as part of the prosecution—have a duty to disclose relevant information to prosecuting authorities and the accused person. This includes information that may undermine the prosecution case or help the accused person. The duty of disclosure is well-established in common law and legislation and it is both a standard and enduring feature of criminal prosecutions and essential to an accused person’s right to a fair trial.

In certain circumstances, such as when material relevant to an accused person’s case is subject to PII, it does not have to be disclosed. Typically, though not always, the use of a human source in an investigation to obtain evidence against an accused person will be subject to PII. This is sometimes referred to as ‘informer privilege’. Informer privilege, however, is not absolute. Whether information about a human source is disclosed to an accused person will depend on a balancing of public interests; that is, whether the public interest in keeping the human source’s identity confidential in a particular circumstance outweighs other important public interests (for example, the public interest in disclosing all relevant evidence to the accused person as part of their right to a fair trial). While police can make PII claims, these can only be determined by a court. It is the court’s role, not that of police, to decide whether certain information relevant to an accused person’s case can be withheld from them.

Victoria Police’s failure to adequately meet its disclosure obligations was critical to concealing Ms Gobbo’s status as a human source for so long.

Had Victoria Police met these obligations, Ms Gobbo’s career as a human source would likely have been limited in time and scope. Full and proper disclosure to:

- Ms Gobbo’s clients would likely have caused them to seek new, independent legal advice—this was the unequivocal evidence of one such client, Mr Cooper, to the Commission
- Victoria Police legal advisers would have resulted in advice reflecting that provided by Mr Maguire in 2011, or the VGSO in 2012, as to the need for disclosure
- the DPP would have prompted the obtaining of legal advice and disclosure to convicted or accused persons and the courts, or the withdrawal of prosecutions
- the court would have likely resulted in disclosure to accused persons or the withdrawal of prosecutions or permanent stays of prosecution.

## Victoria Police officers’ knowledge of disclosure obligations

In Chapter 9, the Commission acknowledges that Victoria Police officers were let down by inadequate training and procedures about their disclosure obligations and PII claims. But that does not absolve officers from personal responsibility. All officers, especially those with direct responsibility or senior and experienced ones involved in the management, use and oversight of Ms Gobbo, should have appreciated her status and conduct as a human source was disclosable, or at the very least required legal advice, given the extraordinary circumstances. In many cases:

- there was an inherent conflict of interest between Ms Gobbo’s role as a criminal defence barrister and human source for Victoria Police
- Ms Gobbo informed on those she represented, acting as an agent for Victoria Police rather than as an independent legal adviser
- Ms Gobbo encouraged and assisted her clients to roll and become prosecution witnesses, keeping her conduct secret although this information would have materially assisted their defence
- when Ms Gobbo became a prosecution witness, her role and conduct as a human source was disclosable as it was relevant to her credit.

The case studies below exemplify police failures in adequately meeting their disclosure obligations in matters associated with Ms Gobbo.

## Case study: Mr Cooper (a pseudonym) as a prosecution witness

Mr Harty Mokbel was arrested on 13 April 2007 on serious drug charges emanating from Operation Posse. He was committed for trial alongside Mr Toreq Bayeh (Mokbel/Bayeh case). The trial took place in September 2008; with Mr Cooper a witness against them. In the lead up to the trial, two defence subpoenas required the Chief Commissioner to produce documents relating to Mr Cooper.<sup>438</sup>

The way Victoria Police handled these subpoenas is instructive. Victoria Police officers avoided disclosing material they knew, or should have known, was relevant to the defence. They did this first by agreeing to narrow the scope of subpoenas with defence counsel, steering them away from relevant matters and not informing them of key information, and second by ‘sanitising’ notes so the defence could not know relevant facts and where PII claims were in court, not presenting the full facts.

### The first subpoena: 12 August 2008

As the police officers involved knew or should have known, the defence was seeking material surrounding any offers, promises, benefits or inducements to Mr Cooper that might cast doubt on his credibility as witness or the propriety of the police investigation.<sup>439</sup> Subject to argument about the breadth of the subpoenas or about PII claims over relevant material,<sup>440</sup> Victoria Police should have produced notes and other materials that would have made clear that Ms Gobbo’s involvement with Mr Cooper was not simply as Mr Cooper’s independent legal adviser.

This did not occur. Instead, Mr Flynn and Detective Senior Constable Tim Johns obtained defence counsel’s agreement to narrow the documentation sought under the subpoena. Mr Flynn’s notes of discussions with defence lawyers suggest they only sought records of meetings not already provided and unedited transcripts of Mr Cooper’s interviews.<sup>441</sup> Mr Johns spoke to them to clarify exactly what they wanted; they stated they were ‘happy with full transcript of interview with Mr Cooper’.<sup>442</sup> Mr Johns told the Commission that, while he did not have a specific memory, he was of the view he told defence counsel that there was a lot of other potentially relevant material that would answer the subpoena but he could not provide it before the trial.<sup>443</sup>

It also seems likely that the defence obtained versions of Mr Flynn’s notes of the night of Mr Cooper’s arrest that were ‘sanitised’ so that they did not reveal the full picture, while his notes from a 14 May 2006 meeting, at which both Ms Gobbo and Mr Cooper were present, would have revealed her duplicitous role and were not produced at all.<sup>444</sup>

Responsive submissions asserted that the evidence does not support a finding that Victoria Police should have produced further materials to the court in response to the subpoena<sup>445</sup>, nor that Mr Flynn and Mr Johns acted improperly in securing this agreement,<sup>446</sup> noting that the narrowing of very broad subpoenas was common practice at the time.<sup>447</sup>

It was also asserted that Mr Flynn did not have improper motives;<sup>448</sup> he acted so as to not reveal Ms Gobbo’s identity as this was consistent with his training and experience, and with the culture within Victoria Police at the time around not revealing the identity of human sources.<sup>449</sup> It was submitted that should not be held responsible for adopting the approach he did, as his training and understanding of this issue was the fault of the broader organisation.<sup>450</sup>

On the evidence before the Commission, it is not possible to definitively determine the individual motivations of the various Victoria Police officers in not making proper disclosure. Protecting the safety of Ms Gobbo as a human source was certainly one motive. A lack of training in, and understanding of, their disclosure obligations was also a contributing factor. Another factor may well have been to prevent adverse consequences to pending, current and past prosecutions and to avoid criticism of officers of Victoria Police should their conduct with Ms Gobbo be revealed.

The Commission considers that in response to the 12 August 2008 subpoena, Victoria Police should have produced all relevant notes that revealed communications concerning Ms Gobbo between Mr Flynn and Mr Cooper in the days following the arrest on 22 April 2006. If Victoria Police wished to claim PII, it should have provided all relevant information to the court for determination of any claims. Instead, the investigators, with the assistance of the SDU, improperly redacted notes and 'agreed' with defence lawyers to limit the production of materials without informing them of all relevant materials.

### **The second subpoena: 1 September 2008**

The second subpoena sought 'all information and reports relating to or touching upon [Mr Cooper] and his activities in the period of November 2004 to April 2006'.<sup>451</sup> The defence had previously sought 16 IRs from Victoria Police, but received redacted versions. The subpoena was likely to ensure scrutiny of the redactions by a court hearing a PII claim,<sup>452</sup> but its terms required the production of much more material held by the Purana Taskforce and the SDU.<sup>453</sup>

Given concerns that disclosure of the IRs could reveal Ms Gobbo's status as a human source, Victoria Police engaged barrister Mr Ron Gipp to make a PII claim over the material. When the application came before the court, defence counsel stated he did not want to know the identity of the human source, just the information relevant to his cross-examination of Mr Cooper.<sup>454</sup> Although Mr Johns and Mr Flynn, present in court, must have known that the identity of the human source was a significant fact in this case, they did not disclose it to Mr Gipp or the court.<sup>455</sup> The confidential affidavit filed with the 16 IRs attached did not reveal the human source was Ms Gobbo or a criminal defence lawyer.<sup>456</sup>

Without the full facts, the judge allowed the PII claim in relation to all but one of the IRs referring to intelligence provided by Ms Gobbo.<sup>457</sup>

In responsive submissions, Mr Johns stated that he appropriately sought advice from Mr Gipp to comply with the subpoena. He said he was grappling with a conflict in his own mind that, 'throughout our training, we're taught to keep an informer's identity secret' and if Ms Gobbo's identity had been revealed, 'she would have been killed'.<sup>458</sup> He also stated he was not involved in the investigation of Mr Cooper or aware of Ms Gobbo's involvement in the events leading up to his arrest or her attendance at the police station. Additionally, he did not appreciate the impropriety of Ms Gobbo's conduct in relation to Mr Cooper.<sup>459</sup> He also contended that, as the SDU was managing Ms Gobbo, her role as a lawyer would have been kept separate to that of a human source,<sup>460</sup> and legally privileged information would be withheld from investigators.<sup>461</sup>

The Commission considers that, subject to any argument about the terms of the subpoena and PII, this broad subpoena would have obliged the Chief Commissioner to produce a significant amount of information including police notes, ICRs, IRs, and other SDU and Purana Taskforce documents that would have exposed Ms Gobbo as a human source.<sup>462</sup> This material was also apt to expose how Victoria Police deployed her to obtain information used to arrest Mr Cooper, her client, and then Mr Harty Mokbel, another client. Mr Flynn and Mr Johns knew or should have known this.

The Commission also considers that Mr Johns, with primary responsibility for responding to the subpoena, should have thought more deeply about the significant issues, raised them with a superior officer, or sought further legal advice from Mr Gipp or others.

## The involvement of senior officers

Following the judge's ruling on this matter, Mr White emailed Mr Biggin stating:

*We had a win re the PII issue for 3838 IRs' regarding re [Mr Cooper]. They have been appropriately sanitised and the defence are satisfied.*<sup>463</sup>

The Commission also notes evidence from Mr White that the SDU was not involved in questions of disclosure or answering subpoenas. At least in this case, however, investigators closely liaised with SDU officers in relation to the subpoenas.<sup>464</sup> The Commission has concluded that that SDU officers became involved in disclosure applications where there was a risk that Ms Gobbo's status as a human source might be revealed.<sup>465</sup>

In responsive submissions, Mr White contended that he did not believe there was any impropriety or potential impropriety in the manner in which the SDU had utilised Ms Gobbo as a human source, and that when counsel was engaged to argue PII claims, they were 'briefed pretty fully' and he kept officers Mr Andrew Glow and Mr Biggin apprised of matters relating to the 1 September 2008 subpoena. It was also submitted that his conduct was consistent with expectations of his role at the time.<sup>466</sup>

The Commission considers that by this time, Mr White knew of at least the potential impropriety arising from the manner in which the SDU and the Purana Taskforce had utilised Ms Gobbo. As such, he should have advised SDU officers of the need to instruct Mr Johns to apprise Victoria Police's legal counsel of the full facts, so that the propriety of Victoria Police's conduct, potentially relevant to the Mokbel/Bayeh case, could be considered.

## Case study: Mr Faruk Orman

The circumstances of Mr Orman's case are outlined in Chapter 7 and in *Orman v The Queen*.<sup>467</sup>

Ms Gobbo acted for Mr Orman as junior counsel to Mr Robert Richter, QC,<sup>468</sup> until the OPP raised conflict concerns and Ms Gobbo ceased acting for him.<sup>469</sup> Ms Gobbo, however, continued to provide legal advice to Mr Orman outside court hearings, while providing information, including about Mr Orman, to the SDU.<sup>470</sup>

Mr Richter told the Commission that the defence was seeking statements, transcripts and other material to attack Mr Thomas' credibility, having been instructed that his evidence was false.<sup>471</sup> Mr Richter asked Ms Gobbo how they could discredit Mr Thomas.<sup>472</sup> She of course knew the answer, but had no intention of providing it, although she feared that Mr Thomas might do so under cross-examination. She turned to police to help.<sup>473</sup>

Ms Gobbo told her SDU handler that Mr Thomas needed to be told to claim legal professional privilege if asked about her influence and involvement with him.<sup>474</sup> Before his committal hearing, Mr Thomas was briefed on how to respond if asked about the circumstances in which he rolled. Mr Ryan told Mr White that Victoria Police would make a PII claim if the defence pushed the issue. Victoria Police officers Mr Buick and Mr Mark Hatt were to be present in court.<sup>475</sup> Mr Buick provided updates on the issue to the SDU during the committal.<sup>476</sup>

In responsive submissions, Mr Hatt asserted that his presence at the committal hearing is not evidence that he was aware of an alleged plan to protect Ms Gobbo from exposure; rather, he was there primarily for Mr Thomas' welfare and to ensure 'logistics' were in place. He submitted that he thought Ms Gobbo was not acting for Mr Thomas at this time; and, during the Commission's inquiry, Counsel Assisting did not ask him about his role in the committal proceedings.<sup>477</sup>

Mr Buick contended in responsive submissions that while it was possible police considered making a PII claim in relation to Ms Gobbo's representation of Mr Thomas to due safety concerns, this was a legitimate process.<sup>478</sup>

On the available evidence, the Commission considers that Mr Buick knew of arrangements to protect Ms Gobbo from compromise during the committal proceeding. The Commission is unable to reach a conclusion on this matter in respect of Mr Hatt.

## Case study: Mr Carl Williams

Mr Williams' prosecution for the Marshall murder is another instance of inadequate disclosure.

After a 14 August 2006 Supreme Court hearing concerning Mr Williams' pending trial, Mr Bateson noted in his diary<sup>479</sup> that the judge reminded Victoria Police that at some point in claiming PII they would need to decide between investigation and prosecution, and that they were required to hand over any material demonstrating that their witness (Mr Thomas or Mr Andrews) was a liar.<sup>480</sup>

Mr O'Brien later spoke to Mr Overland about 'PII issues' associated with the Williams trial.<sup>481</sup> The following day they, together with Mr Bateson and another Purana Taskforce officer, met with Mr Coghlan and other representatives of the DPP to discuss PII and related issues in Mr Williams' trial.<sup>482</sup> Mr O'Brien and Mr Bateson knew that police held material concerning Ms Gobbo relevant to Mr Williams' prosecution, over which they would wish to claim PII. They did not, however, inform either the DPP or their own legal advisers of Ms Gobbo's problematic role as a human source.<sup>483</sup>

In his evidence, Mr O'Brien told the Commission that police never intended to disclose Ms Gobbo's role, as 'in the normal course of events you didn't disclose an informer'.<sup>484</sup> Mr O'Brien conceded in responsive submissions that he should have recommended to his superior officer, Mr Overland, that legal advice be obtained on Victoria Police's disclosure obligations.<sup>485</sup> He submitted that he would have likely taken this step had he and other officers received adequate training about their duty of disclosure and had there been sufficient policies, structures and systems in place to support officers' compliance with those obligations.<sup>486</sup>

Mr Bateson submitted that the hearings focused primarily on the statements of Mr Andrews and Mr Thomas and protecting the integrity of ongoing investigations, an entirely separate issue to protecting Ms Gobbo's status as a human source.<sup>487</sup> He further submitted that he was not aware that the ICRs were responsive to the subpoena, because he did not know that the SDU officers were speaking to Ms Gobbo about Mr Thomas.<sup>488</sup>

Mr Overland submitted that he had no specific recollection but assumed he was receiving reports throughout July and August 2006 about the progress of Mr Thomas' statements and preparations for Mr Williams' trial. He submitted that he was unaware that, in July 2006, Ms Gobbo was provided with Post-it notes and a pen to make comments on Mr Thomas' statement. He stated, on hearing of that matter in the witness box on 16 December 2019, it 'causes me some concern'; that, had he been told, he would have 'made sure that certainly the prosecutor was aware of that'; and that he would also have retained any annotations, notes or comments made by Ms Gobbo with respect to the statements.<sup>489</sup>

Mr Overland accepted that officers needed guidance and training from the outset to ensure they understood their disclosure obligations and that there should be legal support embedded in a unit such as the SDU.<sup>490</sup> Mr Overland disputed that he had any specific obligation to ensure that a particular piece or pieces of legal advice were obtained. He submitted that he had 'complete confidence' in the 'senior, experienced detectives' responsible for disclosure, and it was not his responsibility to supervise or ensure compliance.<sup>491</sup> Mr Overland submitted that it was unrealistic to expect this, given he was not involved in day-to-day operational matters.<sup>492</sup> He also submitted that it was unclear to him what role Ms Gobbo played in informing on Mr Williams such that there was a need for disclosure in his trial for the Marshall murder—noting that Mr Williams was convicted largely on the evidence of Mr McGrath and Mr Andrews, and Ms Gobbo's only role was as Mr McGrath's lawyer (well before her registration as a human source), assisting Mr McGrath to cooperate with police.<sup>493</sup>

Given Ms Gobbo's dual role as criminal defence barrister and human source, this was anything but the normal course of events. Mr O'Brien and Mr Bateson, as highly experienced investigators, and Mr Overland as then Assistant Commissioner, Crime and legally qualified, knew or should have known that informer privilege is never absolute.

The Commission is satisfied that, in August 2006, Mr Overland, Mr O'Brien and Mr Bateson should have raised with Mr Coghlan, who was prosecuting Mr Williams, Ms Gobbo's involvement in rolling Mr Thomas, a key prosecution witness. They should also have sought legal advice as to the need for disclosure in all pending prosecutions relying on evidence obtained through intelligence provided by Ms Gobbo as result of her informing to Victoria Police. Their failure to do this effectively usurped the role of the court in determining PII claims concerning Ms Gobbo and conveniently avoided proper court scrutiny of Victoria Police's use of Ms Gobbo as a human source.

The Commission repeats its earlier conclusions that what was not (but should have been) disclosed was that Ms Gobbo had informed on Mr Thomas and Mr Williams when purporting to act as their independent lawyer. She then encouraged Mr Thomas to roll, without disclosing that she was an agent of Victoria Police; she also did not disclose her involvement in amending Mr McGrath's statements, as noted earlier in this chapter.

## Case study: Mr Zlate Cvetanovski

In April 2008, Mr Zlate Cvetanovski was charged with serious drug offences arising from Operation Posse. He was convicted in July 2011 after his second trial, the first jury having been discharged without a verdict.<sup>494</sup> Mr Cooper was a key witness against Mr Cvetanovski.<sup>495</sup>

At Mr Cvetanovski's first trial, his counsel told the judge that he proposed to ask Mr Cooper as a witness whether he and Ms Gobbo collaborated to secure him a favourable sentence.<sup>496</sup> The prosecutor, Mr John Champion, SC, sought leave to seek instructions from police about this<sup>497</sup> and met with Purana Taskforce officers, Detective Senior Constable Craig Hayes (the informant) and Mr Flynn, along with SDU officer Mr Pearce (a pseudonym), to ascertain the facts.<sup>498</sup>

Mr Pearce emailed his superior, then Inspector John O'Connor with an update from the meeting, indicating that they discussed assertions by the defence that:

- Ms Gobbo and Mr Cooper collaborated on statements made by him to get a lesser sentence
- Mr Cooper was aware that Ms Gobbo was cooperating with police.<sup>499</sup>

The email also said that Mr Champion expected the defence to paint a picture of a conspiracy to pervert the course of justice by Victoria Police, and that, if this occurred, the options were to 'ask Cooper, ask Flynn or call Gobbo'.<sup>500</sup> Mr O'Connor forwarded this email to then Superintendent Paul Sheridan 'for discussion'. It appears the two met later that day regarding Ms Gobbo and the court matter where she may be called.<sup>501</sup> The issue was not raised again in either of Mr Cvetanovski's trials, and police did not disclose relevant information to the defence, DPP or court.

Counsel Assisting suggested that the defence assertion was close to the truth and should have prompted disclosure of Ms Gobbo's true role, at least to the DPP.

Responsive submissions contested this view:

- Mr Flynn noted that Victoria Police had not provided him with training and instruction on how to navigate these issues, and he did not fully understand the ethical issues and consequences of Ms Gobbo's involvement in rolling Mr Cooper.<sup>502</sup>
- Officers Mr Hayes,<sup>503</sup> Mr Pearce,<sup>504</sup> and Mr Richards<sup>505</sup> asserted that, in raising the issue with their superiors in the chain of command, they did all that was required of them. Mr Pearce and Mr Richards added that to do more without a direction from a superior officer would ignore the chain of command and could amount to a breach of discipline.
- Mr O'Connor and Mr Sheridan said they were not involved in nor responsible for Mr Cvetanovski's prosecution or disclosure issues. Mr Sheridan added that at the time he knew little about Ms Gobbo's informing.<sup>506</sup>

The Commission has considered these responsive submissions and the available evidence and considers that Mr O'Connor and Mr Sheridan seek to abrogate the responsibility that goes with their senior positions. Concerns were escalated to them and had they made enquiries they would have found issues of substance going to the fairness of Mr Cvetanovski's trial and perhaps other trials. As senior officers, they had a duty to investigate these issues or at least refer them up the chain of command to satisfy themselves that Victoria Police's disclosure obligations were met; they should have at least informed Mr Champion of all relevant facts. The submissions of Mr Flynn, Mr Hayes, Mr Pearce and Mr Richards have merit, but ultimately the Commission is persuaded that all officers were experienced, intelligent investigators who should have understood the criminal justice system and their disclosure obligations.

The Commission finds that officers Mr Flynn, Mr O'Connor, Mr Hayes, Mr Sheridan, Mr Pearce and Mr Richards should have:

- ensured that Ms Gobbo and Victoria Police's conduct in relation to Mr Cooper's decision to assist police was disclosed to the prosecutor in Mr Cvetanovski's trial; or
- ensured that the relevant conduct was otherwise disclosed to the court so that a claim of PII could have been heard and determined.

The Court of Appeal decision in *Cvetanovski v The Queen*<sup>507</sup> and the concessions made by the prosecution highlights further disclosure failures by Victoria Police and its officers.

## Case study: Mr Milad Mokbel

During 2006 and 2007, Victoria Police and Ms Gobbo worked together to facilitate a guilty plea by Mr Milad Mokbel to charges arising from Operation Posse. This was motivated at least in part to prevent exposure of Ms Gobbo's role as a human source and her involvement with Mr Cooper. The Purana Taskforce and the SDU strategised to prevent this information coming out during committal proceedings.

Purana Taskforce investigators arrested Mr Mokbel on 25 April 2006 after he participated in a drug transaction with Mr Cooper, who had by then rolled and was assisting police.<sup>508</sup> Mr Mokbel wanted Ms Gobbo to represent him. Given her clear conflict of interest, investigators understood the SDU had told her to explain to Mr Mokbel that she could not act for him.<sup>509</sup> After speaking to Mr Mokbel at the police station following his arrest, however, Ms Gobbo told Mr Flynn that he wanted to plead guilty to serious drugs charges, and Mr Mokbel confirmed this to Mr Rowe and Mr Flynn.<sup>510</sup> In responsive submissions, Mr Rowe contended that it is just as likely that Mr Mokbel came to his own decision to plead guilty in order to dispose with his charges as quickly as possible, without Ms Gobbo's advice.<sup>511</sup>

On 5 March 2007, the monthly source review prepared by the SDU noted that court discovery issues in Mr Mokbel's upcoming committal hearing might cause suspicion regarding Ms Gobbo's assistance in rolling Mr Cooper. It noted she would be advised that SDU would focus on these discovery issues to manage her protection.<sup>512</sup> The following day, SDU and Purana Taskforce officers met and discussed how Mr Mokbel had approached Ms Gobbo to assist in negotiating a plea.<sup>513</sup> Her handler was given information for Ms Gobbo about the Purana Taskforce's requirements for a deal,<sup>514</sup> and two days later, Mr O'Brien met with Ms Gobbo in her chambers to discuss the Taskforce's expectations for a guilty plea and Mr Mokbel's case.<sup>515</sup>

Mr O'Brien and Mr Flynn (with the benefit of hindsight) both told the Commission they identified the conflict in Ms Gobbo involving herself in representing Mr Mokbel,<sup>516</sup> although Mr O'Brien said while there may have been discussions about this, he did not think Mr Mokbel would plead guilty.<sup>517</sup>

Certainly, concerns about conflicts were not raised, even during discussions regarding conflicts in other cases. For example, on 14 March 2007, Mr Flynn and Mr Rowe attended a conference with then DPP, Mr Coghlan, who made it clear that Ms Gobbo was not to represent another client, Mr Bickley (a pseudonym), given her conflict in having previously represented both Mr Tony Mokbel and Mr Cooper.<sup>518</sup> This was a missed opportunity for those officers to raise Ms Gobbo's conflict in Mr Milad Mokbel's case with Mr Coghlan, or at least this meeting should have prompted police to take steps to address that conflict themselves.

In tandem with efforts to facilitate a plea, Purana Taskforce and SDU officers met on 13 March 2007 to discuss disclosure issues surrounding Mr Flynn's notes from the night of Mr Cooper's arrest.<sup>519</sup> When they met again on 19 March 2007, they agreed that a guilty plea would be the best option, but in any case they would not disclose Mr Flynn's notes on the basis of relevance and because the defence had not specifically asked for them.<sup>520</sup> This was contrary to their disclosure obligations. As the committal approached, the SDU and Purana Taskforce met again and agreed that Mr Flynn's notes from the night of Mr Cooper's arrest would be redacted on the basis of both relevance and threats against Ms Gobbo. The SML recorded that they determined that if cross-examined, Mr Flynn would need to reveal that Ms Gobbo had attended to provide legal advice.<sup>521</sup> No-one sought legal advice about disclosure requirements.<sup>522</sup>

The SDU met with Ms Gobbo on 30 March 2007 and discussed disclosure risks. They said that no notes relating to Mr Cooper would be provided; that they would not make a PII claim as the information would not be kept secret; and that the SDU would liaise with investigators about relevant notes. They also discussed her upcoming visit to Mr Milad Mokbel, and how she would advise him in relation to a guilty plea.<sup>523</sup>

Over April and May 2007, despite these conflicts and not being the lawyer on the record, Ms Gobbo kept regular contact with Mr Mokbel and continued to negotiate with and provide information to the Purana Taskforce about a possible guilty plea.<sup>524</sup> When Ms Gobbo reported these developments to the SDU, they restated that it was not appropriate for her to represent Mr Mokbel.<sup>525</sup> On 19 June 2007, however, she told her handler that Mr Mokbel wanted to plead guilty, but his solicitor would not assist until he was paid. Ms Gobbo impressed upon her handler the importance of Mr Mokbel pleading guilty to avoid her exposure and requested he take this up with Mr Flynn.<sup>526</sup> Over subsequent days, she told her handler that Mr Mokbel wanted her to act for him on his guilty plea, she was frustrated at the lack of progress and was concerned that, with his solicitor interstate, Mr Mokbel may change his mind about pleading guilty. Her handler suggested she could speak to Mr Mokbel if she thought it would help, adding that she could not represent him (presumably meaning in court).<sup>527</sup>

When the committal proceeding commenced, Mr Mokbel reserved his plea, his lawyer indicating his intent to negotiate a plea. He was therefore not in court for the committal of his co-accused.<sup>528</sup> What occurred provides yet further insight into Victoria Police's unsatisfactory approach to disclosure:

- When asked about Mr Cooper's statements, Mr Flynn said they were taken using a computer with changes saved over the previous version. In relation to one of the statements, he said there were no other drafts and otherwise no other records of changes made during the process.<sup>529</sup> He told the Commission that he had, however, printed some drafts for Mr O'Brien, and had delivered versions to the SDU for Ms Gobbo's review, and possibly emailed some to colleagues. He said his evidence at the committal was not misleading because the Purana Taskforce's process was not to have drafts.<sup>530</sup>
- Under cross-examination, Mr Flynn said that Mr Cooper had access to Ms Gobbo before his first police interview, but that she was not present for the taking of any statements.<sup>531</sup> Counsel Assisting, in their submissions, suggested that this was misleading given Ms Gobbo had a conversation with Mr Cooper on 14 May 2006 when police indicated to her concerns about how forthcoming he was being.<sup>532</sup> Mr Flynn disagreed, noting statements were not taken while she was there.<sup>533</sup>
- In relation to Ms Gobbo's attendance at the police station on the night of Mr Cooper's arrest, Mr Flynn said the interview went over several hours and he would have to check if there was more than one call to Ms Gobbo, 'but that was it basically'.<sup>534</sup> He said Ms Gobbo attended the station but he did not believe she remained there over the course of that first interview.<sup>535</sup>

The Purana Taskforce and SDU officers involved in efforts to avoid adequate disclosure, claimed this was done solely out of concern to protect Ms Gobbo's safety. Another powerful motivator was likely to be the avoidance of reputational damage, public exposure and judicial criticism of their use of a prominent criminal defence lawyer as a human source, given that this may have put past and future convictions at risk. It also allowed them to continue to receive and use her valuable intelligence and tactical advice.

## PETRA TASKFORCE

As outlined in Chapter 6, from 2007 onwards, Ms Gobbo became increasingly involved in, and important to, the work of the Petra Taskforce and the Briars Taskforce. This put her on the path to becoming a witness and her deregistration as a human source in January 2009, when she signed a statement implicating Mr Dale in the Hodson murders.

### The Hodson murders and establishment of Petra Taskforce

On 15 or 16 May 2004, Mr Terry and Mrs Christine Hodson, were murdered in their home in Kew.<sup>536</sup> Mr Hodson had become a human source in 2002 following his arrest on drug charges by then Detective Senior Constable David Miechel of the MDID, who became his police handler. When Mr Dale joined the MDID in 2002, he became Mr Hodson's controller.<sup>537</sup>

In September 2003, Mr Dale, and the officers of the MDID, were targeting large-scale drug manufacturing involving Mr Ahmed, Ms Abbey Haynes and Ms Colleen O'Reilly. Victoria Police were preparing to execute a search warrant at a house in Dublin Street, Oakleigh, thought to contain a large quantity of drugs and cash.<sup>538</sup> On 27 September 2003, Mr Miechel and Mr Hodson were apprehended after committing a burglary at the Dublin Street property. Mr Miechel rang his supervisor, Mr Dale, who went to the MDID office soon afterwards and in the following days. Mr Dale maintained that this was in the course of his duties. It was later alleged he took a file containing duplicate IRs relating to intelligence supplied to police by Mr Hodson.<sup>539</sup>

In the following weeks, Mr Hodson spoke with detectives, implicated both Mr Miechel and Mr Dale in the burglary, and later agreed to give evidence against them.<sup>540</sup> On 5 December 2003, all three men were arrested and charged with the burglary.<sup>541</sup>

Shortly before the Hodson murders, a newspaper published information from a Victoria Police IR (also known as 'IR44') that made clear Mr Hodson was a human source.<sup>542</sup> By the end of May 2004, further media reports suggested that IR44, or at least part of it, had been seen by, and may be in possession of, journalists, criminals or others.<sup>543</sup> It is commonly understood that the Hodson murders were motivated by Mr Hodson's informing.<sup>544</sup>

Operation Loris was established on 17 May 2004 by the Homicide Squad to investigate the Hodson murders. There were several suspects, including Mr Dale, Mr Williams, Mr Tony Mokbel and other gangland figures.<sup>545</sup> The OPI engaged the Honourable Gerald Edward (Tony) Fitzgerald, AC, QC to probe the leaking of the IR. Mr Fitzgerald found Mr Dale was an obvious suspect in the theft of that document.<sup>546</sup>

From late 2006, Victoria Police was in discussions with Mr Williams' lawyers regarding the possible resolution of multiple murder charges and his potential assistance with the Hodson murders.<sup>547</sup> In early March 2007, Purana Taskforce investigators took a 'can say' statement from Mr Williams in relation to these matters, in which he implicated Mr Dale in the Hodson murders.<sup>548</sup> Mr Williams signed the statement on 24 April 2007 and, at a plea hearing three days later, gave an undertaking to give evidence in accordance with it.<sup>549</sup>

After discussions between senior Victoria Police officers and the OPI,<sup>550</sup> on 3 April 2007, Ms Nixon approved the establishment of the Petra Taskforce to investigate the Hodson murders. Joint management arrangements with the OPI included a Board of Management consisting of a Deputy Commissioner, Assistant Commissioner, the ESD, the Crime Department Operations Superintendent and an OPI representative.<sup>551</sup> The Petra Taskforce was initially led by Mr Ryan, with Mr Shane O'Connell as the lead investigator. Mr Sol Solomon and Mr Cameron Davey were seconded to the Petra Taskforce in April 2007. Mr Steven Smith commenced as Inspector in charge of the investigation in mid-2008 after Mr Ryan's retirement.<sup>552</sup>

## Ms Gobbo's connections to Petra Taskforce

Ms Gobbo's connections with people and events associated with the Hodson murders were complex, reflective of her entanglements with organised crime figures and police. As discussed in Chapter 6, key elements were as follows:

- Prior to their arrests, Ms Gobbo dealt with Mr Miechel and Mr Dale as investigators in various drug cases in which she was briefed.
- Ms Gobbo represented Mr Ahmed, Ms Haynes and Ms O'Reilly following their arrests (on the same night as the burglary) for involvement in the drug activity at the Dublin Street house.
- Following the burglary, the ESD contacted Mr Terry Hodson through Ms Gobbo and she represented him in relation to the Dublin Street charges.
- Mr Hodson told the ESD he thought Ms Gobbo was sleeping with Mr Dale.
- Mr Dale rang Ms Gobbo for advice after his arrest on 5 December 2003, and she made two professional visits to him in custody; he gave her written instructions to pass to his solicitor, which she copied and years later gave to the SDU.
- In early 2004, Ms Gobbo and Mr Dale communicated by phones registered in fictitious names, and Ms Gobbo facilitated communication between Mr Williams and Mr Dale.
- Upon finding his parents' bodies after their murder in May 2004, Mr Andrew Hodson's first call was to Ms Gobbo to facilitate contact with the ESD.
- On 1 July 2004, Ms Gobbo was interviewed by the Homicide Squad in relation to the murders; they specifically questioned her about several clients and whether she had discussed Mr Terry Hodson and his status as a human source with them.
- Ms Gobbo was examined by the OPI in relation to IR44 relating to Mr Hodson, and whether she was a conduit between Mr Tony Mokbel, Mr Williams and Mr Dale in relation to the leak, leading to the murders.<sup>553</sup>

Ms Gobbo was identified early in the investigation as a person of interest, given her connection with key players.<sup>554</sup> By February 2008, the Petra Taskforce believed she may have knowledge about the planning of the murders<sup>555</sup> and interviewed her in three meetings from 26 February to 5 March 2008.<sup>556</sup>

## Ms Gobbo becomes a witness

On 30 November 2008, Mr Dale contacted Ms Gobbo and they arranged to meet the following weekend.<sup>557</sup>

On 3 December 2008, Ms Gobbo told the SDU handlers she had met with investigators who said they would do everything in their power to use her as a witness and discussed recording her upcoming meeting with Mr Dale.<sup>558</sup> Ms Gobbo told the SDU handlers that she was concerned about being a witness; she feared death threats and having to leave Victoria.<sup>559</sup> Late that afternoon, her concerned handlers, Mr White, Mr Smith and Mr Green, spoke with Mr O'Connell, who confirmed that the Petra Taskforce wanted to use her as a witness to corroborate Mr Williams' corrupt relationship with Mr Dale and to record her upcoming meeting with him.<sup>560</sup> The SDU officers warned the Petra Taskforce that Ms Gobbo's value as a witness had to be balanced against the risk of exposure. Mr O'Connell said this was a decision for 'a person with higher authority and knowledge of all the facts'.<sup>561</sup> Mr Overland accepted that he was probably this person.<sup>562</sup>

On 5 December 2008, the SDU officers raised their concerns directly with Mr Overland. Before the meeting, Mr Black briefed Mr White on the risks of Ms Gobbo becoming witness. An ICR recording this conversation read:

- *Risk of [Ms Gobbo's] exposure as a Source*
- *Risk to organisation if long term Source role is exposed = perception of Source passing on privileged information and Police using same*
- *Risk of Royal Commission into Source Handling by the SDU as a result of above*
- *Threat to [Ms Gobbo's] personal safety if gives evidence*
- *... If target Dale is charged will call [Ms Gobbo] as legal counsel in the first instance*
- *Target Dale will claim that all previous conversations with [Ms Gobbo] were privileged*
- *... Jeopardise future prosecutions if [Ms Gobbo's] role divulged (mostly Mokbel and spin offs)*
- *Leave previous convictions open to claims of being unsafe [because] of [Ms Gobbo's] involvement/privilege*
- *Duty of care to [Ms Gobbo's] mental [and] physical health for proven assistance of long term—has touched on suicide on several occasions.*<sup>563</sup>

Mr White told the Commission that he recalled all the risks listed in the briefing were raised with Mr Overland, but that Mr Overland said Ms Gobbo was potentially useful in the very serious corruption investigation into Mr Dale, and 'corruption trumps everything'.<sup>564</sup> Mr Black told the Commission that Mr Overland said words to the effect that while he had listened to the SDU's concerns, Ms Gobbo would become a witness.<sup>565</sup>

Mr Overland told the Commission he did not decide Ms Gobbo would be a Petra Taskforce witness until after she recorded her conversation with Mr Dale; this was 'the clincher', as Mr Dale's comments supported aspects of Mr Williams' statement.<sup>566</sup> He did recall the SDU's strong views about not wanting Ms Gobbo to give evidence.

The Commission accepts the evidence of Mr White, supported by the evidence of Mr Black and their contemporaneous notes, that these matters were discussed. This is also supported by some of the strategies developed to deal with the risks that they said were discussed.<sup>567</sup>

In expressing the view that ‘corruption trumps everything’, Mr Overland perhaps did not appreciate the irony that he may be fighting one form of suspected police corruption—police providing confidential information to criminals—with another—police using a lawyer as a human source against her own client.

Following Mr Overland’s instruction that Ms Gobbo would become a witness, Mr White recorded in the SML that the Petra Taskforce was to take over management of Ms Gobbo. He described it as a ‘barrier/break [between] SDU management and witness management’<sup>568</sup> and noted in his diary:

*... agree deployment of [Ms Gobbo] to be done by Petra to isolate re Dale from SDU in order to protect historical relationship with SDU and discovery should [Ms Gobbo] become witness against Dale.*<sup>569</sup>

## **Ms Gobbo records Mr Paul Dale**

On the afternoon of 5 December 2008, Ms Gobbo’s SDU handler told her she was to deal with Petra Taskforce investigators who wanted her to provide a statement and record a meeting with Mr Dale. Ms Gobbo again outlined her concerns at becoming a witness, including the prospect of overturned convictions.<sup>570</sup> On 7 December 2008, however, she recorded her meeting with Mr Dale.<sup>571</sup> On 9 December 2008, Mr O’Connell told Ms Gobbo’s handler that the Petra Taskforce wanted to use her as a witness as her taped conversation with Mr Dale supported aspects of Mr Williams’ statement.<sup>572</sup>

On 11 December 2008, Ms Gobbo met with Petra Taskforce investigators for over two hours. She reported to her SDU handlers that they told her that Mr Dale could not be charged or convicted without her evidence. Ms Gobbo did not want to go into witness protection, but said she was told ‘there is nothing that Simon Overland would not do for [her]’, and that he regarded this to be ‘the most significant prosecution’ for Victoria Police.<sup>573</sup>

The following day, Ms Gobbo told her handler that she was stressed and referred to suicide.<sup>574</sup> She told her handler that if Mr Dale was charged, then she wanted to be a witness as she did not want the defence to allege she was somehow involved in the murders. Her handler noted this was ‘bizarre’. When questioned further, Ms Gobbo said that Mr Dale would likely want her as a witness in any case.<sup>575</sup>

Mr White told the Commission that on 19 December 2008 he met with Mr Biggin, who directed him to convince Ms Gobbo to become a witness.<sup>576</sup>

## **‘The evidence is gold but it comes at a price’**

On 30 December 2008, Ms Gobbo raised compensation with her SDU handler and she said she would make a list of matters to be addressed before she signed a statement.<sup>577</sup> On 1 and 2 January 2009, she provided her statement to Petra Taskforce investigators but, ignoring their pressure, she did not sign it.<sup>578</sup> She again spoke to her handler about compensation and said ‘this evidence is gold but it comes at a price’.<sup>579</sup>

Later, her handler recorded her saying, ‘I do not want to have to sue them in a year’s time, if I don’t get what I need’. Ms Gobbo was concerned that Mr O’Connell was giving her standard assurances about being looked after.<sup>580</sup> She wanted him to know her history as a human source<sup>581</sup> and to avoid all possibility of ‘the informer side coming out, ever’.<sup>582</sup>

## Source Development Unit concerns about Ms Gobbo's transition to witness

From March 2006 until August 2010, Superintendent Mark Porter was in charge of the State Intelligence Division, within the then Intelligence and Covert Services Department, and was the Local Source Registrar (LSR) for the HSMU. He was also the Central Source Registrar (CSR),<sup>583</sup> which involved overseeing Victoria Police's state-wide register of human sources, including the SDU's sources, and making final decisions on disagreements about the management of individual human sources.<sup>584</sup>

Mr Biggin told the Commission that he directed the SDU to prepare a SWOT analysis so the consequences of deciding to make Ms Gobbo a witness were fully identified, properly documented and flagged with the executive group. On 2 January 2009, he submitted it with an Issue Cover Sheet (a Victoria Police internal briefing note) to Mr Porter, recommending it be sent to Mr Moloney, who since November 2008 had been the Assistant Commissioner, Crime.<sup>585</sup> The Issue Cover Sheet, referred to below as the 'Biggin memo', noted that:

- Ms Gobbo had been placed in contact with Mr O'Connell of the Petra Taskforce.<sup>586</sup>
- She had been registered as a human source since 16 September 2005.<sup>587</sup>
- Her registration number had been changed because of concerns arising as to disclosure in court proceedings.<sup>588</sup>
- Attached was a briefing paper setting out a strategic analysis based upon a SWOT analysis.<sup>589</sup>
- If Ms Gobbo ultimately signed a statement and became a witness, it was a matter for her and the investigators.<sup>590</sup>
- She had been a very productive human source; she was responsible for a number of investigations and was due a reward as a result.<sup>591</sup>
- She was highly needy and would be resource intensive.<sup>592</sup>
- There were organisational risks that the SDU was prepared to expand upon to the Petra Taskforce Board of Management.<sup>593</sup>
- The purpose of the paper was to ensure that decision makers were in possession of relevant information to allow proper decisions to be made.<sup>594</sup>
- Decisions made today may have long term implications for Victoria Police.<sup>595</sup>

The SWOT analysis referred to possible implications of transitioning Ms Gobbo to the role of a witness, including:

- her exposure as a long-term human source with Victoria Police<sup>596</sup>
- an OPI or government review into the legal and/or ethical implications of the use of a criminal defence barrister as a human source to Victoria Police<sup>597</sup>
- judicial review of police action in tasking and deploying a criminal defence barrister as a human source<sup>598</sup>
- the disclosure of ICRs and covert recordings<sup>599</sup>
- PII claims and resulting issues<sup>600</sup>
- successful appeals by former clients<sup>601</sup>
- the potential to jeopardise current prosecutions, such as against Mr Tony Mokbe<sup>602</sup>
- the revelation of her prior inconsistent statements to the SDU about her relationship with Mr Dale and her failure to disclose the mobile phone numbers she used to contact him<sup>603</sup>
- concerns as to her questionable motivation<sup>604</sup>
- costs to Victoria Police, which could be substantial because of:<sup>605</sup>
  - Ms Gobbo's loss of income as a result of being unlikely to continue working as a lawyer
  - her relocation if the extent of her role became known

- the risk to her safety, including death or serious injury, as she did not want to enter the full Witness Protection Program<sup>606</sup>
- concerns about her physical and mental health.<sup>607</sup>

Mr Porter signed off on the Biggin memo on 5 January 2009. Mr Biggin collected it and delivered it to Mr Buick, then Mr Moloney's staff officer.<sup>608</sup> Mr Moloney agreed in evidence to the Commission that the SWOT analysis raised very major concerns for Victoria Police and major risks for Ms Gobbo's transition to a witness. For that reason, he said he took the document to Mr Overland with the intention that it be tabled for consideration at the Petra Taskforce Board of Management meeting,<sup>609</sup> scheduled for 4.00pm that day.<sup>610</sup> Mr Buick documented this in the correspondence log.<sup>611</sup>

Mr Overland told the Commission he could not recall the 5 January 2009 Board of Management meeting or seeing the Biggin memo or SWOT analysis, but accepted that the evidence suggested he did receive it.<sup>612</sup> He understood that these were general concerns about Victoria Police having used a barrister as a human source, and that he had always thought this could be an issue at trial.<sup>613</sup> He claimed that he did not know that Ms Gobbo's role as a human source had not previously been disclosed to a court.<sup>614</sup> He thought he discussed the issues with Mr Ashton but could not recall the detail.<sup>615</sup>

Counsel Assisting put to Mr Overland that the SWOT analysis should have immediately been provided to the OPI. He responded that if it was taken to the Board of Management, Mr Ashton would have seen it.<sup>616</sup> He also did not consider it necessary to brief Ms Nixon, this being an operational matter,<sup>617</sup> even after Counsel Assisting pointed out that the SWOT analysis raised broader matters of concern to a Chief Commissioner, such as OPI or government inquiries being undertaken or verdicts being overturned.<sup>618</sup> Mr Overland did not accept that the SWOT analysis warranted analysis or investigation to determine if there was substance to the concerns it raised.<sup>619</sup>

In his responsive submissions, Mr Overland did not accept Counsel Assisting's proposition that it would be clear to anyone reading the SWOT analysis that Ms Gobbo's role had not previously been disclosed to a court. He said risks relating to OPI review, appeals and unsafe verdicts were related to criminal defence barristers defending matters vigorously, including making suggestions of improper police conduct.<sup>620</sup> He highlighted his evidence to the Commission that while he could not recall seeing the SWOT analysis, he was aware of the risks, thought they were being managed, and considered that transitioning Ms Gobbo from human source to witness and getting her into witness protection was the sensible thing to do.<sup>621</sup>

Mr Moloney told the Commission that he recalled attending the 5 January 2009 Petra Taskforce Board of Management meeting. He thought the Biggin memo and SWOT analysis were tabled and the issues they raised discussed by Mr Overland, Mr Ashton and him.<sup>622</sup> He said he had a recollection of Mr Overland speaking generally to the content of the documents and saying words to the effect that he was aware of the issues raised, but they only came from one perspective. He could not remember the issue of a possible OPI review being raised, or whether Mr Ashton read the document.<sup>623</sup> He recalled that there was no real consideration of the documents beyond Mr Overland reading them and making comments.<sup>624</sup> Mr Moloney said that to the best of his recollection Mr Overland, as head of the Petra Taskforce, made the decision for Ms Gobbo to become a witness, after discussion with the Board of Management.<sup>625</sup> Mr Moloney said he did not consider that this evinced a governance problem: Mr Overland was entitled to make this decision.<sup>626</sup>

In responsive submissions, Mr Moloney asserted that it cannot be inferred he had adequate time to consider the contents of the SWOT analysis to the level of detail assumed; he reviewed it only in sufficient detail to recognise the issues raised warranted consideration by the Petra Taskforce Board of Management.<sup>627</sup> He said that as a relatively new member of the Board, he had limited knowledge of Ms Gobbo's informing, did not know that the Purana Taskforce used her intelligence, and was not involved in discussions about non-disclosure of her history—he considered this a risk to be considered in relation to her becoming a witness.<sup>628</sup>

Mr Ashton's evidence to the Commission was that, while aware of the SDU's resistance to Ms Gobbo becoming a witness based on safety concerns, he did not recall the 5 January 2009 meeting<sup>629</sup> and nor did he recall having read the Biggin memo or the SWOT analysis. He said that as the SWOT analysis referred to the OPI, this was something he would have remembered;<sup>630</sup> that as the then Assistant Director of the OPI, he would have questioned what was going on with the human source that could make it necessary for the OPI to conduct a review;<sup>631</sup> that he should have been shown the document;<sup>632</sup> that relevant officers would have had an obligation to notify the OPI; and that he believed the document should also have been provided to the Chief Commissioner.<sup>633</sup>

Mr Ashton's responsive submissions stated that he did not receive or read the SWOT analysis, and that the evidence is unequivocal that its contents were not read out to or addressed at the meeting. Mr Ashton submitted that any suggestion he should have reacted as if he had seen it should be rejected for being based on incorrect hypotheses: that he knew Ms Gobbo was a human source in 2006; and that he learned of the nature of her relationship with police through attendance at Petra and Briars Taskforce meetings.<sup>634</sup>

## Summary of conduct

Having considered the evidence and relevant responsive submissions, the Commission is satisfied that Mr Overland was given the Biggin memo and SWOT analysis, noting Mr Moloney's account and supporting documentary evidence.

The Commission finds that it would or should have been clear to anyone who read the SWOT analysis, or knew of the concerns raised therein, that Ms Gobbo's role as a human source had not previously been disclosed in court proceedings. The Commission is not persuaded by Mr Overland's responsive submissions on this matter and considers that if her use had been condoned by the courts, many of the risks identified would already have been dealt with.

Given the senior roles Mr Overland and Mr Moloney held within Victoria Police and the serious matters raised in the SWOT analysis and Biggin memo, the Commission considers that they should have, but did not: seek legal advice; follow up with Mr Biggin or the SDU as to the serious concerns raised in the documents; or report the matter to the OPI or the Chief Commissioner. The Commission finds that these were serious failings on the part of Mr Overland and Mr Moloney.

The Commission considers that, on the evidence before the Commission, the SWOT analysis and Biggin memo were not shown to Mr Ashton, given his evidence and that of Mr Moloney, who could not recall Mr Ashton reading the documents. The Commission is not persuaded that not showing the documents to Mr Ashton in his OPI role was a deliberate decision on the part of Mr Overland and Mr Moloney.

Mr Ashton also submitted that 'no comment or finding' and, in particular, no 'adverse finding' should be made about his conduct while at the OPI.<sup>635</sup> As Mr Ashton has rightly acknowledged, however, matters that came to his attention while he was an OPI officer may be relevant both to his subsequent conduct as a Victoria Police officer (from December 2009 until June 2020); and may be otherwise relevant to the Commission's terms of reference.<sup>636</sup>

While the Commission is not empowered to inquire into the OPI,<sup>637</sup> as is the case with the Briars Taskforce outlined below, Mr Ashton's conduct on the Petra Taskforce Board of Management is clearly relevant to, and intertwined with, the conduct of Victoria Police and potentially affected cases. What can be said is that these events throw doubt on the wisdom of the combined operations between Victoria Police and the OPI at this time, given the OPI's primary role as an independent police oversight and anti-corruption body.

Mr Ashton may not have known the full extent of Ms Gobbo's duplicitous role, but from earlier discussions regarding Operation Khadi outlined above, he knew she was a criminal defence barrister who had operated for an extended period as a Victoria Police human source under the supervision of the SDU. He should have known that this inherently problematic situation warranted urgent legal advice as to its propriety and that it may very well raise issues requiring the OPI's investigation and oversight. Mr Ashton's omission to investigate the propriety of Ms Gobbo's use as a human source was a lost opportunity for the OPI to perform its independent oversight function.

## Ms Gobbo signs her witness statement

On 7 January 2009, Ms Gobbo signed her statement.<sup>638</sup> Prior to signing, she told Mr O'Connell about her history with Victoria Police.<sup>639</sup> She said she had been in close contact with the SDU since September 2005, and while originally she was only to provide information on the Mokbel family, this developed much further. She told Mr O'Connell:

*Just snowballed, um, in a massive way and then things fell into my lap. Um, all of a sudden there were people telling me about murders ... you name it. And it just, what I thought was going to finished in a certain period of time just went on and on and on. When a number of families kind of, you known, from celebrated all the MOKBELs were locked up and all of a sudden Mick [Gatto] started ringing me and that was like, well, how can we ignore, um, my instructions [from Ms Gobbo's handlers] kind of changed to stop asking those people questions to stop trying to find things out just didn't work. And even doing that, Shane, they're still, um, the information I was getting was still sufficiently valuable.<sup>640</sup>*

She told him that she had represented many people where she had a conflict of interest, including the Mokbels, Mr Cooper, Mr Thomas, Mr Gatto, Mr Orman and clients involved in the Tomato Tins drug syndicate cases. She spoke of her fears that disclosure subpoenas and cross-examination might result in revealing her human source status. Concerningly, Mr O'Connell said they might need to work on structuring an answer for cross-examination that left things vague and open.<sup>641</sup> They also spoke about Ms Gobbo's dealings with the SDU in relation to Mr Dale, including her providing a copy of Mr Dale's instructions to Mr Ryan through the SDU.<sup>642</sup>

In his evidence to the Commission, Mr O'Connell agreed that Ms Gobbo had told him concerning things but did not feel he needed to consider these matters further before she signed her statement.<sup>643</sup> When asked why he did not take these concerns to his superiors, he said he understood that senior officers on the Petra Taskforce Board of Management knew of Ms Gobbo's role, and he believed that it was being dealt with elsewhere.<sup>644</sup> On 1 February 2009, Ms Gobbo told him she initially tried to limit the information she provided to police to non-privileged material but over time it became too hard to tell half the story. Mr O'Connell could not recall that conversation but repeated his view that others were dealing with it.<sup>645</sup>

Counsel Assisting put to Mr O'Connell that, if this information from Ms Gobbo was disclosed to the defence, it would have seriously compromised the case against Mr Dale. He said it was ultimately a decision for a senior Crown Prosecutor to assess the strength of the evidence and added that he could not recall if he provided the material to the DPP.<sup>646</sup>

The Commission considers that Mr O'Connell should have ensured the concerning information Ms Gobbo told him was given to the DPP, or at least his superior officers, to consider whether it needed to be disclosed to the defence.

## Ms Gobbo deregistered as a human source and Mr Dale charged

On 12 January 2009, Ms Gobbo met with her SDU controller and handlers for the last time.<sup>647</sup> She told them that she signed the statement for the Petra Taskforce because she had received all the promises she wanted from Mr O'Connell.<sup>648</sup> Mr O'Connell later refuted her assertion in her civil proceedings against Victoria Police that he had said words to the effect that she 'would be looked after' or 'would be no worse off financially'.<sup>649</sup>

On 13 January 2009, Ms Gobbo was finally deregistered as a human source.<sup>650</sup>

Mr Cornelius told the Commission that, upon his return from leave, he was told nothing of the process that had occurred for Ms Gobbo to become a witness; nor was he aware of any resistance to it. He said he would have been interested in a debate on the merits of Ms Gobbo's transition to witness and that he would have wanted a risk assessment.<sup>651</sup> It is unclear whether Mr Cornelius sought any update on the deliberations of the Board of Management or on significant documents tabled in his absence.

Mr Dale was arrested on 13 February 2009 and charged with the Hodson murders.<sup>652</sup>

On 31 March 2009, Mr Overland chaired the Petra Taskforce Board of Management meeting for the last time, having been appointed Chief Commissioner of Victoria Police on 2 March 2009. Mr Cornelius took over as Chair.<sup>653</sup>

## Witness protection and civil litigation

At its 22 January 2009 meeting, the Petra Taskforce Board of Management was informed that Ms Gobbo's application was submitted to the Witness Security Unit and she had written a letter outlining her needs and requirements for participation in the Witness Protection Program.<sup>654</sup> She provided documentation to support her claims that she had lost the chance of 'becoming a QC and being appointed to a Court in a few years' time'.<sup>655</sup>

Mr Findlay (Fin) McRae, Executive Director of Legal Services, engaged the VGSO on behalf of Victoria Police on 23 January 2009 to assist with negotiations.<sup>656</sup>

Discussions about her entering the Witness Protection Program continued between Victoria Police and Ms Gobbo, with Mr Overland kept informed of progress; or rather, the lack of it.<sup>657</sup>

On 4 June 2009, then Deputy Commissioner Kieran Walshe signed a letter to Ms Gobbo, prepared by the VGSO and reviewed by Mr McRae and Inspector Geoffrey Always of the Witness Security Unit, that insisted she enter the Witness Protection Program, listing threats to her and her family and the high risk to their safety. It required her to first enter a memorandum of understanding detailing the protection and assistance to be provided.<sup>658</sup> Mr McRae and Mr Wilson delivered the letter to Ms Gobbo the next day. Mr McRae told the Commission he had the impression she would never enter witness protection.<sup>659</sup>

At around this time, advice was sought from barrister Mr Peter Hanks, QC regarding potential payments to Ms Gobbo and whether PII could prevent disclosure of this.<sup>660</sup> On 5 August 2009, the VGSO emailed the Witness Security Unit and Mr McRae with Mr Hanks' advice, which indicated that PII could not prevent disclosure of the terms of financial assistance during cross-examination.<sup>661</sup>

An extraordinary 'urgent' meeting, of the Petra Taskforce Board of Management was called later that morning.<sup>662</sup> Mr Steven Smith noted Ms Gobbo was 'refusing to budge' on her demands regarding entering witness protection and was 'making noises' about not giving evidence on medical grounds.<sup>663</sup> They also discussed compensation and Mr Hanks' advice.<sup>664</sup>

On 26 August 2009, Mr Walshe signed a second letter seeking Ms Gobbo's urgent acceptance of an offer to participate in the Witness Protection Program.<sup>665</sup> It was delivered the next day and offered financial assistance of \$1,000 per week towards her living expenses.<sup>666</sup>

On 7 September 2009, at the start of a Petra Taskforce Board of Management meeting, Mr Steven Smith gave Mr Cornelius a copy of a letter from Ms Gobbo to Mr Overland<sup>667</sup> threatening legal action by 14 September 2009.<sup>668</sup> The letter asserted that:

- Ms Gobbo had provided unprecedented assistance to Victoria Police from 2005 to 2009, leading to the prosecution of numerous organised crime figures.
- She was concerned that a PII claim would expose her as a human source.
- She was concerned that her previous and current assistance to Victoria Police should not be disclosed.

Mr Overland, Mr Cornelius and Mr Smith were, at least by 7 September 2009, clearly on notice of the nature and extent of Ms Gobbo's assistance to Victoria Police. Armed with this information, and taking into account their ranks and responsibilities, their failure to explore and address the obvious issues and risks raised—which in their evidence they often said 'would be' of concern—seems grossly unsatisfactory.

Mr Overland told the Commission that he would have seen this letter and was cognisant of the length of time Ms Gobbo had been informing and the cases in which she had been involved. He thought it inevitable her role would be discovered if it had not been already.<sup>669</sup> In his responsive submissions, however, he disagreed with the proposition that upon reading the letter he would have been aware that Ms Gobbo's role had not been disclosed previously during legal proceedings. He noted he was very busy as Chief Commissioner and that it had been referred to Mr McRae to deal with and could be read consistently with disclosure having been properly made.<sup>670</sup>

Mr Cornelius told the Commission he did not have time to read Ms Gobbo's letter of 7 September 2009 because he received it just before the Petra Taskforce Board of Management meeting.<sup>671</sup> He recalled Mr Smith briefing the Board on the content of the letter, and agreeing that Mr McRae would prepare a response. He claimed not to remember reading the letter after the meeting and agreed that the matters referred to in it would have 'leapt out at him'.<sup>672</sup> He did not recall any detailed involvement in developing the response, relying on Mr McRae and the VGSO for this.<sup>673</sup> Mr Cornelius raised similar issues in his responsive submissions.<sup>674</sup>

Given Mr Cornelius' senior role, it is likely he read and understood the effect of the letter, particularly as he attended meetings at the Chief Commissioner's office the next day,<sup>675</sup> the VGSO the following day,<sup>676</sup> and on 14 September 2009 another meeting with Mr McRae, Mr Smith and the Witness Security Unit,<sup>677</sup> the same day Mr Walshe signed Victoria Police's third letter to Ms Gobbo.<sup>678</sup>

The Commission is satisfied Mr Cornelius probably read the letter, and if he did not, he should have.

Given the letter's terms, Mr Cornelius' experience, his position as head of the ESD and his legal qualifications, the Commission is satisfied he must or should have appreciated that Ms Gobbo's role as a human source had not then been exposed during any legal proceedings. He should have immediately ensured that proper measures had been or were taken, so that Victoria Police met all disclosure obligations to those whose cases required it. At a minimum, he should have obtained legal advice, easily accessible through his regular contact with Mr McRae and the VGSO.

Mr McRae told the Commission he made hand-written annotations on the letter and scanned it with a view to understanding why Ms Gobbo was threatening to sue Victoria Police but did not read it 'word for word'.<sup>679</sup> He claimed not to recall reading the references to her 'previous unprecedented assistance (2005–09)' at this time; if he did, he said he ascribed no significance to it. He understood that Ms Gobbo's assistance was limited to her role as a Petra Taskforce witness and had been told she had a tendency to exaggerate.<sup>680</sup> In responsive submissions, Mr McRae raised similar issues, adding that the meeting on 9 September 2009 with Mr Cornelius, VGSO and others to discuss how to respond to the letter, was focused on her safety.<sup>681</sup>

As Victoria Police's most senior in-house lawyer involved in drafting the response to Ms Gobbo's letter and given his annotations on the letter and its astonishing content, the Commission is satisfied Mr McRae probably read the letter carefully and sought instructions about her claim of giving 'previous unprecedented assistance' from 2005 to 2009. If he did not, he should have.

During October and November 2009, negotiations with Ms Gobbo about the Witness Protection Program continued. On 9 October 2009, Mr Wilson and Mr Smith agreed with Ms Gobbo and her lawyer to negotiate her loss of earnings claim.<sup>682</sup> Later that month, she provided a draft memorandum of agreement that referred to her assisting Victoria Police beyond the Petra Taskforce<sup>683</sup> and her agreement to give evidence in the prosecution of the Chartres-Abbott murder, and perhaps other investigations.<sup>684</sup>

On 16 November 2009, Mr McRae, Mr Cornelius, Mr Smith and a VGSO lawyer discussed this draft memorandum of agreement.<sup>685</sup> The VGSO file note from the meeting recorded discussion about her other assistance; and that Mr Cornelius made a phone call about her assistance in other matters and instructed them to amend the agreement to refer only to the major matter.<sup>686</sup> Mr Cornelius told the Commission he could not recall who he had phoned, and that the reference to broader assistance did not trigger further enquiries as he considered it irrelevant to the Witness Protection Program.<sup>687</sup>

Counsel Assisting suggested to Mr McRae that the draft memorandum of agreement indicated that Ms Gobbo's relationship with Victoria Police was not simply as a witness against Mr Dale. He responded that he was told Ms Gobbo was 'prone to having discussions with police'.<sup>688</sup> Asked whether he enquired about what other assistance she was providing, he replied that Mr Cornelius had 'nipped it in the bud', confining the draft agreement back to the major matter.<sup>689</sup> Mr McRae told the Commission that the situation of getting this information was a 'jigsaw puzzle', where 'everyone has a part of the puzzle':

*The VGSO are dealing with bits and pieces of public interest immunity applications. The investigators are dealing with their parts in the investigation and it seems that no one is across everything, even Luke [Cornelius], who to me just is incredible, has an incredible capacity to keep across things, takes copious notes and is very particular.*<sup>690</sup>

On 16 December 2009, the VGSO drew Mr McRae's attention to a recent decision in *R v Moti*,<sup>691</sup> where the court granted a permanent stay of proceedings because AFP payments to members of the alleged victim's family, who were prosecution witnesses, had brought the administration of justice into disrepute.<sup>692</sup> Mr McRae wanted to ensure that Mr Overland and Mr Ashton were aware of the similarities between the conduct explored in *R v Moti* and payments to Ms Gobbo, and perhaps others, such as those made to Mr Williams.<sup>693</sup>

Mr McRae conferred with the then DPP, Mr Jeremy Rapke, QC, on the *R v Moti* issue, and also received advice from Mr Hanks.<sup>694</sup> Mr McRae told Ms Gobbo's lawyers on 4 January 2010 that Victoria Police could not progress discussions regarding final compensation for Ms Gobbo's loss of income while she was a witness, but would continue to provide a 'retainer' (\$1,000 a month living expenses).

On 20 January 2010, Mr Cornelius and Mr McRae met with Mr Rapke, who advised that the only acceptable payments to witnesses were to cover subsistence living expenses and Ms Gobbo should be told to enter the Witness Protection Program on Victoria Police's terms or not at all.<sup>695</sup>

## Mr Paul Dale's subpoena

On 27 January 2010, Mr Dale served a subpoena on the Chief Commissioner requiring the production of all documents concerning Ms Gobbo and any agreement with police to provide inducements to her giving evidence.<sup>696</sup> The VGSO and Mr Gipp thought the broadly cast subpoena would likely capture documents about payments and witness protection negotiations, and advised to claim PII on yet undefined grounds.<sup>697</sup> On 8 February 2010, Ms Gobbo's solicitors wrote to the VGSO demanding a copy of the Dale subpoena.<sup>698</sup>

Over the following weeks, Victoria Police, with involvement of Mr McRae and Mr Cornelius, negotiated with Mr Dale's lawyer about the subpoena.<sup>699</sup> Police foreshadowed PII claims over many documents.<sup>700</sup> On 19 February 2010, Mr Gipp told Mr Dale's lawyer he anticipated the defence would receive only one folder of additional

documents. Mr Dale's lawyer was surprised and concerned about the police redactions. Mr Gipp said he had instructed police to be circumspect and only make genuine claims, and that if there was a dispute, the magistrate would be provided with the material. With Ms Gobbo's credit as a very live issue, Mr Dale's lawyer foreshadowed debate about redactions.<sup>701</sup>

On 26 February 2010, Ms Gobbo's lawyers, equally concerned about disclosure, wrote to:

- the OPP stating that she was medically unfit to give evidence<sup>702</sup>
- the VGSO, stating that she no longer wanted to participate in the Witness Protection Program and demanded Victoria Police pay her the promised compensation.<sup>703</sup>

Mr Cornelius was concerned that these demands may impact on her credit as a witness in Mr Dale's upcoming committal,<sup>704</sup> and on 1 March 2010 he, Mr McRae and Mr Smith met with the DPP. Mr Cornelius told the Commission he could not recall any discussion about Ms Gobbo's identity as a human source.<sup>705</sup>

The Commission considers that Mr Cornelius and Mr Smith knew that there was a more significant issue relating to Ms Gobbo's credit than compensation. This was an opportunity that neither officer took to fully disclose to the DPP and VGSO Ms Gobbo's broader involvement with Victoria Police or to obtain advice about what disclosure needed to be made to other people affected by it.

## Concerns about disclosure

Mr Dale's lawyer wrote to the VGSO on 1 March 2010, querying the paucity of material in response to the subpoena, the substantial redactions and unproduced documents, particularly letters from Ms Gobbo to the VGSO. He confirmed the credit of Ms Gobbo and Mr Williams were central issues for the defence, who would be seeking every document relating to discussions and negotiations between Ms Gobbo and Victoria Police regarding the Dale investigation and her agreeing to give evidence.<sup>706</sup>

The VGSO sent the letter to Mr Gipp, who forwarded it to Mr Davey of the Petra Taskforce to coordinate a response, expressing concern that if there were documents Victoria Police had not told him about, it would look like Victoria Police was hiding material from the defence.<sup>707</sup> Mr Davey sent it to Mr Steven Smith noting Mr Gipp's concerns, and querying whether Mr Overland may have notes regarding negotiations with the Australian Taxation Office (a specific matter in contention).<sup>708</sup> Mr Davey's email reached, among others, Mr Overland, who replied that he had no documents fitting that description.<sup>709</sup>

In his responsive submissions, Mr Overland contended that he was not 'very aware' of other relevant documents in the form of letters from Ms Gobbo regarding negotiations that should have been provided to Mr Gipp.<sup>710</sup>

While Mr Overland may have read this query as being limited to Australian Taxation Office documents, the email and attached letter made clear that Mr Dale was seeking a much wider category of documents and that Mr Gipp wanted all relevant material. Mr Overland was certainly aware of other documents highly relevant to Ms Gobbo's credit, including Ms Gobbo's correspondence with him about her negotiations with Victoria Police. Mr Overland should have provided these and the other relevant documentation concerning Ms Gobbo in the possession of Victoria Police to Mr Gipp for PII assessment. Had he provided this material, it is likely that Ms Gobbo's role with Victoria Police as a human source would have been exposed and dealt with earlier.

Having considered those submissions, given Mr Overland's then role as Chief Commissioner with ultimate responsibility for complying with disclosure subpoenas, his considerable knowledge of and involvement in the matter, and his legal training, the Commission finds that he failed in ensuring Victoria Police met its disclosure obligations.

## Committal commences and human source file sought

On 9 March 2010, the committal for Mr Dale and his co-accused, Mr Rodney Collins, commenced.<sup>711</sup> The Magistrate stood the matter down for the parties to negotiate an outcome on PII claims based on witness safety and informer privilege.<sup>712</sup> Mr Gipp told the Court that agreement had been reached on some things and they would attempt to further narrow the materials subject to PII claims and produce those documents with a confidential affidavit.<sup>713</sup>

On 10 March 2010, after consulting Victoria Police policies, Mr Dale's lawyer told Mr Gipp that, as Victoria Police was relying on informer privilege in their PII claims over relevant material, Ms Gobbo must have a human source file. Mr O'Connell told Mr Gipp she had been a registered human source beforehand and there was probably a source file, but that those matters were not relevant to Mr Dale's prosecution. Mr Gipp asked Mr O'Connell to check whether there was a human source file.<sup>714</sup>

In responsive submissions, Mr O'Connell stated that he responded to Mr Gipp's questions quickly and efficiently and having identified that the file existed and contained relevant material, he immediately told Mr Gipp and sought his advice.<sup>715</sup> The Commission notes, however, that Mr O'Connell had spoken to Ms Gobbo about her history on 7 January 2009; he should have known then that there could be material highly relevant to Ms Gobbo's credit, and discussed this with Mr Gipp earlier.

Following his discussion with Mr Gipp, Mr O'Connell met with Mr White and Mr Steven Smith on 10 March 2010. Mr White's diary entry noted his view that if Ms Gobbo was not planning to give evidence due to health concerns (which she had raised), discussing PII issues was a waste of time. Nonetheless, Mr Steven Smith was to make a written request to Mr Porter, and the SDU would search for references to Mr Dale.<sup>716</sup> It also noted that the defence was entitled to know if she made prior inconsistent statements and that:

*Revealing fact that HS was a HS several years prior to involvement with Petra will compromise same and confirm her police assistance at the time of the MOKBEL investigation.*<sup>717</sup>

Mr O'Connell's diary note of the meeting included 'Insist on non-disclosure of all material re PII—identify F' (Ms Gobbo).<sup>718</sup>

Mr Gipp later rang Mr Dale's lawyer and told him that further documents had been identified but did not confirm that a human source file had been located.<sup>719</sup>

On 11 March 2010, Mr Steven Smith emailed Mr Porter, Superintendent of the HSMU, copying in Mr O'Connell, explaining the situation, and requesting access to Ms Gobbo's human source file so that the Petra Taskforce could negotiate any production, redacted or otherwise, indicating he would bring it to the attention of the 'Steering Committee'.<sup>720</sup>

Mr Steven Smith's diary recorded later that day he spoke to and updated Mr Cornelius on matters including the human source file.<sup>721</sup> In his evidence to the Commission, he said he would have told Mr Cornelius about the defence request for the file and that he had spoken with Mr White and the HSMU about it.<sup>722</sup> The following day, Mr Smith met with Mr Cornelius and Mr McRae to update them on the Dale committal, subpoena and a suppression order application regarding Ms Gobbo. He told the Commission they were aware that Ms Gobbo had been a registered human source and that this may have an impact on her evidence. He accepted that his meeting with Mr White showed there had been no effort before the committal to obtain relevant documents from the SDU.<sup>723</sup> He recalled that during this period, there was discussion about whether Ms Gobbo's human source status needed to be disclosed, possibly at the Petra Taskforce Board of Management meeting.<sup>724</sup>

Mr Cornelius said he had no recollection or records of an issue relating to Ms Gobbo's human source file being raised with him.<sup>725</sup>

At the end of March 2010, barrister Ms Lucia Bolkus, who police had retained to assist with the matter, reminded Mr O’Connell of Victoria Police’s disclosure obligations. In response to an email from Mr O’Connell stating that police do not comment on the existence of a human source file and asking her to contact Mr Dale’s lawyer to ascertain exactly what type of material he was looking for,<sup>726</sup> Ms Bolkus replied:

*Shane and Greg*

*Any conversations between [Ms Gobbo] and police relevant to “any disclosures made by [Ms Gobbo] in relation to Paul Dale and the Hodson murders” do come within the terms of the subpoena.*

*That is what the defence are entitled to.*

*Lucia.*<sup>727</sup>

On 31 March 2010, Mr White told Mr O’Connell the SDU material was ready for PII assessment by the Petra Taskforce. Mr O’Connell responded that the SDU’s material was not currently required as the defence had been directed to specify exactly what they wanted in new subpoenas. He thought there was a possibility that records relating to only Ms Gobbo’s witness management might satisfy the new request.<sup>728</sup> Mr O’Connell told the Commission he could not recall the meeting with Mr White.<sup>729</sup>

This exchange reflects Mr O’Connell’s and Victoria Police’s unsatisfactory approach to their disclosure obligations, despite being given clear and recent advice by Ms Bolkus as to what was required.

The committal proceedings against Mr Dale and Mr Collins recommenced on 12 April 2010, but on 19 April 2010, the prosecution’s star witness, Mr Williams, was murdered.<sup>730</sup> On 7 June 2010, the murder charges against Mr Dale and Mr Collins were formally withdrawn.<sup>731</sup>

Mr Dale’s legal representatives had come close to exposing some of the truth about Ms Gobbo’s relationship with Victoria Police. The Commission considers that, had Mr Dale’s committal proceeding continued, disclosure arguments about Ms Gobbo’s role as a human source with Victoria Police would have been raised, at least with Victoria Police’s lawyers and the court. The disclosure issues ultimately decided by the *AB v CD* proceedings may have been determined in 2010 rather than 2018.<sup>732</sup>

## BRIARS TASKFORCE

In 2007, Ms Gobbo was also involved in another high-profile investigation involving allegations of police corruption, the Briars Taskforce, as discussed below.

On 4 June 2003, Mr Shane Chartres-Abbott was murdered as he left his home to attend court. He was facing serious charges of sexual violence. The media had labelled Mr Chartres-Abbott the ‘vampire gigolo’ because of the details of his alleged offending.<sup>733</sup>

Around May 2006, convicted gangland murderer, Mr Gregory (a pseudonym), told police he shot Mr Chartres-Abbott and implicated others, including Mr Evangelos Goussis, Mr Warren Shea and Mr Mark Perry, the boyfriend of Chartres-Abbott’s alleged victim.<sup>734</sup> In early 2007, he also implicated former police officer, Mr Waters, and serving officer, then Detective Sergeant Peter Lalor, alleging:

- Mr Lalor gave him Mr Chartres-Abbott's address through Mr Waters
- Mr Waters and Mr Lalor knew he intended to kill Mr Chartres-Abbott when they provided the information
- Mr Lalor executed a search warrant on him on the day of the murder to provide him with an alibi.<sup>735</sup>

Investigators would have known they needed persuasive corroboration of Mr Gregory's statements, as he was a career criminal with a reputation for being manipulative.<sup>736</sup>

Ms Gobbo had social and professional relationships with key players in the investigation. On 1 April 2007, she told the SDU she had met Mr Waters at the South Melbourne Anglers Club and he expressed concern about what Mr Gregory was saying.<sup>737</sup>

## Establishment of Briars Taskforce

Before any suggestion of police involvement in the Chartres-Abbott murder, the Purana Taskforce was investigating it through Operation Clonk.<sup>738</sup> Over January and February 2007, Victoria Police assembled the Briars Taskforce. Ms Nixon raised the need for it to have access to legal advice and Mr McRae briefed the VGSO.<sup>739</sup> This suggested that, consistent with her evidence, had Ms Nixon known of the risks posed by police's use of Ms Gobbo as a human source, she would also have sought legal advice.<sup>740</sup>

The question whether Mr Overland told Ms Nixon that Ms Gobbo was a human source was contested. Ms Nixon told the Commission she did not recall knowing that Ms Gobbo was a human source until it was made public.<sup>741</sup> Mr Overland initially agreed he did not tell her about Ms Gobbo's role as a human source but when his missing diaries emerged, he found a diary note of 29 September 2005, which recorded that he told Ms Nixon about '3838'; he therefore thought he did tell her.<sup>742</sup> The Commission accepts the accuracy of the diary entry, but it reveals only that they had a conversation about 3838. It is not possible to conclude whether Mr Overland told her the identity of 3838 or that they were a criminal defence barrister, although it would seem likely that Ms Nixon would have recalled such an extraordinary revelation.

Once police involvement was alleged, the OPI and Victoria Police discussed a joint operation to investigate this matter.<sup>743</sup> On 26 February 2007, Ms Nixon, Mr Overland and Mr Cornelius met with the then Director of the OPI, Mr George Brouwer, and Assistant Director of the OPI, Mr Ashton, and agreed to take a joint approach to the investigation.<sup>744</sup>

On 22 March 2007, Mr Cornelius and Mr Ashton signed the Briars Taskforce Joint Agency Agreement on behalf of Victoria Police and the OPI. It included a Board of Management comprising Mr Overland, Mr Cornelius and Mr Ashton, that was to meet weekly and coordinate the operation, enhance cooperation and monitor results.<sup>745</sup>

Mr Ashton stopped keeping a contemporaneous hand-written diary from 21 February 2007 until 2 July 2008. He outlined his reasoning:

*In light of recognition of weaknesses in OPI subpoena provisions. I took a decision not to retain an official diary until the matter was clarified. That was done on 1 July '08. Now that OPI has adequate subpoena protection I will resume my official diary. For matters in the intervening period I refer to correspondence and my electronic diary.*<sup>746</sup>

As Mr Ashton stated, in 2008 the law was changed to address the concerns about OPI subpoena provisions. The Commission notes, however, that the Minister's second reading speech to the amending legislation stated that the OPI could claim common law PII; consequently, the OPI was not without protection.<sup>747</sup> There was no evidence before the Commission that other OPI officers involved in the Briars Taskforce stopped making contemporaneous notes and/or a handwritten diary.<sup>748</sup>

In responsive submissions, Mr Ashton contended that the gaps in the legislative framework before the 2008 amendments were a ‘good reason’ to stop keeping a diary.<sup>749</sup> While he accepted that a PII claim could have been made under the common law, he said the fact that the legislation was amended demonstrates that there was a reasonable and rational basis for his conduct,<sup>750</sup> and that he was acting in good faith when he stopped keeping a diary.<sup>751</sup>

Mr Ashton also claimed that his decision not to keep a diary during this period fell outside the Commission’s terms of reference.<sup>752</sup> As noted above, the Commission cannot inquire into or exercise its coercive powers over the OPI or its former officers.<sup>753</sup> Mr Ashton’s conduct as part of the Briars Taskforce Board of Management, however, is highly relevant to, and intertwined with, the conduct of Victoria Police officers and the use and management of Ms Gobbo as a human source. This is because the decisions made by the Briars Taskforce Board of Management involved senior Victoria Police officers and directed the conduct of the many officers who reported to it.

After considering Mr Ashton’s submissions and evidence,<sup>754</sup> the Commission concludes that his contemporaneous notes and electronic diary during this period concerning the Briars Taskforce Board of Management did not always amount to adequate record keeping. His important office required him, in the interests of accountability and transparency, to accurately record his actions in a timely way so that he could later properly report on them. It would be for a court to determine whether disclosure of those diary notes was contrary to the public interest. It appears to the Commission that Mr Ashton was not justified in ceasing to keep contemporaneous diary notes concerning an ongoing investigation that he was overseeing. This is regrettable, as it may have meant that matters that should have been disclosed were not, even to a court determining PII claims.

## The tasking of Ms Gobbo

The Briars Taskforce’s interest in Ms Gobbo began in April 2007 when Detective Inspector Stephen (Steve) Waddell discovered she was in contact with Mr Waters.<sup>755</sup> At this stage, the SDU was looking to ease her out.<sup>756</sup> In July 2007, Mr White and Detective Senior Sergeant Ronald (Ron) Iddles, OAM, APM discussed the viability of tasking her to give Mr Waters information.<sup>757</sup>

In early September 2007, SDU and Briars Taskforce officers further discussed plans to use Ms Gobbo to pass information to Mr Waters.<sup>758</sup> Around this time, Ms Gobbo and Mr Waters were in contact, first at Ms Gobbo’s and then at Mr Waters’ instigation regarding his summons to an OPI examination the following week.<sup>759</sup> Ms Gobbo suspected that he would seek her advice after the hearing.<sup>760</sup> On 10 September 2007, following further discussions, Mr Iddles emailed Mr White requesting that Ms Gobbo pass on to Mr Waters information that Mr Gregory:

- would be charged with a murder related to a ‘vampire’
- made a statement implicating Mr Waters and Mr Lalor in preparing for the murder
- mentioned something about Mr Waters and Mr Lalor providing him with an address, and investigators were confident of charging them if they found the computer database source.<sup>761</sup>

The SDU tasked Ms Gobbo on 12 September 2007<sup>762</sup> and she reported the next day that she had passed on the information.<sup>763</sup> Further tasking occurred in October 2007.<sup>764</sup> This included Ms Gobbo telling Mr Waters that investigators met with Mr Gregory at least once a fortnight.<sup>765</sup>

At the end of October 2007, Ms Gobbo told her handler that Mr Waters was thinking of preparing a statement to read out if he was interviewed.<sup>766</sup> Ms Gobbo reviewed Mr Waters’ ‘full denial’ statement, first in-person and then on 7 November 2007 when he emailed it to her marked, ‘CONFIDENTIAL!!!!!!’.<sup>767</sup> The SDU officers told her that they did not want a copy of this document and they would not pass it on to investigators as it could form part of Mr Waters’ defence, wisely rejecting her claim that he gave it to her only as a friend.<sup>768</sup>

## Media leaks

In 2007, the Briars Taskforce investigation was burdened by various unwanted leaks to the media. An OPI investigation determined that these occurred when the then Media Director of Victoria Police, Mr Stephen Linnell, passed confidential information to Assistant Commissioner Noel Ashby, APM, who provided it to fellow officer and Secretary of The Police Association, Paul Mullett, APM.<sup>769</sup>

The OPI informally interviewed Mr Overland and Mr Cornelius about these leaks<sup>770</sup> but was not told that Ms Gobbo was a human source or that she had been tasked by the Briars Taskforce to leak what might otherwise be regarded as confidential information to Mr Waters.<sup>771</sup>

### Briars Taskforce speaks with Ms Gobbo

On 25 January 2008, Ms Gobbo reported to her SDU handler that Mr Waters had spoken to her about his prospective interview with the Homicide Squad, and that if charged, he would ring her for legal representation.<sup>772</sup> Despite Ms Gobbo's earlier insistence she was his friend not his lawyer, this should have indicated to the SDU that Mr Waters seemed to regard Ms Gobbo as a lawyer who would provide him with legal advice.<sup>773</sup>

By late 2008, the Briars Taskforce investigation had largely petered out<sup>774</sup> but on 16 March 2009, its Board of Management reconvened because a potential witness had come forward.<sup>775</sup> In March 2009, Mr Waddell contacted Mr O'Connell (who was now managing Ms Gobbo for the Petra Taskforce) about the Briars Taskforce obtaining a statement from her. Mr O'Connell said this would occur at the appropriate time.<sup>776</sup>

Mr Waddell presented an updated Briars Taskforce investigation plan to the Board of Management meeting on 6 April 2009.<sup>777</sup> In developing the plan, he spoke with Mr White, who emphasised the SDU did not want any link back to Mr Gobbo's 'historical activities' as 'it obviously opens up a whole can of worms'.<sup>778</sup>

During March and April 2009, Mr Waddell met with the SDU officers regarding access to their holdings on Ms Gobbo's contact with Mr Waters.<sup>779</sup> On 24 April 2009, they gave him a 43-page document containing all references to Mr Waters in Ms Gobbo's ICRs.<sup>780</sup> On 5 May 2009, Mr Cornelius recorded in the Petra Taskforce Board of Management meeting notes that the Briars Taskforce statement had been 'pencilled in' at a 'neutral venue'.<sup>781</sup> On 20 May 2009, Mr Cornelius approved Mr Waddell and Mr Iddles travelling to Bali, where Ms Gobbo was holidaying, to take the statement.<sup>782</sup>

They took Ms Gobbo through information she provided in January 2008 and, with this and the 43-page SDU document, drafted a statement.<sup>783</sup> One section was problematic. In 2008, Ms Gobbo had claimed that Mr Valos told her he had heard that Mr Lee Perry confessed to the murder,<sup>784</sup> a contention the investigators had largely debunked. By contrast, in May 2009 in Bali she told Mr Iddles and Mr Waddell that she herself heard Mr Perry confess.<sup>785</sup> On 27 May 2009, Mr Cornelius was advised that Ms Gobbo's statement was gaining strength and that she had received three death threats by text over the past 24 hours from a SIM card in a false name.<sup>786</sup> Mr Cornelius briefed Mr Overland, Mr Wilson and Mr McRae.<sup>787</sup>

Mr Waddell and Mr Iddles were concerned that, if Ms Gobbo became a witness, her role as a human source would be exposed in court proceedings. They sought advice from the Briars Taskforce Superintendent Mr Wilson, who instructed Mr Waddell to take the statement, explaining that this direction came from Mr Overland.<sup>788</sup> While Mr Waddell was expressing his concerns to Mr Wilson, Ms Gobbo told Mr Iddles about her extensive assistance to Victoria Police, including solving the gangland murders and the seizing of \$63 million of Mokbel assets.<sup>789</sup> Mr Iddles thought that if they took her statement and her role was exposed, there was a 'possibility of it all blowing up and ending in a Royal Commission'.<sup>790</sup>

## Source Development Unit concerns about exposing Ms Gobbo

On his return to Melbourne on 29 May 2009, Mr Iddles met with Ms Gobbo's handler, Mr Black, whose diary note recorded they discussed Ms Gobbo's likely exposure as a human source if she became a witness<sup>791</sup> and the concerns that 'disclosure' would 'initiate a Royal Commission with perceived unsafe verdicts' and that 'current arrests HS involved with may be subject to review'.<sup>792</sup>

No such alarm bells were ringing for Mr Cornelius. His notes from the 1 June 2009 Briars Taskforce Board of Management meeting included that Ms Gobbo's statement, while containing sufficient evidence to charge both Mr Perry and Mr Waters, had issues. Her latest version differed from her initial version. He noted that Mr Waddell wanted access to further SDU holdings before the statement could be settled.<sup>793</sup> Mr Waddell emailed Mr Cornelius that night, referring to the vast quantity of material provided by this source and seeking further filtering by specific names and locations.<sup>794</sup> Mr Cornelius, who told the Commission that at this time he thought Ms Gobbo's assistance was limited to the Briars Taskforce, said this did not raise any concern that she might have provided information beyond this.<sup>795</sup>

Mr Black raised concerns about the consequences of Ms Gobbo's exposure as a human source should she become a witness for the Briars Taskforce with his Inspector, Mr Glow, on 2 June 2009.<sup>796</sup> Concerns grew when they learned further SDU holdings were to be provided to the Taskforce.<sup>797</sup>

On 9 June 2009, Mr Porter discussed these matters with Mr Moloney to ensure the executive group understood the implications of their proposed course of action with Ms Gobbo.<sup>798</sup> They agreed to elevate the discussion and the following day senior officers for the Briars Taskforce and the HSMU met.<sup>799</sup> Mr Porter told the Commission that he spoke to a document, prepared by Mr Black, which raised similar issues to the earlier Petra Taskforce SWOT analysis.<sup>800</sup>

On 15 June 2009, Mr Porter and Mr Biggin met with SDU officers, with Mr Biggin recording that Mr Porter would persuade the Briars Taskforce Board of Management that Ms Gobbo making a statement was 'a dangerous decision' that could bring 'potential harm' to Victoria Police and that any 'PII application would probably fail given the circumstances surrounding' Ms Gobbo.<sup>801</sup>

In responsive submissions, Mr Porter stated he was involved in discussions between 2 and 15 June 2009 regarding the prospect of Ms Gobbo giving a statement to the Briars Taskforce and wanted to convey his concern about her being a witness to those making decisions about the Taskforce. He also contended that he briefed the Briars Taskforce about his concerns for Ms Gobbo's safety. Mr Porter was disappointed that his recommendation was not accepted.<sup>802</sup> He emphasised he was not aware of the specific information being provided by Ms Gobbo to the SDU and was satisfied the SDU was cognisant of and managing risks. Mr Porter said he had no reason to reconsider Ms Gobbo's initial risk assessment or to think that due process had not been followed. Further, he submitted that he had no oversight of Purana Taskforce investigations and the sterile corridor prevented him from obtaining information that was not within his line control.<sup>803</sup>

After considering the available evidence and Mr Porter's responsive submissions, the Commission is satisfied that by June 2009, he was aware that Ms Gobbo was a criminal defence barrister acting as a human source for Victoria Police, of his responsibilities to Ms Gobbo as the LSR of the HSMU and the CSR, and of the extraordinary risks associated with her role with Victoria Police.

It follows that Mr Porter understood or should have understood that past convictions may have been obtained on evidence gathered from information provided by Ms Gobbo as a human source and that a court informed of all relevant facts may rule this evidence inadmissible if it rejected Victoria Police PII claims. He should also have understood that these issues had not yet been disclosed to, and therefore had not yet been determined by, a court.

Having considered the evidence, the Commission considers that Mr Porter seems to have failed in his duty as LSR of the HSMU and as CSR to appropriately oversee the SDU's management of Ms Gobbo as a human source.

The Commission recognises that Mr Porter reported his concerns to his superior officers, but it is not possible on the evidence before the Commission to determine the details of that reporting. The information in those briefings may limit Mr Porter's responsibility, and similar or more serious findings may be open against those officers.

## Legal advice not acted upon

In July 2009, barrister Mr Maguire appeared for Victoria Police in the Supreme Court in relation to a subpoena issued on behalf of Mr Tony Mokbel for another matter, but which may have captured Ms Gobbo's draft statement to Briars.<sup>804</sup> The judge rejected the police argument that the identities of potential witnesses in the Chartres-Abbott murder investigation (Mr Gregory, Ms Gobbo and another) were too sensitive to reveal, even to the court.<sup>805</sup> Victoria Police did not disclose that one of these potential witnesses was a criminal defence barrister acting as a human source. The matter was adjourned.

In early July 2009, Mr White gave Mr Waddell the additional SDU holdings<sup>806</sup> and Mr Waddell produced a document outlining issues arising from that material. This included grave credibility issues arising from the differences in Ms Gobbo's accounts between January 2008 and her May 2009 draft statement; whether Ms Gobbo was acting as Mr Waters' lawyer; her eagerness to assist police; and the risk of exaggeration.<sup>807</sup>

Mr Cornelius approved Mr Waddell's request to brief Mr Maguire for advice on the admissibility of aspects of Ms Gobbo's statement, including in relation to questions of legal professional privilege.<sup>808</sup> It appears advice was also sought on the prospect of protecting Ms Gobbo's identity in her draft statement from disclosure in the Briars and Petra Taskforce matters, should they not be relied on.<sup>809</sup>

The update for the Briars Taskforce Board of Management of 21 September 2009 included:

*Current advice from [Mr Maguire] is that witness past will probably be declared to the court at a minimum in prosecution of Dale.*

*If Perry is charged with murder it is probable that extent of witness assistance will be known.*<sup>810</sup>

In its responsive submissions, Victoria Police contended that there is no evidence as to the content of Mr Maguire's advice and that it does not appear to have been provided in writing.<sup>811</sup> It submitted that it could therefore not be accepted that the effect of Mr Maguire's advice was that disclosure of Ms Gobbo's statement, at a minimum, was required in the prosecution of Mr Dale.

That may be so, but Victoria Police appeared to make no attempts to follow up with Mr Maguire as to what disclosure was required given his view that the 'extent of witness assistance will be known', even though:

- Mr Moloney knew of Ms Gobbo's role assisting the Purana, Briars and Petra Taskforces
- Mr Ashton knew that her assistance was not limited to the Petra and Briars Taskforces, given his agreement that she would not be called in OPI's Operation Khadi
- Mr Cornelius knew or should have known that her assistance to Victoria Police extended not only to the Petra and Briars Taskforces but also to Purana Taskforce (Mr Cornelius' knowledge and actions are examined earlier in this chapter).

As noted above, in September 2009, Victoria Police briefed Mr Gipp in relation to subpoenas in the Petra Taskforce's prosecution of Mr Dale and Mr Collins.<sup>812</sup> The co-informants, Mr Solomon and Mr Davey, then handled most day-to-day processes in relation to those subpoenas.<sup>813</sup> As neither officer knew of Ms Gobbo's human source history, perhaps conveniently for some, they could not provide meaningful instructions to Mr Gipp.<sup>814</sup> Further, the evidence before the Commission does not indicate that Mr Gipp was ever apprised of Ms Gobbo's Briars Taskforce statement or of Mr Maguire's advice about it.<sup>815</sup>

The Commission considers that Victoria Police's lack of candour, from the SDU officers and supervisors through to the Boards of Management of the Briars and Petra Taskforces (whether deliberate or inept, and whether to protect Ms Gobbo, themselves or both) in not informing their own legal representatives, the DPP and the court of all potentially relevant disclosure matters arising from the issuing of subpoenas in the Petra and Briars Taskforce's prosecutions, was a failure to discharge their duties. Had they done as they should, Victoria Police's past mistakes would have been exposed and corrected, future mistakes avoided, and the resulting institutional damage more confined.

## CIVIL LITIGATION WITH MS GOBBO

On 29 April 2010, Ms Gobbo filed civil proceedings in the Supreme Court against the State of Victoria, Mr Overland and Ms Nixon.<sup>816</sup> The claim related only to her role as a Petra Taskforce witness, not her broader history with Victoria Police as a human source.<sup>817</sup>

Victoria Police's management of these civil proceedings increased the number of people who knew of her role and gave others a deeper understanding of it, including the Victoria Police executive group. Rather than addressing the obvious risks resulting from her use as a human source, those involved seem to have made considerable efforts to conceal her duplicitous role.

## Victoria Police confronts its use of Ms Gobbo

Ms Gobbo had threatened legal action in a 7 September 2009 letter to Mr Overland.<sup>818</sup> In addition to her assistance in relation to Mr Dale, this letter referred to her previous unprecedented assistance from 2005, 'including but not limited to the successful prosecution of numerous significant organised crime figures'.<sup>819</sup> She also stated 'I need not remind you of the difficulties that Victoria Police may encounter if some or any of my past assistance comes out in the prosecution of Dale'.<sup>820</sup> The threat of exposing 'the difficulties that Victoria Police may encounter' became a key tactic of Ms Gobbo as civil litigant against police.

Mr Overland instructed the SDU to compile a chronology of its dealings with Ms Gobbo.<sup>821</sup> SDU officers explained to Mr O'Connor, their new OIC, that the SML contained this information as well as the risks to Ms Gobbo and the SDU were it to be disclosed; in their view it was imperative to limit the number of people who knew she was a human source.<sup>822</sup> Mr O'Connor read the SML and appreciated the risk to Ms Gobbo's safety should her role be exposed.<sup>823</sup>

On 5 May 2010, Mr McRae, Superintendent Peter Lardner and Mr Stuart McKenzie, all from the Victoria Police Legal Services Department, formed a steering committee to manage the civil litigation.<sup>824</sup> Detective Senior Sergeant Andrew Bona also attended the first meeting, at which they discussed Ms Gobbo's role as a human source and the need to speak with Mr White.<sup>825</sup>

On 21 May 2010, Mr Lardner emailed Mr Moloney stating that he required someone with an understanding of the Petra, Briars and Purana Taskforces to fully brief counsel. Mr Moloney, copying in Mr Cornelius, replied that Mr Cornelius was aware of Ms Gobbo's involvement with the Petra and Briars Taskforces, but not Purana Taskforce.<sup>826</sup> Further emails were exchanged, suggesting Mr Lardner meet with Mr Biggin 'in relation to the covert side of the matter' and to arrange a meeting between Mr Lardner, Mr Moloney and Mr Cornelius 'to address the wider issue and get an insight into the history'.<sup>827</sup>

Mr Cornelius gave evidence to the Commission that he was not concerned at being excluded from knowledge of Ms Gobbo's involvement with the Purana Taskforce, and that the communications suggesting a criminal defence barrister was assisting Victoria Police in matters where she was representing people did not ring alarm bells.<sup>828</sup> This contrasted with Mr Cornelius' assertions to the Commission that if he had known of such things he would have pulled at the 'loose thread' until all the issues were understood.<sup>829</sup>

In responsive submissions, Mr Cornelius contended that he did not know Ms Gobbo was assisting police in relation to the Purana Taskforce and that he was only aware of Ms Gobbo's involvement as a witness.<sup>830</sup>

While that may have been the theoretical intention, given Mr Cornelius' involvement set out earlier in this chapter, the Commission is unable to accept this contention. Mr Cornelius knew or should have known well before this stage that Purana Taskforce had used Ms Gobbo as a human source. The Commission is not persuaded he deliberately gave false testimony. It may be that he justified his position on the basis of an artificial construct based on his role, what he was required to know and what he did not need to know. In reality, as an experienced officer with legal training, he knew enough to clearly put him on notice of something remarkable—that Ms Gobbo, a criminal defence barrister, was a human source. Knowing this and given his role in ESD, the Commission considers he should have made enquiries to ensure Victoria Police's use of Ms Gobbo was lawful and ethical.<sup>831</sup>

Meanwhile, concern about the SML was growing. Mr White met with Mr Sheridan and Mr O'Connor. They agreed the SML should not be produced in court, but considered Ms Gobbo may waive informer privilege, potentially leaving insufficient basis for a PII claim.<sup>832</sup>

On 27 May 2010, Mr O'Connor emailed Mr McRae and Mr Lardner explaining that the SML contained significant detail as to how several high-profile criminal networks had been brought to justice over a three to four-year period using intelligence from Ms Gobbo.<sup>833</sup> Later that morning, together with Mr Bona, they agreed to meet again in June 2010 when everyone had read the SML.<sup>834</sup> Mr Lardner told the Commission that Mr Bona securely stored the SML and he did not recall Mr McRae reviewing it.<sup>835</sup>

On 3 June 2010, Mr McRae and Mr Lardner briefed Mr Overland and then Deputy Commissioner Sir Kenneth (Ken) Jones, QPM on Ms Gobbo's civil litigation, noting:

- Ms Gobbo was registered as a human source from 2005.
- There were 225 hours of recorded conversations between Ms Gobbo and her handlers, significantly more than the 48 hours relating to the Dale prosecution.
- Issues included legal professional privilege, discovery, Ms Gobbo's role in other investigations and OPI review.<sup>836</sup>

Mr Overland told the Commission that he was concerned that it might be 'unethical' and 'not consistent with model litigant principles' to use the fact that Ms Gobbo was a human source against her in civil proceedings.<sup>837</sup> Mr McRae told the Commission that he was prepared to run the matter, that Mr Overland wanted to defend it, and there was no pressure to settle.<sup>838</sup>

On 24 June 2010, the civil litigation steering committee was advised the defence was drafted broadly so that Ms Gobbo's history with police could be brought up at trial if necessary, and agreed to attempt to finalise the matter without releasing too much information.<sup>839</sup>

On 28 July 2010, the VGSO advised Mr Lardner that the State was obliged to make all reasonable efforts to settle the proceeding for a reasonable sum based on counsel's clear advice the State was probably liable and must act as a model litigant. The VGSO gave advice on a reasonable settlement option.<sup>840</sup> They recommended an additional sum to avoid exposing sensitive information—scrutiny of Victoria Police procedures for dealing with human sources and associated publicity could be damaging to the organisation and the administration of the criminal justice system, divert resources and incur significant legal costs.<sup>841</sup> The same day, Mr Overland, Mr Cornelius, Mr McRae and Assistant Commissioner Stephen Leane agreed the financial settlement cap.<sup>842</sup> Because of the quantum, authorisation had to be sought from the Minister for Police and Emergency Services.

## Proposed settlement

On 5 August 2010, Mr McRae attended a meeting with the Victorian Government Solicitor, Mr John Cain, and Mr Michael Strong, Director, OPI and Mr Paul Jevtovic, Deputy Director, OPI to discuss the mediation strategy and proposed settlement with Ms Gobbo. Mr McRae said he did this because of the comparatively high value of the settlement and the fact that a barrister was involved; it was not his normal practice to brief the OPI on civil litigation matters.<sup>843</sup> Mr McRae took the writ, the defence and the VGSO advice to the briefing; only the advice contained information about Ms Gobbo providing intelligence as a human source. His file note stated that the OPI retained two documents, but he could not recall which two.<sup>844</sup>

In responsive submissions, Mr McRae asserted that all the documents were provided to, and retained by, the OPI, and even if they were not, the purpose of the Victorian Government Solicitor's attendance was so he could speak to the VGSO's advice. He noted that while it was not a comprehensive briefing on Ms Gobbo's history as a human source (which was beyond his knowledge), it was to alert the OPI to Ms Gobbo's highly irregular status.<sup>845</sup>

On the evidence before the Commission, it is not possible to know exactly what Mr Strong and Mr Jevtovic were told of Ms Gobbo's role with Victoria Police. Had they been accurately and comprehensively informed of the contents of the advice, it would have been surprising, as the leaders of Victoria Police's oversight body, if they did not ask for more information and enquire further into Ms Gobbo's extraordinary dual role as criminal defence barrister and human source. Mr McRae told the Commission the meeting was about settling Ms Gobbo's litigation, so it is likely that the OPI's primary concern was to know that there was sound independent legal advice supporting the settlement range proposed.<sup>846</sup> It is certainly regrettable that Victoria Police, at least by this time, did not squarely and comprehensively brief the OPI about the many serious risks they knew had arisen from Victoria Police's relationship with Ms Gobbo.

The OPI's relationship with Victoria Police and Ms Gobbo was complicated and arguably compromised by the joint Petra and Briars operations it had entered into with Victoria Police, both of which involved Ms Gobbo. The participation of the then OPI Deputy Director, Mr Ashton, on the Petra Taskforce Board of Management, which had oversight of decisions ultimately relevant to aspects of the civil litigation, gave rise to at least a perception that the OPI may have been hampered in its ability to provide independent scrutiny of this matter.

## The Minister approves the settlement

On 9 August 2010, the Minister for Police and Emergency Services, the Hon Bob Cameron, MP was given a confidential briefing note with Mr McRae's signature block but signed by Mr Lardner. It referred to Ms Gobbo's role in relation to Mr Dale, but made no mention of her status and history as a registered human source.<sup>847</sup> Mr McRae told the Commission he believed that Mr Cain was to facilitate independent advice to the Minister on Ms Gobbo's human source status; however, Mr Cain provided a sworn statement to the Commission that he was not aware of that status until 2015.<sup>848</sup>

On 10 August, Mr Overland wrote to the Minister seeking authorisation to settle the litigation up to a proposed cap, referring to the confidential briefing note that was supported by advice from senior counsel.<sup>849</sup> The Minister approved the instrument of authorisation the following day, and the terms of settlement were signed by Ms Gobbo and Victorian Government Solicitor on that same day. The settlement only referred to Ms Gobbo's status in relation to Mr Dale, not her history as a human source. It included a term that Victoria Police no longer proposed to call her to give evidence in any proceeding and that Petra Taskforce members would not contact her.<sup>850</sup>

In approving the settlement, the Minister asked Mr Overland to advise him of Victoria Police's strategies to mitigate the risk of such an issue arising again.<sup>851</sup> Mr Overland replied that while there was a 'complex history to this matter and due to operational and security concerns you will appreciate that I am unable to brief you fully as to the detail', he would do 'everything possible to ensure that there was no repeat of such a claim against Victoria Police'.<sup>852</sup> He noted the appointment of then Assistant Commissioner Jeffrey (Jeff) Pope, Intelligence and Covert Support, to review processes around such high risk undertakings,<sup>853</sup> adding that 'the primary intention at all times had been to ensure the safety of Ms Gobbo'.<sup>854</sup>

In his responsive submission, Mr Overland emphasised that the Minister was more than adequately informed by a briefing paper by the Victoria Police Director of Legal Services, which was supported by senior counsel.<sup>855</sup> Further, he submitted that the proposition that he did not inform the Minister of the risk posed by the relationship with Ms Gobbo was far greater than that represented by the settlement figure was not put to him in the hearing.<sup>856</sup>

The Commission considers Mr Overland's response unsatisfactory. While operational and safety concerns are rightly front of mind for a Chief Commissioner, they should not be used to deflect scrutiny by the responsible Minister.

The Minister was asked to approve a significant settlement paid for by the taxpayers of Victoria. A component of that was directed to avoiding adverse publicity for Victoria Police. He specifically asked for more detail on how like exposure could be avoided in the future. It was not sufficient for Mr Overland to hide behind 'operational and security concerns'. The Commission considers that principles of transparency and accountability required Mr Overland to fully brief the Minister on Ms Gobbo's long history with Victoria Police and the resulting grave risks, not just to her safety but also to the organisation, the administration of justice and the Government. The Minister seems to have been let down by his Chief Commissioner.

## THE 2011 MAGUIRE ADVICE

When Victoria Police disbanded the Petra Taskforce following the murder of Mr Williams in April 2010, its investigations were taken over by the Driver Taskforce established by Sir Ken Jones to investigate the circumstances surrounding Mr Williams' death.<sup>857</sup> In early 2011, following Sir Ken's departure from Victoria Police, the Driver Taskforce Steering Committee comprised of officers Mr Ashton (now Assistant Commissioner, Crime, Victoria Police), Mr Pope, Deputy Commissioner Emmett Dunne, Superintendent Doug Fryer and Inspector Michael (Mick) Frewen.<sup>858</sup>

### Mr Dale's Australian Crime Commission prosecution

Before the Petra Taskforce was disbanded, Mr Solomon submitted a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP), recommending charges against Mr Dale for offences against the *Australian Crime Commission Act 2002* (Cth).<sup>859</sup> The prosecution relied on Ms Gobbo's 2009 statement to the Petra Taskforce and the recorded conversation with Mr Dale.<sup>860</sup>

On 20 December 2010, the CDPP met with Sir Ken and others from Victoria Police. The CDPP considered the case against Mr Dale was strong and should proceed.<sup>861</sup> Sir Ken raised the civil litigation settlement agreement that she would not be called as a witness, but it was agreed that could be overcome.<sup>862</sup> He did not tell those at the meeting that Ms Gobbo had been a human source and that this could be relevant to her credit, explaining to the Commission he wanted to investigate how broad and deep the issue went before dealing with disclosure.<sup>863</sup>

Mr Dale was charged with the Commonwealth offences on 15 February 2011.<sup>864</sup>

### Concern about disclosure in the 'Tomato Tins' cases

On 24 August 2011, Ms Gobbo, Mr Buick and Detective Sergeant Jason Lebusque and Ms Gobbo met with the Deputy Director of the CDPP, Mr Shane Kirne and solicitors Ms Krista Breckweg and Ms Vicki Argitis to discuss prosecutions emanating from the 'Tomato Tins' drug syndicate cases.

Mr Buick recorded the meeting, unbeknown to the attendees. Ms Gobbo raised matters that she said made it difficult for her to give evidence, referencing the Tomato Tins prosecution indirectly:

*MS BRECKWEG: If they do issue a subpoena—*

*MS GOBBO: I don't want to talk cryptically, but it's maybe a conversation for another day. But it affects matters that are being prosecuted by your office at the moment.*

*MS BRECKWEG: Okay.*

*MS GOBBO: Very significant matters.*

*MS BRECKWEG: I think I know what you're talking about, just a rough guess—your view is that it's not just the threat from Dale ... it's the threat from other people.*

*MS GOBBO: Yeah.*

...

*MS BRECKWEG: Well, that's something we have to take very seriously.<sup>865</sup>*

Ms Gobbo spoke more plainly with Mr Buick after the meeting:

*MR BUICK: —I'm not as clever as, you know, the rest of you. What's the current prosecution that is—is the issue?*

*MS GOBBO: World's biggest ever importation of ecstasy.*

*MR BUICK: And who's up on that?*

*MS GOBBO: Higgs, Karam, Barbaro. The highest level of organised crime dealers.*

*MR BUICK: So they've all—*

*MS GOBBO: Now, yo —I can tell you, you—you, being the ACC, and VicPol and the AFP didn't have a clue about that. I actually had the shipping documents. I got my hands on 'em and that's how you found the world's biggest ever single seizure of ecstasy in the world. Now you think I'm going to risk those people... finding out? No fucking way.<sup>866</sup>*

## Legal advice sought about disclosure

At the end of August 2011, Mr Buick raised the need for legal advice in relation to anticipated subpoenas in Mr Dale's prosecution and concerns this might expose Ms Gobbo's history as a human source.<sup>867</sup> Ms Gobbo also stressed these matters in conversations with the CDPP and mistakenly believed entry to the Witness Protection Program and the *Witness Protection Act 1991* (Vic) (Witness Protection Act) would save her from such questioning.<sup>868</sup> The VGSO later told Mr Buick that the Witness Protection Act would not assist Ms Gobbo in this way.<sup>869</sup>

Mr Buick told Ms Gobbo he had suggested she be withdrawn as a witness but the CDPP, unaware of Ms Gobbo's full relationship with Victoria Police, understandably wanted to proceed with its strongest case.<sup>870</sup> Mr Buick told the Commission that he was discussing withdrawing the matter with Mr Frewen, Mr Fryer and Mr Ashton.<sup>871</sup>

Mr Buick frankly conceded in his evidence to the Commission that those attending a meeting on 13 September 2011 between Mr Buick and Mr Frewen from Victoria Police, Mr Maguire and Ms Louise Jarrett of the VGSO realised that Ms Gobbo's role as a human source may have led to convictions based on material that might have been inadmissible.<sup>872</sup> Ms Jarrett's notes included 'the need to protect the organisation [Victoria Police]—may jeopardise other proceedings/ convictions'.<sup>873</sup>

In responsive submissions, Victoria Police asserted that Counsel Assisting submissions do not refer to the fact that those at the meeting were primarily concerned about Ms Gobbo's safety, instead focusing on Ms Jarrett's note about disclosure. Victoria Police submitted this misconstrues the evidence.<sup>874</sup> Mr Buick confirmed in his oral evidence that the safety of Ms Gobbo was his primary concern.<sup>875</sup> Victoria Police pointed to the evidence of Mr Maguire that there was a significant concern about Ms Gobbo's safety in the event that her role as a human source was revealed. In reference to the 'need to protect the organisation', Victoria Police submitted that there was no evidence that Victoria Police or the VGSO thought, as at September 2011, that Ms Gobbo's informing may have compromised convictions. Mr Buick gave evidence that his understanding was that Ms Gobbo had not breached legal professional privilege as a human source. Additionally, Mr Buick followed his usual process with respect to disclosure.<sup>876</sup>

On 15 September 2011, Mr Maguire and Ms Jarrett met with Mr Lardner and Mr Bona.<sup>877</sup> Ms Jarrett's notes included that 'problem may be if she has been involved in informing on clients of hers—crims will appeal sentences', and 'need to know what problem we are facing based on the extent of her involvement with police'.<sup>878</sup> This was sensible, astute, and obvious legal advice that Victoria Police should have obtained years earlier, before Ms Gobbo's registration as a human source.

On 21 September 2011, Mr Maguire, representatives from the CDPP and the VGSO met with officers of the SDU, the Briars and Driver Taskforces and the Legal Services Department about PII issues and subpoena matters.<sup>879</sup> The CDPP's Ms Breckweg noted, 'Informer and liar' and 'All issues to credit'.<sup>880</sup> Ms Jarrett recorded, 'Serial liar, dobber', 'Dobbed on clients', and 'This will be their tactic'.<sup>881</sup> Mr Maguire said he would need to look at the SML and asked if this would indicate who was being investigated and if Ms Gobbo was representing them.<sup>882</sup> Ms Jarrett recorded that Ms Breckweg responded, 'at least one', perhaps a reference to Mr Karam and the Tomato Tins drug syndicate cases.<sup>883</sup> At the end of September, Victoria Police raised the prospect of withdrawing Ms Gobbo as a witness if it appeared the PII argument would be lost.<sup>884</sup>

Towards the end of September 2011, Mr Maguire read the SML.<sup>885</sup> At around the same time, Mr Frewen reported to Mr Ashton, Mr McRae and Mr Fryer about a meeting with Ms Breckweg, where he raised the prospect of Ms Gobbo being withdrawn as a witness and her evidence given in other ways, if it appeared the PII argument would be lost. Mr Frewen opined that the risk to Ms Gobbo and other high-risk individuals and police methodologies would be too great;<sup>886</sup> Ms Breckweg said it would likely need sign-off from the CDPP in Canberra.<sup>887</sup>

Mr Maguire, having read the SML,<sup>888</sup> provided advice on 4 October 2011, including that:

- Disclosure may need to be made of Ms Gobbo's dealings with the SDU in relation to Mr Dale.
- At the very least, the CDPP would need to consider this material.
- A PII claim may fail in that the court might find that the public interest in protecting the identity of a human source was outweighed by the public interest in disclosing material that would assist accused persons in establishing their innocence.
- Once disclosure was made and Ms Gobbo identified as a human source, the defence would likely press to obtain documents relating to other dealings between her and Victoria Police to show she was providing legal services and advice at the same time as providing information to police.
- If this occurred and Ms Gobbo's role were fully exposed, there was a possibility that people like Mr Tony Mokbel would seek to challenge their convictions on the basis that they were improperly obtained, with a potential collateral effect on his sentences.<sup>889</sup>

Mr Maguire presented his final advice (Maguire advice), at a meeting with Victoria Police and the VGSO on 4 October 2011.<sup>890</sup> The meeting noted the next step was to elevate the issue to Mr Ashton and Mr Pope for them to provide instructions about disclosure. Acting Deputy Commissioner, Crime Timothy (Tim) Cartwright, APM, Mr Ashton, Mr Pope and Mr McRae met on 11 October 2011 and agreed to wait to see if the CDPP was proceeding with Ms Gobbo as a witness; if so, Victoria Police would again encourage her to enter the Witness Protection Program.<sup>891</sup>

Victoria Police contended in responsive submissions that, although the advice was received by the office of the Executive Director of Legal Services on 5 October 2011, Mr McRae did not recall reading it until 3 November 2011.<sup>892</sup> Victoria Police submitted that it was regrettable that the advice was not provided to Mr McRae immediately.<sup>893</sup> Although advice of this nature would have usually come to him directly from the VGSO with a proper briefing on the issues, the advice was not addressed to him. It was addressed to Mr Buick and given to him by Mr Ashton on 3 November 2011. This was consistent with practice at the time, which was for the matter to be dealt with by criminal investigators directly, and not through the Legal Services Department.<sup>894</sup> The Commission therefore accepts that on this material, Mr McRae probably did not receive the advice until 3 November 2011.<sup>895</sup>

## The Commonwealth Director of Public Prosecutions presses for disclosure

In late October, the CDPP reminded Victoria Police that any potential agreement to limit subpoenas did not abrogate responsibility to make disclosure of all documents relevant to Mr Dale's defence, noting disclosure should include:

- documents that informed Mr Dale of the prosecution's case against him<sup>896</sup>
- any information affecting the credibility of any prosecution witness<sup>897</sup>
- any material not sought to be relied upon by the prosecution, but that may run counter to its case or may assist Mr Dale in advancing a defence.<sup>898</sup>

Ms Breckweg emailed Ms Jarrett, Mr Buick and Mr Frewen asking for a list and copies of all these documents to be provided to the CDPP urgently, adding that this material must be made available to the defence unless Victoria Police made a claim of PII or legal professional privilege.<sup>899</sup> Mr Fryer forwarded this to Mr Ashton, adding:

*... the Gobbo witness issues are heating up with the [C]DPP—if the below is correct it would appear ALL needs to be declared re her history—this is a problem. For discussion please.*<sup>900</sup>

## Discussion of the Maguire advice

On 3 November 2011, Mr Cartwright, Mr Ashton and Mr McRae met to discuss the Maguire advice.

Mr Cartwright's note of the meeting contained two action items:

- He was to discuss with Mr Pope how to ensure appropriate governance where a human source was a legal practitioner.
- Mr McRae was to consider disclosure requirements in the AFP prosecutions for the Tomato Tins cases.<sup>901</sup>

It appears they did not discuss disclosure obligations to Mr Tony Mokbel or his associates, despite Mr Mokbel having applied to change his plea to not guilty.<sup>902</sup> And despite the action item recorded by Mr Cartwright, Mr McRae did not consider disclosure requirements in the Tomato Tins case.<sup>903</sup>

Victoria Police submitted that all three attendees had varying degrees of knowledge of Ms Gobbo's involvement with Victoria Police, including in relation to Mr Mokbel and the Tomato Tins prosecution. The three attendees' evidence to the Commission indicated that each diverged in terms of what was agreed at the meeting. Matters that were significant to one attendee did not necessarily carry the same weight with the others.<sup>904</sup>

## The views of Victoria Police officers

### Mr Fin McRae

In responsive submissions, Mr McRae contended that there was no evidence to suggest he was aware, prior to this meeting, of concerns that Ms Gobbo had acted in a position of conflict by representing clients and, at the same time, informing on them, or that her exposure as a human source might put other criminal cases and prosecutions in jeopardy.<sup>905</sup> He submitted that disclosure would have required him to have information he did not have—specific knowledge of the matters to be disclosed.<sup>906</sup> Mr McRae, in his evidence to the Commission, said he had not been tasked to do anything regarding disclosure in Mr Tony Mokbel's<sup>907</sup> or the Tomato Tins cases;<sup>908</sup> had he been, he would have recorded action items. He accepted that there should have been disclosure to the CDPP, but not by him as he did not have 'line of sight' following the meeting.<sup>909</sup>

Mr McRae asserted that: no-one at the meeting had sufficient knowledge of the matters at the time of the meeting to make disclosure; in relation to Mr Mokbel, disclosure was made to the DPP in September 2012 (discussed below); the CDPP was given access to the SML on the day of the meeting; and the meeting led to a review undertaken by former Chief Commissioner Neil Comrie, AO, APM (Comrie Review), an appropriate next step to take.<sup>910</sup>

### **Mr Graham Ashton**

Mr Ashton told the Commission that he discharged his obligation to deal with potential disclosure to Mr Mokbel by notifying his superior officer, Mr Cartwright, and Mr McRae.<sup>911</sup> He said it was Mr Cartwright's role, not his, to check that relevant disclosure information was passed to the CDPP regarding the Tomato Tins case.<sup>912</sup> Further, he recommended a review as the first step to learn what they were dealing with.<sup>913</sup> He considered the steps he took as to disclosure were adequate.<sup>914</sup> In his responsive submissions, Mr Ashton asserted there was no basis to conclude he failed to take reasonable steps to ensure these matters were properly investigated and examined, largely for the reasons set out above.<sup>915</sup>

### **Mr Tim Cartwright**

Mr Cartwright accepted that no one had made a clear action item to deal with the issue raised in the Maguire advice regarding Mr Tony Mokbel following the 3 November meeting.<sup>916</sup> He told the Commission he could not explain why, but suggested it may have been because he believed that the Comrie Review would deal with it.<sup>917</sup>

In relation to disclosure in the Tomato Tins cases, Mr Cartwright said he tasked Mr McRae to consider the matter and whether any further disclosure was required.<sup>918</sup> This was an ongoing issue that should have been dealt with by Mr Ashton and Mr McRae.<sup>919</sup>

In responsive submissions, Mr Cartwright asserted that he took appropriate actions given he was new to the role and his level of knowledge at the time of matters that were potentially disclosable.<sup>920</sup> He also contended that he was unaware of Mr Karam's case before reviewing the Maguire advice. He thought that Mr McRae was tasked to 'consider the requirements' for disclosure in the context of the Tomato Tins cases but this was not communicated, for which he acknowledged responsibility. He mistakenly understood that Mr McRae would report back to him if there was any particular difficulty.<sup>921</sup>

## **Summary of conduct**

Given the Maguire advice, the seniority of those attending and the recorded terms of their discussion, the Commission considers that by the end of the meeting on 3 November 2011, Mr Cartwright, Mr Ashton and Mr McRae knew or should have known:

- The prosecutions of Mr Mokbel and those associated with the Tomato Tins cases may have been adversely affected by the conduct of Ms Gobbo as a human source and/or of police officers who managed her.
- This information had probably not been brought to the attention of the relevant defence legal representatives or prosecuting authorities.
- It was necessary to urgently take all reasonable steps to ensure that the concerns set out above were properly investigated and then considered by Victoria Police's fully briefed, competent and independent legal advisers and/or immediately brought to the attention of the DPP and CDPP.
- As these prosecutions were ongoing, it was necessary to urgently communicate these concerns to the relevant office of public prosecutions.<sup>922</sup>

Given the seriousness of these matters, and noting the seniority, general experience and various duties, obligations and functional responsibilities of those involved, the Commission finds that Mr Cartwright, Mr Ashton and Mr McRae should have satisfied themselves that the concerns raised in the 3 November meeting were appropriately addressed: each seems to have failed in their duty to do so.<sup>923</sup>

## The O'Connor document

Also on 3 November 2011, the CDPP's Ms Breckweg and Mr Beale read the SML, or at least portions of it.<sup>924</sup> The CDPP outlined to Mr O'Connor the type of documents that needed to be disclosed and it was agreed Victoria Police would prepare a document broadly describing contact with Ms Gobbo, which Mr Ashton would review.<sup>925</sup> Mr O'Connor, assisted by the SDU, prepared this document (O'Connor document) and sent it to Mr Sheridan, who gave it to Mr Ashton on 7 November 2011.<sup>926</sup> Mr Ashton told the Commission he was shocked by the O'Connor document,<sup>927</sup> which identified:

- Ms Gobbo had been an active human source managed by the SDU between 16 September 2005 and 14 January 2009 and 319 IRs had been disseminated to investigators based on information she supplied, with 172 ICRs varying in length from two to 30 pages.<sup>928</sup>
- Most documents related to Ms Gobbo's contact with 164 criminals, solicitors or former police officers (whose names were listed in the document); the SDU believed that, in the main, contact with them was driven by the fact that she was a practising lawyer and that her counsel was sought, formally or informally, about the legal status of those involved; for example, pending charges, negotiations with investigating police, plea opportunities and so on.<sup>929</sup>
- Ms Gobbo was suspected of being involved on the periphery of criminal matters, but nothing was ever proven.<sup>930</sup>
- Ms Gobbo failed to disclose to the SDU that she had acted as a conduit for communications between Mr Dale and Mr Williams and, in November 2008, had admitted to the Petra Taskforce that she knew about the use of false phones.<sup>931</sup>

The next day, Mr Ashton decided that Ms Gobbo should be withdrawn as a witness,<sup>932</sup> told the CDPP and updated Mr Cartwright and Mr McRae.<sup>933</sup> Despite initial reluctance, Mr Kirne told Mr Ashton later that day that the CDPP would not call Ms Gobbo as a witness.<sup>934</sup> The CDPP subsequently withdrew a number of charges.<sup>935</sup> Senior Victoria Police officers congratulated Mr Ashton and Mr Cartwright noted, 'as always the protection of life is paramount in decision making'.<sup>936</sup>

Noting Mr Ashton's receipt of, and shock at, the O'Connor document, his seniority, previous policing experience and past contact with and knowledge of Ms Gobbo, the Commission accepts that he knew, or at least should have known, that:<sup>937</sup>

- Potentially many more cases than those discussed in the 3 November 2011 meeting with Mr McRae and Mr Cartwright may have been adversely affected by the conduct of Ms Gobbo as a human source, and/or the conduct of Victoria Police officers who handled or managed her.
- It was unlikely the information in the O'Connor document had been brought to the attention of relevant defence legal representatives or prosecuting authorities.
- It was necessary to take all reasonable steps to ensure concerns raised in the O'Connor document were immediately and thoroughly investigated and considered by competent, independent legal advisers comprehensively briefed with all necessary information.

Mr Ashton's diary for 22 November 2011 recorded that the prosecutor in Mr Mokbel's case, Mr Peter Kidd, QC, suggested that Victoria Police needed separate representation in Mr Mokbel's change of plea application and that Mr Coghlan QC, the then DPP, would telephone Mr Ashton about this.<sup>938</sup> Mr Ashton's responsive submissions asserted that this did not mean he had the opportunity to raise the Mokbel/Gobbo issues with Mr Coghlan on that day; the diary entry related to irregularly sworn affidavits and did not establish he even spoke to Mr Coghlan.<sup>939</sup>

Given Mr Ashton's knowledge of these issues after the meeting of 3 November and receipt of the O'Connor document, the Commission considers that Mr Ashton should have raised the concerns aired in the meeting and in the O'Connor document with Mr Coghlan. It seems most likely from Mr Ashton's diary note that Mr Coghlan rang Mr Ashton and they discussed the case but if he did not, Mr Ashton should have contacted him to do so. These disclosure concerns were highly relevant to the critical issue for the court to determine in Mr Mokbel's application to change his plea. Mr Ashton seems to have failed in his duty to disclose this information to the DPP.

## ADDRESSING CONDUCT: RELUCTANTLY COMING CLEAN

The 3 November 2011 meeting of Mr Cartwright, Mr Ashton and Mr McRae was the catalyst for the Comrie Review.<sup>940</sup>

### The Comrie Review

Mr McRae told the Commission that the Comrie Review was intended to be a largely desktop exercise, providing an independent assessment of the adequacy of Victoria Police's policy, procedures, guidelines and processes relating to human sources such as Ms Gobbo.<sup>941</sup>

Unfortunately, it did not directly consider whether disclosure had affected past or pending cases.<sup>942</sup> Mr McRae conceded that if, instead, someone like Mr Maguire had been asked to review relevant cases, it might have brought forward disclosure to the DPP by nine months.<sup>943</sup>

Mr Comrie finalised his review on 30 July 2012 and noted:

*Entries contained in the 3838 ICRs, taken at face value, indicate that on many occasions 3838, in providing information to police handlers about 3838's clients, has disregarded legal professional privilege. Furthermore, in some instances, it is open to interpret that such conduct may have potentially interfered with the right to a fair trial for those concerned. In the absence of any apparent active discouragement from the police handlers for 3838 to desist with furnishing information on such matters, the handlers remain vulnerable to perceptions that they may have actually been inducing or encouraging the provision of such information. These concerns are heightened in instances where handlers have passed on such information to other police case managers, presumably so that they may make use of it.*<sup>944</sup>

The recommendations of the Comrie Review are discussed in Chapter 11.

On 31 August 2012, Superintendent Stephen Gleeson, who supported Mr Comrie in the conduct of the review, and Mr McRae briefed the OPI on some issues raised in the Comrie Review and provided it with copies of the VGSO advice and Interpose information in relation to conflict issues identified by Mr Gleeson.<sup>945</sup>

## Source Development Unit criticisms of the Comrie Review

The SDU officers suggested that Mr Comrie was a ‘rubber stamp’ to give Mr Gleeson’s work the air of independence, citing a bill issued by Mr Comrie for conducting the review for only five days’ work.<sup>946</sup> Mr McRae rejected that suggestion, stating that Mr Gleeson drafted the report section by section, discussing them with Mr Comrie as they were written, with Mr Comrie assessing and finalising the report as a whole.<sup>947</sup> He said Mr Comrie’s fee was ‘almost embarrassing’ for such a comprehensive report.<sup>948</sup>

The SDU emphasised that they were not consulted during the Comrie Review.<sup>949</sup> Mr McRae said this was because it was a ‘desktop exercise’, with Mr Gleeson noting it was not intended to be a forensic investigation of what occurred.<sup>950</sup> Mr Gleeson told the Commission that he did not think it appropriate to talk to any particular SDU officer once he had read the written material, which, in his view, could potentially give rise to disciplinary or criminal proceedings. He said he:

*... was acutely aware that ... interviewing members about serious issues in the context of a limited review and in the absence of all relevant material could have compromised any future investigations or proceedings. Extensive investigations and personal interviews were also well beyond the scope of this systems and process focused review.*<sup>951</sup>

## Mr Gleeson reports on ‘out of scope matters’

As the Comrie Review proceeded, Mr Comrie and Mr Gleeson identified problems that went beyond the terms of reference, some of which may have required reporting to the OPI.<sup>952</sup>

On 4 June 2012, Mr Gleeson raised these issues with Mr McRae, noting they appeared to have been communicated in the January 2009 Biggin memo and SWOT analysis to Mr Overland, Mr Cornelius, Mr Moloney and Mr Ashton, but nothing was done.<sup>953</sup> Still concerned about this issue two weeks later, he discussed the possibility with Mr McRae and Mr Pope of referring the matter to the OPI and Victorian Ombudsman, given the seniority of the members involved.<sup>954</sup> On 13 June 2012, Mr Gleeson also raised concerns with Mr McRae about the Petra Taskforce Board of Management knowing at least some details of Ms Gobbo’s informing to Victoria Police and the potential risks.<sup>955</sup> At around this time, Mr Gleeson told the Chief Commissioner that he would produce a separate report addressing matters that may require OPI investigation.<sup>956</sup>

On 6 June 2012, Mr Gleeson received legal advice requested from the VGSO during the Comrie Review to the effect that:<sup>957</sup>

- Lawyers’ duties to their clients and the court are likely to significantly limit the use Victoria Police could make of a legal practitioner as a human source.
- Subject to limited exceptions, a human source would be under a duty not to disclose information subject to legal professional privilege to Victoria Police.
- It would be ethically repugnant for:
  - a human source who was a lawyer to assist police in securing a conviction by providing confidential information obtained from a client in the course of seeking legal advice
  - a human source who was a lawyer to review a police brief of evidence against their client for the forensic benefit of Victoria Police
  - Victoria Police to receive information from a human source that it knew was subject to legal professional privilege.

On 22 June 2012, Mr Gleeson finalised his ‘out of scope’ report and sent it to Mr Pope.<sup>958</sup> He pointed out:

- the January 2009 Biggin memo and SWOT analysis
- that there were no minutes of the Petra Taskforce Board of Management meeting and no indication of who attended or whether the documents were circulated, considered or discussed<sup>959</sup>
- Ms Gobbo informing on clients and defence tactics, providing commentary on shortcomings in prosecution briefs and witness statements and tactics for interviewing clients
- Interpose examples of Ms Gobbo providing information to police handlers about her clients and disregarding legal professional privilege
- that Ms Gobbo’s conduct may have compromised rights to a fair trial
- there was no recorded discouragement from her handlers for Ms Gobbo to stop informing on clients, leaving them open to perceptions they may have induced this conduct (especially as information was passed on to investigators)
- concerns that Ms Gobbo’s and Victoria Police’s conduct could suggest they had undermined the justice system.

Despite the many senior Victoria Police officers, some with law degrees, who had been aware at least since early 2009, through the Biggin memo and the SWOT analysis, of the risks arising from Ms Gobbo’s role as a human source, Mr Gleeson, no doubt with the encouragement of Mr Comrie, seems to have been the first officer to act appropriately on these serious issues.

Upon receiving Mr Gleeson’s report on 12 July 2012 and discussing it with Mr Pope, Mr Kenneth (Ken) Lay, AO, APM resolved to brief the OPI as a matter of priority, meeting with its Acting Director, Mr Ron Bonighton, on 20 July 2012. He followed up with a letter and a copy of Mr Gleeson’s report.<sup>960</sup>

## Operation Loricated and disclosure

### Early discussions with the Director of Public Prosecutions

Ms Gobbo’s lawyers wrote to the then DPP, Mr Champion, offering assistance in the investigation of the Hodson murders a number of times, including in late September 2011<sup>961</sup> and again on 27 February 2012.<sup>962</sup> In May 2012, the DPP received two further items of correspondence between Victoria Police and Ms Gobbo:

- a letter from Mr Walshe to Ms Gobbo dated 26 April 2012 stating that the history in Ms Gobbo’s letter ‘does not necessarily accord with the history from the perspective of Victoria Police’<sup>963</sup>
- a letter from Ms Gobbo to Mr Walshe dated 20 May 2012, in which she stated, ‘I remind you the facts speak for themselves and they can be referenced in hundreds of hours of covert recordings made by your members each time they met with me.’<sup>964</sup>

The current DPP, Ms Kerri Judd, QC, noted in material she provided to the Commission that in May 2012 neither the DPP, nor those advising him, knew of any facts to explain why Victoria Police had ‘hundreds of hours of covert recordings’ with Ms Gobbo.<sup>965</sup>

On 1 June 2012, Mr McRae and Mr Fryer met with the DPP and Mr Bruce Gardner from the OPP about Ms Gobbo’s correspondence.<sup>966</sup> Mr Fryer told Mr Champion Ms Gobbo had ‘been a source for a long time’ and they discussed safety concerns.<sup>967</sup> Neither Mr McRae nor Mr Fryer raised the issues discussed in the Maguire advice, Comrie Review or Mr Gleeson’s report.<sup>968</sup>

In August 2012, Mr McRae met with Mr Gleeson, Mr Ashton and Mr Pope to further discuss disclosure to the DPP.<sup>969</sup>

Mr McRae again met with the DPP and Mr Gardner on 4 September 2012, with Mr Gardner’s notes of the meeting stating that:

*Fin advised us today that upon a review of internal Vicpol intelligence material/HSMU material etc, there may be a suggestion that [Ms Gobbo] was providing information to Vicpol about persons she then professionally represented, including [Mr] Mokbel.*

*Possibly suggested that [Ms Gobbo] provided information to Vicpol which enabled Vicpol to detect and then arrest [Mr Mokbel] in Greece, which then led to his extradition.*

*Query whether [Ms Gobbo] in fact acted for [Mr Mokbel]. Query whether [Ms Gobbo] provided data to Vicpol re her own client (in breach of LPP).*

...

*Issue—does OPP have duty of disclosure now, to [Mr Mokbel], re [Ms Gobbo] “information”??<sup>970</sup>*

Mr McRae recalled that he and Mr Gleeson updated the DPP and Mr Gardner about the Comrie Review, including potential conflicts of interest and, in the case of Mr Tony Mokbel’s extradition, the use of potentially privileged information that had been identified in source holdings.<sup>971</sup> They also discussed what the duty of disclosure entailed and, again according to Mr McRae’s recollection, Mr Gleeson noted that Victoria Police was preparing to review intelligence holdings to determine whether disclosure was required, and the DPP said he would wait for the outcome of that process.<sup>972</sup> In responsive submissions, Mr McRae contended that it was open to the DPP to seek further information but they did not do so.<sup>973</sup>

Ms Judd, however, advised the Commission that the OPP does not have evidence of any further substantive information from Victoria Police about Ms Gobbo’s activities until early 2014.<sup>974</sup> As explained below, Victoria Police did not provide the DPP with a further update until 1 April 2014, after the ‘Lawyer X’ story broke in the *Herald Sun*.<sup>975</sup>

On 17 October 2012, the DPP and Mr Gardner met with Mr Tom Gyorffy, SC, who was appearing on behalf of the DPP in Mr Tony Mokbel’s appeal proceedings in the High Court. Mr Gardner’s file note included:

- *All agree—even if true, could not affect appeal issues*
- *Nor is it clear or certain enough to require disclosure*
- *may not involve any breach of LPP anyway.*<sup>976</sup>

Mr Gardner recalled that ‘appeal issues’ referred to technical arguments around Mr Tony Mokbel’s extradition from Greece.<sup>977</sup> The disclosure reference related to the lack of clarity and specificity around what Victoria Police had said Ms Gobbo may have said about Mr Tony Mokbel’s matter.<sup>978</sup> ‘LPP’ referred to the fact that, on the information police provided to the DPP, it was not clear that Ms Gobbo had provided information about any of her clients that was subject to legal professional privilege.<sup>979</sup> Ms Judd informed the Commission that, at this time, Victoria Police had only provided the OPP with the information discussed in the meetings outlined above.<sup>980</sup>

## **Establishment of Operation Loricated and Operation Bendigo**

Operation Loricated was established in January 2013<sup>981</sup> to implement Recommendation 1 of the Comrie Review (that is, to construct a complete record of Ms Gobbo’s use as a human source).<sup>982</sup>

The Commission is troubled that it took Victoria Police almost six months after the finalising of the Comrie Review to establish Operation Loricated, a key objective of which was to identify relevant issues warranting further investigation,<sup>983</sup> and by its glacial progress since, given:

- Ms Gobbo's use as a human source was a problem of its own making, which required immediate and urgent attention
- Ms Gobbo's informing may have affected the trials of many people serving lengthy custodial sentences.

Six months after it started, the Operation Loricated Steering Committee finally identified key emerging risks and instructed that the material be properly analysed and presented to the DPP or IBAC for appropriate action and notified immediately if clear and serious issues arose.<sup>984</sup> The Steering Committee identified that legal issues, including past trials conducted unfairly, were the greatest risk.<sup>985</sup> The minutes recorded that Mr McRae and Mr Fryer had already briefed the DPP on the issue, something disputed by the DPP.<sup>986</sup>

In September 2013, Mr McRae told the Steering Committee about his 2012 meeting with the DPP who had requested that Victoria Police report back on instances where a conflict of interest between Ms Gobbo and a client was identified.<sup>987</sup> By this time, Victoria Police had known a great deal about Ms Gobbo's many conflicts between her roles as both human source and lawyer for years and disclosed almost none of it. But progress remained slow, as Mr McRae<sup>988</sup> and Mr Cartwright conceded.<sup>989</sup>

The Commission finds that Victoria Police's unacceptable delay in complying with its lawful disclosure obligations, while in large part to protect Ms Gobbo's safety, was also to keep hidden the highly questionable conduct of some officers, to protect their reputations and that of Victoria Police, and to avoid the risk of convictions being challenged and overturned. Ms Gobbo's safety concerns, though genuine, provided a convenient 'smoke screen' to conceal these deeply troubling matters, while those who may have been wrongly convicted were serving lengthy prison sentences.

That changed on 31 March 2014, when the *Herald Sun* broke the Lawyer X story with the article, 'Underworld Lawyer a Secret Police Informer'.<sup>990</sup> The article reported that Victoria Police had recruited a prominent lawyer as a human source who gave them 'unprecedented access to information on some of Australia's biggest drug barons and hitmen, including alleged corrupt police and others involved in Melbourne's gangland war'.<sup>991</sup> Victoria Police sought and obtained a suppression order, but not before some copies of the paper containing the article had been circulated.<sup>992</sup>

On 1 April 2014, Mr McRae and Mr Stephen Leane, who had recently been appointed as Assistant Commissioner, Professional Standards Command (formerly ESD), met with the DPP and Mr Gardner as a belated follow up to Mr McRae's September 2012 meeting.<sup>993</sup>

Mr McRae's file note of the meeting included:

*'At present there is no information that indicates there has been a miscarriage of justice and there are a number of avenues open for these issues to be raised.'*<sup>994</sup>

Mr Leane told the Commission the purpose of the meeting was to 'make full disclosure to the DPP of the circumstances—as Victoria Police currently understood them—surrounding Ms Gobbo and her use as an informer'.<sup>995</sup> Mr Leane said they outlined the steps being taken by Victoria Police, particularly reporting to IBAC which would occur later that day.<sup>996</sup> Mr Gardner's file note also included some surprising entries given the information before this inquiry: for example, 'Fin [McRae] doesn't yet know if NG [Nicola Gobbo] did give police data re a person who was then a client. Query if she informed on own client'.<sup>997</sup> In responsive submissions, Mr McRae stated that during this meeting, the prospect of Ms Gobbo having informed on her clients was the very thing that Mr McRae and Mr Leane discussed with the DPP and Mr Gardner at this meeting.<sup>998</sup> The potential for miscarriages of justice was also discussed.<sup>999</sup>

On 3 April 2014, the DPP met with Chief Crown Prosecutor Mr Gavin Silbert, QC, Solicitor for Public Prosecutions, Mr Craig Hyland and Mr Gardner to discuss any disclosure obligations stemming from Ms Gobbo's role as a human source.<sup>1000</sup> Mr Gardner's file note of that meeting included 'Not appropriate to ask VicPol for data', which the DPP told the Commission referred to the fact that Victoria Police had a very large volume of material that would be difficult for the DPP to interpret and Victoria Police and IBAC were already attempting to analyse it.<sup>1001</sup> The Commission considers this was a reasonable approach to take, particularly given Mr McRae wrote to the DPP on 7 April 2014 stating:

*As indicated at our previous meeting we will provide any information that arises that may warrant consideration of your office in regard to the running of criminal prosecutions. I can confirm that at this time I have not received information that has necessitated your consideration.*

*As you are aware our focus has been on safety issues in regard to the risk of the identification of this person. That safety risk is our primary concern at present.*<sup>1002</sup>

Mr McRae told the Commission he had not at that stage reviewed the IRs or formed a view that there had been any miscarriages of justice.<sup>1003</sup>

Victoria Police submitted that the statement in the letter that Mr McRae had not received information that necessitated the DPP's consideration should be understood in the context of the meeting held on 1 April 2014 and the DPP's stated preference to wait until Victoria Police had completed its review of the data. If the DPP had said that he wanted to review the information that Victoria Police had identified at that point, then it would have been made available.<sup>1004</sup> The Commission considers that Mr McRae should have confirmed in his 7 April 2014 letter that he had not reviewed the potentially highly relevant IRs to which he referred.<sup>1005</sup> Given Victoria Police's filtered and arguably disingenuous approach to briefing the DPP on matters of potential disclosure, the DPP's decision to await further information was not unreasonable, although with hindsight it was regrettable that they were not more proactive.

On 8 April 2014, Victoria Police established yet another investigation, Operation Bendigo, to consider issues including any potential legal conflict identified by Operation Loricated but that was outside its scope.<sup>1006</sup> Mr McRae told the Commission that, in light of discussions with the DPP and IBAC, he considered case studies were required to identify specific instances of conflict; if necessary these could be provided to the DPP and IBAC.<sup>1007</sup> Five case studies were completed between September and November 2014; a potential miscarriage of justice requiring disclosure was identified in one case only.<sup>1008</sup> Mr McRae told the Commission he did not accept these findings as the information in the case studies left unanswered questions.<sup>1009</sup>

On 25 November 2014, Mr McRae and Mr Leane met with the DPP and Mr Gardner, Mr McRae having emailed Mr Gardner the previous day a 'Legal Conflict Report' providing the five 'examples', which were no more than names without any substantial information.<sup>1010</sup> Mr McRae and Mr Leane told the Commission they intended to provide the case studies to the DPP during the meeting but this did not occur. Mr McRae's statement to the Commission said the DPP declined to accept them.<sup>1011</sup> Mr Leane, however, told the Commission he thought 'refusal' was stronger than he thought applicable to the circumstance.<sup>1012</sup> Mr McRae's file notes included 'there [was] no evidence of a deliberate attempt to pervert the course of justice or orchestrate court outcomes'.<sup>1013</sup> On 11 December, Mr Gardner emailed Mr McRae, stating that the matter had been considered by the Director's Committee; there was not sufficient information to invoke the *Miscarriage of Justice Policy*; and the position may change depending on the outcome of the IBAC investigation (outlined below).<sup>1014</sup>

Mr McRae's responsive submissions asserted that he was an important driving force behind Victoria Police disclosure to external agencies of issues relating to Ms Gobbo.<sup>1015</sup> Mr McRae's specific contentions around his involvement in responding to the Comrie Review with Operation Loricated and then Operation Bendigo, along with meetings with the DPP and OPI, are outlined above. He also told the Commission his concern was always to protect Ms Gobbo's safety,<sup>1016</sup> and that he 'work[ed] for' the Chief Commissioner.<sup>1017</sup>

Those matters did not absolve him from his legal professional obligations to the administration of justice and the court. This required him to inform the DPP of the extent of Ms Gobbo's relationship with Victoria Police to enable the DPP to meet ongoing disclosure obligations in past, current and pending cases. He seems to have persistently failed in his duty to do so.

It is regrettable that, from his June 2012 meeting with the DPP, Mr McRae, an experienced and senior Victoria Police lawyer, did not clearly and unequivocally inform the DPP about what he and Victoria Police had learned through the Biggin memo and SWOT analysis, the Maguire advice, the Comrie Review and Mr Gleeson's report. The Commission notes that while safety concerns were no doubt real, informing the DPP of relevant disclosure matters could not seriously be considered a security risk.

Having regard to the evidence and responsive submissions, Mr McRae's handling of Victoria Police's disclosure to the DPP, along with Ms Gobbo's civil litigation, fell short of the Commission's expectations of the most senior lawyer in Victoria Police. The Commission considers that, he should have ensured that adequate disclosure was made to the DPP much earlier and much more comprehensively than it was.

Pursuant to section 44 of the Inquiries Act, the Commission has referred Mr McRae's conduct to the Victorian Legal Services Board and Commissioner for consideration, along with a copy of relevant parts of Counsel Assisting submissions, Mr McRae's evidence, responsive submissions and extracts of this final report.

## Closure of the Source Development Unit

In March 2012, Mr Pope commenced the Covert Services Review.<sup>1018</sup> On 24 June 2012, Mr Sheridan emailed Mr Pope suggesting the winding up of the SDU, explaining:

*What really tips the scales for me is that the handling of Witness F [Ms Gobbo] has been undertaken and managed by the best trained human source personnel within the Force. These individuals have travelled the world and been training and educated by the best and yet they still lost their way! In short our best people in this area must be able to ensure that we do not make these mistakes in future.*<sup>1019</sup>

On 5 July 2012, Mr Sheridan gave Mr Pope a report concluding that the SDU was resistant to managerial intervention, its practices had diminished, a culture of peer selection had developed, and controllers were too involved in source strategy.<sup>1020</sup>

Mr Sheridan's views clearly resonated with Mr Pope, as on 24 August 2012, he emailed Mr Lay, stating that the SDU should be closed for reasons related to culture and, following the Comrie Review, the need to uphold the reputation of Victoria Police and the confidence of the community and judiciary.<sup>1021</sup> The SDU was formally closed in 2013.

The SDU officers contended before the Commission that they were 'sacked' to senior police from taking responsibility for their own mismanagement of Ms Gobbo.<sup>1022</sup> As Counsel Assisting submitted, the evidence unequivocally established that no SDU officer was sacked. But the unit was permanently closed and all personnel transferred to other roles.<sup>1023</sup>

On the evidence before the Commission, the contention of the former SDU officers that their unit was closed only to protect senior management in Victoria Police must be rejected. So too must their suggestions that the Comrie Review, the Kellam Report and the *AB v CD* litigation culminating in the High Court's decision, were all based on falsehoods and flawed reasoning. The decision to close the SDU was based on a range of factors, including the conclusions of the Comrie Review and SDU failings in Ms Gobbo's management. The evidence presented to the Commission indicated that the closure of the SDU was rational and defensible on the grounds provided to Mr Lay.

That is not to say, however, that the contentions of the SDU officers were entirely unmeritorious. The decision may well have provided budgetary savings and Victoria Police probably recognised it was in its interests to be seen to have done something to ward off likely future criticism of its use of Ms Gobbo as a human source. Its position was improved if the secret unit dealing with her had been disbanded—this may have added legitimacy to any claim that the events constituted an aberration that would never be repeated. Officers outside the SDU certainly shared in their culpability, together with Victoria Police institutionally, as its recent apology demonstrates.

As Counsel Assisting submitted in respect of Mr White's evidence, however, if senior management hoped that closing the SDU would divert blame and dampen future criticism of Victoria Police, they must have been sorely disappointed. The failure in leadership that allowed Ms Gobbo to act as a human source for so long went far beyond the Senior Sergeant and Inspector in charge of the SDU. Senior Victoria Police officers, including Mr Overland and others on the Petra and Briars Taskforces Boards of Management, were, or should have been, aware of the grave risks involved in the SDU's management of a criminal defence barrister as a human source and did nothing. Rather, they were content to tolerate the many risks involved while the SDU was delivering such 'positive' results where traditional policing methods had not.

## Notification to IBAC and the Kellam inquiry

On 10 April 2014, Mr Lay responded to a letter from the IBAC Commissioner, dated 3 April 2014, seeking clarification of matters discussed at a 1 April 2014 meeting (about the 'Lawyer X' *Herald Sun* article).<sup>1024</sup>

Mr Lay's letter provided a high-level chronology of Ms Gobbo's role as a human source for Victoria Police and stated:

*There are a number of aspects of this investigation and peripheral issues that cause me significant concerns. I am of the view that the allegations require an investigation independent of Victoria Police. This view was formed after considering:*

- *The very real potential of a witness being murdered as a result of possible leaks from Victoria Police;*
- *The extraordinarily high level of media and public interest in this matter, and*
- *The additional investigative tools that are open to IBAC, specifically, coercive hearings.*<sup>1025</sup>

In May 2014, IBAC then engaged the Honourable Murray Kellam, AO, QC, to undertake a review of Victoria Police's use of Ms Gobbo as a human source. On 6 February 2015, Mr Kellam completed his confidential report into Victoria Police's handling of Ms Gobbo as a human source, finding negligence of a high order,<sup>1026</sup> endorsing the 27 recommendations in the Comrie Review and making 16 further recommendations (Kellam Report).<sup>1027</sup>

The Kellam Report identified nine individuals convicted of serious offences who received, or possibly received, legal advice from Ms Gobbo while she was informing on them to police.<sup>1028</sup>

The Kellam Report and the implementation of its recommendations are discussed in Chapter 11.

## The Champion Report and court proceedings

Recommendation 12 of the Kellam Report obliged the DPP to consider whether there were miscarriages of justice in relation to those nine individuals.<sup>1029</sup>

The DPP produced a confidential report in February 2016 (Champion Report).<sup>1030</sup> In his report, he was unable to conclude whether any miscarriages of justice had occurred, and noted that his examination was limited as he did not have knowledge of, or access to, the necessary information that was likely still held by Victoria Police.<sup>1031</sup> He concluded that six of the nine individuals identified in the Kellam Report were in, or potentially in, a lawyer–client relationship with Ms Gobbo.<sup>1032</sup>

As discussed in Chapter 1 of this final report, the Champion Report found that the prosecution had a duty to make disclosures about Ms Gobbo’s conduct to these six individuals, because their convictions may have been tainted. It stated that the DPP was compelled, and intended, to disclose some of the information about which it had become aware to these individuals.<sup>1033</sup>

Following the completion of his report, the DPP wrote to then Chief Commissioner Mr Ashton enclosing a copy of the draft disclosure letter he intended to send to the six individuals named in the Kellam Report, and one other individual whom the DPP had later identified as being potentially affected (Mr Cvetanovski).<sup>1034</sup>

On 10 June 2016, the Chief Commissioner initiated proceedings in the Supreme Court seeking to restrain the DPP from making those disclosures, claiming PII as disclosing Ms Gobbo’s identity would put her and her children at extreme risk of death or other harm.<sup>1035</sup> Ms Gobbo joined as a party to proceedings and commenced her own separate proceeding.<sup>1036</sup>

The matters were heard in closed court between November 2016 and March 2017, with the interests of the seven individuals, who knew nothing of the proceedings, represented only by *amicus curiae*.<sup>1037</sup> The Court dismissed the proceeding, finding that the public interest in disclosing the information outweighed the public interest in protecting Ms Gobbo.<sup>1038</sup> The Court recognised that the risk to Ms Gobbo was a powerful reason to restrain disclosure, but found that it was outweighed by the assistance the information would provide to the seven individuals in potentially having their convictions overturned, and in maintaining public confidence in the integrity of the criminal justice system.<sup>1039</sup>

The Chief Commissioner and Ms Gobbo unsuccessfully appealed the Supreme Court’s decision to the Court of Appeal<sup>1040</sup> and then to the High Court.<sup>1041</sup>

The proceedings in the Supreme Court, Court of Appeal and High Court focused on the period of Ms Gobbo’s use as a human source between September 2005 and January 2009.

Counsel Assisting submitted that at no stage did the Chief Commissioner, through his legal representatives, make any attempt to correct the record of facts before the High Court so as to make clear that Ms Gobbo had been formally registered prior to 2005. The fact of these earlier registrations would have contradicted the Chief Commissioner’s submission that Ms Gobbo had become a human source only because of ‘assurances’ made to her in 2002 and 2003.<sup>1042</sup>

Victoria Police’s responsive submissions stated that neither the 1995 nor 1999 registration was hidden. It submitted that the 1995 registration was not identified by Victoria Police until 2018, and that the Commission was notified as soon as its significance was understood. Victoria Police further submitted that the 1999 registration was disclosed to IBAC in 2014 and referred to extensively in hearings held as part of the Kellam inquiry. While not referred to in the body of the Kellam Report, it submitted that the existence of the 1999 registration is frequently referred to in the report’s annexures, such that a reader would have no doubt Ms Gobbo had previously been registered as a human source. In any case, Victoria Police asserted these earlier registrations were not relevant to the proceedings in question, which focused on disclosure to the seven named individuals only.<sup>1043</sup>

The Commission accepts Victoria Police's submission that the 1995 registration was not found by officers until June 2018, but disagrees that it was not relevant to the High Court proceedings that were then underway. It was of relevance, even if only peripherally. The submission that the 1999 registration was disclosed to the Supreme Court and thus to the High Court through the annexures to the Kellam Report is not accepted, as the annexures tendered made only oblique references to it and it was not easily identifiable.

The Commission is satisfied that Victoria Police failed to inform the High Court of Ms Gobbo's previous registrations as a human source in 1995 and 1999. In particular, the non-disclosure of the 1995 registration to the High Court when it was located by Victoria Police in June 2018 raises questions about its desire and ability to comply with its disclosure obligations.

## CONCLUSIONS AND RECOMMENDATIONS

Police officers perform a vital and difficult role in our society. Their efforts to detect, disrupt and prevent criminal activity help to keep the community safe, hold wrongdoers to account and bring about justice for victims. In undertaking this work, they are entrusted with significant powers and authority, and their actions can have a direct impact on whether the criminal justice system as a whole operates fairly, effectively and in line with individual rights and community expectations. Consequently, when police officers fail to uphold their duties and obligations faithfully and according to law, it can have detrimental consequences—for individuals, victims, the policing organisation and its other officers, the broader community, and the integrity of the criminal justice system.

This debacle began when Ms Gobbo, a law student with a propensity for deception and a fascination with criminals and police officers, committed offences that led to her first registration as a human source by Victoria Police. A decade or so later, when Ms Gobbo had developed an extensive professional and social network of organised crime figures as a criminal defence barrister, and the Victorian community was on edge over the gangland wars, astute detectives sensed an opportunity. They knew of Ms Gobbo's potentially useful criminal connections and also of certain vulnerabilities—she had recently suffered a stroke, and her own clients were threatening her. Despite the obvious risks, Victoria Police registered Ms Gobbo as a human source for the third time and went on to collect vast amounts of information from her to help secure the convictions of organised crime figures.

The Commission is satisfied that some police involved were aware that it was a precarious legal and ethical situation for a criminal defence lawyer to assist police contrary to the interests of her own clients. Putting these reservations aside and without obtaining legal advice, Victoria Police and its officers enabled and at times encouraged Ms Gobbo to breach her professional duties, disregarded their disclosure obligations, and corrupted the prosecutions of those people identified by the High Court and perhaps many more.

For years, Victoria Police ignored opportunities to seek legal advice about the situation or to take other steps to remedy the increasingly compromised situation. They worked to keep their conduct secret from the prosecution, accused persons and the courts—in part to protect Ms Gobbo's safety, but also to protect their own reputations and their hard-earned convictions. They showed contempt for a fundamental human right and premise of our democracy, the rule of law—that everyone, no matter their identity or reputation, the severity of their alleged crime or the strength of the prosecution case, is entitled to a fair trial according to law.

The Commission acknowledges the various organisational conditions and factors that allowed this conduct to occur—poor governance and leadership, a jigsaw of reporting arrangements resulting in dispersed accountability, deficient supervision of the officers working directly with Ms Gobbo, and a substandard policy framework and training. These issues are discussed further in Chapter 9.

But whatever organisational factors may be relevant, they do not absolve officers of individual responsibility. It may be that certain officers did not have the full and complete picture of Victoria Police's engagement with and use of Ms Gobbo at the time—but they knew enough about what was occurring to require them, consistent with their duties to uphold the law and serve the community, to take a different course.

Similarly, the Commission rejects the assertion of some Victoria Police officers that they were not responsible for certain matters related to Ms Gobbo's use and management and the information she provided as a human source because this was not within their chain of command.

In the main, these were senior, experienced officers with a comprehensive understanding of the workings of the criminal justice system, the rights of individuals within that system, and the very real possibility that dispensing with the rules of legal professional responsibility, evidence or disclosure may lead to a failed prosecution. It is a convenient but untenable excuse to suggest that they could not intervene when they had the opportunity, ability and responsibility to do so.

In Chapter 12 of this final report, the Commission has made recommendations to reform Victoria Police's human source management framework, to ensure these events will not be repeated. But even the best systems can be undermined by deliberate or grossly negligent conduct. The independent external oversight regime recommended in Chapter 13 should ensure any such future conduct is exposed promptly. With the implementation of those recommendations, along with this Commission's exposure of past police conduct, and the independent investigation of current and former officers as recommended below, Victorians can be satisfied their criminal justice system is again working as it should, now and into the future.

## Further investigation

On the material before it, the Commission is satisfied that the conduct of current and former Victoria Police officers should be independently investigated and a determination made as to whether there is sufficient evidence to establish the commission of a criminal offence or offences, and/or a disciplinary offence or offences in the case of current officers. The Commission has drawn this conclusion having considered Counsel Assisting submissions, the matters raised in responsive submissions, and other evidence obtained during the inquiry.

The Commission recommends in Chapter 17 that the Victorian Government establishes a Special Investigator with powers to investigate the conduct of Ms Gobbo and current and former Victoria Police officers. The rationale for establishing a Special Investigator is discussed in that chapter. In short, the Commission considers that it would be inappropriate for Victoria Police to conduct this investigation; notes that IBAC lacks the power to investigate all of Ms Gobbo's conduct in its entirety; and notes that it would be an inefficient use of resources for one body to investigate matters involving Ms Gobbo and another the current and former officers of Victoria Police. The establishment of the Special Investigator proposed in Recommendation 92 would, in the Commission's view, best ensure the conduct is comprehensively, efficiently and independently investigated to determine if there is sufficient evidence to bring a disciplinary or criminal charge or charges against all or any persons involved.

While this will necessarily involve consideration of conduct and events discussed in this final report and Counsel Assisting submissions, the Commission notes that there are many people mentioned in these documents, both Victoria Police officers and other individuals, because they are relevant to the narrative—not because the Commission considers their conduct to be improper.

The Commission's investigative and reporting role has elicited a very considerable body of material regarding the impact of this once hidden conduct, some of which will be inadmissible in a court or disciplinary hearing. The Special Investigator's responsibilities will include consideration of whether there is sufficient admissible evidence to support criminal and/or disciplinary charges.

**RECOMMENDATION 3**

That the Victorian Government, immediately after it has established the Special Investigator proposed in Recommendation 92, refers the conduct of current and former Victoria Police officers named in this report or the complete and unredacted submissions of Counsel Assisting to the Special Investigator to investigate whether there is sufficient evidence to establish the commission of a criminal and/or disciplinary offence or offences connected with Victoria Police's use of Ms Nicola Gobbo as a human source.

If the Special Investigator considers that there is sufficient evidence to establish the commission of a criminal offence or offences, they should prepare a brief of evidence for the Victorian Director of Public Prosecutions to determine whether to prosecute.

If the Special Investigator considers that there is sufficient evidence to establish the commission of a disciplinary offence or offences, they should deal with those matters in accordance with Recommendation 99.

## The role of Executive Director, Legal Services

The Commission considers that it is critical that the Chief Commissioner and Victoria Police Executive Command have the benefit of senior, independent legal advice to inform operational decisions that involve complex legal issues and risks. Currently, the most senior legal adviser within Victoria Police is the Executive Director, Legal Services. This role has a dual function—both providing legal advice to the Chief Commissioner and Executive Command; and overseeing the management of a large number of legal services personnel and police prosecutors.

It is critically important that Victoria Police Executive Command is given frank and independent legal advice, even, and in fact especially, when this may be challenging or uncomfortable. This goal may be more difficult to achieve if Victoria Police's most senior legal role—that of Executive Director, Legal Services—is or is seen to be part of the command structure and/or is able to be occupied by the same person over many years.

The Commission notes that several Victorian Government departments, statutory entities and private sector organisations have created general counsel roles to provide legal advice to senior executive and management. It may be beneficial for Victoria Police to consider whether the creation of a general counsel role, instead of or in addition to the role of Executive Director, Legal Services, would help to achieve the level of independence required in the provision of legal advice to Executive Command.

**RECOMMENDATION 4**

That the Chief Commissioner of Victoria Police, within three months:

- a. takes steps to ensure that Victoria Police's organisational and executive structure enables the role of Executive Director, Legal Services to provide independent legal advice to Victoria Police Executive Command (or creates an alternative senior legal advisory role for this purpose)
- b. considers whether limits should be placed on the maximum time a person may spend in the position of Executive Director, Legal Services (or any alternative senior role created within Victoria Police for the purpose of providing independent legal advice to Executive Command).

# Endnotes

- 1 *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants* [2020] VSCA 214, [57] (Beach, McLeish and Weinberg JJA).
- 2 A list of responsive submission made to the Commission is at Appendix D. Victoria Police made submissions on behalf of the organisation and submissions on behalf of current and former officers. For ease of reference, in this chapter the Commission may attribute submissions made by Victoria Police on behalf of specified individuals, as responsive submissions from those individuals.
- 3 *Victoria Police Act 2013* (Vic) sch 2.
- 4 *State of NSW v Tyszyk* [2008] NSWCA 107, [83] (Campbell JA).
- 5 *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).
- 6 *Victoria Police Act 2013* (Vic) pts 7, 9, 10; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) pt 3.
- 7 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4(1)(d), 38; *DPP v Kaba* (2014) 44 VR 526, 647 [466] (Bell J).
- 8 Exhibit RC0030 Registration of Human Source, July 1995.
- 9 Exhibit RC0034a Informer registration application for Ms Nicola Gobbo, 13 May 1999; Exhibit RC0034b Informer registration application, nomination of controller and handler for Ms Nicola Gobbo, 26 May 1999.
- 10 Exhibit RC0793b Letter from solicitors for Australian Federal Police to Solicitors Assisting the Commission, 22 November 2019, 2 [9].
- 11 Exhibit RC0070 Operation Scorn Progress Report, 22 February 1996.
- 12 Exhibit RC0793b Letter from solicitors for Australian Federal Police to Solicitors Assisting the Commission, 22 November 2019, 2 [10]–[11].
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- 14 See, eg, Transcript of Officer 'Sandy White', 23 August 2019, 5240.
- 15 Exhibit RC1256b Statement of Mr Richard Grant, 28 November 2019, 3 [17].
- 16 Exhibit RC1256b Statement of Mr Richard Grant, 28 November 2019, 3 [15]–[16]; Transcript of Mr Gavan Ryan, 9 August 2019, 4236.
- 17 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 7 [34].
- 18 Exhibit RC1256b Statement of Mr Richard Grant, 28 November 2019, 3–4 [18].
- 19 Exhibit RC0310a Statement of Mr Gavan Ryan, 13 June 2019, 3 [16].
- 20 Transcript of Mr Simon Overland, 16 December 2019, 11334–5.
- 21 Ombudsman of Victoria, 'Ceja Taskforce—Investigation of Allegations of Drug Related Corruption', *Interim Report* (May 2003) 16–17.
- 22 Exhibit RC0108b Victoria Police, Review of the Victoria Police Drug Squad (Report, November 2001).
- 23 Exhibit RC0922 Office of Police Integrity Report on Investigation into Operation Clarendon, June 2008, 23.
- 24 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 34.
- 25 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 7 [34]–[35]; Exhibit RC0276 Review and Develop Best Practice Human Source Management Policy 2004, 9.
- 26 Exhibit RC0276 Review and Develop Best Practice Human Source Management Policy, 2004.
- 27 Exhibit RC0276 Review and Develop Best Practice Human Source Management Policy, 2004, 10; Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 2 [11]–[13], 3 [17].
- 28 Transcript of Mr Simon Overland, 16 December 2019, 11330. See also Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 2 [11]–[13].
- 29 Exhibit RC0915b Statement of Mr Simon Overland, 2 [12].
- 30 Exhibit RC0276 Review and Develop Best Practice Human Source Management Policy 2004, 5.
- 31 Exhibit RC0816b Dedicated Source Unit Monthly Report, May 2006, 14.
- 32 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 7 [37].
- 33 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 7 [38].
- 34 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 7–8 [39]–[40].
- 35 Transcript of Mr Stuart Bateson, 2 July 2019, 3372; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 16–17 [3.75], 17 [3.79]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, 3 [10]–[11].

- 36 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, 2 [7].
- 37 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 12, 2 [8]; Exhibit RC0251b Statement of Mr Philip Swindells, 6 May 2019, 6 [30]; Exhibit RC0787 Transcript of conversation between Ms Nicola Gobbo and the Commission, 20 March 2019, 195–6.
- 38 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 16–17 [3.75]–[3.76].
- 39 Exhibit RC0251b Statement of Mr Philip Swindells, 6 May 2019, 6 [32].
- 40 Exhibit RC0269b Statement of Commander Stuart Bateson, 7 May 2019, 9 [51].
- 41 Exhibit RC0269b Statement of Commander Stuart Bateson, 7 May 2019, 9 [51]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 17 [3.79].
- 42 Transcript of Ms Nicola Gobbo, 4 February 2020, 13054.
- 43 Transcript of Officer ‘Sandy White’, 31 July 2019, 3643–5; Transcript of Mr James (Jim) O’Brien, 4 September 2019, 5485.
- 44 Transcript of Officer ‘Sandy White’, 31 July 2019, 3643.
- 45 Exhibit RC0266b Statement of Detective Sergeant Paul Rowe, 25 June 2019, 5 [34]; Exhibit RC0933b Mr James (Jim) O’Brien diary, 31 August 2005, 1; Exhibit RC0468b Mr James (Jim) O’Brien diary summaries, 31 August 2005, 3.
- 46 Transcript of Officer ‘Sandy White’, 31 July 2019, 3642.
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- 49 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015), 6–8 [2].
- 50 Transcript of Officer ‘Sandy White’, 30 July 2019, 3589–90.
- 51 See, eg, Exhibit RC0281 ICR3838 (001), 16 September 2005, 6.
- 52 Exhibit RC0285 DSU Risk Assessment relating to Nicola Gobbo, 15 November 2005, 7.
- 53 Transcript of Officer ‘Peter Smith’, 10 September 2019, 6029.
- 54 Exhibit RC0267b Transcript of meeting between Ms Nicola Gobbo, Officer ‘Peter Smith’ and Officer ‘Sandy White’, 16 September 2005, 14–15.
- 55 Transcript of Officer ‘Peter Smith’, 10 September 2019, 6029–30.
- 56 Transcript of Officer ‘Peter Smith’, 11 September 2019, 6074.
- 57 Exhibit RC0281 ICR3838 (001), 16 September 2005, 1.
- 58 Exhibit RC0281 ICR3838 (001), 16 September 2005, 1; Exhibit RC0267b Transcript of meeting between Ms Nicola Gobbo, Officer ‘Peter Smith’ and Officer ‘Sandy White’, 16 September 2005, 5–10.
- 59 See, eg, Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012), 27.
- 60 Exhibit RC0275b Statement of Officer ‘Sandy White’, undated, 29 [122], 57–8 [247]–[250]; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 21 [45], 22 [47], 70 [159]; Transcript of Officer ‘Peter Smith’, 10 September 2019, 6030–1; Transcript of Officer ‘Black’, 23 October 2019, 8137. See also Responsive submission, Victoria Police, 24 August 2020, 142 [72.6]–[72.7]. Further, Officer ‘Black’ gave evidence that when they registered Ms Gobbo in 2005, they thought they had ‘a reasonable handle’ on legal professional privilege: Transcript of Officer ‘Black’, 23 October 2019, 8137.
- 61 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 21 [45], 22 [47]; Responsive submission, Victoria Police, 24 August 2020, 142–3 [72.9]–[72.10].
- 62 Exhibit RC0822b Mr Douglas (Doug) Cowlshaw day book, 26 October 2005, 4; Transcript of Mr Douglas (Doug) Cowlshaw, 3 December 2019, 10310–1.
- 63 Transcript of Mr Douglas (Doug) Cowlshaw, 3 December 2019, 10310.
- 64 Exhibit RC0591b Officer ‘Black’ diary, 23 November 2005; Transcript of Mr Douglas (Doug) Cowlshaw, 3 December 2019, 10297, 10314; RC0823b Officer ‘Green’ diary, 23 November 2005, 2.
- 65 See Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 73 [26.5], 74 [26.10].
- 66 Transcript of Mr Douglas (Doug) Cowlshaw, 3 December 2019, 10301.
- 67 Transcript of Mr James (Jim) O’Brien, 4 September 2019, 5514.
- 68 Further detail can be found in Volume I the ‘List of key people relevant to the use of Ms Nicola Gobbo as a human source’ and ‘List of key police taskforces and operations’.
- 69 Transcript of Mr James (Jim) O’Brien, 4 September 2019, 5516–17.
- 70 Exhibit RC981b Statement of Mr Simon Overland, 17 January 2020, 16–17 [71], 17 [73].
- 71 Transcript of Mr Simon Overland, 16 December 2019, 11312.

- 72 Transcript of Mr Simon Overland, 16 December 2019, 11312.
- 73 Exhibit RC0984a Diary Entry of Mr Simon Overland, 26 September 2005, 511.
- 74 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 2 [11]–[14]; Exhibit RC0276 Review and Develop Best Practice Human Source Management Policy 2004, 10.
- 75 Exhibit RC981b Statement of Mr Simon Overland, 17 January 2020, 15 [66].
- 76 Exhibit RC0467 Investigation Plan for Operation Posse, 17 November 2005, 3.
- 77 Transcript of Mr Simon Overland, 16 December 2019, 11315.
- 78 Transcript of Mr Simon Overland, 23 January 2020, 12294–5.
- 79 Transcript of Mr Simon Overland, 16 December 2019, 11431.
- 80 Transcript of Mr Simon Overland, 16 December 2019, 11429–32.
- 81 See, eg, Responsive submission, Mr Simon Overland, 18 August 2020, 32 [92].
- 82 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 83 Sir Walter Scott, ‘Marmion: A Tale of Flodden Field’, canto 6, stanza 17.
- 84 Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 103–4 [451.1]–[451.5].
- 85 As noted in Chapter 7, in May 2005 Ms Gobbo met with Mr Bateson and gave him information concerning Mr Carl Williams, Mr George Williams, Mr Antonios (Tony) Mokbel and his solicitor ‘Solicitor 2’: see Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 23 May 2005, 4 June 2005, 29 June 2005, 21 July 2005, 23 August 2005, 20–3; Transcript of Ms Nicola Gobbo, 6 February 2020, 13297–300; Transcript of Commander Stuart Bateson, 2 July 2019, 3428.
- 86 See comments made by Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 135 [641].
- 87 Exhibit RC0269a Statement of Commander Stuart Bateson, 7 May 2019, 8 [46]; Transcript of Commander Stuart Bateson, 2 July 2019, 3366; Transcript of Mr Andrew Allen, 26 June 2019, 2965; Exhibit RC0312b Mr Gavan Ryan day book, 7 April 2004, 8.
- 88 Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 117 [549], 120 [564], [566], 126 [599], 132 [630], 135 [641].
- 89 Exhibit RC0281 ICR3838 (001), 16 September 2005, 2; Exhibit RC0281 ICR3838 (003), 26 September 2005, 14.
- 90 See, eg, Transcript of Mr Gavan Ryan, 14 August 2019, 4477–8.
- 91 Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 22, 23, 25, 29, 30 June 2004, 7–8; Exhibit RC1876 Extract of Transcript of Committal Hearing, R v Williams, 9 March 2005, 778–9.
- 92 Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 9 July 2004, 8.
- 93 Exhibit RC0272b Mr Stuart Bateson diary and day book, 10 July 2004, 2; see also Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 10 July 2004, 8–9.
- 94 Exhibit RC0272b Mr Stuart Bateson diary and day book, 10 July 2004, 2; see also Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 11 July 2004, 9.
- 95 Exhibit RC0109a Mr Terry Purton diary, 12 July 2004, 2.
- 96 Exhibit RC0252b Purana Chronology prepared by Commander Stuart Bateson, 13 July 2004, 9; Transcript of Commander Stuart Bateson, 20 November 2019, 9569.
- 97 See comments made by Counsel Assisting that ‘the credit, truthfulness and reliability of [Mr] McGrath would at all times be an important factor in the course he took’: Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 150 [698].
- 98 Exhibit RC0773b Extract of Transcript of proceedings, R v Williams (Supreme Court of Victoria, Teague J, 23 September 2004), 14.
- 99 Exhibit RC0773b Extract of Transcript of proceedings, R v Williams (Supreme Court of Victoria, Teague J, 23 September 2004), 15–16.
- 100 Exhibit RC0773b Extract of Transcript of proceedings, R v Williams (Supreme Court of Victoria, Teague J, 23 September 2004), 23.
- 101 Transcript of Ms Nicola Gobbo, 6 February 2020, 13278.
- 102 Exhibit RC1875b Extract of Committal Hearing, R v Williams, 9 March 2005, 824, 829.

- 103 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 169–170 [764]–[765]; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 108–27 [387]–[433].
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- 105 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 169 [764].
- 106 See Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 67–9 [17.64]–[17.77].
- 107 See list of changes itemised by Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 168–9 [763].
- 108 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 70–1 [17.84]–[17.88].
- 109 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 36 [13.14(d)], 43–9 [14.45]–[14.62]; see also Responsive submission, Ms Nicola Gobbo, 14 August 2020, 141–54 [464]–[482].
- 110 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 96 [344].
- 111 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 100 [353].
- 112 Transcript of Mr Stuart Bateson, 2 July 2019, 3372–3, 3414–5, 3433.
- 113 Exhibit RC1933b Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 14–5 [101]–[103].
- 114 See *Victoria Police Act 2013* (Vic), sch 2. The predecessor of the Victoria Police Act was the *Police Regulation Act 1958* (Vic).
- 115 Exhibit RC0267b Transcript of meeting between Nicola Gobbo, Officer 'Peter Smith' and Officer 'Sandy White', 16 September 2005, 19–21.
- 116 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 143 [682].
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- 119 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 145 [688]–[689].
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- 121 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 35–6 [13.4]–[13.8], 36 [13.14(c)], 41–3 [14.30]–[14.40], 50 [14.63]–[14.67], 74 [18.1]–[18.3]; Responsive submissions of Ms Nicola Gobbo, 14 August 2020, 140 [458], 156–70 [493]–[527]; Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 16 [8.68], 84 [36.9].
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- 126 Exhibit RC0933a Mr James (Jim) O'Brien Diary, 17 February 2006, 135.
- 127 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 177 [807].
- 128 Exhibit RC0281 ICR3838 (020), 28 February 2006, 172.
- 129 Exhibit RC0281 ICR3838 (019), 19 February 2006, 159.

- 130 Exhibit RC0281 ICR3838 (019), 23 February 2006, 163; see also Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 180 [820].
- 131 Exhibit RC0281 ICR3838 (023), 21 March 2006, 202.
- 132 Exhibit RC0281 ICR3838 (020), 24 February 2006, 165.
- 133 See, eg, Exhibit RC0475b Extract of transcript of conversation between Mr James (Jim) O'Brien, Mr Stuart Bateson and Mr 'Thomas', 22 February 2006, 20, 31.
- 134 See, eg, Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 143, 183–4 [838].
- 135 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 284–6 [52.49]–[52.60].
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- 137 Exhibit RC0292 Officer 'Sandy White' diary, 19 February 2006, 124.
- 138 Exhibit RC0292 Officer 'Sandy White' diary, 20 February 2006, 125.
- 139 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 283–4 [52.40]–[52.48].
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- 141 Exhibit RC0272a Commander Stuart Bateson diary, 21 April 2006, 112.
- 142 Exhibit RC0272a Commander Stuart Bateson diary, 21 April 2006, 112.
- 143 Transcript of Commander Stuart Bateson, 21 November 2019, 9735–6; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 97–9 [22.23]–[22.46].
- 144 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 95 [22.15(a)].
- 145 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 98 [22.30].
- 146 Exhibit RC0312a Mr Gavan Ryan diary, 19 February 2006, 3; Exhibit RC0312a Mr Gavan Ryan diary, 20 February 2006, 3; Exhibit RC0109a Mr Terry Purton diary, 20 February 2006, 14.
- 147 Exhibit RC0772b Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 15 March 2006, 11.
- 148 See Exhibit RC0476a Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 76.
- 149 Exhibit RC0476b Transcript of meeting between Mr 'Thomas', Mr James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 81–2.
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- 151 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 111–12 [23.73]–[23.74].
- 152 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 90–1 [21.6]–[21.10].
- 153 Transcript of Commander Stuart Bateson, 21 November 2019, 9776–77.
- 154 See, eg, Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Green', 20 April 2006, 149–50.
- 155 Exhibit RC0780 Transcript of Mention Hearing, *R v Williams*, Justice King, 30 March 2006, 3.
- 156 Exhibit RC0272b Commander Stuart Bateson diary, 29 March 2006, 106.
- 157 Transcript of Commander Stuart Bateson, 2 July 2019, 3365, 3399; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 88–9 [20.84].
- 158 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 88 [20.80]–[20.83].
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- 160 Exhibit RC0281 ICR3838 (025), 13 April 2006, 226.
- 161 Exhibit RC0284b SML3838, 19 April 2006, 27; Transcript of Commander Stuart Bateson, 21 November 2019, 9738.
- 162 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Green', 20 April 2006, 149–50.
- 163 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Green', 20 April 2006, 167–70.
- 164 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Green', 20 April 2006, 162–3; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 201–2 [918]–[919].

- 165 From Mr Bateson, Mr Ryan and Mr O'Brien: Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 96–8 [22.20]–[22.25], 146–50 [28.33]–[28.69], 294–5 [52.107]–[52.116].
- 166 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 130 [453].
- 167 Exhibit RC0284b SML3838, 19 April 2006, 27.
- 168 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 138 [478].
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- 170 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 132–3 [458]–[465].
- 171 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 200 [910].
- 172 See summary table prepared by Counsel Assisting: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 251–2 [1085].
- 173 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 211–12 [965]–[966]. See also Transcript of Commander Stuart Bateson, 21 November 2019, 9726–8.
- 174 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 212 [968].
- 175 See, eg, the subject of money: Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 212 [970]; Exhibit RC0281 ICR3838 (037), 9 July 2006, 352.
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- 178 Exhibit RC0644 Inspector Boris Buick day book, 5 May 2004, 25. Exhibit RC636b Statement of Mr Boris Buick, 10 May 2019, 10 [45].
- 179 Exhibit RC0636b Statement of Inspector Boris Buick, 10 May 2019, 5 [16].
- 180 Exhibit RC0649d Daybook of Inspector Boris Buick with Post-it note, 19 July 2006; Transcript of Commander Stuart Bateson, 22 November 2019, 9851.
- 181 Transcript of Commander Stuart Bateson, 22 November 2019, 9855–6.
- 182 Exhibit RC0281 ICR3838 (038), 19 July 2006, 360.
- 183 Exhibit RC0480 Transcript of conversation between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Green', 4 August 2008, 239.
- 184 See, eg, Responsive submission, Victoria Police, 24 August 2020, 96 [51.26]; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 60 [137]; Transcript of Commander Stuart Bateson, 2 July 2019, 3369.
- 185 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 7 [34].
- 186 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 7–8 [37].
- 187 Transcript of Mr Simon Overland, 16 December 2019, 11395.
- 188 Transcript of Mr Simon Overland, 16 December 2019, 11333.
- 189 Transcript of Mr Simon Overland, 17 December 2019, 11442.
- 190 Exhibit RC0312a Mr Gavan Ryan diary, 19 February 2006, 3.
- 191 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 1 [8].
- 192 Transcript of Mr Simon Overland, 17 December 2019, 11454.
- 193 Responsive submission, Mr Simon Overland, 18 August 2020, 41 [121], 48 [136], 55 [154]–[158], 57–9 [162]–[163].
- 194 Responsive submission, Mr Simon Overland, 18 August 2020, 50 [141].
- 195 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 246–8 [919].

- 196 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 246–8 [919].
- 197 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 230–4 [1053]–[1058].
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- 199 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 248 [921].
- 200 Exhibit RC0464b Statement of Mr James (Jim) O'Brien (long), 14 June 2019, 1–2 [4], 10 [43], 11 [49].
- 201 Exhibit RC0772 Transcript of meeting between Mr Stuart Bateson, Mr 'Thomas' and Mr James (Jim) O'Brien, 15 March 2006, 3; Exhibit RC0312a Mr Gavan Ryan diary, 19 February 2006, 3.
- 202 Exhibit RC0312a Mr Gavan Ryan diary, 19 February 2006, 3; Transcript of Mr James (Jim) O'Brien, 5 September 2019, 5647–52.
- 203 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 302–3 [52.155].
- 204 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 302–3 [52.155].
- 205 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 299–300 [52.139]–[52.159].
- 206 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 159–60 [552].
- 207 Exhibit RC0310 Statement of Mr Gavan Ryan, 13 June 2019, 1 [3i].
- 208 Exhibit RC0312a Mr Gavan Ryan diary, 7 April 2004, 7.
- 209 Exhibit RC0310 Statement of Gavan Ryan, 13 June 2019, 7 [41].
- 210 Exhibit RC0312a Mr Gavan Ryan diary, 19 February 2006, 3.
- 211 Exhibit RC0310 Statement of Mr Gavan Ryan, 13 June 2019, 8 [47].
- 212 See Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 159–66 [28.147]–[28.176].
- 213 Exhibit RC0269 Statement of Commander Stuart Bateson, 7 May 2019, 6 [27].
- 214 Exhibit RC0281 ICR3838 (019), 19 February 2006, 158; Exhibit RC0476 Transcript of meeting between Nicola Gobbo, James (Jim) O'Brien and Mr Stuart Bateson, 23 March 2006, 81–4.
- 215 Exhibit RC0272 Commander Stuart Bateson diary, 18 March 2006, 101.
- 216 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 60 [137].
- 217 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 61 [138].
- 218 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 60 [137], 61 [138], 65 [146].
- 219 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 275 [1020].
- 220 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 228–9 [1041].
- 221 *Victoria Police Act 2013* (Vic) sch 6, pt 9. The Commission understands that Victoria Police did not investigate whether any officers may have committed a breach of discipline until September 2018, when a Victoria Police panel found on the basis of its review of the Kellam Report that no current officers were believed to have committed a breach of discipline: Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 86, 1.
- 222 Exhibit RC0275 Statement of Officer 'Sandy White', 1 August 2019, 20 [79]–[80]; Transcript of Officer 'Peter Smith', 11 September 2019, 6100–1.
- 223 Transcript of Mr James (Jim) O'Brien, 4 September 2019, 5522.
- 224 Exhibit RC0467 Investigation Plan for Operation Posse, 17 November 2005, 3–4.
- 225 See Chapter 7 for more details.
- 226 Exhibit RC0267b Transcript between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith', 168; Transcript of Officer 'Peter Smith', 11 September 2019, 6100–1.
- 227 Transcript of Officer 'Peter Smith', 11 September 2019, 6100–1; Exhibit RC0538b Statement of Inspector Dale Flynn, 17 June 2019, 6 [34]–[36]; Transcript of Ms Nicola Gobbo, 6 February 2020, 13312, stating that the SDU 'knew' that she was at the time acting for Mr Cooper; Mr Rowe and Mr Mansell were present at the 16 September 2005 meeting between the SDU and Ms Gobbo when she said she was acting for Mr Cooper; an analysis of Mr O'Brien's knowledge is set out below. See also Exhibit RC0281 ICR3838 (010), 6 December 2005, 74.
- 228 See Chapter 7 for more details.

- 229 Exhibit RC0281 ICR3838 (005), 3 October 2005, 25; Exhibit RC0281 ICR3838 (007), 28 October 2005, 45; Exhibit RC0281 ICR3838 (011), 9 December 2005, 78; Exhibit RC0281 ICR3838 (013), 22 December 2005, 94, 95; Exhibit RC0281 ICR3838 (014), 25 December 2005, 99; Exhibit RC0281 ICR3838 (014), 30 December 2005, 105; Exhibit RC0281 ICR3838 (014), 31 December 2005, 106.
- 230 Exhibit RC0281 ICR3838 (011), 9 December 2005, 79; Exhibit RC0281 ICR3838 (014), 30 December 2005, 105.
- 231 Exhibit RC0281 ICR3838 (009), 27 November 2005, 63–4; Exhibit RC0283 Information Report SID317-271105, 12 December 2005; Exhibit RC0281 ICR3838 (011), 8–9 December 2005, 78–9; Exhibit RC0283 Information Report SID323-091205, 19 December 2005; Exhibit RC0283 Information Report SID331-301105, 27 December 2005; Exhibit RC0281 ICR3838 (014), 31 December 2005, 106.
- 232 Transcript of Ms Nicola Gobbo, 6 February 2020, 13331–2.
- 233 Exhibit RC0281 ICR3838 (022), 10 March 2006, 183.
- 234 Exhibit RC0281 ICR3838 (023), 20 March 2006, 198–9; Exhibit RC0282 Transcript of conversation between Ms Nicola Gobbo, Officer ‘Peter Smith’ and Officer ‘Green’, 20 March 2006.
- 235 See, eg, use of the term ‘roll’, at Exhibit RC0218 ICR3838 (028), 18 April 2006, 250.
- 236 Exhibit RC0281 ICR3838 (017), 2 February 2006, 142.
- 237 Exhibit RC0282 ICR3838 (028), 18 April 2006, 250. Cf. Exhibit RC1177 Transcript of Proceedings, AB & EF v CD [2017] VSC 350, 27 February 2017, 254.
- 238 Exhibit RC0281 ICR3838 (028), 18 April 2006, 250.
- 239 Exhibit RC0281 ICR3838 (028), 18 April 2006, 251; Exhibit RC0281 ICR3838 (028), 19 April 2006, 252: ‘Controller [Sandy White] and [Peter Smith] confer with Op Purana D/S/S O’Brien and D/S Flynn, discuss tactics for post arrest, based on HS information’; Exhibit RC0464 Statement of Mr James (Jim) O’Brien, 14 June 2019, 32 [162]–[164].
- 240 Exhibit RC0281 ICR3838 (027), 14 March 2006, 243–4 (‘0118 J O’Brien from Purana updated’); Exhibit RC0283 Information Report SID847, 14 April 2006.
- 241 Exhibit RC0984 Mr Simon Overland diary, 26 September 2005, 511–12.
- 242 Exhibit RC0984 Mr Simon Overland diary, 27 September 2005, 513–14.
- 243 Exhibit RC0282 Transcript of conversation between Ms Gobbo, Officer ‘Sandy White’, Officer ‘Peter Smith’ and Officer ‘Green’, 20 April 2006, 228–9; Exhibit RC0984 Mr Simon Overland diary, 19 April 2006, 263.
- 244 Exhibit RC0281 ICR3838 (024), 1 April 2006, 219; Exhibit RC0281 ICR3838 (025), 5 April 2006, 225; Exhibit RC0281 ICR3838 (025), 7 April 2006, 228; Exhibit RC0281 ICR3838 (027), 14 March 2006, 244; Exhibit RC0281 ICR3838 (028), 18 April 2006, 251; Exhibit RC0281 ICR3838 (028), 19 April 2006, 253; Exhibit RC0281 ICR3838 (030), 28 April 2006, 274.
- 245 Exhibit RC1562 Mr Richard Grant diary, 22 April 2006, 50.
- 246 Exhibit RC0626b Transcript of conversation between Officer ‘Sandy White’, Officer ‘Peter Smith’, Officer ‘Black’ and Ms Nicola Gobbo, 28 October 2005, 142–3.
- 247 Exhibit RC0626b Transcript of conversation between Officer ‘Sandy White’, Officer ‘Peter Smith’, Officer ‘Black’ and Ms Nicola Gobbo, 28 October 2005, 139–40.
- 248 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer ‘Peter Smith’, Officer ‘Green’ and Officer ‘Sandy White’, 9 March 2006, 106–7.
- 249 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer ‘Peter Smith’, Officer ‘Green’ and Officer ‘Sandy White’, 20 April 2006, 258.
- 250 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer ‘Peter Smith’, Officer ‘Green’ and Officer ‘Sandy White’, 20 April 2006, 272–3.
- 251 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 158 [358].
- 252 Exhibit RC0486 Officer ‘Peter Smith’ diary, 21 April 2006, 192.
- 253 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 320 [52.249].
- 254 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 320 [52.248].
- 255 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 320 [52.249].
- 256 Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 428–36 [1831.19.3].
- 257 See Transcript of Inspector Dale Flynn, 1 October 2019, 6882; Exhibit RC0394 Officer ‘Sandy White’ diary, 23 April 2006, 52–54; Transcript of Inspector Dale Flynn, 1 October 2006, 6882–8, 6891–4; Exhibit RC0281 ICR3838 (028), 23 April 2006, 261–2; Exhibit RC0281 ICR3838 (028), 23 April 2006, 261–2; Exhibit RC0281 ICR3838 (029), 25 April 2006, 268; Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 11 [58]; Transcript of Inspector Dale Flynn, 1 October 2006, 6898–9.
- 258 Transcript of Ms Nicola Gobbo, 7 February 2020, 13417.
- 259 Transcript of Mr ‘Cooper’, 31 October 2019, 8667–8.

- 260 Transcript of Mr 'Cooper', 31 October 2019, 8728.
- 261 Transcript of Mr Simon Overland, 17 December 2019, 11436, 11492.
- 262 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 21 [113]–[114].
- 263 See, Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 455–6 [1894]; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 244–45 [906]–[916].
- 264 Transcript of Mr Simon Overland, 17 December 2019, 11436, 11452, 11462, 11466.
- 265 Transcript of Mr Simon Overland, 17 December 2019, 11436, 11472; Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 21 [113]–[114].
- 266 Exhibit RC0984 Mr Simon Overland diary, 27 September 2005, 513–14.
- 267 Transcript of Mr Simon Overland, 17 December 2019, 11436, 11466.
- 268 Exhibit RC0464b Statement of Mr James (Jim) O'Brien, 14 June 2019, 16 [69].
- 269 Exhibit RC0464b Statement of Mr James (Jim) O'Brien, 14 June 2019, 21 [101].
- 270 Exhibit RC1751b Purana Taskforce Operation Order, Operation Posse Phase One, undated, 7–12; Exhibit RC0281 ICR3838 (028), 22 April 2006, 258–9.
- 271 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 315–16 [52.227].
- 272 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 319 [52.244].
- 273 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 326 [52.283].
- 274 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 325 [52.272].
- 275 Transcript of Mr James (Jim) O'Brien, 3 September 2019, 5549–52, 5463–4, 5679.
- 276 Exhibit RC0118 Statement of Detective Senior Constable Liza Burrows, 10 May 2019, 9 [56]–[57]; Transcript of Detective Sergeant Paul Rowe, 1 July 2019, 3276–7; Transcript of Detective Sergeant Paul Rowe, 19 November 2019, 9511–12.
- 277 Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 2 [8].
- 278 Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 4 [24]–[26].
- 279 Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 6 [34]–[36].
- 280 Exhibit RC1751b Purana Taskforce Operation Order, Operation Posse Phase One, undated.
- 281 Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 9 [50].
- 282 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 395 [61.2], 396 [61.11].
- 283 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 418 [65.12].
- 284 See Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 430–7 [67.1]–[67.31].
- 285 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 417 [65.6].
- 286 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 419–20 [65.18].
- 287 Exhibit RC0577b Statement Mr Anthony (Tony) Biggin, 25 July 2019, 2–3 [12].
- 288 Exhibit RC0577b Statement Mr Anthony (Tony) Biggin, 25 July 2019, 3 [14]–[15].
- 289 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7508.
- 290 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7511.
- 291 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7514–15; Exhibit RC0577b Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 9 [46]; Transcript of Inspector Dale Flynn, 30 September 2019, 6807–8, 6814–16.
- 292 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7516.
- 293 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 208 [39.4], 209 [39.7], 222 [43.1]–[43.2], 224 [43.12].
- 294 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 224 [43.14]–[43.15].
- 295 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7518.
- 296 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020) 178–80 [631]–[637].
- 297 Transcript of Detective Sergeant Paul Rowe, 13 November 2019, 9184.
- 298 Exhibit RC0365 Record of interview between then Detective Sergeant Dale Flynn, then Detective Senior Constable Paul Rowe and Mr 'Cooper', 5–73, 78–9; Transcript of Inspector Dale Flynn, 30 September 2019, 6821, 6833–35; Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 10 [53].

- 299 Transcript of Detective Sergeant Paul Rowe, 13 November 2019, 9194.
- 300 Exhibit RC0266 Statement of Detective Sergeant Paul Rowe, 25 June 2019, 11–12 [83]–[89]; Transcript of Detective Sergeant Paul Rowe, 13 November 2019, 9186–88, 9206.
- 301 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 357 [57:17].
- 302 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 73 [266.2], 192–3 [695]–[697]; Transcript of Detective Sergeant Rowe, 1 July 2019, 3276–8, 3303–7.
- 303 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 104–5 [234].
- 304 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 105–6 [236]–[238].
- 305 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 271 [1003]–[1005].
- 306 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 139 [321(d)].
- 307 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 125 [276]; Transcript of Officer 'Sandy White', 2 August 2019, 3810–11.
- 308 Exhibit RC0282 Transcript of meeting between Nicola Gobbo, Officer 'Green' and Officer 'Sandy White', 9 March 2006, 106–7; Exhibit RC0282 Transcript of meeting between Nicola Gobbo, Officer 'Peter Smith', Officer 'Green' and Officer 'Sandy White', 20 April 2006, 272–3.
- 309 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 105–6 [236]–[238]; Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Peter Smith', Officer 'Green' and Officer 'Sandy White', 20 April 2006, 272.
- 310 Exhibit RC0281 ICR3838 (001)–(008), 16 September 2005 to 25 November 2005, 1–62; Exhibits RC0281 ICR3838 (015)–(018), 3 January 2006 to 17 February 2006, 109–56; Exhibit RC0281 ICR3838 (023)–(025), 15 March 2006 to 12 April 2006; Exhibit RC0281 ICR3838 (028), 18 April 2006 to 25 April 2006, 249–67.
- 311 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Peter Smith', Officer 'Green' and Officer 'Sandy White', 20 April 2006, 272.
- 312 Exhibit RC0538b Statement of Inspector Dale Flynn, 17 June 2019, 10 [52]; Transcript of Inspector Dale Flynn, 4 October 2019, 7245.
- 313 Exhibit RC0281 ICR3838 (019)–(022), 17 February 2006 to 15 March 2006, 157–189; Exhibit RC0281 ICR3838 (027), 13 April 2006 to 18 April 2006, 241–8.
- 314 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Peter Smith', Officer 'Green' and Officer 'Sandy White', 20 April 2006, 272.
- 315 Exhibit RC0546 Transcript of meeting between Ms Nicola Gobbo, Officer 'Peter Smith' and Officer 'Green', 22 April 2006, 17; Transcript of Inspector Dale Flynn, 3 October 2019, 7183, in which Mr Flynn accepts that Ms Gobbo 'helped ... convince [Mr Cooper] to become a witness'.
- 316 Exhibit RC0546 Transcript of meeting between Ms Nicola Gobbo, Officer 'Peter Smith' and Officer 'Green', 22 April 2006, 17; Transcript of Officer 'Peter Smith', 11 September 2019, 61213.
- 317 Exhibit RC0281 ICR3838 (009)–(014), 25 November 2005 to 2 January 2006, 63–108; Exhibit RC0281 ICR3838 (026), 12 April 2006 to 13 April 2006, 237–40.
- 318 Exhibit RC0626b Transcript of conversation between Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Black', 28 October 2005, 139.
- 319 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 452 [1878].
- 320 Transcript of Inspector Dale Flynn, 4 October 2019, 7261.
- 321 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 107 [485]–[486]; Exhibit RC0251b Statement of Mr Phillip Swindells, 6 May 2019, 6 [29]–[32].
- 322 Exhibit RC0267b Transcript of meeting between Nicola Gobbo, Officer 'Peter Smith' and Officer 'Sandy White', 16 September 2005, 19–24.
- 323 Exhibit RC0281 ICR2958 (048), 5 December 2008, 757.
- 324 Exhibit RC0281 ICR3838 (030), 2 May 2006, 280.
- 325 Exhibit RC0281 ICR3838 (040), 6 August 2006, 384; Exhibit RC0281 ICR3838 (041), 14 August 2006, 394; Exhibit RC0281 ICR3838 (045), 14 September 2006, 424; Exhibit RC0281 ICR3838 (046), 20 September 2006, 431.
- 326 Exhibit RC0730 Operation Gosford chronology, 7 December 2006, 1.
- 327 Transcript of Mr Gavan Ryan, 9 August 2019, 4308.
- 328 Exhibit RC0312b Mr Gavan Ryan diary, 11 December 2006, 103.

- 329 Exhibit RC0413a Officer 'Sandy White' diary, 11 December 2006, 68.
- 330 Exhibit RC0281 ICR3838 (058) 20 December 2006, 591.
- 331 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 529 [2099].
- 332 Exhibit RC0730 Operation Gosford chronology, 27 February 2007, 2–3.
- 333 Exhibit RC0730 Operation Gosford chronology, 18 March 2007, 3; Exhibit RC0730 Operation Gosford chronology, 20 March 2007, 4; Exhibit RC0730 Operation Gosford chronology, 28 March 2007, 6; Exhibit RC0730 Operation Gosford chronology, 13 June 2007, 10.
- 334 Exhibit RC0310b Statement of Mr Gavan Ryan, 13 June 2019, 15 [91].
- 335 Exhibit RC0730 Operation Gosford chronology, 15 October 2007, 11.
- 336 Exhibit RC0281 ICR2958 (013), 12 April 2008, 153.
- 337 Transcript of Superintendent Jason Kelly, 19 June 2019, 2600.
- 338 Exhibit RC0284 SML2958, 17 April 2008, 23–7.
- 339 Exhibit RC0284 SML2958, 17 April 2008, 23–7.
- 340 See for context, Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 191–2 [471].
- 341 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 40–42 [86]–[88].
- 342 Responsive submission, Mr Simon Overland, 18 August 2020, 30–1 [88].
- 343 Transcript of Mr Dannye Moloney, 20 February 2020, 14561, 14563.
- 344 Transcript of Mr Dannye Moloney, 20 February 2020, 14562–3, 14565; Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 138 [56.10], 139 [56.14].
- 345 See, eg, Exhibit RC0284 SML3838, 18 October 2006, 55.
- 346 Refer to Chapter 7.
- 347 Exhibit RC0281 ICR3838 (112), 21 November 2007, 1435–6.
- 348 See Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 688–99, [2784]–[2790].
- 349 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 119–20 [263].
- 350 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (21 September 2020), 271–2 [1006]–[1012].
- 351 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 120–1 [264]–[266].
- 352 Exhibit RC0282 Transcript of conversation between Ms Nicola Gobbo, Officer 'Sandy White' and Officer 'Peter Smith', 28 July 2006, 80–1.
- 353 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Anderson' and Officer 'Peter Smith', 12 July 2006, 340.
- 354 Exhibit RC0282 Transcript of meeting between Ms Nicola Gobbo, Officer 'Anderson' and Officer 'Peter Smith', 12 July 2006, 340–1.
- 355 Exhibit RC0591b Officer 'Black' diary, 24 July 2006, 2.
- 356 Transcript of Officer 'Black', 23 October 2019, 8208.
- 357 Transcript of Officer 'Black', 23 October 2019, 8206–8.
- 358 Transcript of Officer 'Black', 23 October 2019, 8209.
- 359 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 90 [200].
- 360 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 90 [198].
- 361 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 90 [199].
- 362 Exhibit RC0275b Statement of Officer 'Sandy White', 30 July 2019, 68 [293].
- 363 Exhibit RC0764 Transcript of meeting between Ms Nicola Gobbo, Officer 'Fox' and Officer 'Sandy White', 3 July 2007, 121–2.
- 364 Exhibit RC0286b Informer registration application risk assessment, 20 April 2006.
- 365 Exhibit RC0518 Covert Support Division briefing note with audit trail, including SWOT analysis, 5 January 2009.
- 366 Exhibit RC1099 Memorandum of Advice—Buick v Dale—Gerard Maguire, 4 October 2011 with handwritten mark ups of Findlay McRae, 4 October 2011, 21 [51], [55].
- 367 Exhibit RC1099, Memorandum of Advice—Buick v Dale—Gerard Maguire, 4 October 2011 with handwritten mark ups of Findlay McRae, 4 October 2011, 13 [54].
- 368 Exhibit RC0292b Officer 'Sandy White' diary, 19 April 2006, 29; Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7518, 7528.

- 369 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 4–6 [15]–[34].
- 370 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7470, 7475.
- 371 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7474.
- 372 Exhibit RC0292b Officer ‘Sandy White’ diary, 19 April 2006, 30.
- 373 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7523–4.
- 374 Exhibit RC0277c Victoria Police Issue Cover Sheet audit of human source 21803838 records, 28 April 2006, 2.
- 375 Exhibit RC0277c Victoria Police Issue Cover Sheet audit of human source 21803838 records, 28 April 2006, 2.
- 376 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7525.
- 377 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7477–9, 7508–9, 7515–16; Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (21 September 2020), 178–82.
- 378 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 12 [62]; Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7525, 7543, 7561.
- 379 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 227 [44.4].
- 380 Exhibit RC1238b Statement of Ms Lucinda Nolan, 27 November 2019, 5–6 [25]–[28].
- 381 Exhibit RC0349 Memorandum from Superintendent Lucinda Nolan to Mr Moloney, 15 June 2006, 4.
- 382 Transcript of Mr Dannye Moloney, 20 February 2020, 14638.
- 383 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 187 [449]–[451].
- 384 Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 568 [2269].
- 385 Exhibit RC0591 Officer ‘Black’ diary, 17 April 2007, 177; Exhibit RC0292b Officer ‘Sandy White’ diary, 2 May 2007, 145.
- 386 Exhibit RC0464b Statement of Mr James (Jim) O’Brien, 14 June 2020, 52, [274]–[275]; Exhibit RC0281 ICR3838 (077), 2 May 2007, 822.
- 387 Exhibit RC0292b Officer ‘Sandy White’ diary, 4 May 2007, 148.
- 388 Transcript of Mr Simon Overland, 19 December 2019, 11731.
- 389 Transcript of Officer ‘Black’, 23 October 2019, 8261–2.
- 390 Exhibit RC0284 SML3838, 25 May 2007, 1112; Exhibit RC0292b Officer ‘Sandy White’ diary, 25 May 2007, 26.
- 391 Exhibit RC0284 SML3838, 28 May 2007, 111.
- 392 Exhibit RC0281 ICR3838 (082), 5 June 2007, 876–7.
- 393 Exhibit RC0636b Statement of Inspector Boris Buick, 10 May 2019, 4 [8]; Transcript of Inspector Boris Buick, 29 October 2019, 8495.
- 394 Exhibit RC0817b Mr John (Jack) Blayney diary, 17 July 2007, 70; Transcript of Mr John (Jack) Blayney, 3 December 2019, 10232, 10236–8.
- 395 Transcript of Mr John (Jack) Blayney, 3 December 2019, 10233, 10236–8.
- 396 Transcript of Mr John (Jack) Blayney, 3 December 2019, 10237.
- 397 Exhibit RC0817b Mr John (Jack) Blayney diary, 24 July 2007.
- 398 Exhibit RC0578b Mr Anthony (Tony) Biggin diary, 24 July 2007.
- 399 Exhibit RC0305 Officer ‘Sandy White’ diary, 24 July 2007; Transcript of Officer ‘Sandy White’, 3 September 2019, 5419–20.
- 400 Transcript of Mr Simon Overland, 19 December 2019, 11761–6.
- 401 See Transcript of Mr John (Jack) Blayney, 3 December 2019, 10243–7, 10291.
- 402 Transcript of Officer ‘Sandy White’, 6 August 2019, 3982; Transcript of Mr James (Jim) O’Brien, 4 September 2019, 5490.
- 403 Exhibit RC0281 ICR3838 (028), 21 April 2006, 258; Exhibit RC0486b Officer ‘Peter Smith’ diary, 21 April 2006, 194–195; Transcript of Officer ‘Peter Smith’, 11 September 2019, 6071; Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 24 January 2020, 12358–9.
- 404 Exhibit RC0863b Joint agency agreement for Operation Khadi, OPI and Victoria Police, 5 June 2006.
- 405 Exhibit RC0281 ICR3838 (024), 24 March 2006, 207.
- 406 Exhibit RC1562b Mr Richard Grant diary, 6 June 2006, 29.
- 407 Exhibit RC1823b Office of Police Integrity, Profile of Ms Nicola Gobbo, 6 February 2006.
- 408 Exhibit RC0578b Mr Anthony (Tony) Biggin diary, 5 June 2006, 287.

- 409 Exhibit RC0828b Mr Rodney Wilson diary, 5 June 2006, 50; Exhibit RC1561b Mr Philip Masters diary, 6 June 2006, 1.
- 410 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 12 December 2019, 11055; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020), 503–5 [1967]–[1975].
- 411 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 12 December 2019, 11055.
- 412 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 12 December 2019, 11058.
- 413 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 47 [19.2(c)]; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 502–3 [1969].
- 414 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 60 [22.2].
- 415 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 60 [22.5]; Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 12 December 2019, 11058.
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- 665 Exhibit RC1033b Letter from Deputy Commissioner Kieran Walsh to Witness ‘F’, 26 August 2009.
- 666 Exhibit RC1033b Letter from Deputy Commissioner Kieran Walsh to Witness ‘F’, 26 August 2009.
- 667 Exhibit RC0947b Letter from Ms Nicola Gobbo to Chief Commissioner Simon Overland, 7 September 2009.
- 668 Exhibit RC0947b Letter from Ms Nicola Gobbo to Chief Commissioner Simon Overland, 7 September 2009.
- 669 Transcript of Mr Simon Overland, 19 December 2019, 11887.
- 670 Responsive submission, Mr Simon Overland, 18 August 2020, 83–4, items 24, 25.
- 671 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 29 January 2020, 12499–500.
- 672 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 29 January 2020, 12503.
- 673 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 29 January 2020, 12503.
- 674 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 38 [16.8], 66 [23.9].
- 675 Exhibit RC1036a Assistant Commissioner Thomas (Luke) Cornelius’ note of meeting, 9 September 2009.
- 676 Exhibit RC1036a Assistant Commissioner Thomas (Luke) Cornelius’ note of meeting, 9 September 2009; Exhibit RC1076b, Mr Findlay McRae file note of 9 September 2009 meeting, marked Gobbo letter of 7 September 2009; Exhibit RC1075b, VGSO file note of meeting, 9 September 2009.
- 677 Exhibit RC1774b Mr Thomas (Luke) Cornelius Electronic calendar entry, 14 September 2009.
- 678 Exhibit RC1067b Statement of Mr Findlay McRae, 13 November 2019, 14 [3.26]; Exhibit RC1037b Letter from Deputy Commissioner Kieran Walshe to Ms Nicola Gobbo, 14 September 2009.
- 679 Exhibit RC1067B Statement of Mr Findlay (Fin) McRae, 13 November 2019, 14 [3.24].
- 680 Exhibit RC1067B Statement of Mr Findlay McRae, 13 November 2019, 14 [3.25].

- 681 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 105–8 [46.4]–[46.10], [46.12], [46.16].
- 682 Exhibit RC1705 Email from VGSO to Mr Findlay McRae, and attachment, 9 October 2009
- 683 Exhibit RC1041b Email chain between Catherine Gobbo, Rodney (Rod) Wilson, Steven Smith et al, 27 October 2009.
- 684 Exhibit RC0990 Memorandum of Agreement between Ms Nicola Gobbo and Chief Commissioner of Police, unsigned, undated.
- 685 Exhibit RC1080b Mr Findlay McRae’s file note of meeting, 16 November 2009.
- 686 Exhibit RC1043b VGSO file note of meeting, 16 November 2009.
- 687 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 29 January 2020, 12521.
- 688 Transcript of Mr Findlay (Fin) McRae, 30 January 2020, 12692.
- 689 Transcript of Mr Findlay (Fin) McRae, 30 January 2020, 12691
- 690 Transcript of Mr Findlay (Fin) McRae, 30 January 2020, 12693.
- 691 *R v Moti* [2009] QSC 207.
- 692 Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, 15 [3.30].
- 693 Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, 15 [3.31].
- 694 Exhibit RC1081 File note of discussion with Jeremy Rapke, 23 December 2009; Transcript of Mr Findlay (Fin) McRae, 30 January 2020, 12702; Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, 16 [3.37].
- 695 Exhibit RC1777 Calendar invitation with handwritten notes by Assistant Commissioner Thomas (Luke) Cornelius, 20 January 2010.
- 696 Exhibit RC1067B Statement of Mr Findlay (Fin) McRae, 13 November 2019, 18 [3.48]; Exhibit RC1894 Victorian Government Solicitor’s Office, Subpoena issued on behalf of Mr Paul Dale to Chief Commissioner of Victoria Police, 27 January 2010.
- 697 Exhibit RC1704b Email from Victorian Government Solicitor’s Office to Mr Findlay McRae, 28 January 2009.
- 698 Exhibit RC1706 Letter from Piper Alderman to VGSO, 8 February 2010.
- 699 Exhibit RC1661 Email chain involving David Ryan, Shane O’Connell and Steven Smith, 10–11 February 2010.
- 700 Exhibit RC1733 Letter from Victorian Government Solicitor’s Office to Mr Tony Hargreaves, 8 February 2010; Exhibit RC1709b Draft letter from VGSO to Mr Tony Hargreaves, 15 February 2010; Exhibit RC1732b Letter from VGSO to Mr Tony Hargreaves, 19 February 2010; Exhibit RC1818a File note of Mr Tony Hargreaves’ conversation with Mr Ron Gipp, 19 February 2010.
- 701 Exhibit RC1818a File note of Mr Tony Hargreaves’ conversation with Mr Ron Gipp, 19 February 2010.
- 702 Exhibit RC1725b Letter from Office of Public Prosecutions to Piper Alderman contained on file of Assistant Commissioner Thomas (Luke) Cornelius, 26 February 2010.
- 703 Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, 19 [3.51]; Exhibit RC1038a Email from Isabel Parsons to Findlay McRae, 26 February 2010; Exhibit RC1726b Letter from Piper Alderman to VGSO, 26 February 2010.
- 704 Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, 19 [3.51]; Exhibit RC1083 Email from Assistant Commissioner Thomas (Luke) Cornelius to Mr Jeremy Rapke, 26 February 2010.
- 705 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 29 January 2020, 12531–3.
- 706 Exhibit RC1351 Letter from Mr Tony Hargreaves to Mr Greg Elms, 1 March 2010.
- 707 Exhibit RC1198b Email chain between Simon Overland, Steven (Steve) Smith, Tony Hargreaves et al, 1–2 March 2010.
- 708 Exhibit RC1198b Email chain between Simon Overland, Steven (Steve) Smith, Tony Hargreaves et al, 1–2 March 2010.
- 709 Exhibit RC1198b Email chain between Simon Overland, Steven (Steve) Smith, Tony Hargreaves et al, 1–2 March 2010.
- 710 Responsive submission, Mr Simon Overland (annexure), 18 August 2020, 84, item 28.
- 711 Exhibit RC1821b Victorian Government Solicitors File Note, 9 March 2010, 1–2.
- 712 Exhibit RC1821b Victorian Government Solicitors File Note, 9 March 2010, 1–2; Exhibit RC1058b Petra Taskforce Update, 9 March 2010.
- 713 Exhibit RC1821b Victorian Government Solicitors Office File Note, 9 March 2010, 1–2.
- 714 Exhibit RC1355b Email from Mr Ron Gipp to Mr Phillip Dodgson, 10 March 2010.
- 715 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 165 [65.10].
- 716 Exhibit RC0461 Officer ‘Sandy White’ diary, 10 March 2010, 35.
- 717 Exhibit RC0461 Officer ‘Sandy White’ diary, 10 March 2010, 35.
- 718 Exhibit RC1347 Mr Shane O’Connell diary, 10 March 2010, 70.
- 719 Exhibit RC1045b Letter from Hargreaves to Greg Elms, 31 March 2010.
- 720 Exhibit RC1044b Email chain involving Steven (Steve) Smith to Mark Porter et al, 11 March 2010.
- 721 Exhibit RC1192 Detective Inspector Steven (Steve) Smith diary, 11 March 2010.

- 722 Transcript of Detective Inspector Steven (Steve) Smith, 13 February 2020, 13981.
- 723 Transcript of Detective Inspector Steven (Steve) Smith, 13 February 2020, 13978–81.
- 724 Transcript of Detective Inspector Steven (Steve) Smith, 13 February 2020, 13977.
- 725 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 29 January 2020, 12533–4.
- 726 Exhibit RC1356b Email chain involving Shane O’Connell, Lucia Bolkas and Greg Elms, 29 March 2010.
- 727 Exhibit RC1356b Email chain involving Shane O’Connell, Lucia Bolkas and Greg Elms, 29 March 2010.
- 728 Exhibit RC0305 Officer ‘Sandy White’ diary, 31 March 2010.
- 729 Transcript of Mr Shane O’Connell, 21 February 2020, 14812.
- 730 Exhibit RC1739 Memorandum entitled Driver Taskforce by Sir Ken Jones, 20 April 2010.
- 731 Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 941 [4018].
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- 735 Exhibit RC0937b Briars Taskforce update with notes of Mr Luke Cornelius, 30 July, 188–204.
- 736 Transcript of Detective Senior Sergeant Peter Trichias, 25 June 2019, 2895.
- 737 Exhibit RC0281 ICR3838 (073), 1 April 2007, 758–9; Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 548 [2185].
- 738 Exhibit RC0925a Extract of Operation Briars/Clonk running sheet 21–22 February 2007, 1.
- 739 Exhibit RC0925a Extract of Operation Briars/Clonk running sheet 21–22 February 2007, 3.
- 740 Transcript of Ms Christine Nixon, 18 December 2019, 11618, 11630–1; see also Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 42 [200.3].
- 741 Exhibit RC0920b Statement of Ms Christine Nixon, 30 October 2019, 5 [22].
- 742 Exhibit RC0984 Mr Simon Overland diary, 29 September 2005, 515; Transcript of Mr Simon Overland, 21 January 2020, 12014–7.
- 743 Exhibit RC0861b Chief Commissioner Graham Ashton diary, 20 February 2007, 66.
- 744 With the details to be worked through by Mr Overland, Mr Cornelius and Mr Ashton: Exhibit RC0925a Extract of Operation Briars/Clonk running sheet 21–22 February 2007, 4; Chris Winneke, Andrew Woods and Megan Tittensor, ‘Counsel Assisting Submissions with respect to Terms of Reference 1 and 2’, *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 553 [2209].
- 745 Exhibit RC0865b Joint Agency Agreement between OPI and Victoria Police, 22 March 2007.
- 746 Exhibit RC0861b Chief Commissioner Graham Ashton diary, 2 July 2008, 67.
- 747 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2008, 851 (Bob Cameron, Minister for Police and Emergency Services).
- 748 Exhibit RC1345b Statement of Commander John Nolan, 10 December 2019, 4 [17], 8–9; Exhibit RC1345b Statement of Commander John Nolan, 18 February 2020, 2 [8]; Transcript of Commander John Nolan, 21 February 2020, 14708–9.
- 749 Responsive submission, Mr Graham Ashton, 7 August 2020, 13 [72].
- 750 Responsive submission, Mr Graham Ashton, 7 August 2020, 14 [76].
- 751 Responsive submission, Mr Graham Ashton, 7 August 2020, 14 [76].
- 752 Responsive submission, Mr Graham Ashton, 7 August 2020, 16 [79].
- 753 *Inquiries Act 2014* (Vic) s 123(1). See, discussion in Chapter 17 about the operation of section 123.
- 754 Responsive submission, Mr Graham Ashton, 7 August 2020, 13–15 [70], [74]–[76]; See, eg, Transcript of Chief Commissioner Graham Ashton, 9 December 2019, 10713–8.
- 755 Transcript of Mr Stephen Waddell, 13 February 2020, 14089–90.
- 756 See Transcript of Officer ‘Black’, 14 March 2019, 136–8; Transcript of Officer ‘Black’, 23 October 2019, 8205–6.
- 757 Exhibit RC0305 Officer ‘Sandy White’ diary, 26 July 2007, 11.

- 758 Exhibit RC0284 SML3838, 6 September 2007, 123; Exhibit RC0511b Email from Mr Ronald (Ron) Iddles to Officer 'Sandy White', 10 September 2007.
- 759 Exhibit RC0305b Officer 'Sandy White' diary, 31 August 2007, 38–9; Exhibit RC0281 ICR3838 (098), 31 August 2007, 1178; Exhibit RC0281 ICR3838 (099), 8 September 2007, 1203.
- 760 Exhibit RC0281 ICR3838 (099), 8 September 2007, 1203.
- 761 Exhibit RC0511 Email from Mr Ronald (Ron) Iddles to Officer 'Sandy White', 10 September 2007.
- 762 Exhibit RC0281 ICR3838 (100), 12 September 2007, 1211–12.
- 763 Exhibit RC0281 ICR3838 (100), 13 September 2007, 1214.
- 764 Exhibit RC0281 ICR3838 (103), 3 October 2007, 1259.
- 765 Exhibit RC0281 ICR3838 (103), 4 October 2007, 1265–6, 1269.
- 766 Exhibit RC0281 ICR3838 (107), 29 October 2007, 1325–6.
- 767 Exhibit RC0281 ICR3838 (109), 7 November 2007, 1373–4; Exhibit RC1267 Email chain between David Waters and Nicola Gobbo et al with attachment, 7 November 2007, 21 May 2009.
- 768 Exhibit RC0281 ICR3838 (108), 5 November 2007, 1357, 1362.
- 769 Exhibit RC0988a Mr Simon Overland affidavit, 1 November 2007; Exhibit RC0925a Extract of Operation Briars/Clonk running sheet, 21–22 February 2007, 7; Exhibit RC1054a Mr Luke Cornelius extract of affidavit, 1 November 2007, 54; Exhibit RC0874b Operation Briars Chronology, prepared by Assistant Commissioner Luke Cornelius, 3 October 2007.
- 770 Exhibit RC0988b Affidavit of Mr Simon Overland, 1 November 2007; Exhibit RC0925a Extract of Operation Briars/Clonk running sheet, 21–22 February 2007, 7; Exhibit RC1054 Affidavit of Assistant Commissioner Luke Cornelius, 1 November 2007, 54; Exhibit RC0874b Briars, Contacts with Linnell and Ashby Chronology, 14 September 2007.
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- 772 Exhibit RC0281 ICR2958 (001), 25 January 2008, 4; Exhibit RC0284 SML2958, 25 January 2008, 1.
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- 774 Exhibit RC1196b Statement of Mr Stephen Waddell, 17 September 2019, 6 [31].
- 775 Exhibit RC1196b Statement of Mr Stephen Waddell, 17 September 2019, 6 [31]; Exhibit RC1006b Petra Taskforce Weekly Update with handwritten notes of Assistant Commissioner Luke Cornelius, 16 March 2009, 26–33.
- 776 Exhibit RC1196b Statement of Mr Stephen Waddell, 17 September 2019, 6–7 [33]–[34].
- 777 Exhibit RC1758 Briars Taskforce entry with handwritten notes of Mr Luke Cornelius, 6 April 2009, 402; Exhibit RC1756b Briars Taskforce Supplementary Investigation Plan, 403.
- 778 Exhibit RC0832 Email from Stephen Waddell to Rodney Wilson, 25 March 2009, 1.
- 779 Exhibit RC1196b Statement of Mr Stephen Waddell, 17 September 2019, 7 [35].
- 780 Exhibit RC1202b Summary of Ms Nicola Gobbo ICRs relating to David Waters, 24 April 2009.
- 781 Exhibit RC0898b Statement of Assistant Commissioner Luke Cornelius, 20 September 2019, 15–16 [99].
- 782 Exhibit RC1758b Briars Taskforce Update, 18 May 2009, 392.
- 783 Exhibit RC1206b Statement of Mr Ronald (Ron) Iddles, 3 June 2019, 3 [16].
- 784 Exhibit RC0283 Information Report Briars 301, 14 January 2008; Exhibit RC1262 Information Report Briars 304, 15 January 2008.
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- 786 Exhibit RC0946a Mr Luke Cornelius meeting notes of teleconference with Mr Steven (Steve) Smith, 27 May 2009.
- 787 Transcript of Mr Findlay McRae, 30 January 2020, 12640–1.
- 788 Exhibit RC1206b Statement of Mr Ronald (Ron) Iddles, 3 June 2019, 3–4 [18].
- 789 Exhibit RC1206b Statement of Mr Ronald (Ron) Iddles, 3 June 2019, 4 [19].
- 790 Exhibit RC1206b Statement of Mr Ronald (Ron) Iddles, 3 June 2019, 4 [20].
- 791 Exhibit RC0591b Officer 'Black' diary, 29 May 2009, 692.
- 792 Exhibit RC0591b Officer 'Black' diary, 29 May 2009, 692.
- 793 Exhibit RC0898b Statement of Assistant Commissioner Luke Cornelius, 20 September 2019, 17 [105]; Exhibit RC1754 Covering letter, subpoena and schedule in the matter of R v Mokbel Briars Taskforce file maintained by Assistant Commissioner Luke Cornelius, 1 June 2009, 381.

- 794 Exhibit RC1013b Email from Stephen Waddell to Luke Cornelius, 1 June 2009.
- 795 Transcript of Assistant Commissioner Luke Cornelius, 24 January 2020, 12408–9.
- 796 Exhibit RC0591b Officer 'Black' diary, 2 June 2009, 694.
- 797 Exhibit RC0591b Officer 'Black' diary, 2 June 2009, 695–7.
- 798 Exhibit RC0512b Statement of Superintendent Mark Porter, 15 August 2009, 10 [51].
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- 801 Exhibit RC0578b Mr Anthony (Tony) Biggin diary, 15 June 2009, 737–8.
- 802 Responsive Submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 176 [70.45].
- 803 Responsive Submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 177 [70.52].
- 804 Exhibit RC1026 Email chain involving Stephen Waddell, Thomas (Luke) Cornelius and Findlay (Fin) McRae, 15–18 July 2009; Exhibit RC1678 Email from David Ryan to Findlay (Fin) McRae, 24 June 2009.
- 805 Exhibit RC0282b Officer 'Sandy White' diary, 30 June 2009; Exhibit RC0284 SML2958, 1 July 2009, 71; Exhibit RC1755b Petra Taskforce meeting calendar entry with handwritten notes of Mr Luke Cornelius, 29 June 2009, 354.
- 806 Exhibit RC0282b Officer 'Sandy White' diary, 30 June 2009; Exhibit RC0284 SML2958, 1 July 2009, 71; Exhibit RC0524 ICR Summary of Extracts for Operation Briars, 16 September 2005–30 December 2005; the metadata suggests saved on 29 June 2009.
- 807 Exhibit RC1196b Statement of Stephen Waddell, 17 September 2019, 11 [60]; Exhibit RC1203b Witness summary prepared by Stephen Waddell, undated.
- 808 Exhibit RC1026 Email chain involving Mr Stephen Waddell and Luke Cornelius, 15 July 2009.
- 809 Exhibit RC1027 Briars Taskforce Update with notes of Assistant Commissioner Luke Cornelius, 27 July 2009, 3.
- 810 Exhibit RC1039 Briars Taskforce Update, 21 September 2009.
- 811 Responsive submission, Victoria Police, 24 August 2020, 189 [90.7]–[90.8].
- 812 Exhibit RC1192b Detective Inspector Steven Smith diary, 28 September 2009, 217; Exhibit RC1204b Mr Stephen Waddell diary, 28 September 2009, 37.
- 813 Transcript of Detective Inspector Steven Smith, 13 February 2020, 13973–4.
- 814 Exhibit RC0329b Statement of Mr Cameron Davey, 13 May 2019, 2 [5]; Exhibit RC0326b Statement of Detective Sergeant Solon (Sol) Solomon, 15 January 2019, 4.
- 815 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 900 [3829].
- 816 Exhibit RC1085 Letter from David Ryan to Peter Lardner, 21 May 2010, 4 [12]–[13]; Exhibit RC0950b Statement of Claim, Nicola Gobbo v State of Victoria & Ors, 29 April 2010; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 944 [4019].
- 817 Exhibit RC0950 Statement of Claim, Nicola Gobbo v State of Victoria & Ors, 29 April 2010.
- 818 Exhibit RC0947 Letter from 'Witness F' (Ms Nicola Gobbo) to Simon Overland, 7 September 2009.
- 819 Exhibit RC0947 Letter from 'Witness F' (Ms Nicola Gobbo) to Simon Overland, 7 September 2009, 3 [11].
- 820 Exhibit RC0947 Letter from 'Witness F' (Ms Nicola Gobbo) to Simon Overland, 7 September 2009, 10 [45].
- 821 Exhibit RC0795b Statement of Superintendent John O'Connor, 11 October 2019, 2 [17].
- 822 Exhibit RC0795b Statement of Superintendent John O'Connor, 11 October 2019, 2–3, [17]–[20].
- 823 Exhibit RC0795b Statement of Superintendent John O'Connor, 11 October 2019, 3 [20].
- 824 Exhibit RC1231b Statement of Detective Superintendent Peter Lardner, 27 November 2019, 2–3 [13].
- 825 Exhibit RC1231b Statement of Detective Superintendent Peter Lardner, 27 November 2019, 3 [14]–[16].
- 826 Exhibit RC1047 Email chain between Peter Larder and Dannye Moloney et al, 20 May 2010 to 22 May 2010, 1.
- 827 Exhibit RC1048 Email chain between Peter Larder and Dannye Moloney et al, 20 May 2010 to 22 May 2010, 1.
- 828 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 29 January 2020, 12547.
- 829 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 24 January 2020, 12369.
- 830 Responsive submission, Victoria Police (annexure: specified officers), 24 August 2020, 53–4 [20.15].

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- 832 Exhibit RC0292b Officer 'Sandy White' diary, 24 May 2010, 1120.
- 833 Exhibit RC0354 Email from John O'Connor to Findlay McRae and Peter Lardner, 27 May 2010.
- 834 Exhibit RC0808b Superintendent John O'Connor diary, 27 May 2011.
- 835 Exhibit RC1231b Statement of Detective Superintendent Peter Lardner, 27 November 2019, 4 [22].
- 836 Exhibit RC0912a Whiteboard print out of meeting, 3 June 2010.
- 837 Transcript of Mr Simon Overland, 20 December 2019, 11898–9.
- 838 Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, 23 [4.21].
- 839 Exhibit RC1088 Steering Committee Meeting Agenda for Ms Gobbo's writ management, 24 June 2010; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 956 [4078]–[4079].
- 840 Exhibit RC1052b Letter from David Ryan to Peter Lardner, 28 July 2010.
- 841 Exhibit RC1052b Letter from David Ryan to Peter Lardner, 28 July 2010.
- 842 Exhibit RC1053 File note of Mr Findlay McRae, 28 July 2010.
- 843 Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, 26 [4.36].
- 844 Exhibit RC1092b Mr Findlay McRae, File Note, 5 August 2010; Transcript of Mr McRae, 31 January 2020, 12753.
- 845 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 116 [48.26]–[48.29].
- 846 Transcript of Mr Findlay (Fin) McRae, 31 January 2020, 12760–61.
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- 848 Exhibit RC0960b Statement of Mr John Cain, 29 September 2019, 3 [19].
- 849 Exhibit RC0915b Statement of Mr Simon Overland 19 September 2019, 36 [187]; Exhibit RC1721b Letter from Mr Simon Overland to Mr Bob Cameron, 10 August 2010.
- 850 Exhibit RC1828 Terms of Settlement signed by Ms Nicola Gobbo and Mr David Ryan, 11 August 2010; see also Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 960 [4100].
- 851 Exhibit RC0930a Letter from Bob Cameron to Simon Overland, 11 August 2010.
- 852 Exhibit RC0952b Letter from Simon Overland to Bob Cameron, 16 August 2010.
- 853 Exhibit RC0952b Letter from Simon Overland to Bob Cameron, 16 August 2010.
- 854 Exhibit RC0952b Letter from Simon Overland to Bob Cameron, 16 August 2010.
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- 857 Exhibit RC1306b Statement of Mr Jeffrey (Jeff) Pope, 21 January 2020, 7–8 [32]; Exhibit RC1739 Memorandum entitled Driver Taskforce by Sir Ken Jones, 20 April 2010.
- 858 Exhibit RC1273b Statement of Mr Timothy (Tim) Cartwright, 17 December 2019, 3–4 [27].
- 859 Exhibit RC0326b Statement of Detective Sergeant Solon (Sol) Solomon, 15 January 2019, 18.
- 860 Exhibit RC0903b Statement of Sir Kenneth (Ken) Jones, 7 December 2019, 20 [72]–[73]; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 968 [4140].
- 861 Exhibit RC0326b Statement of Solon (Sol) Solomon, 15 January 2019, 19; Exhibit RC0903b Statement of Sir Kenneth (Ken) Jones, 7 December 2019, 20 [73].
- 862 Exhibit RC0903 Statement of Sir Kenneth (Ken) Jones, 7 December 2019, 20 [73]–[75].
- 863 Transcript of Sir Kenneth (Ken) Jones, 13 December 2019, 11225–9.
- 864 Exhibit RC1255b Statement of Mr Douglas Fryer, 7 October 2019, 9 [49]; Exhibit RC1258 Statement of Commander Michael Frewen, 18 December 2019, 5 [30].
- 865 Exhibit RC0679b Transcript of conversation between Ms Nicola Gobbo and Mr Boris Buick, 24 August 2011, 118.
- 866 Exhibit RC0679b Transcript of conversation between Nicola Gobbo and Mr Boris Buick, 24 August 2011, 139.

- 867 Exhibit RC0680b Issue Cover Sheet, subpoena in Mr Paul Dale prosecution around Victoria Police engagement with Ms Nicola Gobbo, 31 August 2011.
- 868 Exhibit RC1659 Email chain between Krista Breckweg and Inspector Boris Buick, 1–13 September 2011.
- 869 Exhibit RC0683 Extract of letter from Greg Elms to Findlay (Fin) McRae, 6 October 2011; Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 991 [4235].
- 870 Exhibit RC0679b Transcripts of conversations between Ms Nicola Gobbo and Mr Boris Buick, multiple dates, 4 September 2011, 15–16.
- 871 Transcript of Inspector Boris Buick, 1 November 2019, 8858.
- 872 Transcript of Inspector Boris Buick, 1 November 2019, 8872–3.
- 873 Exhibit RC0685b Victorian Government Solicitor's Office file note, 13 September 2011, 4.
- 874 Responsive submission, Victoria Police, 24 August 2020, 238 [111.3]–[111.5].
- 875 Responsive submission, Victoria Police, 24 August 2020, 238 [111.6].
- 876 Responsive submission, Victoria Police, 24 August 2020, 238–9 [111.6].
- 877 Exhibit RC0686b Victoria Government Solicitor's Office, File Note, 15 September 2011.
- 878 Exhibit RC0686b Victoria Government Solicitor's Office, File Note, 15 September 2011.
- 879 Exhibit RC0345 Agenda and notes of VGSO ACC prosecution and subpoena issues meeting, 21 September 2011.
- 880 Exhibit RC0345 Agenda and notes of VGSO ACC prosecution and subpoena issues meeting, 21 September 2011, 1.
- 881 Exhibit RC0345 Agenda and notes of VGSO ACC prosecution and subpoena issues meeting, 21 September 2011, 5.
- 882 Exhibit RC0345 Agenda and notes of VGSO ACC prosecution and subpoena issues meeting, 21 September 2011, 6.
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- 885 Exhibit RC0795b Statement of Superintendent John O'Connor, 11 October 2019, 21 [120].
- 886 Exhibit RC1098b Email between Michael Frewen and Graham Ashton et al, 25 September 2011.
- 887 Exhibit RC1098b Email between Michael Frewen and Graham Ashton et al, 25 September 2011.
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# 9

## Victoria Police's conduct: systemic issues and causal factors

### INTRODUCTION

The Victorian Government established this Commission to find out how Victoria Police came to use Ms Nicola Gobbo, a criminal defence barrister, as a human source; why it happened; and what reforms might be needed to prevent such events from recurring in the future.

In Chapter 8, the Commission discusses the conduct of current and former Victoria Police officers involved in these events. It concludes that the conduct of individual officers may have fallen short of their required duties by:

- encouraging Ms Gobbo to act as a lawyer for certain people, or, at least, condoning her decision to do so, knowing that:
  - she was a human source and therefore not providing her clients with independent legal representation
  - she was covertly informing on them, or had previously informed on them; and/or
  - she was providing information that assisted police to obtain incriminating evidence against them

- failing to disclose to people accused of crimes, either directly or through the Victorian Director of Public Prosecutions (DPP) or the Victorian Government Solicitor's Office (VGSO), the existence of information or evidence that might have enabled them to challenge the admissibility of prosecution evidence on the basis that it may have been improperly or illegally obtained
- failing to take appropriate steps to ensure that public interest immunity (PII) claims concerning disclosable evidence were determined by a court in accordance with law.<sup>1</sup>

This chapter examines some of the common themes that emerge from the Commission's findings and discussion in Chapter 8 regarding individual failures, and the institutional factors that may have contributed to them. This is fundamental to understanding how the conduct of Victoria Police officers continued over such a long period of time, and how similar events can be avoided in the future.

In a submission to the Commission, Victoria Police contended that the conduct of its officers occurred because of reasons that are 'primarily organisational and systemic'.<sup>2</sup> While it accepted that individual officers 'should have done better' in some instances, it submitted there was a strong body of evidence that the individual officers involved in the recruitment, handling and management of Ms Gobbo did not engage in '*knowing* impropriety'.<sup>3</sup>

A group of current and former Victoria Police officers identified a long list of factors that contributed to these events, describing them in combination as 'the perfect storm'.<sup>4</sup> Victoria Police has also consistently emphasised to the Commission that many of the events occurred between 10 and 25 years ago and it is difficult to know with certainty what transpired.<sup>5</sup>

Against that background, this chapter focuses on several failures in organisational structures, cultures and processes that, based on the Commission's assessment of the evidence, contributed to Victoria Police's use of Ms Gobbo as a human source and the associated conduct of individual officers. The chapter addresses failures:

- of leadership and governance
- to properly identify, assess and manage the risks of using Ms Gobbo as a human source
- to manage and supervise police officers dealing with Ms Gobbo
- to understand the police role in the prosecution process, including failures to discharge their disclosure obligations and deal with PII claims appropriately
- to accept responsibility for the use of Ms Gobbo as a human source and its consequences.

An organisation is the sum of its parts; it is not a separate body that functions independently of its individual employees. This is particularly so in police organisations that function according to a strict chain of command. Senior officers within Victoria Police were ultimately responsible for the organisational culture and environment that allowed the recruitment, continued use and non-disclosure of Ms Gobbo as a human source.

Senior Victoria Police officers were also responsible for the delay in instigating comprehensive internal and external reviews of what had gone wrong and how to remedy the situation.<sup>6</sup> If the organisation, led by its senior officers, had taken appropriate action as soon as it became aware of the potential magnitude and seriousness of these events, this inquiry may not have been necessary. The delay has also made the Commission's task more difficult. Obtaining relevant evidence to properly investigate Victoria Police's conduct and its potential effects has been challenging due to the passage of time since the events occurred.

Although Victoria Police's use of Ms Gobbo as a human source occurred many years ago, its repercussions are still being felt. People are still in custody, appeals are progressing through the courts, and public confidence in Victoria Police has diminished.<sup>7</sup> The Victorian community and those directly affected by the events are entitled to know what happened and why.

The evidence of many current and former Victoria Police officers during the inquiry suggested that certain problematic organisational and cultural factors that gave rise to the events continue to exist in parts of Victoria Police.<sup>8</sup> For these reasons, it is important to shine a light on these issues so that the organisation can take all necessary steps to address them.

This chapter outlines:

- Victoria Police's acknowledgement of, and apology for, its failures relating to the use of Ms Gobbo as a human source
- the systemic failures and contributing factors that led to the use of Ms Gobbo as a human source.

One of the organisational failures the Commission has identified is Victoria Police's delay in making disclosure to people whose cases may have been affected by its use of Ms Gobbo as a human source. It is critically important that Victoria Police continues to progress this task and fulfil its continuing disclosure obligations to potentially affected persons. The Commission therefore recommends that Victoria Police provides monthly progress reports to the Implementation Taskforce and Implementation Monitor, recommended in Chapter 17, on its fulfilment of these obligations.

## VICTORIA POLICE'S ACKNOWLEDGEMENT OF ITS FAILURES AND ITS APOLOGY

In its response to the submissions of Counsel Assisting the Commission, Victoria Police acknowledged that:

- Ms Gobbo gave information to her handlers about her clients and continued to act for them while providing information about them
- Ms Gobbo gave some information to her police handlers that was, or may have been, protected by legal professional privilege
- the information received by Ms Gobbo's handlers was disseminated to investigators whether or not it was tainted by her conflicts of interest and/or subject to legal professional privilege, and without adequate records of its dissemination
- Ms Gobbo's involvement with Victoria Police was not disclosed to prosecuting authorities in a timely way in relation to a number of accused persons.<sup>9</sup>

Victoria Police submitted that the causes of these failings were primarily systemic and organisational.<sup>10</sup> It also contended that its officers did not properly understand the issues arising from the use of information given to them by Ms Gobbo about her clients while she was continuing to act for them, due to inadequate training and insufficient knowledge.<sup>11</sup>

In late August 2020, Victoria Police provided a responsive submission to the Commission, in which it accepted:

*... without reservation that the way in which Ms Gobbo was managed as a human source in a way that resulted in a profound interference with the relationship between lawyer and client was a major failing. The consequences of that failing are resonating through the criminal justice system and will do so for many years. It has come at a very high cost to the organisation, to public confidence and to the criminal justice system.<sup>12</sup>*

Victoria Police also publicly apologised to the courts, whose processes were affected by what occurred, and to the community for breaching its trust.<sup>13</sup>

Victoria Police submitted that its acceptance of responsibility is consistent with its publicly stated position after the completion of the Kellam Report in 2015 and throughout the Commission hearings.<sup>14</sup> It contended that accepting responsibility in this way and apologising for what occurred is ‘hardly surprising and entirely appropriate’ and ‘the right thing to do’.<sup>15</sup> It said the apology reflected the genuinely held views of Victoria Police Command, led by new Chief Commissioner Shane Patton, APM.<sup>16</sup>

Victoria Police’s apology and acceptance of responsibility is significant. Regrettably, it comes very late in the day. On 5 November 2018, in the *AB v CD* decision, the High Court of Australia described Victoria Police’s conduct in using Ms Gobbo as a human source as ‘reprehensible’, stating that officers were involved in ‘sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law’.<sup>17</sup> In the wake of this decision and while the Commission was underway, many public statements made by then Chief Commissioner Graham Ashton, AM, APM suggested otherwise.

Counsel Assisting drew attention in their submissions to several public statements made by Mr Ashton between December 2018 and June 2020 and expressed concern that these statements minimised the improper conduct of Victoria Police officers by suggesting it was a result of the ‘high-pressure crime environment’ at the time. Counsel Assisting noted that the public and Victoria Police officers could interpret this as a suggestion that the conduct was justifiable.<sup>18</sup>

Mr Ashton rejected Counsel Assisting submissions.<sup>19</sup> He submitted that his public remarks had been unfairly represented by Counsel Assisting and that a ‘proper analysis’ of his statements throughout the inquiry shows that he was ‘very careful to indicate that Victoria Police respected and was cooperating with the Royal Commission’.<sup>20</sup> Mr Ashton contended he never said the ends of securing convictions justified the means of using Ms Gobbo as a human source, and he had acknowledged the findings in the Kellam Report and the High Court’s decision, which led to the Commission’s inquiry.<sup>21</sup>

While the Commission accepts that Mr Ashton did make public statements about cooperating with the Commission, in some media interviews his statements tended to suggest a ‘desperate times, desperate measures’ excuse for Victoria Police’s conduct. For example, on 28 March 2019, the following exchange occurred during a radio interview of Mr Ashton by Mr Neil Mitchell:

*MR MITCHELL: She [Ms Gobbo] went through ’til 2010 which was after the gangland wars.*

*MR ASHTON: ... there was significant underworld activity right through that period as well.*

*MR MITCHELL: It’s the old argument that the end justifies the means.*

*MR ASHTON: The question is what was the means and what was wrong with the means.*

*MR MITCHELL: The High Court had a view that it was atrocious behaviour by Vic Pol.*

*MR ASHTON: And the courts have a view about this all the way through ... it doesn’t mean that we don’t take a slightly different view of that.*

*MR MITCHELL: You take a slightly different view to the High Court of Australia?*

*MR ASHTON: Yeah.*<sup>22</sup>

Another example is the following exchange in a radio interview on 27 July 2019:

*MR MITCHELL: The High Court said Vic Pol was guilty of reprehensible and atrocious behaviour. Do you still reject that?*

*MR ASHTON: At the time, what police had to deal with was a very difficult situation and someone was able to assist in dealing with that crime and police have taken the information from someone who was able to assist them and I think if they hadn't done that, where would they have been in relation to some of those matters as well. So there's a lot to be taken to account, it's not just the matter of the fact that police used a lawyer as a human source. It's just that there's a lot of complexity in that police had to deal with.<sup>23</sup>*

As Counsel Assisting submitted, the statements made by any organisation's leaders help to define its values and the parameters of appropriate conduct.<sup>24</sup> That is especially so in law enforcement agencies like Victoria Police that operate according to a strict hierarchy where more junior officers look to their leaders to set ethical values and to understand what is and is not appropriate and accepted behaviour.<sup>25</sup>

Further, Victoria Police's role is to uphold and enforce the law so as to promote a safe, secure and orderly society.<sup>26</sup> The Chief Commissioner is the highest ranking Victorian police officer.<sup>27</sup> The person in that role is the chief constable and chief executive officer of Victoria Police, and is responsible for the management and control of the organisation, including its general conduct, performance and operations.<sup>28</sup> The Chief Commissioner could and should have conveyed a clear public message about the improper and unacceptable conduct perpetrated by Victoria Police in its use of Ms Gobbo as a human source, consistent with the High Court's decision. The public statements of Mr Ashton cited above did not do this.

## SYSTEMIC FAILURES AND CONTRIBUTING FACTORS

Chapter 8 demonstrates many failures in the conduct of individual officers at different levels of the organisation. This section examines the historical context relevant to their conduct and explains how cumulative missteps and missed opportunities contributed to the events that were the subject of the Commission's inquiry.

### Understanding the historical context

The Commission heard evidence about several important contextual matters that help to explain the conduct of Victoria Police, especially during Ms Gobbo's third period of registration in 2005–09, her most prolific period of informing.

Counsel Assisting and Victoria Police agreed that the reasons for the conduct are multiple and complex.<sup>29</sup> Victoria Police submitted that two historical matters provide critical context:

- police corruption and misconduct identified by reviews of Victoria Police's Drug Squad in the early 2000s, which among other things, prompted the organisation to overhaul its human source management framework<sup>30</sup>
- the murder of Mr Terrence (Terry) Hodson and Mrs Christine Hodson in May 2004, which almost certainly occurred because Mr Hodson's role as a human source for Victoria Police had become known, possibly among people involved in Melbourne's 'gangland wars' and people he was informing on to Victoria Police.<sup>31</sup>

Victoria Police contended that these matters were important because:

- they demonstrate that Victoria Police was motivated to establish the Source Development Unit (SDU) as a specialist unit responsible for managing high-risk human sources, and in so doing, to help end human source-related corruption within the divisions that handled drug crime investigations<sup>32</sup>
- they explain why Victoria Police went to such lengths to protect the identity of its human sources, including Ms Gobbo.<sup>33</sup>

The Commission agrees that these historical events provide important context. Both clearly influenced the organisational framework for human source management that evolved just prior to and during Ms Gobbo's third period of registration and affected many police officers' mindsets, particularly about the paramount importance of protecting human sources.

The Commission also heard evidence that, during this time, Victoria Police was undergoing significant change and attempting to evolve into a more contemporary policing organisation.<sup>34</sup> The overhaul of its human source management framework, especially in light of past police misconduct and corruption, was one aspect of this transition.<sup>35</sup>

The Commission heard from one former police officer that, after Ms Christine Nixon, APM became Chief Commissioner in 2001, she instigated significant reforms to decision-making arrangements, including establishing steering committees for major investigations. These committees were designed to encourage dialogue and debate about major decisions in investigations, and to move parts of Victoria Police away from the rigid traditional siloed command structure.<sup>36</sup> It appears that these reforms aimed to modernise parts of the organisation and encourage more collaboration around high-risk decisions in major investigations. Unfortunately, as discussed later in this chapter, these new working arrangements did not stop poor decisions being made about the use and management of Ms Gobbo as a human source.

The Commission also heard evidence that the gangland wars in Melbourne provided important historical context.<sup>37</sup> As discussed in Chapters 6, 7 and 8, Ms Gobbo's third registration as a human source occurred at a time when multiple violent homicides and drug-related offences were being committed across the city and Victoria Police was under pressure from the Government, media and the community to stem the violence.<sup>38</sup> Victoria Police's use of Ms Gobbo as a human source was one of its key strategies in achieving this goal.

## Considering the broader organisational context

In considering individual police conduct, it is necessary to consider the broader organisational context in which it occurs and to examine multiple and interrelated factors that contribute to it. Unless there is an appreciation of these factors, it is not possible to properly understand individual failures and to take meaningful institutional steps to avoid repeating the mistakes of the past.

As the Commissioner, the Honourable Justice Wood, observed in the Royal Commission into the New South Wales Police Service:

*To understand police misconduct, and to develop strategies for its minimisation, the causes of wrongdoing need to be seen along a continuum of factors associated with:*

- *the integrity, training and personal ethics of the individual officer*
- *the attitudes encountered within the Service*
- *the structure and nature of the work environment*
- *the vision, management and commitment of the Service*
- *the historical, socio-political and legal context of policing.*<sup>39</sup>

These observations are equally applicable when analysing the conduct of Victoria Police related to its use and management of Ms Gobbo as a human source.

There have been many external reviews and inquiries undertaken into aspects of Victoria Police's organisational culture and conduct over the past 25 years. These reviews arose in a range of different contexts and considered various issues, including but not limited to:

- allegations of misconduct and corruption, including major cases of widespread misconduct across the organisation<sup>40</sup> and entrenched corruption in specialist units or squads<sup>41</sup>
- widespread sexual discrimination and sexual harassment, including predatory behaviour by police officers against other officers and vulnerable civilians<sup>42</sup>
- allegations of excessive use of force by officers<sup>43</sup>
- falsification of data and misuse of confidential information, including the leaking of sensitive police information to criminals and the media<sup>44</sup>
- failures to disclose relevant information to the prosecution, defence and the court and improper evidentiary practices concerning statement taking.<sup>45</sup>

While it is important to acknowledge that there are many positive aspects of Victoria Police culture, these reviews suggest that some common issues have persisted across parts of the organisation over a long period of time and in different contexts.<sup>46</sup> In some cases, these issues have remained despite previous inquiries highlighting similar problems and making recommendations to prevent them recurring.

Many of the common themes identified by these reviews and inquiries also emerged through the Commission's inquiry. In particular, the Commission observed signs of:

- a culture where police officers are driven to get results at any cost<sup>47</sup>
- a culture of exceptionalism; that is, an attitude that police are 'special' and can operate outside of rules and policies because of the nature of their work<sup>48</sup>
- poor ethical decision making, including by leaders<sup>49</sup>
- limited consideration of human rights<sup>50</sup>
- a resistance to exposure, accountability and transparency.<sup>51</sup>

As well as identifying common problems and issues, previous reviews and inquiries have also highlighted ways to build a strong policing culture that supports appropriate and ethical conduct among officers and prevents future misconduct, including:

- role-modelling of ethical behaviour by leaders, noting the important role senior leaders play in demonstrating the organisation's values<sup>52</sup>
- strong and effective management<sup>53</sup>
- the delivery of regular, ethics-based and human rights training to all officers of all ranks<sup>54</sup>
- the need for cultural change to set clear behavioural expectations and encourage the reporting of misconduct and integrity concerns.<sup>55</sup>

Various contextual factors, many of which overlapped or were mutually reinforcing, contributed to the recruitment and use of Ms Gobbo as a human source and the management of issues that arose from her use as a source.

One important factor to reflect upon is the lack of diversity within Victoria Police during the period of Ms Gobbo's third registration as a human source. All of the SDU officers who recruited and managed Ms Gobbo as a human source during this time were male, as were the overwhelming majority of senior officers who were involved in overseeing her use during that period.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) independent review into sex discrimination and sexual harassment within Victoria Police emphasised that gender diversity in decision-making roles should be encouraged, to support greater transparency and improved ethics.<sup>56</sup> It found that fostering greater diversity within Victoria Police is ‘central to driving changes in culture, attitudes and practices’.<sup>57</sup> The Commission commends Victoria Police’s commitment to implementing VEOHRC’s important recommendations aimed at achieving gender equality within the organisation by 2030.<sup>58</sup>

Given the command structure of Victoria Police and the critical role its leaders play in shaping the organisation’s vision, attitudes and ethics, it is necessary to examine the failures of leadership and governance evident during the period of Ms Gobbo’s third registration as a human source.

## Failures of leadership and governance

Several previous reviews into Victoria Police have emphasised the need for strong, ethical leadership. This is particularly critical in organisations that operate through a strict chain of command, like police and paramilitary organisations where decisions made at the highest levels must ordinarily be strictly adhered to by those lower down in the hierarchy.<sup>59</sup> Understanding the nature and effects of this rigid organisational structure is important to understanding the motivations and often the decisions made by individuals who work in these organisations.

As the Office of Police Integrity (OPI) observed in its report on the first 150 years of policing in Victoria, misconduct in Victoria Police has flourished when effective management has been absent.<sup>60</sup> The OPI noted that:

- the most fundamental and simple anti-corruption strategy comes down to strong and effective leadership and supervision
- the culture of a police service is a very difficult area to reform, and change can only be achieved by good leadership, constant monitoring, training and effective discipline.<sup>61</sup>

In their submissions to the Commission, Counsel Assisting contended that it was ‘self-evident that a failure in supervision, management and governance contributed to the relevant conduct’ of Victoria Police officers involved in the use of Ms Gobbo as a human source. In this regard, they submitted, the Kellam Report’s findings that senior officers did not provide effective oversight and supervision were well-founded.<sup>62</sup> Victoria Police accepted that submission,<sup>63</sup> and acknowledged that its organisational and governance structures during this period were weak.<sup>64</sup>

Many aspects of individual conduct detailed in Chapter 8 could not have occurred without critical failures of leadership and governance within Victoria Police. The Commission examines two critical aspects of this leadership and governance that warrant attention:

- an ineffective command and governance structure
- a cultural emphasis, led from the top down, on ‘getting results’ even where to do so created significant risks, both to the organisation and the criminal justice system.

These matters are discussed in turn below.

### Ineffective command and governance structure

The command structure in place in Victoria Police throughout the period of Ms Gobbo’s use as a human source is not dissimilar to the structure that exists today. Then, as now, the human source management program and the SDU, as the specialist unit responsible for the management of certain human sources, sat within the Department responsible for Victoria Police’s intelligence capability, then known as the Intelligence and Covert Services

Department.<sup>65</sup> The Human Source Management Unit (HSMU), responsible for internal oversight of the registration and management of human sources and ensuring compliance with the human source policy, also sat within this Department.

Victoria Police's Crime Department had, and continues to have now as the Crime Command, responsibility for high-level specialist investigations to detect, disrupt and prevent serious and organised crime.<sup>66</sup> Throughout the period Ms Gobbo was used as a human source, it established (as it still does) taskforces to investigate certain crimes. For example, the Purana Taskforce was established in April 2003 to investigate the gangland killings in Melbourne during the 2000s and to disrupt major drug manufacturing and trafficking.<sup>67</sup> Similarly, the Petra Taskforce and Briars Taskforce, described in Chapter 8, were separate taskforces set up within the Crime Department, with the distinguishing feature of being jointly conducted with the OPI. All of these taskforces were supervised by, and under the strategic direction of, a committee of senior officers.

As with the rest of Victoria Police, both the Intelligence Department and Crime Department adopted a hierarchical rank structure with an Assistant Commissioner, or a Commander in the case of some areas, overseeing the activities of their command, department or region. Beneath them were other senior officers such as Superintendents and Inspectors.

After Ms Gobbo's third registration as a human source in 2005, she was supposed to be managed by the SDU in accordance with the sterile corridor principle, explained in Box 9.1.

#### BOX 9.1: STERILE CORRIDOR PRINCIPLE

The 'sterile corridor' refers to an arrangement whereby a human source's handlers are different police officers to those responsible for managing any criminal investigations that may rely on information provided by the source. According to Victoria Police's current human source policy, the *Victoria Police Manual—Human Sources*, the central purpose of the sterile corridor is to ensure that the human source's safety is not compromised through the pursuit of investigative outcomes.<sup>68</sup>

At the time of Ms Gobbo's third period of registration as a human source, the principle required that only the SDU would have management of, and contact with, human sources. Any information provided by a human source would be 'sanitised' by the SDU before being provided to investigators in an Information Report. This ensured investigators did not know that the information came from a human source or, at least, that they could not identify the human source.<sup>69</sup>

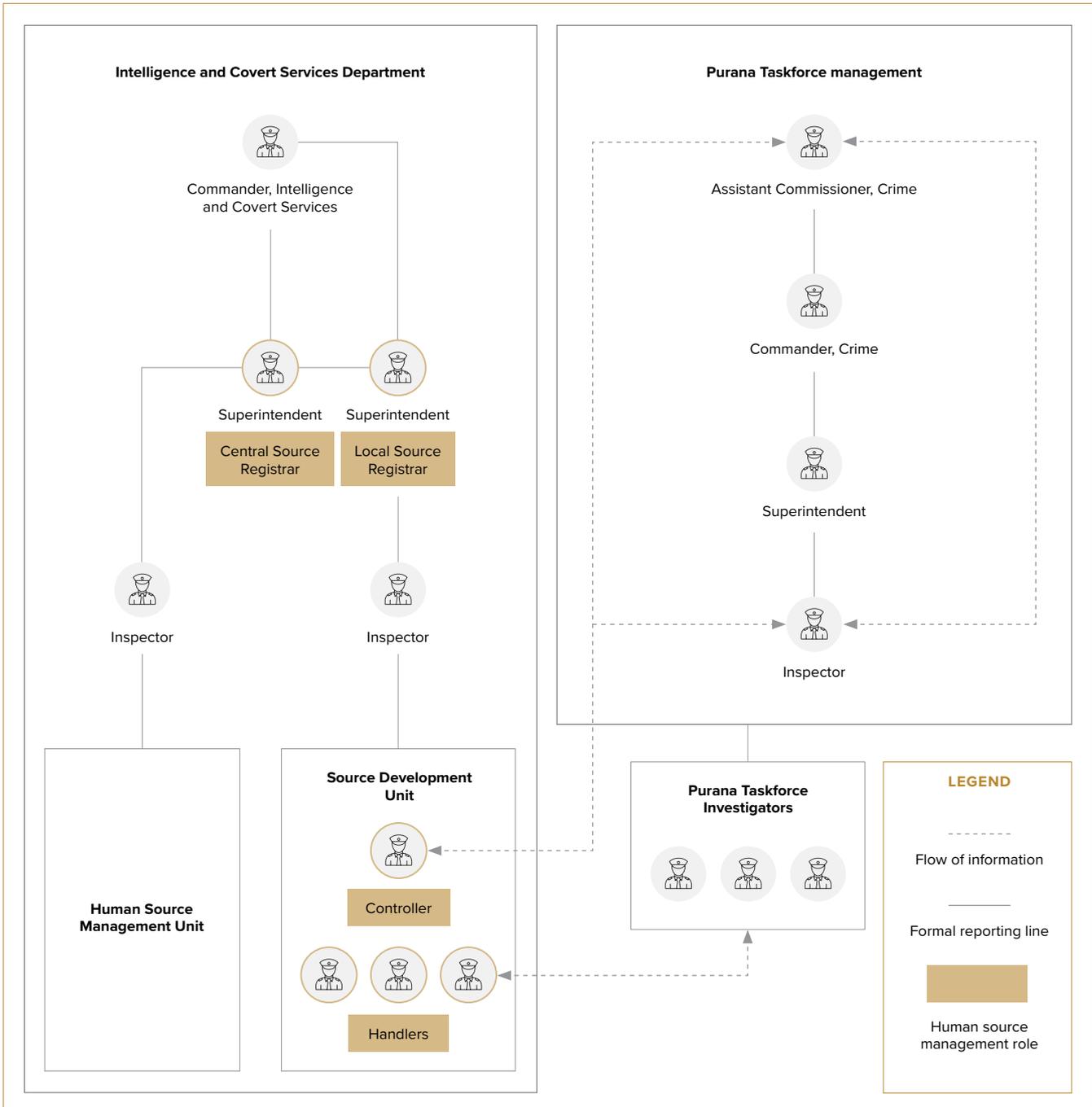
Despite this principle, Ms Gobbo continued to have direct contact with investigators in the Crime Department taskforces when representing some clients on whom she was informing.

The SDU also shared information with Ms Gobbo about her clients at the request of investigators.<sup>70</sup> In addition, senior officers within the Crime Department and the Purana, Petra and Briars Taskforces' management structures were directly involved in her use.<sup>71</sup> That is, many officers within the Crime Department had knowledge of, and involvement in, her use and management as a human source. This blurred accountability and created confusion about which areas or officers held ultimate responsibility for Ms Gobbo's supervision and management, and infected the sterile corridor that should have applied to the transfer of information she provided to Victoria Police.

Other aspects of Victoria Police's otherwise strict chain of command structure were also disregarded. The Commission heard evidence that while senior officers responsible for the SDU knew that Ms Gobbo was a human source, they did not give directions about Ms Gobbo's deployment, in part because of her use by the Purana Taskforce, which sat under the Crime Department.<sup>72</sup>

Figure 9.1 illustrates the organisational structures in which the SDU and Purana Taskforce operated and the flow of information that occurred between the Crime Department and the SDU from mid-2006 until Ms Gobbo was deregistered as a human source in 2009.

**Figure 9.1: Intelligence and Covert Services Department and Purana Taskforce organisational chart, mid 2006–09<sup>73</sup>**



Above the Intelligence Department, Crime Department and other Victoria Police Departments was an executive governance group, then called the ‘Corporate Committee’.<sup>74</sup> This body was composed of high-ranking officers including Deputy Commissioners and Assistant Commissioners.<sup>75</sup>

Former Chief Commissioner Kenneth (Ken) Lay, AO, APM told the Commission that the executive governance arrangements during these periods had a direct impact on Victoria Police’s effectiveness. He explained that

under Ms Nixon, the Corporate Committee consisted of about 25 people, including the Deputy and Assistant Commissioners and Commanders. Most of those officers were not co-located. Mr Lay considered that, because of the size and location of this senior executive group, there was 'less regular informal communication about the issues of the day' compared to when he was Chief Commissioner from 2011 to 2015.<sup>76</sup> He also highlighted the disunity among key members of the executive group during this period.<sup>77</sup>

Several current and former Victoria Police officers contended that officers at the top of the chain of command knew that Ms Gobbo was a human source and this gave 'comfort and confidence to officers below' about the legitimacy of her use.<sup>78</sup> They submitted that this partly explains why none of the more than 100 or so Victoria Police officers and personnel who knew that Ms Gobbo was a human source between 2005 and 2009, ranking from Senior Constables right through to Assistant Commissioners, reported or raised concerns about the appropriateness of her use with Victoria Police's then Ethical Standards Department or an external body.<sup>79</sup>

Victoria Police contended that no officer dealing with Ms Gobbo or the cases involving information she provided had 'full visibility' over her role and history, and that instead many officers saw only a small part of the picture.<sup>80</sup> That was, it submitted, in part due to a failure to implement appropriate governance arrangements to manage such a high-risk situation.<sup>81</sup> Several current and former Victoria Police officers also submitted that the governance structures were 'weak' compared with more modern arrangements in similar organisations.<sup>82</sup>

Victoria Police contrasted those arrangements with what would occur if a similar situation arose under the current human source management framework. Currently, the registration of a prospective human source who is a lawyer, former lawyer, or someone associated with a lawyer would have to be considered and approved by the Human Source Ethics Committee (Ethics Committee), which includes Assistant Commissioners and the Executive Director of Victoria Police's Legal Services Department. If that person was registered, Victoria Police submitted, their use as a human source would be subject to conditions, reviews and reporting to the Ethics Committee.<sup>83</sup>

The Commission acknowledges that the siloed chain of command arrangements and weak executive governance existing at the time contributed to failures in the management of Ms Gobbo as a human source. Contrary to Victoria Police's contentions, however, the Commission does not accept that the current human source governance framework, although admittedly improved, is sufficiently robust to deal with similarly complex situations. It recommends changes to decision-making arrangements to encourage greater accountability in the use and management of certain high-risk sources, including where confidential or privileged information may be obtained, in Chapter 12.

While the Commission recognises the impact of structural weaknesses that existed within Victoria Police at the time, these weaknesses do not absolve individual senior officers who had sufficient knowledge about Ms Gobbo's use as a human source and who failed to take appropriate action at various times during the period of her third registration. Consistent with the analysis in Chapter 8, officers in leadership positions who knew, or should have known, that Ms Gobbo was acting for people while providing information about them to Victoria Police, should have taken steps to prevent this from occurring, including by obtaining fully informed legal advice and ensuring that officers were complying with Victoria Police's disclosure obligations.

## **A cultural emphasis on getting results**

The Commission heard evidence that the information Ms Gobbo was able to provide to Victoria Police was of high value in helping police to detect and prevent serious and organised crime.<sup>84</sup> The large number of potentially affected cases that the Commission has identified in Chapter 7 lends further support to this fact.

As explained in Chapter 8, senior officers within Victoria Police who knew of Ms Gobbo's role clearly appreciated that she was a very high-value human source. They should also have appreciated the risks of her use, especially those who had been closely involved in reviewing and reforming Victoria Police's human source management framework and were therefore aware of the challenges the organisation had faced in managing high-risk sources in the past.<sup>85</sup>

Counsel Assisting submitted that the high value of the information Ms Gobbo could and did provide justified, in the views of many officers at all ranks, the obvious impropriety of using her as a human source and not disclosing this to the courts, prosecuting authorities or accused persons.<sup>86</sup> They submitted that it was open to the Commission to find that, insofar as the conduct of Victoria Police can be said to have been caused by, or influenced by, its ‘culture’, then a relevant cultural factor included a view that the ends of charging, convicting and imprisoning criminals justified the means of securing these convictions, including through improper conduct.<sup>87</sup>

Victoria Police rejected this submission.<sup>88</sup> It emphasised that it has never suggested that the ends of charging, convicting and imprisoning criminals justify the means,<sup>89</sup> and submitted that such a contention is premised on an erroneous assumption that officers participated knowingly in improper conduct.<sup>90</sup>

The Commission does not accept Victoria Police’s broad submission that no officers knowingly acted improperly.

Many Victoria Police officers involved in these events knew that using Ms Gobbo as a human source was a high-risk strategy. As is clear from Chapter 8, some of those officers, especially those in senior positions with legal training, appreciated that using Ms Gobbo was a *very* high-risk strategy.<sup>91</sup> It is also clear that, for the entirety of her third period of registration, Victoria Police considered the value of the information she could, and did provide, warranted her registration and continued use.<sup>92</sup>

The enormity of the risks involved and their potential consequences should have been particularly appreciated by those officers within Victoria Police’s leadership. As noted above, the mismanagement of human sources and associated police misconduct and corruption precipitated significant reforms to the human source management framework in the early 2000s. Victoria Police’s leaders knew what could go wrong when human sources were mismanaged and when there was insufficient oversight of officers dealing with human sources.<sup>93</sup>

Having considered the relevant evidence, including the submissions of Counsel Assisting, Victoria Police and relevant officers, the Commission is satisfied that the registration and management of Ms Gobbo as a human source reflected a pervasive drive to achieve results, with insufficient regard to managing the exceptionally high risks involved, most likely because the information she provided was seen as highly valuable in solving serious crimes associated with Melbourne’s gangland wars.

## Deficiencies in human source management policies and processes

Victoria Police’s current use of human sources is governed by an internal policy—the *Victoria Police Manual—Human Sources* (Human Source Policy).<sup>94</sup> As discussed in Chapter 11, over the years, there have been many iterations of this policy, the most recent in May 2020.

Some of the police conduct described in Chapter 8 points to inadequate policies concerning the recruitment, use and management of human sources. Where those policies did exist, the Commission finds that there were many instances of inadequate adherence to them. There were also significant gaps in the training provided to police to deal with some of these issues.

Terms of reference 1 and 2 span a period of more than 25 years. Consequently, it is difficult to make general statements about the adequacy of, and adherence to, Victoria Police’s policies, processes and training that were applicable at all relevant points in time. Nevertheless, this section focuses on policies in place between 1995 and 2003 (during Ms Gobbo’s first and second registrations) and then between 2003 and 2009 (immediately before and during Ms Gobbo’s third registration).

## 1995 to 2003: Rudimentary policies and processes

Between 1995 and 2003, Victoria Police's policies and processes concerning the management of human sources were rudimentary. Their central focus was to require police to preserve the confidentiality of the identity and location of human sources.<sup>95</sup> Victoria Police described this as the 'golden rule', which was designed to protect the lives and safety of those who assisted police.<sup>96</sup> According to Victoria Police, this rule was the paramount consideration in the use of human sources.<sup>97</sup> A Force Circular Memo published in early 1992, when processes for the formal registration of human sources were introduced, instructed officers to observe the following rules:

- Officers are to maintain the utmost confidentiality in relation to the identity of human sources.
- Officers must not disclose the name of a human source in written reports unless directed to do so by a more senior officer.
- Officers may, if necessary, verbally disclose the name of a human source to their superiors.
- Officers must disclose the name of a human source to a more senior officer if they are directed to do so.<sup>98</sup>

At the time of Ms Gobbo's first and second registrations, policies and processes required the registration of human sources,<sup>99</sup> but did not involve a risk assessment process.<sup>100</sup> This is consistent with the fact that Victoria Police did not conduct any kind of risk assessment process before Ms Gobbo was registered as a human source in 1995 and in 1999.<sup>101</sup>

As discussed in Chapter 6, although there is a lack of material before the Commission about Ms Gobbo's first registration in 1995, it does not appear that Victoria Police gave any consideration to the appropriateness of registering a law student as a human source.<sup>102</sup> Similarly, at the time of Ms Gobbo's second registration in 1999, the policy gave very little guidance on the appropriateness of registering human sources.<sup>103</sup> For example, that policy did not require an assessment of whether the profession of the human source raised any complex legal and/or ethical issues.

Importantly, throughout this period, Victoria Police provided no policy guidance on registering human sources who may be subject to legal obligations of confidentiality or privilege.<sup>104</sup>

The Commission considers that these rudimentary policies and processes substantially mitigate the conduct of individual Victoria Police officers' handling of Ms Gobbo as a human source during this period. There were several weaknesses in the framework; namely, the absence of a formal risk assessment process, lack of guidance regarding human sources subject to legal obligations of confidentiality or privilege, and the overemphasis of the golden rule. These weaknesses all help to explain why no formal or informal risk assessment was conducted at the time of Ms Gobbo's first and second registrations or while she was registered, despite some individual officers flagging concerns about her suitability to be a human source.<sup>105</sup>

## 2003 to 2009: Contemporary policy framework and evolving processes

By 2003, Victoria Police had started to implement a contemporary policy and procedural framework to govern the management of human sources.<sup>106</sup> In 2003, Victoria Police established its first comprehensive organisation-wide human source management policy.<sup>107</sup>

The policy incorporated all phases of the human source management process, including recruitment, registration, interaction, payment, deactivation and requests for human source assistance.<sup>108</sup> It also outlined the roles and responsibilities of officers involved in the management of human sources.<sup>109</sup> In contrast to previous policies, this framework required officers to undertake a risk assessment prior to the registration of a human source, and monthly reviews of risk once the source was registered.

This policy was introduced by Victoria Police largely in response to policy and procedural deficiencies that had contributed to past instances of police misconduct and corruption in the use of human sources.<sup>110</sup> These experiences had prompted Victoria Police to conduct various reviews, with a view to overhauling its human source management framework.<sup>111</sup>

Victoria Police expended significant efforts and resources to set up what it considered was a ‘best practice’ human source management framework. Senior officers of Victoria Police travelled interstate and overseas to consult with law enforcement agencies in comparable jurisdictions, including to the United Kingdom.<sup>112</sup> In early 2004, as a key part of the new framework, Victoria Police established a specialised unit responsible for managing high-risk human sources. This unit came to be called the SDU.<sup>113</sup>

Victoria Police also implemented new standard operating procedures that applied to the SDU and required:

- completion of a comprehensive risk assessment prior to the registration of a human source
- completion of an Acknowledgment of Responsibilities (AOR), setting out the parameters of the relationship between the human source and Victoria Police
- formal and ongoing monthly risk assessment reviews
- contemporaneous records of information provided by a human source, through the completion of Informer Contact Reports (ICRs)
- maintenance of a sterile corridor, by requiring that only the SDU would have management of, and contact with, high-risk human sources.<sup>114</sup>

While this policy and procedural framework was certainly more robust than its predecessor, it was not without flaws. Some of these flaws became critical gaps. Below, the Commission draws particular attention to two significant shortcomings:

- the continued and absolute emphasis on the need to protect the identity of human sources (the golden rule)
- the evolving nature of the new framework, which led to policy and procedure being developed on the run.

### **The ‘golden rule’**

The golden rule, which required the identity of a human source to be protected, was emphasised in police practice throughout this period.<sup>115</sup> The Commission heard that this rule became cast iron as a consequence of the murder of registered human source Mr Hodson and his wife. Mr Hodson’s status as a human source had become known to criminal identities after a Victoria Police Information Report (IR) identifying him as a source was leaked.<sup>116</sup> Human source management did not form part of the training for recruits at the police academy, so typically officers would learn the golden rule on the job from more experienced officers.<sup>117</sup> The mantra ‘never reveal a source’ was drummed into officers in this period.

The Commission accepts that any human source management policy must prioritise the safety of human sources and this includes protecting their identities. The golden rule was put in place with the primary and proper purpose to protect human sources’ safety.<sup>118</sup> Victoria Police, however, has now acknowledged that the human source management framework was flawed in its rigid emphasis on this rule.<sup>119</sup> It submitted that it ‘risked dominating the minds and actions of [officers] to such an extent that they risked making poor decisions.’<sup>120</sup>

The Commission considers that the sole and exclusive focus on this rule through formal directions and informal training, together with a lack of focus on other important public interests, led to a situation where many Victoria Police officers protected the identity of human sources like Ms Gobbo to the detriment of fundamental legal obligations, most notably the duty of disclosure. It also contributed to the reluctance within the organisation to obtain timely, informed and independent legal advice about the use of Ms Gobbo throughout this period, discussed further below.

### **Evolving standard operating procedures and insufficient guidance on complex human sources**

Counsel Assisting submitted that a weakness in the human source management framework was the lack of policies or procedures to protect against the risks of using lawyers or other people subject to legal obligations of confidentiality or privilege as human sources.<sup>121</sup> This was despite Victoria Police examining the United Kingdom human source management model, which included a publicly available Code of Practice containing safeguards related to sources providing confidential or privileged information, when developing its new framework in the early 2000s.<sup>122</sup> Victoria Police candidly acknowledged this weakness in its submission to the Commission.<sup>123</sup>

Another weakness highlighted by Victoria Police and several former and current Victoria Police officers was the novelty of the policy framework.<sup>124</sup> The policies and procedures concerning the SDU were new and untested. While the SDU was staffed by experienced officers, the unit was still developing its standard operating procedures throughout Ms Gobbo's third registration period.<sup>125</sup> Several former SDU officers conceded that, with the benefit of hindsight, these evolving policies 'could have been better crafted to consider and deal with human sources with obligations of confidentiality and privilege'.<sup>126</sup>

The Commission accepts the submissions that an important factor in the improper use of Ms Gobbo as a source was the policy and procedural framework that existed at this time. In particular, the Commission considers the critical deficiencies were:

- the absence of policy guidance and/or restrictions on the recruitment and use of human sources with legal obligations of confidentiality or privilege
- a lack of clear guidance and requirements about when to seek legal advice on complex issues.

As Victoria Police has now rightly acknowledged, had such policy guidance existed, it is unlikely that she would have been registered as a human source in 2005.<sup>127</sup> This significant gap in Victoria Police's human source management policy framework was left un-addressed until 2014, and not fully remedied until amendments were made to the Human Source Policy in 2020.<sup>128</sup>

The Commission considers that the human source management framework also lacked clear guidance about when to seek legal advice on complex issues. Victoria Police acknowledged that a major contributing factor in the use of Ms Gobbo as a human source in 2005–09 was the failure to obtain legal advice, both at the time of her registration and later, as clear conflict of interest issues and problems with legal professional privilege began to emerge.<sup>129</sup> Consequently, some of the more complex legal risks that Ms Gobbo's use posed to Victoria Police, investigations and prosecutions, and the administration of justice were not identified by the SDU or its superior officers.<sup>130</sup>

It is important to acknowledge that, over the period that was the subject of this Commission's inquiry, Victoria Police's Human Source Policy was refined to better address complex issues concerning the use and management of human sources. Despite this, some weaknesses remain. The Commission makes recommendations designed to address these in Chapter 12.

Due to both the volume of information Ms Gobbo provided to Victoria Police immediately before and during her third registration period and the significant and ongoing contact between Victoria Police officers and Ms Gobbo from 2003 until 2010, the remaining sections of this chapter will primarily address issues in the period from 2003 onwards.

## Failure to comply with human source management policies and processes

Counsel Assisting submitted that Victoria Police officers failed to comply with the policies and procedures that did exist when Ms Gobbo was used as a human source in 2005–09.<sup>131</sup> The examples they highlighted included the failure:

- to perform regular, formal risk assessments
- to complete an AOR between Victoria Police and Ms Gobbo
- to complete ICRs in a timely manner
- of the responsible senior officer to review completed ICRs in a timely manner
- to disseminate information to investigators only through IRs.<sup>132</sup>

These policies applied to all Victoria Police officers dealing with human sources, not just the SDU. Investigators in the taskforces under the Crime Department were required to adhere to the sterile corridor principle by not receiving information directly from Ms Gobbo and leaving the management of her as a human source to the SDU. The SDU should have facilitated this by only disseminating information to the investigators in IRs that had been ‘sanitised’ to remove any information that could have identified Ms Gobbo as the source of the information.

In response to Counsel Assisting’s assertion that officers failed to comply with these policies and procedures, Victoria Police submitted that such failures could not occur under the current Human Source Policy and associated processes.<sup>133</sup> It noted that the current framework is supported by an intelligence and case management system, Interpose, that detects instances of policy non-compliance and automatically suspends non-compliant human source files.<sup>134</sup>

As discussed in Chapter 8, there were many instances of officers not complying with the policies and procedures listed above. In addition to the examples given by Counsel Assisting, others included:

- cursory and perfunctory risk assessments<sup>135</sup>
- the SDU providing un-sanitised information to investigators verbally (a practice referred to as ‘hot debriefs’).<sup>136</sup>

The Commission therefore accepts the submission of Counsel Assisting that SDU officers failed to comply with some key policy and procedural requirements.

On the available evidence, it appears that numerous factors contributed to this non-compliance. For example, the requirement for timely completion of ICRs was difficult to comply with because of the huge amount of information Ms Gobbo was providing to SDU officers on a daily basis. The Commission notes that several former SDU officers submitted that they requested more administrative support to assist them with this task but it was not adequately provided.<sup>137</sup>

The Commission also accepts Victoria Police’s submission that another factor was the intense external pressure and scrutiny being applied to police because of the continuation of the gangland wars. As discussed above, one consequence was that Victoria Police officers were driven to achieve results and appear to have ignored compliance with proper processes in some instances. In addition, as discussed below, the SDU was under-supervised, which gave the unit significant freedom to push the boundaries and to operate outside of formal policies and processes.

Pressure was also exerted on investigators in the relevant taskforces, which resulted in them sometimes sidestepping critical aspects of the policies and procedures, including, notably, receiving ‘hot debriefs’ from SDU officers.<sup>138</sup> This practice was directly contrary to the sterile corridor principle.

In the Commission's view, however, while the individual officers who did not adhere to these policies and processes bear some responsibility for that non-compliance, and while it reflects a troubling willingness to 'bend the rules' in the pursuit of investigative objectives, it is substantially mitigated by the lack of effective supervision by senior officers. This is discussed further later in this chapter.

## Failure to properly identify, assess and manage the risks of using Ms Gobbo as a human source

Managing human sources requires police to identify, assess and manage a range of risks. At the time of Ms Gobbo's third registration, Victoria Police had recognised for many years that while human sources can be a valuable means to obtain information about criminal activity, their use also gives rise to risks that must be managed carefully.<sup>139</sup>

Victoria Police policy required officers to complete a risk assessment and in so doing, to consider the following risks:

- risk to the human source
- risk to information
- risk to police officers dealing with human sources
- risk to Victoria Police
- risk to the public.<sup>140</sup>

### The nature of the risks of using Ms Gobbo as a human source

Using Ms Gobbo as a human source involved a number of risks, including:

- the risk to Ms Gobbo's personal safety if her identity as a human source became known, given, in particular, her role as a criminal defence barrister, her high profile within the legal profession, and her relationship with organised crime figures
- the risk that Ms Gobbo would not follow her handlers' instructions, especially because of her overt willingness to assist police and her erratic behaviour
- the risk that Ms Gobbo's physical health would be adversely impacted, particularly because she had recently suffered a stroke at 31 years of age
- the risk that Ms Gobbo would breach her duties to her clients, including her duty to keep the information they gave her confidential and to avoid conflicts of interest, by providing information about them to Victoria Police
- the risk that the use of Ms Gobbo as a human source would jeopardise criminal investigations, prosecutions and the validity of convictions
- the risk that Ms Gobbo's use as a human source, if it became known, would negatively affect Victoria Police's reputation and undermine public confidence in it and the criminal justice system.

Identifying and assessing these risks required Victoria Police officers to appreciate several factors, many of which overlapped, including:

- the nature of the lawyer/client relationship, including conflicts of interest
- the scope of Ms Gobbo's legal obligations of confidentiality and privilege, and of confidential or privileged information
- the prosecution's duty of disclosure and the possible consequences of not complying with this duty, including the risk that a prosecution could be temporarily or permanently stayed and/or convictions overturned
- aspects of Ms Gobbo's personality and mental and physical health that made her particularly difficult to manage as a human source.

Consistent with the findings and discussion in Chapter 8, the Commission is satisfied that from the time of Ms Gobbo's third registration through to when Victoria Police stopped receiving information from her in 2010, some of the risks were obvious and known, or at least should have been known, to police, including that:

- the use of Ms Gobbo as a human source may be disclosed, either through court processes or otherwise<sup>141</sup>
- at least a proportion of the information she provided to Victoria Police in relation to her clients was likely to be confidential or privileged<sup>142</sup>
- miscarriages of justice might eventuate from the use of a lawyer as a human source to inform on their own clients.<sup>143</sup>

Once these risks were identified, Victoria Police officers should have known at the very least that the information Ms Gobbo could lawfully provide to police for use in investigations was tightly constrained by her own legal obligations, and that informed legal advice was needed to better understand the potential risks relating to her use.

As discussed below, there were many failures to:

- properly assess the risks at the time of Ms Gobbo's third registration as a human source
- continually assess and manage the risks throughout her third registration period and after her deregistration as a human source.

## Failure to properly assess the risks at the outset

As noted above, by 2003, Victoria Police's policy framework included the requirement to undertake risk assessments before registering human sources. The initial risk assessment was required to be conducted by officers in the SDU, and approved by the Officer in Charge (OIC), a Detective Inspector of the SDU.

Significantly, the initial risk assessment failed to acknowledge the ethical and legal risks of registering Ms Gobbo, a criminal defence barrister, as a human source and providing information to police about her clients. Despite this notable absence, the risk assessment completed by the SDU and signed off by supervising officers in November 2005 did identify that Ms Gobbo:

- had quickly established a history of providing wide ranging and accurate intelligence
- had the ability to provide accurate and timely intelligence concerning local and major crime
- was capable of being deployed in a criminal environment as her associates appeared to trust her and speak openly in her presence
- was a Victorian criminal barrister and represented many high-profile criminal identities.<sup>144</sup>

The risk assessment also noted that the 'effective utilisation of [Ms Gobbo] has the potential to impede major crime and reduce the illicit drug trade. Failure to do so will have the opposite effect'. It recommended that Ms Gobbo was both 'strategically and tactically viable'.<sup>145</sup>

Victoria Police submitted that this evidence demonstrated that the officers involved in Ms Gobbo's registration recruited her as a human source, 'not as a barrister, but as an associate of criminals'<sup>146</sup> and believed that the information they sought, at least at the time of her recruitment, would be information that she had received in social settings. Confining the information that she gave to police became 'impossible to manage', Victoria Police submitted, primarily because 'Ms Gobbo appeared to have no desire to manage it'.<sup>147</sup>

The initial risk assessment prepared by the SDU was endorsed by Officer Black (a pseudonym) as the Acting Controller and approved by the Officer in Charge, then Acting Superintendent Mr Douglas (Doug) Cowlshaw.<sup>148</sup> Mr Cowlshaw's specific involvement in the risk assessment process is discussed in Chapter 8.

Counsel Assisting submitted that while this formal risk assessment process was a significant improvement from previous processes, it was 'clearly incapable of filtering out such a risky candidate'.<sup>149</sup> They also submitted that the approval process in Ms Gobbo's case was ineffective, and did not give attention to the significant risks that Ms Gobbo's use as a human source posed to the proper administration of the criminal justice system.<sup>150</sup>

Victoria Police acknowledged both that the formal risk assessment framework had problems and that there was insufficient engagement with the approval process by senior officers. It submitted that the framework was not capable of identifying and placing strict requirements around the management of the risks associated with Ms Gobbo, and that this failure was a key reason the events occurred.<sup>151</sup> Several former SDU officers also accepted that the risk assessment could have been better, but noted that it was the first of its kind.<sup>152</sup> Nevertheless, Victoria Police and these former SDU officers said that the SDU's risk assessment was detailed and, in some officers' views, was the most comprehensive that had ever been conducted on a human source at Victoria Police.<sup>153</sup>

Victoria Police submitted that there were two main structural limitations in the risk assessment conducted by the SDU:

- SDU officers' poor understanding of the relevant risks, especially conflicts of interest<sup>154</sup>
- limited oversight of the SDU's risk assessment, meaning the officers' views were not challenged and there was no push for legal advice to be obtained.<sup>155</sup>

Victoria Police contended it was 'unfortunate' that the SDU's supervising officers did not have more active involvement in the risk assessment process because they may have challenged SDU officers' views about the nature of the risks posed and may have requested legal advice.<sup>156</sup> The Commission agrees that this should have occurred.

Several former SDU officers asserted that the risk assessment template should have expressly identified:

- the risk that Ms Gobbo would act for people on whom she informed
- the risk that she would breach her ethical obligations
- the risk that others would believe the SDU deliberately targeted information that was privileged and the risk to fair trials.<sup>157</sup>

The Commission does not accept this submission. Inadequacies in a template do not explain why SDU officers failed to sufficiently address the ethical and legal issues raised by Ms Gobbo's registration. It is neither possible nor desirable for a risk assessment template to cover every possible risk. Its purpose is to set out general categories of risk that officers can use to assess the particular circumstances and risks relevant to different prospective human sources. Further, consistent with the discussion in Chapter 8, the Commission does not accept that these officers did not comprehend that there were obvious ethical and legal risks in using Ms Gobbo as a human source. For example, evidence before the Commission signalled that some officers did at least appreciate issues around legal professional privilege.<sup>158</sup>

Overall, the Commission considers that there were critical failures in the initial risk assessment process in relation to Ms Gobbo's third registration as a human source; namely:

- *No reference to ethical and legal risks around registering a lawyer as a human source*—As Victoria Police acknowledged, the initial risk assessment did not refer to the legal and ethical issues associated with a lawyer acting as a human source and providing police with information about their clients. The Commission considers that, had the SDU adequately performed this risk assessment, they would have at least identified these issues, and the significant risks that Ms Gobbo posed to Victoria Police and the criminal justice system.
- *No meaningful interrogation of the risk assessment by supervising officers*—Had the SDU's supervising officers properly conducted a meaningful review of the SDU's initial risk assessment, it is more likely that legal advice may have been requested and/or that the risks of using Ms Gobbo as a human source may have been deemed too great to justify the potential rewards.
- *The absence of an AOR*—as Victoria Police conceded, the evidence suggests that no satisfactory AOR was ever completed for Ms Gobbo.<sup>159</sup> If such a document had existed, it would have set out the respective responsibilities of Ms Gobbo as a human source and Victoria Police in the context of their ongoing relationship. The absence of an AOR allowed officers to take the misguided view that it was for Ms Gobbo to be responsible for managing her ethical obligations.<sup>160</sup> As with the risk assessment template, several former SDU officers submitted that the AOR pro-forma was 'ill adapted' to dealing with a source like Ms Gobbo.<sup>161</sup> The Commission appreciates that the AOR template was not specifically designed for a source like Ms Gobbo, but any shortcomings, if they existed, did not prevent the SDU officers from adapting the template to clearly set out proper parameters of the arrangement between Victoria Police and Ms Gobbo.

## Failure to adequately assess and manage the risks on an ongoing basis

The initial risk assessment was obviously not the only opportunity Victoria Police had to identify the risks posed by Ms Gobbo's use as a human source. The policy required ongoing monthly risk assessments designed to ensure that officers continually assessed the risks in relation to each human source and considered appropriate steps to mitigate unacceptably high risks. As several former SDU officers submitted, the SDU 'continually assessed the risk to a source on an interaction by interaction basis'.<sup>162</sup>

In addition to failing to properly identify and assess the risks at the outset, evidence before the Commission points to many instances of officers failing to adequately re-assess and manage risks on an ongoing basis during Ms Gobbo's third registration.

Some prominent examples include:

- the failure of SDU officers, Purana investigators and those overseeing the SDU and the Purana, Briars and Petra Taskforces to seek legal advice about the potential risks of using Ms Gobbo as a human source and/or information she had provided<sup>163</sup>
- the failure of SDU officers to take steps to deactivate Ms Gobbo when it became clear that her role as a human source was becoming increasingly problematic.<sup>164</sup>

Victoria Police offered several explanations as to why its officers managed these risks so poorly throughout this period. Broadly, it pointed to:

- the difficulties of managing Ms Gobbo as a human source
- the impact of, and unintended weaknesses in, the sterile corridor and 'need-to-know' principles
- ongoing failures by SDU officers to assess and manage the risks.

These matters are discussed in turn below.

### The difficulties of managing Ms Gobbo as a human source

The Commission heard evidence that SDU officers, investigators and senior officers assumed and/or accepted that Ms Gobbo was responsible for managing her own ethical and legal obligations.<sup>165</sup> Several former and current officers involved in her use said they 'did not contemplate' that Ms Gobbo would over time disregard her professional obligations in the way she did. Many officers proceeded on the basis that it was for Ms Gobbo to consider her professional obligations, and that if she did not do that, or did it incorrectly, then any consequences were for her alone.<sup>166</sup> They said that this was not an 'unreasonable assumption' to make, as people outside of Victoria Police 'seem to have made the same assumption'.<sup>167</sup>

Counsel Assisting, however, drew attention to evidence that individual officers were sometimes expressly made aware of Ms Gobbo's disregard for her obligations to her clients, and that at other times this was implicit.<sup>168</sup> They also submitted that SDU handlers managed the information Ms Gobbo gave to them inconsistently. Sometimes the handlers left it to Ms Gobbo to manage legal professional privilege issues; sometimes they appeared to disseminate privileged information to investigators; and at other times they tried to remove potentially privileged information from IRs before disseminating them to investigators.<sup>169</sup> This suggests that, at least on some occasions, the SDU identified that Ms Gobbo was providing privileged or potentially privileged information.

In explaining this behaviour, Victoria Police placed significant reliance on Ms Gobbo's 'uniqueness' and the challenges she created for her handlers. It submitted it was:

*... hard to imagine a more unusual potential human source: a criminal defence barrister who was also as much a part of the criminal world of her clients as she was their representative.*<sup>170</sup>

This situation, Victoria Police said, created 'unique challenges' for her risk assessment, registration and management. It submitted that Ms Gobbo was simultaneously 'intelligent, articulate, needy, vulnerable, manipulative, dishonest and with a questionable moral and ethical compass'.<sup>171</sup>

Victoria Police contended that Ms Gobbo's relationship with Victoria Police was, in reality, a complex set of relationships with a number of different officers; that the only constant in that relationship was Ms Gobbo herself; and that Counsel Assisting submissions failed to acknowledge that complexity.<sup>172</sup> It follows, Victoria Police argued, that those officers involved in her management both during her third registration period and after her deactivation in 2009, did not have collective knowledge of all aspects of her relationship with Victoria Police. The only person who had that was Ms Gobbo.<sup>173</sup>

Some former and current Victoria Police officers submitted that neither the SDU officers nor investigators had ever handled a human source like Ms Gobbo, a lawyer closely associated with criminals and who, as time went on, disregarded her professional obligations and the directions of her handlers.<sup>174</sup> One former SDU officer gave evidence that while he had significant experience with the duplicity of human sources, he 'dropped his guard' when managing Ms Gobbo, believing she would act honestly because she was a barrister.<sup>175</sup>

Implicit, and sometimes explicit in the submissions of Victoria Police and many of its former and current officers is the notion that the relevant officers failed to identify the risks at the outset and then to continually assess and manage these risks throughout the relationship because none of them could have, or did, anticipate Ms Gobbo's particular propensity to disregard her ethical and legal obligations, to lie and manipulate, to behave in inconsistent ways and to disregard instructions.

Without diminishing in any way Ms Gobbo's reprehensible conduct, the Commission is of the view that these submissions do not excuse Victoria Police's failure to identify, assess and manage the relevant risks. This is so for three key reasons:

- First, it was well understood by Victoria Police that some high-risk human sources will routinely lie and manipulate<sup>176</sup> and that a common danger in human source management is the development of personal relationships between the handler and human source that 'opens the door for corrupt practice to occur'.<sup>177</sup> The creation of the SDU, a group of expert human source handlers to manage complex human sources, was specifically designed to mitigate these risks. SDU officers should have been aware from the outset of the need to actively manage Ms Gobbo and to put clear parameters around the relationship.
- Second, as discussed in Chapter 8, as the relationship continued, the recorded conversations between Ms Gobbo and Victoria Police suggest that at times, officers were concerned by Ms Gobbo's behaviour and conduct. There were many discussions, at critical moments, where it was clear that Ms Gobbo was disregarding her ethical and legal obligations to her clients.<sup>178</sup> Yet these officers did not take adequate steps to set firm boundaries or end the relationship.
- Third, and most fundamentally, the submissions minimise Victoria Police's powerful and pivotal role in facilitating a situation where a criminal lawyer was informing against her own clients and police were using that information in ongoing investigations and prosecutions. It seems inconceivable that the relevant officers believed Ms Gobbo was entirely responsible for and capable of managing her legal obligations to the clients she was informing on, given the precarious situation in which she found herself.

As noted above, several Victoria Police officers contended that it was not an 'unreasonable assumption' that Ms Gobbo would manage her own professional obligations, noting that others outside Victoria Police appeared to have made the same assumption.<sup>179</sup> The Commission rejects this submission. As explained in Chapter 8, Victoria Police did not begin to fully brief the VGSO and prosecutors about Ms Gobbo's use as a human source until late 2011.<sup>180</sup> The assertion that these people outside Victoria Police appear to have reached the same assumption is misguided: they were not provided with sufficient information to reach an informed opinion on this matter.

### **Impact of the sterile corridor and need to know principles**

Victoria Police placed significant reliance on the application of the sterile corridor and need to know principles to explain failures to manage the risks arising from Ms Gobbo's use as a human source. Issues arising from the application of these principles, it contended, meant that information was kept in silos and not shared.<sup>181</sup> For example, Victoria Police submitted that the operation of the need to know principle made it very difficult if not 'practically impossible' for police officers to get a complete picture of Ms Gobbo's role, and this exacerbated the failures of officers to disclose the use of Ms Gobbo, and the use of information received from Ms Gobbo, to prosecutors, courts and accused persons in accordance with the duty of disclosure.<sup>182</sup>

While the Commission acknowledges that the sterile corridor and need to know principles had consequences for the ability of officers in different units to manage some risks, it does not accept this as a satisfactory explanation for Victoria Police's failure to manage the most obvious risks. The evidence does not support the contention that these principles, in practice, prevented officers from being aware of the risks that:

- Ms Gobbo would provide confidential or privileged information to police; or
- Ms Gobbo would act as a legal representative for a client while providing information to police about them.

Officers should have been aware of these obvious risks and taken steps to prevent Ms Gobbo from providing confidential or privileged information or from representing people she had provided such information about. When those risks materialised, the SDU officers and investigators involved should have immediately raised

these matters with their supervising officers, taken steps to deregister Ms Gobbo as a human source or put other strategies in place to manage her in a different way; and/or sought legal advice about how to handle the situation.

### **Source Development Unit failures to assess and manage the risks**

Counsel Assisting submitted that it was open to the Commission to find that the SDU's approach to risk assessment and mitigation throughout Ms Gobbo's third registration was 'lamentably inadequate'.<sup>183</sup> They highlighted the evidence that the SDU prepared only two formal written risk assessments throughout this period—the initial assessment discussed above and a second in April 2006—and the lack of any formal risk mitigation process other than the perfunctory preparation of a 'monthly source review' by the Controller in the SDU, a brief, high-level summary of matters relevant to Ms Gobbo over the preceding month.<sup>184</sup>

Several former SDU officers did not accept this submission. They contended that every significant incident relevant to risk was documented in the ICRs, summarised in the Source Management Log (SML) and discussed at management meetings.<sup>185</sup> They submitted that when Ms Gobbo received threats, additional measures were put in place to monitor her safety.<sup>186</sup> They conceded that registering Ms Gobbo and using her as a human source 'did not resolve the fact that Ms Gobbo was in danger' but said that 'such is the role of human sources'.<sup>187</sup>

These submissions demonstrate an inadequate understanding both at the time, and now looking back on events, of the many complex risks posed by Ms Gobbo's use as a human source.

While the serious risk to Ms Gobbo's personal safety was a major risk, it was certainly not the only one. Merely documenting the ongoing risks to her safety in ICRs and the SML and discussing them at management meetings was not a satisfactory way to manage the risk to Ms Gobbo's safety, let alone the many other risks that Ms Gobbo posed. The Commission agrees with Counsel Assisting that the monthly source reviews were perfunctory and do not evidence a rigorous and continual assessment of the risks associated with Ms Gobbo's use as a human source as her relationship with Victoria Police became increasingly complex and problematic.

In addition, the former SDU officers' assertions that all those who choose to be human sources place themselves in danger<sup>188</sup> overlooks the critical responsibility of police when registering human sources; that is, to continually assess and manage the risks to those human sources. In the case of Ms Gobbo, as Victoria Police now rightly acknowledges, a person as complex and high-risk should never have been registered, used and managed as a human source in the way that she was.<sup>189</sup> For all of these reasons, and after considering the contrary contentions of Victoria Police and the former SDU officers, the Commission agrees with Counsel Assisting's assessment that the SDU's risk management and mitigation was wholly inadequate throughout the period of Ms Gobbo's third registration as a human source.

While the SDU had the day-to-day operational management of Ms Gobbo, its officers did not have sole responsibility for decisions about her use and management. Management and supervision of the SDU was also a significant factor in their failure to manage risk. This is discussed further below.

### **Failure to seek legal advice throughout Ms Gobbo's third registration period**

As is apparent from the narrative set out in Chapters 6, 7 and 8, there were many occasions between 2005 and 2009 when Victoria Police should have sought legal advice about the use of Ms Gobbo as a human source. Had this occurred, it is likely that much of the damage would have been avoided, or at least mitigated to a significant degree.

#### **Failure to seek legal advice at initial registration**

As former Chief Commissioner Neil Comrie, AO correctly observed in his 2012 review, the Comrie Review, this was a case 'crying out' for legal advice.<sup>190</sup> Victoria Police's failure to seek timely, informed legal advice was a central reason for its inability to adequately identify, assess and manage the risks of using Ms Gobbo as a human source.

Counsel Assisting submitted that, given the apparently imperfect understanding of some officers dealing with Ms Gobbo about complex aspects of the risks she posed (including the scope of legal obligations of confidentiality and privilege and conflicts of interest), they should have obtained legal advice before and during Ms Gobbo's third registration.<sup>191</sup> Victoria Police accepted this criticism and acknowledged that the failure to seek legal advice at the time of Ms Gobbo's registration was a major contributing factor to what subsequently was allowed to occur.<sup>192</sup>

As noted above, the Commission considers that a deficiency in the policy framework was the absence of a requirement to obtain legal advice before registering a source as high risk and complex as Ms Gobbo. Even without a formal requirement though, the SDU and its supervising officers could and should have managed the obvious risks by seeking legal advice at the time of Ms Gobbo's registration.

Former Chief Commissioner Mr Simon Overland, APM told the Commission that as soon as he learned that Ms Gobbo was to be registered, he immediately identified issues of concern, including the potential for miscarriages of justice.<sup>193</sup> Despite this, he did not seek legal advice.<sup>194</sup> He said he was 'conscious not to intervene because [he] didn't think it was appropriate' as the SDU was not in his chain of command.<sup>195</sup>

### **Continued reluctance to seek legal advice as relationship became more complex**

As the obvious risks of using Ms Gobbo as a human source materialised over the course of the relationship, Victoria Police officers failed to obtain informed legal advice.

Counsel Assisting drew attention to findings in both the Comrie Review and Kellam Report that using Ms Gobbo and receiving information from her for the purpose of furthering investigations without having first obtained legal advice was negligent.<sup>196</sup> They referred to then Deputy Commissioner Graham Ashton's somewhat concerning evidence to the Kellam inquiry that Victoria Police was under 'considerable pressure' at the time of Ms Gobbo's use as a human source and that this 'sometimes diverts you from the necessary sense of steps'.<sup>197</sup>

Mr Kellam concluded 'on balance, it is highly likely that the prospect of "the glittering prize" distracted all concerned from the obvious steps that were required to be taken to mitigate the risks'.<sup>198</sup> This 'glittering prize' was that Ms Gobbo would provide information leading to breakthroughs in Victoria Police's investigations of the crimes associated with the gangland wars.

Victoria Police rightly acknowledged that it should have sought legal advice as issues began to emerge throughout Ms Gobbo's third registration period.<sup>199</sup> Several former and current Victoria Police officers agreed with this but contended that it was 'very rare' at the time for police officers to obtain legal advice about operational matters. It submitted that generally officers 'briefed up or they tried to work it out themselves'.<sup>200</sup>

Victoria Police also submitted that a number of officers did turn their minds to the question of whether it was appropriate to use Ms Gobbo as a human source, or whether the information she had provided could be used, but assumed the issue had already been considered by more senior officers and/or the SDU, or that legal advice had already been obtained.<sup>201</sup>

Several former SDU officers accepted that legal advice should have been sought from an early stage, but submitted that they did not consider it was necessary at the time.<sup>202</sup> Victoria Police said that, at least in part, this erroneous view was reached by some SDU officers because of their incomplete understanding of the legal issues involved.<sup>203</sup> That is, while those officers considered they had a reasonable understanding of legal professional privilege, and could navigate these issues with Ms Gobbo, they did not fully understand the nature of a lawyer's duty to avoid conflicts of interest.<sup>204</sup>

There is some merit in the submissions of Victoria Police and its current and former officers, but they do not adequately explain why it was considered unnecessary to obtain legal advice, especially when confronted with the legal and ethical minefield that Ms Gobbo's use as a human source posed. A former senior Victoria Police

officer, Mr Terry Purton, who was responsible for Victoria Police's *Review of the Victoria Police Drug Squad* (including that unit's relationship with human sources) in 2001 obtained external legal advice because of the importance and complexity of the legal and ethical issues involved.<sup>205</sup> By contrast, when it came to Victoria Police's use of Ms Gobbo, Mr Purton gave evidence that he did not consider whether legal advice was necessary as it had never entered his mind at any stage that Victoria Police was acting unlawfully.<sup>206</sup>

The Commission considers there are several possible explanations for Victoria Police officers' prolonged failure to seek legal advice on Ms Gobbo's use as a human source. In part this can be attributed to police adherence to the golden rule, and the fear that the more people outside the SDU who knew about Ms Gobbo's use as a human source, the greater the danger to her.<sup>207</sup> Some officers appeared to be concerned that members of the legal profession may gossip and therefore could not be trusted with the information.<sup>208</sup> Ms Gobbo also expressed this concern to them.<sup>209</sup> Certainly, if they judged all members of the legal profession by Ms Gobbo's standards, they would have reason for that concern.

The Commission, however, is satisfied these officers knew they could find trusted, reliable, discreet independent lawyers in whom they could fully confide to provide advice. The Commission finds this reluctance was motivated, at least in part, by an appreciation that legal advice might prevent or limit the information that Victoria Police hoped Ms Gobbo would provide.<sup>210</sup> The Commission agrees with the conclusion in the Kellam Report, that the glittering prize was front of mind for many officers who had responsibility for using Ms Gobbo as a human source, and they were not prepared to jeopardise the free flow of intelligence that could lead to breakthroughs in the gangland wars.

As time passed, and the relationship between Victoria Police and Ms Gobbo became more complex, the Commission considers that the reluctance to obtain legal advice can also be significantly attributed to a concern that exposure of Victoria Police's conduct would have detrimental reputational repercussions and may affect the validity of past convictions and future prosecutions. This is discussed further in Chapter 8.

## Failure to manage and supervise those handling Ms Gobbo

The Commission has made several findings in Chapter 8 regarding failures of senior officers to appropriately manage and supervise both SDU officers and the investigators dealing directly with Ms Gobbo.

As Victoria Police acknowledged, while the daily management of Ms Gobbo was the SDU's responsibility, its former officers are not wholly responsible for what went wrong with her management.<sup>211</sup> Indeed, investigators and senior officers—including from the Purana, Petra and Briars Taskforces and each taskforce's executive group—were aware of Ms Gobbo's use as a human source and used the information she provided to further their investigations, but, disregarding their professional obligations, did not disclose her role or the source of their information to prosecuting authorities, the courts or relevant accused persons.

Counsel Assisting submitted that it was 'self-evident' that supervision and management failures were contributing factors.<sup>212</sup> They submitted that the Kellam Report findings concerning the lack of effective supervision of the SDU were well-founded.<sup>213</sup> Mr Kellam found that any impropriety on behalf of individual police officers was 'substantially mitigated' by the lack of guidance and supervision from their superiors.<sup>214</sup>

Victoria Police acknowledged weaknesses in the supervision and management of the SDU officers handling Ms Gobbo, including that:

- for much of the relevant time, the SDU did not have a full-time Inspector overseeing its operations<sup>215</sup>
- there were insufficient resources within the SDU to manage a source like Ms Gobbo.<sup>216</sup>

Separately, many investigators knew Ms Gobbo was a human source, and were using the information that she provided in their investigations. Officers within the Purana Taskforce gave evidence that because Ms Gobbo had been registered by the SDU and was being managed by the specialist officers within that unit, she was the SDU's responsibility and it was not for them to trespass into that area.<sup>217</sup> The Purana Taskforce was overseen by an executive management team of senior officers, including then Assistant Commissioner, Crime, Mr Overland, and then Commander, Crime, Mr Purton.<sup>218</sup> Purana's investigators knew that their management team was aware of Ms Gobbo's registration and her provision of information relevant to their investigations.<sup>219</sup> The Commission accepts that this may have led investigators to assume Ms Gobbo's use was authorised and being appropriately managed. Ironically, members of this management team also told the Commission that they assumed that any legal or ethical issues were being managed by the investigators or by the SDU.<sup>220</sup>

The Commission addresses the following issues that, in its assessment, contributed to the mismanagement of Ms Gobbo by both SDU officers and investigators:

- structural and resourcing problems
- issues with managing the SDU and investigators dealing with Ms Gobbo
- the deference of the SDU's managers to the 'experts'—that is, the handlers and controllers, rather than actively supervising and challenging their actions.

## Structural and resourcing issues

Victoria Police, according to official policy, had a chain of command in place for supervising officers who handled human sources from at least 2003 onwards. In many respects, that structure is similar to the current organisational structure.

Then, as now, officers appointed as the handler or co-handler of a human source were to be supervised by the following officers, in ascending order of seniority:

- Controller
- OIC
- Local Source Registrar (LSR)
- Central Source Registrar (CSR).

A centralised unit, the HSMU, provided internal oversight.<sup>221</sup> These roles are explained in the summary of human source management terms and processes in Volume I and shown in Figure 9.1.

The use of crime taskforces—such as the Purana, Petra and Briars Taskforces—is common across law enforcement agencies; it allows investigative resources and capability to be targeted at a particular crime type or problem.

As noted above, the Purana Taskforce was overseen by an executive management team at the relevant time consisting of Mr Overland, Mr Purton and then Superintendent John Whitmore.<sup>222</sup> Following Ms Gobbo's registration as a human source, Mr Overland noted in his diary that Ms Gobbo would need to be managed very carefully and that Mr Purton was to be fully involved.<sup>223</sup> This was despite Mr Overland and Mr Purton having no direct line management of the SDU officers who were responsible for managing Ms Gobbo.

In contrast with the significant involvement of officers in the crime taskforces, there was evidence from then Commander Danye Moloney, the senior officer overseeing the SDU, that in July 2005, shortly before Ms Gobbo's third registration, Mr Overland instructed Mr Moloney that he would not be briefed on sensitive elements of Purana Taskforce investigations that the SDU was involved with; and instead those Superintendents formally reporting to Mr Moloney would brief Mr Overland directly.<sup>224</sup>

Mr Moloney said that this instruction stayed in place throughout his tenure as the Commander responsible for the SDU.<sup>225</sup> At the time, he neither questioned nor challenged it because he said he understood the need to know principle. The effect of this instruction, as acknowledged by Mr Moloney, was to prevent him from learning the full extent of Ms Gobbo's involvement as a human source.<sup>226</sup> The Superintendents who reported to Mr Moloney and should have been actively supervising the SDU could brief him only on administrative and resourcing matters, not operational matters.<sup>227</sup> Consequently, even though Mr Moloney was formally responsible for those with direct oversight of the SDU, in practice he was not told what SDU officers were doing and so was unable to effectively supervise the unit.

The Commission accepts the submissions of both Victoria Police and former SDU officers that the SDU was inadequately resourced.<sup>228</sup> The SDU did not have a dedicated Inspector for much of the time Ms Gobbo was registered. This lack of a dedicated Inspector meant that there was insufficient regular senior management to ensure that the SDU complied with policy and procedural requirements and that identified risks were appropriately managed.<sup>229</sup>

The frequent absence of a dedicated Inspector throughout Ms Gobbo's third registration period exacerbated the unit's tendency to develop reactive and ad hoc policies and procedures, which were wholly inadequate to deal with a human source as complex as Ms Gobbo. The SDU officers were left, unsupervised, to work around or adapt existing procedures to deal with each of the many new challenges Ms Gobbo threw at them.

The Commission recognises the impacts of this resourcing issue but considers that its significance should not be overstated. While this factor explains some of SDU's conduct during Ms Gobbo's third registration period, the structural failing outlined above—superior officers in the SDU's chain of command not adequately overseeing its operational practices due to the involvement of Purana management—along with the issues discussed below, played a much greater role in Victoria Police's poor supervision of the SDU.

### **Issues with managing the Source Development Unit and investigators dealing with Ms Gobbo**

The Commission accepts the submissions of several former SDU officers that while, as controller, Officer Sandy White (a pseudonym) made most if not all of the operational decisions about Ms Gobbo on behalf of the SDU, he was conscientiously reporting up the chain of command.<sup>230</sup> There were many instances of insufficient active management of the SDU officers' decisions by those in the hierarchy above Mr White who occupied clearly defined formal oversight roles.

One example of a critical failure in the management and supervision of the SDU has already been discussed; that is, the failure of those approving Ms Gobbo's risk assessment to meaningfully engage with, and potentially challenge, the SDU's views on her registration.

Another example is the poor auditing and monitoring of the SDU's compliance with policies and procedures, including in respect of its use of Ms Gobbo as a human source. As discussed in Chapter 8, there were two audits of the SDU's human source files in 2006 (one by Superintendent Anthony (Tony) Biggin and another by then Superintendent Lucinda Nolan, who acted as the Superintendent in charge of the SDU for four weeks). Mr Biggin's audit failed to sufficiently interrogate or examine Ms Gobbo's human source file, yet made findings that risks were being appropriately managed.<sup>231</sup> Several former SDU officers understandably submitted that Mr Biggin's audit report reinforced the SDU's belief that they were managing Ms Gobbo appropriately.<sup>232</sup> When Ms Nolan conducted her audit of the SDU's human source files, she was not permitted to examine Ms Gobbo's file and was not aware that Ms Gobbo was a human source.<sup>233</sup>

The HSMU was responsible for administering the human source policy and processes and monitoring compliance with those processes. It therefore had a role in ensuring the SDU complied with policies, and advising the CSR

of any issues identified.<sup>234</sup> Despite this formal compliance role, the HSMU's actual oversight of the SDU was limited. One senior officer supervising the HSMU gave evidence that he conducted a procedural audit of the SDU on 16 May 2006 to assess whether policies had been followed, but that this did not involve an audit of the actual content of the ICRs, where the information Ms Gobbo provided to the SDU was summarised.<sup>235</sup>

Mr Purton told the Commission that regular audit and compliance checks are an important and 'best practice' element of human source management because they promote transparency and give managers confidence that officers are managing human sources appropriately and effectively. They are also an anti-corruption tool, as they allow active oversight of what is occurring on the ground.<sup>236</sup> The poor quality and infrequency of the audits of the SDU's files meant that instances of policy non-compliance went unchecked and unremedied, and decisions on legal or ethical issues were not scrutinised by superior officers.

Several former and current officers and Victoria Police submitted that management and supervision issues within the SDU were compounded by the fact that at least one of the Inspectors during this period had no real experience in human source management, and this negatively impacted on their understanding of the risks and their ability to actively manage the unit.<sup>237</sup> The Commission accepts this submission. The lack of human source experience at this level contributed to a culture where SDU supervisors and managers deferred to the SDU handlers and controllers, effectively allowing them to self-manage.

Management issues within the Crime Department were also evident. There were instances of Mr Overland, as Assistant Commissioner, Crime, approaching investigators or handlers directly rather than going through their chain of command.<sup>238</sup> One witness told the Commission that this would have made it 'very hard for a manager to manage when they're out of the loop of what's happening'.<sup>239</sup>

A further example of how these management issues contributed to the mishandling of Ms Gobbo by SDU officers is illustrated in Box 9.2.

#### **BOX 9.2: SUPERINTENDENT OVERSIGHT AND MANAGEMENT OF THE SOURCE DEVELOPMENT UNIT, 2006–07**

In mid-2006, Mr Anthony (Tony) Biggin assumed responsibility as the Superintendent and LSR for the SDU. He had extensive experience in human source management as a Superintendent in the then Intelligence and Covert Services Department and was involved in the projects that led to the establishment of the SDU.<sup>240</sup>

Mr Biggin told the Commission that he was aware of Ms Gobbo's use as a human source before becoming responsible for the SDU and was also cognisant of the ethical and legal risks arising from using a practising defence barrister as a human source.<sup>241</sup> He gave no evidence of taking steps to find out how these risks were being managed. He told the Commission that 'it was left as an assumption' that the SDU would take care of any risks and that he had no functional control over the SDU until his appointment in mid-2006.<sup>242</sup> He also stated he did not enquire into the specifics of the information Ms Gobbo was providing and only became aware of the extent of her informing after he conducted his audit of Ms Gobbo's human source file in April 2006.<sup>243</sup>

Mr Biggin outlined that, in his role as the LSR overseeing the SDU, his monthly review of human source files was conducted through an informal and brief conversation with the controllers. He explained that the SDU Inspector conducted more regular reviews; the HSMU performed a critical oversight role and he 'expected that there would have been regular communications between' the HSMU and SDU about Ms Gobbo.<sup>244</sup>

Notwithstanding that Mr Biggin told the Commission he had no knowledge about if, or how, any ethical or legal risks were being managed, in July 2007, Mr Biggin agreed to Ms Gobbo's continued use as a human source.<sup>245</sup>

A submission on Mr Biggin's behalf stated that:

*He accepted his own failings and responsibilities with respect to Ms Gobbo's management as a human source during the period in which the SDU [was] under his command, and expressed genuine regret for the mistakes that were made. However, at the time of these events, Mr Biggin did not appreciate that anything improper was occurring. This is despite Mr Biggin performing his role diligently and to the best of his abilities.*<sup>246</sup>

Mr Biggin also submitted that, before the SDU came under his responsibility, it was not his role to 'involve himself in, or second guess, decisions made within the specialist units within other Superintendents' command'.<sup>247</sup>

Regardless, Mr Biggin was asked to conduct an audit of Ms Gobbo's file, providing an opportunity, indeed an obligation, to question these decisions. Further, all officers of Victoria Police have a responsibility to uphold the values and integrity of the organisation, including by questioning and reporting improper conduct.

Once responsible for the SDU, Mr Biggin contended, he was 'spread too thin' and his role was onerous, making it impossible for him to closely supervise the work of the SDU. Mr Biggin submitted that he expected any issues to be reported to him by the SDU officers and Inspector, but the lack of dedicated Inspectors for much of this time impacted on the frequency of reporting.<sup>248</sup>

## Deferring to the human source management 'experts'

Unfortunately, the view of many officers in the Crime Department that it was not appropriate for them to trespass upon the SDU's management of Ms Gobbo was also shared by some SDU managers.

One Superintendent told the Commission that if he had 'needed to know' the identity of a particular source, officers would have told him but that he did not recall ever asking. He said he understood his role to be a manager of policy, procedural and financial administration, 'greasing the wheels for the [officers] to do their specialist policing work'.<sup>249</sup> This management style directly contradicted the critical need for effective supervision in the high-risk area of human source management, something previously identified by Victoria Police as best practice. It seemed based upon an incorrect interpretation of both the role of management and the need to know principle, a variant of the golden rule of never disclosing the identity of a human source.

This willingness to defer to the SDU was particularly evident in the differing perspectives of witnesses before the Commission about which parts of the organisation were ultimately responsible for managing the legal and ethical issues concerning Ms Gobbo's use as a human source.<sup>250</sup> There was, however, a clear theme that other officers across the organisation were content to leave the SDU to handle the management of Ms Gobbo, including making decisions about highly complex and fraught ethical and legal issues, on the basis that they were the 'experts'.

The Commission also heard from senior police officers that significant egos tend to exist in specialist areas such as the SDU and that there was a complacency culture in the unit that was difficult to manage.<sup>251</sup> The Commission considers that these difficulties in managing the SDU also likely contributed to the willingness of investigators and senior officers to defer responsibility and decisions to the SDU.

## Failure to understand and value the police's role in the prosecution process

Police are an integral part of the criminal justice system in Victoria. Part of their role is investigating crime,<sup>252</sup> another is prosecuting criminal proceedings.

Some aspects of the police's role in criminal proceedings, and in particular their obligations of disclosure to prosecuting authorities and accused persons, are discussed in Chapter 14.

In order to grapple with the consequences of Victoria Police's failures concerning disclosure, PII and statement taking, it is important to understand that:

- police must take witness statements that are an accurate and full record of a witness' account, and those statements, if relevant, must be disclosed in a criminal prosecution<sup>253</sup>
- police must ordinarily disclose all information obtained in an investigation that is, or may be, relevant to the prosecutor, court and the accused person
- any claims of PII over material that would otherwise have to be disclosed must be brought to the attention of a court to determine.

Legal principles and rules relating to these requirements, discussed further in Chapter 14, are longstanding and are designed to ensure that an accused person receives a fair trial and justice is administered fairly. If they are not obeyed, there is a serious risk that an accused person will not receive a fair trial and/or there may be an interference with the proper administration of justice. That is, these rules give legal force to fundamental rights and ethical and social values. If police persistently flout them, this erodes public confidence in the criminal justice system and jeopardises these values.

The approach taken to statement taking, disclosure and PII in relation to the potentially affected cases suggests that relevant Victoria Police officers may have failed to adequately comprehend and honestly discharge their duties. Chapters 7 and 8 address these issues through particular case studies, including the case studies of Mr Thomas, Mr McGrath and Mr Cooper. This approach is particularly evident in some of the examples of non-disclosure discussed in Chapter 8, where certain Victoria Police officers seem to have made extraordinary efforts to prevent Ms Gobbo's role from becoming known.

### Statement-taking failures

The Commission identified serious problems with Victoria Police's statement taking in relation to several case studies.<sup>254</sup> Common failures included:

- failing to retain drafts of statements so that they were available to be disclosed to the defence if necessary
- failing to keep a record of what changes were made to each draft statement or when and by whom those changes were made
- failing to provide draft statements, where they did exist, to the defence when requested
- failing to disclose Ms Gobbo's role in the statement-taking process to the defence.

Operation Gloucester, a recent investigation by the Independent Broad-based Anti-corruption Commission (IBAC), examined Victoria Police's witness statement-taking practices in relation to police conduct in its investigation into the murder of two Victoria Police officers in 1998 (the Lorimer Investigation). IBAC identified several examples of improper practices concerning statement taking by Victoria Police throughout the late 1990s and early 2000s, as well as in more recent investigations.<sup>255</sup> On 10 November 2020, the Court of Appeal of the Supreme Court of Victoria set aside the conviction of Mr Jason Roberts, one of the people convicted of the murders that were the subject of the Lorimer Investigation, and ordered a re-trial, as it was satisfied there had been a substantial miscarriage of justice, in part because of these improper practices.<sup>256</sup>

Some of the improper practices discussed in IBAC's investigation align with the evidence received by the Commission about statement taking, including:

- officers failing to disclose all relevant material to the prosecution, defence and the courts
- the destruction or discarding of signed statements or unsigned completed draft statements.<sup>257</sup>

Before the Commission, Victoria Police submitted that, at the relevant time, while some guidance was provided to officers about taking statements from witnesses,<sup>258</sup> there was no policy or procedure that directed officers in relation to:

- version control between draft statements<sup>259</sup>
- whether or not to retain each completed draft statement<sup>260</sup>
- keeping a clear record of what changes were made to each draft statement, or when and by whom these changes were made<sup>261</sup>
- the circumstances in which a completed draft statement, and any record of changes in the drafting process, were required to be disclosed.<sup>262</sup>

Similarly, Victoria Police provided no training on these matters.<sup>263</sup>

Overall, the Commission is satisfied that these systemic inadequacies in the policies, processes and training contributed to the individual instances of poor statement taking outlined in Chapter 8. It is clear, however, that another significant contributing factor was individual officers concealing the extent of Ms Gobbo's involvement in the statement-taking process and permitting her to refine the statements of her clients to assist police investigations.

## Disclosure and public interest immunity failures

As set out in Chapter 8, the Commission identified numerous occasions where Victoria Police officers failed to make appropriate disclosure of the use of Ms Gobbo in police investigations to the prosecutors, accused persons and the courts.

Chapter 8 examines disclosure failures in several case studies. The Commission concludes that it should have been clear to Victoria Police officers directly involved in the oversight and use of Ms Gobbo as a human source that her status and conduct needed to be disclosed to the DPP, the accused persons and the court, unless the court, having been provided with all the relevant material, accepted Victoria Police's PII claims. These officers should have identified the risks associated with the disclosure and use of Ms Gobbo as a human source and, at the very least, should have obtained legal advice on their disclosure obligations in these cases.

On any view, the disclosure practices in these cases were improper. This was especially concerning as Victoria Police had previously identified that a failure to manage disclosure as a key danger in the management of human sources.<sup>264</sup>

This danger was clearly articulated in 2004 in Victoria Police's *Review and Develop Best Practice Human Source Management Policy* report:

*The criminal justice system presents significant hurdles to the effective use of human sources by law enforcement. The criminal justice system is based on the concept of justice being transparent and open. This is the antithesis of the requirements of a human source system which is based on the covert collection of evidence and intelligence in a manner which will protect the identity of the human source and limit exposure of police methodology.*

*There is a great temptation by handlers to be economical with the truth by failing to properly disclose the role played by sources in police operations. Managers which condone this course of action or turn a blind eye to its existence fail to develop strategies designed to meet the requirements of a human source system and the court system. This in turn leaves themselves and their organisations open to the risk of compromise of the source system and/or total corruption.<sup>265</sup>*

Despite being aware of this danger, Victoria Police's policies, procedures and training on disclosure and PII were inadequate in a number of respects and enabled the behaviour identified by the High Court in *AB v CD* in 2018.<sup>266</sup>

### **Historical policies, procedures and training on disclosure and public interest immunity**

The Commission heard that from at least 1995 to the late 2000s, Victoria Police officers did not receive adequate training on their disclosure obligations and the making of PII claims.<sup>267</sup> When police did receive training on disclosure and PII it was often on the job, inadequate and did not always reflect the law.<sup>268</sup>

Specifically, it is evident that the policies and training delivered both to officers dealing with human sources and to investigators generally<sup>269</sup> did not cover the complex issues that arose in relation to dealing with Ms Gobbo. Officers were given minimal and in some cases no training on:<sup>270</sup>

- lawyers' professional obligations
- identifying and responding to lawyers' conflicts of interest
- the management of human sources
- the duty of disclosure.

Victoria Police told the Commission that the policies and procedures concerning police obligations of disclosure and PII were inadequate across the relevant period, which it defined relevantly as being from 1995 to 2010.<sup>271</sup> Victoria Police acknowledged that the understanding of the duty of disclosure by officers was generally very limited and the duty was not emphasised by the organisation.<sup>272</sup>

The inadequacies in Victoria Police policies concerning disclosure and PII meant that:

- individual officers were left with the responsibility of making a PII claim, without sufficient guidance on how to do this or the process by which material subject to a PII claim was to be presented to a court for a ruling<sup>273</sup>
- there was no formal procedure for officers to follow when they had documents referring to a human source relevant to accused persons in prosecutions (other than in response to a subpoena)<sup>274</sup>
- there was no formal procedure requiring officers to refer complex PII matters to their superior officer, the HSMU or a legal adviser<sup>275</sup>
- there was no formal procedure as to the method to be adopted for withholding information that disclosed a human source.<sup>276</sup>

In the context of giving evidence in court hearings, the written policies expressly directed officers to forestall cross-examination on the identity of a human source to avoid being asked a direct question in court.<sup>277</sup> Victoria Police has now accepted these policies were clearly inappropriate and potentially had serious consequences for the proper administration of justice.<sup>278</sup>

As noted earlier in this chapter in relation to the human source policy, Victoria Police's policies and training that dealt with disclosure and handling PII claims in relation to human sources were, to a significant degree, shaped by the golden rule that the identity of human sources must be protected by police.<sup>279</sup>

These policies did not accurately reflect the legal obligations of police to disclose all material that is, or is possibly, relevant to accused persons. They also did not accurately explain that the general protection of human sources by PII does not automatically allow police to avoid disclosing the existence or the identity of a human source in all circumstances, or that this is a decision for the court, not police, to make. In the absence of Victoria Police providing appropriate training and clear guidance on these complex issues, it was in some respects unsurprising that many officers simply applied the golden rule strictly.

This was a profound systemic failure on the part of the organisation over many years. Recognising this, however, does not absolve individual officers. Ignorance of the law is not generally a defence in other contexts; and inadequate policies, processes and training do not simply excuse non-compliance with a legal obligation, especially given how well-established and longstanding the legal principles concerning the duty of disclosure are. The reluctance of officers involved in these events to obtain legal advice at the time on these issues was consistent with them not wanting to hear that advice. Some senior officers involved, for example, Assistant Commissioner Thomas (Luke) Cornelius APM and Mr Overland, had law degrees and told the Commission they were aware of police's disclosure responsibilities.<sup>280</sup> Further, after the receipt of barrister Mr Gerard Maguire's advice in late 2011, Victoria Police was told in clear terms about many of the disclosure issues it faced.<sup>281</sup> In fact, as noted below, very early on in Ms Gobbo's third registration some SDU officers expressly identified that her identity as a human source could not be absolutely protected from disclosure. For this reason, the Commission rejects the submission by several former SDU officers that they could not have known that Ms Gobbo's identity as a human source was not properly the subject of a PII claim until the High Court's decision in 2018.<sup>282</sup>

## A systemic failure to disclose

Counsel Assisting submitted that because the failure to make appropriate disclosure occurred on so many occasions and across multiple levels of Victoria Police, it appeared to be a systemic failure.<sup>283</sup>

Victoria Police has accepted that a key organisational failure was that Ms Gobbo's involvement in police investigations was not disclosed to prosecuting authorities in a timely way in respect of a number of accused persons facing criminal charges.<sup>284</sup>

Victoria Police provided several explanations for this failure:

- First, the application of the golden rule that Victoria Police would not reveal information identifying a human source.<sup>285</sup> Victoria Police submitted that officers had front of mind the very serious risks to Ms Gobbo's safety and those close to her and that heavily influenced the decisions of individual officers not to disclose.<sup>286</sup> It submitted that individual officers—without appropriate governance structures adapted to this 'extraordinary' situation—were heavily focused on the desire to prevent death or serious injury, and for that reason did not properly balance this with other considerations.<sup>287</sup> It accepted, however, that the application of the rule did not justify non-disclosure without proper balancing of the competing public interests and proper legal advice.<sup>288</sup>
- Second, the unintended consequences of the sterile corridor principle, which resulted in the officers responsible for disclosure not being aware of certain matters that should have been disclosed to prosecutors, courts and accused persons.<sup>289</sup>

- Third, the operation of the need to know principle, which made having a full understanding of Ms Gobbo's role hard 'if not practically impossible' to achieve.<sup>290</sup>
- Fourth, incomplete and inconsistent knowledge about disclosure obligations by officers because of inadequate training.<sup>291</sup>

As already discussed, the Commission accepts that the golden rule played a part in keeping Ms Gobbo's identity and role as a human source secret from those external to Victoria Police. This rule was reiterated in both formal directions and on-the-job training and therefore influenced how officers understood and discharged their disclosure obligations. The law of PII is also an important and intertwined part of this, as it is possible that some officers may have wrongly believed that Ms Gobbo's identity as a human source was absolutely protected from disclosure because of the principle of PII. The Commission notes, however, that some SDU officers managing Ms Gobbo knew from the outset of her third registration that her identity as a human source could not be protected from disclosure in all cases.<sup>292</sup>

It is important, however, not to place too much weight on the golden rule in explaining the motivations of Victoria Police officers choosing not to disclose Ms Gobbo's role. Although Victoria Police rightly took Ms Gobbo's personal safety very seriously, it is clear that throughout Ms Gobbo's third registration period, police were prepared to take great risks regarding her safety in order to continue to receive valuable information. Some of these risks may have compromised her identity as a human source.

Against this background, the Commission does not accept that the application of the golden rule is a satisfactory explanation for Victoria Police's numerous disclosure failures.

As Chapter 8 demonstrates, the Commission finds the second and third explanations, outlined above, even less persuasive. By June 2006, when Mr Thomas entered his guilty plea, just nine months into Ms Gobbo's third registration period, many people within the organisation were aware that she was being used as a human source. By 2009, over 100 Victoria Police officers and personnel knew Ms Gobbo was a human source.<sup>293</sup> These facts alone makes it difficult to accept that the failure to make proper disclosure was a result of the sterile corridor or need to know principle. The lengthy period of Ms Gobbo's third registration also makes these explanations difficult to accept. While early on, these principles likely made it harder for any one officer to get a 'full picture' of Ms Gobbo's role, by the time she was deregistered in 2009, a large number of officers, including at very senior levels, were aware, or should have been aware, that information she had provided to Victoria Police had led to charges being laid and prosecutions commenced against many accused persons.

Further, the SDU prepared the Strengths Weaknesses Opportunities Threats (SWOT) analysis in December 2008, a document that clearly laid out many of the risks of using Ms Gobbo as a witness because of the nature of her involvement with Victoria Police.<sup>294</sup> Consistent with the Commission's discussion in Chapter 8, the Petra Taskforce Board of Management discussed this SWOT analysis, at least in general terms, in January 2009, and by early 2009 several officers had knowledge of Ms Gobbo's informing and the potential risks it posed to prosecutions.

The Commission finds the fourth explanation more compelling. It is supported by the evidence of many officers to the Commission that they were ignorant of these legal obligations and did not receive formal training, instead learning largely 'on the job'.<sup>295</sup> As acknowledged by Victoria Police, the organisation did not properly train its officers about the nature of their disclosure obligations, nor did it provide them with appropriate policies and guidance on disclosure and making PII claims.

Overall, the Commission accepts Counsel Assisting and Victoria Police's submissions that the failure to make appropriate disclosure to prosecutors, courts and accused persons was primarily a systemic failure. Victoria Police should have, but did not, put in place policies and processes and provided training on the duty of disclosure and the need for police officers to comply with this legal duty. The Commission considers that, from at least 2004, this systemic failure contributed to the use of Ms Gobbo as a human source. At the time of her formal registration in 2005, if SDU officers had appreciated that Ms Gobbo's role may have to be disclosed through court processes, it is highly probable that she would not have been registered. Certainly, had Ms Gobbo or Victoria Police disclosed her duplicitous role to her clients, it is likely that they at least some of them would not have engaged her as their lawyer.<sup>296</sup> And had Ms Gobbo and Victoria Police disclosed her use as a human source to the prosecutors or a court, that would have immediately resulted in the cessation of her use.

### **Continuing obligation of disclosure: Victoria Police's progress over the course of the Commission**

By the time the High Court handed down its decision in the *AB v CD* proceedings in November 2018, it should have been readily apparent to Victoria Police that it would be necessary to make proper disclosure to potentially a large number of people.

By then, Victoria Police had received the Comrie Review in 2012, the Kellam Report in 2015, the Champion Report in 2016, and the Supreme Court of Victoria and Court of Appeal decisions in 2017. It was therefore on notice that it would very likely have to make disclosure to potentially affected people. Victoria Police submitted that preparation for making disclosure was underway before the High Court's judgement.<sup>297</sup> Of course, the police's continuing duty to disclose relevant, or possibly relevant, material to an accused or convicted person existed entirely independently of the work of the Commission; it is a legal duty imposed by legislation and common law principles.

In May 2019, the Court of Appeal directed Victoria Police to prioritise disclosure to those who had already commenced conviction appeal proceedings.<sup>298</sup> At that time that was five persons. During the Commission's inquiry, the number of related criminal proceedings underway has never exceeded 10.<sup>299</sup>

### **Continuing disclosure over the course of the Commission's inquiry**

The Commission had ongoing discussions with Victoria Police over the course of 2019 about its progress in fulfilling its continuing disclosure obligation to potentially affected persons. The Commission suggested to Victoria Police that in addition to prioritising those who had commenced appeal proceedings, it should also prioritise making disclosure to people in custody.<sup>300</sup> On 6 November 2019, Victoria Police formally advised the Commission that it would do this.<sup>301</sup>

By 6 December 2019, Victoria Police informed the Commission that 30 people had received disclosure from Victoria Police.<sup>302</sup> The Commission was concerned that at least 70 potentially affected persons were in custody and of those, only 17 had received disclosure.<sup>303</sup> The Commission wrote to the Chief Commissioner requesting that Victoria Police provide a weekly update of its progress in making disclosure to potentially affected persons.<sup>304</sup> As a result, weekly progress reports were provided to the Commission since January 2020. These reports have demonstrated gradual progress with respect to disclosure.

Counsel Assisting submitted that both the method employed by Victoria Police to meet its continuing disclosure obligations and delay in making disclosure were concerning.<sup>305</sup> Victoria Police rejected that submission.<sup>306</sup> It submitted that since early 2019, it had increased resourcing levels dedicated to disclosure tasks<sup>307</sup> and deployed substantial resources to the process of disclosure to the Office of Public Prosecutions and the Commonwealth Director of Public Prosecutions (CDPP), which were in turn disclosing information to people, where appropriate.<sup>308</sup>

Victoria Police submitted that its disclosure ‘has been, and continues to be, an immensely complex and challenging task’.<sup>309</sup> The task of searching its Loricated database (where the material regarding Ms Gobbo’s third registration period is kept), searching for historical documents outside that database and assessing the real risks to people’s safety arising from the disclosable material is ‘difficult, large and resource intensive’.<sup>310</sup> Victoria Police said that it had disclosed substantial material to the nine Court of Appeal appellants and Mr Faruk Orman, whose appeal was finalised in July 2019.<sup>311</sup> On 24 August 2020, Victoria Police submitted that in addition to the disclosure in the Court of Appeal proceedings, partial disclosure had also been made during the course of the Commission’s hearings to 20 of the 154 potentially affected persons identified by Victoria Police.<sup>312</sup> As at 30 October 2020, Victoria Police advised that it had provided partial disclosure to 20 of the 164 potentially affected persons (this figure included the Court of Appeal parties).<sup>313</sup> It appears there has been no change between 24 August 2020 and 30 October 2020.

The Commission accepts that Victoria Police has faced substantial administrative challenges to provide disclosure to all potentially affected persons identified by Counsel Assisting. Its historical record-keeping practices have made it difficult to locate and assess potentially disclosable material. It also acknowledges that Victoria Police was directed by the Court of Appeal in May 2019 to prioritise disclosure to persons whose appeals were underway.

While recognising these challenges, the Commission accepts the submissions of Counsel Assisting that the delay in Victoria Police acquitting its continuing obligations of disclosure to potentially affected persons is a matter of concern.<sup>314</sup> Given the lengthy period since Victoria Police first became aware that it may have to make disclosure to these persons, its progress is unsatisfactory. At 30 October 2020, the task is still incomplete, but Victoria Police told the Commission it was committed to providing all disclosable material contained on its Loricated database to potentially affected persons by 30 November 2020.<sup>315</sup> Ultimately, the Commission considers that Victoria Police has not sufficiently prioritised its continuing obligation to make disclosure to potentially affected persons. It is very important that Victoria Police continues to fulfil these obligations in a timely manner.

The Court of Appeal has continued to reiterate the fundamental importance of the duty of disclosure in two decisions regarding related criminal proceedings involving Mr Orman and Mr Zlate Cvetanovski.

In relation to Mr Cvetanovski’s proceedings, on 30 October 2020, the Court of Appeal overturned some of Mr Cvetanovski’s convictions relating to drug offences. Chapters 7 and 8 discuss Victoria Police and Ms Gobbo’s conduct in relation to Mr Cvetanovski’s trial. The Court found that there had been a substantial miscarriage of justice in Mr Cvetanovski’s case because of a failure to disclose information about payments made by Victoria Police to a key prosecution witness in his trial, Mr Cooper, and that Ms Gobbo was acting for him while she was a human source.<sup>316</sup> The DPP accepted that, in Mr Cvetanovski’s case, this non-disclosure meant that:

- Mr Cvetanovski could not properly interrogate Mr Cooper, police officers or Ms Gobbo about the nature, circumstances and extent of the payments
- the jury was not able to assess the ways that Ms Gobbo’s involvement in Victoria Police’s payments to Mr Cooper affected his credibility or the truth of the evidence more generally
- Mr Cvetanovski was unable to undertake further investigations and conduct further cross-examination, as Ms Gobbo’s involvement in his case was not disclosed.<sup>317</sup>

The Commission heard evidence about payments made by Victoria Police to Mr Cooper while he was in prison.<sup>318</sup> The Commission issued a notice to produce to Victoria Police requesting the production of documents regarding payments made to Mr Cooper. Though some information was produced in April and May 2020,<sup>319</sup> Victoria Police did not inform the Commission that:

- it first received documents regarding payments to Mr Cooper from Corrections Victoria on 26 February 2020
- it had not disclosed the information to Mr Cvetanovski or other potentially affected cases in which Mr Cooper had given evidence.

After the delivery of the Court of Appeal's decision, the Commission wrote to the DPP to indicate that a similar failure to make disclosure about the payments made to Mr Cooper may have occurred in 25 other prosecutions in which his evidence was relied upon.<sup>320</sup>

While conceding there may be reasons for Victoria Police's late disclosure of this information to the Commission, it would be concerning if this evidenced ongoing poor disclosure practices.

## Failure to accept responsibility

The Commission heard a number of explanations from Victoria Police and many of its current and former officers for the failures that flowed from the non-disclosure about and the recruitment, use and management of Ms Gobbo as a human source. In many cases, these explanations sought to deflect responsibility to others.

### 2005 to 2009: The many explanations for why someone else was responsible

As discussed above, many different explanations were provided by officers regarding the use of Ms Gobbo as a human source during her third registration.

Their explanations to the Commission are set out in Boxes 9.3 to 9.6.

#### BOX 9.3: SUMMARY OF EXPLANATIONS OF FORMER OFFICERS OF THE SOURCE DEVELOPMENT UNIT

Police officers of SDU said that:

- Ms Gobbo was responsible for managing her own ethical and legal obligations.<sup>321</sup>
- SDU officers were under-resourced and under-supervised and this impacted on their ability to perform their role throughout Ms Gobbo's registration as a human source.<sup>322</sup>
- SDU officers appropriately reported up to superior officers within and outside of their direct line of command on the unit's use of Ms Gobbo as a human source.<sup>323</sup>
- SDU officers were acting under the direction of senior officers.<sup>324</sup>
- The investigators within the Crime Department and the HSMU were primarily responsible for managing police disclosure obligations, not the SDU.<sup>325</sup>

**BOX 9.4: SUMMARY OF EXPLANATIONS OF OFFICERS WITH OVERSIGHT OF THE SOURCE DEVELOPMENT UNIT**

- Superintendent Mark Porter, a former LSR and CSR and supervisor of the HSMU said that the HSMU primarily fulfilled an administrative role, including in relation to auditing SDU files, and was not responsible for supervision or oversight of the SDU.<sup>326</sup>
- Mr Porter said that when he was performing the roles of LSR and CSR he was not aware of the detail of the SDU's involvement in Purana Taskforce operations because it was not information he needed to know.<sup>327</sup> He said there would have been no reason for him to question the appropriateness of Ms Gobbo's registration as a human source as the SDU would have given proper consideration to all relevant matters.<sup>328</sup>
- Mr Anthony (Tony) Biggin said the SDU were the experts in human source management, and it was a matter for them to assess and manage the risks.<sup>329</sup> He said that his management of the SDU was complicated by the fact that it was not adequately funded when initially established; therefore, a significant amount of his time was spent on seeking funding for the SDU rather than focusing on its operations.<sup>330</sup>
- Mr Biggin also said that the officers with formal oversight of the SDU were not actively involved in the management of Ms Gobbo, as the then Assistant Commissioner, Crime, Mr Simon Overland was leading the taskforces using Ms Gobbo as a human source and the information she provided.<sup>331</sup>

**BOX 9.5: SUMMARY OF EXPLANATIONS OF OFFICERS WITHIN THE PURANA TASKFORCE, PETRA TASKFORCE AND BRIARS TASKFORCE**

Police officers within the Purana, Petra and Briars Taskforces said that:

- They took comfort that senior officers had approved and sanctioned Ms Gobbo's use as a human source.<sup>332</sup>
- They were too busy with other duties in the context of the gangland wars and were not able to look at the full picture.<sup>333</sup>
- They relied on the SDU to assess and manage the risks as they were experts in human source management.<sup>334</sup>
- They could not stop people from communicating with Ms Gobbo or requesting her as their lawyer, relying on section 464C of the *Crimes Act 1958* (Vic).

**BOX 9.6: SUMMARY OF EXPLANATIONS OF OFFICERS IN SENIOR LEADERSHIP POSITIONS**

- Mr Simon Overland said he was not responsible for the decision to register Ms Gobbo but did accept some responsibility for her use in the context of the taskforce investigations, and said he had directed his investigators not to allow her to inform on her own clients.<sup>335</sup> Mr Overland did not consider it necessary, however, to monitor whether or not this direction was complied with by his investigators because, as they were very senior and experienced, he thought they knew what they were doing.<sup>336</sup> He said that he did not pay attention to whom Ms Gobbo was representing.<sup>337</sup>

- Mr Thomas (Luke) Cornelius, then Assistant Commissioner of the Ethical Standards Department, said it was not necessary for him to know either the identity of Ms Gobbo or the details of her use as a human source, as he assumed the SDU would have recognised the very serious ethical concerns.<sup>338</sup>
- Mr Danye Moloney, then Commander responsible for the SDU and other covert services, said he had limited capacity to oversee the SDU and its officers because of his other responsibilities, particularly his management responsibility for the Ceja Taskforce until December 2006.<sup>339</sup> In addition, he said he was prevented from learning the extent of Ms Gobbo's role as a human source because of the effect of Mr Overland's instruction that he would not be briefed on the sensitive parts of the SDU's operational matters.<sup>340</sup> After he became aware of Ms Gobbo's registration he trusted that the officers reporting to him would 'do [their] jobs' and bring appropriate matters to his attention.<sup>341</sup>

Counsel Assisting submitted that it was open on the evidence to find that many current and former officers thought that responsibility for the authorisation and use of Ms Gobbo as a human source, and the appropriateness of that, lay with someone else, often Ms Gobbo.<sup>342</sup> Counsel Assisting argued that while most current and former Victoria Police officers who appeared before the Commission were aware of the risks of using Ms Gobbo as a human source, they were reluctant to concede that the responsibility lay with them.<sup>343</sup>

In response, Victoria Police submitted that Counsel Assisting had correctly identified that a number of officers gave evidence that they considered that issues relating to the authorisation and handling of Ms Gobbo, as well as associated disclosure issues, were for others to manage and not for them.<sup>344</sup> It said that the officers involved were unclear about their roles and responsibilities, and this lack of clarity was an important part of the explanation of how this was able to occur.<sup>345</sup> Victoria Police also highlighted the operation of the sterile corridor and need to know principles, and governance failures, as contributing to this confusion about where responsibility lay.<sup>346</sup> Victoria Police specifically rejected Counsel Assisting's criticism that officers had failed to take responsibility for Ms Gobbo's use and non-disclosure.<sup>347</sup>

As discussed earlier in this chapter, many current and former Victoria Police officers submitted that Ms Gobbo bears a significant amount of responsibility for the events that occurred. While the Commission in no way minimises Ms Gobbo's role, it considers that these officers failed to adequately accept individual responsibility for conduct that, collectively, was apt to corrupt the criminal justice system. Further, while Victoria Police has now publicly acknowledged that in its view, the key failures were organisational and that it therefore bears the primary responsibility for these events, its submissions about the extent of Ms Gobbo's responsibility appear to undermine this acknowledgment.<sup>348</sup>

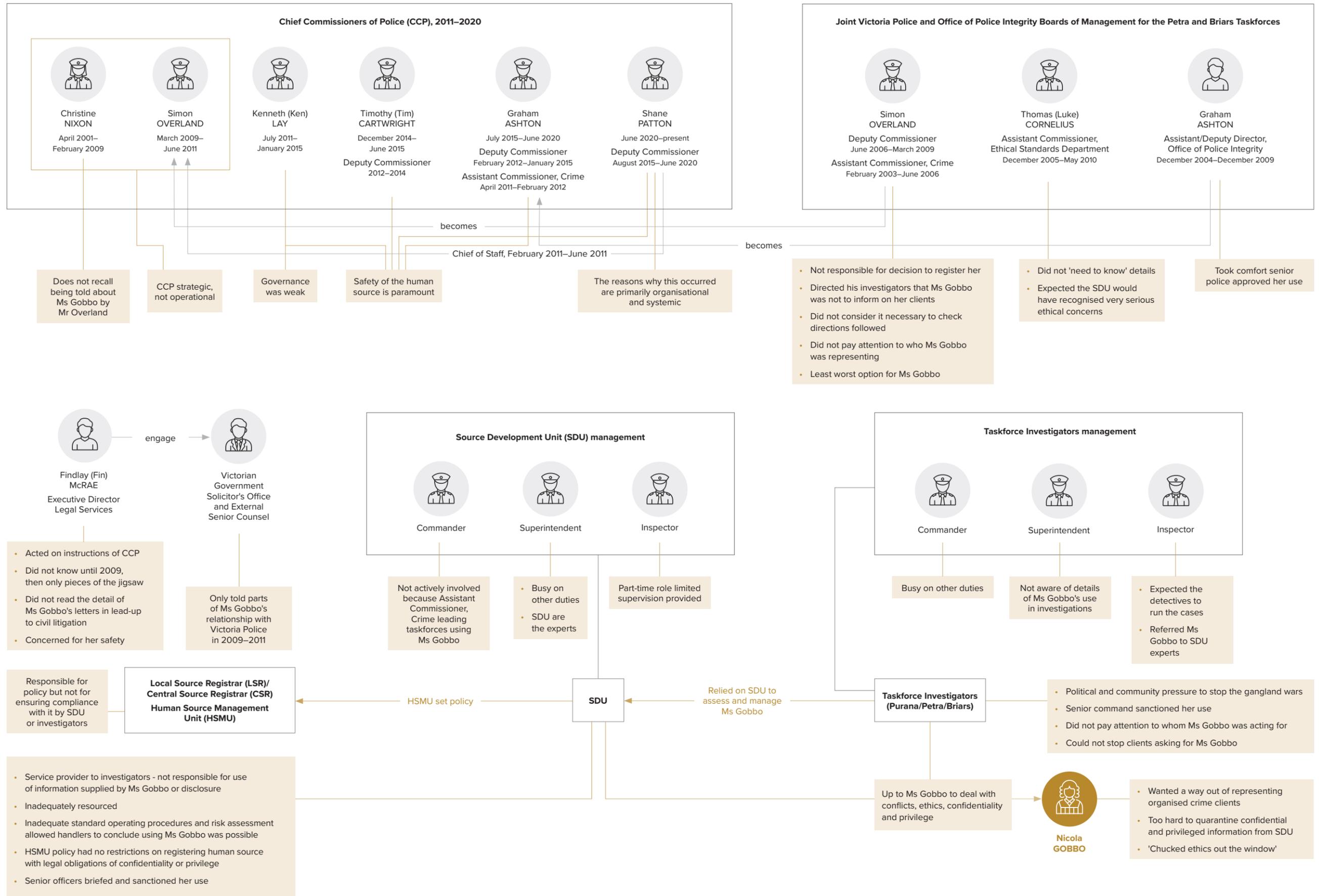
Ultimately, the Commission accepts Counsel Assisting's contention that the evidence demonstrates an unhealthy reluctance by many former and current Victoria Police officers to accept individual responsibility for their contribution to the collective and institutional failings arising from Victoria Police's use and management of Ms Gobbo as a human source between 2005 and 2009.

The systemic nature of this failing and many explanations given by different people involved in these events is illustrated in Figure 9.2.

### **Figure 9.2: Summary of explanations of conduct by Victoria Police officers and Ms Gobbo**

← Figure on foldout

Figure 9.2: Summary of explanations of conduct by Victoria Police officers and Ms Gobbo



Organisational policy and practice: never disclose a human source; rare to seek legal advice; inadequate training in lawyers' professional duties, legal professional privilege, disclosure obligations and making public interest immunity claims

## 2009 to 2016: Delaying accountability and resisting external scrutiny

As is clear from the Commission's assessment of the evidence outlined in Chapter 8, in 2009, after the SWOT analysis prepared by the SDU was circulated, several senior officers within Victoria Police were, or should have been, aware of the potentially extremely serious implications of Ms Gobbo's use and management as a human source, including for past convictions and ongoing prosecutions.<sup>349</sup> Given the risks to public confidence in Victoria Police and the administration of justice, and the impact on the fundamental rights of a large number of convicted and accused persons, Victoria Police should have acted urgently and decisively to provide disclosure to potentially affected persons, which, as at 30 October 2020, is still incomplete.

The Commission considers that Victoria Police acted too slowly to address these potential impacts. Consistent with the analysis in Chapter 8, the organisation did not proactively report or disclose these matters to the appropriate agencies.

Victoria Police rejected the contention that it failed to appropriately report or disclose the issues flowing from Ms Gobbo's use as a human source.<sup>350</sup> It submitted that:

- in August 2010 (before the Comrie Review), Victoria Police had briefed the OPI, with the VGSO, during the course of civil litigation about Ms Gobbo's role as a human source. Victoria Police said that what the OPI did or did not do with that information has not been explored by the Commission<sup>351</sup>
- the issues regarding the handling of Ms Gobbo came to light because of the Comrie Review, a process commissioned by senior Victoria Police officers in November 2011<sup>352</sup>
- the 'out of scope' matters identified by Mr Comrie were given to the OPI by a senior police officer (Superintendent Stephen Gleeson) with the support of the Victoria Police Legal Services Department in 2012
- the 'out of scope' matters were provided to the CDPP, IBAC and the Legal Services Commissioner.

The matters that fell outside the scope of the Comrie Review included descriptions of some of the information and assistance Ms Gobbo provided to her SDU handlers about clients she was legally representing, including that:

- Ms Gobbo advised her handlers about who would provide evidence at her client's forthcoming bail application and what that evidence would be
- Ms Gobbo advised her handlers about technical defences that were open to her client
- Ms Gobbo reviewed and identified deficiencies in the criminal brief against her client and handlers relayed that information to officers responsible for preparing the brief.<sup>353</sup>

Victoria Police also submitted it took steps to inform the DPP of the 'out of scope' matters in 2012.<sup>354</sup>

According to Victoria Police, it provided these external agencies and prosecuting authorities with enough information about Ms Gobbo's role as a human source for those bodies to be alive to the potential issues, including that prosecutions may potentially be affected. Victoria Police submitted that, while it was 'legitimate to examine how long the whole process took' there could be 'no doubt that [Victoria Police] was the prime catalyst' for these matters becoming known by these agencies and authorities.<sup>355</sup>

Under the *Inquiries Act 2014* (Vic) the Commission does not have jurisdiction to inquire into or exercise any powers in relation to the OPI, IBAC or the DPP.<sup>356</sup> Accordingly, the Commission does not consider it appropriate to engage in commentary about those bodies' involvement in the events referred to above by Victoria Police. As is evident from the discussion in Chapter 8 and Figure 9.2, senior OPI personnel were involved in some of the events the subject of the Commission's inquiry, particularly in Mr Ashton's capacity as a member of the joint Briars and Petra Taskforces. It is possible this involvement may have given rise to a perception that the OPI sanctioned Victoria Police's use and management of Ms Gobbo.

Nonetheless, and consistent with the discussion and relevant findings in Chapter 8, the Commission does not accept that Victoria Police acted with appropriate speed to:

- inform itself of the scope of the problems arising from Ms Gobbo's use, by reviewing all information she provided to police and determining whether and how that information was used in investigations and prosecutions
- alert external oversight bodies or prosecuting authorities about the extent of the potential problem.

Overall, the Commission is satisfied that the approach Victoria Police took demonstrated a reluctance to accept responsibility for what had occurred and to be fully transparent about the size and scope of the problem.

As discussed in Chapter 8, in 2016, after the DPP had concluded that it was necessary to disclose Ms Gobbo's conduct to several individuals because her use as a human source may have tainted their convictions,<sup>357</sup> Victoria Police and Ms Gobbo commenced legal proceedings to prevent that from happening.<sup>358</sup> These proceedings prevented these events from coming to light for a further two years.

Victoria Police was the only organisation in possession of all the relevant material about its use and management of Ms Gobbo as a human source. As such, the only way these events could have ever fully come to light is if Victoria Police disclosed them of its own volition or was compelled to do so by a court or external inquiry. The Commission is deeply concerned with the length of time it has taken for the full scope of Ms Gobbo's involvement with Victoria Police to emerge.

## CONCLUSIONS AND RECOMMENDATIONS

While one focus of this Commission has been the conduct of individual officers, it is equally important to consider systemic issues and look broadly at instances of multiple failings across Victoria Police that may reflect problematic cultural attitudes. This chapter has addressed systemic issues that the Commission considers significantly contributed to Victoria Police's failures in its disclosures about and recruitment, handling and management of Ms Gobbo as a human source. Given those systemic failures, it is important for the public, Victorian Government and the courts to be assured that Victoria Police has already addressed, or is in the process of addressing these issues, so that past mistakes are not repeated.

Victoria Police has already taken steps to improve several aspects of its human source management framework, partly in response to the events that are the subject of terms of reference 1 and 2. These include improving policies and processes around the use of human sources subject to confidentiality and privilege, and implementing new governance arrangements. The Commission considers, however, that Victoria Police must do more to reform its current management of human sources, and proposes specific reforms tailored to address current systemic concerns in Chapters 12 and 13.

Victoria Police has also taken steps to improve its policies, practices and training about disclosure and PII. The Commission recommends reforms to strengthen and clarify these critical obligations in Chapter 14. IBAC's Operation Gloucester report has also recently made a series of recommendations to improve Victoria Police's statement-taking practices, processes and training, having considered similar systemic issues to those of concern to this Commission.<sup>359</sup>

Victoria Police has reiterated its commitment to fulfilling its current and future disclosure obligations and to work proactively with key stakeholders, including prosecutors and the courts.<sup>360</sup>

The Commission is encouraged by the organisation's public commitment to this critical work as it suggests a positive shift in Victoria Police's attitude towards the importance of disclosure and, more generally, the proper police role in the prosecution process. The Commission notes, however, that at the time of writing, Victoria Police had not yet

made full disclosure to all persons potentially affected by the conduct of Ms Gobbo as a human source. This is further discussed below.

Victoria Police's public apology and acknowledgement of responsibility for the organisational failings that contributed to the events at the heart of this Commission's inquiry, although belated, suggest it is now taking significant and positive steps towards addressing its past failures.

## The need for timely disclosure

As outlined above, Victoria Police, as part of the prosecution, has an ongoing responsibility to disclose information about its use of Ms Gobbo as a human source to people whose cases may have been affected. At the time of drafting this final report, Victoria Police had not discharged its disclosure obligations in relation to all potentially affected persons.

Since January 2020, Victoria Police has provided a weekly report to the Commission on the progress of its disclosure to potentially affected persons. The Commission considers it important that Victoria Police continues to regularly report on, and is held to account for, its timely disclosure to those people.

In Chapter 17, the Commission recommends that the Victorian Government establishes:

- an Implementation Taskforce—to coordinate all implementation tasks associated with the Commission's recommendations
- an Implementation Monitor—to assess and report on the progress and adequacy of implementation of the Commission's recommendations.

The Commission recommends that Victoria Police provides monthly progress reports to the proposed Implementation Taskforce, until they have met their disclosure obligations to all potentially affected persons. These reports should also be provided to the proposed Implementation Monitor to assist its monitoring and reporting on the implementation activities of the Taskforce and in turn the Attorney-General's reports to Parliament.

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### RECOMMENDATION 5

That Victoria Police provides monthly progress reports to the Implementation Taskforce proposed in Recommendation 107, regarding its progress in fulfilling its ongoing disclosure obligations to potentially affected persons identified by the Commission. These reports should also be made available to the Implementation Monitor proposed in Recommendation 108.

# Endnotes

- 1 As discussed in Chapter 8 and consistent with the submissions of Counsel Assisting: see Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 1, 104 [451].
- 2 Responsive submission, Victoria Police, 24 August 2020, 10 [2.10].
- 3 Responsive submission, Victoria Police, 24 August 2020, 13 [2.32], [2.35] (emphasis in original).
- 4 Responsive submission, Victoria Police (specified former and current officers), 8 September 2020, 1–2 [1.5]–[1.6].
- 5 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 3 [1.8]; Responsive submission, Victoria Police, 24 August 2020, 39 [19.2]; Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 95 [407].
- 6 Victoria Police submitted that it took the appropriate steps to have these events internally and externally reviewed: see Responsive submission, Victoria Police, 24 August 2020, 18–19 [5.1]–[5.8]. These submissions and the Commission's views are addressed later in this chapter.
- 7 See 'Only 42% of Victorians rate the Victorian Police highly for their ethics and honesty', *Roy Morgan* (Survey, 17 September 2020) <[www.roymorgan.com/findings/8519-stage-4-restrictions-in-victoria-week-4-september-17-2020-202009161201](http://www.roymorgan.com/findings/8519-stage-4-restrictions-in-victoria-week-4-september-17-2020-202009161201)>; Victoria Police, *Victoria Police Annual Report 2019–20* (Report, October 2020) 17. The Annual Report indicated 81.3 per cent of the community have confidence in the Victoria Police, 6.6 per cent below the 2019/20 target of 87 per cent. This measure is considered an integrity indicator and the result is a negative outcome.
- 8 This evidence is addressed in detail later in this chapter in the section titled 'Failure to accept responsibility'.
- 9 Responsive submission, Victoria Police, 24 August 2020, 11 [2.14].
- 10 Responsive submission, Victoria Police, 24 August 2020, 10 [2.10].
- 11 Responsive submission, Victoria Police, 24 August 2020, 11 [2.16].
- 12 Responsive submission, Victoria Police, 24 August 2020, 10 [2.8].
- 13 Responsive submission, Victoria Police, 24 August 2020, 10 [2.9].
- 14 Responsive submission, Victoria Police, 6 October 2020, 4 [4.3].
- 15 Responsive submission, Victoria Police, 6 October 2020, 4 [4.3]–[4.4].
- 16 Responsive submission, Victoria Police, 6 October 2020, 4 [4.4].
- 17 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 18 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1108 [4799].
- 19 Responsive submission, Mr Graham Ashton, 7 August 2020, 43–5 [211]–[217].
- 20 Responsive submission, Mr Graham Ashton, 7 August 2020, 45 [217].
- 21 Responsive submission, Mr Graham Ashton, 7 August 2020, 43–4 [211]–[213].
- 22 Exhibit RC1942 Transcript of Chief Commissioner Graham Ashton's 3AW interview, 28 March 2019, 2–3.
- 23 Exhibit RC1945 Transcript of Chief Commissioner Graham Ashton's 3AW interview, 27 June 2019, 18.
- 24 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1103 [4786].
- 25 Independent Broad-based Anti-corruption Commission, *Unauthorised Access and Disclosure of Information Held by Victoria Police—An Analysis of Corruption Risks and Prevention Opportunities* (Report, September 2019) 28; Independent Broad-based Anti-corruption Commission, *Annual Report 2018/19* (Report, 29 October 2019); Peter Collins, *Report into Falsification of PBT Numbers* (Report, 31 August 2018) 6.
- 26 *Victoria Police Act 2013* (Vic) s 8.
- 27 *Victoria Police Act 2013* (Vic) s 13.
- 28 *Victoria Police Act 2013* (Vic) ss 16(1), (2)(c).
- 29 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1085 [4718]; Responsive submission, Victoria Police, 24 August 2020, 64 [33.4].
- 30 Responsive submission, Victoria Police, 24 August 2020, 64 [34.1].

- 31 Responsive submission, Victoria Police, 24 August 2020, 64 [34.3]; Office of Police Integrity, *Report on the Leak of a Sensitive Victorian Police Information Report* (Report, February 2005) 7 [24].
- 32 In 2004, Victoria Police established a specialised unit to manage high-risk human sources, known then as the Dedicated Source Unit. In 2006, that unit changed its name to the Source Development Unit (SDU). In this chapter, the Commission refers to both units as the SDU.
- 33 Responsive submission, Victoria Police, 24 August 2020, 64–65 [34.6]–[34.9].
- 34 Transcript of Mr Anthony (Tony) Biggin, 10 October 2019, 7640.
- 35 Transcript of Mr Anthony (Tony) Biggin, 10 October 2019, 7640–1.
- 36 Transcript of Mr Anthony (Tony) Biggin, 10 October 2019, 7637.
- 37 Transcript of Mr Terry Purton, 14 May 2019, 1714, 1729–30; Transcript of Commander Stuart Bateson, 2 July 2019, 3350–2; Transcript of Mr Gavan Ryan, 9 August 2019, 4244–5; Transcript of Mr Simon Overland, 16 December 2019, 11343–5.
- 38 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 11 [59].
- 39 *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 1, 38. This Royal Commission is commonly known as the ‘Wood Royal Commission’.
- 40 Victoria Police, *Taskforce Deliver 2018: Investigation into the Falsification of Preliminary Breath Tests within Victoria Police* (Report, 9 November 2018). See also Office of Police Integrity, *Past Patterns—Future Directions: Victoria Police and the Problem of Corruption and Serious Misconduct* (Report, 2007).
- 41 See Office of Police Integrity, *The Victorian Armed Offenders Squad—A Case Study* (Report, 2008); Victorian Ombudsman, *Ceja Task Force Drug Related Corruption: Second Interim Report of Ombudsman Victoria* (Report No 2, June 2004).
- 42 See Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 1* (Report, December 2015). The Commission also produced two further reports in September 2017 (Phase 2) and August 2019 (Phase 3).
- 43 See Independent Broad-based Anti-corruption Commission, *Operation Ross Special Report* (Report, November 2016).
- 44 See Victoria Police, *Taskforce Deliver 2018: Investigation into the Falsification of Preliminary Breath Tests within Victoria Police* (Report, 9 November 2018); Office of Police Integrity, *Leak of a Sensitive Victorian Police Information Report* (Report, February 2005); Office of Police Integrity, *Investigation into the Publication of One Down, One Missing* (Report, September 2005).
- 45 See Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020).
- 46 See, eg, Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 3* (Report, August 2019) 4.
- 47 Victorian Ombudsman, *Ceja Task Force—Drug Related Corruption—Second Interim Report of Ombudsman Victoria* (Report No 2, June 2004) 10.
- 48 Office of Police Integrity, *The Victorian Armed Offenders Squad—A Case Study* (Report, 2008) 13; Office of Police Integrity, *Past Patterns—Future Directions: Victoria Police and the Problem of Corruption and Serious Misconduct* (Report, October 2007) 136; Victorian Ombudsman, *Ceja Task Force Drug Related Corruption: Second Interim Report of Ombudsman Victoria* (Report No 2, June 2004) 14; Victorian Ombudsman, *Operation Bart—Investigation of Allegations against Police in Relation to the Shutter Allocation System* (Final Report, May 1998) 55; Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 3* (Report, August 2019) 8.
- 49 Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 1* (Report, December 2015) 14, 56, 142; Independent Broad-based Anti-corruption Commission, *Operation Ross* (Special Report, November 2016) 57; Peter Collins, *Report into Falsification of PBT Numbers* (Report, 31 August 2018) 6–7; Victorian Ombudsman, *Investigation into an Allegation about Victoria Police Crime Statistics* (Report, June 2011) 4.
- 50 David Barton and Sue Tait, *Office of Police Integrity, Human Rights and Cultural Change in Policing* (Paper, December 2008) 8–10; Independent Broad-based Anti-corruption Commission, *Operation Ross* (Special Report, November 2016) 8, 18, 23.
- 51 Office of Police Integrity, *The Victorian Armed Offenders Squad—A Case Study* (Report, 2008) 17; State Services Authority, *Inquiry into the Command, Management and Functions of the Senior Structure of Victoria Police* (Report, 2012) 15; Independent Broad-based Anti-corruption Commission, *Operation Ross* (Special Report, November 2016) 6.
- 52 Peter Collins, *Report into Falsification of PBT Numbers* (Report, 31 August 2018) 6; State Services Authority, *Inquiry into the Command, Management and Functions of the Senior Structure of Victoria Police* (Report, 2012) 33; Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 3* (Report, August 2019) 7–8.
- 53 Independent Broad-based Anti-corruption Commission, *Predatory Behaviour by Victoria Police Officers against Vulnerable Persons* (Report, 2 December 2015) 2; Victorian Ombudsman, *Operation Bart—Investigation of Allegations against Police in relation to the Shutter Allocation System* (Final Report, May 1998) 58 [9.3]–[9.4].
- 54 Peter Collins, *Report into Falsification of PBT Numbers* (Report, 31 August 2018) 6–7.

- 55 Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 3* (Report, August 2019), 8; State Services Authority, *Inquiry into the Command, Management and Functions of the Senior Structure of Victoria Police* (Report, 2012) 16–17; David Barton and Sue Tait, *Office of Police Integrity, Human Rights and Cultural Change in Policing* (Paper, December 2008) 7; Office of Police Integrity, *Past Patterns—Future Directions: Victoria Police and the Problem of Corruption and Serious Misconduct* (Report, 2007) 132.
- 56 Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 1* (Report, December 2015) 17.
- 57 Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 1* (Report, December 2015) 19.
- 58 Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 3* (Report, August 2019) vi.
- 59 Independent Broad-based Anti-corruption Commission, *Unauthorised Access and Disclosure of Information Held by Victoria Police—An Analysis of Corruption Risks and Prevention Opportunities* (Report, September 2019) 28; Independent Broad-based Anti-corruption Commission, *Annual Report 2018/19* (Report, 29 October 2019); Peter Collins, *Report into Falsification of PBT Numbers* (Report, 31 August 2018) 6.
- 60 Office of Police Integrity, *Past Patterns—Future Directions: Victoria Police and the Problem of Corruption and Serious Misconduct* (Report, 2007) 136.
- 61 Office of Police Integrity, *Past Patterns—Future Directions: Victoria Police and the Problem of Corruption and Serious Misconduct* (Report, 2007) 132, 136.
- 62 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1099 [4767].
- 63 Responsive submission, Victoria Police, 24 August 2020, 12 [2.22].
- 64 Responsive submission, Victoria Police, 24 August 2020, 11 [2.17], 12 [2.22], 20 [5.16].
- 65 Responsive submission, Victoria Police, 24 August 2020, 166 [78.59]–[78.62].
- 66 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 7 [34].
- 67 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 11 [54].
- 68 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 23 [6.6].
- 69 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 2 [7] citing Exhibit RC0299a Dedicated Source Unit Standard Operating Procedures, 27 December 2004.
- 70 See, eg, Exhibit RC0464b Statement of Mr James (Jim) O'Brien, 14 June 2019, 4 [11].
- 71 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 23 [124], 25 [131], [133]; Transcript of Mr Anthony (Tony) Biggin, 10 October 2019, 7735–6.
- 72 Exhibit RC1325b Statement of Mr Dannye Moloney, 28 November 2019, 8 [44]; Responsive submission, Victoria Police, 24 August 2020, 20 [5.16]; Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 138 [56.8].
- 73 Based on Responsive submission, Victoria Police, 24 August 2020, 166 [78.64].
- 74 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 7 [36].
- 75 Exhibit RC1171b Statement of Mr Kenneth (Ken) Lay, 9 February 2020, 2–3 [9]–[11]; Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 7 [36], 8 [38].
- 76 Exhibit RC1171b Statement of Mr Kenneth (Ken) Lay, 9 February 2020, 2–3 [11].
- 77 Exhibit RC1171b Statement of Mr Kenneth (Ken) Lay, 9 February 2020, 2–3 [8]–[11].
- 78 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 29 [11.26]–[11.27].
- 79 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 29 [11.21]–[11.22].
- 80 Responsive submission, Victoria Police, 24 August 2020, 20 [5.16].
- 81 Responsive submission, Victoria Police, 24 August 2020, 20 [5.16].
- 82 Responsive submission, Victoria Police (specified former and current officers), 8 September 2020, 1 [1.5].
- 83 Responsive submission, Victoria Police, 24 August 2020, 20–1 [5.17]. Victoria Police also noted that the current intelligence and case management system, Interpose, requires the HSMU to monitor and be made aware of any issues concerning high-risk sources.
- 84 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 23 [489]; Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 14 [73]; Exhibit RC0856b Statement of Chief Commissioner Graham Ashton, 30 August 2019, 9 [85].

- 85 Mr Overland, as then Assistant Commissioner, Crime, instigated a review of human source management and sat on the Steering Committee of the review: Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 7 [34]; Exhibit RC1325b Statement of Dannye Moloney, 28 November 2019, 6 [32]; Exhibit RC0276 Review & Develop Best Practice Human Source Management Policy 2004, 16 April 2004, 10; Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 4–5 [21]–[28]; Transcript of Mr Terry Purton, 14 May 2019, 1690–1, 1695.
- 86 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1095 [4758].
- 87 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1096 [4761.6].
- 88 Responsive submission, Victoria Police, 24 August 2020, 66 [35.6]–[35.9].
- 89 Responsive submission, Victoria Police, 24 August 2020, 66 [35.11].
- 90 Responsive submission, Victoria Police, 24 August 2020, 65–6 [35.3]–[35.4].
- 91 See, eg, Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 17 [90]–[91].
- 92 See, eg, Exhibit RC0591 Officer 'Black' diary, 13 April 2006, 135; Exhibit RC0267b Transcript of meeting between Nicola Gobbo, 'Sandy White' and 'Peter Smith', 16 September 2005, 15; Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 17 [92]; Exhibit RC0277c Issue cover sheet, Audit conduct of human source 21803838 records, 28 April 2006.
- 93 Many of these risks, described as 'dangers', were outlined by Victoria Police at the time: Exhibit RC0276 Review & Develop Best Practice Human Source Management Policy 2004, 16 April 2004, 17–19.
- 94 The current version of the Human Source Policy was finalised in April 2020 but came into effect in May 2020: Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020.
- 95 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 195–6 [4.6]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 30; Responsive submission, Victoria Police, 24 August 2020, 67 [36.3].
- 96 Responsive submission, Victoria Police, 24 August 2020, 72 [39.1].
- 97 Responsive submission, Victoria Police, 24 August 2020, 72 [39.2].
- 98 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 30, 9.
- 99 Responsive submission, Victoria Police, 24 August 2020, 72 [39.4].
- 100 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 28.
- 101 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1097 [4764]; Responsive submission, Victoria Police, 24 August 2020, 12 [2.23].
- 102 As discussed in Chapter 6, the process of registering a human source at that time involved an officer giving a registration form in an unsealed envelope to a more senior officer, who would review the information and seal the envelope. See Transcript of Assistant Commissioner Neil Paterson, 27 March 2019, 316.
- 103 Exhibit RC0032 Statement of Detective Inspector Gavan Segrave, 1 April 2019, 5 [14].
- 104 Responsive submission, Victoria Police, 24 August 2020, 13 [2.32].
- 105 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 10 [50].
- 106 This process commenced with the issuing of the 'Chief Commissioner's Instruction 7/03' on 22 September 2003: Exhibit RC0008, Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 27 [4.14].
- 107 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 27 [4.14]–[4.17].
- 108 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 27 [4.16].
- 109 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 27 [4.17].
- 110 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1097 [4763]–[4764]; Responsive submission, Victoria Police, 24 August 2019, 47–9 [271]; Exhibit RC0108 Review of the Victoria Police Drug Squad, Steering Committee Endorsed Final Report, November 2011, 31; Responsive submission, Victoria Police, 24 August 2020, 103–4 [53.5]–[53.12].
- 111 Notably, the project initiated by Mr Simon Overland in mid-2003, 'Review and Develop Best Practice Human Source Management Policy': Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 335 [1502]. See also Exhibit RC0108 Victoria Police, Review of the Victoria Police Drug Squad, Report, November 2001, 21; Exhibit RC1807b Victoria Police, Operation Hemi—C3-4/2218/2000 Final Investigation Report, 11 July 2002; Exhibit RC0577c Statement of Anthony (Tony) Biggin, 25 July 2019, 4–6 [21]–[34]; Exhibit RC920b Statement of Ms Christine Nixon, 30 October 2019, 7 [35].

- 112 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 6 [2].
- 113 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 18 [3.81].
- 114 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 2 [7] citing Exhibit RC0299a Dedicated Source Unit Standard Operating Procedures, 27 December 2004.
- 115 See Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 34; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 35.
- 116 See Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 29 [4.29]; Responsive submission, Victoria Police, 24 August 2020, 21–2 [71]–[72].
- 117 Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 10 [58]–[59].
- 118 Responsive submission, Victoria Police, 24 August 2020, 66 [35.5].
- 119 Responsive submission, Victoria Police, 24 August 2020, 66 [35.5], 74 [40.14].
- 120 Responsive submission, Victoria Police, 24 August 2020, 74 [40.14].
- 121 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1097 [4763].
- 122 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1097 [4763]; see Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 9.
- 123 Responsive submission, Victoria Police, 24 August 2020, 12 [2.19], 41 [21.2], 63 [33.2]. Victoria Police also submitted that the current framework has 'strict policies and procedures in place concerning the use of lawyers and other individuals with legal obligations of confidentiality or privilege as human sources': Responsive submission, Victoria Police, 24 August 2020, 41 [22.1].
- 124 Responsive submission, Victoria Police, 24 August 2020, 12 [2.21], 156 [77.4]; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 26 [55], 40 [81]; Responsive submission, Victoria Police (specified former and current officers), 8 September 2020, 1 [1.5].
- 125 Responsive submission, Victoria Police, 24 August 2020, 12 [2.21].
- 126 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 21 [45]; Transcript of Officer 'Sandy White', 2 August 2019, 3846; Transcript of Officer 'Sandy White', 31 July 2019, 3598; Transcript of Officer 'Peter Smith', 10 September 2019, 6030; Transcript of Officer 'Black', 23 October 2019, 8137.
- 127 Responsive submission, Victoria Police, 24 August 2020, 11–13 [2.17]–[2.32]. See also Transcript of Officer 'Sandy White', 2 September 2019, 5361.
- 128 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 25 [4.3]; Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29–31 [8.3]–[8.6].
- 129 Responsive submission, Victoria Police, 24 August 2020, 12 [2.25].
- 130 Some of this ignorance appears to persist in the submissions made by some former officers to the Commission: see, eg, Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 36 [73]–[74].
- 131 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1097 [4764].
- 132 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1097 [4764].
- 133 Responsive submission, Victoria Police, 24 August 2020, 47–9 [27.1].
- 134 Responsive submission, Victoria Police, 24 August 2020, 47–9 [27.1].
- 135 Exhibit RC0284 SML3838, 22 May 2006, 32; Exhibit RC0284 SML3838, 28 May 2007, 112; Exhibit RC0284 SML3838, 20 July 2007, 118; Exhibit RC0284 SML3838, 4 September 2007, 123; Exhibit RC0284 SML3838, 7 November 2007, 126–7.
- 136 See, eg, Responsive submission, Victoria Police (specific former and current officers), 17 August 2020, 302–3 [52.155]; Exhibit RC0464b Statement of James (Jim) O'Brien, 14 June 2019, 25 [125], 26 [126], [128], 27 [130]–[131], [135]–[136], 28 [141].
- 137 Responsive submission, Victoria Police (specific former and current officers), 17 August 2020, 45–6 [99]–[101]; Exhibit RC0372 'Sandy White' diary, 19 December 2005; Exhibit RC0381 Mr 'Sandy White' diary, 14 February 2006.
- 138 Responsive submission, Victoria Police (specific former and current officers), 17 August 2020, 268 [50.62]–[50.64].
- 139 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 36, 6 [18]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 39, 4–5 [5.13]; Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 17 [5].
- 140 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 39, 7 [21].
- 141 This was a risk Ms Gobbo raised herself and discussed with her handlers in their first meeting in September 2005: Exhibit RC0281 ICR3838 (001), 16 September 2005, 1.

- 142 See, eg, Exhibit RC0267b Transcript of meeting between Nicola Gobbo, 'Sandy White' and 'Peter Smith', 16.
- 143 In Mr Simon Overland's case, he gave evidence that he immediately identified that Ms Gobbo's registration may have the potential for miscarriages of justice: Transcript of Mr Simon Overland, 23 January 2020, 12294–5.
- 144 Exhibit RC0285b Risk assessment relating to Ms Nicola Gobbo, 15 November 2005, 7.
- 145 Exhibit RC0285b Risk assessment relating to Ms Nicola Gobbo, 15 November 2005, 7.
- 146 Responsive submission, Victoria Police, 24 August 2020, 23 [7.9].
- 147 Responsive submission, Victoria Police, 24 August 2020, 23 [7.10].
- 148 Exhibit RC0591 Officer 'Black' diary, 23 November 2005.
- 149 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1098 [4769].
- 150 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1099 [4769].
- 151 Responsive submission, Victoria Police, 24 August 2020, 12 [2.22]–[2.23].
- 152 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 38–9 [83], 43 [91].
- 153 Responsive submission, Victoria Police, 24 August 2020, 142 [72.4]; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 39 [81]; Transcript of Officer 'Black', 23 October 2019, 8114.
- 154 Responsive submission, Victoria Police, 24 August 2020, 142 [72.6].
- 155 Responsive submission, Victoria Police, 24 August 2020, 142–3 [72.6]–[72.11].
- 156 Responsive submission, Victoria Police, 24 August 2020, 143 [72.11].
- 157 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 22 [47].
- 158 Exhibit RC0485d, Statement of Officer 'Peter Smith', undated, 1; Transcript of Officer 'Sandy White', 31 July 2019, 3613–4; Statement of Officer 'Sandy White', undated, 59 [254]; Transcript of Officer 'Black', 23 October 2019, 8136–7.
- 159 Responsive submission, Victoria Police, 24 August 2020, 164 [78.50]–[78.51].
- 160 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 12 [6], 13 [9].
- 161 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 21 [46].
- 162 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 42 [84].
- 163 Transcript of Mr John (Jack) Blayney, 3 December 2019, 10233, 10236–38.
- 164 Transcript of Mr Simon Overland, 17 December 2019, 11531–32; Transcript of Mr Simon Overland, 17 December 2019, 11531–2; Exhibit RC0591 Officer 'Black' diary, 17 April 2007, 177; Exhibit RC0620 Mr Robert Hardie diary, 17 April 2007, 83–4.
- 165 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 30 [11.29]; Exhibit RC1067b Statement of Mr Findlay (Fin) McRae, 13 November 2019, [115], [4.13]; Transcript of Simon Overland, 23 January 2020, 12244–5.
- 166 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 29 [11.29].
- 167 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 30 [11.30].
- 168 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1093 [4755.3]. See Exhibit RC0492b Transcript of meeting between Ms Gobbo, Officer 'Peter Smith' and Officer 'Sandy White', 2006, 1–3; Exhibit RC0764b Transcript of conversation between Ms Nicola Gobbo, Officer 'Jones' and Officer 'Bourne', 3 July 2007, 1–4.
- 169 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1095 [4755.4]; Exhibit RC0626b Transcript of conversation between Ms Nicola Gobbo, Officer 'Sandy White', Officer 'Peter Smith' and Officer 'Black', 28 October 2005; see Exhibit RC0281 ICR3838 (100), 8 August 2006, 1219; Exhibit RC0281 ICR3838 (100), 4 August 2006, 1215.
- 170 Responsive submission, Victoria Police, 24 August 2020, 22 [7.4].
- 171 Responsive submission, Victoria Police, 24 August 2020, 22 [7.4].
- 172 Responsive submission, Victoria Police, 24 August 2020, 21 [6.2].
- 173 Responsive submission, Victoria Police, 24 August 2020, 21 [6.2].
- 174 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 28 [11.15], [11.17].
- 175 Transcript of Officer 'Sandy White', 2 September 2019, 5356.
- 176 Exhibit RC0915b Statement of Mr Simon Overland, 2 [12]; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 33 [63].

- 177 Exhibit RC0276 Review and Develop Best Practice Human Source Management Policy 2004, 16 April 2004, 18.
- 178 See, eg, Exhibit RC0497d Transcript of meeting between Nicola Gobbo, Officer 'Sandy White' and Officer 'Green' et al, 2006, 1–4; Exhibit RC0282 Transcript of conversation between Ms Gobbo, Officer 'Anderson' and Officer 'Fox', 5 June 2007, 274–6; Exhibit RC0282 Transcript of conversation between Ms Nicola Gobbo, Officer 'Anderson' and Officer 'Peter Smith', 12 July 2006, 339; Exhibit RC0253b Summary of meeting between Ms Nicola Gobbo, Mr Philip Swindells and Mr Lindsay Attrill, 24 July 2006, 3–5.
- 179 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 30 [11.30].
- 180 Exhibit RC0685b File note of Ms Louise Jarrett, VGSO, 13 September 2011, 1–3.
- 181 Responsive submission, Victoria Police, 24 August 2020, 21 [6.4]–[6.5].
- 182 Responsive submission, Victoria Police, 24 August 2020, 21 [6.4], 25 [10.4].
- 183 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 540 [2142].
- 184 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 540 [2140]–[2141].
- 185 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 42 [88].
- 186 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 42 [88].
- 187 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 41 [87(d)].
- 188 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 41 [87(d)].
- 189 Responsive submission, Victoria Police, 24 August 2020, 50 [28.1].
- 190 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012) 27.
- 191 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1097–8 [4765]–[4766].
- 192 Responsive submission, Victoria Police, 24 August 2020, 12 [2.25].
- 193 Transcript of Mr Simon Overland, 23 January 2020, 12294–5.
- 194 Transcript of Mr Simon Overland, 16 December 2019, 11315.
- 195 Transcript of Mr Simon Overland, 16 December 2019, 11431.
- 196 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting Submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1089 [4740].
- 197 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 57.
- 198 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 58.
- 199 Responsive submission, Victoria Police, 24 August 2020, 12 [2.25].
- 200 Responsive submission, Victoria Police (specified former and current officers), 8 September 2020, 2 [1.5(h)]; Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 16 [109]–[115].
- 201 Responsive submission, Victoria Police, 24 August 2020, 53 [30.15].
- 202 Exhibit RC0275b Statement of Officer 'Sandy White', undated, 58 [250]; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 21 [45]; Transcript of Officer 'Peter Smith', 10 September 2019, 6030; Transcript of Officer 'Black', 23 October 2019, 8137.
- 203 Responsive submission, Victoria Police, 24 August 2020, 131 [69.10], 142 [72.6].
- 204 Exhibit RC0275b Statement of Officer 'Sandy White', undated, 29 [122]; Responsive submission, Victoria Police, 24 August 2020, 142 [72.6]–[72.7].
- 205 Transcript of Mr Terry Purton, 14 May 2019, 1694.
- 206 Transcript of Mr Terry Purton, 14 May 2019, 1755–56.
- 207 See Responsive submission, Victoria Police, 24 August 2020, 13 [2.30].
- 208 Exhibit RC0281 ICR 3838 (028), 21 April 2006, 258; Exhibit RC0486 Officer 'Peter Smith' diary, 21 April 2006, 194–5; Exhibit RC0281 ICR 3838 (032), 19 May 2006, 303; Transcript of Officer 'Peter Smith', 11 September 2019, 6071; Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 24 January 2020, 12358–9.
- 209 Exhibit RC0281 ICR 3838 (083), 15 June 2007, 901.
- 210 Exhibit RC0275b Statement of Officer 'Sandy White', undated, 58 [250]; Transcript of Officer 'Peter Smith', 10 September 2019, 6030; Transcript of Officer 'Black', 23 October 2019, 8137.
- 211 Responsive submission, Victoria Police, 24 August 2020, 156 [77.2].

- 212 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1098 [4767].
- 213 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1098 [4767].
- 214 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 80, referring to Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012) 5, 15, 37, 39.
- 215 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 46–7 [95]–[98]; Responsive submission, Victoria Police, 24 August 2020, 22 [7.3].
- 216 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 43–4 [93]–[94]; Responsive submission, Victoria Police, 24 August 2020, 22 [7.4].
- 217 Responsive submission, Mr Simon Overland, 18 August 2020, 22–3 [62]–[66], 25 [69], 32 [92], 36 [102(c)], 52 [147(d)], 55 [153(i)], 58 [163(e)]; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 268 [50.62], 269 [51.7], 270–71 [57.10]–[57.12], 395 [61.6], 400 [63.3].
- 218 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 88–9 [404]–[406]. While the Purana Taskforce drew on the resources of the Crime Department, it did not formally report to it.
- 219 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 303–4 [1354].
- 220 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 92 [423]; Responsive submission, Victoria Police, 24 August 2020, 23–4 [7.15]–[7.17].
- 221 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 4–8 [40]–[42]. Prior to 2006, the HSMU was called the 'Informer Management Unit': Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 45 [5.9].
- 222 The Commission notes that Mr Whitmore was not required to attend and give evidence before the Commission and did not provide a written statement due to his poor physical health, which had significantly impacted on his recollection of the events relevant to the inquiry: Exhibit RC1960 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 10 February 2020.
- 223 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 306 [1358].
- 224 Transcript of Mr Danyne Moloney, 20 February 2020, 14562.
- 225 Transcript of Mr Danyne Moloney, 20 February 2020, 14561, 14563.
- 226 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 110 [56.10].
- 227 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 110 [56.10].
- 228 Responsive submission, Victoria Police, 24 August 2020, 166 [78.58]; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 46 [95].
- 229 Responsive submission, Victoria Police, 24 August 2020, 166 [78.58].
- 230 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 12 [18(d)].
- 231 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 9–11 [50]–[58].
- 232 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 55 [127]. As discussed in Chapter 8, there is some uncertainty about the purpose of Mr Biggin's audit. Officer 'Sandy White' submitted that the audit was to provide independent oversight of Ms Gobbo's management (Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 53 [121]), while Victoria Police and several former and current officers submitted that Mr Biggin was asked by Mr Moloney to conduct a high-level audit, rather than a more extensive analysis of Ms Gobbo's human source file, and that this was consistent with Victoria Police audit methodology at the time: Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 228–9 [44.12]–[44.14]; Responsive submission, Victoria Police, 24 August 2020, 141 [56.24].
- 233 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 9–10 [50]–[55]; Responsive submission, Victoria Police (specified former and current officers), 8 September 2020, [1.5(g)].
- 234 Transcript of Mr Mark Porter, 20 September 2019, 6602; Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019 7 [37].
- 235 Exhibit RC0512b Statement of Superintendent Mark Porter, 15 August 2019, 5 [27].
- 236 Transcript of Mr Terry Purton, 14 May 2019, 1697.
- 237 Exhibit RC1217b Statement of Inspector Andrew Glow, 21 November 2019, 3–4 [17]–[27]; Responsive submission, Victoria Police (specified former and current officers), 8 September 2020, [1.5(g)].
- 238 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 23 [124], 25 [131], [133]; Exhibit RC0398 Officer 'Sandy White' diary, 17 May 2006, 137; Exhibit RC0308 Officer 'Sandy White' diary, 6 August 2007, 1.

- 239 Transcript of Mr Anthony (Tony) Biggin, 10 October 2019, 7735.
- 240 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 4–6 [21]–[34].
- 241 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7474.
- 242 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7475.
- 243 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7575.
- 244 Exhibit RC0577b Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 13 [63]–[67].
- 245 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7568–69.
- 246 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 208 [39.6].
- 247 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 213 [41.4].
- 248 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 240–1 [46.8]–[46.11].
- 249 Exhibit RC1217 Statement of Inspector Andrew Glow, 21 November 2019, 3 [18].
- 250 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 6 [5(j)], 10 [18(d)], 51–2 [114].
- 251 See Exhibit RC1306b Statement of Mr Jeffrey (Jeff) Pope, 21 January 2020, 14–27 [60]–[88]; Exhibit RC0795b Statement of Superintendent John O'Connor, 11 October 2019, 25–26 [142]–[144].
- 252 Known as the duty to investigate, which at the relevant time was an obligation reflected in Victoria Police policy: see Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 33, [4.1].
- 253 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020) 9.
- 254 As discussed in Chapter 14, *Operation Gloucester*, a review by the Independent Broad-based Anti-corruption Commission, examined Victoria Police's witness statement-taking practices in relation to police conduct in Victoria Police's investigation into the murder of two Victoria Police officers in 1998 (the Lorimer Investigation) and has made recommendations to improve Victoria Police's statement-taking practices: Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020) 78.
- 255 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020), 10–11.
- 256 *Roberts v The Queen* [2020] VSCA 277, [147]–[157], [259], [284] (T Forrest, Osborn JJA and Taylor AJA).
- 257 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020), 11.
- 258 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 33, [4.5.3].
- 259 Responsive submission, Victoria Police, 24 August 2020, 71 [38.10]; Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 12 [76].
- 260 Responsive submission, Victoria Police, 24 August 2020, 71 [38.10]; Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 12 [76].
- 261 Responsive submission, Victoria Police, 24 August 2020, 71 [38.10]; Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 12 [76].
- 262 Responsive submission, Victoria Police, 24 August 2020, 71 [38.10]; Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 12 [76].
- 263 Responsive submission, Victoria Police, 24 August 2020, 71 [38.11]; Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 12 [77].
- 264 Exhibit RC0276 Review & Develop Best Practice Human Source Management Policy 2004, 16 April 2004, 18.
- 265 Exhibit RC0276 Review & Develop Best Practice Human Source Management Policy 2004, 16 April 2004, 17.
- 266 See, eg, *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 267 Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 4–5 [17], 9 [45], 10 [58], 11 [66]–[67].
- 268 Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 10 [59], 11 [67], [69], [70]; Responsive submission, Victoria Police, 24 August 2020, 69 [37.1], 73 [39.6].
- 269 Responsive submission, Victoria Police, 24 August 2020, 68 [36.5].
- 270 Exhibit 1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 4–5 [17], 9 [45], 10 [58], 11 [66]; Responsive submission, Victoria Police, 24 August 2020, 68 [36.4], [38.10]–[38.11].
- 271 Responsive submission, Victoria Police, 24 August 2020, [36.1]–[36.2]; in relation to PII policies and processes: Responsive submission, Victoria Police, 24 August 2020, 72–4 [40.1]–[40.19]; in relation to disclosure policies and processes: Responsive submission, Victoria Police, 24 August 2020, 76–7 [41.1]–[41.4].
- 272 Responsive submission, Victoria Police (specified former and current officers), 8 September 2020, 2 [1.5(k)].
- 273 Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020, 11 [67]; Responsive submission, Victoria Police, 24 August 2020, 75 [40.21].

- 274 Responsive submission, Victoria Police, 24 August 2020, 76 [40.24].
- 275 Responsive submission, Victoria Police, 24 August 2020, 76 [40.24].
- 276 Responsive submission, Victoria Police, 24 August 2020, 76 [40.24].
- 277 Responsive submission, Victoria Police, 24 August 2020, 73 [40.6].
- 278 Responsive submission, Victoria Police, 24 August 2020, 74 [40.15].
- 279 Responsive submission, Victoria Police, 24 August 2020, 72 [39.1]–[39.2].
- 280 Exhibit RC0915b Statement of Mr Simon Overland, 19 September 2019, 28 [146]; Exhibit RC0898b Statement of Assistant Commissioner Thomas (Luke) Cornelius, 20 September 2019, 14 [89], 26 [159], [160], [162].
- 281 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 75.
- 282 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 24 [48], 127–8 [278].
- 283 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1102 [4782].
- 284 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 95 [407]; Responsive submission, Victoria Police, 24 August 2020, 51 [30.1].
- 285 Responsive submission, Victoria Police, 24 August 2020, 25 [10.2].
- 286 Responsive submission, Victoria Police, 24 August 2020, 13 [2.30].
- 287 Responsive submission, Victoria Police, 24 August 2020, 54 [30.15].
- 288 Responsive submission, Victoria Police, 24 August 2020, 13 [2.31].
- 289 Responsive submission, Victoria Police, 24 August 2020, 25 [10.3].
- 290 Responsive submission, Victoria Police, 24 August 2020, 25 [10.4].
- 291 Responsive submission, Victoria Police, 24 August 2020, 26 [10.5].
- 292 Exhibit RC0267b Transcript between Ms Nicola Gobbo, Officers 'Peter Smith' and 'Sandy White', 16 September 2005, 7.
- 293 Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 26 [11.2]. The evidence before the Kellam Inquiry was that at least 150 Victoria Police officers were aware of Ms Gobbo's identity as a human source by 2009: Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 84 n 176.
- 294 Exhibit RC0518b Covert Support Division briefing note with audit trail dissemination list, 31 December 2008.
- 295 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 29 [171]; Transcript of Officer 'Sandy White', 19 August 2019, 4799; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 128 [23.199], 140 [27.56].
- 296 See the findings and conclusions in Chapter 8 regarding Mr Thomas' case.
- 297 Responsive submission, Victoria Police, 24 August 2020, 26 [10.9].
- 298 Responsive submission, Victoria Police, 24 August 2020, 355 [161.3].
- 299 At 30 October 2020, the Commission understands there are criminal appeal proceedings on foot in relation to nine persons.
- 300 Exhibit RC1714 Letter from the Commissioner of the Royal Commission to Chief Commissioner Graham Ashton, 16 December 2019; Letter from the Commission to Victoria Police, 5 July 2019.
- 301 Exhibit RC1715 Letter from solicitors representing Victoria Police to Solicitors Assisting the Commission, 6 November 2019.
- 302 Exhibit RC1806b Victoria Police, 'List of Persons with Disclosure Materials', 6 December 2019.
- 303 This number was calculated by comparing Exhibit RC1806b Victoria Police, 'List of Persons with Disclosure Materials', 6 December 2019 and Exhibit RC1714 Letter from the Commissioner to Chief Commissioner Graham Ashton, 16 December 2019.
- 304 Exhibit RC1714 Letter from Commissioner to Chief Commissioner Graham Ashton 16 December 2019.
- 305 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1110 [4804].
- 306 Responsive submission, Victoria Police, 24 August 2020, 252 [159.2(b)], [161].
- 307 Responsive submission, Victoria Police, 24 August 2020, 362 [165.2].
- 308 Responsive submission, Victoria Police, 24 August 2020, 355 [161.1].
- 309 Responsive submission, Victoria Police, 24 August 2020, 355 [161.2].
- 310 Responsive submission, Victoria Police, 24 August 2020, 355 [161.2].
- 311 Responsive submission, Victoria Police, 24 August 2020, 356–7 [163.1]–[163.7].
- 312 Responsive submission, Victoria Police, 24 August 2020, 363 [165.9].
- 313 Email from solicitors for Victoria Police to Solicitors Assisting the Commission, 6 November 2020.

- 314 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1110 [4803].
- 315 Email from solicitors for Victoria Police to Solicitors Assisting the Commission, 6 November 2020.
- 316 *Cvetanovski v The Queen* [2020] VSCA 272, [7] (Maxwell P, Beach and Weinberg JJ).
- 317 *Cvetanovski v The Queen* [2020] VSCA 272, [8] (Maxwell P, Beach and Weinberg JJ).
- 318 Transcript of Inspector Dale Flynn, 1 October 2019, 6923–8.
- 319 Exhibit RC1955, Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 17 April 2020; Exhibit RC1956 Corrections Victoria table of payments made to Mr 'Cooper', multiple dates.
- 320 Letter from Solicitors Assisting the Commission to the Office of Public Prosecutions, 5 November 2020.
- 321 Transcript of Officer 'Sandy White', 2 September 2019, 5356.
- 322 Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 45–6 [93]–[96], 46 [99].
- 323 Transcript of Officer 'Sandy White', 1 August 2019, 3766; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 54–5 [117]–[120].
- 324 Transcript of Officer 'Sandy White', 19 August 2019, 4799; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 124 [270], 130 [285].
- 325 Transcript of Officer 'Black', 23 October 2019, 8161; Transcript of Officer 'Sandy White', 19 August 2019, 4799.
- 326 Exhibit RC0512b Statement of Superintendent Mark Porter, 15 August 2019, 5 [27], 6 [30], 7 [33], 7 [37].
- 327 Exhibit RC0512b Statement of Superintendent Mark Porter, 15 August 2019, 5 [25].
- 328 Exhibit RC0512b Statement of Superintendent Mark Porter, 15 August 2019, 5 [26].
- 329 Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7475; Transcript of Mr Dannye Moloney, 20 February 2020, 14592.
- 330 Exhibit RC0577c Statement of Mr Anthony (Tony) Biggin, 25 July 2019, 8 [43].
- 331 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 138 [56.10]; Transcript of Anthony (Tony) Biggin, 10 October 2019, 7735–6.
- 332 See Transcript of Mr Paul Rowe, 28 June 2019, 3264; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 29 [11.26]–[11.27].
- 333 See Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, [28.106]; Transcript of Mr James (Jim) O'Brien, 4 September 2019, 5546, 5675; Transcript of Detective Sergeant Paul Rowe, 13 November 2019, 9199; Transcript of Commander Stuart Bateson, 28 November 2019, 10104.
- 334 Transcript of Mr James (Jim) O'Brien 4 September 2019, 5515, 5530, 5534; Transcript of Detective Sergeant Paul Rowe, 1 July 2019, 3276; Responsive submission, Victoria Police (specified former and current officers), 17 August 2020, 268 [50.62], 269–70 [51.7], 355–56 [57.10]–[57.12], 395 [61.6], 400 [63.3].
- 335 Transcript of Mr Simon Overland, 17 December 2019, 11435–6.
- 336 Transcript of Mr Simon Overland, 17 December 2019, 11454–5.
- 337 Transcript of Mr Simon Overland, 17 December 2019, 1143.
- 338 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 12 December 2019, 11121.
- 339 Exhibit RC1325b Statement of Mr Dannye Moloney, 28 November 2019, 3 [12]–[13]; Transcript of Mr Dannye Moloney, 20 February 2020, 14640.
- 340 Responsive submission, Victoria Police (annexure: specified individual officers), 24 August 2020, 138 [56.10].
- 341 Transcript of Mr Dannye Moloney, 20 February 2020, 14562.
- 342 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1110 [4778].
- 343 Chris Winneke, Andrew Woods and Megan Tittensor, 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2', *Royal Commission into the Management of Police Informants* (26 June 2020) vol 2, 1047–53 [4513]–[4778].
- 344 Responsive submission, Victoria Police, 24 August 2020, 20 [5.13].
- 345 Responsive submission, Victoria Police, 24 August 2020, 20 [5.13]–[5.14].
- 346 Responsive submission, Victoria Police, 24 August 2020, 20 [5.15]–[5.16].
- 347 Responsive submission, Victoria Police, 24 August 2020, 20 [5.13].
- 348 Responsive submission, Victoria Police, 24 August 2020, 22 [7.3]–[7.5].

- 349 Exhibit RC1039b Briars Taskforce Update, 21 September 2009; Exhibit RC0795b Statement of Superintendent John O'Connor, 11 October 2019, 2–3 [17]–[20]; Exhibit RC1231b Statement of Detective Superintendent Peter Lardner, 27 November 2019, 3 [14]–[16]; Exhibit RC1085b Letter of Advice from Victorian Government Solicitor's Office to Superintendent Lardner, 21 May 2010; Exhibit RC0305 Officer 'Sandy White' diary, 24 May 2010, 1120.
- 350 Responsive submission, Victoria Police, 24 August 2020, 18 [5.2].
- 351 Responsive submission, Victoria Police, 24 August 2020, 18–19 [5.1]–[5.9].
- 352 Responsive submission, Victoria Police, 24 August 2020, 18 [5.1].
- 353 Responsive submission, Victoria Police, 24 August 2020, 18–19 [5.4].
- 354 Responsive submission, Victoria Police, 24 August 2020, 19 [5.5].
- 355 Responsive submission, Victoria Police, 24 August 2020, 19 [5.5].
- 356 *Inquiries Act 2014* (Vic) s 123(1).
- 357 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016), 37 [212], [217].
- 358 The history of these legal proceedings is explained in Chapter 1.
- 359 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020), 19.
- 360 Responsive submission, Victoria Police, 20 September 2020, 20 [1.5]–[1.6]; Responsive submission, Victoria Police, 24 August 2020, 363 [165.10]

# Appendix A: List of potentially affected persons

As detailed in Chapter 7, the Commission considers that at least 1,011 individuals may have been affected by Ms Nicola Gobbo's conduct as a human source. That figure includes 124 individuals subject to case studies in Counsel Assisting submissions as well as 887 individuals whose convictions or findings of guilt may have been affected in the manner identified in *R v Szabo* [2001] 2 Qd R 214.

The Commission published 114 of the 124 case studies. Of the 10 unpublished case studies:

- four were not published due to public interest immunity claims made by Victoria Police
- four were not published at the request of the individuals involved
- two were not published as the Commission was unable to locate the individuals involved prior to publication of this final report and did not consider it necessary or appropriate to publish their case studies.

The 114 published case studies in Counsel Assisting submissions are listed in the table below.

Case studies relating to potentially affected persons
Mr Anvardeen Abdul-Jabbar
Mr Adams (a pseudonym)
Mr Salvatore Agresta
Mr Agrum (a pseudonym)
Mr Fady Ahmad
Mr Azzam (Adam) Ahmed
Mr Arnold (a pseudonym)
Mr John Balakis
Mr Domenic Barbaro
Mr Pasquale Barbaro
Mr Phillip Batticciotto
Mr Toreq (Tony) Bayeh
Mr Bickley (a pseudonym)
Mr Christopher Binse
Mr Boyd (a pseudonym)
Mr Craig Bradley
Mr Gratian Bran
Mr Shane Bugeja
Mr Cooper (a pseudonym)
Mr Cooper's relative (a pseudonym)

Case studies relating to potentially affected persons
Mrs Alexandra Cvetanovski
Mr Zlate Cvetanovski
Mr Myer Dagher
Mr Dawes (a pseudonym)
Mr Antonino Di Pietro
Mr Eddington (a pseudonym)
Mr Jacques El-Hage
Mr Elk (a pseudonym)
Mr Ellsworth (a pseudonym)
Mr Albert El-Moustafa
Mr Emerson (a pseudonym)
Mr Carmelo Falanga
Mr Anthony Fezollari
Mr Matthew Finn
Mr Wayne Finn
Mr Stephen Gavanoas
Mr Garry Gibbs
Mr Goldman (a pseudonym)
Mr Craig Greenslade
Mr Vance John Greenslade <sup>1</sup>
Mr Nadim Haj
Mr Hamilton (a pseudonym)
Mr John Higgs
Mr Huntley (a pseudonym)
Mr Irons (a pseudonym)
Mr Chafic Issa
Mr Oliver Robert Jackson
Mr Joyce (a pseudonym)
Mr Nabil (Bill) Karam
Mr Rabie (Rob) Karam
Mr Romi Karam
Mr Stephen John Kavanagh

1 This person is also known as Mr Vance John Thow.

**Case studies relating to potentially affected persons****Mr Kearney (a pseudonym)****Mr Keene (a pseudonym)****Mr Kelvin (a pseudonym)****Mr Ketch (a pseudonym)****Mr Khan (a pseudonym)****Mr Mohammad Khodr****Mr King (a pseudonym)****Mr Dimitrios Kondalis****Mr Ibrahim Kurnaz****Mr Noel Laurie****Mr Linley (a pseudonym)****Mr Luxmore (a pseudonym)****Mr Francesco Madafferi****Mr Maddox (a pseudonym)****Mr Giuseppe Mannella****Mr Fadl Maroun****Ms Georgina Matta****Mr Antonios (Tony) Mokbel****Mr Horty Mokbel****Mr Kabalan Mokbel****Mr Milad Mokbel****Ms Renate Mokbel****Ms Zaharoula Mokbel****Mr Frank Molluso****Mr Seyed Moulana****Mr Danny Moussa****Mr Mohammed Nasfan Abdul Nazeer****Mr Newton (a pseudonym)****Mr Faruk Orman****Mr Saleh Osman****Mr Anastasios Papadopoulos****Mr Joseph Parisi****Mr Parrish (a pseudonym)**

**Case studies relating to potentially affected persons****Mr Vasilios (Peter Adam) Pilarinos****Mr Giovanni Polimeni****Mr Paul Psaila****Ms Sharon Ropa****Mr Christopher Ross****Mr Peter Roth****Mr Alan Saric****Mr Fadi Sarkis****Mr Saturn (a pseudonym)****Mr Antonio (Tony) Sergi****Mr Pasquale John Sergi****Mr Pasquale Rocco Sergi****Mr Shannon (a pseudonym)****Mr Summers (a pseudonym)****Mr Anil Suri****Mr Snyder (a pseudonym)****Mr Robin Taylor****Mr Thomas (a pseudonym)****Mr David Tricarico****Mr Pino Varallo****Mr Jan Visser****Mr John Waters****Mr Carl Williams****Mr Winchester (a pseudonym)****Mr Winters (a pseudonym)****Mr Alan Woodhead****Mr Saverio Zirilli****Person 12 (a pseudonym)****Solicitor 2 (a pseudonym)**



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**Royal Commission  
into the Management of Police Informants**

# Final Report

Volume III

NOVEMBER 2020

**Royal Commission  
into the Management of Police Informants**

**Final Report**  
**Volume III**

**The Honourable Margaret McMurdo, AC**  
Commissioner

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**ORDERED TO BE PUBLISHED**

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# 10

## Victoria Police's use of other human sources with legal obligations of confidentiality or privilege

### INTRODUCTION

In January 2019, the Commission obtained a copy of a letter from Victoria Police to the Independent Broad-based Anti-corruption Commission (IBAC) regarding its identification of seven human source files that required an assessment to determine whether there had been 'any possible breaches of legal professional privilege'.<sup>1</sup> Those files related to people in occupations associated with the legal profession. The disclosure prompted an amendment to the Commission's Letters Patent, to extend the scope of its terms of reference to inquire into Victoria Police's use of human sources, other than Ms Nicola Gobbo, with legal obligations confidentiality or privilege.<sup>2</sup>

Term of reference 5 required the Commission to recommend any measures that may be taken to address:

- a. the use of other human sources subject to legal obligations of confidentiality or privilege who came to the Commission's attention during the inquiry
- b. any systemic or other failures in Victoria Police's processes for its disclosures about and recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, and in the use of such human source information in the broader justice system, including how those failures may be avoided in future.

This chapter examines term of reference 5a and the use of other human sources subject to legal obligations of confidentiality or privilege who were disclosed to the Commission during the course of its inquiry.

The use of a human source who is subject to legal obligations of confidentiality or privilege, such as a lawyer, doctor, journalist or priest, is not necessarily problematic if the information the source provides to law enforcement agencies does not relate to the person to whom they owe such an obligation. For example, a doctor may provide information to a law enforcement agency about a relative or a personal associate that does not relate to the doctor's occupation or professional duties.

Where, however, a person provides confidential or privileged information to a law enforcement agency in possible breach of legal obligations owed to other people, including their clients or patients, and that information is then used in the investigation and prosecution of a crime, it puts at risk the validity of any criminal convictions that may be obtained from the use of that information.

During the Commission's inquiry:

- Victoria Police identified the seven human source files mentioned above, plus a further five files relating to people associated with the legal profession, dated between 1990 and 2016. The Commission reviewed these 12 files and, in some cases, examined relevant issues in private hearings.
- Victoria Police identified 91 human source files, dated between 15 March 2016 and 30 September 2019, relating to people associated with other occupations that are potentially subject to legal obligations of confidentiality or privilege, such as nurses and government workers. The Commission audited a sample of 31 of these files.
- Members of the public alleged that 45 people with legal obligations of confidentiality or privilege were used by Victoria Police as human sources. The Commission undertook inquiries to investigate the allegations, including by seeking information from Victoria Police.

Based on the information available to the Commission, there is no evidence to indicate that Victoria Police's use of any human sources, other than Ms Gobbo, resulted in the use of confidential or privileged information that may have affected the validity of any criminal prosecutions or convictions.

There were, however, some limitations to the Commission's inquiries. The Commission had to rely on Victoria Police to identify and disclose its relevant human source files, and it did not provide all relevant files to the Commission. During the Commission's audit, Victoria Police steadfastly refused to make 11 human source files available, on the grounds of public interest immunity (PII). The Commission recommends that those 11 human source files be reviewed by an independent and suitably qualified person appointed by the Victorian Government to ensure that any issues relating to the use of those human sources are identified and addressed as a matter of priority. Security arrangements should be put in place to enable the appointed person to review all relevant information.

Of the human source files that were reviewed, the Commission identified some instances of non-compliance with Victoria Police's policies and procedures and a potential lack of understanding among police officers about issues and risks arising from the use of human sources subject to legal obligations of confidentiality or privilege. These observations were consistent with observations arising from other aspects of the Commission's work, including its focus groups with Victoria Police officers who hold human source management responsibilities.

In Chapters 12 and 13, the Commission makes recommendations to improve Victoria Police's human source management practices and support officers' compliance with policies and procedures, including by introducing a legislative framework to govern Victoria Police's use of human sources, improved training for officers who work in human source management, and external oversight of Victoria Police's registration and management of human sources. The Commission anticipates that the implementation of these reforms will help to address some of the issues and risks identified in this chapter.

**BOX 10.1: THE IDENTITY OF OTHER HUMAN SOURCES**

This chapter refers to people, other than Ms Gobbo, who may be subject to legal obligations of confidentiality or privilege and who were considered and/or used as human sources by Victoria Police. It also refers to people with legal obligations of confidentiality or privilege who are alleged to have been human sources by members of the public. None of these people are named or identified in this report.

It is well established that it is in the public interest to protect information that might reveal the identity of a human source. The effective and continued use of human sources by law enforcement agencies depends on the identity of human sources being kept confidential and their safety being protected. Unlike in the case of Ms Gobbo, a court has not ruled that it is in the public interest to disclose the identity of the human sources or prospective human sources referred to in this chapter.

## THE USE OF OTHER HUMAN SOURCES WITH LEGAL OBLIGATIONS OF CONFIDENTIALITY OR PRIVILEGE

Victoria Police's use and management of human sources is governed by an internal policy, the *Victoria Police Manual—Human Sources* (Human Source Policy).<sup>3</sup> Since 2008, all information relating to the registration and approval of human sources, contact with sources and the dissemination of information provided by them has been recorded in Interpose, Victoria Police's intelligence and case management system.<sup>4</sup>

The use of human sources who are subject to legal obligations of confidentiality or privilege is not prohibited by Victoria Police policy or procedures; however, since 2014 there have been specific safeguards and requirements in place for their use and management.<sup>5</sup> Those requirements were introduced following two reviews into Victoria Police's use of Ms Gobbo as a human source between 2005 and 2009: the Comrie Review and the Kellam Report.<sup>6</sup>

As discussed in Chapter 11, both the Comrie Review in 2012 and the Kellam Report in 2015 identified failures and shortcomings in Victoria Police's human source policies and practices in relation to its use of Ms Gobbo as a human source when she was registered for a third time in 2005 until 2009. Key recommendations of the Comrie Review and Kellam Report focused on the need for better safeguards around the use of human sources with legal obligations of confidentiality or privilege, including that:

- the 'utmost caution ... be exercised before engaging a human source who may have conflicting professional duties (eg lawyers, doctors, parliamentarians, court officials, journalists and priests etc)'
- legal advice be obtained prior to the registration of a human source who may be subject to legal obligations of confidentiality or privilege.<sup>7</sup>

Victoria Police made changes to its Human Source Policy during 2014–16 and again in 2018, in response to the recommendations of the Comrie Review and Kellam Report. These changes are detailed in Chapter 11.

Victoria Police considers that these changes will prevent the reoccurrence of the types of failures identified by these reviews.<sup>8</sup> Then Assistant Commissioner Neil Paterson, APM, Intelligence and Covert Support Command, told the Commission:

*The failures that have occurred in relation to Ms Gobbo could not occur in the context of our current policies, intrusive supervision and practice and [governance] framework.<sup>9</sup>*

That view was shared by Deputy Commissioner Wendy Steendam, APM, Special Operations. In her evidence to the Commission, she explained that the reforms made by Victoria Police, prompted by the Comrie Review and the Kellam Report, mean that the circumstances relating to the use of Ms Gobbo as a human source 'cannot and will not happen again'.<sup>10</sup>

The human source files considered by the Commission and detailed throughout this chapter were dated between 1990 and 2020. As such, some files pre-dated the Comrie Review and Kellam Report and associated changes to Victoria Police's Human Source Policy, while others were created after Victoria Police implemented many of the recommendations of those inquiries between 2014 and 2018.

The following section details the Commission's approach to examining these files.

## 'Human sources' and 'community sources'

Term of reference 5a required the Commission to recommend measures that could be taken to address Victoria Police's use of any other *human sources* subject to legal obligations of confidentiality or privilege, who came to the Commission's attention during its inquiry.

When the Commission's terms of reference were prepared, Victoria Police's Human Source Policy distinguished between 'human sources' and 'community sources', as follows:

- *Human source*—a 'person who provides information to Victoria Police (or another law enforcement agency) with an expectation that their identity will be protected'. A human source may 'actively seek out intelligence or information at the direction, request or tasking of police'; may be in potential danger or harm due to their active relationship with police; and may be the primary source of information in targeted investigations or controlled operations.
- *Community source*—a person who volunteers information to Victoria Police 'with an expectation that their anonymity will be preserved'. Also referred to as a 'community contact', a community source may provide information to police on a single occasion or on numerous occasions regarding events they see or hear in the context of their everyday habits and routines, and 'must not be requested or tasked to actively gather intelligence'.<sup>11</sup>

The Commission interpreted its obligation to consider Victoria Police's use of human sources with legal obligations of confidentiality or privilege to apply to both source categories, given that both human sources and community sources refer to people who provide information to Victoria Police on a confidential basis.

Additionally, under Victoria Police's Human Source Policy at the time, both human sources and community sources had to be registered and were subject to certain safeguards, such as the completion of a risk assessment, and supervision and internal oversight by senior officers.<sup>12</sup> The risks relating to the use of sources subject to legal obligations of confidentiality or privilege also apply regardless of whether a person is categorised as a human source or a community source.

In this chapter, the Commission uses the term 'human source' to refer collectively to both categories of sources.

During the Commission's inquiry, in May 2020, Victoria Police removed the category of 'community source' from its Human Source Policy.<sup>13</sup> All sources are now classified as 'human sources'.

## Identifying relevant human source files

The Commission did not have access to the Interpose system and had no means of undertaking its own independent search of Victoria Police's human source records.

The Commission relied on Victoria Police to:

- identify human source files relating to people with possible legal obligations of confidentiality or privilege who were used, or considered for use, by Victoria Police
- disclose those files and all relevant information to the Commission
- advise if any information was disseminated or Information Reports (IRs) created from information provided by a human source with possible legal obligations of confidentiality or privilege and shared with investigators, and whether that information was used in a criminal prosecution or conviction
- make inquiries, at the Commission's request, into allegations made by members of the public that certain people with legal obligations of confidentiality or privilege had been used as a human source.

The following sections detail:

- the human source files identified and disclosed by Victoria Police relating to people associated with the legal profession
- the human source files identified and disclosed by Victoria Police relating to people from other professions or occupations that potentially hold legal obligations of confidentiality or privilege and that were dated between 2016 (after the completion of the Kellam Report) and 2019
- the inquiries undertaken by Victoria Police, at the request of the Commission, into allegations from members of the public that a lawyer or other person subject to legal obligations of confidentiality or privilege was used as a human source.

## HUMAN SOURCES: THE LEGAL PROFESSION

The Commission first learned that Victoria Police had identified seven human source files relating to people associated with the legal profession in January 2019, when it was forwarded a copy of a letter from Victoria Police to IBAC by the Department of Justice and Community Safety.<sup>14</sup> The letter, dated 18 December 2018, indicated that Victoria Police had identified:

- six human source files that required an assessment to determine whether there had been any possible breaches of legal professional privilege
- one human source file relating to a lawyer that had previously been disclosed by Victoria Police to IBAC in March 2018.<sup>15</sup>

In January 2019, the Commission issued a notice to Victoria Police requiring it to produce all records in relation to the use of any human sources with legal obligations of confidentiality or privilege other than Ms Gobbo.<sup>16</sup>

In March 2019 and August 2019, a further five human source files relating to people associated with the legal profession were identified by Victoria Police and disclosed to the Commission and IBAC.<sup>17</sup> In total, 12 human source files relating to people associated with the legal profession were identified by Victoria Police and disclosed to the Commission.

By late August 2019, Victoria Police had provided the Commission with hard copies of reconstructed Interpose human source files for these 12 people, with substantial redactions to de-identify them. Following a series of requests and a discussion of the issue in a public hearing in May 2020, Victoria Police ultimately allowed the Commission to inspect copies of the human source files with fewer redactions at Victoria Police's offices, so that a more meaningful review could be conducted.<sup>18</sup>

## The Commission's review of the 12 human source files

The 12 Victoria Police human source files relating to people associated with the legal profession were dated between 1990 and 2016. Some of those files related to human sources, or prospective sources, whose interactions with Victoria Police occurred before 2014, which is when significant changes were made to Victoria Police human source policies and procedures to implement the recommendations of the Comrie Review and the Kellam Report.

Given the significant changes to Victoria Police's human source management policies and practices in recent years, the Commission did not seek to undertake a full and comprehensive assessment of the 12 files' compliance with the Human Source Policy in place at the time. The primary focus of the Commission's review was to identify whether the use of any of these people as human sources may have resulted in the acquisition and use of confidential or privileged information and, if so, whether this may have affected criminal prosecutions or convictions.

### Scope of the review

To examine the 12 human source files, the Commission:

- reviewed the reconstructed human source files from Interpose prepared by Victoria Police
- considered additional information produced by Victoria Police, including copies of legal advice it had obtained
- examined issues in hearings that were closed to the public to protect the identity of the human sources or prospective human sources.

In relation to each human source file, the Commission's review focused on identifying whether:

- the human source or prospective source, by virtue of their occupation, was subject to a legal obligation of confidentiality or privilege, or had access to confidential or privileged information
- the source had potentially provided confidential or privileged information to Victoria Police
- any information provided by the source had been recorded in an IR and disseminated within Victoria Police
- any information provided by the source had been used in a criminal investigation or prosecution
- Victoria Police officers had turned their minds to any issues relating to the source's possible legal obligations of confidentiality or privilege
- Victoria Police had obtained legal advice to inform its decision making prior to the registration and use of the source.

### Summary of the human source files reviewed

A summary of the 12 human source files is outlined below. These files are numbered in the order provided to the Commission by Victoria Police.

One file dates back to 1990 and the other 11 files range from 2005 to 2016.

### Source file 1: 'Law clerk'

*Victoria Police file: 2009–2011*<sup>19</sup>

The person was recorded as a 'law clerk' who provided information to Victoria Police about criminal activity. They were first registered as a community source in 2009 and converted to a human source some months later.

Victoria Police advised the Commission that 27 IRs were generated and disseminated to the investigating taskforce from the information the source provided, and criminal charges were laid—at least in part—on the basis of that information.

Though initially described by Victoria Police as a 'law clerk', the source had a business relationship with a law firm, and it does not appear that they had access to confidential or privileged information in their role with the firm.

Based on the evidence available to the Commission, the source provided information to Victoria Police obtained through their personal associations and observations and it is unlikely that the source was subject to legal obligations of confidentiality or privilege.

### Source file 2: Legal secretary

*Victoria Police file: 2015*

The person was a legal secretary for a company (not a law firm) and was registered as a community source. They provided information to Victoria Police in relation to a personal associate.

Victoria Police advised that three IRs were generated and disseminated from the information provided by the source. Criminal charges were laid in relation to matters unrelated to the information provided.

As a legal secretary for a company, the source could have been subject to legal obligations of confidentiality and could have had access to confidential and privileged information.

Based on the evidence available to the Commission, the source provided information to Victoria Police obtained through their personal associations and observations.

### Source file 3: Court officer

*Victoria Police file: 2014*

The person was a court officer who provided information to Victoria Police in relation to another person's criminal activities. The court officer was not approved for registration as a human source, having been considered 'erratic' and at risk of disclosing that they were talking to police.

Victoria Police advised that two IRs were generated and disseminated from the information provided by the person, despite them not being approved for registration. One of the IRs led to further investigation by police, but no person was charged as a result of the information provided.

As a court officer, the person was subject to legal obligations of confidentiality and had access to confidential information.

Based on the evidence available to the Commission, the person provided information to Victoria Police obtained through their personal associations and observations.

#### **Source file 4: Self-proclaimed 'legal adviser'**

*Victoria Police file: 2015–16*

The person was a self-proclaimed 'legal adviser' and provided information to Victoria Police in relation to possible crimes being committed in their community. The person was not approved for registration as a human source; reasons for this included that they had no intention to provide information on a regular basis.

Victoria Police advised that two IRs were generated and disseminated from the information provided by the person, despite them not being approved for registration. No person was charged as a result of the information provided.

According to the Victoria Police file, the person provided advice and assistance to help others 'fix problems'. They did not have any legal qualifications; nor did they appear to have access to confidential or privileged information.

Based on the evidence available to the Commission, it is unlikely that the person was subject to legal obligations of confidentiality or privilege.

#### **Source file 5: Retired solicitor**

*Victoria Police file: 2015*

The person was a retired solicitor who provided historical information to Victoria Police in relation to their personal and professional associates. The person was not approved for registration as a human source due to personal reasons and their inability to provide accurate and timely information. Victoria Police's contact with the person lasted only a few days.

Victoria Police advised that no IRs were generated or disseminated from the information provided by the person, and no person was charged as a result of the information provided.

As a former solicitor, the person had legal obligations of confidentiality and privilege, and potentially still had access to confidential and privileged information.

Based on the evidence available to the Commission, it is not clear whether the information provided to Victoria Police was in contravention of the person's legal obligations or was obtained from their own personal associations and observations. Even if the person had provided confidential or privileged information to Victoria Police, there is no evidence before the Commission to indicate that the information was disseminated and used in the prosecution of a crime.

### Source file 6: Solicitor

*Victoria Police file: 2014*

The person was a practising solicitor who was approached by Victoria Police, while appearing at court, to provide information in relation to criminal activities. The person was not approved for registration as a source because, it appears that, upon review of the file, the senior officer identified that using a solicitor as a source could give rise to a conflict of interest and leave Victoria Police open to criticism if it became public knowledge.

Victoria Police advised that no IRs were generated or disseminated from the information provided by the person, and no person was charged as a result of the information provided.

As a practising solicitor, the person had legal obligations of confidentiality and privilege, and access to confidential and privileged information.

Based on the evidence available to the Commission, no information was provided to Victoria Police in relation to the person's clients. Even if the person had provided confidential or privileged information to Victoria Police, there is no evidence before the Commission to indicate that the information was disseminated and used in the prosecution of a crime.

### Source file 7: Lawyer

*Victoria Police file: 2011–12*

The person was a practising lawyer who was registered as a community source and assisted Victoria Police with its investigations, including by gathering information.

Victoria Police advised that two IRs were generated and disseminated from the information provided by the source. While criminal charges were laid in connection with a broader police investigation, there is no evidence before the Commission to indicate that the information provided by the source was used in the prosecution of a crime.

As a practising lawyer, the source had legal obligations of confidentiality and privilege, and access to confidential and privileged information.

Based on the evidence available to the Commission, the source provided information to Victoria Police obtained through their observations of people within their community.

### Source file 8: Court officer

*Victoria Police files: 2009–2010, 2012–13*

The person was a court officer who was first registered as a human source in 2009 and provided information to Victoria Police in relation to a personal associate.

Victoria Police advised that three IRs were generated and disseminated from the information provided by the source and criminal charges were laid as a result of the police investigation and the information provided by the source in 2009.

In 2012, the person again provided information to Victoria Police regarding a personal associate. On this occasion, they were not approved for registration as a human source. It appears this was due to incomplete documentation; for example, the risk assessment had not been properly completed. Victoria Police advised that no IRs were generated or disseminated from the information provided by the person in 2012.

As a court officer, the source was subject to legal obligations of confidentiality and had access to confidential information.

Based on the evidence available to the Commission, the source provided information to Victoria Police in 2009 and 2012 obtained through their personal associations and observations.

### **Source file 9: Personal assistant at law firm**

*Victoria Police file: 2012–13*

The person was a personal assistant at a law firm who was registered as a human source. They provided information to Victoria Police in relation to the criminal activities of their personal associates.

Victoria Police advised that 59 IRs were generated and disseminated from the information provided by the source and criminal charges were laid as a result of that information.

As a personal assistant at a law firm for several months at the beginning of their registration as a human source, the source was subject to legal obligations of confidentiality and likely had access to privileged and confidential information.

Based on the evidence available to the Commission, the source provided information to Victoria Police obtained through their personal associations and observations.

### **Source file 10: Lawyer**

*Victoria Police files: 2008,<sup>20</sup> 2014*

The person was a practising lawyer who first provided information to Victoria Police in 2008 in relation to a former client who was a person of interest to police. The person was not registered or approved as a human source—not because of issues with using a lawyer as a source, but because their assistance was considered limited and not required in the long term.

Victoria Police advised that six IRs are likely to have been generated and disseminated from the information provided by the person, despite them not being approved for registration. No person was charged as a result of the information provided by the person in 2008.

In 2014, the person provided further information to Victoria Police about a person of interest to police. At the time, the person made it clear to Victoria Police that they always intended to maintain legal professional privilege. The person was not registered or approved as a human source. This was due to a lack of cooperation, including their unwillingness to answer telephone calls from police; not because they were a practising lawyer.

Victoria Police advised that five IRs were generated and disseminated from the information provided by the person, despite them not being approved for registration. No person was charged as a result of the information provided by the person in 2014.

Victoria Police officers had identified in 2014 that using this lawyer as a human source could give rise to a conflict of interest and leave Victoria Police open to public criticism. That realisation came shortly after a newspaper article published on 31 March 2014 indicated that Victoria Police had used 'Lawyer X' (Ms Gobbo) as a human source. Despite some Victoria Police officers signalling an intention to withdraw from their engagement with the person, officers continued to engage with them over the following months.

As a lawyer, the person was subject to legal obligations of confidentiality and privilege and provided information to Victoria Police in relation to a person for whom they had previously acted. Victoria Police officers were also aware that the prospective source had previously acted for the person of interest.

Based on the evidence available to the Commission, the information provided to Victoria Police in 2008 and 2014 may have been obtained through the person's personal associations or during the course of their employment as a lawyer.

### Source file 11: Former solicitor

*Victoria Police files: 2005,<sup>21</sup> 2009*

The person was a former solicitor who first provided information to Victoria Police in 2005 in relation to various criminal activities. The person was registered as a human source but their use as a human source did not proceed, for reasons including that it was difficult for police to maintain communication with them.

Victoria Police advised that one IR was generated and disseminated from the information provided by the source in 2005, but no person was charged as a result of the information provided.

As a former solicitor, the source was subject to legal obligations of confidentiality and privilege, and potentially still had access to confidential and privileged information.

Based on the evidence available to the Commission, the information provided by the source to Victoria Police in 2005 appeared to have been obtained through their personal associations, not through their previous role as a solicitor. It is possible, however, that some of the information the source provided was obtained during their time as a solicitor.

The person was registered again as a human source in 2009. Victoria Police advised that seven IRs were generated and disseminated from the information provided by the source in 2009, but no person was charged as a result of the information provided.

Based on the evidence available to the Commission, the information provided by the source to Victoria Police in 2009 appears to have been obtained through the source's personal associations and observations, and not from their previous role as a solicitor. Even if the source provided confidential or privileged information to Victoria Police, there is no evidence before the Commission to indicate that it was disseminated and used in the prosecution of a crime.

### Source file 12: Solicitor

*Victoria Police file: 1990*<sup>22</sup>

The person was a solicitor who provided advice to Victoria Police and was registered as a human source to formally document Victoria Police's contact with them, even though it was not, in the traditional sense, a human source arrangement. The person may have been unaware that they were ever considered to be a human source.

Victoria Police advised that no IRs were generated or disseminated from the information the source provided, and no person was charged as a result of the information provided.

Based on the evidence available to the Commission, the source provided legal policy advice to Victoria Police, rather than information relating to the activities of any other person.

## Observations from the Commission's review

Of the 12 human source files reviewed, the Commission observed that:

- Two people were unlikely to have been subject to legal obligations of confidentiality or privilege and, on the evidence available to the Commission, it appears that they did not have access to confidential or privileged information during the time they provided information to Victoria Police.<sup>23</sup>
- 10 people were subject to legal obligations of confidentiality or privilege, or had access to confidential or privileged information, during the time they provided information to Victoria Police.

Of those 10 people:

- Eight provided information to Victoria Police that appeared to be of a personal nature or was not otherwise confidential or privileged information, such as legal policy advice.<sup>24</sup>
- Two may have been in a position to communicate confidential or privileged information to Victoria Police.<sup>25</sup>

Those two people, both practising lawyers at the time of their contact with Victoria Police, were not registered as human sources. In both cases, the police officers identified, at some point during their engagement with them, that the use of lawyers as human sources could give rise to a potential risk for Victoria Police, and a conflict for the lawyers. These were the only examples among the 12 files reviewed indicating that police officers had identified potential issues with the use of people with legal obligations of confidentiality or privilege as human sources.

## Disseminating information provided by people not registered as human sources

The Commission observed that Victoria Police generated and disseminated IRs from information provided by three people who had not been registered as human sources.<sup>26</sup> Two of those were subject to legal obligations of confidentiality or privilege:

- a court officer who provided information regarding their personal associations and observations in 2014
- a lawyer who may have provided privileged and confidential information in 2008 and 2014, though Victoria Police advised that no person was charged as a result of the information provided.<sup>27</sup>

The dissemination of IRs before the registration of a human source is approved, or where there is ultimately no approval, is not permitted under the current Human Source Policy.<sup>28</sup>

## Obtaining legal advice

None of the 12 human source files indicated that Victoria Police had obtained legal advice about the use, or prospective use, of any of those people as human sources. This is despite Victoria Police having received legal advice in October 2011 that raised concerns regarding the use of a lawyer, Ms Gobbo, as a human source. That legal advice led to the commissioning of the Comrie Review.<sup>29</sup> Of the 12 human source files reviewed by the Commission, nine related to periods of engagement with Victoria Police after October 2011.

The requirement under the Human Source Policy to obtain legal advice related to the use of human sources with potential legal obligations of confidentiality or privilege was not introduced until September 2014.<sup>30</sup> Even then, the requirement was limited to specific circumstances.

The Human Source Policy in 2014 only required the Human Source Management Unit (HSMU) to obtain legal advice from Victoria Police's Legal Services Department in relation to the quarantine or use of information obtained from a human source that 'may breach a professional obligation'.<sup>31</sup>

Three of the source files reviewed by the Commission were commenced on Interpose after September 2014, which is when the requirement to obtain legal advice came into effect.<sup>32</sup>

The Commission notes, however, that one of those files related to a source (a legal secretary) who provided information obtained from their personal associations and observations; one file related to a person (a self-proclaimed legal adviser) who was unlikely to have been subject to legal obligations of confidentiality or privilege; and one file related to a person (a retired solicitor) who was not used as a human source and no IRs were generated or disseminated from the information they provided.<sup>33</sup>

Consequently, while it would have been open for officers to obtain legal advice relating to these three source files, it was not required under the specific policy provisions operating at the time. There was no requirement to obtain legal advice simply because a prospective human source had an occupation that may have been subject to legal obligations of confidentiality or privilege.<sup>34</sup> This is now a mandatory requirement under the Human Source Policy.<sup>35</sup>

## Disclosure of a human source in 2020

In May 2020, Victoria Police advised the Commission of a lawyer who was used as a human source in 2019.<sup>36</sup> The information was provided to the Commission as a recent example of the operation of Victoria Police's compliance and audit functions of its human source policies. The source was not included in the 12 human source files reviewed by the Commission.

Victoria Police advised the Commission that in 2019, a lawyer contacted a police officer to provide information in relation to the potential criminal offending of their personal associates.<sup>37</sup> In early 2020, the officer submitted several IRs containing information derived from the lawyer, in which the officer claimed that the source of the information was either 'anonymous' or that it was provided by an unnamed member of the public. This was contrary to the Human Source Policy, which required a person to be named, or alternatively to be registered as a human source, before an IR is completed.<sup>38</sup>

Detectives reminded the officer that if information was being provided on a confidential basis, the officer needed to register the lawyer as a human source. When that registration process commenced and the officer entered the person's occupation into the Interpose system as 'lawyer', the HSMU was automatically notified.<sup>39</sup>

As a result, the matter was brought to the attention of the Victoria Police Human Source Ethics Committee (Ethics Committee), which requested:

- a full chronology of matters and the IRs generated
- legal advice
- that the HSMU complete a complaint/incident form and submit it to Professional Standards Command in respect of the actions of the officer, which could amount to a breach of Victoria Police policy.<sup>40</sup>

The Ethics Committee 'administratively approved' the dissemination of the IRs that had already been created and disseminated. As the officer and the handling team no longer sought to register the lawyer, the Ethics Committee did not approve their registration on an ongoing basis.<sup>41</sup>

Victoria Police considers that this human source file demonstrates an 'excellent example of its governance processes operating effectively'.<sup>42</sup>

## HUMAN SOURCES: OTHER OCCUPATIONS

As discussed in Chapter 4, in addition to the legal profession, a range of other professions and occupations are bound by legal or ethical obligations of confidentiality or privilege, including medical practitioners and journalists. It is difficult to identify all of these occupations, due to the wide range of legislation, regulations and professional codes of conduct that set out the relevant obligations of confidentiality. It is important to note, however, that a breach of confidentiality by a person is arguably less likely to affect a criminal prosecution or conviction than a breach of legal professional privilege.

To identify whether human sources in other occupations with legal obligations of confidentiality or privilege had been used by Victoria Police, the Commission asked Victoria Police to provide advice regarding the number of human source files relating to people with those obligations, as discussed below. Victoria Police undertook a process of identifying relevant human source files within its Interpose database.<sup>43</sup>

## Identifying other human source files

Due to the limitations of the Interpose system and because there is no automatic way to search and identify human sources who hold or potentially hold legal obligations of confidentiality or privilege, Victoria Police took a very broad approach to identifying relevant human source files. Broad searches were undertaken of the ‘occupation’ and ‘employer’ fields in Interpose; for example, sources described as ‘writers’ were considered potentially relevant to the ‘journalist’ profession, and sources described as ‘carers’ were considered potentially relevant to the ‘medical’ profession, regardless of whether a clear legal obligation of confidentiality or privilege could be identified.<sup>44</sup>

In March 2019, Victoria Police provided initial advice to the Commission that it had identified 285 human sources who may have been subject to legal obligations of confidentiality or privilege. The 285 sources had been used, or considered for use, by Victoria Police between 21 October 2008 (the earliest file created on Interpose) and 12 February 2019.<sup>45</sup>

Following that advice, the Commission initiated an audit of Victoria Police’s human source files.

## The Commission’s audit of human source files

The purpose of the Commission’s audit was to:

- inform the Commission’s assessment as to the adequacy and effectiveness of Victoria Police’s current human source management policies and practices, and its compliance with the recommendations of the Kellam Report, relevant to term of reference 3
- identify any issues arising out of Victoria Police’s use of other human sources with legal obligations of confidentiality and privilege, relevant to term of reference 5a.

### Scope of the audit

Term of reference 3 required the Commission to inquire into whether Victoria Police’s practices continue to comply with the recommendations of the Kellam Report. As discussed in Chapter 11, according to Victoria Police, the recommendations of the Kellam Report were incorporated into the Human Source Policy on 15 March 2016.<sup>46</sup> The audit therefore focused on human sources with potential legal obligations of confidentiality or privilege whose files were dated between 15 March 2016 and 30 September 2019, and assessed whether the files were compliant with the iteration of the Human Source Policy operating at the relevant time.<sup>47</sup>

Following Victoria Police’s initial advice that 285 files dated between October 2008 and February 2019 related to human sources who may have been subject to legal obligations of confidentiality or privilege, the Commission sought revised data from Victoria Police relating to files dated between March 2016 and September 2019. As noted above, Victoria Police’s process to identify these files was to search the ‘occupation’ and ‘employer’ fields in Interpose, using broad search terms. Consequently, in addition to capturing the specific occupations identified in the Kellam Report and Victoria Police’s Human Source Policy—doctors, parliamentarians, court officials, journalists and priests—the search also captured a range of other occupations.<sup>48</sup> For example, occupations under the ‘medical’ category included general practitioner, nurse, youth worker, social worker and therapist.

Lawyers and occupations associated with the legal profession were excluded from the audit as Victoria Police informed the Commission that it had separately disclosed these files, as discussed above.

Victoria Police provided audit data to the Commission in late 2019. In 2020, it identified additional relevant files after discovering that its human source records were incomplete. Of the active human source registration files in Interpose between 15 March 2016 and 30 September 2019, Victoria Police identified that 43 per cent did not have an entry in either or both of the 'occupation' and 'employer' fields.<sup>49</sup> These files were subsequently reviewed by Victoria Police, and the human source files they considered relevant to the audit were brought to the Commission's attention in early 2020.

Based on the data provided in 2019 and 2020, a total of 91 human source files were identified as being within the scope of the audit. Victoria Police provided the Commission with summary information for all 91 files, from which the Commission identified files to audit.

Victoria Police refused to provide the Commission with access to 11 human source files identified as relevant to the audit, claiming that the files were subject to a PII claim. This is discussed further below.

Of the remaining 80 files, 31 were selected for the audit where the summary information indicated:

- the human source or prospective human source's occupation was clearly subject to legal or ethical obligations of confidentiality or privilege;
- the information provided by the human source to police appeared to be connected with or obtained as a result of their occupation, or it was not clear from the summary whether this was the case; and/or
- there was insufficient detail in the summary information to describe the circumstances in which an individual had been used as a human source or considered for use as a source, or the nature of the information they had provided to police.<sup>50</sup>

Access to hard copy redacted versions of Interpose records for the 31 files was provided to Commission staff undertaking the audit. The 31 files included eight human sources, 22 community sources and one confidential contact. The files related to three professional categories: government, journalist and medical. These files are set out in Figure 10.1.

**Figure 10.1: The 31 files audited by occupation**



## Audit methodology

The Commission's audit involved reviewing the 31 reconstructed human source files from Interpose and assessing the contents of the files against requirements in place under Victoria Police's Human Source Policy operating at the time.

The audit focused particularly on compliance with policy requirements arising from the recommendations of the Kellam Report, along with other key policy safeguards designed to manage the risks of using human sources, including those with legal obligations of confidentiality or privilege. These included requirements for officers to:

- obtain approval for the registration of a human source before creating and disseminating IRs containing information provided by the individual<sup>51</sup>
- be 'mindful' that some human sources, as a result of their occupation, may be bound by duties of confidentiality, privilege or ethical or professional obligations; and to consider the legal and ethical implications when registering a human source<sup>52</sup>
- seek advice from the HSMU as to the method of handling and recording information from such human sources, and for the HSMU to obtain legal advice from Victoria Police's Legal Services Department<sup>53</sup>
- refer a matter to the Ethics Committee where information provided by a human source may be in breach of a legal obligation of confidentiality or privilege, to make a recommendation as to how the information and the source will be treated.<sup>54</sup>

## Observations from the Commission's audit

Of the 31 human source files subject to the audit, the Commission observed that:

- In 18 files, people had provided information to Victoria Police that had been obtained in their personal capacity; for example, information related to their personal associates—including family members and/or neighbours—or from their own personal observations.
- In 13 files, people had provided information to Victoria Police that had been obtained in the course of their employment. Based on the information provided, it does not appear advice was sought from Victoria Police's Legal Services Department in relation to any of these files, nor were these people subject to consideration by the Ethics Committee.

The Commission's review of these 13 human source files identified that in only seven of the 13 files did officers identify issues relating to confidentiality or privilege. The files where these issues were identified and the files where those issues were not identified, are discussed in turn below.

### Human source files where possible legal obligations of confidentiality or privilege were identified

The Commission observed that seven of the 13 human source files indicated that Victoria Police officers had identified issues relating to potential legal obligations of confidentiality or privilege.<sup>55</sup> These issues were identified by officers at various stages of the registration and approval process.

The seven human source files where potential legal obligations of confidentiality or privilege were identified by officers included people with occupations as a school counsellor, a prison employee and government workers.<sup>56</sup>

Examples of these files are outlined below.

### **Source file: School counsellor**

The person was a counsellor employed at a school. They were registered as a community source to help Victoria Police identify students subject to police investigations. In their professional role at the school, the person obtained information directly from students that could be subject to legal obligations of confidentiality.

It appears that no legal advice was obtained by Victoria Police and that the registration of the community source was approved without a referral to the Ethics Committee.

The risks associated with using the source were identified by Victoria Police early in the assessment process and discussed with the source, who had a clear understanding of their obligations and the limits on the information and assistance they could provide to police.

### **Source file: Prison officer**

The person was an employee within a prison who accessed information from prisoners—both directly, and from observations and prisoner conversations overheard by the person. They were not registered as a human source.

Given the nature of the person's employment, during the registration process, Victoria Police officers formed a view that providing information from prisoners may be in breach of a code of conduct. As a result, inquiries were conducted, which established that alternative avenues were available to the person to report the information to police (that is, through established information-sharing legislation and protocols). Accordingly, the person's registration was not approved.

The issues and risks associated with the person's obligations of confidentiality and/or a conflict of interest were identified and addressed accordingly by Victoria Police.

### **Source file: Government worker**

The person was a government-employed youth social worker who provided information to Victoria Police received directly from a client regarding their criminal associates. The client had provided that information to the person with the intention that it be passed to police.

The handling team considered potential obligations of confidentiality at the early stages of the registration process. In consultation with the person and their supervisor, the handler determined that provision of the information was in accordance with legislation enabling the relevant government department to share information with police for law enforcement purposes, noting that the information was provided by the person with the client knowing it would be passed to police. Accordingly, they were not registered as a human source.

The issues associated with potential legal obligations of confidentiality were identified and addressed by Victoria Police. It does not appear, however, that any legal advice was sought from Victoria Police's Legal Services Department, nor that the matter was considered by the Ethics Committee.

### Human source files where possible legal obligations of confidentiality or privilege were not identified

The Commission observed that for six of the 13 human source files where an individual was providing information to police obtained in the course of their employment, officers had not considered or identified any possible issues relating to legal obligations of confidentiality or privilege.

Upon review of the files, the Commission considered that five of the six files related to information provided by sources that did not appear to be subject to legal obligations of confidentiality or privilege. Rather, the information was gained from personal observations in the workplace or access to official records that, based on the nature of the information, would not have breached an obligation of confidentiality or privilege.

The remaining file related to a nurse who provided information about a patient. An obligation of confidentiality may have existed but was not identified by officers at any stage of the registration process. A summary of this file is outlined below.

#### Source file: Nurse

The person was a nurse who provided information to Victoria Police relating to the drug use of a patient they were treating. The person was not approved for registration as a human source, but this was not due to the possibility that the person was subject to legal obligations of confidentiality or privilege arising from their occupation.

Nurses are not bound by legal obligations of privilege; however, the nurse could have been subject to legal obligations of confidentiality, as the information provided to police was received directly from their patient, with the patient likely assuming that this information would be kept confidential.

The information provided to Victoria Police by the person appears to have been forwarded to investigators to assist them in obtaining a search warrant that was executed in relation to drugs of dependence. The information on the file suggested that no drugs were located and no further action resulted from the information provided.

Given the nature of the relationship between the person and their patient, and that the information provided was clearly obtained during the course of their employment, it is arguable that Victoria Police ought to have considered the potential obligations of confidentiality owed by the nurse to their patient and referred the matter to the Ethics Committee for consideration and obtained legal advice. There was no evidence, however, that the information provided by this person was used in the prosecution of a crime.

In a submission to the Commission, Victoria Police considered that the results of the audit:

*... demonstrate that members have generally been able to identify the existence of potential issues relating to legal obligations of privilege or confidentiality and that, with the possible exception of one source, there was no need for the position of the proposed sources to be considered by the [Ethics Committee]. This reflects the reality that most information provided by human sources is not subject to any legal obligation of [confidentiality] or privilege.<sup>57</sup>*

## Dissemination of information

From the information available to the Commission, it was not always possible to determine if IRs were completed or if information provided by the human sources was shared with investigators. The Commission observed that:

- for some files, IRs were not created or disseminated, as the registration of the human source was not approved or did not eventuate
- notations on other files demonstrated that information obtained from the human source was utilised by investigators or assisted in obtaining search warrants; however, it was not always clear how that information was shared; that is, through IRs or directly with investigators.

The Commission did observe some good, clear examples where IRs were appropriately de-identified to protect the confidentiality of the source's identity, and where Victoria Police officers took care not to disseminate IRs prior to the approval and registration of a human source.

## Human source files subject to a claim of public interest immunity

For 11 of the 91 human source files identified as being within the scope of the Commission's audit, Victoria Police provided the Commission with a confidential affidavit in support of a claim of PII.<sup>58</sup> It said these files were extremely sensitive.

Victoria Police did not provide these 11 files for viewing by the Commissioner or Commission staff conducting the audit; instead it provided brief summary information on each of the files and verbally briefed the Commission's Chief Executive Officer, answered specific questions in relation to the files, and produced advice from senior counsel.<sup>59</sup> The PII claim over the files was reviewed by 'independent senior counsel' for Victoria Police.<sup>60</sup>

The Commission understands that each file was subject to an internal review within Victoria Police, but that none of the files has been subject to an independent or external audit.<sup>61</sup>

## Further inquiries made in relation to the prospective use of a human source

In 2020, the Commission's review of documents produced by Victoria Police identified that a religious leader, who was potentially subject to legal obligations of confidentiality or privilege, may have provided information regarding possible criminal activity to Victoria Police as a human source in 2014.

In July 2020, the Commission issued a notice to produce to Victoria Police seeking the production of all documents, correspondence and legal advice relating to the use of, or any decision to use, that person as a human source.<sup>62</sup>

In response, Victoria Police produced a redacted copy of legal advice received in relation to the prospective use of the person as a human source, and following an additional request by the Commission, provided a copy of an IR detailing the information the person had provided to police regarding possible criminal activity.<sup>63</sup>

Victoria Police advised the Commission that this person was not registered as a human source and provided information on one occasion. That information was contained in the one IR produced to the Commission.<sup>64</sup> The Commission understands that no person was charged based on the information provided by the person in 2014.<sup>65</sup>

## HUMAN SOURCES IDENTIFIED BY MEMBERS OF THE PUBLIC AND MS GOBBO

In February 2019, the Commission invited members of the public and organisations to make written submissions relevant to the Commission's terms of reference.

The Commission received 27 submissions relevant to term of reference 5a. Those submissions detailed allegations from people alleging that their lawyer, or another person with legal obligations of confidentiality, was a human source. Most of those submitters alleged that their lawyer (or multiple lawyers) was a human source, and that their use as a human source by Victoria Police had affected the criminal investigation and/or prosecution of the submitter's case.

Some submitters also alleged that their case had been affected by the use of Ms Gobbo as a human source (in addition to alleging that their case was affected by another individual). Those submissions were also considered as part of the Commission's work on term of reference 1 and its identification of cases potentially affected by the conduct of Ms Gobbo as a human source.

Ms Gobbo herself also alleged that other lawyers may have been used as human sources.

### **Alleged human sources identified in public submissions**

In the submissions received:

- 43 people—comprising 41 lawyers, one court officer and one public servant—were alleged to have been human sources
- four of those lawyers were alleged to have been a human source by more than one submitter.

The detail provided by submitters to support their allegations varied. Some submitters provided reasons for their belief that a person was a human source, while other submitters suggested that their lawyer (for example) was a human source based on the inadequacy of legal assistance they believed they received or the interactions their lawyer had with prosecuting authorities during their trial.

Regardless of the detail provided in submissions, if the Commission was able to reasonably infer that a submitter believed a person with legal obligations of confidentiality or privilege is or was a human source, the Commission made inquiries into the allegations made.

Unlike the Commission's inquiries under term of reference 1, term of reference 5a did not require the Commission to inquire into and report on the extent to which cases may have been affected by the use of other human sources with legal obligations of confidentiality or privilege. The Commission's task under term of reference 5a required it to recommend measures to be taken to address any issues arising from Victoria Police's use of any such human sources, if required.

The inquiries the Commission made on behalf of submitters are discussed below.

## **Alleged human sources identified by Ms Gobbo**

On 10 December 2019, prior to Ms Gobbo giving evidence at the Commission's public hearings, the Australian Broadcasting Corporation (ABC) broadcast a televised interview with her on its 7.30 program.

During that interview, Ms Gobbo was asked whether she knew of other lawyers who had acted as human sources. She advised the ABC that she was aware of other lawyers, and at least one who was still practising.<sup>66</sup> Subsequently, Ms Gobbo provided the Commission with the names of two lawyers who she believed may have been used by Victoria Police as human sources.

The inquiries made by the Commission in relation to those two lawyers are discussed below.

## **Inquiries made into allegations made by members of the public and Ms Gobbo**

The Commission took steps to investigate the allegations made by members of the public and Ms Gobbo by seeking information from Victoria Police.

In December 2019, the Commission issued a notice to Victoria Police with a list of the names of 41 people identified by members of the public, including the two people identified by Ms Gobbo, requesting that Victoria Police produce all documents relating to the use or registration of any of those people as human sources.<sup>67</sup> The names of a further four people identified by members of the public were provided by the Commission to Victoria Police in May 2020, bringing the total number to 45.<sup>68</sup>

The Commission also asked Victoria Police to confirm whether any of the 45 people provided information to Victoria Police in possible breach of their legal obligations of confidentiality or privilege.<sup>69</sup> Subsequently, with the permission of submitters, brief details of some of the allegations made were provided to Victoria Police to further aid a search of their information systems.<sup>70</sup>

No evidence was produced to the Commission to indicate that any of the 45 people were used, considered for use or registered as human sources.<sup>71</sup>

The Commission was unable to ascertain whether any of the 45 people had ever provided information to Victoria Police in possible breach of their legal obligations of confidentiality or privilege. Information received from a human source is recorded in Victoria Police's Interpose system and there is no dedicated field in the system for officers to input information they consider may be subject to legal obligations of confidentiality or privilege, and no simple automated search function to retrieve such information.<sup>72</sup>

## **CONCLUSIONS AND RECOMMENDATIONS**

Term of reference 5a required the Commission to inquire into Victoria Police's use of human sources, other than Ms Gobbo, subject to legal obligations of confidentiality or privilege. In undertaking its task, the Commission sought to determine whether any such human sources had been used by Victoria Police, and if so, the manner in which they had been used. The Commission undertook a review of relevant human source files and, where necessary, examined any issues in private hearings.

While Victoria Police has used, or considered using, other human sources with legal obligations of confidentiality or privilege, there is no evidence before the Commission to indicate that Victoria Police's use of any of these sources resulted in the dissemination of information that may have affected the validity of any criminal prosecutions or convictions.

The Commission did identify some evidence of officers not complying with Victoria Police's Human Source Policy or where the Human Source Policy at the time was insufficient to prevent certain actions or manage certain risks. For example, the Commission observed some instances where IRs were disseminated before the registration of a human source was approved, or where there was ultimately no approval. This is not permitted under current Human Source Policy. Victoria Police advised the Commission that this should not have occurred, but that there were no adverse outcomes resulting from the dissemination of information.<sup>73</sup>

There was also evidence that officers might not have fully understood and addressed issues relating to obtaining and using confidential or privileged information from human sources.

In undertaking its inquiry into term of reference 5a, the Commission was heavily reliant on Victoria Police to identify and disclose relevant files. As detailed further below, the Commission also encountered numerous obstacles in obtaining access to necessary and relevant information. Consequently, the Commission's conclusions about Victoria Police's use of other sources with legal obligations of confidentiality or privilege need to be considered with these constraints in mind.

The challenges faced by the Commission mean that further work is needed to examine the use of certain human sources whose files were not provided by Victoria Police. Those challenges also demonstrate that, should any agency or inquiry be assigned responsibility for examining Victoria Police's use of human sources in future, that agency or inquiry must have full and unobstructed access to the information necessary for it to undertake this task effectively.

The Commission's conclusions and recommendations are set out in more detail below.

## **Issues affecting other criminal prosecutions or convictions**

The Commission reviewed 12 human source files associated with the legal profession and completed an audit of 31 human source files relevant to other occupations with possible legal obligations of confidentiality or privilege. Based on the limited information made available by Victoria Police, the Commission did not identify any evidence to suggest that Victoria Police's use of these people as human sources resulted in the dissemination and use of confidential or privileged information that may have affected the validity of any criminal prosecutions or convictions.

The Commission also received no evidence to substantiate allegations from members of the public and Ms Gobbo that 45 people subject to legal obligations of confidentiality or privilege were used as human sources.

## **Policy and procedural issues**

The Commission's review of the 12 human source files associated with the legal profession identified some shortcomings and inconsistencies in Victoria Police policy and practices at the time relating to the use of human sources. Key examples included officers:

- engaging people subject to possible legal obligations of confidentiality or privilege as human sources without proper identification or consideration of the risks and issues that the use of such sources could pose
- registering such people as human sources without seeking legal advice (though there was not a formal requirement to do so under Human Source Policy at the time)
- disseminating information received from people who were neither approved nor registered as human sources.

Only two of the 12 human source files demonstrated any evidence that officers had turned their minds to potential issues of confidentiality and privilege as part of the risk assessment and registration process.<sup>74</sup>

The Commission's audit of 31 human source files relevant to other occupations with possible legal obligations of confidentiality or privilege identified some evidence of officers turning their minds to issues relating to confidentiality or privilege, but this was not consistent across the files. Additionally, none of the files were referred for legal advice or consideration by the Ethics Committee. This may be due to a lack of clarity in the Human Source Policy at the time about the types of matters requiring legal advice and Ethics Committee consideration.<sup>75</sup>

The Commission's audit also suggested that there is a lack of understanding among officers about issues relating to obtaining and using confidential or privileged information from human sources. This corroborated themes and observations that emerged from other aspects of the Commission's work, including its focus groups with Victoria Police officers; evidence provided by witnesses at the Commission's hearings; and information produced to the Commission.<sup>76</sup>

As outlined in Chapter 12, Victoria Police most recently amended its Human Source Policy in May 2020.<sup>77</sup> Some of the changes introduced provide greater clarity about the requirements for legal advice, Ethics Committee consideration and the types of matters that must be referred to the Committee.

Changes to policy alone, however, do not ensure a greater understanding among officers about *why* the use of a human source with legal obligations of confidentiality or privilege may be problematic; nor a greater understanding of the effect that the use of information improperly obtained from these sources may have on individual criminal prosecutions and the effective operation of the justice system.

As discussed in Chapter 12, the Commission considers that changes to Victoria Police's policy framework must be accompanied by the training of all officers who work in human source management to:

- support their ability to identify potential legal obligations of confidentiality or privilege
- promote an understanding of the consequences of using improperly obtained confidential or privileged information.

The Commission also considers that changes to Victoria Police's policy framework and training must be supported by a governance and decision-making structure that provides robust internal oversight and clear accountabilities for decisions about the registration and use of human sources.

As discussed in Chapter 13, the Commission also considers that independent external oversight of Victoria Police's use of human sources is necessary to:

- enable regular inspection and monitoring of its use of human sources to encourage compliance with the Human Source Policy and detect any issues at an early stage
- promote community confidence in Victoria Police's use of human sources
- ensure that this high-risk area of policing is subject to independent scrutiny
- promote a culture of greater transparency and accountability to Government, the criminal justice system and the community, and continuous improvement within Victoria Police.

## Access to human source files subject to a claim of public interest immunity

During the Commission's audit of human source files, 11 files were not provided to the Commission for review due to a claim of PII. Victoria Police told the Commission these files were extremely sensitive.

Under the *Inquiries Act 2014* (Vic), a person to whom a royal commission has issued a notice to produce documents has a reasonable excuse not to comply with that notice if the information requested is the subject

of PII.<sup>78</sup> The challenges arising from Victoria Police's many PII claims over material relevant to the Commission's inquiry are discussed in Chapter 16.

In a submission to the Commission, Victoria Police considered that it would be unreasonable for the Commission to criticise it for 'upholding its legal responsibilities to the community by maintaining' its PII claim over these 11 files. It noted that it was open to the Commission to dispute the PII claim by referring the matter to the Supreme Court of Victoria for determination.<sup>79</sup>

The Commission notes Victoria Police's submission, and further that it is not in a position to assess or question the legitimacy of its PII claim. The Commission did not challenge Victoria Police's PII claim in the Supreme Court because, given time and budget constraints, it was impractical to do so.

The Commission maintains that it was disappointing that Victoria Police did not provide these human source files to the Commission to review, given the relevance of the files to the inquiry and the fact that the Commission had been specifically tasked to consider the use of such human sources under its terms of reference. This task could have been restricted to a few trusted people who fully understood their obligations of confidentiality, including the Commissioner. Other human source files and documents were provided to the Commission with redactions to information subject to PII claims. With these 11 human source files, however, Victoria Police did not provide the files or any relevant documents in those files, even in redacted form.

While Victoria Police provided the Commission with a brief summary and advice in relation to the 11 files, without full access or, at a minimum, redacted copies of the files, the Commission was unable to confirm whether the use of these human sources was appropriate, or whether it involved any acquisition or use of confidential or privileged information. The Commission understands that these 11 files have not been independently reviewed or audited by any other body for the purpose of identifying whether any of the human sources provided information to Victoria Police in possible breach of their legal obligations of confidentiality or privilege.

In Chapter 13, the Commission recommends that IBAC should be provided with new powers and functions to oversee Victoria Police's use and management of human sources. Though it is intended that IBAC will have the power to review Victoria Police's human source files, it will take time, potentially up to two years, to develop and implement the legislation necessary for IBAC to assume its proposed role.

The Commission considers that the 11 human source files subject to a claim of PII need to be reviewed as a priority. For this reason, the Commission recommends that the Victorian Government appoints, within three months, an independent person with suitable legal qualifications and experience to review the 11 human source files.

The review should identify whether the Chief Commissioner of Victoria Police should make a referral to the Victorian Director of Public Prosecutions (DPP) and/or the Commonwealth Director of Public Prosecutions (CDPP), if there is evidence to suggest that any criminal prosecutions were affected either because evidence was improperly obtained by Victoria Police from any of the 11 human sources, or because relevant evidence that should have been disclosed to prosecuting authorities and accused persons was not disclosed.

Any necessary security clearances and protocols should be arranged to ensure that the person appointed to undertake the review has full and unfettered access to the human source files and all relevant information.

The Commission expects that if the independent review recommends that a referral be made to the DPP and/or CDPP, a copy of the independent report and all relevant information should be provided to the appropriate prosecuting agency to enable them to consider whether Victoria Police's use of any of the human sources potentially resulted in miscarriages of justice.

**RECOMMENDATION 6**

That the Victorian Government, within three months, appoints a suitably qualified and independent person to review the 11 Victoria Police human source files subject to a claim of public interest immunity. The appointed person should have full and unfettered access to the human source files and report to the Attorney-General, the Minister for Police and the Chief Commissioner of Victoria Police on whether:

- a. any of the human sources provided information to Victoria Police in possible breach of their legal obligations of confidentiality or privilege
- b. any confidential or privileged information provided by the human sources was used or disseminated by Victoria Police
- c. a referral should be made to the Victorian Director of Public Prosecutions and/or Commonwealth Director of Public Prosecutions for further consideration, if there is evidence to suggest a prosecution or conviction was based on information improperly obtained by Victoria Police or may have been affected by the non-disclosure of relevant evidence.

## Victoria Police's identification and disclosure of other human source files

The Commission necessarily relied entirely on Victoria Police to identify relevant human source files and disclose those files to the Commission. These disclosures occurred at different—and sometimes late—stages of the Commission's inquiry. For example, Victoria Police:

- disclosed human source files associated with the legal profession to IBAC in December 2018, then disclosed additional files to the Commission in March and August 2019
- identified files relevant to the Commission's audit in 2019, before identifying additional relevant files in early 2020, after discovering that a large proportion of human source records on Interpose were incomplete.

On 26 November 2020, when this final report was going to print, Victoria Police disclosed to the Commission that it had identified further information relating to one of the 12 human source files associated with the legal profession. The Commission was unable to consider this new information.

System limitations within Victoria Police, and the Commission's inability to undertake its own independent search of the Interpose system, mean that the Commission is unable to provide assurance that every human source subject to a potential legal obligation of confidentiality or privilege was identified by Victoria Police and disclosed to the Commission. For example, the limitations of the Interpose system reportedly prevented Victoria Police from identifying sources relevant to the Commission's audit who were not themselves subject to legal obligations of confidentiality or privilege, but who provided information that may have been subject to such obligations.

The difficulty Victoria Police claimed to have in identifying relevant human source files and information points to issues within its record management, audit and system capability. These shortcomings were also evident in Victoria Police's disclosure of information to the Commission relating to the use of Ms Gobbo as a human source.

As discussed in Chapter 11, in October 2019, a number of enhancements were made to the Interpose system to assist officers in identifying and managing sources with possible legal obligations of confidentiality or privilege, and to better assist in managing compliance with policy timeframes. Those enhancements include prompts for officers when registering human sources to require them to consider whether information provided by a source may be subject to legal obligations of confidentiality or privilege.

The Commission considers that further enhancements to the Interpose system are required to support the identification of potentially privileged or confidential information. In Chapter 12, the Commission recommends that Victoria Police makes further changes to Interpose to enable the timely and accurate recording of the acquisition or use of any such information.

## **Access to human source files**

The Commission encountered a range of other challenges in obtaining access to files and information relating to Victoria Police's use of other human sources with legal obligations of confidentiality or privilege.

Despite the Commission having issued a notice to produce to Victoria Police in January 2019 requiring the production of all documents relating to the human source files associated with the legal profession, hard copy reconstructed human source files were not provided to the Commission until late August 2019.<sup>80</sup> Those files were heavily redacted by Victoria Police due to its claims of PII. As the Commissioner was not given access to the unredacted files, she was unable to determine the merits of those claims. Without full access to the files, the Commission could not satisfy itself that Victoria Police, in its use of such human sources, had appropriately considered issues around the use of confidential or privileged information.

Following negotiations with Victoria Police and discussion of the issue in a public hearing, the Commission was provided with access to view the human source files at Victoria Police offices, with some redactions removed in accordance with the Commission's request. That access was not provided until May 2020, some 16 months after the notice to produce was issued.<sup>81</sup>

Additionally, the Commission's audit of the 31 human source files relevant to other occupations with possible legal obligations of confidentiality or privilege required substantial discussion and negotiation with Victoria Police before Commission staff were provided with access to hard copies of redacted files. As noted above, the Commission was also unable to obtain access to the 11 files, due to Victoria Police's claim of PII.

The challenges in gaining access to human source files were heightened by Victoria Police responding to the Commission's requests for information in the form of confidential affidavits, with restrictions on which Commission staff were able to view the information.

In a submission to the Commission, Victoria Police said it granted the Commission appropriate access to relevant human source files as soon as practicable, given the security and PII issues; that Interpose records were difficult to convert into hard copy files; and that redactions were required to protect the identity of the human sources. Victoria Police submitted that it was necessary to approach the provision of information with 'extreme care' and that the risk of not doing so could result in someone being seriously harmed or killed. It noted that Victoria Police has legal and moral obligations to take reasonable steps to ensure that this does not happen.<sup>82</sup>

The Commission appreciates the critical need to protect the confidentiality of a human source's identity to prevent harm coming to them or those close to them. The challenges the Commission faced regarding timely and full access to human source files, however, underscore the need to provide assurance to the Victorian community that Victoria Police is using human sources appropriately and in accordance with relevant policies and procedures. It also raises the question, as discussed in Chapter 16, of whether the Inquiries Act should be amended to remove the application of PII to royal commissions.

In Chapter 13 of this final report, the Commission recommends that Victoria Police's use and management of human sources be subject to external oversight. It will be important that the agencies responsible for these oversight functions are provided with full and unfettered access to Victoria Police's human source files, with appropriate security protocols to facilitate access and protect highly sensitive information.

# Endnotes

- 1 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 78; Letter from Department of Justice and Community Safety to the Commission, 10 January 2019.
- 2 The Letters Patent were amended on 7 February 2019. The amendments to the Commission's terms of reference are discussed in Chapter 1.
- 3 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020.
- 4 See generally Letter from solicitors for Victoria Police to Solicitors Assisting the Commission (Annexure 3), 13 March 2019.
- 5 See Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 44, 15–16 [4.6].
- 6 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012); Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015).
- 7 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012) 20 (Recommendation 3); Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 86 (Recommendation 1).
- 8 See, eg, Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 70 [11.6], 71 [11.8].
- 9 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 71 [11.8].
- 10 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14924.
- 11 See Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 2 [1.1]–[1.2].
- 12 See Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 2, 12–14 [3.1]–[3.2].
- 13 Victoria Police's changes to its Human Source Policy dated 15 April 2020 came into effect in May 2020. Victoria Police also removed the category of 'juvenile source' from its Human Source Policy but the policy continues to provide separate guidance for the use of human sources under the age of 18 years: Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 20 [5.4]; Exhibit RC1529 Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 18–19 [88]–[93].
- 14 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 78; Letter from the Department of Justice and Community Safety to the Commission, 10 January 2019.
- 15 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 67 [8.28]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 78.
- 16 Notice to Produce served on Victoria Police, 23 January 2019.
- 17 Meeting with Victoria Police, 6 March 2019; Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 7 March 2019, 2; Meeting with Victoria Police, 7 August 2019.
- 18 See Transcript of Directions Hearing, 7 May 2020, 14847–9.
- 19 These dates record the period from when Victoria Police commenced the source file on Interpose until it formally deactivated the file. The dates do not necessarily reflect the period that a source was approved for use as a human source or used as a human source (for example, Victoria Police may have stopped using a source for a period before formally deactivating the file on Interpose).
- 20 Dates not recorded on Interpose as the file pre-dated the creation of the Interpose system.
- 21 Dates not recorded on Interpose as the file pre-dated the creation of the Interpose system.
- 22 Dates not recorded on Interpose as the file pre-dated the creation of the Interpose system.
- 23 These observations are made in relation to source files 1 and 4.
- 24 These observations are made in relation to source files 2, 3, 5, 7, 8, 9, 11 and 12.
- 25 These observations are made in relation to source files 6 and 10.
- 26 These observations are made in relation to source files 3, 4 and 10.
- 27 These observations are made in relation to source files 3 and 10.
- 28 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 10 [3.1].
- 29 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 75; Exhibit RC0962 Statement of Mr Gerard Maguire, 8 August 2019, 16 [74]–[76].
- 30 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 44, 16 [4.6].
- 31 See Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 44, 16 [4.6]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 37 [4.65].
- 32 These observations are made in relation to source files 2, 4 and 5. Three other source files (3, 6 and 10) were commenced in Interpose in 2014, but prior to September 2014, when the requirement to obtain legal advice came into effect.

- 33 These observations are made in relation to source files 2, 4, 5. Source files 2 and 4 indicated that IRs had been generated and disseminated from the information provided.
- 34 Responsive submission, Victoria Police, 20 September 2020, 14 [2.6]. Further changes to the Human Source Policy came into effect in March 2016, after the period to which the 12 human source files relate. The Human Source Policy in 2016 similarly only imposed a requirement for officers to seek legal advice if a human source with legal obligations of confidentiality or privilege voluntarily offered information to police that may be in breach of those obligations: Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 47, 14 [4.6].
- 35 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.4].
- 36 The information was in the form of a summary, provided to the Commission as an ‘example of operation of compliance and audit functions of human source policies’. The human source file itself was not reviewed by the Commission: Letter from solicitors acting for Victoria Police to the Solicitors Assisting the Commission, 1 May 2020, 1.
- 37 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission (Annexure), 1 May 2020, 1.
- 38 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission (Annexure), 1 May 2020, 1.
- 39 Victoria Police’s upgrades to its Interpose system in October 2019 is discussed in Chapter 11.
- 40 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission (Annexure), 1 May 2020, 1.
- 41 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission (Annexure), 1 May 2020, 2.
- 42 Responsive submission, Victoria Police, 20 September 2020, 15 [4.3].
- 43 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 13 March 2019, 5.
- 44 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission (Annexure 3), 13 March 2019.
- 45 The 285 human source files identified are additional to the 12 human source files associated with the legal profession: Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 13 March 2019, 5.
- 46 See Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 38 [4.70].
- 47 The date of 30 September 2019 was selected to enable to audit project to commence in October 2019.
- 48 See Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 86 (Recommendation 1); see Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 16 [4.6].
- 49 Email from Victoria Police to the Commission, 29 October 2019; Email from Victoria Police to the Commission, 11 November 2019.
- 50 Police officers were identified as human sources in the Interpose search of occupations connected with the ‘government’ category.
- 51 See Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 13 [3.1], [3.2], 21–2 [6.5]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 47, 14 [4.6], 18 [6.5].
- 52 See Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 16 [4.6]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 47, 14 [4.6].
- 53 See Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 17 [4.6]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 47, 14 [4.6].
- 54 The Human Source Policy in 2016–18 refers to the same committee as either the ‘Human Source Management Ethics Committee’ or the ‘Intelligence and Covert Support Command Ethics Committee’. In 2020, the Intelligence and Covert Support Command Ethics Committee was renamed the ‘Human Source Ethics Committee’: see, eg, Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 47, 14 [4.6]; Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 9 [1.20], 17 [4.6]; Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.4].
- 55 The 13 files indicated that four people were approved for registration as a human source.
- 56 Two files related to two separate registrations of the same human source.
- 57 Responsive submission, Victoria Police, 28 September 2020, 7 [5.5].
- 58 Confidential Affidavit, 25 February 2020.
- 59 Meeting with Victoria Police, 17 December 2019; Responsive submission, Victoria Police, 20 September 2020, 16 [4.10]. The Commission’s Chief Executive Officer was briefed by then Assistant Commissioner Neil Paterson, Acting Deputy Commissioner Stephen Fontana and senior counsel, in relation to 10 of the files and the security concerns relating to those files. Victoria Police identified a further file after the briefing.
- 60 Responsive submission, Victoria Police, 20 September 2020, 16 [4.10].
- 61 See Confidential Affidavit, 25 February 2020.
- 62 Notice to Produce served on Victoria Police, 7 July 2020.
- 63 Email from Solicitors Assisting the Commission to solicitors for Victoria Police, 2 September 2020; Email from Solicitors Assisting the Commission to solicitors for Victoria Police, 17 September 2020.
- 64 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 9 September 2020.

- 65 Email from solicitors for Victoria Police to Solicitors Assisting the Commission, 6 October 2020.
- 66 Australian Broadcasting Corporation, 'Transcript of interview between the Australian Broadcasting Corporation 7:30 Program and Ms Nicola Gobbo', December 2019, 63, produced by the Australian Broadcasting Corporation in response to a Commission Notice to Produce.
- 67 Notice to Produce served on Victoria Police, 23 December 2019.
- 68 Letter from Solicitors Assisting the Commission to solicitors for Victoria Police, 25 May 2020.
- 69 Notice to Produce served on Victoria Police, 23 December 2019; Letter from Solicitors Assisting the Commission to solicitors for Victoria Police, 10 February 2020; Letter from Solicitors Assisting the Commission to solicitors for Victoria Police, 25 May 2020.
- 70 For example, submitters who asked the Commission to treat their submission as anonymous or confidential were contacted and their permission was sought to provide Victoria Police with information from their submission. This information included their name and some brief details of their case, or a case about which they made a submission, and the allegation made.
- 71 See, eg, Confidential Affidavit, 16 January 2020.
- 72 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 1, 2 July 2020; Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 17 August 2020, 2.
- 73 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 10 [3.1]: see Responsive submission, Victoria Police, 20 September 2020, 15–16 [4.8].
- 74 Victoria Police's human source risk assessment and registration processes are discussed in Chapter 12.
- 75 This is discussed in Chapter 12.
- 76 Focus groups conducted by the Commission are discussed in Chapter 12.
- 77 Victoria Police's changes to Human Source Policy dated April 2020 came into effect on 4 May 2020: Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020.
- 78 *Inquiries Act 2014* (Vic) s 18(2)(c).
- 79 Responsive submission, Victoria Police, 20 September 2020, 16 [4.11].
- 80 At the time the notice to produce was issued to Victoria Police in January 2019, seven human sources associated with the legal profession had been identified by Victoria Police. The hard copy reconstructed Interpose files, together with other human source files that were later identified, were produced to the Commission on 27 August 2019: Notice to Produce served on Victoria Police, 23 January 2019.
- 81 See Transcript of Directions Hearing, 7 May 2020, 14847–9.
- 82 Responsive submission, Victoria Police, 20 September 2020, 18 [7.1]–[7.2].

# 11

## Victoria Police's implementation of the Kellam Report recommendations

### INTRODUCTION

Term of reference 3 required the Commission to inquire into and report on the adequacy and effectiveness of Victoria Police's processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, including:

- whether Victoria Police's practices continue to comply with the recommendations of the 2015 report commissioned by the Independent Broad-based Anti-corruption Commission (IBAC) entitled *Report Concerning Victoria Police Handling of Human Source Code Name 3838 (Kellam Report)*<sup>1</sup>
- whether current Victoria Police practices in relation to such human sources are otherwise appropriate.

The adequacy and effectiveness of Victoria Police's current processes for the use of human sources subject to legal obligations of confidentiality or privilege is discussed in Chapter 12. This chapter outlines historical changes made to Victoria Police's human source policies and examines its implementation of the Kellam Report recommendations.

As discussed in Chapter 1, the Kellam inquiry was the second confidential external review into the use of Ms Nicola Gobbo as a human source between 2005 and 2009. Led by the Honourable Murray Kellam, AO, QC on behalf of IBAC, the Kellam inquiry examined Victoria Police policies and practices relating to the management and use of Ms Gobbo as a human source.<sup>2</sup> The inquiry followed a series of previous reviews and investigations, from 2001 onwards, into Victoria Police's human source management practices.

The Kellam Report, finalised in February 2015, made 16 recommendations focused on improving Victoria Police's processes for the use of human sources, including the use of human sources where legal obligations of confidentiality or privilege may arise.

In examining Victoria Police's implementation of the Kellam Report recommendations, the Commission considered:

- the effectiveness and timeliness of implementation
- the extent to which Victoria Police's actions fulfilled the intention of the Kellam Report recommendations, and addressed the issues and shortcomings raised in the report
- the extent to which key recommendations were adequately embedded in practice through policy and procedural amendments and training.

Having reviewed the evidence, the Commission considers that Victoria Police implemented most of the Kellam Report recommendations through a series of amendments to its human source policies in 2015, 2016, 2018 and 2020, with some changes introduced in 2014 while the Kellam inquiry was underway. The changes included new requirements for officers to consult with the Victoria Police Legal Services Department prior to registering a human source with legal obligations of confidentiality or privilege, and to subject these registrations to a more rigorous approval process.

While Victoria Police has taken steps to strengthen its policy framework, many of these reforms were implemented in the past two years and remain untested. In particular, policy changes to apply greater safeguards to obtaining and using confidential or privileged information from human sources—directed at one of the most critical recommendations of the Kellam Report and previous reviews—were only introduced in May 2020, following advice from counsel representing Victoria Police during the Commission's inquiry.<sup>3</sup> As detailed in Chapter 12, the Commission has also identified that current human source management processes need further improvement.

The Commission also considers that some policy and procedural changes arising from the Kellam Report recommendations were introduced by Victoria Police in a manner that contributed to operational complexity and uncertainty, and could have been supported by additional guidance and training for police officers.

As noted above, the Kellam Report followed a series of internal and external reviews into Victoria Police's management of human sources. Many of these reviews made similar findings and recommendations about the need for more effective supervision, additional training and clearer policy requirements—some of which are also made by the Commission in this final report. The persistence of these issues over time suggests that, while Victoria Police has made substantial amendments to its policy over many years, this has not always resulted in improvements in operational practice.

The Commission considers that there are opportunities for Victoria Police to adopt a more robust and considered approach to policy development, implementation and change management, to ensure that future reforms to its human source management framework are considered carefully, communicated clearly and implemented effectively. This includes establishing clear processes for seeking and incorporating operational input, communicating changes across the organisation, and regularly reviewing and evaluating policy changes.

## DEVELOPMENT OF VICTORIA POLICE'S HUMAN SOURCE POLICY

Victoria Police's use of human sources is governed by an internal policy—the *Victoria Police Manual—Human Sources* (Human Source Policy), which outlines requirements for the registration and management of human sources and the information that they provide.<sup>4</sup>

In Victoria, as in other Australian and international jurisdictions, policies for the use and management of human sources by police have evolved significantly in recent decades. Evidence before the Commission indicated that, while today law enforcement agencies consider human sources to be organisational resources, prior to the 2000s, human sources tended to be managed and 'owned' by individual police officers, with little or no policy in place to govern their use.<sup>5</sup> Over time, reviews into the use of human sources and broader developments in policing increased awareness about the importance of protecting human sources, managing them ethically, and adhering to robust organisational policies and procedures.<sup>6</sup>

### Changes to and reviews of Victoria Police's human source management practices since 2003

In 2003, Victoria Police introduced the *Chief Commissioner's Instruction 7/03 Informer Management Policy*, the first comprehensive organisation-wide human source management policy that covered recruitment, registration, interaction, payment, deactivation and requests for assistance from human sources.<sup>7</sup> The policy was intended, among other things, to encourage greater transparency, professionalism and security at all stages of the human source management process.<sup>8</sup> Around the same time, Victoria Police established a centralised unit, now called the Human Source Management Unit (HSMU), with responsibility for overseeing the use of human sources managed by handling teams.<sup>9</sup>

Policy changes were introduced to reflect 'best practice' principles, such as maintaining a 'sterile corridor' where possible, to separate the management of a human source from the conduct of any investigations that used information obtained from the source.<sup>10</sup> The use of a sterile corridor was thought to attract a number of benefits, such as protecting the identity of human sources and protecting the integrity of police methodology.<sup>11</sup> Victoria Police also began issuing an 'Acknowledgement of Responsibilities' (AOR) to human sources in 2003, setting out the terms and conditions of their relationship with the police.<sup>12</sup> These policy changes, as they relate to the current human source management framework, are discussed in Chapter 12.

In 2004, following a pilot program, Victoria Police established the Dedicated Source Unit, which later registered and managed Ms Gobbo as a human source.<sup>13</sup> The Dedicated Source Unit was renamed the Source Development Unit (SDU) in 2006.

Further changes to Victoria Police's human source management policy were not made until 2007. At this time, Victoria Police established a module in its intelligence and case management system, Interpose, for the electronic management of human source files.<sup>14</sup> It also introduced specific requirements relating to the use of high-risk human sources (as determined in accordance with a risk assessment tool); for example, a requirement that handlers seek operational advice and assistance from the HSMU when engaging with such sources and that a sterile corridor be maintained at all times.<sup>15</sup> Risk assessment processes were also strengthened.<sup>16</sup>

Following incremental changes in 2008 and 2010, the next significant set of reforms to policy were introduced in 2014 in response to the Comrie Review, as discussed below.

Many changes to Victoria Police's human source management framework have arisen in response to internal and external reviews undertaken between 2001 and 2015. While focused on different events, officers and objectives, these reviews consistently highlighted failures, risks and deficiencies in Victoria Police's human source management policies and practices. Key themes arising from the reviews included:

- insufficient management and supervision of officers responsible for handling human sources, creating risks of misconduct and corruption<sup>17</sup>
- the development of inappropriate and sometimes corrupt relationships between human sources and police officers<sup>18</sup>
- insufficient information management controls and leaking of sensitive and secretive information to criminal networks<sup>19</sup>
- a lack of compliance with Victoria Police's human source policy among certain officers and units, including the use of 'unregistered sources'<sup>20</sup>
- a lack of sufficient safeguards and coverage of key issues within the policy framework<sup>21</sup>
- inadequate training of officers responsible for handling human sources.<sup>22</sup>

The findings of these reviews are summarised in Figure 11.1 below. Some of the reviews, including the Kellam Report, were not published at the time of their completion, but redacted versions were later released as part of the proceedings in the Supreme Court of Victoria relating to the use of Ms Gobbo as a human source.<sup>23</sup>

**Figure 11.1: Reviews into Victoria Police's human source management practices, 2001 to 2015<sup>24</sup>**

2001

**Internal review**

**Victoria Police, *Review of the Victoria Police Drug Squad (Purton Review)***

Identifies failings in the Victoria Police Drug Squad's handling of human sources, including corrupt relationships. The review recommends an organisation-wide information management system for human sources, the establishment of a dedicated source team, and regular audit and compliance monitoring to address critical risks.

2003

**Published external review**

**Ombudsman Victoria, *CEJA Task Force: Investigation into allegations of drug-related corruption – Interim Report***

Concludes that the Drug Squad 'used unstructured, secretive, unaccountable and sometimes unprofessional methods in handling [human sources]'. The report endorses the Purton Review's recommendations for improvements to human source management and the establishment of a dedicated source team.

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**2004****Internal review****Victoria Police, *Dedicated Source Handling Team's Project Report***

Acknowledges historical mismanagement of human sources and notes that a new policy was introduced in late 2003. References a new approach, the sterile corridor, whereby information is 'sanitised' before dissemination to investigation teams, to avoid revealing a human source's identity.

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**2004****Internal review****Victoria Police, *Review and Develop Best Practice Human Source Management Policy***

Finds that in comparison with other international and national law enforcement bodies, Victoria Police's use of human sources is 'primitive'. Notes there should be greater emphasis on training, competency assessments and raising awareness of good practice.

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**2005****Published external review****Office of Police Integrity, *Report on the Leak of a Sensitive Victoria Police Information Report***

Finds that copies of an information report containing statements by then human source, Mr Terrence (Terry) Hodson, had probably been circulated to criminals and their associates. Concludes that instructions for document security were 'part of a confusing array of instructions and policies relating to the management of [human sources]'.

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**2005****Published external review****Office of Police Integrity, *Investigation into the Publication of One Down, One Missing***

Examines the 2004 publication of a book authored by a serving Victoria Police officer, which disclosed extensive details of police operations, including about human sources. Notes that changes introduced in 2003 were expected to result in greater compliance but that 'a major shift in Force culture is required'.

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**2007****Published external review****Office of Police Integrity, *CEJA Task Force Drug Related Corruption – Third and final report***

Finds that the 'Drug Squad environment at the time included inadequate supervision with little or no accountability and lack of proper policies or procedures for ... managing [human sources]'. Notes that a new policy framework is in place for the management of human sources but requires continued monitoring to determine its effectiveness. These findings echoed those made in the second interim report of the CEJA Task Force Drug Related Corruption by the Ombudsman Victoria, published in June 2004.

2007

**Published external review****Office of Police Integrity, *Annual Report***

Refers to investigations into improper relationships between Victoria Police officers and human sources and concludes that there are 'critical gaps between the policy and how human sources are actually managed by regional police'.

2008

**Published external review****Office of Police Integrity, *Report on Investigation into Operation Clarendon***

Examines Victoria Police's involvement with former police officer and barrister Mr Kerry Milte in 2002. Finds significant deficiencies in Victoria Police's human source policies and notes that 'there were unacceptable delays in rectifying ... deficiencies and developing an appropriate framework for managing this important area'.

2010

**Internal review****Victoria Police, *Audit of Victoria Police Human Source Management Practices (CMRD audit)***

Examines 95 human source files and identifies a number of system, process and managerial shortcomings. Makes 26 recommendations to improve human source management practices.

2012

**Internal review****Victoria Police, *Covert Services Review***

Recommends that the unit primarily responsible for the use and management of high-risk human sources, the Source Development Unit (SDU), be immediately disbanded. Asserts that SDU staff had refused to accept the decisions of management on a number of occasions; did not consider the criminality of human sources; circumvented the rule of law; and refused to follow certain protocols, exposing human sources, the unit and organisation to risk.

2012

**Victoria Police commissioned confidential review****Neil Comrie, *Victoria Police Human Source 3838: A Case Review (Comrie Review)***

Identifies a range of concerns about processes and practices relating to the use of Ms Gobbo as a human source. Makes 26 recommendations focused on strengthening the use and management of human sources with legal obligations of confidentiality or privilege.

2015

**IBAC commissioned confidential inquiry****Murray Kellam, *Report concerning Victoria Police Handling of Human Source Code Name 3838 (Kellam Report)***

Examines the use of Ms Gobbo as a human source by Victoria Police and finds 'negligence of a high order'. Makes 16 recommendations, 11 of which are aimed at enhancing human source management practices.

## Reviews into the use of Ms Gobbo as a human source

Two of the reviews listed in Figure 11.1 examined the use of Ms Gobbo as a human source between 2005 and 2009 and focused particularly on issues arising from the use of human sources subject to legal obligations of confidentiality or privilege: the Comrie Review in 2012<sup>25</sup> and the Kellam Report in 2015.

The events that led to the Comrie Review and the Kellam Report are detailed in Chapters 1 and 6. The reviews are summarised below.

### Comrie Review

On 19 March 2012, Victoria Police engaged former Chief Commissioner Neil Comrie, AO, APM to undertake a confidential review of the use of Ms Gobbo as a human source.<sup>26</sup> The Comrie Review assessed the adequacy of Victoria Police's human source management policies that were in place in 2012 and applied those retrospectively to the handling of Ms Gobbo as a human source between September 2005 and January 2009.<sup>27</sup>

The Comrie Review identified a number of issues relating to Victoria Police's use of Ms Gobbo as a human source, including that risk assessment processes used were 'grossly inadequate', control measures were not complied with and registration processes were not as robust as they ought to have been.<sup>28</sup> The review concluded:

*Whilst there may be some issues of concern within the Victoria Police processes, by far and above the most significant issues of concern [regarding the use of Ms Gobbo as a human source] would seem to relate to unsatisfactory management and supervision of process.<sup>29</sup>*

On 30 July 2012, the Comrie Review made 27 recommendations for reform of Victoria Police processes relating to the use of human sources, many of which had also been made in an earlier 2010 audit conducted by Victoria Police's Corporate Management Review Division (CMRD) but had not been implemented.<sup>30</sup> The recommendations of the Comrie Review are detailed throughout this chapter insofar as they informed the Kellam Report recommendations.

### Kellam Report

On 10 April 2014, Victoria Police made a notification to IBAC regarding the use of Ms Gobbo as a human source.<sup>31</sup> Media at the time had reported on Victoria Police's alleged use of a human source named 'Lawyer X'.<sup>32</sup>

IBAC appointed Mr Kellam to confidentially examine the conduct of current and former Victoria Police officers identified in the Comrie Review in relation to their use of Ms Gobbo as a human source, and the application and adequacy of Victoria Police policies, control measures and management practices during the period 2005–09.<sup>33</sup>

The Kellam Report, completed on 6 February 2015, highlighted many of the same issues identified by the Comrie Review, including that:

- handlers had an imperfect understanding of the meaning and extent of legal privilege and confidential information<sup>34</sup>
- handlers were not subject to sufficient oversight in their dealings with Ms Gobbo<sup>35</sup>
- there was a lack of formal documentation that set out the key risks and boundaries of Victoria Police's relationship with Ms Gobbo<sup>36</sup>
- officers utilised their own subjective assessments to determine what was ethical and appropriate, in the absence of formal documentation.<sup>37</sup>

Mr Kellam considered that Victoria Police's receipt and use of confidential and privileged information provided by Ms Gobbo for the purpose of furthering police investigations against her clients, without having first obtained legal advice, was negligent.<sup>38</sup>

Mr Kellam also suggested that the absence of early legal advice and the failure to establish strict parameters around the acquisition and use of information from Ms Gobbo may have resulted from 'wilful blindness' on the part of the SDU, which managed Ms Gobbo, and by those responsible for its oversight.<sup>39</sup> He surmised that, had there been adequate documentation to govern the relationship between Ms Gobbo and Victoria Police and a regular review of the risks involved, the need for appropriate legal advice would likely have become obvious and the risks that materialised would have been significantly reduced, if not eliminated.<sup>40</sup>

Mr Kellam considered that any impropriety on the part of SDU officers was 'substantially mitigated by the lack of guidance and supervision' that they should have had from their superior officers.<sup>41</sup> He concluded that the:

*... conduct by individual police officers resulted not from any personal intention to act with impropriety on their part, but from what I consider to be behaviour constituting negligence of a high order on the part of those responsible for their supervision, guidance, instruction and management in the particular prevailing circumstances of obvious attendant risk.*<sup>42</sup>

The Kellam Report made 16 recommendations, many of which had been made earlier in the Comrie Review. These recommendations and the steps Victoria Police took to implement them are discussed below.

## IMPLEMENTATION OF THE KELLAM REPORT RECOMMENDATIONS

Since 2014, Victoria Police has made a series of policy changes to implement the recommendations of the Comrie Review and the Kellam Report. Victoria Police also provided information to the Victorian Government and IBAC about these changes in 2015 and 2018, as outlined in Figure 11.2.

**Figure 11.2: Key dates and events in Victoria Police's implementation of the Kellam Report recommendations, 2014 to 2020<sup>43</sup>**

### 2014

**1 July:** The Honourable Murray Kellam, AO, QC commences an inquiry on behalf of the Independent Broad-based Anti-corruption Commission (IBAC) into Victoria Police's use of Ms Nicola Gobbo as a human source and the adequacy of human source policies and risk management practices (Kellam inquiry).

**29 September:** During the Kellam inquiry, Victoria Police issues a new policy, the *Victoria Police Manual Policy Rules—Human Sources* (Human Source Policy), which reflects several changes in response to former Chief Commissioner Neil Comrie's 2012 confidential report entitled *Victoria Police Human Source 3838: A Case Review* (Comrie Review). As part of these policy changes, Victoria Police establishes the Intelligence and Covert Support Command Ethics Committee (Ethics Committee) to, among other things, provide advice and make decisions related to human source matters that have strategic implications or are likely to raise significant community interest issues.

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**2015**

**6 February:** Mr Kellam produces his confidential report entitled *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Kellam Report). His findings are consistent with several historical reviews and his recommendations focus on strengthening policies and procedures for the recruitment, handling and management of human sources, particularly where legal obligations of confidentiality or privilege may arise.

**9 June:** Victoria Police issues a further iteration of the Human Source Policy in response to the Kellam Report recommendations.

**26 June:** Victoria Police writes to IBAC and the Minister for Police advising that all the Kellam Report recommendations have been 'adopted'.

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**2016**

**15 March:** Victoria Police issues a further iteration of the Human Source Policy that addresses additional aspects of the Kellam Report recommendations.

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**2018**

**18 March:** IBAC writes to Victoria Police requesting an update on its implementation of the Kellam Report recommendations.

**8 May:** Victoria Police issues a further iteration of the Human Source Policy that addresses additional aspects of the Kellam Report recommendations.

**9 May:** Victoria Police writes to IBAC advising that an internal review identified the need for further changes to the Human Source Policy and that these changes have been made. Victoria Police also advises that all of the Kellam Report recommendations have been 'acquitted'.

**13 December:** The Victorian Government establishes the Royal Commission into the Management of Police Informants.

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**2019**

**17 February–9 March:** Then Assistant Commissioner Neil Paterson, APM, Intelligence and Covert Support Command, travels to the United Kingdom, Canada and the United States of America to better understand each country's legislation, policy and practices for the management of human sources, including those with legal obligations of confidentiality or privilege.

**20 August:** For the first time, an issue of legal privilege and/or confidentiality relating to a human source is referred to the Ethics Committee for consideration.

**12 December:** Victoria Police advises the Commission it is reviewing the Human Source Policy and has commenced several pilot initiatives to strengthen human source management processes and practices.

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**2020**

**28 February:** Victoria Police produces to the Commission a draft version of a new Human Source Policy. The draft contains provisions that address the Kellam Report recommendations more comprehensively and address issues and risks identified by the Commission during its inquiry. This policy is not implemented.

**31 March:** Victoria Police advises the Commission it intends to make further changes to the draft Human Source Policy.

**28 April:** Victoria Police produces to the Commission a new draft version of the Human Source Policy.

**4 May:** Victoria Police implements its revised Human Source Policy.

**7 May:** Deputy Commissioner Wendy Steendam, APM, Specialist Operations, appears before the Commission to provide evidence about Victoria Police's human source practices and its implementation of the Kellam Report recommendations. She advises the Commission that the Human Source Policy was revised in early 2020 after counsel appearing for Victoria Police at the Commission's inquiry provided advice on the policy.

In assessing Victoria Police's implementation of the Kellam Report recommendations, the Commission considered:

- the intent, scope and context of the Kellam Report recommendations (and of the Comrie Review recommendations, where they informed the Kellam Report recommendations)
- the steps taken by Victoria Police to implement the Kellam Report recommendations and when this occurred
- the extent to which, based on the evidence available to the Commission, key Kellam Report recommendations were embedded in policy and translated into Victoria Police's operational practice.

The Commission examined Victoria Police's implementation of the Kellam Report recommendations primarily against the 2018 version of the Human Source Policy, as this was the policy document in place when the Commission was established in December 2018, until 4 May 2020, when a new policy came into effect.<sup>44</sup> Where relevant, this chapter reflects additional changes that Victoria Police made to address aspects of the Kellam Report recommendations in the current Human Source Policy.<sup>45</sup>

The Commission's inquiry was also informed by its audit of other human source files (discussed in Chapter 10) and focus groups held with Victoria Police officers who have human source management responsibilities (discussed in Chapter 12).

As noted above, the Kellam Report made 16 recommendations. These covered four areas:

- safeguards associated with the use of human sources with legal obligations of confidentiality or privilege (Recommendation 1)<sup>46</sup>
- improvements to risk assessment practices (Recommendations 2 and 3)<sup>47</sup>
- changes to Victoria Police policies and procedures for the day-to-day management of human sources (Recommendations 4–10)<sup>48</sup>
- dissemination of the Kellam Report and amended Victoria Police policies to relevant parties (Recommendations 11–16).<sup>49</sup>

Below the Commission addresses these four key areas, and the adequacy and timeliness of the implementation of recommendations.

## Safeguards associated with legal obligations of confidentiality or privilege (Recommendation 1)

Recommendation 1 of the Kellam Report proposed that all Victoria Police human source policies, associated instructions and practice guidelines be revised to clearly reflect:

- a. *That special consideration applies to the obtaining, usage and management of information that may be subject to legal professional privilege and/or the subject of confidential information.*
- b. *That the utmost caution ought to be exercised before engaging a human source who may have conflicting professional duties (eg lawyers, doctors, parliamentarians, court officials, journalists and priests etc).*
- c. *That prior to the registration of any human source to whom a professional duty may apply, appropriate legal advice must be obtained.*
- d. *That handlers should not actively seek information from human sources to whom a professional duty may apply if such information would cause the human source to breach such a duty knowingly.*
- e. *That source handling and management duties provide no indemnification that would allow those performing such duties to disregard confidentiality notices that may be issued for IBAC, [Australian Criminal Intelligence Commission] or similar types of coercive hearings. Contravening such notices, in the absence of formal authority to do so, carries risk of criminal prosecution.<sup>50</sup>*

The Comrie Review made essentially the same recommendation in 2012, albeit referring only to privileged information, rather than privileged and/or confidential information.<sup>51</sup>

Mr Comrie advised the Commission that part (a) of this recommendation was intended to prompt the introduction of additional safeguards to manage the risk of obtaining privileged information from a human source, regardless of whether that person was themselves in an occupation bound by the relevant professional obligations.<sup>52</sup> For example, a person who is not a lawyer, but has access to privileged information and seeks to provide that information to police, would—if managed in accordance with Mr Comrie’s recommendation—be subject to special consideration and safeguards.

Mr Comrie also confirmed that the references to specific professions in part (b) of the recommendation were examples only and not intended to be exhaustive.<sup>53</sup>

As noted above, Mr Kellam endorsed these recommendations.

The nature and scope of legal obligations of confidentiality and privilege are discussed further in Chapter 4.

## Changes to Victoria Police's Human Source Policy

During the Kellam inquiry, and in response to the Comrie Review recommendations, Victoria Police updated its Human Source Policy in 2014 to include provisions stating that:

- *The HSMU must be contacted for advice when a member becomes aware, through the course of their duties, that*
  - *an active or deactivated human source is to be the subject of a compulsory hearing before an [authorised] examiner (OCE, ACC, IBAC etc.); and*
  - *the examination may adversely affect the human source or an investigation*
- ...
- *Where complex, legal, ethical or medical considerations are evident with a human source, such as the human source being occupationally bound by other duties ... advice must be sought from the HSMU.*
- *Members must be mindful that some sources as a result of their occupations may have professional obligations regarding confidentiality eg. Lawyers, Doctors and Clergy*
- *Handlers must consider the legal and ethical implications for the management of these sources and the information or intelligence they transmit in compiling their registration applications.*
- *Members must obtain advice from HSMU management as to the method of handling and recording of any such information or intelligence that may conflict with the professional obligations of the source*
- ...
- *The HSMU will obtain advice from Legal Services [Department] regarding the quarantine or use of information or intelligence obtained which may breach a professional obligation.*
- *The strict adherence of this policy is not intended to discourage the use of high-risk sources in such circumstances but to effectively manage the relationship and information obtained in accordance with acceptable legal and community standards.<sup>54</sup>*

In May 2018, Victoria Police further reframed its Human Source Policy to refer to the specific occupations included as examples in the Kellam Report and Comrie Review, described by Victoria Police as the 'Kellam Occupations'. Under the policy, Victoria Police officers were required to be 'mindful' that some sources may have professional or ethical obligations regarding confidentiality, specifically 'lawyers, doctors, parliamentarians, court officials, journalists and priests etc'.<sup>55</sup> Further, it prohibited handlers from actively seeking information from 'sources to whom a professional obligation may apply if such information would cause the human source to breach such a duty knowingly'.<sup>56</sup>

The updated Human Source Policy 2018 also required that applications to register human sources with legal obligations of confidentiality or privilege be referred to the Ethics Committee for review and a decision.<sup>57</sup> It also expanded instructions for officers on how to manage human sources who had appeared (or were to appear) before coercive or compulsory hearings before law enforcement agencies such as IBAC or the Australian

Criminal Intelligence Commission. This included advice on how to manage the risk of obtaining information subject to a confidentiality notice.<sup>58</sup>

The policy referred to the existence of certain laws and rules requiring confidentiality, such as legal privilege and the medical Hippocratic oath.<sup>59</sup> It did not include further guidance about how to identify confidential and privileged information or explain the laws and rules that apply to specific persons or occupations.

The Human Source Policy 2018 did not contain requirements relating to human sources in other occupations that may be subject to legal or ethical obligations of confidentiality or privilege (that is, occupations that fell outside the ‘Kellam Occupations’). Nor did the policy address the risks of obtaining or using confidential or privileged information from human sources who were not themselves in an occupation subject to legal obligations of confidentiality or privilege but were sharing such information (for example, a friend or family member of a lawyer who provided police with privileged information obtained from the lawyer).

In a statement to the Commission, then Assistant Commissioner Neil Paterson, APM, Intelligence and Covert Support Command, advised that a prospective human source who is not themselves bound by legal obligations of confidentiality or privilege, but who may access confidential or privileged information, would also be referred to the Ethics Committee under the Human Source Policy 2018.<sup>60</sup> In the absence of a clear policy direction, however, it is unclear how officers would have been prompted to make this referral.

## Changes to Victoria Police’s Interpose System

Victoria Police uses Interpose to record information relating to the registration of human sources, their contact with police officers, and officers’ dissemination of intelligence received from human sources.

In October 2019, Victoria Police updated Interpose to support the identification of legal obligations of confidentiality or privilege during the process of registering a human source.<sup>61</sup> These changes included a series of questions that officers must answer when seeking to register a person as a human source, as outlined in Box 11.1.<sup>62</sup>

### BOX 11.1: SYSTEM PROMPTS RELATING TO LEGAL OBLIGATIONS OF CONFIDENTIALITY OR PRIVILEGE

When commencing a new application in Interpose to register a human source, police officers involved in human source management are required to answer ‘Yes’ or ‘No’ to whether the prospective source could be subject to a legal obligation of confidentiality or privilege (whether they belong to one of the Kellam Occupations) or whether the registration could breach such an obligation. If ‘yes’ is selected, the officer is notified that the registration must be discussed with the HSMU and the officer cannot proceed with the application.<sup>63</sup>

Police officers are also required to answer questions relating to a prospective human source’s employment:

*Does this occupation have an obligation regarding confidentiality or privilege?*

*Could the information being provided during this registration be as a result of their occupation and lead to a breach of disclosure or confidentiality?<sup>64</sup>*

If the police officer selects ‘yes’ to these questions, a message appears indicating that the officer must contact the HSMU.<sup>65</sup>

The Interpose system also requires the officer to select the prospective human source's occupation from a drop-down field. This field was introduced in Interpose in 2006 but only became mandatory to complete in October 2019.<sup>66</sup>

Mr Paterson advised the Commission that the new features in Interpose enable the HSMU to actively monitor new registrations and to report any issues to the Central Source Registrar (CSR) and the Ethics Committee.<sup>67</sup>

Currently, Interpose does not support the identification of circumstances where a prospective human source is not in an occupation subject to legal obligations of confidentiality or privilege, but nonetheless has access to, and may provide, confidential or privileged information.<sup>68</sup>

Through focus groups with Victoria Police officers and an audit of selected human source files, the Commission considered the practical effect of the policy and system changes outlined above.

The Commission's audit highlighted inconsistencies in officers' identification and management of potential legal obligations of confidentiality or privilege when considering and registering human sources. In several cases, Victoria Police officers did not identify potential obligations of confidentiality or privilege; in other cases, these obligations tended to be identified later in the process by the HSMU or the CSR, rather than by the handler seeking to register the person.

Observations from the Commission's focus groups with Victoria Police officers are outlined in Box 11.2.

**BOX 11.2: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: SAFEGUARDS ASSOCIATED WITH LEGAL OBLIGATIONS OF CONFIDENTIALITY OR PRIVILEGE**

The Commission observed varied levels of understanding among focus group participants about legal obligations of confidentiality and privilege.

When asked about the applicable policy requirements, some participants mentioned the 'Kellam Occupations' listed in the Human Source Policy 2018, while many others mentioned occupations that did not feature in the policy and are not considered by Victoria Police to hold legal obligations of confidentiality or privilege; for example, bankers, financial services employees and school employees. Some participants indicated that these types of human sources would require approval of the Ethics Committee, yet this was not a requirement under the Human Source Policy 2018.

Some focus group participants said that in assessing whether legal obligations of confidentiality or privilege apply, it is necessary to consider the context in which a person came to obtain the information. Some participants cited hypothetical examples of lawyers providing information to police that they obtained in a social rather than a professional setting, suggesting it might be permissible to use the information in the former scenario.

Some participants with human source management and supervision responsibilities pointed to the inherent complexity of the concepts of confidentiality and privilege. Many questioned how far a legal obligation of confidentiality might extend, citing examples including hotel employees and security guards employed under contracts carrying commercial obligations of confidentiality.

According to participants, the Interpose system changes introduced in October 2019 assisted police officers to consider the origin of information provided by a registered or prospective human source. Most participants indicated that to identify a potential legal obligation of confidentiality or privilege, they would generally ask a prospective source about their current employment and/or where they obtained the information. One participant indicated that they would also ask the person about their previous employment. Several participants said that they would consult the HSMU if unsure about any issues relating to the use of confidential or privileged information.

## Changes introduced during the Commission’s inquiry

In May 2020, Victoria Police issued a new version of the Human Source Policy, which requires Ethics Committee approval not only for the use of prospective human sources employed within a ‘Kellam Occupation’—defined in the Human Source Policy as Category 1 sources— but also for people who have a ‘connection to’ one of these occupations.<sup>69</sup> These are people who:

- previously worked in a Kellam Occupation
- are likely to receive confidential or privileged information from someone in one of these occupations; or
- work in a similar occupation where they are likely to receive confidential or privileged information.<sup>70</sup>

These types of human sources are explained in Chapter 12. The Human Source Policy does not contain guidance on how to identify these individuals.

In a statement to the Commission in April 2020, Deputy Commissioner Wendy Steendam, APM, Specialist Operations, stated that training courses were being revised to assist officers with the identification of human sources with a legal obligation of confidentiality or privilege, as well as those with a connection to these persons.<sup>71</sup>

The current Human Source Policy removed the requirement introduced in earlier versions to address Recommendation 1(d)—that officers must not actively seek information from human sources that would knowingly cause the human source to breach a professional obligation. Ms Steendam told the Commission that, notwithstanding the removal of this provision, ‘the extensive registration approval requirements’ contained in the policy make clear to officers that in ‘almost no circumstances’ should they seek information from a human source with legal obligations of confidentiality or privilege.<sup>72</sup>

## Improvements to risk assessment practices (Recommendations 2 and 3)

Risk assessments are intended to identify all known or potential risks associated with a prospective human source, to help determine whether their registration and use as a human source is appropriate. Reviewing risk assessments on an ongoing basis after a human source has been registered helps to inform Victoria Police about whether to continue using the human source or deactivate them.<sup>73</sup>

Prior to the completion of the Kellam Report, Victoria Police’s Human Source Policy required risk assessments for each source registration to be documented, comprehensive, and subject to a formal and ongoing monthly review.<sup>74</sup> Despite this, as the Kellam Report notes, there were only two documented risk assessments on Victoria Police’s file relating to its use of Ms Gobbo as a human source between 2005 and 2009.<sup>75</sup>

Mr Kellam found that the risk assessments completed in relation to Ms Gobbo were insufficient, with neither referring to the potential ethical and legal issues associated with using a criminal defence barrister as a human source.<sup>76</sup> These observations were consistent with the findings of the Comrie Review.<sup>77</sup>

Both the Comrie Review and the Kellam Report recommended that Victoria Police develop a more robust human source risk assessment process to address identified shortcomings.

Recommendation 2 of the Kellam Report was based on a recommendation in the Comrie Review, which was in turn based on findings of an internal review of Victoria Police's human source management practices, conducted by the CMRD in 2010.<sup>78</sup>

Recommendation 2 stated that the:

*... lack of risk assessment insight, and lack of revisiting risk assessments must be the subject of sustained remedial action, and ... regular periodic review and regular audit and for more detailed and proximate oversight by senior officers than was the case under consideration in this inquiry.*<sup>79</sup>

Recommendation 3 of the Kellam Report required Victoria Police's risk assessment processes to be amended to ensure:

- a. *Clear particularisation of the purpose for engagement of the human source and instructions that if there is any change to this purpose, or any form of 'bracket creep' in original intentions, then a new and full risk assessment process must be undertaken.*
- b. *That where complex legal and ethical considerations are evident, such as the source being bound occupationally by other ethical responsibilities, then consultation must occur with the [Victoria Police] Director Legal Services or Victorian Government Solicitor prior to completion of the risk assessment process.*
- c. *That where other complex issues are recognised, such as health or mental health matters, then appropriate professional advice is obtained.*
- d. *That any risk assessment reliant on positive obligations to utilise a source must be subjected to the utmost scrutiny to reflect upon the issues of proportionality and necessity. Positive obligation reliance must be for [a] specific purpose only and approval must lapse upon fulfilment of this purpose. Where positive obligations are to be relied upon consultation must first occur with the [Victoria Police] Director Legal Services.*
- e. *That source registration cannot occur until the Local Source Registrar (LSR) has endorsed the risk assessment document to indicate their satisfaction that all perceivable risks have been identified, that the risk controls are sufficient and that any change to risk profile must trigger a new risk assessment process.*
- f. *That for high-risk source cases the [LSR], as a component of the monthly inspection process, must endorse current risk assessments to reflect that no new risks have arisen that would require a revised risk assessment being conducted and that the current risk assessment remains fit for purpose. The LSR must also document the checks and inquiries undertaken in order to make such a determination.*
- g. *That for high-risk source cases there is sufficient capability and capacity to service the relationship and maintain reporting requirements.*<sup>80</sup>

The concept of 'positive obligation' is explained below.

According to Victoria Police, all aspects of these recommendations were implemented through:

- changes to the Human Source Policy in September 2014
- a revised 'Human Source Risk Assessment' template implemented in May 2015
- clarifying amendments incorporated in the Human Source Policy 2018.<sup>81</sup>

Under both the Human Source Policy 2014 and Human Source Policy 2018, human sources with occupations attracting legal obligations of confidentiality or privilege were automatically regarded as high-risk.<sup>82</sup>

The Human Source Policy 2018 required:

- Risk assessments to clearly articulate the purpose for engaging a human source and a full new risk assessment to be undertaken, if there was any change to that purpose or any movement from original intent.<sup>83</sup>
- Decisions regarding human source management that had strategic implications, involving complex ethical, legal or medical issues, to be referred to the Ethics Committee for consideration, which could obtain relevant legal advice.<sup>84</sup>
- As part of the approval process for human sources, advice to be obtained from the HSMU where complex medical considerations were evident or where a human source had medical or mental health issues. In those circumstances, the HSMU was required to obtain advice from a medical officer or psychologist.<sup>85</sup>
- Advice to be obtained from the HSMU where a registered human source, who was in a position to which confidentiality obligations or professional privilege applies, voluntarily offered information to police that was or appeared to be in breach of that privilege. The HSMU was required to obtain legal advice.<sup>86</sup>

Other aspects of Recommendation 3 and the steps Victoria Police took to implement the recommendation are outlined below.

## **'Positive obligation'**

As noted above, the Comrie Review and Kellam Report recommended that Victoria Police's revised processes ensure that risk assessments relying on a positive obligation to use a human source 'must be subjected to the utmost scrutiny to reflect upon the issues of proportionality and necessity'.<sup>87</sup> The concepts of necessity and proportionality are discussed below.

In the context of risk assessments, a positive obligation arises where Victoria Police considers it has a duty to act on information for the broader protection of the community.<sup>88</sup>

The term was first referred to in the Comrie Review when detailing the two documented risk assessments on file for Ms Gobbo.<sup>89</sup> The Comrie Review suggested the content of these risk assessments could imply that Victoria Police was prepared to justify its engagement of Ms Gobbo regardless of any recognisable moral and legal barriers or other risks.<sup>90</sup> It noted a provision of a policing manual used at the time as a possible basis used by officers to justify the views articulated in the risk assessments related to Ms Gobbo's registration and use as a human source. This provision read:

### *Positive obligation to use or register source*

#### *a. Will the decision not to use or register the Human Source increase the risks to the public?<sup>91</sup>*

Mr Comrie considered that this provision was poorly and incompletely expressed and that a positive obligation to act on information (that is, to protect the community) should not be interpreted as giving just cause to override

other considerations, such as the legality of actions.<sup>92</sup> Both the Comrie Review and Kellam Report recommended that risk assessments that rely on a positive obligation to register a human source must be for a specific purpose only, that approval must lapse upon fulfilment of that purpose and that consultation must first occur with the Director of Victoria Police's Legal Services Department.<sup>93</sup>

The recommendation applied to risk assessments relying on a positive obligation in respect of *any* human source. It was not directed specifically to those human sources subject to legal obligations of confidentiality or privilege.

On 26 June 2015, in its reporting on the implementation of the Kellam Report recommendations, Victoria Police advised IBAC that it understood that a positive obligation 'relates to a need to register a human source in circumstances where a failure to do so could result in serious harm to members of the public, even though the source may represent an unacceptable risk in normal circumstances'.<sup>94</sup>

The Human Source Policy 2015 did not refer to the term positive obligation. The Ethics Committee's original terms of reference, dated 19 March 2015, referred to its role in reviewing the registration of human sources in cases where a positive obligation exists, though this provision was later removed.<sup>95</sup>

The term was first explicitly referenced in the Human Source Policy 2018.<sup>96</sup> In place until 4 May 2020, the policy contained the following provision:

*The definition of positive obligation is 'where information is provided by a source who is bound by legislation or rules of their profession (i.e. legal/professional privilege, medical Hippocratic oath) or provided in circumstances where Victoria Police would not normally accept the information, but which is of such high community impact that it is proportionate and necessary to be utilised'.<sup>97</sup>*

The policy also specified that where a positive obligation applies, legal advice is to be obtained, and decisions are to be escalated to the Ethics Committee for endorsement.<sup>98</sup>

The Human Source Policy 2018 did not include further information or guidance about the term or how officers responsible for human source management were expected to identify the existence of a positive obligation.

In late 2019, Mr Paterson advised the Commission that Victoria Police intended to remove the term 'positive obligation' from its Human Source Policy because it was not well understood by officers.<sup>99</sup> The term was removed in May 2020.

Although the current Human Source Policy does not specifically refer to a duty on Victoria Police to act on information provided by a human source, it refers to a category of people whom Victoria Police 'would not ordinarily register' but whom an officer wants to register because the information is of 'extraordinarily high value'.<sup>100</sup> The Human Source Policy does not define information that is of 'extraordinarily high value'.

## Assessment of necessity and proportionality and human rights

In his report, Mr Comrie considered that:

- any positive obligation identified by Victoria Police needed to be considered against whether it was necessary and proportionate to register and use a human source
- in order to undertake a meaningful assessment of necessity and proportionality, the reasons for registering a source and the purpose of doing so would need to be documented.<sup>101</sup>

The Comrie Review drew upon the concepts of necessity and proportionality that apply to the United Kingdom's human source management framework, which operates alongside statutory human rights obligations.<sup>102</sup>

These concepts are broadly comparable with Victoria Police's obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) to ensure that a 'human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'.<sup>103</sup>

The concepts of necessity and proportionality first appeared in Victoria Police's Human Source Policy in 2018. As noted above, a provision was introduced into the policy to require Ethics Committee approval in cases involving complex legal, ethical or medical issues, to ensure that registrations of such human sources were necessary and proportionate.<sup>104</sup> No further information was included to define these terms or to explain how police officers ought to have considered these concepts in conducting risk assessments of prospective human sources.

In her evidence to the Commission, Ms Steendam stated that officers' obligations to consider human rights and comply with the Charter are also set out in the *Victoria Police Manual Policy Rules—Human Rights Equity and Diversity Standards* (Human Rights Standards).<sup>105</sup>

The Human Rights Standards explain that when making decisions, officers must consider whether:

- there is a reason for acting and under what law or authorisation the action will occur
- police action will protect or limit human rights
- any limit to human rights is reasonable and can be justified in the circumstances, including having regard to whether the limitation is specifically authorised by law and whether it is for a legitimate purpose
- the limitation is necessary and proportionate to the intended goal
- there is another reasonable way of achieving the goal that is less restrictive of human rights and whether it can be done better or differently.<sup>106</sup>

The 2014, 2015, 2016, 2018 and 2020 versions of the Human Source Policy list various policy and procedural documents that are related to and should be read in conjunction with the Human Source Policy. The Human Rights Standards are not listed.

Victoria Police's human rights obligations in the context of human source management practices are discussed further in Chapter 12.

## Review of risk assessments

Recommendation 3(e) and 3(f) of the Kellam Report were specifically targeted at strengthening supervision and internal oversight of risk assessments.

During the Kellam inquiry and in response to the Comrie Review, Victoria Police amended the Human Source Policy in September 2014 to require the Local Source Registrar (LSR) to:

- assess the suitability of a prospective human source for registration
- review the risk assessment to make sure it is comprehensive, evaluates potential and identified risks and indicates that appropriate mitigation strategies are in place
- review the AOR
- make a recommendation about approval of the registration, taking into consideration all factors identified in the human source registration file
- document the reasons for their recommendation.<sup>107</sup>

Additional changes introduced in March 2016 required LSRs to ensure risk assessments were complete within timeframes specified in the Human Source Policy. They also required the LSR to endorse that the risk assessment

remained fit for purpose on a monthly basis and in doing so, record in Interpose the 'checks and inquiries undertaken in order to make such a determination'.<sup>108</sup>

Information provided to the Commission during its inquiry indicated that low compliance with policy requirements relating to risk assessments and the ongoing review of assessments was an area of concern to Victoria Police. A draft internal strategy document prepared in 2018 pointed to perceptions within Victoria Police that the risk assessment process was bureaucratic and contributed to police officers running human sources 'off the books'—that is, deciding not to register people as human sources but nonetheless engaging with them as though they were human sources.<sup>109</sup>

The Commission considered the practical impact of the changes to Victoria Police's risk assessment processes through its audit of selected human source files and focus groups with Victoria Police officers.

Observations from the Commission's audit and focus groups are outlined in Boxes 11.3 and 11.4.

### **BOX 11.3: OBSERVATIONS FROM THE COMMISSION'S AUDIT OF HUMAN SOURCE FILES: RISK ASSESSMENTS**

As discussed in Chapter 10, the Commission conducted an audit of 31 human source files relating to people with occupations potentially subject to legal obligations of confidentiality or privilege, such as nurses and government workers. Lawyers and people associated with the legal profession were excluded from the audit as those files were separately disclosed to the Commission for review.

The Commission observed that the 31 files audited were generally compliant with the policy requirement for the completion of a risk assessment before registering a human source. In some cases, the Commission could not determine compliance with certain risk assessment requirements because documents in the files were undated.

Of the 31 human source files audited by the Commission:

- 28 files had risk assessments completed and uploaded to Interpose, and for the remaining three files, there were reasonable explanations for the absence of the risk assessment
- 24 included a risk assessment that appeared to appropriately address all areas of risk
- 26 had risk assessments endorsed by senior officers, as required under the Human Source Policy.

The level of detail recorded in risk assessments, however, ranged from minimal to comprehensive, as did the comments recorded on file by senior officers, including the LSR.

The Commission's audit confirmed that, in line with its internal oversight and monitoring role, the HSMU reviewed human source files to determine compliance with policy requirements. The time taken by LSRs to review source files was among the issues identified by the HSMU. This led to remedial action, including the suspension of files until the compliance issues were addressed.

#### **BOX 11.4: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: RISK ASSESSMENTS**

##### ***Positive obligation***

Victoria Police officers involved in the Commission's focus groups reported varying levels of understanding of the term 'positive obligation' and its relevance to decisions about whether to register a human source. Some officers identified that the term relates to circumstances where Victoria Police would be obliged to act on certain information; others considered that it refers to legal obligations of confidentiality or privilege held by a human source; others considered that it refers to an individual's obligation or ability to report certain matters to Victoria Police (for example, under mandatory reporting obligations that exist in relation to child abuse and neglect, and information-sharing legislation and protocols that enable government agencies to share information with police if there is a law enforcement purpose).

Most focus group participants agreed there was a lack of clarity about the term 'positive obligation' and indicated it would be helpful to have the term and associated requirements clarified.

##### ***Assessment of necessity and proportionality***

Focus group participants informed the Commission that while they had received general training on human rights, the human source training courses did not cover human rights or the principles of necessity and proportionality in detail.

##### ***Review of risk assessments***

Some focus group participants indicated that while certain LSRs review risk assessments in detail, this is not practised consistently. Many officers said it was common for LSRs to not review risk assessments at all.

Participants in the LSR focus group indicated that when reviewing risk assessments, they consider the handler's level of knowledge and experience in deciding how much oversight and scrutiny is necessary.

Officers perceived that the LSRs' ability to undertake a thorough review of risk assessments was diminished by competing operational priorities and responsibilities; a view that was supported by the LSR participants. Some officers considered that LSRs had limited knowledge of human source management and had not received sufficient training, resulting in a deferral to the handling team on compliance with policy requirements, such as the completion of comprehensive risk assessments. Some LSR participants agreed that they would generally defer to the judgement of handlers and controllers on issues that relate to the risk assessment but noted that they would perform a more thorough review in some cases; for example, if the prospective source was a member of the legal profession.

## **Changes introduced during the Commission's inquiry**

The Human Source Policy issued in May 2020 contains some guidance for police officers about human rights relevant to human source management.<sup>110</sup> The Ethics Committee's current terms of reference also outline the factors taken into account when considering the proposed registration of a human source and Victoria Police's human rights obligations.<sup>111</sup>

On 30 October 2019, Mr Paterson approved a pilot program to trial a dynamic risk assessment tool for human sources to assist in identifying and managing changes in a human source's risk once they have been registered.<sup>112</sup>

Victoria Police also informed the Commission that it is updating its initial risk assessment template, with the intention to have it fully implemented by December 2020.<sup>113</sup> These untested aspects of Victoria Police's practices are discussed further in Chapter 12.

## Changes to Victoria Police policies and processes for the day-to-day management of human sources (Recommendations 4-10)

Recommendations 4–10 of the Kellam Report related to changes to Victoria Police policies and processes for the day-to-day management of human sources; in particular:

- preparation of an AOR
- mental health and wellbeing of a human source
- tasking of a human source
- dissemination of Information Reports (IRs)
- independent review of high-risk human source files and records
- engagement of a human source by other police officers
- transition of a human source to a witness.

These recommendations are discussed in turn below.

### Preparation of an Acknowledgement of Responsibilities

An AOR has been required under Victoria Police policy since 2003. As noted earlier in this chapter, an AOR is issued to human sources and sets the boundaries of the relationship between Victoria Police and the human source.

The Kellam Report noted that the unexplained absence of an AOR to govern the relationship between Ms Gobbo and Victoria Police 'meant that multiple persons dealing with the source were required to utilise their own, possibly differing, subjective assessments in determining what was ethical and appropriate in any particular circumstance'.<sup>114</sup>

Recommendation 4 of the Kellam Report required:

*That human source policies and instructions reflect that the sufficiency of the AOR must be the subject of constant evaluation, with additional instructions being documented and reinforced with the source as may be necessary.*<sup>115</sup>

The Comrie Review had previously made the same recommendation.<sup>116</sup>

Victoria Police advised that this recommendation was initially implemented in 2014 by an amendment to its Human Source Policy.<sup>117</sup> Further clarifying amendments were made in 2015 and 2018.<sup>118</sup>

The Commission's review of Victoria Police's policy framework indicated that this recommendation appears to have been implemented consistently with the intention of the Kellam Report recommendation.

## Mental health and wellbeing of a human source

The Kellam Report noted that then Assistant Commissioner Simon Overland, APM and all members of the SDU involved in the management of Ms Gobbo were aware that she had provided Victoria Police information that was confidential or privileged.<sup>119</sup> Despite this, the ‘majority of those members considered that the issue was a matter for which [Ms Gobbo] bore ultimate responsibility’, while also recognising that the existence of mental health issues may have impaired Ms Gobbo’s judgement.<sup>120</sup>

Indeed, at one point, officers had identified that a psychological assessment and review of the viability of using Ms Gobbo as a human source was needed, although this assessment did not eventuate.<sup>121</sup>

Consequently, Recommendation 5 of the Kellam Report required:

*That policies and procedures are developed to guide actions where significant psychological issues are apparent or are perceived to exist with a human source. These policies and procedures must ensure escalation of such issues to source registrar level and also ensure that where appropriate professional psychological advice is obtained and given proper regard.<sup>122</sup>*

Victoria Police advised that this recommendation was implemented in March 2016 through the following amendment to its Human Source Policy:

*Where significant psychological or medical issues are apparent or are perceived to exist at any stage of the human source registration or management process HSMU must seek advice from [Victoria Police’s] Psychology Services or a Forensic Medical Officer at [the Victorian Institute of Forensic Medicine] and provide that advice both to the LSR and CSR for consideration and proper regard.<sup>123</sup>*

The above advice was also reflected in the Human Source Policy 2018. Neither policy included further information about the purpose of this advice or how police officers should consider any issues of consent and confidentiality that might emerge.

In May 2020, Victoria Police introduced a ‘Mental Health Functioning Screen’ to assist police officers in identifying potential indicators that may suggest a prospective human source has a serious mental health condition. While this is consistent with the Kellam Report recommendation and appears to provide a more robust framework for considering and responding to potential mental health issues, the Mental Health Functioning Screen is a new and untested aspect of Victoria Police’s policy framework.

Observations drawn from the Commission’s audit of human source files that relate to this Kellam Report recommendation are outlined in Box 11.5.

### **BOX 11.5: OBSERVATIONS FROM THE COMMISSION’S AUDIT OF HUMAN SOURCE FILES: MENTAL HEALTH AND WELLBEING OF A HUMAN SOURCE**

The Commission’s audit of the 31 human source files identified an instance in which a handling team appeared to conduct a medical assessment itself, without having sought advice from Victoria Police’s Psychology Services, contrary to the Human Source Policy in place at the time and Recommendation 5 of the Kellam Report.

The file indicated that the handling team determined that such advice was not necessary because even though the proposed human source was presenting with high levels of stress and anxiety, the team considered the source’s provision of intelligence to Victoria Police would be an ‘outlet’.

## Tasking of a human source

At various points after mid-2006 while Ms Gobbo was registered as a human source, Victoria Police management decided that, to manage the associated risks, no 'tasking' of Ms Gobbo by police was to occur.<sup>124</sup> Despite this, Ms Gobbo continued to be in regular contact with Victoria Police, providing information about her clients and their associates. As the Kellam Report noted, there was an absence of clear operational boundaries as to whether this constituted tasking.<sup>125</sup>

Recommendation 6 of the Kellam Report required:

*That [Victoria Police] settle and publish within [its] human source policy a clear and unambiguous definition of what constitutes 'tasking' and ensure that this definition is brought to the attention of all personnel involved in human source operations.*<sup>126</sup>

Victoria Police advised that this recommendation was implemented in March 2016 by an amendment to its Human Source Policy.<sup>127</sup> It further clarified the definition of 'tasking' in an update to its policy in April 2018.

According to the Human Source Policy 2018, tasking is:

*... any assignment or instruction given to the human source by the handlers. This includes asking the human source to obtain information, to provide access to information or to otherwise act, incidentally, for the benefit of [Victoria Police].*<sup>128</sup>

The Commission's review of Victoria Police's policy framework indicated that this recommendation appears to have been implemented consistently with the intention of the Kellam Report recommendation.<sup>129</sup>

## Dissemination of Information Reports

The Kellam Report referred to a number of instances where information provided to Victoria Police by Ms Gobbo was verbally disseminated by SDU officers to other police units and was not documented in an IR for some time—on some occasions, months or years after it was initially disseminated.<sup>130</sup>

Up-to-date IRs, among other things, enable supervising officers to scrutinise the use of a human source by the officers engaging with the source, and delayed finalisation of an IR impedes the capacity of supervising officers to provide this oversight.

Recommendation 7 of the Kellam Report required:

*That Human Source Management policies and instructions reflect that in any instance where as a result of information being provided by a human source, oral advice is disseminated to another area of [Victoria Police], such actions are to be fully documented in an expeditiously submitted Information Report.*<sup>131</sup>

Victoria Police indicated that this recommendation was implemented in March 2016, more than a year after it was made in the Kellam Report and over four years after a similar recommendation was made by the Comrie Review.<sup>132</sup>

The Commission's review of Victoria Police's policy framework indicated that this recommendation appears to have been implemented consistently with the intention of the Kellam Report recommendation.

## Independent review of high-risk human source files and records

Recommendation 8 of the Kellam Report required:

*That a process of independent and appropriately skilled case officer assessments be established to provide for frequent, comprehensive and accountable review of all high-risk human source files and records.*<sup>133</sup>

Victoria Police advised the Commission that this recommendation was implemented in March 2016 by an amendment to its Human Source Policy, with further minor refinements made in April 2018.<sup>134</sup>

Under the Human Source Policy 2018, the HSMU was required to, 'in consultation with the CSR, undertake frequent, comprehensive and accountable reviews of all human source files and records'.<sup>135</sup>

The Commission's review of Victoria Police's policy framework indicated that this recommendation appears to have been implemented consistently with the intention of the Kellam Report recommendation.

## Engagement of a human source by other police officers

The Kellam Report reflected that many witnesses examined during its inquiry had identified the potential for a 'loss of control' as a consistent theme in the relationship between Ms Gobbo and Victoria Police.<sup>136</sup> Mr Kellam observed that this theme was evident in the use of Ms Gobbo as a human source by various taskforces.<sup>137</sup>

Recommendation 9 of the Kellam Report required:

*That in any instance where it is contemplated that a human source is to be engaged by other police in order to secure evidence an appropriate management plan must first be compiled. Such a plan should clearly articulate roles, responsibilities and management arrangements and also include a full risk assessment process. The plan should also endeavour to extract the maximum benefits available from all learnings derived to date from source interaction.*<sup>138</sup>

Victoria Police considered this recommendation was introduced in September 2014.<sup>139</sup>

The Commission's review of Victoria Police's policy framework indicated that some aspects of this recommendation were implemented. The Human Source Policy 2014 required a management plan to be created in these circumstances, clearly articulating roles and arrangements, and a new risk assessment to be developed.<sup>140</sup>

## Transition of a human source to a witness

Ms Gobbo was deregistered as a human source in January 2009 in order to act as a witness in a criminal trial.

The Kellam Report noted that 'the decision to use [Ms Gobbo] as a witness was fraught with danger to both [Ms Gobbo] and to the proposed prosecution and to the good repute of and confidence by the community' in Victoria Police.<sup>141</sup> Mr Kellam indicated that the dangers associated with the use of Ms Gobbo as a witness were not adequately considered and that they ought to have been.<sup>142</sup>

As a result, Recommendation 10 of the Kellam Report required:

*That [Victoria Police] develop a process to be activated when it may be contemplated that a human source may be required to become a witness. This process should include the compilation of a source to witness transition management plan which encompasses:*

- a. Comprehensive legal advice and the involvement of the [Victoria Police] Director Legal Services.*
- b. Full risk assessments and briefing notes (both from source managers and from the particular investigators).*
- c. [Witness Security Unit] program suitability and economic impact assessments (if protected witness issues are perceived to exist or to be likely).*

*An appropriate high-level committee should be convened to make accountable decisions in regard to proposed transitions. Representation on this committee should include senior management having responsibility for human source operations, the particular investigation and, where appropriate, [the Witness Security Unit].<sup>143</sup>*

Victoria Police advised the Commission that this recommendation was implemented in May 2018 by an amendment to its Human Source Policy, some three years after the recommendation was made.<sup>144</sup>

The Commission's review of the Human Source Policy 2018 indicated that most aspects of the recommendation were incorporated in the policy framework in May 2018.<sup>145</sup> The Human Source Policy 2018 reflected the role of the Ethics Committee to consider proposals to transition high-risk human sources to witnesses.<sup>146</sup> The Kellam Report recommendation, however, was directed at all human sources. It was not confined to high-risk sources such as those with legal obligations of confidentiality or privilege.

The Human Source Policy now applies the same witness transition processes to all human sources, regardless of their risk classification, which appears to fulfil the intention of the recommendation.

## **Dissemination of the Kellam Report and amended Victoria Police policies to relevant parties (Recommendations 11–16)**

Recommendations 11–16 of the Kellam Report required Victoria Police to report back to IBAC on consequential amendments to its Human Source Policy, and to disseminate the Kellam Report and its annexures to third parties.

### **Adoption and implementation of the recommendations**

Recommendation 11 of the Kellam Report required:

*That in the event that any part of the aforesaid recommendations has already been implemented that copies of any amended policies, guidelines and amendment to manuals in consequences thereof be provided to IBAC.<sup>147</sup>*

In addition, Recommendation 15 specified:

*Recognising that the Chief Commissioner of Police may well have adopted many of the above recommendations subsequent to the provision of the Comrie Review, the Chief Commissioner of Police [should] inform the Commissioner of IBAC whether or not any such recommendations*

*have been adopted and implemented, and otherwise to provide a report to IBAC under section 161 of the IBAC Act.*<sup>148</sup>

In June 2015, Victoria Police wrote to IBAC confirming that it had ‘adopted’ all recommendations of the Kellam Report.<sup>149</sup> In doing so, Victoria Police explained the steps it had taken to implement the Kellam Report recommendations and provided IBAC with copies of the Human Source Policy issued in June 2015, the new Human Source Risk Assessment template and the Ethics Committee terms of reference.

In May 2019, Victoria Police wrote to IBAC again after issuing a new Human Source Policy in May 2018, advising that all of the recommendations of the Kellam Report had been ‘acquitted’.<sup>150</sup>

Despite the advice Victoria Police provided to IBAC, the Commission’s inquiry has indicated that not all of the recommendations were fully implemented by May 2018. This is discussed further below.

## Dissemination of the Kellam Report

Recommendations 12, 13 and 14 of the Kellam Report related to the dissemination of the Kellam Report to third parties.

Recommendation 12 required:

*That the Chief Commissioner of Police provide a copy of this report, (including its annexures) together with such other material as he may consider appropriate to the Director of Public Prosecutions for consideration at the highest level, as to whether any prosecutions conducted by the [Director of Public Prosecutions] in the past and based upon evidence provided by [Victoria Police], which evidence may have been obtained by reason of breach of legal professional privilege or release by the Source of other confidential material has resulted in a miscarriage of justice.*<sup>151</sup>

In addition, Recommendation 13 required that a copy of the Kellam Report and its annexures be provided to the Minister for Police and Recommendation 14 required that a copy of the report be provided to the then Inspector of the Victorian Inspectorate, Mr Robin Brett, QC.<sup>152</sup>

Evidence before the Commission indicates that Victoria Police provided the Director of Public Prosecutions a copy of the Kellam Report and most of its annexures on 13 February 2015.<sup>153</sup>

Victoria Police did not provide a copy of the Kellam Report and annexures to the Minister for Police or the Victorian Inspectorate, on IBAC’s advice that it had already provided the Minister and Inspector with a copy of the report.<sup>154</sup> It appears that there was an oversight in that the annexures to the report were not provided to the Minister for Police by either IBAC or Victoria Police.

In addition, Recommendation 16 of the Kellam Report required:

*That this report should be accorded the highest level of confidentiality by all persons to whom it is disseminated. Failure to accord such confidentiality would be highly likely to increase the already significant danger to the life of the Source referred to in this report.*<sup>155</sup>

There is no information before the Commission to indicate Victoria Police or any other body did not apply the highest level of confidentiality to the Kellam Report.

## The adequacy and timeliness of implementation

Victoria Police considers that substantial and timely changes have been made since the use of Ms Gobbo as a human source and the completion of the Kellam Report.

Ms Steendam explained:

*As with all organisations, Victoria Police's processes, policies and systems have continued to evolve and improve over time. As a result, very many of the issues relevant to the recruitment and use of Nicola Gobbo are of their time and have already been dealt with through organisational changes and developments. Equally, Victoria Police has made substantial changes to its management of human sources in response to the Comrie Review and the Kellam Report.*

...

*Changes in order to prevent these issues occurring again have already been implemented through changes in regulation, governance, policy and oversight of human source management within Victoria Police.<sup>156</sup>*

In a submission to the Commission in August 2020, Victoria Police stated that all Kellam Report recommendations were implemented within six months of receipt and that these amendments reflected best practice at the time.<sup>157</sup>

Victoria Police suggested that the additional policy changes introduced since 2015 reflect the evolving nature of its risk management framework for the use of human sources and further, that they are 'evidence of Victoria's commitment to best practice' and 'policy of continuous improvement', rather than emblematic of any deficiency in its response to the Kellam Report recommendations.<sup>158</sup>

## POLICY DEVELOPMENT AND CHANGE MANAGEMENT

As part of its examination of Victoria Police's implementation of the Kellam Report recommendations, the Commission considered the manner in which Victoria Police developed and managed the changes to its policies and practices.

Change management can be described as:

*... the application of processes and tools to manage the people side of change from a current state to a new future state so that the desired results of the change (and expected return on investment) are achieved.<sup>159</sup>*

The Victorian Public Sector Commission is a statutory authority established to improve the performance of the Victorian public sector and assist it to provide services effectively and efficiently. It has indicated that communication with employees impacted by or expected to apply a change to policy is important to maintain clarity, consistency and accuracy of information.<sup>160</sup> Where appropriate and possible, management should consult with staff and relevant stakeholders to identify options to achieve the outcomes intended through policy change.<sup>161</sup> In order for change to be effective, the Victorian Public Sector Commission recommends ongoing monitoring and review following implementation.<sup>162</sup>

Victoria Police's *Capability Plan 2016–2025* sets out its goal to be an effective, agile, responsive, people-focused and connected organisation.<sup>163</sup> The plan highlights the need for Victoria Police to become more proficient in change management.<sup>164</sup>

The sections below discuss the governance and review structures Victoria Police put in place to address the findings and recommendations of the Comrie Review and Kellam Report and test the effectiveness

of change, and how it engaged with and trained officers responsible for human source management to support policy development and implementation.

## Governance and review structures

Following the completion of the Comrie Review, Victoria Police established two taskforces to manage issues arising from its use of Ms Gobbo as a human source; however, neither focused on overseeing all changes arising from the Comrie Review and Kellam Report.<sup>165</sup>

As noted earlier in this report, during the Kellam inquiry and in response to the Comrie Review recommendations, Victoria Police implemented various changes to its Human Source Policy in September 2014. In January 2015, Victoria Police tasked its Internal Audit Unit to review the implementation of the recommendations arising from the audit conducted by Victoria Police's CMRD in 2010, many of which were repeated in the Comrie Review.

After completion of the Kellam Report in 2015, the scope of the Internal Audit Unit review was expanded to consider the effectiveness of new controls embedded in the Human Source Policy.<sup>166</sup> The outcomes of this review are outlined below.

### Findings of the Internal Audit Unit review

The Internal Audit Unit was provided access to the Comrie Review to identify findings that underpinned the recommendations and a list of the recommendations from the Kellam Report.<sup>167</sup>

The Internal Audit Unit review found that:

- despite having implemented recommendations from the 2010 CMRD audit, Comrie Review and Kellam Report, compliance with the Human Source Policy across the organisation was 'unsatisfactory'
- the absence of an organisational human source strategy within Victoria Police to support specific objectives and to consider system as well as policy implications was leading to inconsistent practices
- a series of changes to the Human Source Policy arising from these reviews had led to the policy becoming 'too prescriptive' and had led to increased non-compliance.<sup>168</sup>

### Advice on policy changes

Alongside the Internal Audit Unit's review, on 22 April 2015, Victoria Police obtained legal advice about proposed changes to the Human Source Policy. This advice indicated that the policy should highlight the need for police officers to consider issues of confidentiality or privilege that might arise outside of dealing with a human source subject to occupational obligations of confidentiality or privilege. The advice noted the potential for confidential or privileged information to be obtained by police from a person not themselves in an occupation subject to these obligations (for example, a partner or close family member of a lawyer).

The advice stated that:

*While a duty of confidentiality arises as a professional obligation between a professional person and their client, the information does not lose its confidential status if disclosed to another. Even the recipient of wrongly disclosed confidential information can be compelled by law to keep that information confidential.*<sup>169</sup>

This advice also noted that the group of occupations with obligations of confidentiality or privilege is broader than what the Human Source Policy reflected, pointing to confidentiality obligations that can attach to trade or business.<sup>170</sup>

While Victoria Police incorporated changes to reflect some issues raised in the advice, neither of the matters relating to confidential or privileged information were addressed in the Human Source Policy until May 2020.

## Consultation, communication and training

Between 2014 and 2018, Victoria Police officers responsible for applying the Human Source Policy were informed of policy changes arising from the Kellam Report via the internal Victoria Police 'Gazette', emails to handlers and the provision of a version of the new Human Source Policy with sections highlighted to illustrate what had been added or removed.<sup>171</sup>

It appears that Victoria Police did not consult more broadly with officers involved in human source management as part of its development of changes to the Human Source Policy in 2014, 2015, 2016 and 2018.

Ms Steendam, on behalf of Victoria Police, explained that for more specialist functions such as human source management, Victoria Police consults officers who practise and work in that specific field.<sup>172</sup> She also indicated that Victoria Police has a 'structured approach for policy development',<sup>173</sup> noting that:

*[p]olicy is developed as part of a process of continuous improvement and to adapt to new and emerging issues within [Victoria Police's] operating environment.*<sup>174</sup>

According to Ms Steendam, this approach means that where there is 'legislative change, issues identified, rifts identified or gaps in the policy,' Victoria Police takes steps to 'continuously improve' those policies.<sup>175</sup>

Mr Paterson also described Victoria Police's approach to policy development as 'a continual process where current policies are frequently reviewed and updated as necessary'. He explained that this is particularly the case with the development of human source management policies.<sup>176</sup>

General review processes within Victoria Police are in place for annual or biannual reviews of most policies, though this does not apply to human source management policies.<sup>177</sup> Ms Steendam told the Commission that Victoria Police would be open to incorporating a formal review schedule.<sup>178</sup>

Victoria Police advised the Commission that the May 2020 changes to the Human Source Policy were informed by:

- information obtained from an international study tour undertaken by Mr Paterson and Superintendent Scott Mahony in February 2019 after the commencement of the Commission's inquiry
- information and consultation with the Australasian Human Source Working Group
- feedback provided by the Victorian Government Solicitor's Office
- court matters where human source issues have been raised
- learnings from issues explored in the Commission's hearings
- feedback from human source handlers, controllers, Officers in Charge, LSRs, HSMU officers, officers from the dedicated unit that manages high-risk human sources, and internal subject matter experts
- advice provided by counsel appearing for Victoria Police.<sup>179</sup>

In 2015, Victoria Police amended its human source management training to refer to the Human Source Policy provisions that relate to legal obligations of confidentiality and professional privilege.<sup>180</sup> The following content was included in the training module:

*Professional privilege: Are they a doctor, parliamentarian, court official, journalist, priest or someone else who may have professional obligations regarding confidentiality? (Refer [to the Human Source Policy])*

*Where any of these circumstances exist, contact HSMU at the earliest opportunity (preferably before meeting the Source) to discuss the associated risks.<sup>181</sup>*

From the information available to the Commission, this training did not cover what confidentiality and privilege mean, or why obtaining confidential and privileged information from a human source is a risk.

During the course of this inquiry, in November 2019 and March 2020, Victoria Police arranged for the Victorian Government Solicitor's Office to provide training on privilege and Victoria Police's disclosure obligations to officers from the HSMU, officers from dedicated source units and other officers 'actively involved in human source management'.<sup>182</sup>

Ms Steendam informed the Commission that all officers involved in human source management 'at the ground level' will have access to training about the changes incorporated in the Human Source Policy and will be expected to understand the revised policy requirements.<sup>183</sup> Handlers who have not undertaken updated training will not be able to register a human source.<sup>184</sup>

In addition, the Human Source Policy now includes examples of hypothetical scenarios to assist officers in understanding their responsibilities under the new framework.

Observations drawn from the Commission's focus groups with Victoria Police officers relating to the organisation's policy development and change management processes are outlined in Box 11.6.

#### **BOX 11.6: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: POLICY DEVELOPMENT AND CHANGE MANAGEMENT**

Most participants involved in the Commission's focus groups indicated that amendments to human source management policies are communicated well by the HSMU through emails, bulletin boards and Victoria Police's intranet.

There were mixed views about the utility and clarity of the Human Source Policy 2018. Some focus group participants reported that the policy was clear, easy to find and 'black and white', while others felt that it did not adopt a clear position on specific issues. Some participants indicated they were unaware of the existence of certain policy requirements.

Some participants suggested that Victoria Police makes reactive policy changes 'on the run', without sufficient operational input from officers involved in handling human sources. Others indicated they had provided some input in the development of the new Human Source Policy that came into effect in May 2020.

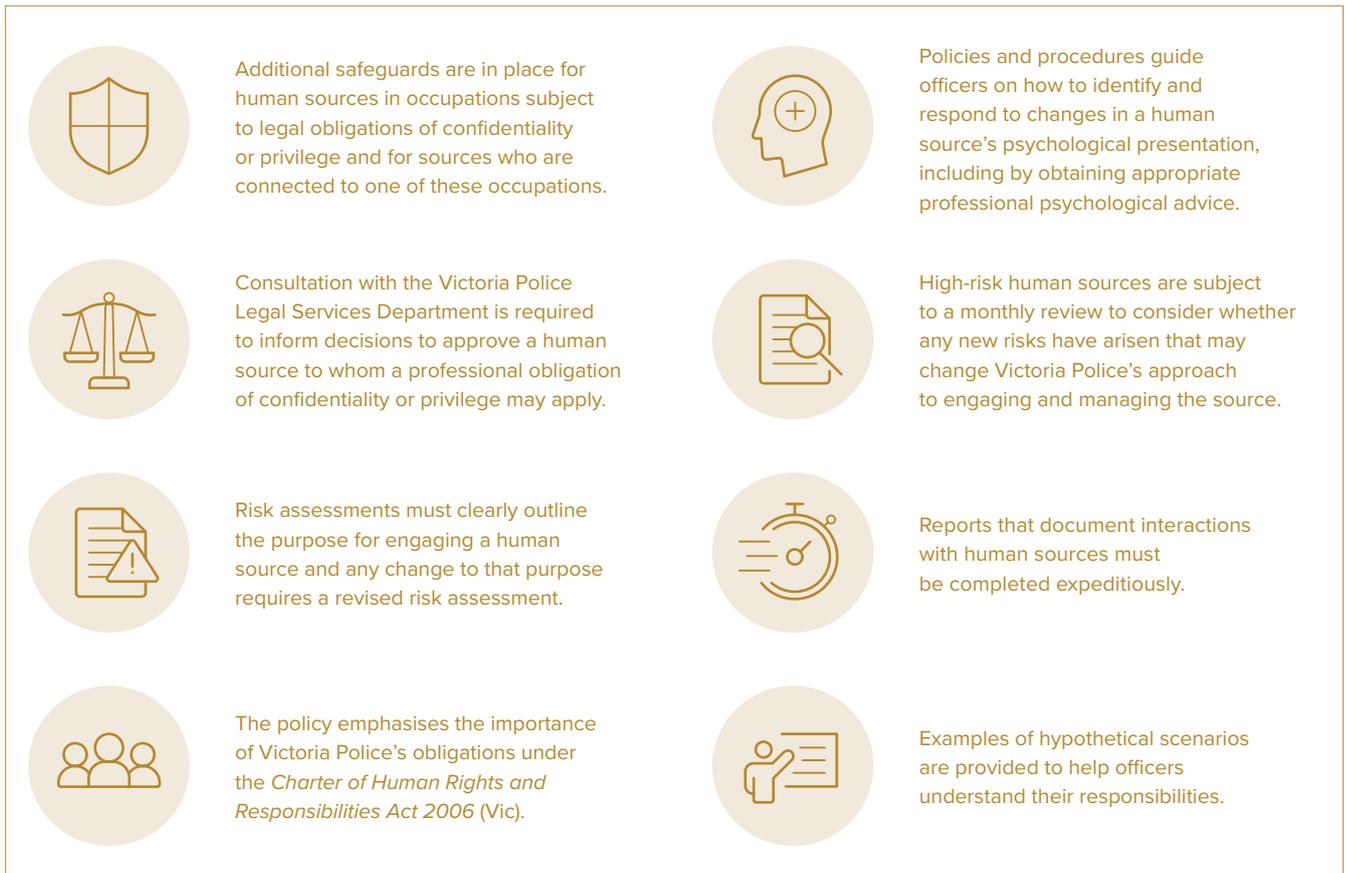
HSMU officers indicated that they had undertaken training relating to issues of confidentiality and privilege in the context of human source management. Most other participants could not recall having undertaken training to assist them to understand, identify and manage potential obligations of confidentiality or privilege in their registration and use of human sources.

## CONCLUSIONS AND RECOMMENDATIONS

Including the Commission's inquiry, Victoria Police's human source management practices have been subject to over 20 reviews in as many years. The recurrence of similar findings and recommendations points to the persistence of common risks and issues in these practices.

The Commission acknowledges that during the Kellam inquiry and up until the introduction of the most recent version of the Human Source Policy in May 2020, Victoria Police made a number of significant changes to its human source management policies and processes to address identified risks and issues. A summary of the key changes is provided in Figure 11.3.

**Figure 11.3: Key changes to the Human Source Policy arising from the Kellam Report<sup>185</sup>**



Overall, the Commission is satisfied that Victoria Police has now implemented most of the Kellam Report recommendations. It took early action to amend its Human Source Policy in September 2014 in response to the Comrie Review, while the Kellam investigation was underway. It also made further changes once the Kellam Report was finalised, revising the policy framework in 2015, 2016, 2018, and most recently in 2020, informed by the advice of its counsel appearing at the Commission's hearings.<sup>186</sup> The Commission considers, however, that these amendments have had different levels of success in achieving the intent of the Kellam Report recommendations and addressing all aspects of those recommendations.

Some recommendations were implemented consistently with the apparent intention of the Comrie Review and Kellam Report, while others were not implemented in full until recently. In some cases, Victoria Police directly transposed text from recommendations into the Human Source Policy and did not include contextual information or guidance to achieve effective implementation of the new requirements.

In some cases, it took Victoria Police several years to introduce policy changes to address the Kellam Report recommendations. Some of these recommendations were first made in other reviews completed years before the completion of the Kellam Report.

In the following sections, the Commission addresses these issues in more detail.

## Adequacy of policy and system reforms

Evidence before the Commission indicated that Victoria Police implemented a number of the Kellam Report recommendations in a way that adequately addressed their scope and intent and contributed to a more robust human source management framework.

These include the recommendations related to the day-to-day management of human sources (Recommendations 4–10), and the dissemination of the Kellam Report and amended Victoria Police policies to relevant parties (Recommendations 11–16).

In contrast, recommendations to incorporate safeguards relating to confidential and privileged information (Recommendation 1) and risk assessment practices (Recommendations 2 and 3) appear to have been implemented less effectively.

Importantly, it was the absence of safeguards related to the use of confidential and privileged information and inadequate risk assessment processes that gave rise to the inappropriate use of Ms Gobbo as a human source and the establishment of the Commission. It is therefore a concern that Victoria Police's Human Source Policy did not, until very recently, fully address these issues identified by the Comrie Review and the Kellam Report.

## Supporting an understanding of confidentiality and privilege

Between 2014 and 2020, Victoria Police made a number of policy and system changes in response to the Comrie Review and Kellam Report recommendations that called for special consideration to be applied to obtaining, using and managing information that may be subject to confidentiality or privilege.<sup>187</sup> As outlined earlier in this chapter, these changes included:

- requiring officers to be mindful that some human sources might be bound by professional obligations and to obtain advice from the HSMU about how to handle confidential or privileged information<sup>188</sup>
- establishing an Ethics Committee to consider the registration of human sources in 'Kellam Occupations' and involving complex ethical or legal issues, which appeared to be consistent with Recommendation 1(b) of the Kellam Report<sup>189</sup>
- strengthening its system capability to identify sources with legal obligations of confidentiality or privilege.

While these steps improved Victoria Police's capacity to identify issues relating to legal obligations of confidentiality or privilege, Victoria Police did not introduce changes that fully addressed Recommendation 1(a) of the Kellam Report until May 2020. That aspect of the recommendation was intended to create safeguards for the use of potentially confidential and privileged information obtained from all human sources, not only those in one of the Kellam Occupations.

Victoria Police acknowledged to the Commission that the initial amendments to the Human Source Policy in response to the Kellam Report did not effectively capture the full set of circumstances in which officers might receive confidential or privileged information, as Recommendation 1(a) intended. It explained that these policy amendments targeted what Victoria Police considered to be the occupations 'most likely to potentially provide

information that may be subject to legal obligations of confidentiality and privilege' and suggested that the current Human Source Policy contains more stringent requirements than those that exist in other jurisdictions.<sup>190</sup>

The Commission also considers that the policy changes introduced in response to the Comrie Review and the Kellam Report were not accompanied by sufficient supporting guidance and training about the nature of confidential and privileged information, the difference between the two, how to identify such information, and the risks associated with obtaining and using such information from human sources. This appears to have contributed to uncertainty among officers responsible for implementing the Human Source Policy and handling human sources, which was evident in the responses of some officers who participated in the Commission's focus groups. Victoria Police advised the Commission that training related to confidential and privileged information was provided to officers involved in human source management in November 2019 and March 2020.<sup>191</sup>

Additionally, the Commission considers that Victoria Police's removal of a clear instruction from the Human Source Policy for officers not to actively seek information from human sources involving legal obligations of confidentiality or privilege—in line with Recommendation 1(d) of the Kellam Report—creates a gap in the current policy. This is discussed further in Chapter 12.

Finally, while the Ethics Committee was established in 2014 to make decisions about human sources involving complex ethical and legal issues, until 20 August 2019, it had not considered any human source matters involving issues of confidentiality or privilege. Based on the evidence available to the Commission through its audit of selected human source files, it appears that in practice, officers in the handling team or the CSR made the decision about whether an issue of confidentiality or privilege existed. Consequently, there was no referral to the Ethics Committee, no legal advice was sought to inform the decisions, and there were inconsistencies in decision making about the registration and use of these human sources.

The Commission notes that the current Human Source Policy aims to address the Kellam Report recommendations more fully and better protect against the inappropriate use of confidential or privileged information from human sources. Nonetheless, the Commission considers that further policy, procedural, system and structural reforms are necessary to manage this risk. Chapter 12 examines these issues in more detail.

## **Further strengthening risk assessments**

Following the Kellam Report, Victoria Police took prompt action to revise its risk assessment processes. It introduced a new Human Source Risk Assessment template and amended its Human Source Policy to require risk assessments to state the purpose of engagement with a human source and for this to be regularly reviewed. Yet operational demands, conflicting priorities and overly cumbersome risk assessment processes appear to have contributed to inconsistent practices and areas of non-compliance. The Commission recognises, however, that its audit of human source files indicated that routine monitoring by the HSMU sometimes enabled instances of non-compliance to be remedied.

The Commission's conclusions associated with aspects of the Kellam Report recommendations relating to risk assessments discussed below, informed its recommendations about Victoria Police's current risk assessment practices, contained in Chapter 12.

### **Positive obligation: a duty to protect the community**

The concept of 'positive obligation', as envisaged by the Comrie Review and Kellam Report, was not confined to human sources subject to legal obligations of confidentiality or privilege. The recommendation related to circumstances in which Victoria Police considers it has a duty to use information from any human source to protect the broader community.<sup>192</sup> This recommendation is important, because it sought to guard against situations where officers disregard or understate the ethical and legal risks of using a human source due

to the perceived value of the source's information. It emphasised the need to reflect carefully on necessity and proportionality in the use of all human sources where Victoria Police considers it has a positive obligation to use the information.

Prior to May 2018, there was no definition or explanation of positive obligation within the Human Source Policy. This was despite the inclusion of the term in the Ethics Committee terms of reference in 2015. When this was introduced into policy, it was conflated with legal obligations of confidentiality or privilege and defined by reference to circumstances 'where information is provided by a source who is bound by legislation or rules of their profession (that is, legal/professional privilege, medical Hippocratic oath)'.<sup>193</sup>

These policy provisions created confusion among police officers responsible for engaging with human sources and did not appropriately contextualise the circumstances in which Victoria Police is under a duty to act on information to protect the community. Although Victoria Police has now removed reference to the term, greater support should be provided to officers to assist them in navigating the complex balancing exercise of assessing necessity and proportionality in the use of human sources.

### **Improved human rights guidance**

Aspects of the Kellam Report recommendations dealing with necessity and proportionality were based on the Comrie Review. The Comrie Review highlighted the importance of reflecting upon these concepts, which exist within the United Kingdom's rights-based approach to human source management. Victoria Police's existing obligations under the Charter similarly require that a human right may only be subject to reasonable limits.<sup>194</sup>

Victoria Police's Human Source Policy did not set out the requirement for officers to consider human rights or to assess necessity and proportionality in the use of human sources until May 2020, about 18 months into the Commission's inquiry and 14 years after the introduction of the Charter. Although Victoria Police's Human Rights Standards were in place, these were not referenced in any versions of the Human Source Policy.

Victoria Police explained to the Commission that the Human Source Policy is to be read within the broader context of its *Victoria Police Manual* and that while past versions of the Human Source Policy did not expressly refer to human rights requirements, officers 'were still aware of and required to act in accordance with' the Human Rights Standards.<sup>195</sup>

Victoria Police also suggested that, because each part of the *Victoria Police Manual*, including the Human Source Policy, 'is developed in consideration of human rights implications, it was not necessary for each iteration of the [Human Source Policy] to have referred to human rights'.<sup>196</sup> Victoria Police also noted that 'while all members involved in human source management make decisions in fulfilling their duties that may affect human rights, the most impactful decisions are reserved to senior experienced members and are subject to review by the [Ethics Committee] and Deputy Commissioner, Specialist Operations'.<sup>197</sup>

The Commission disagrees with Victoria Police on these matters. The fact that human rights are considered as part of Victoria Police's development of a policy does not negate the need to inform and guide officers about their obligations to consider and act compatibly with the Charter in their management of human sources. Further, while more senior officers may well make the most 'impactful decisions', handlers and other officers involved in the day-to-day management of a human source also make decisions that potentially affect and limit human rights, and require guidance to do so in a lawful and considered way. An awareness of and respect for human rights should be embedded at every level throughout the organisation.

The Commission notes that the Human Source Policy introduced in May 2020 now contains a section that deals with human rights obligations. While this is a positive development, the policy and associated training could be more instructive about what necessity and proportionality mean in practice and in the context of the Charter. This is discussed further in Chapter 12.

## Reviewing risk assessments

The recommendations that required LSRs to review, endorse and amend risk assessments as appropriate were adequately reflected in amendments to the Human Source Policy in 2014.

Despite these early policy amendments, evidence before the Commission indicates that LSRs have not practised supervision and review of risk assessments consistently. The Commission's audit and focus groups with Victoria Police officers suggested that although LSRs review risk assessments thoroughly on occasion, this is not a common practice. It appears that operational demands, competing priorities and limited training have each contributed to the lack of consistent and robust oversight and scrutiny of risk assessments. The adequacy of supervision and management more broadly is discussed in Chapter 12.

## Timeliness of implementation

This chapter has focused on Victoria Police's implementation of the Kellam Report recommendations. Yet many of these recommendations were originally raised in reviews conducted many years prior. The Kellam Report, completed in February 2015, repeated recommendations made by the Comrie Review in 2012,<sup>198</sup> which had endorsed the findings of a Victoria Police Corporate Management Review Division Audit finalised in 2010.<sup>199</sup>

The Commission is satisfied that most of the Kellam Report recommendations were implemented within a reasonable timeframe; that is, within one year following the completion of the report. There were, however, significant delays in the implementation of some recommendations.

Contrary to Victoria Police's advice to IBAC in 2018, the Commission considers that Recommendations 1 and 3 of the Kellam Report were not implemented at this time. As outlined above, these recommendations related to safeguards regarding the use of confidential or privileged information from human sources and risk assessment practices, and were, arguably, the most important of the Kellam Report recommendations. The recommendations were also made in the Comrie Review.

The Commission considers that Victoria Police did not fully address these recommendations until it issued the most recent version of the Human Source Policy in May 2020—eight years after the Comrie Review was completed; and 18 months after the Commission's inquiry commenced. In addition, some aspects of these recommendations are not yet adequately embedded in officers' operational practice.

In the Commission's view, this delay is unacceptable. Addressing these recommendations in a timely way was critical, given the significance of the issues and risks identified by those reviews relating to the use of Ms Gobbo as a human source, and the need to prevent similar events from occurring in future.

Victoria Police acknowledged that it could have implemented some of the Kellam Report recommendations faster but noted that it had implemented 'the vast majority of recommendations' within a year and that all recommendations have since been incorporated into its human source management framework.<sup>200</sup> Victoria Police also emphasised that there was no intention to provide inaccurate information to IBAC in 2015 and 2018 when it reported on the measures adopted to address the Kellam Report.<sup>201</sup>

While there is no evidence before the Commission to suggest that Victoria Police deliberately misled IBAC, the fact remains that some important Kellam Report recommendations were not fully implemented at this time.

It will be important for Victoria Police to implement the Commission's recommended changes to Human Source Policy in a timely way to mitigate the risks that remain in its current human source management framework.

Recommendations must also be implemented thoughtfully and with due consideration to the organisational and system supports needed to effect meaningful change. This is discussed further below.

## Improving policy development and change management processes

Throughout the Commission's inquiry, Victoria Police continued to make changes to the Human Source Policy. In a submission in response to Counsel Assisting submissions, Victoria Police indicated these policy changes reflected the evolution of human source management over time and its commitment to best practice, rather than a deficient response to the Kellam Report recommendations.<sup>202</sup>

Several changes incorporated in the Human Source Policy in May 2020 better reflected the intent of the Kellam Report recommendations and usefully clarified aspects of the policy. As noted in Chapter 12, many of these changes also appeared to align the Human Source Policy more closely to principles underpinning the United Kingdom's human source management framework. These principles have been in place in the United Kingdom since 2001, some 14 years before the completion of the Kellam Report, and were considered by the Comrie Review, completed in 2012.

As noted above, the changes were not introduced until almost 18 months into the Commission's inquiry, after Victoria Police received advice from its counsel. The changes also addressed several risks and issues identified by the Commission during the inquiry. As such, the Commission does not agree with Victoria Police's view that its continual changes to the Human Source Policy demonstrate only its commitment to best practice, and not any deficiency in its earlier response to the Kellam Report recommendations. The changes seemed reactive rather than proactive.

An agency taking steps to improve its policies during an inquiry is not in and of itself worthy of criticism. Indeed, an agency that did not take some steps to promptly remedy identified deficiencies and strengthen its framework might be subject to criticism. Nonetheless, Victoria Police's most recent updates to the Human Source Policy during the Commission's inquiry related principally to changes that should have been implemented earlier and more comprehensively, in response to the Comrie Review and Kellam Report.

The Commission's inquiry indicated that Victoria Police sought legal advice in 2015 associated with changes to its Human Source Policy. It appears that aspects of this advice were not incorporated into the policy, predominantly in relation to safeguards associated with identifying issues relating to confidentiality or privilege, consistent with Recommendation 1 of the Kellam Report and Recommendation 3 of the Comrie Review.

The Commission's focus groups indicated that officers responsible for human source management were often not consulted to provide operational input into proposed policy changes. Consultation with stakeholders and staff, including those expected to apply and adhere to new requirements, is an important way that agencies can clarify intended impacts, obtain helpful operational feedback and guard against unintended consequences.

In addition, as outlined above, the policy changes implemented between 2014 and 2018 were not accompanied by adequate communication, guidance and training to officers responsible for human source management. This likely contributed to the uncertainty that exists among some officers about critical policy requirements and safeguards relating to the use of confidential or privileged information from human sources.

In a submission to the Commission, Victoria Police agreed that, as a general rule, broader input from and communication with officers can lead to policy improvements, but noted that, due to the specialised nature of human source management and the highly confidential nature of the Kellam Report, its consultation with officers on changes to the Human Source Policy was appropriately limited.<sup>203</sup>

The Commission considers that, notwithstanding the confidentiality of the Kellam Report, there would have been no impediment to Victoria Police consulting with and seeking input from relevant operational officers on proposed changes to the Human Source Policy before finalising and issuing that policy. Victoria Police's implementation of the Kellam Report recommendations could have been accompanied by a more effective consultation and change management process aimed at ensuring that the policy changes were operationally feasible and that officers understood the nature, scope and intent of those changes. The Commission notes that Victoria Police undertook a process of consultation with officers when developing the Human Source Policy in 2020 and has indicated that all officers who manage human sources will receive training related to the new policy. This is a positive, if overdue step.

The Commission also considers that Victoria Police could have taken more effective action to monitor and evaluate the effectiveness of policy changes, including by engaging with officers responsible for human source management regarding their understanding of revised expectations and changes to policy. Ongoing monitoring and review of policy changes is necessary to ensure that policy requirements are clear, understood by officers, and applied effectively and consistently across the organisation. This is also important to enable continuous improvement and ensure that policies respond to emerging issues and risks.

#### RECOMMENDATION 7

That Victoria Police, within three months and consistent with its *Capability Plan 2016–2025*, establishes clear processes for the review and amendment of human source management policies and procedures, including processes for:

- a. seeking and incorporating operational input from police officers involved in human source management
- b. disseminating and communicating policy and procedural changes so that all relevant officers receive timely and accurate advice about impending change
- c. reviewing and evaluating policies and procedures on an annual basis to ensure its human source management practices are responsive to emerging risks, changes to the operating environment and changes to any relevant legislation; and are consistent with Victoria Police's human rights obligations under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

The Commission considers that this recommendation should be implemented within three months, so that the new processes can support and guide Victoria Police's development and implementation of the human source management reforms the Commission recommends in Chapter 12. This also aligns with the timeframe the Commission has recommended in that chapter for Victoria Police to establish a strategic governance committee to oversee this reform program.

# Endnotes

- 1 Mr Kellam led the inquiry on behalf of IBAC after the then Commissioner of IBAC, Mr Stephen O'Bryan, QC, declared himself unable to act due to a perceived conflict of interest: Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 1 [1].
- 2 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 4 [9].
- 3 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14897–8; Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 17–18 [5.1], 19–20 [5.3].
- 4 The current Human Source Policy was finalised in April 2020 but came into effect in May 2020: Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020.
- 5 Exhibit RC0275b Statement of Officer 'Sandy White', undated, 14 [52]–[54]; Consultation with South Australia Police, 6 September 2019; Consultation with Sir Jonathan (Jon) Murphy, 11 October 2019.
- 6 Consultation with South Australia Police, 6 September 2019; Consultation with Queensland Police, 8 October 2019.
- 7 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 27 [4.14]–[4.17].
- 8 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 34, 1 [3]–[4]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 36, 1 [4].
- 9 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 45 [5.9], 46 [5.10].
- 10 Exhibit RC0276 Review & Develop Best Practice Human Source Management Policy 2004, 16 April 2004, 20.
- 11 Exhibit RC0276 Review & Develop Best Practice Human Source Management Policy 2004, 16 April 2004, 20–1.
- 12 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 28 [4.22].
- 13 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 46 [5.10].
- 14 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 12 [3.44].
- 15 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 37, 5 [7.1]; Exhibit RC0276 Review & Develop Best Practice Human Source Management Policy 2004, 16 April 2004, 20.
- 16 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 37, 5 [7.2].
- 17 See, eg, Exhibit RC0108 Victoria Police, Review of the Victoria Police Drug Squad (Report, November 2001), 176–8.
- 18 Exhibit RC0108 Victoria Police, Review of the Victoria Police Drug Squad (Report, November 2001) 22 [3.5]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 51, 16 [10]; Office of Police Integrity, *Past Patterns—Future Directions: Victoria Police and the Problem of Corruption and Serious Misconduct* (Report, October 2007); Office of Police Integrity, *Annual Report—Financial Year Ending 30 June 2008* (Report, 2008).
- 19 Office of Police Integrity, *Leak of a Sensitive Victoria Police Information Report* (Report, February 2005); Office of Police Integrity, *Investigation into the Publication of One Down, One Missing* (Report, September 2005).
- 20 See, eg, Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 50, 114 [13.12]; Office of Police Integrity, *Investigation into the Publication of One Down, One Missing* (Report, September 2005); Office of Police Integrity, *Annual Report—Financial Year Ending 30 June 2006* (Report, 2006) 52; Office of Police Integrity, *Report on Investigation into Operation Clarendon* (Report, 2008), 17.
- 21 See, eg, Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 51, 16–17; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 57, 6–11.
- 22 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 57, 9–10.
- 23 *AB & EF v CD* [2017] VSC 350 (Ginnane J).
- 24 Based on Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 50; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 51, 16; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 53, ii; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 56, 2; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 60; Exhibit RC0276 Review & Develop Best Practice Human Source Management Policy, April 2004, 13–15; Exhibit RC0359 Victoria Police, Covert Services Review (Intelligence & Covert Support Command) (Report, December 2012) 10–11; Office of Police Integrity, *Leak of a Sensitive Victoria Police Information Report* (Report, February 2005) 8 [26]; Office of Police Integrity, *Investigation into the Publication of One Down, One Missing* (Report, September 2005) 15; Ombudsman Victoria, *Ceja Task Force Drug Related Corruption: Second Interim Report of Ombudsman Victoria* (Report, June 2004); Office of Police Integrity, *Annual Report—Financial Year Ending 30 June 2008* (Report, 2008) 18; Office of Police Integrity, *Report on Investigation into Operation Clarendon* (Report, 2008) 23; Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012).
- 25 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012).

- 26 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 47 [5.17].
- 27 Exhibit RC1407b Statement of Superintendent Stephen Gleeson, 6 November 2019, 2 [9].
- 28 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012) 26, 28, 42, 45, 47.
- 29 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012) 43.
- 30 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 57.
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- 32 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 1 [1]; Anthony Dowsley, 'Underworld Lawyer a Secret Police Informer', *Herald Sun* (Melbourne, 31 March 2014).
- 33 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 1 [4].
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- 38 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 61 [11].
- 39 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 57 [2].
- 40 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 58 [2].
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- 56 Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 17 [4.6].
- 57 Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 9 [1.20]. The Ethics Committee was then referred to as the ‘Human Source Management Ethics Committee’ and was later renamed to the ‘Human Source Ethics Committee’. This Committee is referred to as the ‘Ethics Committee’ throughout this chapter.
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- 60 Exhibit RC1952 Statement of Assistant Commissioner Neil Paterson, 5 March 2020, 3 [17].
- 61 Exhibit RC1952 Statement of Assistant Commissioner Neil Paterson, 5 March 2020, 13 [98].
- 62 Exhibit RC1952 Statement of Assistant Commissioner Neil Paterson, 5 March 2020, 13 [96].
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- 84 Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 9 [1.20].
- 85 Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 16 [4.5].
- 86 Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 16–17 [4.5]–[4.6].
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- 98 Exhibit RC1530b Victoria Police Manual—Human Sources, 8 May 2018, 9 [1.20].
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- 111 Victoria Police, 'Human Source Ethics Committee Terms of Reference', 12 April 2020, 6, produced by Victoria Police in response to a Commission Notice to Produce.
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- 119 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 11 [1].
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- 123 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 47, 14 [4.5]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 1, 8.
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- 129 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015), 28 [2].
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# 12

## Victoria Police's processes for the use and management of human sources involving legal obligations of confidentiality or privilege

### INTRODUCTION

Term of reference 3 required the Commission to inquire into and report on the current adequacy and effectiveness of Victoria Police's processes for the recruitment, handling and management of human sources with legal obligations of confidentiality or privilege.

In this chapter, the Commission refers to human sources *involving* legal obligations of confidentiality or privilege, unless specifically talking about people who are themselves in an occupation or profession subject to such an obligation. This is because a human source who is not in an occupation subject to these obligations themselves might still have access to, and share with police, information that is confidential or privileged. As noted in Chapter 4, the Commission is primarily concerned with legal obligations of confidentiality and privilege arising from professional relationships, and by extension, confidential and privileged information derived from those relationships. In this chapter, the Commission uses the term 'confidential or privileged information' in this context.<sup>1</sup>

Victoria Police's use of Ms Nicola Gobbo as a human source occurred more than a decade ago and its policies have since undergone substantial changes, including changes made during the Commission's inquiry. Victoria Police told the Commission that the failures relating to its use of Ms Gobbo as a human source could not occur today due to the safeguards in its current policy framework.<sup>2</sup>

In this chapter, the Commission considers whether Victoria Police's current human source management framework is adequate and effective—that is, whether it sufficiently mitigates the risks that arise in the use of human sources, particularly the risk of obtaining and disseminating confidential or privileged information. Managing these risks is essential for the safety of human sources, the integrity of Victoria Police and the proper administration of justice. It is also integral to community trust and confidence in police and the criminal justice system, and the willingness of people to share information with Victoria Police that may in turn help to detect and prevent serious crimes.

A broad range of evidence informed this aspect of the Commission's inquiry, including evidence from witnesses who appeared at the Commission's hearings, the outcomes of the Commission's audit of Victoria Police human source files, the views of Victoria Police officers who participated in the Commission's focus groups, and information provided in response to notices to produce. The Commission also considered the human source management processes of other Australian and international law enforcement agencies, focusing particularly on the United Kingdom framework due to the safeguards it applies to confidential and privileged information, and similarities in the common law and statutory frameworks that operate in Victoria and the United Kingdom.

To conduct a thorough and meaningful inquiry into term of reference 3, the Commission considered the processes that apply to Victoria Police's use and management of human sources generally, not just those that apply to the narrow class of human sources involving legal obligations of confidentiality or privilege. There are two key reasons for this.

First, while some of Victoria Police's processes apply specifically to human sources involving legal obligations of confidentiality or privilege, others apply to all human sources. Consequently, it has been necessary to examine the broader framework to understand the full suite of processes that apply to the category of sources specified in term of reference 3.

Second, human sources involving legal obligations of confidentiality or privilege constitute a small proportion of sources used by Victoria Police, yet many risks and issues related to their registration and management also arise in the use of other human sources. The Commission sought to consider Victoria Police's human source management framework in a holistic way—both to enable the development of meaningful and practical recommendations for reform, and to prevent unnecessarily fragmented or inconsistent approaches to different types of human sources.

Having examined the evidence, the Commission considers that Victoria Police's current internal policy for the use of human sources is not sufficient to appropriately manage risk or guide officers in their decisions and actions, nor to assure the Victorian community and Government that events like those involving Ms Gobbo will not reoccur. While the Commission acknowledges that the use of human sources is a potent tool in Victoria Police's investigative arsenal, it considers that continued self-regulation with an opaque set of rules, guidance and internal governance would be unsatisfactory.

With this in mind, the Commission recommends the introduction of legislation to regulate this high-risk area of policing more effectively; provide accountability and transparency to the public; and reinforce Victoria Police's obligations to use human sources in a way that is necessary, proportionate and compatible with human rights.

The Commission also recommends that Victoria Police adopts a different organisational model, with dedicated handling teams, a more centralised decision-making process with clearer accountability, and a more rigorous registration process for human sources who are reasonably expected to have access to confidential or privileged information.

To support these changes and help officers fulfil their responsibilities under the new framework, the Commission recommends improvements in training and risk assessment processes, and regular auditing and monitoring of officers' compliance with policy requirements.

The Commission appreciates that human sources provide Victoria Police with information that can be essential to the prevention and detection of crime. It also recognises the efforts Victoria Police has made to strengthen its policy framework, and the efforts its officers make every day to control and mitigate the many risks and challenges that arise in their use of human sources. The Commission's recommendations aim to build on Victoria Police's recent reforms and existing strengths, and support its officers to manage sources lawfully, ethically and even more effectively.

## CURRENT CONTEXT AND PRACTICE

This section summarises Victoria Police's current framework for the use and management of human sources, including:

- the policy framework governing its use and management of human sources, including human sources involving legal obligations of confidentiality or privilege
- the key phases of the human source management framework
- the training Victoria Police officers receive in human source management
- the use and management of human sources in other Australian and international jurisdictions.

A summary of common human source management terms and processes, including the roles and responsibilities of officers involved in Victoria Police's use and management of human sources, can be found in Volume I of this final report.

### Policy framework

The *Victoria Police Manual—Human Sources* (Human Source Policy), issued by the Chief Commissioner of Victoria Police under section 60 of the *Victoria Police Act 2013* (Vic), is the primary document governing Victoria Police's use and management of human sources.

The Human Source Policy is not available publicly, on the basis that it contains material protected by public interest immunity.

#### BOX 12.1: VICTORIA POLICE'S HUMAN SOURCE POLICY

In May 2020, while the Commission was underway, Victoria Police issued a new version of the Human Source Policy. This policy was current at 30 October 2020.<sup>3</sup>

Unless otherwise stated, the Commission refers to this version of the policy throughout this chapter.

The Human Source Policy defines a human source as a person who:

- *volunteers or provides information on a confidential basis to Victoria Police to assist with criminal investigations; and*
- *has an expectation that their identity will remain confidential; and*
- *is registered as a human source.*<sup>4</sup>

The objectives of the Human Source Policy are to:

- *protect the integrity and safety of members [of Victoria Police] and human sources*
- *ensure the management of human sources is within legal and ethical boundaries*
- *protect Victoria Police's reputation*
- *protect covert methodology*
- *support the use of human sources in investigations and information gathering*
- *assist Victoria Police to support community safety outcomes.*<sup>5</sup>

The Human Source Policy sets out requirements for registering human sources, maintaining and recording contact with human sources, disseminating information, training officers who manage human sources, and internal decision-making, supervision, governance and auditing arrangements. The policy also sets out the roles, duties and responsibilities of the officers involved in human source management.

Victoria Police recognises that:

*... well managed human sources can be the most affordable and efficient way to obtain information and subsequently evidence, but a poorly managed human source can be a significant risk for the organisation ... For an organisation to reduce the risks presented by human sources, an effective policy and governance process framework is required that protects the organisation. If police do not adhere to policy then risk is amplified.*<sup>6</sup>

Police officers who manage human sources must comply with the Human Source Policy. Non-compliance can lead to the suspension of human source files, management or disciplinary action against an officer, or—where unethical conduct is suspected—a referral to Victoria Police's Professional Standards Command for investigation.<sup>7</sup>

In addition to internal policies and procedures, Victoria Police, like all public authorities in Victoria, is bound by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter).<sup>8</sup> The purpose of the Charter is to protect and promote 20 essential civil and political human rights.<sup>9</sup> It requires public authorities to act compatibly with human rights, and to consider human rights when developing policies, making laws, delivering services and making decisions.<sup>10</sup>

Under the Charter:

*A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—*

- a. the nature of the right; and*
- b. the importance of the purpose of the limitation; and*
- c. the nature and extent of the limitation; and*
- d. the relationship between the limitation and its purpose; and*
- e. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*<sup>11</sup>

If a public authority acts 'in a way that is incompatible with a human right' without a reasonable basis, this will amount to a breach of the Charter.<sup>12</sup>

The Human Source Policy provides brief guidance for police officers about considering and applying the Charter. This is discussed further in the 'Challenges and opportunities' section of this chapter.

## **Use and management of human sources involving legal obligations of confidentiality or privilege**

The Human Source Policy sets out specific requirements for human sources where legal obligations of confidentiality or privilege might arise, over and above the requirements that apply to other human sources.<sup>13</sup> As noted in Chapter 4, this is because the provision of confidential or privileged information by a human source might result in a breach of another person's right to and expectations of privacy, undermine the public interest in establishing and maintaining professional relationships built on trust, and damage the reputation and integrity of the profession and professionals involved.

Further, if the acquisition and/or use of the information is subsequently found to be illegal or improper, it can compromise criminal investigations, prosecutions and potentially convictions. This in turn can undermine the integrity of the criminal justice system.

The Human Source Policy lists types of human sources that may involve legal obligations of confidentiality or privilege and provides safeguards for their registration, use and management. As noted in Box 12.2, the policy does this by listing several occupations that may be subject to legal obligations of confidentiality or privilege, known as 'Category 1' human sources, and defines other classes of human sources who do not hold such obligations, but who may access confidential or privileged information because of their 'connection to' a Category 1 occupation.<sup>14</sup> The Human Source Policy also prescribes further safeguards for situations where Victoria Police *intends* to obtain or use confidential or privileged information from a human source, regardless of whether or not that source is a Category 1 human source.

### **BOX 12.2: CATEGORY 1 HUMAN SOURCES AND OTHER SOURCES INVOLVING LEGAL OBLIGATIONS OF CONFIDENTIALITY OR PRIVILEGE**

#### ***Category 1 human sources***

Category 1 human sources are people in the following occupations (irrespective of whether the information they seek to provide to Victoria Police is connected to their occupation):

- lawyers
- doctors
- parliamentarians
- court officials
- journalists
- priests.<sup>15</sup>

As discussed in Chapter 11, Victoria Police also refers to these occupations as the 'Kellam Occupations'.

***People with a connection to a Category 1 occupation***

People with a connection to a Category 1 occupation are people who may access confidential or privileged information due to:

- having ‘previously worked in a Category 1 occupation’
- being ‘likely to receive confidential or privileged information from a person who is in a Category 1 occupation’
- being ‘in a similar occupation or role where they are likely to receive legally privileged or confidential information’.<sup>16</sup>

While the Human Source Policy does not strictly define this group as ‘Category 1’ human sources, the same additional safeguards and requirements apply. Accordingly, and for ease of reference, the Commission also uses the term ‘Category 1’ to refer to human sources with a connection to a Category 1 occupation.

***People registered as a human source with the specific intention of obtaining or using confidential or privileged information***<sup>17</sup>

People who have access to confidential or privileged information that Victoria Police specifically intends to obtain or use.

As outlined in Box 12.3 below, the number of human sources involving legal obligations of confidentiality or privilege is very small.

**BOX 12.3: PROPORTION OF VICTORIA POLICE’S HUMAN SOURCES INVOLVING LEGAL OBLIGATIONS OF CONFIDENTIALITY OR PRIVILEGE**

Victoria Police produced data to the Commission outlining the number of human source applications and registrations between 2017 and 2020.

The data indicates that of the approximately 1,200 human source registration applications submitted between July 2017 and June 2020, only about 4.4 per cent were potentially subject to legal obligations of confidentiality or privilege. Of the 1,200 applications, the proportion that were authorised by Victoria Police (resulted in the registration of the person as a human source) and that involved potential legal obligations of confidentiality or privilege was even smaller, approximately 3.5 per cent.<sup>18</sup>

**Use and management of other human sources involving higher risks**

In addition to Category 1 human sources, Victoria Police also recognises that there are increased risks associated with the use of human sources:

- who are under the age of 18 years old (known as ‘Category 2’ human sources)
- who have a serious mental health condition or other serious medical health condition (known as ‘Category 3’ human sources)
- where the risks that they pose ‘would not normally permit registration’, but the information they wish to provide is of ‘extraordinarily high value’ (known as ‘Category 4’ human sources).<sup>19</sup>

Due to the risks of using Category 1–4 human sources, decisions to approach or register them must be made by the Victoria Police Human Source Ethics Committee (Ethics Committee).<sup>20</sup>

The Ethics Committee is chaired by the Assistant Commissioner, Intelligence and Covert Support Command (ICSC). Its other members are the Assistant Commissioner, Professional Standards, the Executive Director, Legal Services and two other Assistant Commissioners or Commanders.

## The key phases of Victoria Police's human source management framework

The sections below outline the key phases of Victoria Police's human source management framework, including the specific requirements that apply to human sources involving legal obligations of confidentiality or privilege (Category 1 human sources).

### Phase 1: Risk assessment and registration

Before Victoria Police officers can disseminate information from a prospective human source, the person must first be registered as a human source.<sup>21</sup> As outlined below, the registration process involves four key steps:

- submission of a registration application
- multi-levelled review and referral for registration
- authorisation of registration
- delivery of the Acknowledgement of Responsibilities (AOR) and activation of the registration.

#### Submission of a registration application

The handler initiates the registration process by creating a registration application in Interpose, Victoria Police's intelligence and case management system.

Since October 2019, Interpose has had input requirements and alerts in place to prevent a person with legal obligations of confidentiality or privilege from being registered as a human source without the necessary stages of review and approval.<sup>22</sup> For example, a registration application cannot proceed without the person's occupation, or previous occupation, being entered into a mandatory field in Interpose.<sup>23</sup>

Further, when creating a human source registration application in Interpose, a pop-up window appears asking the handler if the prospective source could be subject to a legal obligation of confidentiality or privilege (or whether the registration could breach such an obligation).<sup>24</sup> If the handler selects 'yes', they are instructed to discuss the proposed registration with the Human Source Management Unit (HSMU).<sup>25</sup>

Since May 2020, the Human Source Policy has included hypothetical examples of circumstances where legal obligations of confidentiality or privilege could arise.

To support an application to register any human source (not just those involving legal obligations of confidentiality or privilege), the handler must submit the following documentation via Interpose:

- *Initial Source Contact Report*—a record of any information provided by the prospective (not yet registered) human source, including their personal information, and details of any contact with them.<sup>26</sup>
- *Mental Health Functioning Screen*—a tool that identifies any potential indicators of serious mental health conditions, based on a prospective human source's observable behaviour and self-reporting.<sup>27</sup>

- *AOR* (in draft form)—an agreement setting out the parameters of the prospective human source’s relationship with Victoria Police.<sup>28</sup>
- *Initial Risk Assessment*—an evaluation of the risks of using a prospective human source, which must identify the purpose of using the prospective human source.<sup>29</sup>

The completion of the Initial Risk Assessment informs the decision about whether to register the person as a human source.<sup>30</sup> The assessment determines whether the prospective source is ‘low’, ‘medium’ or ‘high’ risk. It comprises 58 mandatory questions across the following categories:

- risk of compromising the safety or security of the source
- risk to the handling team
- risk to the information or investigation—that is, to the credibility of the information or the integrity of the investigation
- risk to the public
- risk to Victoria Police.<sup>31</sup>

There are no questions across these categories to prompt officers to consider risks to human rights or the administration of justice.

Once the risks are identified and assessed, mitigation strategies are applied to reduce or manage them. These strategies are employed on a case-by-case basis and could include appointing a more experienced handler or providing specific supports to the source. Some human sources may still be rated high-risk even after mitigation strategies are applied.

Only a specialised and dedicated human source team can handle and manage high-risk human sources.<sup>32</sup> Under the Human Source Policy, Category 1 sources are always treated as high-risk.<sup>33</sup>

### **Multi-levelled review and referral for registration**

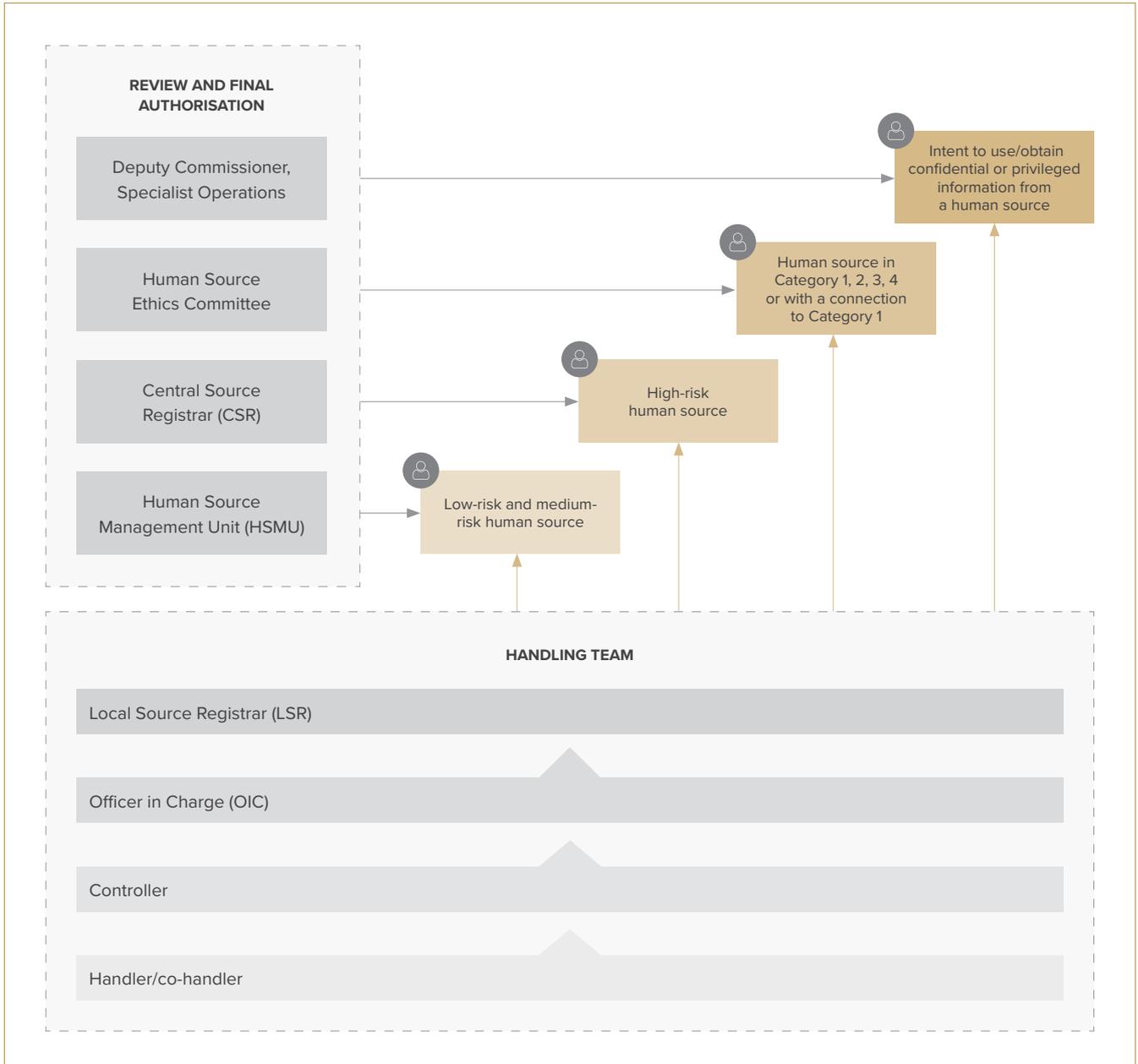
Five police officers or business units—the controller, Officer in Charge (OIC), Local Source Registrar (LSR), HSMU and Central Source Registrar (CSR), in that order, review the application prepared by the handler and the whole human source file in Interpose to:

- assess the appropriateness of registering the prospective human source
- review the Initial Risk Assessment and mitigation strategies
- review the draft AOR to ensure all responsibilities and accountabilities are outlined
- review the Mental Health Functioning Screen
- ensure all required documents are uploaded to Interpose within the stipulated timeframes
- make recommendations, including whether the registration should proceed.<sup>34</sup>

Ordinarily, an application for registration is authorised by the HSMU or CSR.<sup>35</sup> The CSR authorises the registration of high-risk human sources, while the HSMU authorises the registration of low-risk and medium-risk human sources.<sup>36</sup>

If the use of a prospective human source involves legal obligations of confidentiality or privilege (Category 1 human sources), the registration must be authorised at a higher level, by the Ethics Committee,<sup>37</sup> and, if there is a specific intention to use or obtain confidential or privileged information, by the Deputy Commissioner, Specialist Operations.<sup>38</sup> This is displayed in Figure 12.1 below.

**Figure 12.1: Multi-levelled review of registration applications and final authorisation for the registration of human sources under the Human Source Policy<sup>39</sup>**



### Authorisation of registration: Ethics Committee decisions

Under the Human Source Policy, the Ethics Committee's decision to authorise the registration of a Category 1–4 source must be formally documented and must also be informed by the Charter.<sup>40</sup>

The Ethics Committee must consider the following factors in making its decisions:

- *the seriousness of the offence to which the information relates, including the potential of serious injury or death to a person/s*
- *the [imminence] of the threat to which the information relates*
- *the likelihood of investigators obtaining the same information through other, less intrusive, investigatory or intelligence methods*

- *the potential to obtain the information from another human source who is not a category 1–4 human source*
- *the disclosure obligation if the [Ethics Committee] were to approve the use of a human source and information was obtained that was subject to a legal obligation of privilege or confidentiality*
- *the impact on the human rights of any individuals or the community if the information is utilised or not utilised*
- *legal advice obtained on the use of the potential human source and the use of any information [obtained] from the human source that is subject to a legal obligation of privilege or confidentiality*
- *any other legal or ethical considerations the [Ethics Committee] considers relevant*
- ...
- *how the risk to the safety of the potential human source will be mitigated*
- *the potential for reputational damage to Victoria Police by entering [into] a human source relationship with the person*
- *any other specific conditions that should apply to the approach or registration.*<sup>41</sup>

In addition, the Human Source Policy states that for Category 1 sources, the Ethics Committee:

*... must obtain appropriate legal advice as to the legal implications of registering and using that human source and as to any conditions or safeguards that should be put in place in the event that the [Ethics Committee] provides approval to register the potential human source.*<sup>42</sup>

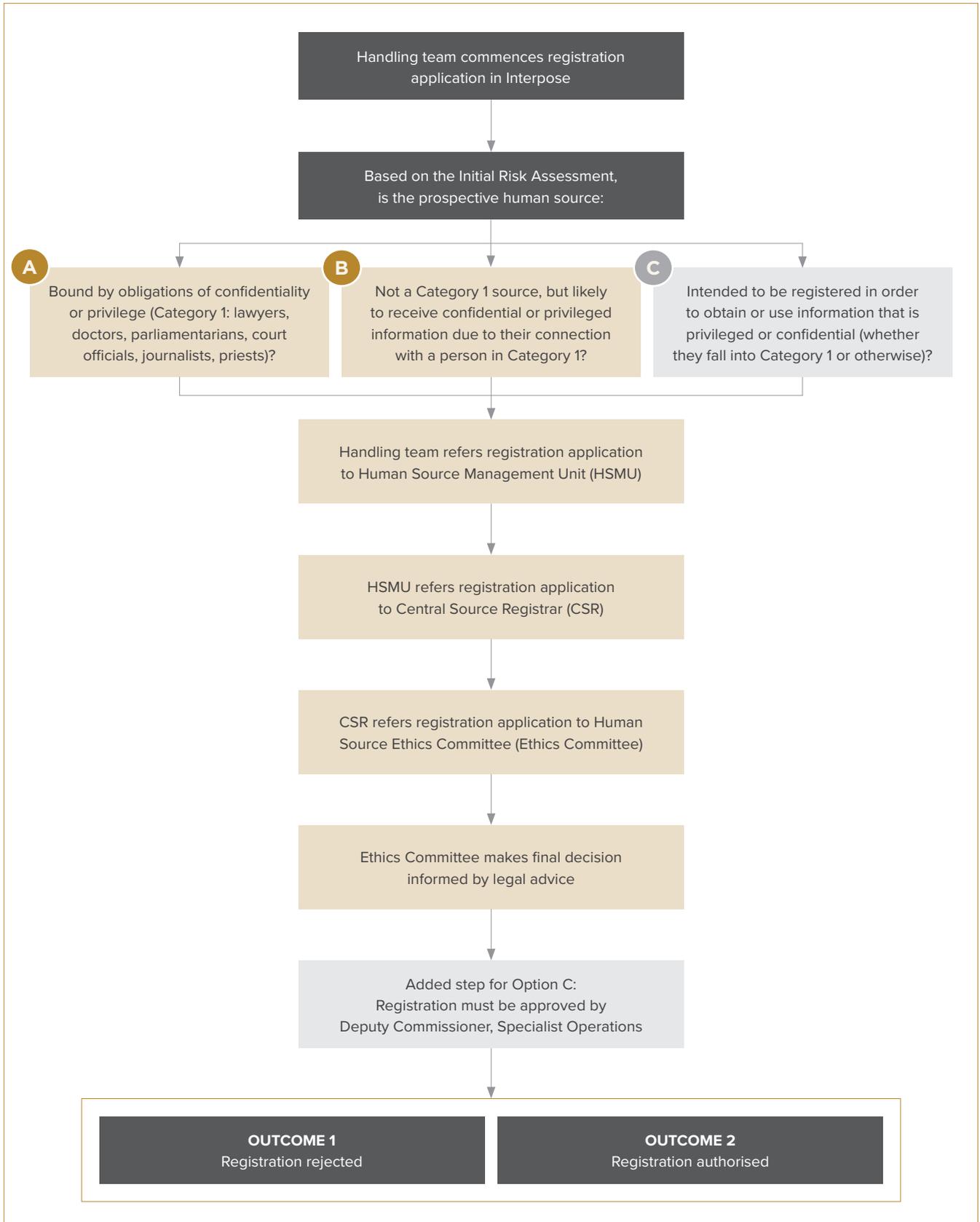
Before the Ethics Committee can authorise the registration of a human source, it must establish the specific purpose for using the human source and set a time period for their use. It can also set review periods, impose reporting obligations on the handling team, and set any other conditions for the use and management of the source, to be stipulated in the AOR.<sup>43</sup>

Cases where the proposed registration or use of a human source is specifically intended to obtain or use confidential or privileged information must be authorised by the Deputy Commissioner, Specialist Operations, who is only permitted to do so ‘if there are exceptional and compelling circumstances’, meaning the action is:

- *In the interests of national security; or*
- *For the purpose of preventing a serious threat to life or serious injury—and*
- *There is no other reasonable means of obtaining the information.*<sup>44</sup>

Figure 12.2 displays this registration process.

**Figure 12.2: Current registration process for human sources involving legal obligations of confidentiality or privilege<sup>45</sup>**



## Delivery of the Acknowledgement of Responsibilities and activation of the registration

As noted above, the AOR sets the boundaries of the relationship between the human source and Victoria Police. It can include specific conditions to mitigate risks identified in the Initial Risk Assessment. For example, an AOR could include a condition that a human source who does not have a driver's licence, and has prior convictions for driving unlicensed, does not drive a motor vehicle.<sup>46</sup>

The AOR is delivered by the handling team to the prospective human source within a timeframe specified in the Human Source Policy.<sup>47</sup> The human source can then provide information and be 'tasked' by police.<sup>48</sup> Tasking is when handlers give an assignment or instructions to the human source to obtain, or provide access to, information for the benefit of Victoria Police.<sup>49</sup>

### One-off registrations

While human sources are typically people with whom police maintain ongoing relationships, in 2020 the Human Source Policy introduced 'one-off' registrations, for people who give information to Victoria Police on a single occasion.<sup>50</sup> The HSMU determines whether to authorise a one-off registration.

In these situations, a *One-off Risk Assessment* is completed. This one-page assessment is less extensive than the Initial Risk Assessment mentioned above. It requires the officer to, among other things, mark 'yes' or 'no' to the question: is 'there any possibility that this information may be subject to legal professional privilege or confidentiality?'<sup>51</sup> If the officer marks 'yes', they must contact the HSMU for 'advice regarding the suitability' of the one-off registration.<sup>52</sup> Completion of an AOR and a Mental Health Functioning Screen is not required, but the prospective human source must be invited to sign a *Consent for One-off Registration* form.<sup>53</sup>

Once the information provided by the human source is disseminated to investigators, the person will be deactivated as a human source.<sup>54</sup> If the person seeks to provide further information on a confidential basis within 12 months from deactivation, the regular registration process applies.<sup>55</sup>

The one-off registration process cannot be used for high-risk human sources and those whose registration requires approval by the Ethics Committee (Category 1–4 human sources).<sup>56</sup>

## Phase 2: Use and management of human sources

Victoria Police may engage with the human source once they are registered. Officers must make a record of each contact and may disseminate information from the source to investigators.

Victoria Police operates a 'hybrid' human source management model. This means that some human sources are managed by a dedicated source team (DST), which consists of officers whose only duties are to manage human sources, whereas other sources are managed by officers with additional responsibilities, such as investigating and detecting crime.

Victoria Police currently has nine DSTs: four across the Commands and five across the Regional Divisions.<sup>57</sup> Victoria Police produced human source registration data to the Commission indicating that the proportion of human sources being managed by DSTs has increased over recent years, from 61 per cent in June 2017 to 79 per cent in June 2020.<sup>58</sup>

Tenure requirements (or 'maximum time in position' rules) apply to certain officers who hold human source management responsibilities, as set out in Box 12.4.

#### BOX 12.4: TENURE OF HUMAN SOURCE MANAGEMENT ROLES

In 2012, an internal Victoria Police review recommended 'maximum time in position' requirements be implemented for officers working in covert services. Noting the high-pressure environment in which handlers operate and their frequent contact with criminals, the review identified that maximum times in position would reduce the risk of corruption and misconduct, as well as support officer health and wellbeing.<sup>59</sup>

Victoria Police does not have uniform maximum time in position requirements for officers involved in human source management.

Under general Victoria Police policy, officers of the rank of Inspector and above—such as the CSR, LSRs and some OICs—are subject to redeployment after spending between two to five years in any one role.<sup>60</sup>

Handlers of high-risk sources and officers from the HSMU are restricted to a maximum of three to five years in their positions, while senior handlers and controllers of high-risk sources are restricted to five to seven years.<sup>61</sup>

The Human Source Policy imposes various requirements intended to mitigate risk and monitor the management of human sources. These are set out below.

#### Handling human sources within a 'sterile corridor'

The 'sterile corridor' refers to an arrangement whereby a human source's handlers are different police officers to those responsible for managing any criminal investigations that may rely on information provided by the source.<sup>62</sup> According to the Human Source Policy, the central purpose of the sterile corridor is to ensure that the human source's safety is not compromised through the pursuit of investigative outcomes.<sup>63</sup>

#### Acquisition of confidential or privileged information

Where a human source involving legal obligations of confidentiality or privilege provides information to police that appears to be in breach of their legal obligations, the handling team must immediately advise the HSMU and must not disseminate or act on the information.<sup>64</sup>

At the earliest opportunity, the handling team must record in Interpose that the information appears to breach legal obligations of confidentiality or privilege.<sup>65</sup>

The Human Source Policy indicates that the HSMU will then advise the CSR of the matter, who will refer it to the Ethics Committee. The Ethics Committee will review the information and determine how it should be treated.<sup>66</sup>

#### Supervision and management

The Human Source Policy specifies that 'supervisors, particularly human source controllers', are to perform 'intrusive supervision' of the handler–source relationship.<sup>67</sup> Although the policy does not define the term, it states that intrusive supervision must be practised by:

- *Understanding the expectations of Victoria Police in managing the inherent risks in human source relationships.*
- *... situational awareness of tactical deployments of human sources.*
- *Knowing how, where and when handlers are meeting with human sources.*

- ... [B]riefing ... handling teams following face-to-face contacts and other contacts (e.g. phone contact) where significant information is obtained or changes to risk are identified.
- Ensuring the AOR has been delivered, is appropriate, is being reinforced, remains appropriate and compliance is monitored.<sup>68</sup>

### Reviewing and reassessing the human source

The Human Source Policy sets out requirements for the ongoing review of human source files by the handling team and supervising officers:

- Handlers are to reassess risk every three months, or when a change in risk occurs, using the *Dynamic Risk Assessment*.<sup>69</sup> This requirement was introduced in May 2020. The controller, OIC and the LSR must all review this assessment.<sup>70</sup>
- Handlers are to review the Mental Health Functioning Screen at least every three months. If relevant issues are identified, they must consult the HSMU.<sup>71</sup>
- Controllers must conduct a monthly review 'of the human source relationship, risk assessment and value of the continued relationship', and record this in Interpose.<sup>72</sup> This also includes reviewing the AOR, at least monthly, to ensure its scope and conditions continue to be appropriate and sufficient.<sup>73</sup>
- OICs are to conduct a three-monthly review of active human source files, including whether they are compliant with policy requirements, which is then reviewed by the LSR.<sup>74</sup>
- LSRs must conduct a monthly review of high-risk human sources, including all human sources involving legal obligations of confidentiality or privilege. This review requires the LSR to confirm that current risk assessments remain 'fit for the purpose' and to record in Interpose the checks they undertook to inform that endorsement.<sup>75</sup>

These requirements intersect and are spread across multiple sections of the Human Source Policy.<sup>76</sup>

### Audits of human source files

The HSMU oversees all human source files, can review any action taken by members of the handling team, and must notify the LSR if it identifies compliance issues; for example, risk assessments or AORs that are not completed or updated within the specified timeframes.<sup>77</sup> To inform this process, the HSMU prepares spreadsheets, based on a manual review of Interpose, outlining the compliance status of human source registrations for the LSRs to review.<sup>78</sup>

Additionally, a unit within the ICSC, the Compliance and Risk Management Unit (CaRMU), conducts rolling six-monthly audits.<sup>79</sup> CaRMU audits aspects of Victoria Police's human source program, predominantly focusing on the management of high-risk sources, and measures compliance with the Human Source Policy.<sup>80</sup>

### Phase 3: Deactivation of a human source

A human source must be deactivated (that is, their registration brought to an end) where:

- there is no longer any operational need for the human source
- the risks have become too high to continue using the human source
- the human source deliberately breaches a condition of the AOR
- the human source has not provided reliable information for at least three months
- the human source has deliberately provided false or misleading information
- the human source is transitioned to the role of a witness in a criminal prosecution (which must be authorised by the Ethics Committee and be subject to a management plan).<sup>81</sup>

The Human Source Policy states that if a 'chance meeting' occurs between a deactivated human source and the handler, the handler must advise the controller as soon as practicable and submit a report of the contact.<sup>82</sup>

The Human Source Policy does not contain any further guidance relating to contact with or management of a source following deactivation, including the management of any risks to a deactivated source that might arise from the dissemination of information they provided to police while registered.

## Policy exemptions

The Ethics Committee can authorise a departure from procedural or technical requirements under the Human Source Policy. This may include, for example, requirements regarding timeframes for the completion of certain documents. While it is generally not possible to depart from policy requirements relating to Category 1–4 human sources, the Human Source Policy states:

*Nothing in this policy is intended to limit the capacity of Victoria Police to receive and use confidential information in a situation that is time critical and where there is an imminent threat to the life or safety of a person or the community ...*<sup>83</sup>

Where police perceive that it is necessary to disseminate information provided by a prospective (not yet registered) human source, the handling team must commence the registration process 'at the first available opportunity' and, if it relates to a Category 1–4 human source, refer the matter to the Ethics Committee for registration and directions.<sup>84</sup>

## Human source management training

The Human Source Policy requires the appointment of 'appropriately trained' officers to manage human sources.<sup>85</sup>

The HSMU coordinates and delivers in-house human source management training.<sup>86</sup> As part of the registration process, the HSMU considers the training competencies of the handling team, and the CSR may direct teams to include officers with a higher level of training and/or require officers to undergo additional training.<sup>87</sup>

### General human source management training

Victoria Police delivers the following human source management training courses, listed in order of increasing complexity and specialisation:

- *Basic online training course*—a course that provides basic awareness of the management and governance of human sources, including definitions, roles, responsibilities, and requirements set out in the Human Source Policy. All officers in the handling team are required to complete this training.<sup>88</sup>
- *Intermediate training*—a 'face to face training course that provides handlers and controllers with basic [techniques for] the management of human sources'.<sup>89</sup> This is recommended for officers who register human sources more frequently.<sup>90</sup> Human sources who will be tasked must be managed by a handler and controller who have completed this training.<sup>91</sup>
- *Specialised training*—an intensive course that provides handlers and controllers with a deeper understanding of human source management techniques.<sup>92</sup> Specialised training is designed for officers whose role is primarily management of sources in a DST.<sup>93</sup>

## Training specific to legal obligations of confidentiality or privilege

Victoria Police Deputy Commissioner Wendy Steendam, APM, Specialist Operations, told the Commission that all human source management training mentions the requirement for officers to contact the HSMU to obtain advice about the use of Category 1 human sources.<sup>94</sup> She also explained that training on issues relating to confidentiality and privilege may be provided by external experts, such as the Victorian Government Solicitor's Office (VGSO), or provided outside of the human source management context, including in police prosecutors' courses.<sup>95</sup>

## Training requirements for senior officers

The Human Source Policy specifies training requirements for senior officers. Generally, the controller, OIC and LSR are only required to undertake the basic online training.<sup>96</sup> The controller, however, is required to complete a higher level of training if managing certain types of human sources or involved in tasking them.<sup>97</sup>

This can mean that the handler has received the most specialised human source management training of all the officers in the handling team.

The Human Source Policy does not specify training requirements for HSMU officers, the CSR, members of the Ethics Committee, the Assistant Commissioner, ICSC, or the Deputy Commissioner, Specialist Operations. Victoria Police advised the Commission that, instead, position descriptions for these roles set out the requisite qualifications, skills and experience.<sup>98</sup>

Victoria Police told the Commission that, in practice, it is common for officers involved in the management of human sources to undertake a higher level of training than the minimum requirement, with 'a large proportion' of those officers having completed 'advanced training'. Victoria Police also advised that there are requirements (not outlined in the Human Source Policy) for officers in the HSMU to have received the 'same training undertaken by handlers and controllers, in addition to other courses in risk management'.<sup>99</sup>

## Use and management of human sources in other Australian jurisdictions

Each state and territory in Australia has a dedicated law enforcement agency that operates its own human source program, guided by internal policies and standard operating procedures.<sup>100</sup>

Australian law enforcement agencies collaborate in working groups to share knowledge about 'best practice' in human source management and training.<sup>101</sup> In consultations with the Commission, agencies identified that best practice principles and features of human source management include:

- review of applications to register human sources by senior officers<sup>102</sup>
- supervision and oversight of the handler–source relationship by senior officers<sup>103</sup>
- maintenance of a sterile corridor<sup>104</sup> (although there was not universal agreement that this constitutes best practice, as discussed below)
- 'sanitisation' of information prior to dissemination (that is, the removal of any details that could lead to the identification of the source)<sup>105</sup>
- ongoing and regular risk reviews of the human source<sup>106</sup>
- training for officers with human source management responsibilities<sup>107</sup>
- in some jurisdictions, DSTs.<sup>108</sup>

While human source frameworks around Australia are broadly consistent with Victoria Police's processes, policy differences can arise due to the specific legislative, geographic and operational environment in each state and territory.<sup>109</sup>

For example, New South Wales Police does not use sterile corridors, as it does not regard them as best practice. It told the Commission that its approach provides a larger pool of human sources from whom to draw information than would be possible if it used sterile corridors (presumably because it also enables a larger pool of officers to handle sources).

While some law enforcement agencies consider that the sterile corridor helps to protect the identity and thus the safety of human sources, New South Wales Police emphasised that it operates according to an overriding principle of maintaining the anonymity and safety of human sources and manages these risks effectively through robust disclosure and other organisational procedures.<sup>110</sup> Other challenges associated with using sterile corridors are discussed later in this chapter. Disclosure requirements and obligations that apply in New South Wales are discussed in Chapter 14.

Tasmania Police told the Commission it adopts different approaches to the use and management of human sources due to its smaller population and police service relative to other states and territories.<sup>111</sup>

The human source policies of most Australian law enforcement agencies do not specifically address the registration and use of human sources involving legal obligations of confidentiality or privilege.<sup>112</sup> Most agencies consulted by the Commission indicated that they would determine the appropriateness of using such a source on a case-by-case basis, taking into account the nature and value of the information the source may provide.<sup>113</sup> At the time of these consultations, some Australian law enforcement agencies indicated that they were in the process of updating their policies to include specific guidance on the use and management of human sources involving legal obligations of confidentiality or privilege.<sup>114</sup>

Northern Territory Police told the Commission that its general policy position is not to use human sources who are bound by legal obligations of confidentiality or privilege, such as lawyers or doctors, but that it may permit their use if the information is unconnected to their occupation or satisfies a legal exception,<sup>115</sup> such as under the *Evidence Act 1939 (NT)*.<sup>116</sup>

New South Wales Police's policy instructs that, if a lawyer or legal representative is to be registered as a human source, caution should be exercised to ensure that any information provided does not impinge upon or breach obligations of legal professional privilege. It also explains to officers what legal professional privilege is, its purpose and that it can only be waived by the client.<sup>117</sup> The policy also warns officers that should New South Wales Police use privileged information for investigative or intelligence purposes, it may be in breach of the *Evidence Act 1995 (NSW)*, which could 'constitute an abuse of the court process, or be contrary to the interests of justice and bring the law and legal system into disrepute'.

The policy requires that where information from a lawyer or legal representative appears to have been obtained directly or indirectly from a client, police should, in the first instance, ask the lawyer or legal representative whether the information could be privileged and whether they have any evidence that privilege has been waived by the client. If they cannot produce such evidence, the policy states that police should not use the information for any purpose. The policy also directs police to seek advice from senior officers or the Human Source Unit in relation to such matters.<sup>118</sup>

Federal law enforcement and intelligence agencies in Australia also use human sources. While the objectives and approaches of intelligence agencies reflect significant differences to those of police, aspects of their frameworks provide a useful comparison to the management and oversight of human sources by Victoria Police.

For example, under sections 8A(1) and 8A(2) of the *Australian Security Intelligence Act 1979* (Cth), the Minister of Home Affairs issues publicly available guidelines and sets principles that the Australian Security Intelligence Organisation (ASIO) must observe when performing its functions, including when obtaining and evaluating intelligence. In this way, the guidelines ‘form a critical component of the accountability framework that provides assurance that ASIO fulfils its functions consistent with the values of the community it serves’.<sup>119</sup>

The guidelines specify that in collecting information, ASIO must ensure, among other things, that:

*... any means used for obtaining and analysing information must be proportionate to the gravity of the threat posed and the likelihood of its occurrence ... [T]he intrusiveness of techniques or methods for collecting information are to be considered in determining approval levels for their use. More intrusive techniques should generally require a higher level ASIO employee or ASIO affiliate to approve their use ...*<sup>120</sup>

## Use and management of human sources in international jurisdictions

Human source practices differ across international jurisdictions and may be governed by legislation, public guidelines and/or internally developed policies.

Victoria Police informed the Commission that, in early 2019, it conducted international research tours in Canada, the United States of America and the United Kingdom to inform its own human source management processes.<sup>121</sup> Some Victoria Police practices are also comparable with those of New Zealand Police, as both agencies are members of various Australasian policing committees and adopt consistent standards.<sup>122</sup> In examining the adequacy of Victoria Police’s practices, the Commission considered how these jurisdictions approach human source management.

### New Zealand

New Zealand Police’s human source management policy does not prohibit the use of human sources involving legal obligations of confidentiality or privilege, but it does state that a source must not be tasked to obtain privileged information.

New Zealand Police advised the Commission that lawyers might approach police on behalf of their clients; for example, to inform them that a client has relevant information about a third party that the client wishes to disclose. It informed the Commission that, in these circumstances, officers would assume that the lawyers are acting lawfully, ethically and in the best interests of their client.<sup>123</sup>

Registering a human source in New Zealand requires dual approval by the most senior officer within the relevant district and the centralised Human Source Management Unit. If the prospective human source is higher risk, or any significant risks cannot be mitigated, an Officer in Charge of the Human Source Management Unit would be consulted and make a decision.<sup>124</sup>

### Canada

The Royal Canadian Mounted Police (RCMP) is responsible for federal law enforcement in Canada and provincial policing in most of Canada’s provinces and territories. The RCMP has an internal policy that governs its use and management of human sources.

Under the RCMP's model, authorisation to register a human source is granted by a senior officer within a division of the RCMP (usually an officer known as the Criminal Operations Officer) or alternatively by a Superintendent, Chief Superintendent or Assistant Commissioner. For very high-risk prospective human sources, authorisation must be given by RCMP's National Headquarters.<sup>125</sup>

The RCMP may use people involving legal obligations of confidentiality or privilege as human sources. It told the Commission that this would depend on the circumstances and the nature of the information being provided. If such a person were used, the RCMP indicated it would appoint an experienced handler and ensure close monitoring of the file by senior officers and RCMP's National Headquarters.

## United States of America

In the United States, federal law enforcement is carried out by several agencies administered through the Department of Justice. The Attorney-General is the head of the Department of Justice and the chief law enforcement officer who oversees federal prosecutions, advising on relevant legal matters.<sup>126</sup>

In the early to mid-2000s, the Attorney-General issued guidelines on using human sources (also known as 'confidential informants') to 'set policy regarding the[ir] use ... in criminal investigations and prosecutions by all Department of Justice Law Enforcement Agencies'.<sup>127</sup> These guidelines are:

- *The Attorney General's Guidelines Regarding the Use of Confidential Informants (2002)*
- *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (2006)*.<sup>128</sup>

The position of the United States Government and relevant agencies is to neither confirm nor deny whether these guidelines are current or have been superseded.

The 2002 and 2006 guidelines set out required processes for registering, assessing and reviewing the use of human sources, as well as for governance and decision making. The guidelines also establish authorisation processes for the registration and use of human sources who are 'under the obligation of a legal privilege of confidentiality'. Law enforcement agencies are required to establish a committee that is responsible for authorising the use of, and reviewing certain decisions relating to, human sources under such an obligation.<sup>129</sup>

The United States Drug Enforcement Administration (DEA) told the Commission that the use of human sources with legal obligations of confidentiality or privilege, such as lawyers, doctors or journalists, is technically permitted but very rare in practice and subject to stringent safeguards.<sup>130</sup> It explained that, due to the risks associated with obtaining privileged or confidential information, a United States attorney or federal prosecutor is always involved in the proposal to use such a source from the outset, with the investigation run in conjunction with the prosecution to ensure due process and privacy laws are strictly adhered to.<sup>131</sup>

Additionally, the DEA indicated that the proposed registration of a human source with legal obligations of confidentiality or privilege requires review by the DEA Sensitive Activities Review Committee and final authorisation by the United States Attorney-General's Office.<sup>132</sup>

## United Kingdom

The Commission paid particular attention to the United Kingdom's human source management framework, given the parallels between Victoria's common law and human rights systems and those of the United Kingdom, as well as the previous examination of this framework by Victoria Police and the 2012 review undertaken by former Chief Commissioner Neil Comrie, AO, APM (the Comrie Review).<sup>133</sup>

The United Kingdom framework includes:

- the *Regulation of Investigatory Powers Act 2000* (UK) (RIPA), which governs and provides the legal authority for the use of investigatory powers (such as the use of human sources) by public authorities, including police services and other law enforcement agencies<sup>134</sup>
- statutory orders issued by the Secretary of State and the *Covert Human Intelligence Sources Revised Code of Practice* (Code of Practice) issued by the Home Office; these supplement the RIPA's procedures and requirements and are all publicly available<sup>135</sup>
- external oversight mechanisms, such as the Investigatory Powers Commissioner's Office (IPCO), which oversees the use of investigatory powers (discussed further in Chapter 13).<sup>136</sup>

Key features of the United Kingdom's legislative framework as they apply to human sources are outlined below.

### Human rights, necessity and proportionality

The RIPA was established in response to the European Court of Human Rights' scrutiny of police use of surveillance devices in *Khan v United Kingdom*.<sup>137</sup> The Court found that although the conduct of police was consistent with guidelines issued by the Home Office, their use of human sources was inconsistent with the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Convention), to which the United Kingdom is a signatory, because there was no legislation authorising the use of these powers and because the powers were used in a way that limited human rights.<sup>138</sup>

The introduction of the RIPA aimed to establish a clear, lawful basis for the employment of investigatory powers, including the use of human sources, and to balance the need for police to combat crime by using certain investigatory powers with the need to protect human rights under the Convention. In doing so, the RIPA specifies that the use of human sources must be *necessary* and *proportionate* to what is sought to be achieved.<sup>139</sup>

For authorisation of a human source to be necessary, certain criteria must be satisfied; for example, it is in the interests of public safety or national security, or for the purpose of preventing or detecting crime.<sup>140</sup> The RIPA and Code of Practice use the term 'authorisation' when discussing decisions to approve the use of a human source. This chapter generally uses the term 'registration' of a source when referring to Victoria Police's framework, consistent with its Human Source Policy.

The Code of Practice indicates that the consideration of proportionality involves:

- *balancing the size and scope of the proposed activity against the gravity and extent of the perceived crime or harm*
- *explaining how and why the methods to be adopted will cause the least possible intrusion on the subject and others*
- *[considering] whether the conduct to be authorised will have any implications for the privacy of others, and an explanation of why (if relevant) it is nevertheless proportionate to proceed with the operation*
- *evidencing, as far as reasonably practicable, what other methods have been considered and why they were not implemented, or have been implemented unsuccessfully*
- *considering whether the activity is an appropriate use of the legislation and a reasonable way, having considered all reasonable alternatives, of obtaining the information sought.*<sup>141</sup>

## Authorisation of human sources generally

The use of human sources by public authorities in the United Kingdom may be authorised by a person who holds a prescribed office, rank or position.<sup>142</sup> Public authorities are not required to apply for an authorisation just because it is available; however, they are advised to do so when they intend to task a person to act as a human source or where they intend to obtain information from a person acting in such a capacity.<sup>143</sup> For standard authorisations in law enforcement agencies, the authorising officer must be of or above the rank of Superintendent.<sup>144</sup> These authorisations are ordinarily valid for an initial 12 months and must be in writing, unless the use of a human source is urgent.<sup>145</sup>

## Authorisations of human sources where confidential or privileged information may be acquired

The United Kingdom's framework provides enhanced authorisation procedures where the use of a human source is intended, or likely, to result in obtaining, accessing or disclosing confidential or privileged information.<sup>146</sup> The *Police Act 1997* (UK) (Police Act) defines 'matters subject to legal privilege' as any communication between a professional legal adviser and their client (or a person representing their client) that is made 'in connection with the giving of legal advice to the client'.<sup>147</sup> Similar to Australia, information exchanged in the course of a client–lawyer relationship is not privileged if it is created or held 'with the intention of furthering a criminal purpose'.<sup>148</sup> The Police Act also provides definitions of 'confidential personal information' and 'confidential journalistic material'.<sup>149</sup>

Box 12.5 provides an overview of the enhanced authorisation procedures in the United Kingdom.

### BOX 12.5: UNITED KINGDOM KEY REQUIREMENTS FOR AUTHORISATION OF HUMAN SOURCES WHERE CONFIDENTIAL OR PRIVILEGED INFORMATION MAY BE ACQUIRED

#### *Use of sources where it is intended to obtain legally privileged information*

- Authorisation must be granted by a more senior authorising officer (for police services, this is generally the Chief Constable) and approved by a Judicial Commissioner from IPCO.<sup>150</sup>
- Authorisations are for a shorter (three-month) duration, rather than the standard 12-month duration.<sup>151</sup>

#### *Use of sources where it is likely (but not intended) that legally privileged information will be obtained*

- Authorisation must be granted by a more senior authorising officer (generally the Chief Constable).<sup>152</sup>
- The application should assess the likelihood of legally privileged information being obtained.<sup>153</sup>
- Any inadvertently obtained legally privileged material should be treated in accordance with safeguards set out in the Code of Practice and reasonable steps should be taken to minimise access to it.<sup>154</sup>

#### *Use of sources where it is intended or likely that other types of confidential information will be obtained*

- Authorisation must be granted by a more senior authorising officer (generally the Chief Constable).<sup>155</sup>
- If *intended*, the application should document the specific necessity and proportionality of registration, and the authorising officer must be satisfied that appropriate safeguards for the management of the material are in place.<sup>156</sup>
- If *likely*, any possible mitigation steps should be considered by the authorising officer, and if none are available, consideration should be given to whether special handling arrangements are required.<sup>157</sup>

**Exceptions to privilege**

- If it is intended to obtain material that would be subject to legal privilege had it not been created or held with the intention of furthering a criminal purpose, applications must include a statement and reasoning to this effect (in these cases, normal registration processes for human sources apply, with final authorisation generally granted by a Superintendent).<sup>158</sup>
- Where there is doubt as to whether material is privileged due to this exception, advice should be sought from a legal adviser in the relevant authority.<sup>159</sup>

**Changes in scope of registration**

- If it becomes necessary for a human source authorised under standard procedures to obtain or disclose legally privileged material, the initial authorisation should be cancelled, and a new registration sought.<sup>160</sup>

## CHALLENGES AND OPPORTUNITIES

This section sets out the main issues that emerged from the Commission's assessment of the adequacy and effectiveness of Victoria Police's processes for the use and management of human sources, including those involving legal obligations of confidentiality or privilege. It draws on a range of evidence from witnesses who appeared at the Commission's hearings, its focus groups with Victoria Police officers, its audit of Victoria Police human source files, and information provided voluntarily or in response to notices to produce.

Consultations with Australian and international law enforcement, intelligence and justice agencies, and with academics and experts in human source management, also informed the Commission's understanding of the risks and challenges arising from the use of human sources and helped it identify opportunities for reform. A list of individuals and organisations consulted by the Commission is at Appendix G.

As outlined at the beginning of this chapter, a broad examination of Victoria Police's human source management framework was necessary to properly assess its practices for identifying and managing the risks of obtaining and using confidential or privileged information from human sources. The need for this broad approach was underscored in the Commission's engagement with other jurisdictions, where requirements for the use of confidential or privileged information from human sources generally form part of a broader policy and regulatory framework to deal with the varied and intersecting risks associated with the use and management of all human sources.

### Overarching framework for the use and management of human sources

As outlined earlier in this chapter, the Human Source Policy sets out requirements for the use and management of human sources. Unlike other covert and intrusive powers and methods used by Victoria Police (for example, telecommunications interception, surveillance devices and controlled operations), there is no legislative framework for, or independent external oversight of, the use and management of human sources in Victoria.

Recognising the significance of these other covert powers and their potential to infringe the rights of individuals, the Victorian and other Australian Parliaments have enacted legislation to establish clear parameters for their use by police and other law enforcement agencies.<sup>161</sup> These legislative regimes recognise that the use of such powers involves a balancing of relevant public interests; that is, weighing up the public interest in protecting the rights of individuals against the public interest in detecting and preventing serious crime. In addition to setting out

requirements for the use and monitoring of relevant powers and methods, such legislation also specifies who is responsible for approving their use. Typically, this will be either an agency's most senior officer or a court.

Box 12.6 summarises one such Victorian legislative regime, which sets out requirements for police use of surveillance devices.

#### **BOX 12.6: FRAMEWORK FOR OBTAINING A SURVEILLANCE DEVICE WARRANT**

In Victoria, the *Surveillance Devices Act 1999* (Vic) provides the legislative framework for Victorian law enforcement agencies, including Victoria Police, to use surveillance devices to investigate, or obtain evidence of, the commission of an alleged or committed offence. Recognising the significant incursions into privacy that the use of surveillance devices can involve, the legislative framework includes various requirements for their authorisation and use.

Surveillance device warrants are issued by the Supreme Court of Victoria and allow law enforcement agencies to use optical, listening and data surveillance devices. Applications for tracking devices can be authorised by the Magistrates' Court.<sup>162</sup> In issuing a warrant, the judge or magistrate must have regard to:

- a. the nature and gravity of the alleged offence in respect of which the warrant is sought; and*
- b. the extent to which the privacy of any person is likely to be affected; and*
- c. the existence of any alternative means of obtaining the evidence or information and the extent to which those means may assist or prejudice the investigation; and*
- d. the evidentiary or intelligence value of any information sought to be obtained; and*
- e. any previous warrant sought or issued under this Division or a corresponding law (if known) in connection with the same offence; and*
- f. any submissions made by a Public Interest Monitor.<sup>163</sup>*

The Public Interest Monitor (PIM) has a role in testing 'the content and sufficiency of the information relied on and the circumstances of the application'.<sup>164</sup> The applicant 'must fully disclose to the PIM all matters of which the applicant is aware that are adverse to the application'.<sup>165</sup>

External oversight of Victoria Police's use of covert powers and functions, including by the PIM, is discussed in Chapter 13.

Victoria Police's Human Source Policy aims, among other things, to manage risks arising from the use of human sources, some of which are comparable to the risks that arise in the use of other covert powers and methods used by police and that are generally governed by legislation. Below, the Commission discusses evidence received about the adequacy of this overarching policy framework, including the extent to which it:

- supports consideration and protection of human rights
- provides an adequate framework to regulate the risks associated with using human sources
- is consistent with the practices adopted by other police agencies across Australia.

## Human rights within the human source management framework

As noted above, Victoria Police has obligations under the Charter. In line with these obligations, its officers must give proper consideration to the human rights of people affected by its activities.

One of the human rights protected by the Charter is the right to a fair hearing.<sup>166</sup> Since May 2020, Victoria Police's Human Source Policy has listed some human rights that are relevant to human source management, but does not refer to the right to a fair hearing.<sup>167</sup> Separate to the Human Source Policy, officers can also consult the *Victoria Police Manual Policy Rules—Human rights equity and diversity standards* which provides high-level advice on officers' human rights obligations applicable to all areas of policing.<sup>168</sup>

The Human Source Policy notes that under the Charter, human rights can be lawfully limited if there is a proportionate justification that 'properly considers' and balances the impacts on a person's human rights. It states that 'properly considering' involves identifying 'the rights relevant to the decision and whether and how those rights will be interfered with by the decision, and [balancing] the competing private and public interests involved in the decision'.<sup>169</sup> It does not provide practical examples of how officers can fulfil this obligation.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) submitted that the Charter should be an integral aspect of the framework for Victoria Police's recruitment, handling and management of human sources, particularly those who hold legal obligations of confidentiality or privilege. It emphasised that 'the Charter's legal framework brings rigour, accountability and fairness to Victoria Police's conduct, which ultimately instils greater confidence in the administration of justice'.<sup>170</sup>

Former police officer Professor Clive Harfield, University of Queensland, noted that intrusion of privacy is inherent in the use of human sources, because a source typically uses deceit to breach an individual's trust and inform on them to police. He submitted that information obtained from human sources is acquired by infringing upon the 'fundamental principles of fairness, impartiality and honesty upon which the proper operation of the criminal justice system is founded', and that this is particularly the case when police have tasked the source. At the same time, Professor Harfield stressed that the use of human sources is 'justifiable when the harms of not having such information convincingly outweigh the harms inherent in [the criminal justice system] recruiting and exploiting individuals as [human sources]'.<sup>171</sup>

Under the United Kingdom's legislative framework, decisions to register a human source must balance the public interest in detecting and preventing crime and the public interest in protecting relevant human rights, such as the right to privacy, the right to life and an accused person's right to a fair hearing.<sup>172</sup>

The United Kingdom Home Office told the Commission that the primary benefit of the RIPA is its recognition of human rights and provision of a framework that seeks to ensure the use of investigatory powers is lawful, necessary and proportionate.<sup>173</sup> Several stakeholders from the United Kingdom told the Commission that the RIPA also helps to build public understanding of human rights and the circumstances under which they can be lawfully interfered with by public authorities, including police.<sup>174</sup>

Some stakeholders also pointed to the benefits of this legislative framework for law enforcement agencies.<sup>175</sup> For example, the United Kingdom National Crime Agency advised the Commission that, by requiring authorising officers to specifically consider necessity and proportionality, and to document those considerations when determining whether to authorise the use of a human source, the framework helps law enforcement agencies establish the rationale for their decisions, which is particularly important should those decisions ever be challenged.<sup>176</sup>

## Regulating the risks of human source management through legislation

Human source management is a high-risk activity, covert and intrusive in nature, requiring police to build professional relationships with criminals, and potentially limiting human rights in order to achieve investigatory outcomes. Each of these factors can increase the risk of police corruption and misconduct. Indeed, previous inquiries have suggested that human source management is one of the most significant ethical risks faced by Victoria Police.<sup>177</sup>

The Commission heard that both internal and external mechanisms to support accountability in the use of human sources can assist in the earlier identification of issues, help prevent sources being used improperly, and promote a stronger compliance culture among police.<sup>178</sup> Professor Sir Jonathan (Jon) Murphy, QPM, DL, Liverpool John Moores University, told the Commission that the transparency afforded through a legislative regime ultimately strengthens police practices, noting that 'policing activities that are conducted in secret and without supervision and oversight create corruption and misconduct risks'.<sup>179</sup>

The Commission heard from some stakeholders that there is a need for a legislative framework to govern Victoria Police's use and management of human sources.<sup>180</sup> The Independent Broad-based Anti-corruption Commission (IBAC) observed that the absence of legislation is at odds with the regulatory and oversight arrangements in place for other covert powers and functions exercised by police. It told the Commission:

*There are obvious benefits associated with statutory governance, particularly over powers that are inherently coercive or intrusive in nature. The adoption of a statutory framework to regulate the registration and use of human sources specifically has benefits arising from greater transparency of the management of human sources, and the prospect of incorporating mandated principles in the governance of this complex, sensitive and high-risk area of policing activity.*<sup>181</sup>

The Public Interest Monitor (PIM) told the Commission that a legislative model could establish criteria to guide decisions about registering a human source involving legal obligations of confidentiality or privilege and disseminating any information provided by them. These criteria could cover the nature of a human source's legal obligations, the value of the information expected to be obtained, and arrangements to ensure no privileged material is released, as well as requirements to consider any risks to the source, and whether their registration is in the broader public interest.<sup>182</sup>

Ms Steendam explained that, while 'there are no specific changes to the legislative and regulatory framework that Victoria Police is advancing', legislative change would likely be necessary to accommodate any new oversight arrangements.<sup>183</sup> In the Commission's focus groups with Victoria Police officers who hold human source management responsibilities, there were mixed views about the need for and value of a legislative framework for the use of human sources, as outlined in Box 12.7.

**BOX 12.7: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: REGULATING THE RISKS OF HUMAN SOURCE MANAGEMENT THROUGH LEGISLATION**

Some Victoria Police officers who participated in focus groups suggested that introducing a legislative framework could help police officers understand how they can use human sources involving obligations of confidentiality or privilege, including how any information provided by such human sources must be managed and disseminated.

Others noted that legislative frameworks for similar covert methods and powers result in an extensive internal review process before external authorisation by a court, but that this process also assists police by legitimising their actions.

Greater clarity about the scope of police powers and when they can be used was one of the benefits expected to flow from the introduction of legislation to standardise various covert and intrusive investigative methods across Australian jurisdictions.<sup>184</sup> When introducing the Crimes (Controlled Operations) Bill 2004 (Vic), it was noted in the parliamentary debates that the regulatory regime provided by the legislation would make it easier for police to undertake controlled operations, 'to define and monitor those operations and ultimately to provide some mechanism of accountability'.<sup>185</sup>

Sir Jon expressed similar views about the introduction of the United Kingdom legislative framework. He suggested that police services welcomed the RIPA, recognising that they had previously been operating without clear rules and a clear basis for decision making. He contended that it empowers officers by providing a framework within which they can articulate and justify their decisions.<sup>186</sup>

The Commission heard from some United Kingdom stakeholders that the RIPA also enhances public confidence in law enforcement as it means that the use of covert powers is subject to appropriate parameters and oversight, and is therefore less open to speculation.<sup>187</sup> IPCO told the Commission that the legislation provides officers seeking to authorise human sources with confidence that they are acting in good faith and according to the law.<sup>188</sup>

The Commission also heard that the United Kingdom model has presented some challenges. The Home Office observed that the RIPA and Code of Practice brought information about certain covert law enforcement powers and processes into the public domain for the first time—and, while noting the benefits of greater transparency and accountability, also emphasised that it can be challenging to balance these with the need to protect the confidentiality of covert tactics.<sup>189</sup>

The Home Office told the Commission that one of the challenges of the RIPA, its associated statutory orders and its Code of Practice is the time it takes to develop and pass amendments. The Home Office noted, for example, that it can be difficult to keep up with the pace of technological advancements, which often necessitate the employment of new or enhanced law enforcement powers and techniques.<sup>190</sup>

IBAC told the Commission that, while adopting a legislative framework to regulate Victoria Police's registration and use of human sources would increase transparency and provide an opportunity to set principles for human source management, it would need to provide sufficient flexibility and discretion for police in their management of human sources.<sup>191</sup>

Likewise, several Australian law enforcement and intelligence agencies emphasised that any legislative model would need to consider and support law enforcement agencies' operational requirements and capabilities. For example, South Australia Police stated that given the dynamic and fluid nature of managing human sources, it is important that any recommended reforms are clear, practical, able to be adhered to by officers, and flexible enough to respond to operational realities.<sup>192</sup> Queensland Police cautioned against any reforms that might limit the use of human sources, noting that this would greatly compromise police capability to detect and investigate crime.<sup>193</sup>

Based on his experience of the United Kingdom framework, Sir Jon said he had not seen evidence to indicate that the RIPA deters the use of human sources. He noted, though, that no legislative framework can fully protect against human error, inexperience or deliberate misconduct, and that any framework must still 'be supported by strong [police] leadership and culture that encourages adherence to the highest ethical standards'.<sup>194</sup>

## National consistency and interoperability

As outlined earlier in this chapter, Australian law enforcement agencies currently use working groups to share knowledge about best practice, including in relation to the use and management of human sources, which provides a level of consistency in policies and processes across jurisdictions.<sup>195</sup> Additionally, these agencies sometimes work together across state and federal legislative and policy frameworks to investigate and prosecute alleged offences—particularly in relation to serious and major crimes. This ability to work across jurisdictional boundaries is sometimes referred to as 'interoperability'. The Commission considered the extent to which the introduction of new policy or procedural reforms for the use of human sources by Victoria Police might have implications for law enforcement agencies in other Australian states and territories.

Ms Steendam told the Commission that the Australasian Human Source Working Group—which has representatives from each state and territory police service, and from relevant federal agencies—has developed national competencies for human source management training.<sup>196</sup> Then Assistant Commissioner Neil Paterson, APM, ICSC, pointed to national consistency in risk assessment processes across Australian and New Zealand agencies.<sup>197</sup>

While many stakeholders indicated that Australian law enforcement agencies use and manage human sources in similar ways and have broadly consistent processes, some also explained that there are differences in policies, decision-making arrangements and organisational models across jurisdictions.<sup>198</sup> As noted earlier, this includes differences related to the registration, authorisation and management of human sources involving legal obligations of confidentiality or privilege.

The Australian Institute of Policing proposed that the use of information from human sources involving these obligations should be standardised across Australian law enforcement jurisdictions. It suggested that this should be undertaken by the affected agencies and/or the Australian and New Zealand Policing Advisory Agency, rather than through legislation.<sup>199</sup>

The Australian Federal Police (AFP) told the Commission that it supports nationally consistent principles and practices in the management of human sources because it enhances interoperability between agencies. It said that this is particularly important in the case of multi-jurisdictional investigations and prosecutions, which are becoming increasingly prevalent as criminal networks expand their reach. The AFP noted that if a legislative framework, independent authorisation process or independent oversight mechanism were to be introduced in Victoria, consideration should be given to how this could impact joint taskforce investigations and ensuing prosecutions. For instance, it suggested that issues would arise surrounding the lawful authority of any state-based independent oversight mechanism to require the inspection of any relevant documents in the possession of federal agencies.<sup>200</sup>

Ms Steendam told the Commission that, due to each jurisdiction having its own framework and operational requirements, there is little scope for a national approach to the use of human sources.<sup>201</sup> She noted, however, that there is generally no need for human sources to be managed within different jurisdictional frameworks at the same time.<sup>202</sup> For example, if Victoria Police made contact with a potential human source who had information pertinent to the investigation of Commonwealth criminal offences, Victoria Police would do one of two things: register the human source, capture the information and disseminate it to the relevant federal body; or introduce the potential human source to the relevant federal body to be managed within Commonwealth frameworks.<sup>203</sup>

Other Australian law enforcement and intelligence agencies noted there may be challenges for consistency and interoperability should Victoria adopt a legislative model for the use and management of human sources, but also noted that different frameworks and requirements operate across jurisdictions now. For example, unlike Victoria, most other states and territories do not have human rights obligations under a charter.<sup>204</sup>

## Categorisation of human sources

Victoria Police's policy framework incorporates various safeguards that apply to human sources involving legal obligations of confidentiality or privilege. For this framework to operate as intended—that is, to prevent the improper acquisition and use of confidential or privileged information—police officers must first be able to identify who these human sources are. If officers are unable to do so, they are also unable to adhere to the policy requirements that apply to these types of sources, such as the requirement to consult the HSMU on the source's registration, or to refer the matter to the Ethics Committee for consideration.

As discussed in Chapter 11, between 2014 and May 2020, Victoria Police's Human Source Policy adopted a profession- or occupation-based approach to identifying and managing the risks of obtaining confidential or privileged information from human sources. The policy referred specifically to 'lawyers, doctors, parliamentarians, court officials, journalists or priests etc', based on examples listed in the Kellam Report.<sup>205</sup> Victoria Police now refers to these as the 'Kellam Occupations' or 'Category 1' human sources.

Chapter 4 of this final report notes that the critical issue is whether the *information* provided by a human source is confidential or privileged. A person with an occupation subject to legal obligations of confidentiality or privilege, such as a lawyer, doctor or journalist, might provide information to police that is clearly unconnected to their occupation and not confidential or privileged. Conversely, a person who is not themselves subject to such obligations might access and disclose to police information that is confidential or privileged.

Many Australian law enforcement agencies consulted by the Commission agreed that the critical issue is whether the information itself is confidential or privileged, and whether its value to law enforcement and community safety warrants its use and the associated risks.<sup>206</sup>

Participants in the Commission's focus groups expressed similar views, as outlined in Box 12.8.

**BOX 12.8: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: CATEGORISATION OF HUMAN SOURCES**

The Commission's focus groups with Victoria Police officers examined officers' awareness of the policy requirements pertaining to human sources with legal obligations of confidentiality or privilege, and their understanding of the issues and risks associated with obtaining and using confidential or privileged information. At the time of the focus groups, the Human Source Policy applied safeguards based on whether human sources were in one of the occupations now termed the 'Kellam Occupations', also referred to as 'Category 1' sources.<sup>207</sup>

As noted in Chapter 11, focus group participants expressed confusion about the scope of Victoria Police's policy requirements relating to human sources in the 'Kellam Occupations' category. When asked about human sources subject to obligations of privilege or confidentiality, many gave examples of occupations not mentioned in the Human Source Policy, such as bankers, financial services employees, school employees, security personnel and government employees. While most participants demonstrated a clear understanding of legal privilege, many were unsure about the nature and scope of obligations of confidentiality.

Several participants suggested that the source's occupation is less relevant to the risks associated with their use as a source than the nature and provenance of the information they are seeking to provide.

These views differed somewhat from those of several legal services and legal profession stakeholders; as noted in Chapter 4, some of these stakeholders suggested that any use of a lawyer as a human source (regardless of whether the information relates to a client) presents significant challenges due to, among other things, the difficulty in identifying whether information is confidential or privileged.

As noted above, in May 2020, the Human Source Policy expanded the range of people who might be at risk of providing confidential or privileged information to those with a 'connection to Category 1' occupations; that is, those who: previously worked in a Category 1 occupation; are likely to receive confidential or privileged information from a person in a Category 1 occupation; or are in a similar occupation where they are likely to receive confidential or privileged information.

The Human Source Policy does not provide further guidance on the types of individuals 'likely to receive privileged or confidential information' or in 'similar' occupations; nor does it articulate why using and obtaining confidential or privileged information from a human source may be problematic.

Ms Steendam indicated that a broad range of people might fall into this category, noting that it might include someone who worked in the office of a person with one of the Category 1 occupations, or someone in a relationship with such a person. Ms Steendam suggested, 'it can be as broad as someone who might incidentally come across that information, say a cleaner who is at perhaps a legal practice, who might overhear something or find something inadvertently'.<sup>208</sup>

The human source framework in the United Kingdom focuses on the nature of the information to be obtained from a human source; that is, safeguards apply where it is likely or intended that the information is confidential or privileged. The Code of Practice provides examples of information that warrant greater caution but does not specify the occupations or types of people who might hold such material. In reflecting on the United Kingdom model, Sir Jon told the Commission that it is impossible to prescribe every possible scenario or circumstance in policy, noting that it must be broad and flexible enough to capture the myriad of potential situations that may arise and to enable a case-by-case assessment about the nature of the information and associated risks.<sup>209</sup>

Likewise, Mr Gary Dobson, Director of Policing Programs at Macquarie University, told the Commission that any framework governing human source management must be understandable, easy for police to use, and flexible enough that processes can be adapted to manage the varied and complex risks that arise in the use of human sources. Where it is not, he noted, the risks include officers improperly circumventing the system, or no longer using human sources at all, which could ultimately result in major crimes not being solved.<sup>210</sup>

## Registration and decision making

As detailed earlier in this chapter, the Human Source Policy requires multi-levelled review and endorsement of a proposed human source registration. Depending on the type of human source, this process involves five to seven review points. The controller, OIC, LSR, HSMU and CSR are required to endorse all registrations and if the prospective human source falls into Categories 1–4, authorisation by the Ethics Committee is also required. Where there is an intention to use or obtain confidential or privileged material, authorisation must be granted by the Deputy Commissioner, Specialist Operations.

In some circumstances, an officer may wish to approach a prospective Category 1–4 human source to assess whether to submit a registration application. The Ethics Committee is required to authorise any request to ‘approach’ such a source. Victoria Police advised that such a request must be reviewed and endorsed by the controller, OIC, LSR, HSMU and CSR before referral to the Ethics Committee. If the handler decides to then seek registration of this source, the registration application must proceed through the same multi-levelled process, creating the possibility that there may be up to 14 review points before authorisation.<sup>211</sup>

The Commission received evidence pointing to various issues relating to Victoria Police’s decision-making model for the registration of human sources, as discussed below.

## Accountability and efficiency of decision making

Australian and New Zealand law enforcement agencies consulted by the Commission described multi-levelled processes for the registration of human sources, noting that review by a range of roles and ranks provides more rigorous oversight and assessment of risk.<sup>212</sup> Northern Territory Police explained that this process means conditions for registration can be added at any stage of the process and facilitates a more objective assessment of the application.<sup>213</sup>

Ms Steendam told the Commission that Victoria Police’s multi-levelled approach to the review and endorsement of human source registrations allows it to manage the ‘natural tension between appropriate governance, controls and making sure that we are careful in the way in which we manage these issues’.<sup>214</sup>

Most law enforcement agencies consulted by the Commission indicated that their decision-making models involve fewer review points than Victoria Police’s model, with some noting that additional or higher levels of authorisation may apply if warranted by the risk assessment.<sup>215</sup> Victoria Police’s use of a committee to determine registration applications for certain categories of human sources also differed to the approaches adopted by most other law enforcement agencies consulted by the Commission. In relation to human sources involving potential legal obligations of confidentiality or privilege, Australian law enforcement agencies generally described other processes and practices to support the decision-making process, including the handling team notifying and seeking the advice of senior and/or executive officers, or obtaining legal advice.<sup>216</sup>

As outlined earlier in this chapter, the United Kingdom framework requires the use of a human source by police to be approved by an authorising officer, generally at the rank of a Superintendent, with a higher level of approval by the Chief Constable required where it is likely or intended that confidential or privileged information will be obtained.

Sir Jon outlined the benefits of decision making by dedicated authorising officers; that is, officers who are only responsible for decisions about the use of human sources (and in some cases, the use of other covert powers and functions), rather than officers who are balancing many other operational responsibilities. He indicated that this provides a single point of accountability and supports more rigorous scrutiny and oversight of the registration process and the subsequent handler–source relationship.<sup>217</sup>

While commenting on his own experience in United Kingdom law enforcement rather than specifically on Victoria Police's decision-making model, Sir Jon expressed the view that the use of committees to make operational decisions can reduce accountability, suggesting that they are better suited to governance and oversight:

*I think we train people for roles and we promote them on the basis of their experience, their skills and their judgment and then we hold people accountable for the decisions they make. I am personally not a fan of decisions by committee. I think the role of committees is to hold people accountable for the decisions that they've made.*<sup>218</sup>

Former Chief Commissioner Kenneth (Ken) Lay, AO, APM told the Commission that many governance arrangements in place during his time at Victoria Police did not support accountability in decision making, and that decisions were often not documented or appropriately reviewed or challenged by senior leaders, particularly in operational policing areas.<sup>219</sup> He also suggested the absence of a risk and audit committee overseeing high-risk decisions in operational policing was in direct contrast to practices adopted by administrative or corporate areas in policing and by other public sector and private sector organisations.<sup>220</sup>

When asked about the reasons for adopting a committee-based decision-making model rather than assigning responsibility to a senior Victoria Police officer, Ms Steendam stated that any decision by the Ethics Committee is ultimately signed off by the Assistant Commissioner, ICSC. This is not specified in the Human Source Policy. Ms Steendam also noted that matters considered by the Ethics Committee are complex and difficult, and consequently need a variety of perspectives to inform and support decisions about registration.<sup>221</sup>

Box 12.9 and Box 12.10 outline issues related to the decision-making role of the Ethics Committee, observed through the Commission's audit of human source files and focus groups with Victoria Police officers.

#### **BOX 12.9: OBSERVATIONS FROM THE COMMISSION'S AUDIT OF HUMAN SOURCE FILES: ETHICS COMMITTEE REFERRAL**

The Commission's audit of Victoria Police human source files related to people with potential legal obligations of confidentiality or privilege found that of the 31 files subject to the audit, none were subject to consideration by the Ethics Committee.

As discussed in Chapter 11, this appears to have been because officers decided that legal obligations of confidentiality or privilege did not apply to the sources in question (for example, because the information was obtained from their personal associations rather than in the course of their employment). Consequently, these matters were not referred to the Ethics Committee or for legal advice; nor were any of the sources managed as high-risk sources.

Victoria Police told the Commission it 'considers that the results of the audit demonstrate that [officers] have generally been able to identify the existence of potential issues relating to legal obligations of privilege or confidentiality and that, with the possible exception of one source, there was no need for the position of the proposed sources to be considered by the [Ethics Committee]'.<sup>222</sup>

**BOX 12.10: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: ACCOUNTABILITY FOR DECISION MAKING**

Participants in the Commission's focus groups expressed mixed views about the role and operation of the Ethics Committee. Some suggested that it is beneficial to have a committee determine high-risk matters. Some said that the Ethics Committee does not routinely communicate the reasons for its decisions, and expressed concern that handlers are not involved in its discussions and deliberations. Others suggested that the roles of the LSR and OIC in the decision-making structure for registering a human source are unnecessary, since the CSR or the HSMU make the final registration decision.

Some participants said that when a potential issue of confidentiality or privilege is identified in relation to a human source or prospective source, handlers are required to cease contact and take no further action until the Ethics Committee makes a determination. Participants suggested that this limits their ability to seek details from the person about the nature of the information and the relevance of any obligations of confidentiality or privilege, which in turn limits their ability to support the Ethics Committee in making an informed decision.

Participants in most focus groups were critical of what they perceived to be growing risk aversion in the Ethics Committee's decisions. They suggested that decisions not to register certain prospective sources are driven by concerns about reputational risk to Victoria Police, and expressed the view that this is compromising community safety outcomes. In contrast, senior officers who participated in the focus groups emphasised that decisions not to register certain sources are made following a careful balancing of the potential risks, the value and nature of the information, and the public interest.

In her evidence to the Commission, Ms Steendam explained that the CSR's primary responsibility is the management of human source capability for Victoria Police; whereas LSRs (typically Divisional Superintendents) and OICs are expected to manage multiple issues on behalf of the organisation, while also applying careful scrutiny during the decision-making process for human source registrations.<sup>223</sup>

Several participants in the Commission's focus groups commented on the number of review points in Victoria Police's current decision-making model, as outlined in Box 12.11.

**BOX 12.11: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: INEFFICIENCY OF DECISION MAKING**

Numerous focus group participants suggested that the decision-making process is inefficient and duplicative. Several participants expressed frustration about the time it takes for registrations to be authorised. Some suggested that this can take between four and six weeks and that, by this time, often the human source has lost motivation, or the information is no longer relevant or actionable. Many suggested that these delays are partly due to the number of people involved in the decision-making process.

Participants also told the Commission that when decisions are made not to register a prospective source after numerous contacts with that person, it can put handlers in a position where they are expected to 'unhear' information that could solve or prevent serious crime.

Some participants asserted that the Ethics Committee meets on an ad hoc basis and suggested it should be required to meet regularly and make registration decisions within specified timeframes. Others said that it meets every six weeks and functions effectively.

In her statement to the Commission, Ms Steendam noted that between 1 January 2016 and 9 April 2020, the Ethics Committee convened on 13 occasions. There is no meeting schedule or requirement to convene a minimum number of meetings; rather, meetings are 'held as and when required'.<sup>224</sup>

Ms Steendam explained that Ethics Committee decisions can be made quickly in urgent circumstances, potentially within one day, and that for other, non-urgent matters, it can take up to 14 days or longer for a decision, depending on the issues.<sup>225</sup> She also stated that while in some cases it is appropriate to streamline and make processes more efficient, this needs to be balanced against the risks and the need to protect the prospective human source.<sup>226</sup>

## Role of legal and other specialist advice

As noted in Chapter 4, issues associated with confidential and privileged information are inherently complex and difficult to navigate.

Victoria Police told the Commission that decisions about Category 1 human sources are informed by legal advice, and that this is generally facilitated by the Executive Director of Victoria Police's Legal Services Department (or delegate) being a member of the Ethics Committee. In May 2020, the Executive Director, Legal Services became a voting member of the Ethics Committee.<sup>227</sup> Prior to this, a Legal Services Department representative had been a member of the Ethics Committee but they did not have voting rights.<sup>228</sup>

Ms Steendam noted that Victoria Police might also seek external legal advice to determine more complex matters, such as through the VGSO or other counsel.<sup>229</sup> For less complex matters, Ms Steendam considered that internal legal advice is sufficiently independent, as the staff providing the advice are unconnected to the work units that submit applications to register human sources. She noted that any decision to obtain external legal advice must consider the efficient use of public resources and, to protect the safety of human sources, the need to limit the number of people aware of their identity.<sup>230</sup>

Professor Alexandra Natapoff, University of California, told the Commission that external and independent legal advice can mitigate the risk of internal lawyers being invested in the outcome of a conviction.<sup>231</sup> Law enforcement agencies consulted by the Commission generally indicated they would be more likely to seek internal rather than external legal advice.

Mr Paterson identified the increased role of legal advice in the management of human sources overseas, noting that in jurisdictions he had visited, legal advisers are embedded in or operate alongside DSTs. Mr Paterson noted that these agencies consider that this helps to ensure agency compliance with legislative and policy frameworks, and to enable early identification and mitigation of any issues in the use of human sources who may hold legal obligations of confidentiality or privilege.<sup>232</sup>

Law enforcement agencies in the United Kingdom told the Commission that internal legal advisers play an important role in the human source management process. The Police Service of Northern Ireland told the Commission its internal Human Rights Legal Adviser is involved in every aspect of an application to register a human source where it is intended or likely to result in the acquisition of confidential or privileged information.<sup>233</sup> Similarly, the United Kingdom's National Crime Agency indicated it would seek internal legal advice where confidential or privileged information is likely or intended to be obtained.<sup>234</sup>

Queensland Police told the Commission that while it is not required, in practice, internal legal services often provide advice to inform registration decisions—particularly for those human sources considered to be 'extreme' risk.<sup>235</sup> Likewise, Tasmania Police told the Commission that in its human source management framework, officers work closely with the Principal Legal Officer from early on in the decision-making process.<sup>236</sup>

## External authorisation

As mentioned earlier in this chapter, there is currently no external independent oversight of, or involvement in, the registration of, human sources by law enforcement agencies in Australia. This means that decisions to use human sources involving legal obligations of confidentiality or privilege are made internally by officers and/or senior command, and that these decisions are not subject to dedicated and routine external monitoring.

Issues relating to external oversight of Victoria Police's use and management of human sources are discussed in Chapter 13.

## Identification, assessment and review of risk

At 30 October 2020, and as detailed earlier in this chapter, Victoria Police used three risk assessments to consider the suitability of a prospective human source: the Initial Risk Assessment, the Dynamic Risk Assessment and the One-off Risk Assessment.<sup>237</sup>

In May 2020, Victoria Police advised the Commission that the Initial Risk Assessment was under review, and that it intended to implement a new risk assessment by December 2020.<sup>238</sup>

The Commission received evidence about the adequacy of Victoria Police's risk assessment processes relating to issues of confidentiality or privilege and human rights, and about the overall usability of the risk assessment tools. These matters are addressed below.

### Risk assessments: Issues of confidentiality and privilege

Similar to Victoria Police's policy framework for the use of human sources, the Initial Risk Assessment focuses on identifying a prospective human source's occupation, rather than the nature and origin of the information that may be obtained. It requires officers to consider whether a prospective source is occupationally bound by other duties that may give rise to legal, ethical or medical privilege considerations.<sup>239</sup> The identification of these duties determines what safeguards will be applied under the Human Source Policy.

Beyond considering a prospective human source's occupation, the Initial Risk Assessment does not seek to identify the likelihood of confidential or privileged information being provided; nor how any associated risks will be mitigated.

Victoria Police's more recently developed Dynamic Risk Assessment and One-off Risk Assessment require consideration of whether the information provided by the source could be confidential or privileged by the officers completing the assessments.<sup>240</sup>

Several participants in the Commission's focus groups commented on practices for identifying confidential or privileged information, as outlined in Box 12.12.

**BOX 12.12: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: IDENTIFYING RISKS RELATED TO OBLIGATIONS OF CONFIDENTIALITY OR PRIVILEGE**

Most focus group participants told the Commission that they find it difficult to determine whether information is confidential or privileged due to the complexity of these concepts, though some noted that they might detect any legal obligations of confidentiality or privilege by answering the questions set out in the Initial Risk Assessment. Some participants also noted that they would use the risk assessment to identify and outline ways to mitigate the risks of using high-risk human sources, including those involving legal obligations of confidentiality or privilege.

Several officers noted that the recent introduction of fields in Interpose to capture the occupation of a human source or prospective source has improved the risk assessment process, but also observed that this could discourage officers from filling it out correctly, as any identification of a source as being subject to obligations of confidentiality or privilege would result in them being rated as high-risk and therefore transferred to a different team (that is, the DST that manages high-risk sources).

Under the Human Source Policy, officers who identify that a prospective human source is likely to receive confidential or privileged information must refer the matter to the CSR via the HSMU, which in turn must refer it to the Ethics Committee for a decision.<sup>241</sup>

The Commission heard that, in these circumstances, a condition would be included in the AOR stating that the human source is not to provide confidential or privileged information (unless explicitly authorised by the Deputy Commissioner, Specialist Operations). Ms Steendam explained that while the Human Source Policy does not mandate the inclusion of such a clause in the AOR, in practice the Ethics Committee would require its inclusion alongside any other requirements specific to the circumstances.<sup>242</sup>

### **Risk assessments: Human rights, necessity and proportionality**

Unlike in the United Kingdom, the concepts of necessity and proportionality are not explicitly set out in Victoria's Charter, but are recognised as key concepts in human rights law.

In its submission to the Commission, VEOHRC explained that the lawful limitation of a human right is justified following an assessment of the nature of the right, the importance, proportionality, nature and extent of the purpose of the limitation, and whether there is 'any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.<sup>243</sup> Any limitation of rights must also be necessary and reasonable.<sup>244</sup>

According to former Chief Commissioner of Victoria Police, Mr Comrie, decisions to use a human source must be underpinned by a robust and effective risk assessment process that includes consideration of whether use of a human source is legitimate, necessary and proportionate.<sup>245</sup>

In the context of human source management, an assessment of necessity and proportionality would involve considering any limitation of human rights and might also involve considering broader risks to the organisation. For example, the safety and reputational risks associated with registering a human source with a significant criminal history must be balanced against the seriousness of the crime police are seeking to prevent or prosecute.

Victoria Police's risk assessment tools do not prompt a human rights assessment for prospective or registered human sources. In evidence before the Commission, Ms Steendam indicated that all officers involved in the human source registration process are responsible, when commencing the registration application process, for assessing

whether it is necessary and proportionate to register a human source.<sup>246</sup> Ms Steendam said that this is a separate process to a risk assessment, and takes into account the findings of that assessment, the details of the registration documentation and any risk mitigations.<sup>247</sup> The Human Source Policy does not reflect this separate process.

Sir Jon explained that as part of assessing necessity and proportionality in the United Kingdom, ‘officers responsible for conducting and authorising such activity ought to be thinking through at the outset whether they can reasonably justify the activity in the face of any future scrutiny’.<sup>248</sup>

Under the United Kingdom’s Code of Practice, assessing proportionality involves officers identifying the ‘least possible intrusion’ on human rights, and turning their minds to ‘what other methods had been considered and why they were not implemented, or have been implemented unsuccessfully’.<sup>249</sup> Where there is an intention to obtain legally privileged material, the Code of Practice also sets a higher threshold to satisfy the concepts of necessity and proportionality, requiring authorising officers to set out in the application the ‘exceptional and compelling circumstances’ that necessitate the registration.<sup>250</sup>

## The usability of risk assessment tools

Mr Dobson emphasised the importance of risk assessments being easily used and understood by officers. He noted that overly complex risk assessments can be a disincentive to officers using human sources and may therefore limit the ability of police to solve major crimes. To this end, he noted the reduced number of registered human sources in New South Wales following the introduction of the risk assessment process after the 1997 Royal Commission into the New South Wales Police Service.<sup>251</sup>

As outlined in the 2010 Victoria Police *Audit of Victoria Police Human Source Management Practices*, risk assessments should include all relevant information on the prospective human source and their circumstances, along with an honest and accurate assessment of whether the person is suitable for use as a human source. This enables the handling team to develop a comprehensive plan for managing the identified risks and ensures that supervising officers are aware of all the risks.<sup>252</sup>

The usability of Victoria Police’s human source management risk assessments was raised by officers who participated in the Commission’s focus groups, as outlined in Box 12.13.

### **BOX 12.13: OBSERVATIONS FROM THE COMMISSION’S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: THE USABILITY OF RISK ASSESSMENT TOOLS**

Participants in several focus groups suggested that the Initial Risk Assessment, which contains 58 mandatory questions, is onerous and impractical. Some suggested that the tool should be more tailored and tiered, so that the overall number of questions is determined by whether certain threshold questions receive a ‘yes’ or ‘no’ response (meaning there would be a more comprehensive assessment for higher risk individuals, and a simpler and shorter assessment for lower risk individuals).

Some participants indicated that the risk assessment is a ‘tick and flick’ exercise, and while the ‘free text’ fields are useful for including information specific to a prospective human source, the ‘checkbox’ questions are of minimal use or relevance. Several participants indicated that the tool could be streamlined.

Some participants suggested it is possible to complete the Initial Risk Assessment in such a way as to lower the risk level—to, for example, reduce the risk rating category from a high risk to a medium risk. Officers noted this could be done to avoid certain handling requirements for high-risk sources, and/or to increase the likelihood that the application will be authorised.

Victoria Police's *Human Source Strategy 2018–2022*, an internal draft document prepared in 2018, indicated that the Initial Risk Assessment was not fit for purpose and was contributing to non-compliance with policy requirements.<sup>253</sup>

In evidence before the Commission, Ms Steendam indicated that the Initial Risk Assessment is being refined with the assistance of a senior forensic psychologist who has expertise in designing risk assessments.<sup>254</sup> When asked whether the risk assessment is potentially being viewed as a 'tick and flick' exercise among officers, Ms Steendam explained:

*That first risk assessment is quite lengthy ... there's a review process being undertaken ... to see if there's opportunity to refine that process and make it more specific ... and make it more streamlined for this very reason, to assist our handlers in the completion of that form.*<sup>255</sup>

## Supervision of the human source–handler relationship

Law enforcement agencies consulted by the Commission agreed that close supervision of the human source–handler relationship is a critical aspect of human source management and should form part of a broader risk management and governance structure that supports the ethical and proper handling of human sources.<sup>256</sup>

In combination with other safeguards and risk mitigation strategies, effective supervision:

- encourages compliance with human source policies and keeps officers accountable<sup>257</sup>
- helps to manage key risks associated with human source management (such as corruption, breaches of confidentiality relating to the source's identity, and risks to prosecutions and the administration of justice)<sup>258</sup>
- assists in identifying administrative errors or discrepancies that could be concealing wrongdoing.<sup>259</sup>

The Commission consulted with serving Western Australia police officer and Adjunct Associate Professor Dr Charl Crous, APM and Associate Professor Pamela Henry, Edith Cowan University. They advised that in the context of human source management, 'intrusive supervision is key, including coordinated self-reflection, critical-assurance and appraisal of performance. [It] leads to improved self-practices ... which continues after formal training has concluded'.<sup>260</sup>

Stakeholders consulted by the Commission emphasised that human source policies and systems are not foolproof, and there is always a risk that officers will act outside required approval processes and management controls, either intentionally or through ignorance.<sup>261</sup> Western Australia Police and Sir Jon indicated that effective supervision aids in detecting this type of improper conduct.<sup>262</sup>

### The adequacy of supervision

In her evidence to the Commission, Ms Steendam noted that in a practical sense, exercising 'intrusive supervision' means that officers with supervisory responsibilities:

*... are active, that it's not just a tick box, that they actually have active conversations, look at the risks that have been identified and make sure that the mitigations are appropriate.*

*... It's ensuring that the OIC and the controller are exercising the supervision requirements that they need to across the source and how they're managing that in a tactical sense. It's also to make sure that continuation of that relationship is appropriate. So it crosses over multiple and varied parts of their responsibility.*<sup>263</sup>

Ms Steendam told the Commission that all officers in a human source chain of command should be practising effective supervision, including the Assistant Commissioner, ICSC, and noted that the Human Source Policy makes this clear.<sup>264</sup>

Mr Paterson said that ‘the failures that have occurred in relation to Ms Gobbo could not occur in the context of our current policies, intrusive supervision and governance framework’.<sup>265</sup>

In its focus groups with Victoria Police officers, the Commission explored how supervision was being exercised across Victoria Police’s human source management functions.<sup>266</sup> Key observations from the focus groups are summarised in Box 12.14.

#### **BOX 12.14: OBSERVATIONS FROM THE COMMISSION’S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: SUPERVISION PRACTICES**

##### ***Inconsistent supervision***

The consensus among focus group participants was that supervision of handlers is not practised consistently across Victoria Police. Participants reported a lack of supervision by responsible officers in some areas, including controllers, LSRs and OICs.

The Commission’s audit of Victoria Police files similarly noted a lack of critical review by LSRs and OICs in their assessment of documentation to support the registration and ongoing management of human sources.

##### ***Expectation that others will acquit responsibility***

Participants in several focus groups indicated that they do not have confidence that OICs and LSRs actively review and audit human source files as required under the Human Source Policy. They suggested that LSRs rely on the HSMU for supervision and governance of source files and on the handling team to advise them of any risks or issues that arise.

Some LSR and HSMU participants made similar observations. Several HSMU participants said that because primary responsibility for supervision rests with the controller, OIC and LSR, HSMU officers do not routinely check certain reports generated from handlers’ interactions with human sources.

##### ***Resource and structural challenges***

Controllers in the Commission’s focus groups indicated that they perform supervision in a range of ways, including by reviewing human source documentation and reports in Interpose. Some, however, said that limited resources impede proper supervision—for example, it is sometimes necessary for an officer to act as both handler and controller, thus eliminating controller oversight of the handler.

Focus group participants suggested that Victoria Police’s current hybrid model of human source management affects the quality of supervision. As noted elsewhere in this chapter, DSTs are focused purely on human source management functions and are not responsible for other duties, such as investigating suspected crime. Participants indicated that DSTs are subject to more effective and consistent supervision by senior officers, in contrast to handling teams with investigative functions, which have fewer resources available to prioritise human source management. For example, participants noted that in certain regional areas without a DST, it is sometimes necessary to nominate a controller located in an entirely separate office over an hour away, making it difficult for the controller to provide consistent and active oversight and supervision.

LSRs said it can be difficult to find time to supervise handlers and controllers, given the breadth of their responsibilities as Divisional Superintendents. One participant indicated that they adopt a ‘minimalist’ approach to supervision, with several others saying that they assess the skill level and experience of handlers when deciding how much supervision and oversight is necessary.

Victoria Police produced other information to the Commission that pointed to challenges in achieving effective supervision of human source management across the organisation. Its draft Human Source Strategy 2018–2022 suggested that:

- officers involved in supervision and governance were not prioritising compliance with human source policy over other duties
- there was a lack of consistent supervision and governance, leading to a failure to comply with policy
- LSRs relied heavily on the OIC and the controller to supervise handlers, but often all three of these roles failed to provide the level of supervision required.<sup>267</sup>

The document indicated that inadequate supervision could have resulted from managers:

- having little interest in, or intentionally or recklessly ignoring, compliance obligations due to competing priorities
- having no background in investigations and/or prosecutions
- having no training in relation to their specific role and responsibilities
- demonstrating an absence of ownership over their position due to acting arrangements, as opposed to being appointed for a certain period.<sup>268</sup>

Sir Jon told the Commission that having an authorising officer with a dedicated focus on human source management facilitates effective supervision, noting that such officers are better positioned to actively challenge controllers and handlers in their use of a source and how they propose to manage identified risks.<sup>269</sup> Likewise, former police officer Dr Adrian James, Liverpool John Moores University, explained that effective supervision can prevent administrative errors along with more serious wrongdoing.<sup>270</sup>

## Human source management training

The Commission heard that, generally, training for officers responsible for human source management is delivered consistently across Australian law enforcement agencies in the form of basic online training, intermediate training and specialised training. The Commission heard of similar tiered training frameworks operating in Canada, New Zealand and Scotland.<sup>271</sup>

In May 2020, Ms Steendam advised the Commission that Victoria Police was reviewing the training requirements for officers involved in human source management.<sup>272</sup> To inform this review, the Commission discusses below five key themes relating to Victoria Police's human source training that emerged during its inquiry:

- the adequacy of basic training for people who handle and manage human sources
- the adequacy of training for senior officers with human source management or registration responsibilities
- the absence of ongoing or 'refresher' training
- the extent to which human source management training supports an understanding of human rights obligations
- the extent to which human source management training covers obligations of confidentiality or privilege.

### Adequacy of basic online training

As noted earlier in this chapter, police officers who directly manage or supervise the use of human sources are required, at a minimum, to complete Victoria Police's basic online training.<sup>273</sup> As the majority of officers complete this training, rather than intermediate or specialised modules, the Commission considered the adequacy of this training and its ability to support officers to manage human sources ethically and in accordance with the Human Source Policy.

A Victoria Police Human Source Management Training Evaluation Report, completed in December 2019, noted that the basic online training is intended ‘to effectively train a large volume of serving [officers]’. It stated that while the basic training was updated in August 2019 to align it with the Human Source Policy, the risk is that an online course may not be sufficient to mitigate the risks associated with human source management to both the individual and the organisation.<sup>274</sup>

According to the evaluation report, a key barrier to introducing more effective training is Victoria Police’s current hybrid model for human source management; that is, any new or improved basic training would need to be delivered to the large number of officers who are permitted to manage human sources under this model.<sup>275</sup> In contrast, under a dedicated model, only officers in dedicated source handling roles would be able to manage human sources, thus reducing the number of officers requiring training.

The Commission discussed the basic online training with focus group participants, as outlined in Box 12.15.

**BOX 12.15: OBSERVATIONS FROM THE COMMISSION’S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: ADEQUACY OF BASIC ONLINE TRAINING**

Participants in the Commission’s focus groups conveyed mixed views about the basic online training provided to officers involved in the management of human sources. Most officers pointed to areas where training could be improved or strengthened.

Some suggested that the basic online training does not adequately support officers to understand and apply Victoria Police’s policy requirements for the management of human sources, and suggested that all officers involved in managing sources should, at a minimum, be required to complete the intermediate training.

The Commission consulted with Dr John Buckley, a former United Kingdom police officer with experience in the delivery of human source management training. Dr Buckley told the Commission that the benefit of online training is its ability to reach a large group of officers and teach them basic rules and principles, and suggested that more in-depth training is necessary to teach an officer how to effectively and safely manage a human source. Dr Buckley noted:

*Online training could be used to teach officers the difference between a member of the public providing information and a human source. In particular, online training could outline the process officers should follow where they receive information from a member of the public, and then reiterate that only specialised officers can manage human sources.<sup>276</sup>*

## **Adequacy of training for senior officers**

As noted earlier in this chapter, there are no mandatory human source management training requirements for HSMU officers, the CSR, members of the Ethics Committee, the Assistant Commissioner, ICSC, or the Deputy Commissioner, Specialist Operations. Additionally, the OIC and LSR are not required to complete human source management training beyond the basic online course.<sup>277</sup> Controllers are only required to complete a higher level of training when they are supervising the use of certain types of sources, or where a source is being tasked.<sup>278</sup>

In practice, officers in these senior roles might have completed relevant training despite the lack of a formal policy requirement for them to do so. For example, officers appointed to roles in Executive Command or the Ethics Committee may have received training in relation to risk management, ethical leadership and application of the Charter, as well as other training specific to their roles and responsibilities.<sup>279</sup>

Ms Steendam told the Commission that, although there are no specific human source qualifications required for the CSR role, the officer currently holding the role of CSR has completed extensive specialist training. She explained that extensive policing and risk management experience are prerequisites for the CSR role.<sup>280</sup>

Ms Steendam also informed the Commission that, because the responsibilities of supervising officers are focused on governance, risk management and 'intrusive leadership', the current human source training offered by Victoria Police is 'not fit for purpose' for these types of senior roles.<sup>281</sup>

In a submission to the Commission, Victoria Police similarly emphasised that the training undertaken by senior officers is necessarily more focused on systemic risks and is therefore different to the training delivered to officers responsible for handling and interacting with human sources.<sup>282</sup> Victoria Police also advised that it is reviewing training for LSRs with a view to incorporating a greater focus on human rights, risk and governance as it applies to human source management.<sup>283</sup>

The Commission discussed the adequacy of training for senior officers with participants at its focus groups, as outlined in Box 12.16.

**BOX 12.16: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: ADEQUACY OF TRAINING FOR SENIOR OFFICERS**

The Commission asked focus group participants about their views on the need for senior officers to receive human source management training.

Participants indicated that it was common for the handler to have undertaken a higher level of training than their controller, LSR and OIC. Most participants considered there was a need for more advanced training for supervising officers and specialist functions, such as controllers, LSRs, OICs and the HSMU, to equip them with the skills and knowledge to effectively supervise and support the handler.

Some international stakeholders consulted by the Commission referred to training designed specifically for senior human source management roles, such as authorising officers and controllers.<sup>284</sup>

Sir Jon told the Commission that the lack of formal training in human source management for authorising officers is a key risk for law enforcement agencies, particularly when high-risk human sources are being considered for registration.<sup>285</sup> He noted that without such training, there is a danger that authorising officers will not actively challenge handlers and controllers in relation to their use and management of human sources, or be able to identify the accompanying ethical risks.<sup>286</sup> In addition, he suggested that when the successes of individual officers go unquestioned by leaders, it can create a 'breeding ground for conduct that blurs criminal and ethical boundaries'.<sup>287</sup> Sir Jon emphasised that:

*... officers need to be provided with the requisite training to support them in navigating challenging operational and ethical situations. This is true for all officers involved in human source management, at all levels.*<sup>288</sup>

## **Absence of ongoing or 'refresher' training**

The Commission heard that most Australian law enforcement agencies do not have formal 'refresher' courses; nor do they require officers to repeat human source management training periodically. Some agencies do, however, encourage officers to re-attend training when course content is updated.<sup>289</sup> Consistent with other jurisdictions, Victoria Police does not provide ongoing or 'refresher' training, but it advised the Commission that all officers involved in human source management received additional training associated with changes to the Human Source Policy in 2020.<sup>290</sup>

The Commission discussed ongoing training with focus group participants, as outlined in Box 12.17.

**BOX 12.17: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: ABSENCE OF ONGOING OR 'REFRESHER' TRAINING**

Several focus group participants indicated that ongoing training would be beneficial in keeping their skills and knowledge of policy requirements up to date. Some told the Commission that there is a need for ongoing training for officers from non-dedicated handling teams who do not frequently manage human sources.

Some participants observed that the 'return on investment' in human source management training is low, as it is a 'perishable' skill—particularly as some officers who undertake the training do not manage sources on a regular basis (that is, those who are not in DSTs). Some participants also raised issues around access to training courses.

During the inquiry, Victoria Police confirmed that its hybrid human source management model is a barrier to the delivery of ongoing human source management training. It also noted that if it were to move to a centralised model—where only one Command or Division is responsible for human source management—it would be in a better position to consider implementing requirements for ongoing training.<sup>291</sup>

## Human rights training

In August 2019, Victoria Police updated the basic online training to expressly refer to human rights obligations. This included listing some Charter rights relevant to human source management: the right to life; the right to privacy and reputation; the right to freedom of thought, conscience, religion and belief; the right to protection of families and children; the right to peaceful assembly and freedom of association; cultural rights; and rights in criminal proceedings.<sup>292</sup> While these rights are listed, they are not discussed in detail and there is no accompanying practical guidance.

Victoria Police confirmed that officers undertaking intermediate training and Ethics Committee members (as outlined above) receive training on the Charter and relevant human rights considerations.<sup>293</sup>

A training evaluation undertaken by Victoria Police in 2019 recommended the roll-out of new competencies to help controllers and handlers understand not only human rights theory, but also how to consider human rights in human source management from a practical perspective.<sup>294</sup>

In September 2020, Victoria Police acknowledged it could do more to provide guidance to police officers on how to apply human rights in practice, including considerations of necessity and proportionality, noting that this will be a priority in future. It advised that human rights will soon be included in the specialised training and, as noted above, that training for LSRs is being reviewed to embed a greater focus on human rights, among other things.<sup>295</sup>

The Commission discussed human rights training with focus group participants, as outlined in Box 12.18.

**BOX 12.18: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: HUMAN RIGHTS TRAINING**

Most participants in the Commission's focus groups said that they had received general human rights training, but that human rights were not covered in the basic online human source management training they had undertaken—possibly because they completed the training prior to the changes introduced by Victoria Police in 2019.

Other participants who had completed the intermediate training said that it informed officers of the requirement to consider human rights when managing human sources but that the human rights content was general rather than specific to human source management. Participants generally expressed support for human rights and ethics training to be tailored to human source management.

The United Kingdom College of Policing told the Commission that it aims for human rights to be at the forefront of its policing practice training materials.<sup>296</sup> Sir Jon indicated that incorporating human rights considerations in human source management training supports officers to properly balance the risks and potential impacts of their decisions and actions in managing human sources.<sup>297</sup>

### **Training about legal obligations of confidentiality and privilege**

Victoria Police informed the Commission that in November 2019, officers from the HSMU received a training presentation delivered by the VGSO that focused specifically on the laws relating to professional privilege. In March 2020, Victoria Police made this presentation available to officers from DSTs.<sup>298</sup>

In May 2019, Victoria Police updated the basic online human source management training to include content relating to legal obligations of confidentiality or privilege.<sup>299</sup> The training broadly reflects the Human Source Policy, asking officers to consider if the prospective human source is subject to legal obligations of confidentiality or privilege or if they are providing information received from someone who is. It advises that if these circumstances exist, the officer is to contact the HSMU at the earliest opportunity, and prior to receiving information from such a person.<sup>300</sup>

The Commission discussed training about legal obligations of confidentiality or privilege with focus group participants, as outlined in Box 12.19.

**BOX 12.19: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: TRAINING ABOUT LEGAL OBLIGATIONS OF CONFIDENTIALITY OR PRIVILEGE**

Most focus group participants told the Commission that they could not recall having undertaken training to assist them in identifying potential legal obligations of confidentiality or privilege, and managing human sources with such obligations.

As noted in Chapter 11 and earlier in this chapter, focus group participants demonstrated varied levels of understanding about legal obligations of confidentiality or privilege, the scope of these obligations, the types of information or occupations to which such obligations might apply, and the requirements set out in the Human Source Policy.

The College of Policing, United Kingdom, told the Commission that most human source training courses in the United Kingdom cover the management of confidential and privileged information.<sup>301</sup> Dr Buckley told the Commission that the commencement of the RIPA resulted in changes to human source training to encompass officers' obligations under the legislation and associated guidelines, including changes to help officers identify privileged material.<sup>302</sup>

Ms Steendam explained that changes being made to Victoria Police's human source management training will cover, among other things:

*... [the] identification of human sources with a legal obligation of privilege or confidentiality, as well as those with a connection to those persons, and address the procedures in place under the [Human Source Policy] for managing human sources of this type.*<sup>303</sup>

## System capability

Victoria Police advised the Commission that Interpose was first developed in 2005 as an intelligence and case management system and 'has been improved and modified within [the limits of] its functionality'.<sup>304</sup> Victoria Police began using a human source management module within Interpose in 2008. Prior to that, it used a paper-based system to manage human source records.<sup>305</sup>

Victoria Police told the Commission that the human source management module within Interpose was upgraded in October 2019 to 'increase the capacity of Victoria Police and handling teams to comply with policy', including the Human Source Policy.<sup>306</sup> As discussed earlier and in Chapter 11, the upgrade introduced fields and prompts related to a prospective human source's occupation. This is the main way that the system supports identification of potential issues related to legal obligations of confidentiality or privilege.<sup>307</sup>

Interpose does not currently contain a separate field for officers to indicate that, beyond the occupation of the human source, there is a risk that the source may provide, or has provided, confidential or privileged information.<sup>308</sup>

The Commission discussed Interpose capability with focus group participants, as outlined in Box 12.20.

### BOX 12.20: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: SYSTEM CAPABILITY

Some focus group participants remarked that the new fields and prompts in Interpose help them to identify people who may have legal obligations of confidentiality or privilege.

More generally, there were mixed views across the focus groups about the utility of Interpose in supporting the management of human sources. Some participants were positive about the system, whereas others suggested that it would benefit from additional functionality, such as the ability to generate reports and flag compliance issues.

Participants recognised the challenges in developing a new system, observing that any such system would need to interact with existing information and communication technology systems including Victoria Police's Law Enforcement Assistance Program.<sup>309</sup>

Victoria Police informed the Commission that it will continue to enhance the functionality of Interpose where possible, but that new systems are likely to be required for any significant improvement.<sup>310</sup> It indicated that it is planning for a new case management system to replace Interpose, which will include a human source management module.<sup>311</sup> Ms Steendam noted that this new system, which she described as 'intuitive', would support the registration, oversight and auditing of human sources and would require additional investment and resourcing.<sup>312</sup>

## Internal monitoring and audit

As noted earlier in this chapter, separate to the review of individual human source files by supervising officers, the primary mechanisms Victoria Police adopts for program-wide audit of human source files are:

- review of files and preparation of compliance spreadsheets by the HSMU, outlining the status of human source registrations for review by the LSR
- compliance audits by CaRMU, particularly in respect of high-risk human sources, conducted every six months.<sup>313</sup>

These audits are not mentioned in the Human Source Policy.

In evidence before the Commission, Ms Steendam said that, due to the requirements under the Human Source Policy for the multi-levelled review of registration applications, regular review of human source files by supervising officers, supervision of the source–handler relationship and the HSMU's oversight, Victoria Police's human source files are, in effect, 'constantly being audited'.<sup>314</sup>

The evidence provided to the Commission on the adequacy of the HSMU and CaRMU audit mechanisms is set out below, along with Victoria Police's identification of, and response to, non-compliance in the use and management of human sources.

### Adequacy of internal monitoring and audit mechanisms

Two key themes emerged during the Commission's inquiry regarding audit of human source files and records:

- that regular and comprehensive audits are critical to the organisation's ability to assess levels of policy compliance and detect discrepancies or inappropriate practices
- that they should ideally be undertaken independently; that is, by a unit or officers other than those who are responsible for undertaking the work being audited.

Dr James told the Commission that internal monitoring and audit are essential to managing risks associated with human source management programs and should complement other governance and oversight mechanisms.<sup>315</sup> Mr Dobson told the Commission that any audit process should not only be clearly understood by the officers being audited, but also managed in a way that can withstand informal influence.<sup>316</sup>

Some Australian law enforcement agencies told the Commission that they had strengthened internal monitoring of human source management through regular reviews and/or formal audits of human source files. They indicated that reviews are generally carried out by supervising officers or centralised units, while formal audits are carried out by professional standards commands or central audit teams that are functionally separate to the agency's human source management program.<sup>317</sup> Tasmania Police told the Commission that while its audits are conducted by senior officers involved in decision making associated with human sources, the audit results are sometimes reviewed by a centralised area, such as a professional standards unit.<sup>318</sup>

Some stakeholders emphasised the importance of an audit program that is flexible and takes into account the dynamic and fluid nature of human source management, such as changes to the nature and level of risk posed by the human source, and the organisation's relationship with the source.<sup>319</sup>

CaRMU is structurally separate from Victoria Police's human source management program, whereas HSMU officers responsible for review and oversight are also involved in the provision of advice to handlers about registering and managing human sources, and decisions about source registration and management.

Ms Steendam informed the Commission that CaRMU's most recent audits examined compliance with:

- responsibilities and procedures
- the registration process
- risk assessment practices, including whether the controller evaluated the risk assessment and ensured that sufficient mitigation strategies were in place
- contact with human sources
- audit and compliance monitoring by supervising officers.<sup>320</sup>

Victoria Police informed the Commission that CaRMU's audits focus primarily on high-risk sources because the consequences of non-compliance with the Human Source Policy 'in the context of high-risk sources are likely to be magnified'. It noted that automated audit processes within Interpose, which are monitored by the HSMU, apply to all human sources, not just high-risk sources.<sup>321</sup>

Although not required by policy, Ms Steendam informed the Commission that any audits identifying compliance issues would be reported back to supervising officers, and any significant issues would be raised with the Assistant Commissioner, ICSC and the broader leadership team for discussion.<sup>322</sup>

When asked whether these issues are also reported to Victoria Police's Audit and Risk Committee, Ms Steendam told the Commission that she did not believe this occurs.<sup>323</sup> The Audit and Risk Committee consists of members of Victoria Police's Executive Command and independent members from outside of Victoria Police. Its purpose is to provide independent assurance and assistance to the Chief Commissioner on 'governance, risk, control and compliance frameworks and its external accountability responsibilities', as well as to consider recommendations from internal and external auditors.<sup>324</sup>

In the Commission's focus groups with Victoria Police officers, some participants said that the current internal audit mechanisms are overly focused on high-risk sources, as outlined in Box 12.21.

#### **BOX 12.21: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: AUDIT PROGRAM**

Participants in the Commission's focus groups said that the audit program is not appropriately balanced across Commands and Regional Divisions; specifically, that certain central and dedicated teams and those managing high-risk human sources are audited much more frequently than non-dedicated handling teams based in regional Commands. Some participants expressed the view that the level of compliance with policy is generally high among DSTs and that, if undertaken in the regions, audits would find much lower levels of compliance.

Although focus group participants emphasised the critical role of the HSMU in supporting effective human source management practices, many noted that the unit's capacity to deliver its core functions, including regular review and audit of human source files, has diminished because of an increasing focus on managing disclosure-related issues. Some participants advised that these pressures will likely continue beyond the Commission.

## Identifying and responding to non-compliance

In June 2018, CaRMU conducted an audit of all Victoria Police human source files. It found that over 60 per cent of files were not compliant with the Human Source Policy. Victoria Police informed the Commission that most instances of non-compliance related to administrative or technical issues, with one instance involving the dissemination of information before a human source had been registered.

Following the audit, Victoria Police briefed IBAC on the non-compliance issues and Mr Paterson sent an email to all LSRs reminding them of requirements under the Human Source Policy.<sup>325</sup> The human source files identified as non-compliant were suspended, preventing the dissemination of information obtained from those human sources. Relevant handling teams were asked to either deactivate the human source or remedy the non-compliance.<sup>326</sup>

Victoria Police's draft Human Source Strategy 2018–2022 noted that:

- continued poor compliance with human source policy, due to a bureaucratic registration process, competing priorities for the handling team and an ineffective governance framework, 'is likely to seriously damage Victoria Police's reputation'
- audit results indicate a system-wide failure of appropriate local governance
- the introduction of an independent auditing process is critical to ensuring that issues identified by previous inquiries into Victoria Police's human source management are not repeated.<sup>327</sup>

The Commission examined Victoria Police's compliance with the Human Source Policy in its audit of human source files. Its observations are outlined in Box 12.22.

### **BOX 12.22: OBSERVATIONS FROM THE COMMISSION'S AUDIT OF HUMAN SOURCE FILES: IDENTIFICATION OF AND RESPONSE TO NON-COMPLIANCE WITH HUMAN SOURCE POLICY**

As discussed in Chapter 10, separate to CaRMU's audit, the Commission conducted its own audit of 31 files related to human sources with potential legal obligations of confidentiality or privilege.

The Commission's audit did identify some issues relating to officers not considering potential legal obligations of confidentiality or privilege and some non-compliance with the Human Source Policy, particularly in relation to timeframes and management oversight.

The audit also identified that, at times, compliance with Human Source Policy could not be confirmed because some records were undated.

Encouragingly, the audit found that where instances of non-compliance with the Human Source Policy had been identified by the HSMU, the files were suspended until remedial action was taken.

## Use, handling and dissemination of confidential and privileged information

The Human Source Policy provides safeguards for the handling of information in circumstances where a human source subject to legal obligations of confidentiality or privilege volunteers information to police ‘that is or appears to be in breach of that obligation’.<sup>328</sup> In these circumstances, police must not act upon or disseminate the information and the HSMU and Ethics Committee must be advised. Since May 2020, the Human Source Policy has specified that if Victoria Police wishes to disseminate the information to investigators, this must be authorised by the Deputy Commissioner, Specialist Operations.<sup>329</sup>

It appears that the same or a similar process applies to confidential or privileged information provided by human sources who are not in an occupation bound by legal obligations of confidentiality or privilege,<sup>330</sup> though the Human Source Policy lacks clarity on whether this is the case.

The PIM advised the Commission that it believes existing police procedures for other covert methods, such as the use of telecommunications intercepts and surveillance devices, prevent the release of privileged information to investigators, intelligence analysts and other agencies. Those procedures require that the information is quarantined and reviewed by a lawyer who will only release the information if it is determined that no privilege applies.<sup>331</sup> There is no such requirement under the Human Source Policy.

The Commission sought information from Victoria Police on its policies and procedures related to the handling, use and dissemination of confidential or privileged information obtained through the use of other police powers. Victoria Police declined to provide the Commission with this information on the basis that it was not relevant to the Commission’s terms of reference, notwithstanding the broad scope of term of reference 6.<sup>332</sup>

Victoria Police did, however, produce a statement to the Commission outlining that, if it obtains legally privileged information through telephone intercepts, it quarantines this information to prevent it being used as intelligence or disseminated to an investigation team.<sup>333</sup> In October 2020, Victoria Police advised the Commission it had recently identified that privileged information obtained from telephone intercepts had not been fully quarantined and it was working with IBAC and the Victorian Director of Public Prosecutions to address this issue.<sup>334</sup>

The United Kingdom’s Code of Practice contains detailed guidance relating to the use, handling, dissemination, retention and destruction of confidential and privileged information that police may receive, including the requirement to obtain legal advice for the acquisition and use of privileged material.<sup>335</sup> The Code of Practice also provides that all human source material must be handled in accordance with the relevant agency’s safeguards and that these safeguards should be made available to IPCO.<sup>336</sup>

## Organisational model

Ms Steendam described Victoria Police's current hybrid organisational model for the management of human sources, noting that:

*... across Victoria Police there is currently a mix of dedicated human source units in some work areas, and in other work areas, investigators will be handling their own human sources.*

*The current framework is based on each operational superintendent deciding if they will take resources from other units within their division to create a dedicated human sources team rather than an agreed organisational structure and allocation of resources.<sup>337</sup>*

Participants in the Commission's focus groups explained that, under this model, whether a local division has a DST is determined by the Divisional Superintendent (who typically performs the LSR role), based on the nature of crime in an area, the resources available, and the Superintendent's attitude to, and experience in, human source management. Several participants suggested that some Superintendents are unwilling to divert resources from other priorities or to take on the risks associated with managing human sources.

In contrast to a hybrid model, a centralised model would likely see all DSTs reporting to one central Command or Division; that is, there would be no regionally managed DSTs or ad hoc local arrangements for the management of human sources by officers undertaking other duties unrelated to human source management.

The Commission discussed Victoria Police's human source management organisational model with focus group participants, as outlined in Box 12.23.

### **BOX 12.23: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: HUMAN SOURCE MANAGEMENT ORGANISATIONAL MODEL**

As noted earlier in this chapter, several focus group participants pointed to the challenges that Victoria Police's hybrid model presents for effective supervision and management. Participants also identified that the model presents other challenges; namely:

- Officers who are not part of DSTs do not always have the requisite knowledge, experience, training or resources to handle human sources effectively.
- Even if these officers have undertaken training, they tend to use human sources infrequently; consequently, their skills, knowledge and familiarity with policy requirements are often insufficient (in contrast to officers in DSTs, whose skills and knowledge remain current because they handle sources every day).
- Divisional OICs and LSRs have a broad range of other responsibilities and lack the time and experience to focus on human source management and the associated risks.
- Local areas without DSTs lack the resources and equipment to manage human sources safely and effectively.
- Some Superintendents are not prepared to commit the resources to managing sources in their divisions unless there is a clear benefit for their area. This can mean that they will not agree to register a human source offering information that may benefit investigations in another division or benefit Victoria Police more broadly.

As an alternative to the current hybrid model, many focus group participants pointed to the benefits of a centralised, dedicated model of human source management. Participants highlighted the following specific benefits:

- Handlers and supervisors who are focused only on human source management responsibilities would have the time, and the specialist experience and contemporary knowledge, to manage sources safely, effectively and in accordance with policy requirements.
- It would foster increased specialisation and career opportunities by providing dedicated resources and roles to develop and enhance specialist skills.
- It would encourage the use of human sources as organisational resources rather than as the assets of a particular region, providing greater flexibility for police to use sources across divisions or regions in line with the organisation's strategic priorities.
- There would be a greater 'return on investment' in human source management training, as it would be undertaken only by officers in (or seeking to move into) dedicated human source roles and who would frequently use the resulting skillset.

While there was general support for DSTs and a centralised model across the focus groups, some Superintendents raised concerns that it might disadvantage the regions, which rely on the use of low-risk sources to aid in investigating and solving local crime.

Ms Steendam noted that a key benefit of the hybrid model of human source management is that it allows Victoria Police business areas to determine their own priorities, while retaining dedicated and specialised units to give guidance to, and build the capability of, officers who are not in dedicated human source management roles.<sup>338</sup> At the same time, Ms Steendam acknowledged similar limitations of the current model to those identified by the focus group participants.

In December 2019, Victoria Police Executive Command provided in-principle support for a more centralised model, subject to further development of the resourcing allocation, delivery model and investment requirements. Ms Steendam indicated that the inclusion of DSTs, enabling effective supervision and consistent practice in the management of human sources, would be a key principle guiding the future approach to the organisational model.<sup>339</sup>

Victoria Police did, however, advise the Commission of challenges associated with adopting a centralised model, including the current lack of a centralised information management system, 'the size and diversity of Victoria Police's jurisdiction', and 'the potential lack of suitable police resources with the required attributes, particularly in regional areas, to effectively implement and use [DSTs]'.<sup>340</sup>

Western Australia Police is the only Australian law enforcement agency with a fully centralised model, even though it is the largest geographically of all the states. It told the Commission that this model is critical for the effective management and protection of human sources, particularly those who are high-risk, and noted that while maintaining this model comes at a high financial cost, the overall benefits outweigh the costs.<sup>341</sup>

Human sources are also managed by DSTs in the United Kingdom, with the Code of Practice noting that 'dedicated and sufficient resources, oversight and management' are needed to manage the impacts and risks of using human sources.<sup>342</sup>

The Police Service of Northern Ireland told the Commission that officers in its DSTs have a sophisticated understanding of the risks associated with the use of human sources, including those related to obtaining and using privileged information. It noted that while dedicated units reduce capacity for the use of human sources across the organisation, this needs to be balanced against the need for sources to be properly handled.<sup>343</sup>

While noting the benefits of DSTs, Sir Jon also acknowledged the geographical challenges of this model in Australia, where policing service areas are much larger than those in the United Kingdom.<sup>344</sup> Noting that dedicated models can pose ethical risks, including officers becoming overly familiar with sources, he emphasised that a tenure (or 'maximum time in position') policy should be in place to mitigate these risks.<sup>345</sup>

Police Scotland told the Commission that a dedicated model clarifies who is responsible and when matters should be escalated to management for oversight and direction, while also enabling more effective and targeted pursuit of policing priorities.<sup>346</sup>

The Metropolitan Police, United Kingdom, told the Commission that the benefits of DSTs include compliance with the management structure as required by the RIPA, separation of intelligence-gathering from the evidentiary chain, and corruption prevention, but also noted that taking officers out of investigative roles can limit their skill sets and isolate them.<sup>347</sup>

A 2004 Victoria Police review entitled *Review and Develop Best Practice Human Source Management* suggested that DSTs result in higher standards of professionalism, better source control, and more focused recruitment of sources to support policing objectives. It also acknowledged that the corruption risks need to be mitigated by active management and oversight of the source–handler relationship, tailored selection processes, training and a tenure policy for the handling team.<sup>348</sup>

In contrast, other reviews of Victoria Police's human source management framework found that the dedicated model resulted in poor work practices, disregard for management and governance, and a culture of risk taking. It identified that, when not implemented correctly, these models can raise significant health and safety concerns for staff, and increase risks of improper relationships between handlers and sources.<sup>349</sup>

## The sterile corridor

The Commission heard that another key advantage of DSTs is the ability to maintain a 'sterile corridor'. As outlined earlier in the chapter, this is where the management of a human source is undertaken by different officers to those who are responsible for the management of any investigations that may rely on information provided by the source.

The Human Source Policy specifies that:

- a full sterile corridor is where investigators are unaware of the existence of a human source
- a partial sterile corridor is where investigators are aware of either the existence, or the identity, of a human source.<sup>350</sup>

The policy states that, where possible, 'human sources should be managed in either a partial or full sterile corridor', and 'a partial or full sterile corridor must be employed in the management of all high-risk human sources'.<sup>351</sup> There is no information on the circumstances that would warrant dispensing with this requirement.

Most Australian and international law enforcement and intelligence agencies described the use of a sterile corridor as an important feature of their human source programs.<sup>352</sup> They noted that it prioritises a law enforcement agency's duty of care to the human source, and reduces the burden on investigators—allowing them to focus on the evidence and investigation rather than cultivating relationships with human sources.<sup>353</sup>

A sterile corridor has also been said to reduce the risks of corruption, misconduct and improper relationships between officers and human sources, because when handlers are separated from criminal investigations, they 'do not have the same personal vested interest in the outcome of an investigation'.<sup>354</sup>

As discussed above, New South Wales Police does not use sterile corridors as it does not regard them as best practice. It nonetheless adopts an overriding principle of maintaining the anonymity and safety of human sources and seeks to manage these risks effectively through robust disclosure and other organisational procedures.<sup>355</sup>

Dr James told the Commission that while a sterile corridor is desirable, it is not always practical in smaller police services or where there are significant resourcing constraints.<sup>356</sup>

The Commission discussed Victoria Police's use of a sterile corridor with participants at its focus groups, as outlined in Box 12.24.

#### **BOX 12.24: OBSERVATIONS FROM THE COMMISSION'S FOCUS GROUPS WITH VICTORIA POLICE OFFICERS: STERILE CORRIDOR**

Focus group participants generally agreed that a full sterile corridor is considered best practice. Many commented on the importance of the sterile corridor in protecting the human source from the accidental or deliberate disclosure of information, which could result in their identity becoming known and risks to their safety.

Some participants said that a sterile corridor is difficult to achieve in all cases under Victoria Police's current hybrid model, because investigators in areas without DSTs often manage human sources while also conducting investigations. Some were concerned about the risks to human sources arising from sterile corridors not being implemented, or only being partially implemented.

Some participants noted that even under a dedicated model, a full sterile corridor may not be possible in all circumstances. For example, an investigator may arrest a person and refer them to a DST for registration as a source. The investigator will therefore be aware of the identity of the prospective human source, though under the policy, they should not be informed subsequently that any intelligence provided to them originated from the source.

Some participants noted the difficulties that the sterile corridor can present for ensuring compliance with Victoria Police's disclosure obligations, as discussed further in Chapter 14. Victoria Police informed the Commission that the introduction of 'dedicated disclosure officers' will help to address these challenges.<sup>357</sup>

## **CONCLUSIONS AND RECOMMENDATIONS**

Victoria Police has taken significant steps to strengthen its human source management processes in recent years. While it has made progress, more work is needed to improve the current framework. The Commission considers that some features of Victoria Police's human source management framework limit its capacity to manage human sources safely, ethically and effectively, including aspects of its policy requirements, decision-making model, organisational model, risk assessment processes, supervision practices and training.

The Commission also considers that Victoria Police does not adequately equip its officers with the knowledge to effectively identify and manage the risks of obtaining and disseminating confidential or privileged information from human sources. Perhaps most significantly, the Commission considers that an internal policy is not sufficient to govern Victoria Police's use and management of human sources, nor to instil confidence in the Victorian community that it will do so in a way that is necessary, proportionate, ethical and compatible with human rights.

In a submission to the Commission, Victoria Police disagreed with these observations, suggesting that the evidence before the Commission should lead it to the conclusion that Victoria Police's processes for managing human sources involving legal obligations of confidentiality or privilege 'are likely to be the most stringent and effective of most (if not all) comparable jurisdictions'.<sup>358</sup>

The Commission accepts that Victoria Police's processes for this specific category of human sources are more advanced than those operating in some other jurisdictions. This is in no doubt due to the events that led to the establishment of this Commission. Nonetheless, the Commission maintains that the current human source management framework needs improvement to assure the Victorian Government and the community that similar events will not occur in the future.

Without exception, law enforcement agencies consulted by the Commission emphasised the critical importance of human sources to the detection and prevention of serious crimes. Some noted that the use of human sources is becoming an increasingly valuable method of intelligence-gathering, as technological advancements and the growing sophistication of organised crime groups render other law enforcement techniques less reliable and effective.<sup>359</sup>

The Commission agrees that the use of human sources benefits policing, and ultimately, community safety. For all those benefits, however, it also carries considerable risks: to the rights of human sources and other people; to the integrity of Victoria Police and its officers; and to the administration of justice. As the events examined by this inquiry demonstrate, the right to a fair trial is particularly at risk when police use human sources involving legal obligations of confidentiality or privilege. But the use of all human sources poses risk, due in part to the covert nature of the activity and the significant discretion afforded to police in managing, tasking and rewarding them.

This Commission is not the first inquiry into Victoria Police's use of human sources. Over 20 reviews in as many years have identified issues including deficiencies in policy and procedure, failures of supervision and management, non-compliance with policy requirements and improper conduct by some officers in their dealings with human sources. All of these factors point to the need for a clear and comprehensive regulatory framework that supports greater accountability and transparency in Victoria Police's use of human sources.

The Commission recommends the introduction of legislation to govern the use and management of human sources, with specific safeguards for those who may provide or have access to confidential or privileged information. To support this legislation, it recommends a more effective and accountable internal decision-making model; clear, practical policy guidance; training at all levels of the organisation for officers involved in the management of human sources; regular and robust internal audit and monitoring; and an organisational model that enables Victoria Police to use human sources effectively and flexibly to meet its operational goals.

## Design principles

The Commission has identified a set of key principles that it believes should guide the development of the proposed regulatory framework for Victoria Police's use of human sources and related operational policies, processes and structures. As discussed in Chapter 13, these principles should also underpin the development of the external oversight model recommended by the Commission.

These principles are summarised in Box 12.25.

**BOX 12.25: KEY DESIGN PRINCIPLES FOR THE DEVELOPMENT OF THE PROPOSED REGULATORY FRAMEWORK**

The recommended regulatory framework for Victoria Police's use and management of human sources should be designed around several key principles:

***Integrity in the criminal justice system***

- The framework supports ethical and lawful practice by police and upholds fundamental principles of the criminal justice system, including the right to a fair hearing and the right to independent legal advice.

***Necessity and proportionality***

- Registration and use of a human source occurs only when it is necessary to achieve a legitimate law enforcement objective.
- The use of a human source is proportionate to the law enforcement objective Victoria Police is seeking to achieve and represents the least restrictive means reasonably available to achieve its objective.
- Decisions to use a human source balance the potential impact on individuals' human rights with the public interest in detecting and preventing serious crime.
- Regulatory requirements are proportionate to the risks presented by different types of human sources. More stringent registration requirements apply to higher-risk human sources.

***Accountability***

- Victoria Police is responsible for and able to justify its decisions and actions relating to the use and management of human sources.
- The regulatory framework clearly establishes Victoria Police's legal authority to use human sources.
- There are clear roles and responsibilities for all aspects of human source use and management, and decisions are made by officers with the requisite seniority and capability to effectively assess and manage the risks arising from the use of human sources.
- Decisions related to the registration, use and management of human sources are clearly documented and subject to regular and independent review.

***Effectiveness***

- The regulatory framework facilitates proper identification and management of risks, while also being operationally workable and supporting officers to effectively and efficiently use human sources to detect, disrupt and prevent criminal activity.

***Safety and sensitivity***

- The regulatory framework achieves its objectives without compromising the safety of any individual, exposing sensitive police methodology, or compromising investigations, current prosecutions or convictions.

***Consistency***

- Where possible, the regulation of human sources is consistent with regulatory regimes for comparable covert investigative powers and methods in Victoria.

The Commission has drawn on the principles outlined in Box 12.25 in recommending a framework for Victoria Police's future use and management of human sources. An overview of this framework is set out below.

## Overview of the recommended framework

The Commission's recommendations call for a robust, risk-based framework that supports accountability in decision making and supervision; comprehensive guidance for police officers with human source responsibilities; and careful scrutiny where there is a reasonable expectation that the registration and use of a source might result in the acquisition of confidential or privileged information.

Some of the Commission's recommendations apply broadly to Victoria Police's framework for all human sources, while others are specific to the use of human sources where confidential or privileged information may be obtained. This is necessary for system coherence and consistency. Limiting the broader recommendations to only those human sources with legal obligations of confidentiality or privilege would, in the Commission's view, result in a disjointed, unbalanced and unnecessarily complex system in which other types of human sources are not subject to sufficiently robust processes and oversight.

The Commission is mindful of Victoria Police's concern that 'overly onerous requirements for registering or managing human sources could result in a reduction in Victoria Police's capability to effectively gather and utilise criminal intelligence' and that this, in turn, could have a negative impact on the Victorian community.<sup>360</sup> The Commission's recommendations aim to improve accountability and scrutiny of Victoria Police's use of human sources, while also being practical and proportionate, and without compromising its ability to detect, disrupt and prevent criminal activity.

The Commission proposes that the human source management framework should be reformed by:

- developing legislation to regulate and publicly legitimise Victoria Police's use of human sources and support it to manage them in accordance with the public interest
- clarifying and streamlining responsibilities for registering a human source, to increase accountability and efficiency in decision making
- requiring decision makers to consider necessity and proportionality and other key factors when determining whether to register a human source
- refocusing the issue of confidentiality and privilege on whether a human source is reasonably expected to have access to confidential or privileged information.

Further, the Commission proposes that these reforms should be supported by Victoria Police:

- aligning its Human Source Policy with the new legislative framework and ensuring that it provides clear, practical guidance and instruction to officers with human source management responsibilities
- adopting a dedicated and centralised human source management model
- increasing the delivery of human source management training to help officers identify and acquit their responsibilities under the recommended regulatory framework
- strengthening compliance, monitoring and governance functions to support robust internal oversight.

Figure 12.3 displays the Commission's recommendations relevant to each part of the human source management process.

**Figure 12.3: Overview of recommendations to strengthen Victoria Police’s human source management framework**



The Commission is conscious that the proposed reforms call for significant change and will require stakeholder consultation along with careful transition and implementation planning. Broadly, the Commission proposes a two-phased approach to implementation of its recommendations:

- *Phase 1*—implementation of policy, training, internal audit and monitoring improvements, along with some limited changes to decision-making arrangements within 12 months
- *Phase 2*—implementation of the new legislative framework and new organisational model for the management of all human sources within two years.

The Commission considers that this approach will allow for adequate consultation, design and planning for the more significant legislative reforms and changes to organisational structures, while also enabling Victoria Police to introduce a series of policy, procedural and training improvements in the interim, some of which it has already taken steps to develop and implement.

## **Introducing legislation to govern the use and management of all human sources**

There is no legislation governing the use of human sources in Victoria. This is at odds with requirements for the use of other covert powers and methods by police and means that the legal basis for the use of human sources is unclear.

While the Commission acknowledges that the use of Ms Gobbo as a human source was in many ways extraordinary, it was also a systemic failure—it continued for several years, even though a large number of police officers, including several senior officers, were aware of Ms Gobbo's informing. Victoria Police has made many changes to its policy framework in response to these events, but, in the Commission's view, the changes have not been enough to adequately manage the significant and enduring risks that arise in the use of human sources.

The very nature of human source management creates risks of improper conduct. This is relevant to all human sources, not just those who might have access to and provide confidential or privileged information. The need for police to form relationships with criminals or their associates can blur ethical and professional boundaries, sometimes to achieve operational goals (or 'get the job done'). Tasking of human sources and issuing rewards to them can also involve police pushing ethical boundaries—whether by exploiting the source's relationships with others, encouraging them to engage in deception, or facilitating their engagement in what would otherwise be criminal conduct.

This is not to say that the use of human sources is inherently wrong or unjustified, but rather that it occurs in a covert environment that is susceptible to ethical failure, misconduct and corruption, and requires a clear system of checks and balances to counter these risks. The Commission is not persuaded that the current internal policy adopted by Victoria Police achieves this. Nor is it convinced that a system of self-regulation of this necessary but high-risk area of policing could ever satisfactorily mitigate the risks, particularly the potential to compromise the criminal justice system and undermine the community's confidence in it. In light of the events that led to the Commission, and what it has uncovered, there is more need than ever before to restore the community's trust in Victoria Police and its management of human sources.

Except for the media coverage surrounding the use of Ms Gobbo as a human source, the related court decisions and this inquiry, there is very little publicly available information about how Victoria Police uses human sources. There are also no legislated, enforceable rules for when, why or how Victoria Police and its officers can engage in this activity.

In the United Kingdom, the introduction of a legislative framework aimed to establish a clear, lawful basis for the employment of investigatory powers, including the use of human sources, and to achieve an appropriate balance between protecting human rights and protecting community safety. The Commission heard that this framework gave law enforcement agencies more certainty about the use of and constraints on these powers, and helped to promote trust and confidence in the communities they serve.

Similarly, the introduction of legislation to regulate the use of surveillance devices, telecommunications interception, assumed identities, covert search warrants and controlled operations in Victoria and other Australian jurisdictions has increased accountability and transparency in the use and regulation of those powers and methods. The legislation also provides consistent frameworks able to withstand time and changes in senior leadership.

In her statement to the Commission, Ms Steendam indicated that Victoria Police was not advocating any legislative or regulatory reform but recognised that external oversight of its use of human sources would likely require legislative change. When addressing questions regarding external oversight, she expressed concerns about the potential for such a regime to apply to all human sources—rather than just those involving legal obligations of confidentiality or privilege—noting the risks to human sources should their identity become known.<sup>361</sup>

The Commission did not receive evidence indicating that a legislative framework would inhibit Victoria Police's ability to use human sources to detect and prevent criminal offences. Law enforcement agencies and other stakeholders from the United Kingdom who have operated under such a model for some time emphasised the positive effects and reassurance that the framework provides to agencies and their officers.

While the AFP expressed some concerns about the potential for Victorian legislation to limit interoperability across jurisdictions in the management of human sources, Ms Steendam, on behalf of Victoria Police, indicated that human sources are generally not managed across jurisdictions simultaneously. The Commission also heard that different frameworks and policy requirements appear to operate successfully across Australian police agencies now. For these reasons, it was not persuaded that a legislative framework would create significant inter-jurisdictional challenges.

The Commission anticipates Victoria Police may have concerns that introducing legislation will result in the use of human sources becoming more widely known in the community. There is an obvious and important need to protect the safety of human sources and the integrity of police investigative methods. The Commission considers, however, that establishing legislative requirements should not in and of itself compromise either the safety of human sources or covert policing methods, provided that the legislation is drafted carefully and in consultation with Victoria Police and other justice and legal profession stakeholders.

Having examined all of the evidence, the Commission considers that a legislative framework would lead to more effective management of the risks associated with Victoria Police's use of human sources. Specifically, it would:

- support clear parameters and minimum standards for the use of human sources, consistent with the arrangements in place for other covert powers and methods
- ensure that any future expansion or amendment of these standards is subject to proper and public consideration by the Parliament
- improve transparency by building public awareness of the circumstances in which Victoria Police can use human sources and any limitations on such use
- provide assurance to human sources that Victoria Police will be held accountable for their management
- provide greater certainty to officers and support them to ensure that their decisions appropriately balance competing public interests.

In examining the United Kingdom legislative framework, the Commission considered the utility of introducing a code of practice in Victoria. A key purpose of the Code of Practice in the United Kingdom is to ensure consistency across hundreds of public authorities. In contrast, only a small number of Victorian agencies use human sources. Victoria also has a significantly smaller population than the United Kingdom. Further, the Commission considers that legislation and any associated regulations in Victoria could set out the types of requirements specified in the Code of Practice. Consequently, the Commission considers that it is unnecessary to introduce a code of practice in Victoria.

In the following sections, the Commission sets out the recommended:

- objectives and scope of the proposed legislation
- responsibilities for registration decisions under the legislative framework
- key considerations to underpin registration decisions.

## **Objective and scope of proposed human source management legislation**

The proposed legislation needs to permit and facilitate the effective use of human sources to gather intelligence, conduct investigations and prevent, disrupt and detect criminal activity, while simultaneously ensuring that their use is ethical, necessary, proportionate and justified. The principal objective of the proposed legislation should be to appropriately balance these competing interests and provide a clear legal framework for police to use and manage human sources and the information they provide.

In the previous section, the Commission explained the need for such legislation to apply to all human sources used by Victoria Police, not just those in the narrow category of people with legal obligations of confidentiality or privilege. The Commission has also considered other aspects of the legislation's scope; that is, which elements of Victoria Police's use of human sources should be subject to legislative requirements; whether the requirements should differ depending on the type of source; and the potential implications of legislation for other Victorian agencies that use human sources. These are discussed below.

### **Registration, use and management of human sources**

Typically, the risks associated with the use of a human source are considered and assessed at the point at which an officer seeks to register them as a source. These risks do not disappear, however, once the source is registered. Their ongoing management by police—which may include tasking the source to actively obtain information about criminal activity, requiring the source to put themselves in a precarious situation with criminal associates, or rewarding the source with cash or other benefits—also presents risks that need to be managed.

The importance of police maintaining an appropriate relationship with the human source over time underscores the need for the proposed legislative framework to cover the entirety of the human source's relationship with police: from registration, through to ongoing use and management, to deactivation or transfer of the source to the role of a witness.

As noted earlier in this chapter, Victoria Police's Human Source Policy requires officers to obtain authorisation before they can 'approach' certain human sources, separate and additional to that required for the (subsequent) registration of those sources. The Commission considers that this should not be within the scope of the proposed legislative framework. This issue is discussed later in this chapter.

The Commission also recognises there are issues associated with potential contact with, or risks to, a human source after they are deactivated. While the Commission did not examine these issues in detail during its inquiry, it notes that the very real risks to a human source's safety do not cease simply because Victoria Police has ended its relationship with them.

As noted by several officers who participated in the Commission's focus groups, the risk to a human source's safety increases considerably if and when any information they provided to police is then relied on to arrest or charge the subject of that information. This may occur after the human source has been deactivated. These issues will be important to consider in developing the proposed regulatory framework, noting that this may be more appropriately dealt with in internal policy and procedures rather than in the proposed legislation.

Further, given the critical need to protect the identities and safety of human sources, the Commission recommends that the proposed legislation makes it an offence to disclose, without authority, information about a human source or information provided by a human source (including, in both cases, people who were formerly human sources). Section 36 of the *Crimes (Controlled Operations) Act 2004* (Vic) may provide a suitable model for this offence.

### **'Reportable' and 'non-reportable' human sources**

The Commission also considered whether there should be more stringent legislative requirements and safeguards for human sources involving legal obligations of confidentiality or privilege.

The Commission supports Victoria Police's progress towards a policy framework that focuses on the nature of the information held or provided by a human source, rather than the occupation of the source. It agrees, as envisaged by the Human Source Policy, that more stringent safeguards should apply to the use and management of human sources who may provide confidential or privileged information, recognising the potential to jeopardise criminal prosecutions or convictions, impair a person's right to a fair trial, compromise the integrity of the justice system and undermine professional relationships built on trust.

The Commission considers that the proposed legislation should create a category of human sources or prospective sources who are reasonably expected to have access to confidential or privileged information—hereafter referred to by the Commission as 'reportable human sources'. For the avoidance of doubt, this includes prospective or registered human sources who are identified as already possessing confidential or privileged information, as well as those considered likely to access it in future. As discussed below, these reportable sources should be subject to certain requirements over and above those that apply to other human sources ('non-reportable human sources'). The Commission considers that this approach would simplify the categorisation of human sources and processes for their registration.

### **Other potential reportable human sources**

Victoria Police's Human Source Policy lists other categories of human sources who may present higher risks or more complex issues, including those under the age of 18 years and those with a serious mental health or serious medical health condition. In the Commission's view, there are clear ethical, welfare and human rights risks associated with the use of these individuals as human sources.

The Commission's terms of reference did not extend to these types of human sources. Nor has the Commission had the opportunity to consult with all relevant stakeholders who have expertise and experience relevant to the specific issues and risks associated with the use of these sources.

Subject to consultation with these stakeholders, the Commission urges the Victorian Government to include people under 18 years of age or with serious mental or medical health conditions in the definition of 'reportable human source' under the proposed legislative framework. This would ensure that (like human sources who are reasonably expected to have access to confidential or privileged information), these sources are also subject to enhanced protections and safeguards.

## One-off registrations

The Commission recognises that some risks that arise in the use of human sources on an ongoing basis do not apply in the case of one-off registrations; that is, prospective human sources who wish to provide information on a single occasion. For example, the risks of improper source–handler relationships could potentially be lower, because police cannot task one-off human sources and must not have an ongoing relationship with them. Some risks, however, apply to the use of all human sources, regardless of whether they provide information on a single occasion or multiple occasions—for example, the risk to a human source’s safety should it become known they have informed on their associates.

The Commission understands that Victoria Police has introduced a process for one-off registrations to provide more operational flexibility and efficiency. After giving careful thought to whether these one-off registrations should be within the scope of the proposed legislative framework, the Commission has concluded that this is necessary. Fundamental principles and requirements, like the need to consider human rights, necessity and proportionality, should apply to the use of all human sources, not just those used on an ongoing basis.

It may, however, be possible to tailor some aspects of the legislative and policy framework to facilitate more streamlined registration and risk assessment processes for one-off registrations, similar to those that currently exist under the Human Source Policy. This should be considered further by the Victorian Government in consultation with Victoria Police and other stakeholders about the proposed legislation.

## Other Victorian agencies’ use of human sources

While other Victorian agencies such as IBAC also use human sources, the Commission’s inquiries were limited to Victoria Police because of its terms of reference and the *Inquiries Act 2014 (Vic)*. As such, the Commission has confined its recommendations to Victoria Police’s use of human sources and has not consulted with other relevant agencies about their use of human sources.

Nonetheless, the Commission notes that the use of human sources by other agencies may well pose risks similar to those arising from Victoria Police’s use of sources. Consequently, while not formally recommending it, the Commission considers that there is merit in applying the legislative framework to all Victorian agencies that use human sources, subject to consultation with the affected agencies and an assessment of their current operations, policies and processes.

### RECOMMENDATION 8

That the Victorian Government, within two years, implements legislation for Victoria Police’s registration, use and management of human sources, to provide a clear framework for police to obtain and use information from human sources and to ensure they are used in an ethical and justifiable manner.

### RECOMMENDATION 9

That the Victorian Government, in developing the legislation for Victoria Police’s registration, use and management of human sources, makes it an offence to disclose information relating to a human source without authorisation (including information that a human source provided or was tasked to provide, and information about the identity of a human source and their registration and management).

**RECOMMENDATION 10**

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, defines 'reportable human sources' as a class of people who are prospective or registered human sources and who are reasonably expected to have access to confidential or privileged information.

These recommendations and the other recommendations listed below are not intended to be exhaustive, but rather focus on key features of the proposed legislation—with a particular emphasis on safeguards for the use of human sources who may provide confidential or privileged information, and on other critical issues raised with the Commission during the inquiry.

## Responsibility for registration decisions

The Commission considers Victoria Police's current decision-making model for the registration of human sources is duplicative and inefficient, resulting in both a lack of clarity about roles and responsibilities and inadequate ownership of the decisions made.

Under the Human Source Policy, the Ethics Committee makes decisions about the registration of certain higher-risk human sources, dispersing accountability across a group of people. The CSR makes decisions about the registration of other human sources; though in practice, the registration of low and medium-risk human sources is delegated to a business unit, the HSMU. Under this model, registrations requiring Ethics Committee authorisation must proceed through five to seven review points before being considered. If an officer wishes to approach a person to ascertain whether they have useful information and could be registered as a human source, this request to 'approach' must proceed through these review points before Ethics Committee consideration, and the same multi-levelled process must be repeated if the officer wishes to then register the person as a source.

Several focus group participants pointed to delays in the authorisation of registration applications. Some also questioned the utility of LSRs and OICs reviewing applications, suggesting that many of these officers do not have the experience, time or training in human source management to actively interrogate applications. The Commission also considers that having so many officers involved in the review and decision-making process, without a clear articulation of the distinction between their roles and responsibilities, increases the risk that officers will not give applications the thorough and careful attention they deserve, on the assumption that others will take on this responsibility. It also increases the number of officers who are aware of the identity of a human source and therefore increases risks to their safety.

Further, the committee-based decision-making model for certain higher-risk human sources blurs accountability and unnecessarily delegates to a group of people a decision that could and should be made by an officer with appropriate seniority and experience.

Victoria Police disagreed with the Commission's views on these matters. It explained that the committee-based decision-making model enables consideration of multiple perspectives, which is necessary for complex and difficult human source decisions. It also submitted that the Assistant Commissioner, ICSC is ultimately responsible for decisions made by the Ethics Committee.<sup>362</sup> Nothing in the Human Source Policy, however, makes this clear and no other evidence was produced to the Commission to confirm it.

The Commission recognises that, in making particularly complex human source decisions, a senior responsible officer may benefit from the views and experience of other officers and personnel, but considers that this would be better facilitated through an advisory group, rather than a committee making decisions that, according to

Victoria Police, are ultimately the responsibility of the Assistant Commissioner, ICSC. Similarly, the Commission considers that, while workload pressures may warrant delegation of the CSR's decision-making responsibilities, this delegation should be to a specific and sufficiently senior role, rather than to a business unit made up of multiple officers with varied levels of seniority and experience.

Having specific senior officers responsible for decisions, and making this clear in policy and procedures, would facilitate a shared understanding of roles and responsibilities, increase the transparency of decision making and encourage thorough consideration of registration applications. The Commission considers that it may also allow for more efficient and streamlined decision making.

The proposed authority for registration decisions under the Commission's recommended legislative framework is outlined in Box 12.26.

**BOX 12.26: PROPOSED AUTHORITY FOR REGISTRATION DECISIONS UNDER THE LEGISLATIVE FRAMEWORK**

Consistent with similar legislation regulating the use of covert police powers and methods, the Commission recommends that the proposed legislation should empower the Chief Commissioner of Victoria Police to authorise the registration of human sources.

Given Victoria Police's size and the scale of its operations, it would be impractical for the Chief Commissioner to authorise the use of all human sources. Consequently, the Commission recommends that the proposed legislation should empower the Chief Commissioner to delegate this power to certain senior officers; namely:

- officers of or above the rank of Assistant Commissioner in the case of reportable human sources (likely the Assistant Commissioner, ICSC)
- officers of or above the rank of Superintendent in the case of non-reportable human sources (likely the CSR).

In Chapter 13, and discussed below, the Commission recommends that, in the case of reportable human sources, the Chief Commissioner's (or delegate's) decision would need to take into account:

- formal legal advice relating to the proposed registration, including the likelihood and possible consequences of obtaining confidential or privileged information
- the recommendation of the PIM about the registration of the person as a human source.

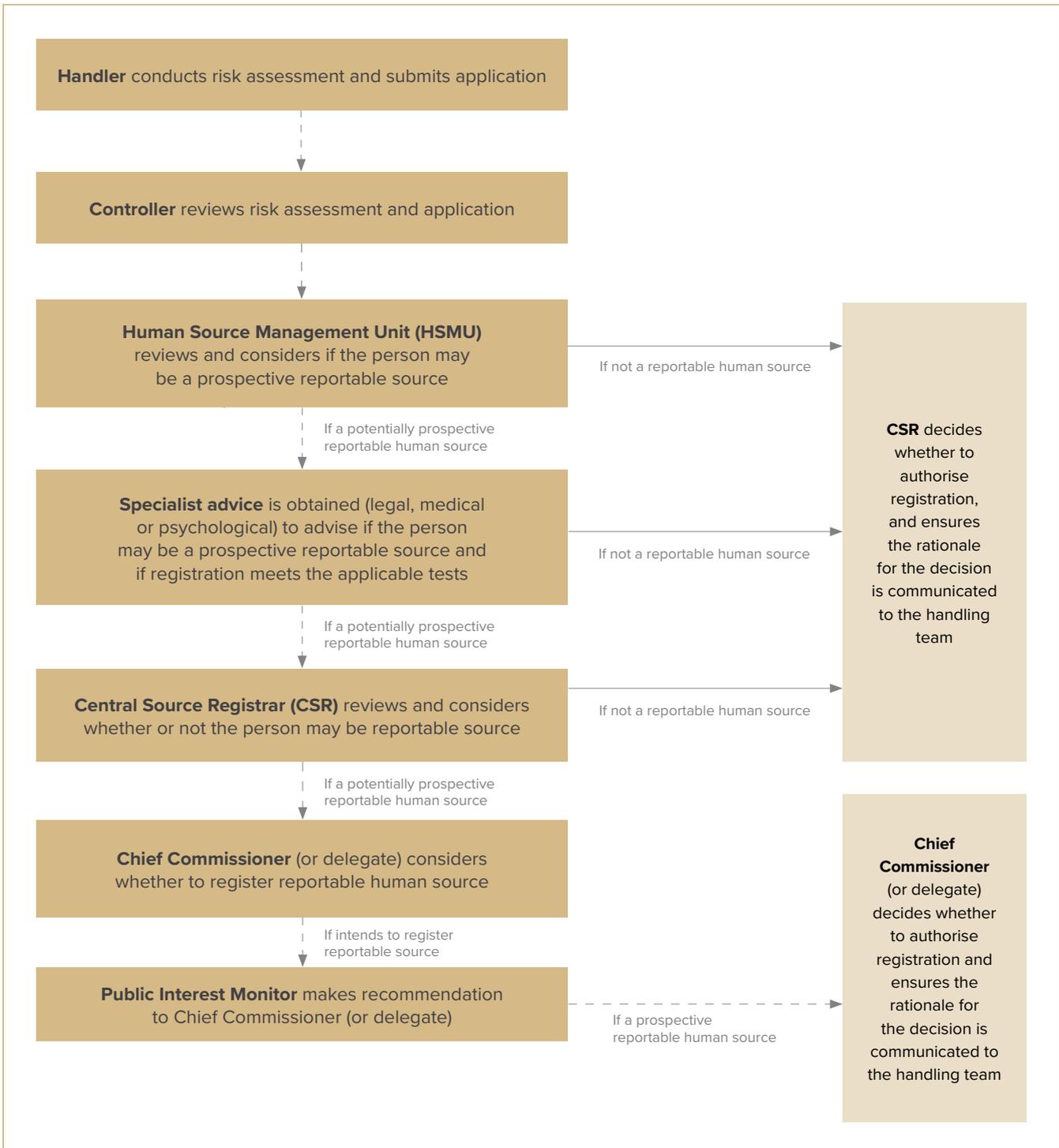
Figure 12.4 below sets out how the recommended registration process would operate.

Under this process, the handler, controller and the HSMU would be required to critically assess the application and whether the person is a reportable human source, and outline their reasons for submitting, endorsing or not endorsing the application. The CSR would also have to undertake this process when submitting applications for the registration of reportable human sources to the Assistant Commissioner, ICSC.

Once made, the decisions of the CSR and the Assistant Commissioner, ICSC, along with their rationale for those decisions, should be communicated back to the handling team to provide them with a clear understanding about their assessment of the issues and risks involved.

While this process does involve multi-levelled review, the removal of the LSR and OIC roles from the decision-making model would reduce the number of review points. This aspect of the model is discussed further in the section below on 'Victoria Police's organisational model'.

Figure 12.4: Recommended registration process for human sources



The Commission acknowledges that the proposed arrangements for reportable human sources would increase the decision-making responsibilities of the Chief Commissioner or delegate (Assistant Commissioner or above), but given the small number of human sources likely to fall into this category, this is unlikely to have significant workload or resourcing implications.

The proposed model would also increase the decision-making responsibilities of the CSR, assuming that this officer is the delegate responsible for decisions about non-reportable human sources. This would likely have resourcing implications, given that the CSR currently delegates decisions about the registration of low-risk and medium-risk human sources to the HSMU.

The Commission considers that the precise resourcing arrangements are operational matters best left for Victoria Police to determine but suggests two potential options to manage the increased workload:

- the creation of an additional CSR position (or positions)
- enabling the CSR to sub-delegate their responsibility for certain registration decisions to a senior officer (for example, at the rank of Inspector or potentially Senior Sergeant).

Should Victoria Police consider that the second option is more feasible, the Commission considers that any such sub-delegation should be to a specific position, rather than to the HSMU as a unit—consistent with the objective of providing clear lines of accountability. Further, if this option were pursued, the Commission considers that Victoria Police should implement a functional separation between that position and other HSMU functions, to avoid any conflict of interest that might arise if the officer responsible for making a registration decision was to subsequently review that decision on behalf of the HSMU as part of the unit's compliance monitoring functions.

#### RECOMMENDATION 11

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, establishes clear decision-making arrangements that demonstrate alignment between the seniority of the decision maker and the level of risk posed by the registration of human sources. The legislation should:

- a. empower the Chief Commissioner of Victoria Police to register human sources to assist in gathering criminal intelligence and/or investigating criminal activity
- b. permit the Chief Commissioner to delegate the power to register reportable human sources to an officer of or above the rank of Assistant Commissioner and non-reportable human sources to an officer of or above the rank of Superintendent
- c. require that an application for the registration of a prospective human source must be authorised by the Chief Commissioner or their delegate before the person can be used as a human source.

### Key considerations for registration decisions about all human sources

Just as there should be clarity about who is responsible for making decisions about the registration of human sources, so too must there be a clear set of criteria to guide those decisions.

Victoria Police's Ethics Committee terms of reference set out the various factors it considers when making decisions about certain higher-risk human sources, including legal, ethical and human rights implications and the nature and imminence of the criminal conduct to which the human source information relates. The Commission believes that such considerations should extend to decisions about all human sources, not just those in specific categories.

Several stakeholders told the Commission that one of the strengths of the United Kingdom framework is its emphasis on necessity and proportionality in the use of investigatory powers, which provides a clear basis for decision making by public authorities. Similar principles and considerations should underpin the proposed legislative framework for Victoria Police's use of human sources.

In determining whether to authorise the registration of any human source, the Commission recommends that the Chief Commissioner (or delegate) must be satisfied that the registration and use of a human source is appropriate and justified, including whether:

- the use of the prospective source is necessary and proportionate
- the risks associated with the prospective human source's registration have been identified and can be adequately managed.

The Chief Commissioner (or delegate) should be assisted in making that determination by having regard to the following key considerations:

- the seriousness of the offence and imminence of the threat to which the information relates
- the likelihood of investigators being able to obtain the same information through other, less intrusive investigatory or intelligence methods
- the impact on the human rights of any individuals or the community if the person is used as a source and if information from them is utilised or not utilised
- legal advice or any other specialist advice obtained about the use of the person as a human source
- conditions that should apply to the AOR setting out the terms of Victoria Police's relationship with the human source
- the specific purpose and length of time for the registration
- how the risk to the safety of the potential human source will be mitigated
- the adequacy of the risk assessment and other materials supporting the application.

These factors build on the matters currently considered by the Ethics Committee when making human source management decisions, and also draw on decision-making principles and factors outlined in legislation for other covert police powers and methods.

The Commission considered whether the proposed legislation or supporting regulatory or policy requirements should specify the duration of registration periods for certain categories of human sources, as exists under the United Kingdom's Code of Practice. The Commission considers that it would be preferable for Victoria Police decision makers to have the flexibility and discretion to determine this on an individual basis, taking into account the purpose of the registration and the specific risks and circumstances involved.

Recognising the importance of ongoing risk management throughout the human source's involvement with police, the Chief Commissioner (or delegate) should also have the power to impose conditions on registrations and determine how regularly the registration should be reviewed, informed by the specific risks and circumstances.

The requirement to set review periods recognises that the level of risk to or posed by a human source may increase or decrease over the course of their relationship with Victoria Police, requiring officers to adopt new mitigation strategies in response, or to deactivate the source if the registration is no longer appropriate. The subsequent review of a human source's registration should require the Chief Commissioner (or delegate) to be satisfied the registration remains appropriate, taking into account the key considerations specified above, and that the identified risks are being or can be managed.

#### RECOMMENDATION 12

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, requires the Chief Commissioner of Victoria Police or their delegate to be satisfied that in registering any human source, the registration is appropriate and justified, including that:

- a. the use of the person as a human source is necessary to achieve a legitimate law enforcement objective and is proportionate to that objective
- b. the risks associated with the person's registration have been identified and can be adequately managed.

#### RECOMMENDATION 13

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources:

- a. empowers the Chief Commissioner of Victoria Police or their delegate to impose conditions in respect of the registration of any human source
- b. requires the Chief Commissioner or their delegate to determine the period that a human source may be registered
- c. requires the Chief Commissioner or their delegate to determine the frequency with which the registration of a human source should be reviewed.

## Establishing additional requirements for the registration of reportable human sources

The material the Commission examined did not warrant a complete prohibition on Victoria Police's use of human sources involving legal obligations of confidentiality or privilege. As discussed in Chapter 4, a blanket ban would not eradicate the risk of confidential or privileged information being provided by a human source; nor would it equip officers with the skills to respond appropriately when this occurs. Additionally, the Commission recognises the possibility that, in rare cases, it may be legitimate and necessary to use human sources in occupations subject to legal obligations of confidentiality or privilege.

The Commission does consider, however, that the use of human sources who are reasonably expected to have access to confidential or privileged information should be treated with caution and subject to a clear and comprehensive system of checks and balances.

Victoria Police submitted that the current Human Source Policy casts a broader net over human sources involving legal obligations of confidentiality or privilege than other jurisdictions examined by the Commission, potentially going further than those jurisdictions. It noted that it is possible under the United Kingdom's framework for a lawyer to be registered as a human source without engaging the enhanced registration process.<sup>363</sup> The Commission acknowledges this, but notes that the United Kingdom framework would only permit this in circumstances where it is neither intended, nor likely, that the use of a lawyer as a human source would result in the acquisition of confidential or privileged information (in other words, where the information is clearly and entirely unrelated to the person's occupation as a lawyer).

The Commission also accepts that Victoria Police has already taken steps to strengthen safeguards related to the use of human sources involving legal obligations of confidentiality or privilege. There is, however, scope to build on these measures by clarifying, formalising and embedding the safeguards within the recommended legislative framework.

In this section, the Commission sets out further requirements that it considers should apply to the registration and management of reportable human sources; specifically, requirements for:

- identifying and classifying reportable human sources
- obtaining and considering formal legal advice
- registering a reportable source, including where the intention is to obtain confidential or privileged information
- circumstances where there is a change in the scope of the registration
- emergency authorisations.

## Identifying and classifying reportable human sources

As noted above, the Commission recommends that the proposed legislation should define a class of people who are reasonably expected to have access to confidential or privileged information, referred to in this chapter as reportable human sources.

Essentially, this means that the following people would be classified as reportable human sources:

- People currently or previously in an occupation that typically involves possession of or access to confidential or privileged information (such as lawyers, doctors, court officials, certain government workers and so forth), *regardless of whether the information they are providing or offering to police is related to their occupation.*
- People who are not in such an occupation, but appear to have access to information that might be confidential or privileged (for example, because it appears that the information *originated from some type of professional relationship or context* where a legal obligation to keep information confidential might apply).

The Commission considered the merits of a formulation similar to that adopted in the United Kingdom; that is, where the registration is *likely or intended* to result in a public authority's *acquisition* of confidential or privileged material from a human source.

Ultimately, the Commission considers that it would be preferable to set a lower threshold, by focusing on whether a person is reasonably expected to *have access to* confidential or privileged information, rather than whether a person is reasonably expected to *provide* such information to police.

There are two, interrelated reasons for this:

- First, it can be very difficult to identify whether information is subject to a legal obligation of confidentiality or privilege. As noted in Chapter 4, this involves complex legal issues, and a determination about whether and to what extent an obligation applies typically relies heavily on the specific circumstances in which the information was shared or obtained. In the case of a prospective human source who is a lawyer, it will likely be easier for a police officer to identify that the person has access to confidential and privileged information (that is, because the person is a lawyer), than to determine whether the specific information being offered or provided is, in fact, confidential or privileged.
- Second, making the possession of or access to confidential or privileged information the determining factor in whether someone is a reportable source reduces the risk of officers, either deliberately or unknowingly, wrongly classifying a person as a non-reportable source.

The use of Ms Gobbo as a human source illustrates this point. In registering and using Ms Gobbo as a human source during her third registration in 2005–09, some Victoria Police officers suggested that the information she provided was not privileged (for example, because it was obtained in a social context, not in the course of providing legal services to her clients) and was therefore justifiable.

The difficulty is that, even where information held by a lawyer (or by another person subject to a legal obligation of confidentiality or privilege) appears to relate to a person's personal associations, the question of whether the information is confidential or privileged may not be clear cut. Even if some of the information Ms Gobbo provided to police was obtained in a social context, the person disclosing it may have believed they were talking to her in her capacity as a lawyer, and their social discussions may have intermingled with discussions about legal advice.

Under the Commission's recommended model, a lawyer in similar circumstances would automatically qualify as a reportable human source, because of their access to confidential and privileged information. They would therefore be subject to the more rigorous registration process proposed by the Commission.

While this approach will result in some prospective human sources being subject to a more rigorous registration process even though the information they hold may not ultimately be deemed confidential or privileged, the Commission considers it is justified because:

- it ensures that the decision about whether certain information is confidential or privileged sits with senior officers, informed by legal advice (discussed further below)
- even though this approach casts a broader net, the number of individuals expected to fall into the reportable human source category will still be very small
- it aligns substantially with Victoria Police's current approach, whereby human sources involving legal obligations of confidentiality or privilege must be authorised by the Ethics Committee, irrespective of whether the information they hold is related to their occupation.

### **Exceptions to the duty of confidentiality or privilege**

As noted in Chapter 4, there are exceptions to legal obligations of confidentiality and privilege. Of the exceptions, the most relevant to the duty of confidentiality are a waiver by the person to whom the obligation is owed and where legislation overrides the duty. The main exceptions to privilege are where it is waived or where the communications are made by the client to their lawyer or a third party in furtherance of the commission of a fraud or offence.

There is a risk that such exceptions could be used within Victoria Police to classify a prospective source as a non-reportable human source (that is, on the basis that the information is not confidential or privileged due to an exception), thereby avoiding the more rigorous registration process the Commission recommends for reportable sources.

Consequently, the Commission considers that the legislation should adopt a rule to the effect that, where there is a possibility that a prospective human source may fall within a recognised exception to a legal obligation of confidentiality or privilege, they should be treated as though they are a reportable source. This approach would ensure that decisions about whether information is subject to an exception are the responsibility of senior officers, informed by legal advice (as discussed below).

#### RECOMMENDATION 14

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, requires that a prospective human source who is reasonably expected to have access to information that would be confidential or privileged but for an exception to the duty of confidentiality or privilege, should for the purpose of the human source registration process be treated as though they are a reportable human source.

### Formal legal advice to inform registration decisions about reportable human sources

As noted above, determining whether information is confidential or privileged is a difficult exercise that raises complex legal issues.

The Commission considers that Victoria Police's processes for seeking legal advice to inform human source management decisions need to be formalised and strengthened. While there is a requirement for the Ethics Committee to consider legal advice when making its decisions, this is primarily through Victoria Police's Executive Director of Legal Services, who is a member of the Committee and, since May 2020, has a vote in its decisions. In the Commission's view, this is not an adequate substitute for formal legal advice.

Victoria Police told the Commission that there are established procedures for officers to obtain legal advice in relation to human sources, explaining that the HSMU often procures advice from Victoria Police's Legal Services Department and the VGSO.<sup>364</sup> There are, however, no explicit requirements or processes set out in the Human Source Policy for obtaining such advice.

The Commission considers that, under its recommended legislative framework, any proposed registration of a reportable human source must be informed by formal legal advice, and that this advice should be sought early in the registration process.

The Commission has considered whether Victoria Police should be required to seek legal advice from external independent lawyers in relation to the registration of reportable human sources, and notes Ms Steendam's evidence that Victoria Police's internal legal advisers are capable of giving 'frank fearless and independent advice and appropriately meet their duty and their requirements as a legal practitioner' and that Victoria Police engages the VGSO when needed.<sup>365</sup> The Commission has also considered the fact that the recommended registration process will necessarily involve scrutiny of the legal advice obtained by senior Victoria Police decision makers and the PIM. Finally, the Commission notes that in Chapter 8, it has recommended that the Chief Commissioner takes steps to ensure that the role of Executive Director, Legal Services, provides independent legal advice.

The Commission considers that formal legal advice provided by Victoria Police's Legal Services Department or the VGSO early in the registration process would act as an important safeguard, without the additional cost associated with obtaining legal advice from external lawyers, though Victoria Police could still seek external advice if and when it considered it necessary.

## Registration of a reportable human source

Earlier in this chapter, the Commission recommended that the decision to register a reportable human source should be the responsibility of the Chief Commissioner or delegate of or above the rank of Assistant Commissioner. The Commission also considers that, for the reasons outlined above and in Chapter 13, the Chief Commissioner, in deciding whether to register a reportable human source, must have regard to formal legal advice and any recommendations made by the PIM before registering the person as a human source. They must also satisfy themselves of the key factors outlined earlier in the section, 'Key considerations for registration decisions about all human sources'. In Chapter 13, the Commission makes recommendations about Victoria Police's obligations to support the PIM's role in these registration decisions and associated external oversight functions.

### RECOMMENDATION 15

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, requires that:

- a. the Chief Commissioner of Victoria Police or their delegate must consider formal legal advice before deciding to register a reportable human source
- b. the Chief Commissioner or their delegate must have regard to any recommendations or submissions on the proposed registration that the Public Interest Monitor has made before deciding to register a reportable human source.

## Registration of a reportable human source where it is intended to obtain or disseminate confidential or privileged information

In 2020, a new requirement was introduced to the Human Source Policy stating that, where Victoria Police *intends* to either obtain (that is, actively seek out) or disseminate confidential or privileged information from a human source, additional safeguards should apply; specifically, authorisation of the Deputy Commissioner, Specialist Operations.

The Commission considers that the proposed legislative framework should similarly impose enhanced safeguards in these circumstances, over and above those that apply to reportable human sources. This is because, rather than there being just a risk or a reasonable expectation that the use of a human source might result in obtaining confidential or privileged information, in this scenario there is an explicit intention to obtain or disseminate such information, which poses a greater risk of illegally or improperly obtaining evidence. In turn, this poses a heightened risk to the validity of criminal prosecutions or convictions and to the administration of justice more broadly.

In accordance with the test already envisaged by the Human Source Policy, the Commission considers that, under the proposed legislative framework, where Victoria Police wishes to register a person as a human source with a specific intent to obtain or disseminate confidential or privileged information, the Chief Commissioner or delegate of or above the rank of Assistant Commissioner must be satisfied not only that it is necessary and proportionate to do so, but also that there are *exceptional and compelling circumstances* to justify this course of action.

As with decisions to register reportable human sources, the decision maker must notify and consider the recommendation of the PIM (discussed further in Chapter 13). The PIM would apply the same test in forming a view about the registration; that is, whether there are exceptional and compelling circumstances to justify it.

The Commission considers that this test would only be met in circumstances where there is a serious threat to national security, the community, or the life and welfare of a person; and further, where the information is not able to be obtained through any other reasonable means.

The decision maker, as well as the PIM, would need to be satisfied that the public interest in averting such a serious threat outweighs the public interest in maintaining the confidentiality or privilege that attaches to the information. As with the decision to register a reportable human source, the Commission considers that this decision must be informed by formal legal advice provided by the Victoria Police Legal Services Department, the VGSO or external lawyers.

It is possible that any situation constituting exceptional and compelling circumstances would fall within an exception to the duty of confidentiality or privilege. The Commission nonetheless considers that the inclusion of an exceptional and compelling circumstances test in the legislative framework would provide clear guidance on the rare occasions where the intentional acquisition or dissemination of confidential or privileged information is permissible.

#### RECOMMENDATION 16

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources:

- a. requires that the Chief Commissioner of Victoria Police or their delegate must be satisfied that there are exceptional and compelling circumstances to justify the registration of a human source where Victoria Police intends to obtain or disseminate confidential or privileged information from that person
- b. provides that 'exceptional and compelling circumstances' be defined as circumstances where there is a serious threat to national security, the community or the life and welfare of a person; and where the information cannot be obtained through any other reasonable means
- c. requires that the Chief Commissioner or their delegate must consider formal legal advice before deciding to register a human source with the intention to obtain or disseminate confidential or privileged information from that person
- d. requires that the Chief Commissioner or their delegate must have regard to any recommendations or submissions on the proposed registration that the Public Interest Monitor has made before deciding to register a human source with the intention to obtain or disseminate confidential or privileged information from that person.

## Changes in the scope of the registration

The risks of using a human source, their individual circumstances, and the nature of the information they provide or have access to may all change during their relationship with police.

It is possible that a human source originally assessed and registered as a non-reportable human source may subsequently fall into the category of a reportable human source—for example, after unexpectedly coming into possession of confidential or privileged information. In such cases, the Commission considers that any potentially confidential or privileged information provided should be quarantined so that it cannot be disseminated; the person's registration should be cancelled (meaning they cannot be used as a human source) and a new application commenced to register the person as a reportable human source (if Victoria Police considers it necessary to continue using them as a source). In line with the registration process for reportable human sources recommended above, the Chief Commissioner (or delegate) would then be required to assess that new application, informed by legal advice and any recommendation of the PIM.

Similarly, there may be circumstances where a reportable human source has been registered with no expectation that they will provide confidential or privileged information but ends up doing so—for example, a lawyer who is registered on the basis that they are providing information about friends or relatives, but subsequently provides information about a client. As above, in these circumstances, the information should be quarantined so that it cannot be disseminated. As outlined in Chapter 13, the Commission also recommends that Victoria Police be required to report such instances to IBAC, which would have a role in monitoring Victoria Police's compliance with the legislative and policy framework.

If, in either of these scenarios, Victoria Police wished to disseminate the confidential or privileged information, this would trigger the same requirements that apply to circumstances where there is an intention to register a person as a human source to obtain confidential or privileged information. That is, police would need to cancel the registration and commence a new application seeking the Chief Commissioner's (or their delegate's) authorisation, informed by legal advice and any recommendation of the PIM, on the basis that there are exceptional and compelling circumstances.

### RECOMMENDATION 17

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, requires that where a reportable or non-reportable human source provides confidential or privileged information to police that was not expected or authorised at the time of their registration as a human source:

- a. Victoria Police must quarantine the confidential or privileged information
- b. Victoria Police must cancel the registration and commence a new application (if Victoria Police considers it necessary to continue using the person as a human source), in line with Recommendations 11, 15 and 16.

## Emergency authorisations

The Commission recognises that there may be circumstances where there is a genuinely imminent threat to community safety or harm to a person, and Victoria Police must act promptly to counter that threat. Consequently, the Commission considers that the proposed legislation should include provisions enabling the Chief Commissioner to register a reportable human source without the involvement of the PIM in emergency situations.

The Commission considers that this would only be justifiable where there are exceptional and compelling circumstances (where there is a serious threat to national security, the community or the life and welfare of a person, and the information is not able to be obtained through any other reasonable means) *and* that threat is imminent.

This is broadly consistent with existing emergency authorisation provisions for the use of other covert powers and methods, such as those set out in the *Surveillance Devices Act 1999* (Vic).

If Victoria Police were to make such an emergency authorisation, the Chief Commissioner should be required to provide the application materials to the PIM as soon as possible after registration, and the PIM should be able to examine the material and make recommendations as it considers necessary. This is addressed in more detail in Chapter 13.

### RECOMMENDATION 18

That the Victorian Government, in developing the legislation for Victoria Police's registration, use and management of human sources, allows the Chief Commissioner of Victoria Police or their delegate to make an emergency authorisation of a reportable human source. This power should only be used in circumstances where: there is a serious threat to national security, the community, or the life and welfare of a person; the threat is imminent; and the information is not able to be obtained through any other reasonable means.

## Strengthening the decision-making model in advance of new legislation

As noted above, the Commission recommends a legislative framework under which the Chief Commissioner may register human sources or delegate that power to senior officers—of or above the rank of Assistant Commissioner in the case of reportable sources, and of or above the rank of Superintendent for non-reportable sources. A key benefit of this model is having a clear chain of command of individual officers accountable for the functioning of Victoria Police's human source program.

The Commission considers that some of these benefits can be realised in advance of the proposed legislation through relatively straightforward interim amendments to the current decision-making model and associated requirements set out in the Human Source Policy.

The Commission recognises that Victoria Police recently adopted a new Human Source Policy that, among other things, reframed and expanded the categories of human sources whose registration requires Ethics Committee approval. The Commission also recognises that the introduction of new policies and processes involves substantial work to implement changes, update relevant guidance material, and communicate changes to officers. Thus, while recommending that certain new decision-making arrangements could be introduced in advance of the proposed legislation, the Commission is not recommending changes to the current categories of human sources set out in the Human Source Policy before the legislation is introduced. In this way, the Commission has sought to strike a balance

between, on the one hand, remedying what it considers to be one of the most pressing issues in the current model; and on the other, ensuring that these remedies can be realistically achieved in the short-term, without creating unreasonable complexity and operational disruption for Victoria Police.

The Commission considers that the following changes could be introduced within 12 months, while the proposed new legislative framework is being developed, for the reasons outlined above:

- The Assistant Commissioner, ICSC (rather than the Ethics Committee) should be responsible for making decisions about the registration of Category 1–3 human sources and the dissemination of confidential or privileged information obtained from any human source, to establish clear accountability for determining these higher-risk matters.
- The CSR should be responsible for making decisions about the registration of human sources other than Category 1–3 human sources, which may require the appointment of an additional CSR or enabling the existing CSR to delegate certain decisions to an officer with appropriate seniority and experience.
- In making decisions about the registration of Category 1 human sources and any dissemination of confidential or privileged information, the Assistant Commissioner, ICSC should be required to consider formal legal advice provided by the Victoria Police Legal Services Department, the VGSO or external lawyers, and other specialist advice where required in the case of Category 2 and 3 human sources.
- Officers should not be required to seek approval through a multi-levelled process to ‘approach’ a prospective Category 1–3 human source and to subsequently follow the same process to register the source; however, the handling team should be required to seek advice from the HSMU before approaching such a person, and any subsequent registration application would require authorisation by the Assistant Commissioner, ICSC, as noted above. The Commission considers that, if there are robust processes in place for the registration of human sources and the dissemination of information they provide, a separate authorisation process for ‘approaching’ a prospective human source should not be necessary, and potentially pre-empts the matters to be considered and determined through the risk assessment and registration process.
- Category 4 human sources should no longer form a separate and standalone category of human sources. These are people who pose risks that would not normally permit their registration but for the fact that the information they hold is of ‘extraordinarily high value’. The Commission considers that this category is unnecessary and undermines the risk assessment and registration process. While there may be certain people who are not normally suitable for registration as a human source, the very purpose of a risk assessment is to assess the prospective source and their individual circumstances to determine the nature and value of the information they can provide, the risks and issues arising from their use as a human source, whether those issues can be managed, and ultimately, whether their registration and use can be justified. Rather than forming a special category of human sources, the Commission considers that these people should be subject to a risk assessment as with any other source, and registered if the decision maker (Assistant Commissioner, ICSC or CSR) deems their registration necessary and appropriate.

The Commission suggests that if Victoria Police wishes to preserve its Ethics Committee, the policy should remove any ambiguity about its role by making clear that its role is advisory rather than determinative.

Later in this chapter, the Commission recommends that the OIC and LSR should no longer form part of the human source management organisational model, including decision-making and supervision processes. The Commission considers that this change should be implemented as part of broader organisational changes simultaneously with the introduction of the legislative framework, given that this would represent a more substantial change to the existing model.

**RECOMMENDATION 19**

That Victoria Police, within 12 months, implements changes to its decision-making model and associated requirements in the Human Source Policy, on an interim basis until the legislation proposed in Recommendation 8 comes into force. The Human Source Policy should:

- a. provide that the Assistant Commissioner, Intelligence and Covert Support Command, is responsible for decisions to register Category 1–3 human sources and to disseminate confidential or privileged information obtained from any human source
- b. provide that the Central Source Registrar is responsible for the registration of human sources other than Category 1–3 human sources
- c. require the Assistant Commissioner to consider formal legal advice in deciding whether to authorise the registration of a Category 1 human source or to disseminate confidential or privileged information, and to consider other specialist advice as required in deciding whether to register a Category 2 or 3 human source
- d. replace the requirement for officers to seek approval from the Human Source Ethics Committee to ‘approach’ a prospective Category 1–3 human source with a requirement for the handling team to consult with the Human Source Management Unit before approaching such a prospective source
- e. remove Category 4 human sources as a separate category under the Human Source Policy.

## Improving the Human Source Policy

Victoria Police has made substantial efforts to improve and strengthen its Human Source Policy, most notably through amendments introduced in 2014, 2015, 2016 and 2018 in response to the Comrie Review and Kellam Report, and in May 2020, to incorporate additional measures designed to, among other things, manage the risks of obtaining and using confidential or privileged information from human sources.

Despite these efforts, the Commission considers that Victoria Police’s Human Source Policy needs further improvement; in particular, to:

- set out clear principles and objectives to guide and inform officers about why the lawful and ethical management of human sources is important and necessary
- support officers’ understanding of the interaction between human rights and human source management, and how to meet their obligations under the Charter
- provide additional guidance about legal obligations of confidentiality or privilege, the potential consequences of obtaining confidential or privileged information from a human source, and how such information should be used, handled and disseminated
- clarify and strengthen requirements relating to the AOR and sterile corridor.

These are discussed below.

## Principles and objectives for the use and management of human sources

Human sources are individuals—consequently, they present unique motivations, behaviours, benefits and risks. It is not possible to prescribe rules for every potential scenario. Rather, processes must be sufficiently flexible to enable police to exercise appropriate discretion, and underpinned by clear principles and objectives to guide police decisions and actions in various situations and contexts.

The Commission considers that the Human Source Policy currently lacks these principles and objectives. For example, the policy refers briefly to the principles of necessity and proportionality, without articulating the factors to be considered by police officers in assessing whether the use of a human source is necessary and proportionate. It refers to certain types of people whose risks would 'not normally permit registration' but for the fact that the information they have is of 'extraordinarily high value'—without explaining either of these terms or how officers should weigh up the competing risks and benefits. The policy mandates that supervising officers practise 'intrusive supervision' of the handler–source relationship but does not explain the purpose of supervision or why it is important.

In focus groups with the Commission, some participants observed that Victoria Police does not have a clear policy or strategic position on the use of human sources, their value to the organisation and whether their use should be increased or discouraged. Many participants demonstrated awareness of recent procedural changes; however, some either could not articulate the purpose of these changes or regarded them as reactive responses to recent reviews or the Commission's inquiry, rather than thoughtful, evidence-based changes to improve the human source management framework.

The lack of appropriate guidance in the Human Source Policy, combined with a perceived lack of clear communication about why certain decisions are made, has contributed to varied views among officers about when human sources should and should not be used and why. Handlers and controllers in the Commission's focus groups consistently expressed the view that decisions by senior officers about the registration of certain higher-risk sources are driven purely by the avoidance of reputational risk to Victoria Police, and that this is at the expense of detecting and preventing serious crime. In contrast, senior officers and decision makers repeatedly emphasised that registration decisions always weigh up competing public interests, and that certain higher-risk prospective sources are typically not registered because it is not in the public interest to do so.

Victoria Police needs to address this issue. It must do more than set out technical procedures in its Human Source Policy and expect unquestioning compliance among its officers. An effective policy framework requires coherent principles that encourage a shared understanding of the organisation's expectations for the proper and ethical use of human sources. If officers do not respect and understand the basis of decisions and are not guided to consider and balance the relevant public interests themselves, there is a significant risk that their use and management of human sources will fall short of the standards now expected by Victoria Police.

The legislation recommended by the Commission would establish a publicly accessible and transparent framework for the regulation of the use and management of human sources, but it would not displace the need for internal policies and procedures. Rather, the Human Source Policy should complement and expand upon legislative requirements and provide officers with practical instruction and guidance about why these requirements exist and how to satisfy them.

The Commission considers that Victoria Police should undertake work to clearly set out the principles and objectives of its human source management program in the Human Source Policy, and that it should do so within 12 months, rather than waiting until the new legislation commences operation. Some of the Commission's suggestions about the legislation's objectives could usefully inform the development of this policy guidance.

The Commission also urges Victoria Police to adopt a careful and considered approach to this work, recognising that, as noted in Chapter 11, previous changes to the Human Source Policy have at times contributed to greater complexity and uncertainty for officers.

**RECOMMENDATION 20**

That Victoria Police, within 12 months:

- a. implements changes to its Human Source Policy to include a statement of the organisation's objectives and guiding principles for the registration, use and management of human sources, including but not limited to principles of integrity, necessity and proportionality, accountability, effectiveness, consistency, and safety and sensitivity
- b. obtains operational input to inform the development of these objectives, principles and associated guidance.

**A human rights-based approach in the use of human sources**

The Commission found that Victoria Police's current policy framework for human source management does not provide officers with adequate guidance to uphold their obligations under the Charter. A focus on human rights should underpin the entire period for which a human source is used and managed.

The strong emphasis on human rights in the United Kingdom's framework, equally appropriate in Victoria given the Charter, puts necessity and proportionality at the forefront of police considerations of, and decisions about, the use of human sources. Several stakeholders told the Commission this emphasis also helps to engender community support for policing activities. The Commission considers that it is likely to result in more, not fewer, suitable individuals being prepared to become human sources.

The Commission is of the view that the Human Source Policy could be more instructive about how human rights are engaged, and how and whether they can be lawfully limited, through the use of human sources. This includes the right to a fair trial. One way to improve the policy would be to include hypothetical examples or scenarios that are relevant to the human source context. The Human Source Policy should also refer officers to the general guidance already provided within the *Victoria Police Manual Policy Rules—Human rights equity and diversity standards*.

Victoria Police has acknowledged it could do more to provide guidance to officers about how to apply human rights in practice. It submitted that this is the case across its broader operations, not just human source management, and noted that consistent with its 'focus on ethical leadership, human rights will be a priority in training and policy development moving forwards'.<sup>366</sup> The Commission supports Victoria Police in these endeavours, including through the incorporation of additional human rights guidance in the Human Source Policy.

The Commission also makes recommendations to foster a greater focus on human rights in Victoria Police's risk assessment process and human source management training later in this section.

**RECOMMENDATION 21**

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide practical examples of the ways in which human source management can engage and limit the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and guidance for police officers in considering whether the use of a human source is necessary and proportionate.

## Guidance about confidential and privileged information

The Commission's focus groups with Victoria Police officers suggested that ambiguous policy and insufficient guidance have contributed to a lack of certainty and understanding among many officers about legal obligations of confidentiality and privilege. Without such an understanding, it is difficult for officers to fully appreciate the risks of obtaining and using confidential and privileged information, to identify where these risks might exist and seek appropriate advice, and to manage them carefully and in accordance with the policy requirements.

As outlined in Chapter 4, there can be considerable complexities in identifying what is confidential or privileged information and anticipating circumstances when it may be provided. Given the risks to investigations, prosecutions and possibly convictions that may flow from the disclosure or use of such information, it is critical that the human source management framework provides clear guidance to assist officers with this task. Such guidance should be buttressed by legal advice, discussed above, and comprehensive training, discussed below. The Commission considers that the policy needs to place greater emphasis on whether the information held by a prospective human source originated from a professional relationship and could create a conflict of interest for the source, as well as providing advice on the occupations in which legal obligations of confidentiality or privilege commonly arise. In making these changes, Victoria Police should seek advice from its Legal Services Department or the VGSO.

In addition to providing more guidance about when issues of confidentiality and privilege may arise, the Commission considers that police officers need clearer guidance about how to appropriately use, handle and disseminate confidential and privileged information.

The Commission notes that Victoria Police may also acquire confidential or privileged information through its other covert methods. While the Commission has not examined the processes for handling such information in detail, it may be beneficial for Victoria Police to consider aligning these processes with those recommended by the Commission, to ensure that there is a clear and consistent approach to managing confidential or privileged information across the organisation.

### RECOMMENDATION 22

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide practical guidance to assist police officers to identify potentially confidential or privileged information. This guidance should include advice and examples relating to:

- a. the types of occupations and professional relationships that attract legal obligations of confidentiality or privilege
- b. the exceptions to legal obligations of confidentiality or privilege and when these may apply
- c. the implications of using confidential or privileged information, including the potentially adverse consequences for any resulting investigations, prosecutions or convictions
- d. when and how to seek further advice, including from the Human Source Management Unit.

Victoria Police should seek legal advice from its Legal Services Department or the Victorian Government Solicitor's Office in developing this guidance.

**RECOMMENDATION 23**

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide clear requirements and instructions to police officers on the use and handling of confidential and privileged information, including in relation to the quarantine, retention, dissemination and destruction of such information.

**Acknowledgement of Responsibilities**

The Commission appreciates most human sources managed by Victoria Police do not have legal obligations of confidentiality or privilege. On the rare occasions that police do register such a source, the Commission considers that the AOR should clearly state that the source is not to provide confidential or privileged information (unless specifically authorised to do so, under the registration process outlined above, where it is intended to obtain and disseminate such information). The Commission heard that, in practice, the Ethics Committee would insist on setting this out in the AOR. Specifying this as a requirement in the Human Source Policy would help to ensure that it occurs in practice and that all officers dealing with human sources understand what must occur.

Further, as outlined in Chapter 11, while the Human Source Policy previously included a requirement that officers must not actively seek information from a human source that would cause the human source to breach a professional obligation—a requirement included in response to the Comrie Review and Kellam Report—this was removed from the most recent version of the policy. The Commission considers that, for the avoidance of doubt, the Human Source Policy should clearly state that officers are not to do this (again, unless specifically authorised under the registration process outlined above).

**RECOMMENDATION 24**

That Victoria Police, within 12 months, implements changes to its Human Source Policy to require that:

- a. when dealing with human sources involving legal obligations of confidentiality or privilege, the Acknowledgement of Responsibilities must clearly set out any limitations on the information a human source can provide
- b. police officers must not actively, without appropriate authority, seek information from a human source that would cause the human source to breach a legal obligation of confidentiality or privilege.

**Handling a human source within a sterile corridor**

Victoria Police's Human Source Policy explains that human sources should be managed in a full or partial sterile corridor, and high-risk sources *must* be managed in a full or partial sterile corridor 'to ensure the safety of the human source is not compromised in order to achieve investigative outcomes'. It follows that if a full sterile corridor is not in place, or not feasible, there are obvious risks that need to be managed.

The Commission acknowledges the sterile corridor may be difficult to strictly apply in practice, particularly under Victoria Police's current model. It also recognises that any policy needs to be flexible enough to accommodate operational requirements; however, the Human Source Policy does not provide clear guidance on when the lack of a sterile corridor is permitted and why. Nor does it provide any guidance on how to manage the risks associated with a partial, or absent, sterile corridor. This creates the potential for inconsistent practice across Victoria Police and may compromise the safety and wellbeing of human sources if not managed appropriately.

Later in this chapter the Commission recommends a dedicated and centralised human source management model, which, if adopted, should go part of the way to addressing this risk. As this model may not be implemented for some time, the Commission considers that Victoria Police should take steps now to include clear guidance in the Human Source Policy on the requirement for a sterile corridor and when it may be appropriate not to adhere to this requirement.

Chapter 14 addresses Victoria Police's efforts to manage disclosure issues arising from the sterile corridor approach.

#### RECOMMENDATION 25

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide clear instructions and practical guidance on the circumstances in which it may be appropriate to dispense with the requirement for a sterile corridor and the measures that officers should adopt to manage the associated risks.

## Strengthening Victoria Police's capability and capacity

In this section, the Commission considers Victoria Police's capability and capacity to manage human sources, taking into account the Commission's recommendations to introduce a new legislative framework and to strengthen the Human Source Policy.

### Victoria Police's organisational model

The Commission appreciates that Victoria Police's current hybrid model for human source management provides flexibility for Regional Divisions to manage and allocate resources in response to operational needs.

Notwithstanding these benefits, there are significant limitations in the model and its ability to ensure the robust and ethical management of all human sources across Victoria. For example, the model increases the risk of poorly managed conflicts of interest, by allowing regional officers to manage sources directly linked to their investigations, contrary to the preference for a sterile corridor outlined in the Human Source Policy. It also creates an environment where some police officers manage human sources infrequently, sometimes years after having completed human source management training, reducing the likelihood of them understanding and adhering to current policy requirements.

In a submission to the Commission, Victoria Police acknowledged the limitations of the hybrid model, noting that the multi-level registration process could be simplified in a more centralised model, but also noted that the current process is necessary so that LSRs are sufficiently appraised of and able to effectively supervise operational activity in their local areas or units.<sup>367</sup>

Evidence before the Commission indicated not all police officers responsible for human source management are subject to rigorous supervision and management, in part due to supervising officers having no experience or specialised skills in this area. The hybrid human source management model makes it difficult for OICs and LSRs, in particular, to balance their human source management roles with a much broader set of operational and managerial responsibilities.

A centralised and dedicated human source management model means that human sources would only be handled by DSTs that report directly to centralised management. This would increase Victoria Police's ability to ensure that all officers involved in human source management have the appropriate skills, training and experience to identify and manage the associated risks.

The Commission acknowledges Victoria Police may be concerned that removing OICs and LSRs from the human source management organisational model could diminish oversight of human source management in the regions.

Victoria Police may wish to consult with Western Australia Police, noting it has successfully implemented a centralised model even though it is responsible for the largest geographic state in Australia. By contrast, Victoria is the second most populous state, but the second smallest in geographic area, which should be an advantage in implementing a centralised model.

Victoria Police's Executive Command has given in-principle support to a more centralised and dedicated human source management model and the Commission supports this approach. While this would likely require an increase in resources allocated to human source management—along with work to attract and train police officers with the suitable attributes, particularly those to be based in regional areas—such a model would reflect both the importance of and the high level of risk associated with this function. It would also support the development of a specialised workforce capable of managing the particular challenges that arise in the use of human sources, including issues related to confidentiality and privilege. It is important, however, that any such model delivers services across Victoria and not solely in metropolitan areas, ensuring that the entire state benefits from Victoria Police's investigative powers and methods.

The decision-making arrangements recommended in the preceding sections would be complemented by a centralised model, with a clear hierarchical management structure and designated responsibility for decision making. It would also provide Victoria Police with the opportunity to select officers with the appropriate skills, attributes and experience for human source management roles.

The Commission acknowledges that DSTs can pose an increased risk of police misconduct and corruption; for example, through handlers developing personal or otherwise inappropriate relationships with human sources over long periods of time. The Commission considers that this risk could be effectively managed through reasonable maximum time in position requirements, regular rotation of handlers and controllers of long-term human sources, and appropriate misconduct prevention strategies.

The Commission recognises Victoria Police already rotates officers through certain dedicated human source management roles and considers that these existing requirements should be applied and extended across all dedicated roles.

#### RECOMMENDATION 26

That Victoria Police, within two years, establishes an organisational model for the registration, use and management of human sources that provides for:

- a. the management of all human sources by dedicated source teams
- b. centralised internal oversight of the management of human sources by the Human Source Management Unit, the Central Source Registrar and the Assistant Commissioner, Intelligence and Covert Support Command.

#### RECOMMENDATION 27

That Victoria Police, within two years, removes the roles of Officer in Charge and Local Source Registrar from its decision-making process and organisational model for the registration, use and management of human sources.

#### RECOMMENDATION 28

That Victoria Police, within two years, introduces requirements limiting the maximum time that police officers can hold positions within dedicated source teams and the Human Source Management Unit to five years.

#### RECOMMENDATION 29

That Victoria Police, within two years:

- a. develops a prevention and detection strategy to mitigate the risk of misconduct and corruption that may arise from the implementation of a centralised and dedicated human source management model, taking into account the Commission's findings and those of previous inquiries
- b. ensures that this strategy is regularly reviewed and refined as part of Victoria Police's strategic management of this high-risk area of policing.

### Risk assessment

A robust approach to the identification, assessment and mitigation of risk is essential for Victoria Police to manage human sources ethically and effectively.

Central to the decision to register a human source is the issue of whether the risks of their use can be appropriately and adequately mitigated; that is, reduced to an acceptable level. This assessment needs to be repeated regularly through the period of registration, so that any escalation in risk is identified and additional risk mitigation strategies put in place.

Initial risk assessments must consider all relevant factors for the engagement of a person as a human source, including whether their use as a source engages any human rights and is necessary and proportionate. They must provide decision makers with sufficient information to assess the nature and value of the information against the risks of using the person as a source and whether the decision to register a prospective source is justified and in the public interest. To do this, risk assessments must also include contrary information that could result in the rejection of the application, as is the case with similar covert intelligence and investigative methods.

The Commission has identified, and Victoria Police acknowledged, limitations with its current Initial Risk Assessment. One of these limitations is that it does not specifically prompt officers to consider if information to be provided by a human source is, or may be, confidential or privileged. The Initial Risk Assessment could better highlight the importance of considering the origin and nature of information to accurately assess risk.

Most participants in the Commission's focus groups expressed the view that the Initial Risk Assessment is unnecessarily cumbersome and not fit for purpose. These shortcomings give rise to some serious risks:

- creating a perverse incentive for officers to operate outside the process by using unregistered human sources
- deterring officers from using human sources (and potentially limiting opportunities to detect and prevent serious crime)
- causing officers to see the risk assessment as a meaningless exercise that is necessary only for compliance with the policy.

The Commission notes Victoria Police is reviewing its Initial Risk Assessment tool, and that the review is likely to streamline the assessment while also taking into account the issues identified as part of this inquiry.

The Commission acknowledges Victoria Police has recently implemented the One-off Risk Assessment for human sources providing information to Victoria Police on a single occasion and the Dynamic Risk Assessment, which is designed to assess changes in risk throughout the period of a source's registration. Both assessments prompt officers to consider confidential and privileged information.

Victoria Police's human source management risk assessments would benefit from explicit inclusion of fields that require officers to consider human rights and the necessity and proportionality of using the source. Documenting and providing reasoned analysis of human rights in human source risk assessments would assist officers to fulfil their obligations under the Charter and determine whether registration of a prospective human source is justified.

Additionally, Victoria Police should amend its risk assessments to prompt officers to consider the risks that the use of a human source could pose to the proper administration of justice. The Commission considers this would be best achieved by including additional questions and guidance within the category of 'risk to the information or investigation'.

The work undertaken by Victoria Police to improve and strengthen its risk assessments is a positive step. To ensure that these changes are effective, the Commission recommends that Victoria Police engages an external expert to undertake a thorough evaluation of the revised tools after implementation.

### RECOMMENDATION 30

That Victoria Police, within 12 months and as part of its current work to improve its human source risk assessments, develops guidance on how to assess:

- a. the source and nature of information reasonably expected to be provided by a human source, to identify whether that information could be confidential or privileged
- b. the risks that the use of a human source could pose to the proper administration of justice
- c. the engagement of any human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), including how any limitation is reasonable, necessary and proportionate in the circumstances.

### RECOMMENDATION 31

That Victoria Police, within three years, engages an independent expert to evaluate and report on the effectiveness of its new human source management risk assessment tools, to determine whether they support effective identification and management of risks.

## Supervision of the human source–handling team relationship

Active supervision and support of handlers and controllers is critical to the appropriate and ethical management of human sources.

While the Human Source Policy instructs all supervisors to exercise 'intrusive supervision', the Commission found the practical application of it is at best variable and often poor among some LSRs and OICs. Consistent and thorough supervision is best achieved when the people responsible have adequate time to do so rather than when they are trying to balance multiple, and often competing, operational priorities.

For these reasons and in line with the Commission's recommendations for Victoria Police to adopt a dedicated and centralised model without the OIC and LSR roles, the Commission considers the supervision of handlers and controllers is best suited to the dedicated roles of the HSMU and the CSR.

It is not appropriate for senior officers to regard handlers and controllers as 'experts' who do not require close scrutiny, as demonstrated in Victoria Police's management of Ms Gobbo. The Commission observed during its focus groups that this perception still has currency among some officers with supervisory functions. The risks associated with the use of human sources are such that, no matter how experienced a handler or controller may be, there should always be consistent and rigorous monitoring and oversight of the source's management and the relationship between the source and the handling team.

The Commission considers that the Human Source Policy does not contain sufficient guidance for officers about why supervision is necessary and important, who is responsible for it and how they must acquit those responsibilities. It also conflates the processes of supervision and compliance monitoring (for example, reviewing files to ensure compliance with timeframes and other policy requirements). Supervision should go further than monitoring compliance and include active discussion with the handling team about how to manage the human source, testing and challenging their approach, and assisting them to identify and maintain strategies to manage risks.

### RECOMMENDATION 32

That Victoria Police, within 12 months, implements changes to its Human Source Policy to provide clear instructions and practical guidance about who is responsible for supervision of the handling team, why effective supervision is necessary and how it should be applied in practice.

## Human source management training

As outlined earlier in this chapter, all police officers involved in human source management are required to complete the basic online training course, and handlers and controllers of certain types of sources must complete a higher level of training.

The Commission found that until recently, Victoria Police's human source management training courses have not addressed the risks associated with obtaining and using confidential and privileged information, nor the significance of human rights in determining whether the use and management of a human source is justified in all circumstances. This was evident in the confusion among some focus group participants about when these obligations may exist; although officers who had completed intermediate and specialised training generally had a stronger understanding of these concepts. The Commission's proposed reforms to the Human Source Policy would assist in building officers' understanding of confidentiality and privilege and human rights. This should be supported by comprehensive training on these issues.

During the Commission's inquiry, Victoria Police made amendments to training and delivered tailored training courses, including a session on privilege and disclosure for some officers. It also updated the basic online training course to align with the Human Source Policy introduced in 2020 and include content on legal obligations of confidentiality or privilege and human rights.

Notwithstanding these improvements, the Commission has reviewed Victoria Police's basic online training and considers that it is unsuitable as a minimum requirement for those with direct responsibility for human source management. It heard that the training may not equip officers with adequate practical skills to manage a human source or to fully understand their obligations under the Human Source Policy. The Commission therefore considers that basic online training should only be used to provide officers who are not in human source management roles with an understanding of general requirements for the management of human sources, and to assist them to identify issues for escalation to the HSMU (including issues of confidentiality or privilege).

In a submission, Victoria Police disagreed with the Commission's views. It cautioned that, while it is receptive to conducting additional face-to-face training, this requires significant resourcing, particularly when officers may not be 'particularly active in performing human source management activities'.<sup>368</sup>

While noting Victoria Police's response, the Commission maintains that face-to-face training is necessary for officers who are responsible for managing human sources, or overseeing the handler–human source relationship. This would provide assurance that these officers have been sufficiently trained in, and understand, their responsibilities and how to identify and manage any risks. The Commission's recommendation for Victoria Police to adopt a centralised and dedicated organisational model may reduce the number of officers able to manage human sources and therefore the number of officers requiring face-to-face training.

The Commission also considered whether the lack of specific training requirements for HSMU officers, the CSR and Assistant Commissioner, ICSC is appropriate. The Commission accepts Victoria Police's view that because these officers are responsible for risk mitigation, supervision and governance rather than engaging with and managing human sources, the current training courses may not be necessary requirements for these roles.

They must, however, receive training that assists them to effectively supervise handling teams and to identify and manage the risks that commonly arise in human source management, including risks of non-compliance with policy requirements, risks of unethical or improper conduct and risks related to confidential and privileged information.

The Commission also considered the current lack of ongoing or 'refresher' training for officers involved in human source management. Many participants in the Commission's focus groups suggested that human source management skills are perishable—they need to be reinforced and strengthened over time. The current lack of ongoing training and professional development relating to human source management means that there are Victoria Police officers handling sources who may not have completed any training for many years. The Commission considers that ongoing training is necessary to update officers' knowledge and understanding of policy requirements and to reinforce and build on their existing skills to effectively manage human sources and the associated risks.

While human source management training is expensive, Victoria Police must ensure its officers are appropriately equipped for their roles.

Should Victoria Police adopt a dedicated and centralised human source management model in line with the Commission's recommendations, it is likely that fewer officers would be involved in human source management across the organisation. Further, those who are involved in this work would be in dedicated roles; that is, focused only on human source management functions and responsibilities. This would enable training resources to be allocated in a more cost-effective way, with more intensive training, and ongoing training, delivered only to those officers who need it to undertake these roles.

### RECOMMENDATION 33

That Victoria Police, within 12 months, develops guidance in its human source management training to assist police officers to identify confidential and privileged information, focusing on the origin of information and circumstances in which such information could be provided to police, including:

- a. how to identify potential legal obligations of confidentiality or privilege through the risk assessment process
- b. how to manage any professional conflicts of interest that may arise for a human source with legal obligations of confidentiality or privilege.

Victoria Police should seek legal advice from its Legal Services Department or the Victorian Government Solicitor's Office in developing this training material.

### RECOMMENDATION 34

That Victoria Police, within 12 months, develops guidance in its human source management training on:

- a. the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* that are generally engaged by the management of human sources, including the right to life, the right to privacy and the right to a fair hearing
- b. how to assess whether the use of a human source unreasonably limits the human rights of the source or other people.

Victoria Police should seek input from the Victorian Equal Opportunity and Human Rights Commission in developing and delivering this training.

### RECOMMENDATION 35

That Victoria Police, within 12 months, develops and implements training for controllers, the Human Source Management Unit, the Central Source Registrar and the Assistant Commissioner, Intelligence and Covert Support Command, focused on effective risk management, supervision, oversight and decision making in respect of the use of human sources. This training should include guidance on identifying confidential and privileged information, and the circumstances in which such information could be provided to police.

**RECOMMENDATION 36**

That Victoria Police, within 12 months, requires all handlers and controllers to successfully complete intermediate human source management training at a minimum.

**RECOMMENDATION 37**

That Victoria Police, within 12 months, introduces requirements for mandatory annual human source management training for all police officers with human source management responsibilities and timely training associated with any significant policy or legislative changes.

**Information and communication technology system capability**

Victoria Police has improved its information and communication technology systems over recent years, including enhancing Interpose to manage risks associated with human sources and the information they provide.

The Commission accepts that Interpose is limited in its capacity to provide a wholesale remedy to these risks. While a dedicated human source management system could undoubtedly bring benefits, the costs of such a system and the timeframe for its implementation are unknown.

While recent improvements to Interpose have increased the capability of police officers to identify, understand and manage issues relating to legal obligations of confidentiality or privilege, the Interpose system still has limitations. In particular, as discussed in Chapter 10, there is currently no field to capture whether information may be confidential or privileged and no simple automated way to search for human sources or information that may be subject to legal obligations of confidentiality or privilege. It is likely that these limitations impede effective audit and monitoring of the human source management program. The Commission encountered several challenges when undertaking its audit of human source files and seeking to obtain other human source information and data from Victoria Police.

The Commission considers that Interpose would be enhanced by the ability to record the origin of information provided by human sources and identify information that may be confidential or privileged.

While the Commission has not undertaken a detailed review of the functionality of Interpose, it notes that significant policy and operational changes will flow from its recommendations. Therefore, the Commission considers that Victoria Police should ensure Interpose has the necessary functionality to support robust and secure record-keeping for its human source management program and the effective implementation of the Commission's recommendations. It also suggests that, if Interpose cannot be enhanced to do this, Victoria Police should ensure that the required functionality is built into the new case management system under consideration by Victoria Police.

**RECOMMENDATION 38**

That Victoria Police, within 12 months, enhances Interpose or develops some other system for recording details of the origin of information provided by human sources and how it was obtained.

### RECOMMENDATION 39

That Victoria Police, within 12 months, reviews the broader functionality of Interpose to ensure that it will support the effective implementation of the Commission's recommendations.

## Internal audit and monitoring of compliance

Victoria Police has strengthened mechanisms for internal audit and monitoring of the human source program in recent years. The routine audits undertaken by CaRMU appear to have appropriate scope and frequency, covering a broad range of human source related activities. Further, the functional separation of CaRMU from the human source management program supports a rigorous and objective approach.

As CaRMU's audits are predominantly focused on high-risk sources, there is a risk that low and medium-risk human sources may not be subject to adequate monitoring. Risk is fluid and subject to change—a low-risk source can quickly become a high-risk source due to a change in life or other circumstances. Further, improper or non-compliant management of a low or medium-risk source could potentially have consequences that are as severe as the consequences of inadequate management of a high-risk source.

There is also a possibility that officers may erroneously categorise a high-risk source as low or medium risk, or fail to identify all relevant risks. The Commission considers that expanding the reach of CaRMU's audits to low and medium-risk sources is necessary to provide assurance that risks across the entirety of Victoria Police's human source management program are being managed effectively. This may also address concerns noted by some focus group participants that the current audit program has a disproportionate focus on areas with already high rates of compliance.

In a submission, Victoria Police explained that CaRMU's audits focus on high-risk human sources because the consequences of non-compliance with the Human Source Policy for these sources are likely to be magnified; however, 'there are automated audit processes in Interpose, which are monitored by the HSMU, that apply to all human source registrations'.<sup>369</sup>

The Commission suggests that the Institute of Internal Auditors' 'three lines of defence' model provides a useful way of looking at arrangements for managing the risks that arise from Victoria Police's human source program. Under that model, 'management control is the first line of [defence] in risk management, the various risk control and compliance oversight functions established by management are the second line of [defence], and independent assurance is the third.'<sup>370</sup> The model provides 'a simple and effective way to enhance communications on risk management and control by clarifying essential roles and duties' in an organisation.<sup>371</sup> Looking at the current arrangements in Victoria Police, the HSMU's role is a hybrid of the first and second lines of defence, CaRMU is in the second line of defence and Professional Standards Command and Internal Audit constitute the third line of defence.

While acknowledging the HSMU's audit activities, for the reasons above, the Commission considers that it would be preferable to extend CaRMU's audit program to low and medium-risk human source registrations. The Commission also considers that it would be beneficial for Victoria Police to specify an ongoing program of CaRMU audits within its Human Source Policy so that officers involved in human source management have a clear understanding of the organisation's requirements for internal audit and monitoring of the human source program.

The Human Source Policy outlines the responsibilities of the HSMU for reviews, audits and compliance reporting. The Commission observed that the HSMU performs a critical role in the day-to-day monitoring of compliance with the Human Source Policy by conducting reviews, undertaking quality assurance and providing specialist advice to handling teams.

The importance of the HSMU's role was consistently recognised by focus group participants, who spoke about the substantial assistance, expert advice and support provided by the unit. The Commission noted, however, that the dual role of the HSMU undertaking compliance reviews and making decisions about registration of certain sources has the potential to create conflicts of interest.

Victoria Police told the Commission that while 'the HSMU provides advice to members of the handling team, the advice is generally based on ensuring compliance' with the Human Source Policy, and the CSR has a key role both in overseeing the HSMU and retaining overall authority on all human source governance functions.<sup>372</sup>

The Commission considers that CaRMU's auditing role assists in managing these potential conflicts, and that the Commission's recommendations earlier in this chapter to restrict registration decisions to individual senior officers would also help to address this risk.

In addition to clearly setting out the audit and compliance monitoring functions of the HSMU and CaRMU in the Human Source Policy, the Commission considers that it would also be beneficial to distinguish between the role of senior officers to directly supervise the management of a human source and monitor the handling team's compliance with policy requirements, and the broader audit and compliance monitoring roles of HSMU and CaRMU in providing assurance across the whole human source management program.

Victoria Police would also benefit from a formalised regime for regular reporting on these audits to the Assistant Commissioner, ICSC to ensure executive oversight of any issues identified. There should also be additional reporting processes for any system-wide risks identified or major failings involving the use of human sources to the Audit and Risk Committee. This would assist with implementing a risk-based approach to human source management and better ensure Victoria Police Executive Command is appropriately informed of relevant issues so that they can be acted upon.

Should the Commission's recommendations in Chapter 13 be adopted, IBAC would also have a role in monitoring Victoria Police's compliance with its legislative and policy obligations relevant to human source management. This, together with the recommended measures below, would result in an internal audit and compliance program delivered by HSMU and CaRMU and overseen by the Assistant Commissioner, ICSC forming 'the first two lines of defence'. The additional safeguards provided by the other aspects of the Commission's proposed external oversight framework would create what is sometimes referred to as the 'fourth line of defence' in risk management.<sup>373</sup>

#### RECOMMENDATION 40

That Victoria Police, within 12 months, implements changes to its Human Source Policy and associated processes to:

- a. provide for six-monthly compliance audits of human source files at all risk levels by the Compliance and Risk Management Unit within the Intelligence and Covert Support Command
- b. clearly set out the compliance monitoring functions of both the Compliance and Risk Management Unit and the Human Source Management Unit.

#### RECOMMENDATION 41

That Victoria Police, within 12 months, implements changes to its Human Source Policy and associated processes to require that:

- a. the results of human source management audits be reported to the Assistant Commissioner, Intelligence and Covert Support Command
- b. any system-wide risks or major failings that are identified through human source management audits be reported to the Victoria Police Audit and Risk Committee.

### Strategic oversight of the human source function

Victoria Police has made efforts to strengthen governance of its human source program over recent years, with systems in place for increased internal oversight and reporting on higher-risk matters. The Commission's recommendation to reallocate the Ethics Committee's decision-making role to the Assistant Commissioner, ICSC presents an opportunity to reconsider Victoria Police's governance arrangements for its human source management program.

In Chapter 11, the Commission recommends that alongside Victoria Police's *Capability Plan 2016–2025*, Victoria Police should establish clear processes for the review and management of human source management policies and procedures. To complement this work, the Commission considers there would be benefits in Victoria Police establishing an internal governance body to oversee implementation of the significant reforms recommended by the Commission and support effective change management across the organisation.

The Commission also considers that this internal body could perform an ongoing governance and advisory role, focused on identifying and examining emerging strategic risks and issues related to Victoria Police's human source program, and providing strategic advice to the Assistant Commissioner, ICSC and Deputy Commissioner, Specialist Operations.

#### RECOMMENDATION 42

That Victoria Police, within three months, establishes a strategic governance committee to:

- a. contribute to the development, and oversee Victoria Police's implementation of, the human source management reforms recommended by the Commission
- b. identify, address and monitor emerging risks, issues and opportunities in Victoria Police's human source management program and provide strategic advice to the Assistant Commissioner, Intelligence and Covert Support Command and Deputy Commissioner, Specialist Operations
- c. be responsible for strategic planning for Victoria Police's human source management program.

## Funding and implementation

Victoria Police told the Commission that further changes to Victoria Police's human source management program, such as a move to a dedicated human source management model, would require additional resourcing. While that may be the case, the Commission also notes human source management already receives ongoing funding and resourcing as it is part of Victoria Police's current operational framework.

#### RECOMMENDATION 43

That the Victorian Government ensures Victoria Police is appropriately funded and resourced to implement the Commission's recommendations.

# Endnotes

- 1 The Commission acknowledges that all human sources, by their very nature, provide information that others expect them to keep secret and not disclose to the police and/or other people. This is different to information that is confidential because of a legal obligation associated with a professional relationship or because of a person's occupation.
- 2 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 71 [11.8].
- 3 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020. This policy is dated 15 April 2020 but came into effect on 4 May 2020.
- 4 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 2.
- 5 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 1.
- 6 Exhibit RC1532b Victoria Police, Covert Services Division, Intelligence & Covert Support Command, Human Source Strategy 2018–2022 (draft v7): A Better Way to Manage Risk, Undated, 5.
- 7 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 1, 17 [4.5], 43 [21]–[22].
- 8 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4.
- 9 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1(1), pt 2. The human rights set out in the Charter are drawn primarily from the International Convention of Civil and Political Rights, opened for signature 16 December 1966, ATS 23 (entered into force 23 March 1976).
- 10 'Human Rights', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <[www.humanrights.vic.gov.au/for-individuals/human-rights](http://www.humanrights.vic.gov.au/for-individuals/human-rights)>.
- 11 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
- 12 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38(1)–(2); *PJB v Melbourne Health (Patrick's Case)* (2011) VSC 327 [306], [309]–[312]; *Antonovic v Dawson* (2010) VSC 377 [70], [135]; *Certain Children v Minister for Families and Children* [2016] VSC 796 [206]; *Baker v DPP* [2017] VSCA 58 [57]–[58].
- 13 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29–31 [8.4]–[8.6]. These additional safeguards are discussed in later in this chapter.
- 14 These occupational groups are based on the recommendations of the Kellam Report: Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015). Victoria Police's implementation of the Kellam Report is covered in Chapter 11. See also Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29–30 [8.3]–[8.5].
- 15 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.4]. As discussed in Chapter 11, these are the occupations identified and mentioned in the Kellam Report: Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 86.
- 16 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 30 [8.5].
- 17 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 31 [8.6].
- 18 This data is based on people identified as either a lawyer, doctor, parliamentarian, court official, journalist or priest (described by Victoria Police as 'Category 1' human sources or the 'Kellam Occupations'); or belonging to one of the following occupation categories: medical, parliament, government, religious, journalist (based on a manual search of human source files by Victoria Police). The Commission has manually adjusted the data to eliminate double counting of people belonging to both categories (for example, a doctor also identified as belonging to the 'medical' category). The data does not include people identified as having a 'connection to' a Category 1 human source (for example, the spouse of a lawyer), as introduced under the May 2020 version of the Human Source Policy.
- 19 The Human Source Policy contains examples of people classified as 'Category 4' human sources; however, these examples cannot be included in this final report due to a public interest immunity claim by Victoria Police. Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.3], 32 [8.9].
- 20 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.3].
- 21 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 10 [3.1].
- 22 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 47 [218]–[219].
- 23 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 63 [286].
- 24 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 62 [286].
- 25 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 62 [286].
- 26 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 14 [4.1], 26 [7.4].
- 27 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 13–14 [3.6].

- 28 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 12 [3.3].
- 29 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 18 [5.1].
- 30 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 14–15 [4.1], 18 [5.1].
- 31 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 18 [5.1].
- 32 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 18 [5.2].
- 33 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.4].
- 34 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 10–11 [3.2], 15–16 [4.2].
- 35 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 8 [2.7].
- 36 The duty to authorise ‘low risk’ and ‘medium risk’ human sources is delegated by the CSR to the HSMU: Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 8 [2.7].
- 37 As mentioned earlier, Categories 2–4 are also referred to the Human Source Ethics Committee for authorisation of their recruitment or registration.
- 38 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 19 [5.3], 30–1 [8.6].
- 39 Based on Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 8 [2.7], 10–11 [3.2], 31 [8.6].
- 40 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 34 [8.15].
- 41 Exhibit RC1534b Victoria Police, Human Source Ethics Committee Terms of Reference, 12 April 2020, 3–4 [12].
- 42 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.4].
- 43 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 29 [8.4]; Exhibit RC1534b Victoria Police, Human Source Ethics Committee Terms of Reference, 12 April 2020, 3–4 [12].
- 44 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 31 [8.6].
- 45 Based on Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 10–11 [3.2], 29 [8.4], 31 [8.6].
- 46 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 12 [3.3].
- 47 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 12 [3.3].
- 48 Registration is authorised at two levels: Level 1: ‘Approved—Tasking may be undertaken’ and Level 2: ‘Approved—With Special Conditions’: Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 16 [4.3].
- 49 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 3.
- 50 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 39–40 [14].
- 51 Victoria Police, ‘One-off Human Source Registration—Risk Assessment’, Undated (Version 1.0) 1, produced by Victoria Police in response to a Commission Notice to Produce.
- 52 Victoria Police, ‘One-off Human Source Registration—Risk Assessment’, Undated (Version 1.0) 1, produced by Victoria Police in response to a Commission Notice to Produce.
- 53 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 39–40 [14].
- 54 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 39–40 [14].
- 55 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 39–40 [14].
- 56 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 39–40 [14].
- 57 Victoria Police’s operational policing is divided across four geographical regions and 12 commands, all of which are led by an Assistant Commissioner.
- 58 Victoria Police, ‘Untitled spreadsheet’, 27 July 2020, produced by Victoria Police in response to a Commission Notice to Produce.
- 59 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 59, 6, 9.
- 60 Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure A, 10.
- 61 Handlers of high-risk sources and officers from the HSMU have two opportunities to extend their original three-year tenure for another year, and senior handlers and controllers have one opportunity to extend their original five-year tenure for a further two years. All opportunities for extension are at the discretion of the Assistant Commissioner, Intelligence and Covert Support Command: Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure B, 10, 13.
- 62 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 23 [6.6].
- 63 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 23 [6.6].
- 64 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 19 [5.3]; Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14886.
- 65 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 19 [5.3].

- 66 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 19 [5.3].
- 67 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 22 [6.5].
- 68 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 22 [6.5].
- 69 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 17 [5].
- 70 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 17 [5], 43–4 [22]; Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 35 [159].
- 71 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 14 [3.6].
- 72 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 45 [214].
- 73 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 12 [3.3].
- 74 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 43–4 [22].
- 75 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 43 [22].
- 76 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 12 [3.3], 14 [3.6], 17 [5], 43–4 [22].
- 77 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 43–4 [22].
- 78 Exhibit RC1952 Statement of Assistant Commissioner Neil Paterson, 5 March 2020, 12 [89]–[91].
- 79 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 45 [215].
- 80 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 45–6 [215]; Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14911–12.
- 81 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 5 [1.4], 38 [12].
- 82 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 25 [7.3].
- 83 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 34 [8.14].
- 84 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 34 [8.14].
- 85 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 20 [6.1].
- 86 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 9 [2.8].
- 87 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 21 [6.1].
- 88 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 52 [235]; Victoria Police, ‘Human Source Management Training Evaluation Report (Version 3)’, 18 December 2019, 29 [10.3], produced by Victoria Police in response to a Commission Notice to Produce.
- 89 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 52 [235].
- 90 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 55 [250].
- 91 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 20 [6.1].
- 92 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 52 [235].
- 93 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 18 [5.2].
- 94 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 55 [253], 56 [256]–[257]; Victoria Police, ‘Outline of Changes to Basic Online Course’, Undated, 3, produced by Victoria Police in response to a Commission Notice to Produce.
- 95 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 55–6 [253]–[254], 58 [265].
- 96 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 53–4 [244]–[245].
- 97 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 20 [6.1].
- 98 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14902.
- 99 Responsive submission, Victoria Police, 28 September 2020, 3 [2.2]–[2.3].
- 100 Consultation with South Australia Police, 6 September 2019; Consultation with Tasmania Police, 12 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with New South Wales Police, 4 March 2020; Consultation with Northern Territory Police, 4 March 2020.
- 101 Consultation with South Australia Police, 6 September 2019; Consultation with Tasmania Police, 12 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with New South Wales Police, 4 March 2020; Consultation with Northern Territory Police, 4 March 2020.
- 102 Consultation with South Australia Police, 6 September 2019; Consultation with Tasmania Police, 12 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with Northern Territory Police, 4 March 2020.

- 103 Consultation with South Australia Police, 6 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with Northern Territory Police, 4 March 2020.
- 104 Consultation with South Australia Police, 6 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with Northern Territory Police, 4 March 2020.
- 105 Consultation with South Australia Police, 6 September 2019; Consultation with Queensland Police, 8 October 2019.
- 106 Consultation with South Australia Police, 6 September 2019; Consultation with Tasmania Police, 12 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with New South Wales Police, 4 March 2020.
- 107 Consultation with South Australia Police, 6 September 2019; Consultation with Tasmania Police, 12 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with New South Wales Police, 4 March 2020; Consultation with Northern Territory Police, 4 March 2020.
- 108 Consultation with South Australia Police, 6 September 2019; Consultation with Western Australia Police, 24 September 2019.
- 109 Consultation with South Australia Police, 6 September 2019; Consultation with Tasmania Police, 12 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with New South Wales Police, 4 March 2020; Consultation with Northern Territory Police, 4 March 2020.
- 110 Consultation with New South Wales Police, 4 March 2020.
- 111 Consultation with Tasmania Police, 12 September 2019. These are discussed in more detail later in this chapter under 'Challenges and opportunities'.
- 112 Consultation with South Australia Police, 6 September 2019; Consultation with Tasmania Police, 12 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019.
- 113 Consultation with South Australia Police, 6 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with Northern Territory Police, 4 March 2020.
- 114 Consultation with South Australia Police, 6 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Tasmania Police, 12 September 2019.
- 115 Although lawyers and doctors are generally prohibited from being used as human sources under Northern Territory Police's human source policy, those who work in legal or medical workplaces (for example, a receptionist at a law firm) are not: Consultation with Northern Territory Police, 4 March 2020.
- 116 Section 12 of the *Evidence Act 1939* (NT) establishes medical privilege. Under section 12, a medical practitioner must not disclose any doctor-patient communication in civil proceedings without the patient's consent. This privilege, however, does not cover any communication made for a criminal purpose. Additionally, Part 7 of the Evidence Act protects confidential communications between a victim and their counsellor from disclosure in sexual assault proceedings. This protection does not extend to any information that: the victim or their guardian consents to be produced in evidence; is acquired by a doctor or nurse during a physical examination of the victim; or demonstrates a criminal fraud or perjury.
- 117 New South Wales Police, *Human Source Management Policy* (June 2019) [3.2.1].
- 118 New South Wales Police, *Human Source Management Policy* (June 2019) [3.2.1].
- 119 Minister for Home Affairs, *Minister's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functions and the exercise of its powers* (August 2020) 2.
- 120 Minister for Home Affairs, *Minister's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functions and the exercise of its powers* (August 2020) 11–12 [3.4].
- 121 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 49 [5.30]. Victoria Police has also undertaken research tours to these countries. For example, in 2010 then Assistant Commissioner Jeffrey (Jeff) Pope and Acting Inspector Brian Horan visited the United Kingdom, the United States of America and Canada from 31 May to 18 June and met with 'police and related agencies'. The purpose of their visit 'was to learn more about their intelligence models and capability, their sex offender and human source management programs and to discover how organised crime and other intelligence related policing issues were being tackled': Victoria Police, '2010 visit to the UK, USA and Canada by Victoria Police', 2, produced by Victoria Police in response to a Commission Notice to Produce.
- 122 See, eg, Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 30 [4.33]; Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14853.
- 123 Consultation with New Zealand Police, 20 September 2019.
- 124 Consultation with New Zealand Police, 20 September 2019.
- 125 Consultation with Royal Canadian Mounted Police, 19 September 2019.
- 126 'About the Office', *United States Department of Justice* (Web Page, 17 July 2018) <[www.justice.gov/ag/about-office](http://www.justice.gov/ag/about-office)>.
- 127 Office of the Attorney General (US), *The Attorney General's Guidelines regarding the use of confidential informants* (2002) 1.

- 128 In 2006, the United States Department of Justice issued the Federal Bureau of Investigations with its own set of Guidelines. Prior to the issuing of the FBI Guidelines, the FBI was governed by the 2002 *Attorney General's Guidelines regarding the use of confidential informants* that apply to all other Department of Justice law enforcement agencies.
- 129 Office of the Attorney General (US), *The Attorney General's Guidelines regarding the use of confidential informants* (2002) 7, 14; Office of the Attorney General (US), *The Attorney General's Guidelines regarding the use of FBI confidential human sources* (2006) 17–18.
- 130 Consultation with United States Drug Enforcement Administration, 27 August 2019.
- 131 Consultation with United States Drug Enforcement Administration, 27 August 2019.
- 132 There is also Congressional Oversight of the DEA Sensitive Activities Committee: Consultation with United States Drug Enforcement Administration, 27 August 2019.
- 133 Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012).
- 134 Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK) pt 2 ss 26–48. While the *Regulation of Investigatory Powers (Scotland) Act 2000* (Scot) applies in Scotland, this largely replicates the RIPA. For ease of reference, the Commission has focused primarily on the statutory framework set by the RIPA.
- 135 Exhibit RC1543 Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 (UK) SI 2010/123; Exhibit RC1542 Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (UK) SI 2010/521; Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) issued pursuant to s 71 of the *Regulation of Investigatory Powers Act 2000* (UK).
- 136 Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK) pt IV ss 57–64. The *Investigatory Powers Act 2016* (UK) establishes the Investigatory Powers Commissioner and other Judicial Commissioners. In 2017, IPCO assumed responsibility for the oversight of investigatory powers from the Office of Surveillance Commissioners, the Interception of Communications Commissioner's Office, and the Intelligence Services Commissioner.
- 137 *Khan v United Kingdom* (2000) 5 Eur Court HR 279.
- 138 Contrary to Article 8(2) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature on 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). Prior to the *Regulation of Investigatory Powers Act 2000* (UK), the Home Office's *Guidelines on the Use of Equipment in Police Surveillance Operations* (Home Office, 1984) regulated the use of covert listening devices until Part III of the *Police Act 1997* (UK) came into force on 22 February 1999. These guidelines were not reflected in law: *Khan v United Kingdom* (2000) 5 Eur Court HR 279.
- 139 See United Kingdom, *Parliamentary Debates*, House of Commons, 6 March 2000, [767]–[768] (Jack Straw, Secretary of State for the Home Department); Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK) s 29(2); Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 15 [3.3]–[3.5].
- 140 Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK) s 29(3).
- 141 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 15–16 [3.5].
- 142 Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK) ss 29(4), 30(1). In contrast to Victoria, the *Regulation of Investigatory Powers Act 2000* (UK) s 32(6)(a) provides that a Chief Constable of a police service is the 'senior authorising officer' who has authority to approve an authorisation for 'intrusive surveillance'. The position of Chief Constable in the United Kingdom is the equivalent of the Chief Commissioner of Police in Victoria.
- 143 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 10 [2.12]. See also Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK) s 80.
- 144 In the United Kingdom police services, ranks are as follows: Constable; Sergeant; Inspector; Chief Inspector; Superintendent; Chief Superintendent; Assistant Chief Constable; Deputy Chief Constable; and Chief Constable. See Exhibit RC1542 Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (UK) SI 2010/521, Part 3 and Schedule Part 1.
- 145 Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK) ss 43(1)(a)(b), 43(3).
- 146 Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK), Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 (UK) SI 2010/123; Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 44 [8.27]–[8.28].
- 147 *Police Act 1997* (UK) ss 98(2)–(3).
- 148 *Police Act 1997* (UK) s 98(5)(b).
- 149 *Police Act 1997* (UK) ss 99–100.
- 150 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) Annex A; Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 (UK) SI 2010/123, s 4(2).
- 151 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 49–50 [8.59]; Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 (UK) SI 2010/123, s 8(1)(b).
- 152 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 50 [8.60], Annex A.

- 153 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 50 [8.60].
- 154 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 50 [8.60].
- 155 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 44 [8.27], Annex A.
- 156 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 45 [8.33].
- 157 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 45 [8.33].
- 158 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 50 [8.61].
- 159 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 48 [8.51].
- 160 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 51 [8.62]–[8.65].
- 161 Some of these laws were enacted as a result of a 2003 Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers report proposing that model laws for a national set of powers for cross-border investigations be developed. According to that report, the model laws aimed to enhance arrangements for investigating multi-jurisdictional crime. See, The Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-border Investigative Powers for Law Enforcement* (Report, November 2003) [i]–[iii]. In Victoria, examples of the legislation governing these powers include the *Crimes (Assumed Identities) Act 2004* (Vic) for undercover investigations; *Crimes (Controlled Operations) Act 2004* (Vic) for controlled operations; *Surveillance Devices Act 1999* (Vic) for surveillance; and the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) for the interception of telephones or similar devices.
- 162 *Surveillance Devices Act 1999* (Vic) s 14.
- 163 *Surveillance Devices Act 1999* (Vic) s 17(2).
- 164 *Surveillance Devices Act 1999* (Vic) s 12D.
- 165 *Surveillance Devices Act 1999* (Vic) s 12C.
- 166 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24.
- 167 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 5 [1.3].
- 168 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 41 [191], 42 [197]–[198].
- 169 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 5 [1.3].
- 170 Submission 111 Victorian Equal Opportunity and Human Rights Commission, 7.
- 171 Submission 130 Clive Harfield, 3 [17]–[19], 4 [23], 6 [29].
- 172 Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK) ss 29(2), (3); Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 10 [2.12], 15 [3.5], 16 [3.9], 46–7 [8.45].
- 173 Consultation with United Kingdom Home Office, 13 November 2019.
- 174 Consultation with Police Service Northern Ireland, 4 September 2019; Consultation with United Kingdom Home Office, 13 November 2019; Consultation with United Kingdom National Crime Agency, 28 April 2020.
- 175 Consultation with Police Service Northern Ireland, 4 September 2019; Consultation with Police Scotland, 5 September 2019; Consultation with United Kingdom Home Office, 13 November 2019. Police Scotland pointed to the benefits of the *Regulation of Investigatory Powers (Scotland) Act 2000* (UK), which is broadly consistent with the RIPA.
- 176 Consultation with United Kingdom National Crime Agency, 28 April 2020.
- 177 See, eg, Office of Police Integrity, *Past Patterns—Future Directions, Victoria Police and the problem of corruption and serious misconduct* (Parliamentary paper 4, February 2007); Office of Police Integrity, *Annual Report 2008* (Report, 2008) 16–17; Exhibit RC0108 Review of the Victoria Police Drug Squad, November 2001.
- 178 Consultation with Professor Alexandra Natapoff, 11 September 2019.
- 179 Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 11 [74].
- 180 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020; Consultation with Dr John Buckley, 12 September 2019; Submission 98 International Commission of Jurists Victoria, 20 [32].
- 181 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 182 Consultation with Public Interest Monitor, 11 March 2020.
- 183 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 81 [345].
- 184 See, eg, Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-border Investigative Powers for Law Enforcement* (Report, November 2003) [ii].
- 185 Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2004, [852]–[853] (Andrew McIntosh).
- 186 Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 3 [23]–[26].

- 187 Consultation with United Kingdom National Crime Agency, 28 April 2020; Consultation with Police Service Northern Ireland, 4 September 2019; Consultation with Police Scotland, 5 September 2019.
- 188 Consultation with United Kingdom Investigatory Powers Commissioner's Office, 12 September 2019.
- 189 Consultation with United Kingdom Home Office, 13 November 2019.
- 190 For example, the *Investigatory Powers Act 2016* (UK) updated and consolidated existing rules under the *Regulation of Investigatory Powers Act 2000* (UK), to modernise legislation for investigatory powers involving digital tools activities, such as the intercepting of communications via email. The Code of Practice was updated in 2018 to align the use of human sources with covert surveillance powers and associated processes: Consultation with United Kingdom Home Office, 13 November 2019.
- 191 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 192 Consultation with South Australia Police, 6 September 2019.
- 193 Consultation with Queensland Police, 8 October 2019.
- 194 Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 6 [42].
- 195 Consultation with Tasmania Police, 12 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with South Australia Police, 6 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with Northern Territory Police, 4 March 2020.
- 196 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 68 [304].
- 197 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 30 [4.33].
- 198 Consultation with New South Wales Crime Commission, 18 November 2019; Consultation with Northern Territory Police, 4 March 2020; Consultation with New South Wales Police, 4 March 2020.
- 199 Submission 101 Australasian Institute of Policing, 15 [44], 17.
- 200 Consultation with Australian Federal Police, 10 July 2020.
- 201 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 68 [302].
- 202 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 69 [306].
- 203 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 69 [306].
- 204 Consultation with New South Wales Crime Commission, 18 November 2019; Consultation with New South Wales Police, 4 March 2020; Consultation with South Australia Police, 6 September 2019; Consultation with Tasmania Police, 12 September 2019.
- 205 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 86–7; Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14864.
- 206 Consultation with South Australia Police, 6 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with Northern Territory Police, 4 March 2020.
- 207 The focus groups were conducted when an earlier version of the Human Source Policy, dated 2018, was in place.
- 208 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14870–1. See also 14951–2.
- 209 Consultation with Sir Jonathan (Jon) Murphy, 11 October 2019.
- 210 Consultation with Mr Gary Dobson, 15 October 2019.
- 211 Exhibit RC1531b, Victoria Police Manual—Human Sources, 15 April 2020, 28–31 [8.1]–[8.6]; Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure B, 12.
- 212 Consultation with South Australia Police, 6 September 2019; Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with New Zealand Police, 20 September 2019.
- 213 Consultation with Northern Territory Police, 4 March 2020.
- 214 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14888.
- 215 Consultation with Western Australia Police, 24 September 2019; Consultation with Northern Territory Police, 4 March 2020, Consultation with New Zealand Police, 20 September 2019.
- 216 Consultation with Tasmania Police, 12 September 2019; Consultation with Queensland Police, 8 October 2019; Consultation with South Australia Police, 6 September 2019.
- 217 Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 7 [51]–[53].
- 218 Transcript of Sir Jonathan Murphy, 13 May 2020, 14972.
- 219 Exhibit RC1171b Statement of Mr Kenneth (Ken) Lay, 9 February 2020, 2–3; Transcript of Mr Kenneth (Ken) Lay, 10 February 2020, 13560–1.
- 220 Transcript of Mr Kenneth (Ken) Lay, 10 February 2020, 13560–1.
- 221 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14878, 14891.

- 222 Responsive submission, Victoria Police, 28 September 2020, 7 [5.5].
- 223 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14890, 14895–7.
- 224 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 12 [58].
- 225 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14887–9.
- 226 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14883, 14888–90.
- 227 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14891, 14897.
- 228 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14897.
- 229 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 27 [131]; Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14876–7.
- 230 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14876–8.
- 231 Consultation with Professor Alexandra Natapoff, 11 September 2019.
- 232 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 55 [5.61].
- 233 Consultation with Police Service of Northern Ireland, 4 September 2019.
- 234 Consultation with United Kingdom National Crime Agency, 28 April 2020.
- 235 Consultation with Queensland Police, 8 October 2019.
- 236 The engagement with the Principal Legal Officer is currently on an ‘as needs’, case-by-case basis; however, it is intended that this engagement will have a more formalised structure with the implementation of a new Human Source Policy and guidelines, which remained under development at the time of this report: Consultation with Tasmania Police, 12 September 2019.
- 237 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 34–5 [158]–[159].
- 238 Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure A, 10.
- 239 Victoria Police, ‘Victoria Police—Human Source Risk Assessment (Version 2)’, May 2015, 6, produced by Victoria Police in response to a Commission Notice to Produce.
- 240 Victoria Police, ‘One-off Human Source Registration—Risk Assessment (Version 1.0)’, Undated, 1, produced by Victoria Police in response to a Commission Notice to Produce; Victoria Police, ‘Human Source Dynamic Risk Assessment’, 3, produced by Victoria Police in response to a Commission Notice to Produce.
- 241 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 30 [8.5].
- 242 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14875–6.
- 243 Submission 111 Victorian Equal Opportunity and Human Rights Commission, 3–4.
- 244 ‘Human Rights’, *Victorian Equal Opportunity and Human Rights Commission (Web Page)* <[www.humanrights.vic.gov.au/for-individuals/human-rights](http://www.humanrights.vic.gov.au/for-individuals/human-rights)>.
- 245 Email from Neil Comrie to the Commission, 13 November 2019; Neil Comrie, *Victoria Police Human Source 3838: A Case Review (Report, 30 July 2012)* 20, 61.
- 246 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14884–5.
- 247 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14884–5.
- 248 Exhibit RC1540, Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 12 [76].
- 249 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice (August 2018)* 15–16 [3.5].
- 250 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice (August 2018)* 27 [5.11].
- 251 Consultation with Mr Gary Dobson, 15 October 2019. The Commission was not able to independently confirm that the number of registered human sources declined in New South Wales following the Royal Commission into the New South Wales Police Service (commonly known as the ‘Wood Royal Commission’).
- 252 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 57, 22–33.
- 253 Exhibit RC1532b Victoria Police, Covert Services Division, Intelligence & Covert Support Command, Human Source Strategy 2018–2022 (draft v7): A Better Way to Manage Risk, Undated, 2, 14. This draft document was not progressed nor endorsed by Victoria Police Executive Command; however, Ms Steendam told the Commission it was drafted by relevant members of the Intelligence and Covert Support Command who were subject matter experts: see Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14867.
- 254 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 35 [159], 37 [171].
- 255 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14900.
- 256 See, eg, Confidential consultation, 4 February 2020; Consultation with Queensland Police, 8 October 2019.
- 257 Consultation with New Zealand Police, 20 September 2019; Consultation with Queensland Police, 8 October 2019.

- 258 Consultation with Queensland Police, 8 October 2019.
- 259 Consultation with Dr Adrian James, 6 November 2019.
- 260 Consultation with Adjunct Associate Professor Charl Crous and Associate Professor Pamela Henry, 10 September 2019.
- 261 Consultation with New Zealand Police, 20 September 2019; Consultation with Sir Jonathan (Jon) Murphy, 11 October 2019.
- 262 Consultation with Western Australia Police, 24 September 2019; Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 11 [74].
- 263 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14896.
- 264 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14896.
- 265 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 71 [11.8].
- 266 The focus groups were conducted when an earlier version of the Human Source Policy, dated 2018, was in place. The policy provisions relating to 'intrusive supervision' under that policy are the same as those under the current version of Human Source Policy.
- 267 Exhibit RC1532b Victoria Police, Covert Services Division, Intelligence & Covert Support Command, Human Source Strategy 2018–2022 (draft v7): A Better Way to Manage Risk, Undated, 2, 6–7, 13.
- 268 Exhibit RC1532b Victoria Police, Covert Services Division, Intelligence & Covert Support Command, Human Source Strategy 2018–2022 (draft v7): A Better Way to Manage Risk, Undated, 13.
- 269 Exhibit RC1540 Statement of Sir Jonathan Murphy, 28 April 2020, 7 [52].
- 270 Consultation with Dr Adrian James, 6 November 2019.
- 271 Consultation with Royal Canadian Mounted Police, 19 September 2019; Consultation with New Zealand Police, 20 September 2019; Consultation with Police Scotland, 5 September 2019.
- 272 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 55 [253].
- 273 Victoria Police, 'Human Source Management Training Evaluation Report (Version 3)', 18 December 2019, 29 [10.3], produced by Victoria Police in response to a Commission Notice to Produce.
- 274 Victoria Police, 'Human Source Management Training Evaluation Report (Version 3)', 18 December 2019, 29 [10.3], produced by Victoria Police in response to a Commission Notice to Produce.
- 275 Victoria Police, 'Human Source Management Training Evaluation Report (Version 3)', 18 December 2019, 29 [10.3], produced by Victoria Police in response to a Commission Notice to Produce.
- 276 Consultation with Dr John Buckley, 12 September 2019.
- 277 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 53–4 [244]–[245].
- 278 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 20 [6.1]. The Commission has adopted this somewhat vague terminology due to a claim of public interest immunity by Victoria Police.
- 279 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 54 [249]; Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14904, 14906–7.
- 280 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 54 [246]; Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14903.
- 281 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14906.
- 282 Responsive submission, Victoria Police, 28 September 2020, 3–4 [2.5].
- 283 Responsive submission, Victoria Police, 28 September 2020, 3 [2.3], 3–4 [2.5].
- 284 Consultation with Royal Canadian Mounted Police, 19 September 2019; Consultation with Police Scotland, 5 September 2019; Consultation with Police Service Northern Ireland, 4 September 2019.
- 285 Consultation with Sir Jonathan (Jon) Murphy, 11 October 2019; Transcript of Sir Jonathan (Jon) Murphy, 13 May 2020, 15004–5.
- 286 Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 9 [61].
- 287 Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 11 [74].
- 288 Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 9 [60].
- 289 Consultation with Western Australia Police, 24 September 2019; Consultation with Queensland Police, 8 October 2019.
- 290 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 55 [253]; Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure A, 6.
- 291 Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure A, 6.
- 292 Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure B, 12; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 9, 13, 14, 16, 17, 19, 25; Victoria Police, 'Outline of Changes to Basic Online Training', Undated, 9, produced by Victoria Police in response to a Commission Notice to Produce.

- 293 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 54 [249], 57 [259]–[263]; Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure B, 12.
- 294 Victoria Police, 'Human Source Management Training Evaluation Report', 18–21 [9]–[10.6], produced by Victoria Police in response to a Commission Notice to Produce.
- 295 Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure B, 12; Responsive submission, Victoria Police, 28 September 2020, 4 [2.5], 5–6 [4.2].
- 296 Consultation with United Kingdom College of Policing, 4 December 2019.
- 297 Consultation with Sir Jonathan (Jon) Murphy, 11 October 2019.
- 298 Exhibit RC1949 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 26 June 2020, Annexure A, 6–7.
- 299 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 17 August 2020, 3.
- 300 Victoria Police, 'Outline of Changes to Basic Online Training', Undated, 3, produced by Victoria Police in response to a Commission Notice to Produce.
- 301 Consultation with United Kingdom College of Policing, 4 December 2019.
- 302 Consultation with Dr John Buckley, 12 September 2019.
- 303 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 55 [253].
- 304 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 65 [288]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 12 [3.44].
- 305 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 12 [3.44], 27 [4.18], 70 [11.6], 71 [11.8].
- 306 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 61 [281].
- 307 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 62–3 [286].
- 308 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 17 August 2020, 4.
- 309 Victoria Police's Law Enforcement Assistance Program (LEAP) is an online database that stores information about all crimes, family incidents and missing persons brought to police attention.
- 310 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 65 [288].
- 311 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 66 [293], 67 [301]; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 56 [5.65].
- 312 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 50 [229], 66 [291].
- 313 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 44–6 [208]–[216].
- 314 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 44 [208].
- 315 Consultation with Dr Adrian James, 6 November 2019.
- 316 Consultation with Mr Gary Dobson, 15 October 2019.
- 317 Consultation with Queensland Police, 8 October 2019; Consultation with Tasmania Police, 12 September 2019; Consultation with Northern Territory Police, 4 March 2020; Consultation with Western Australia Police, 24 September 2019.
- 318 See, eg, Consultation with Tasmania Police, 12 September 2019.
- 319 See, eg, Consultation with the New South Wales Crime Commission, 18 November 2019; Consultation South Australia Police, 6 September 2019.
- 320 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 45–46 [215].
- 321 Responsive submission, Victoria Police, 28 September 2020, 10 [5.21].
- 322 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14912.
- 323 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14912–13.
- 324 Victoria Police, *Annual Report 2018–19*, (Report, October 2019) Appendix E, 55.
- 325 This audit was conducted against the provisions of the previous Human Source Policy: Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 48; Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 47–8 [221]–[222]; Exhibit RC1952 Statement of Assistant Commissioner Neil Paterson, 5 March 2020, 13–14 [102]–[107].
- 326 This audit was conducted against the provisions of the previous Human Source Policy: Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019; Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 47–8 [221]–[223]; Exhibit RC1952 Statement of Assistant Commissioner Neil Paterson, 5 March 2020, 13–14 [102]–[107].
- 327 Exhibit RC1532b Victoria Police, Covert Services Division, Intelligence & Covert Support Command, Human Source Strategy 2018–2022 (draft v7): A Better Way to Manage Risk, Undated, 2, 5, 6, 15.
- 328 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 19 [5.3].

- 329 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 31 [8.6].
- 330 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 19 [5.3], 30 [8.5].
- 331 Consultation with Public Interest Monitor, 11 March 2020.
- 332 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 31 March 2020, 2–3.
- 333 Exhibit RC1538 Statement of Inspector Ilena Pucar, 7 May 2020, 7–8 [6.1]–[6.12].
- 334 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 30 October 2020.
- 335 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 45 [8.33]–[8.36], 48 [8.51], 52 [8.70]–[8.71].
- 336 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 39 [8.3].
- 337 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 49 [225]–[226].
- 338 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 49 [227].
- 339 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 49 [228]–[229]; 53 [243].
- 340 Responsive submission, Victoria Police, 28 September 2020, 5 [3.4].
- 341 Consultation with Western Australia Police, 24 September 2019.
- 342 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 10 [2.12].
- 343 Consultation with Police Service of Northern Ireland, 4 September 2019.
- 344 Consultation with Sir Jonathan (Jon) Murphy, 11 October 2019; Transcript of Sir Jonathan (Jon) Murphy, 13 May 2020, 14985, 14989–90, 14994–5.
- 345 Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 8 [59].
- 346 Consultation with Police Scotland, 5 September 2019.
- 347 Consultation with Metropolitan Police Service, 17 October 2019. The term 'evidentiary chain' refers to the demonstrated continuous possession of evidence by police, from its collection through to its use in a prosecution or disposal.
- 348 Exhibit RC0276 Review and Develop Best Practice Human Source Management Policy, 2004, 2, 17–21, 29–30.
- 349 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 59, 10–12; Exhibit RC1784 Victoria Police, 'Corporate Management Review Division—Evaluation of Dedicated Source Unit—Pilot', April 2005, 11, 15–16; Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 56, 30.
- 350 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 23 [6.6].
- 351 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 23 [6.6].
- 352 Consultation with Western Australia Police, 24 September 2019; Consultation with South Australia Police, 6 September 2019; Consultation with New South Wales Crime Commission, 18 November 2019; Consultation with Police Service Northern Ireland, 4 September 2019; Consultation with Police Scotland, 5 September 2019; Consultation with New Zealand Police, 20 September 2019; Consultation with Metropolitan Police Service, 17 October 2019. While Tasmania Police does not currently adopt a sterile corridor in its management of human sources, this approach is being reviewed in its updated policy: Consultation with Tasmania Police, 12 September 2019.
- 353 See, eg, Consultation with Western Australia Police, 24 September 2019.
- 354 Clive Harfield, 'Police Informers and Professional Ethics' (2012) 31(2) *Criminal Justice Ethics*, 73, 89.
- 355 Consultation with New South Wales Police, 4 March 2020.
- 356 Consultation with Dr Adrian James, 6 November 2019.
- 357 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 49–50 [229], 87–8 [370]–[374].
- 358 Responsive submission, Victoria Police, 28 September 2020, 1 [1.1]–[1.2].
- 359 Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 55 [5.58]; Submission 101 Australasian Institute of Policing, 14 [35]–[37]; Consultation with Royal Canadian Mounted Police, 19 September 2019.
- 360 Responsive submission, Victoria Police, 28 September 2020, 2 [1.4].
- 361 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 76–7 [326]–[327], 81 [345].
- 362 Responsive submission, Victoria Police, 28 September 2020, 8–9 [5.13].
- 363 Responsive submission, Victoria Police, 20 September 2020, 7 [4.11].
- 364 Responsive submission, Victoria Police, 28 September 2020, 9 [5.14]–[5.15].
- 365 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14877.
- 366 Responsive submission, Victoria Police, 28 September 2020, 5–6 [4.2]–[4.4].

- 367 Responsive submission, Victoria Police, 28 September 2020, 5 [3.3].
- 368 Responsive submission, Victoria Police, 28 September 2020, 10 [5.18]–[5.19].
- 369 Responsive submission, Victoria Police, 28 September 2020, 10 [5.21].
- 370 Institute of Internal Auditors, ‘The Three Lines of defense in Risk Management and Control’ (Position paper, January 2013) 2 <[na.theiia.org/standards-guidance/](http://na.theiia.org/standards-guidance/)>.
- 371 Institute of Internal Auditors, ‘The Three Lines of defense in Risk Management and Control’ (Position paper, January 2013) 2 <[na.theiia.org/standards-guidance/](http://na.theiia.org/standards-guidance/)>.
- 372 Responsive submission, Victoria Police, 28 September 2020, 10–11 [5.23].
- 373 See, eg, PwC, “Coordinated control: the ‘four lines of defence’ model”, *Disclose* (Issue 1, 2015) <[disclose.pwc.ch/21/en/articles-focus--02/](https://disclose.pwc.ch/21/en/articles-focus--02/)>.

# 13

## External oversight of Victoria Police's use of human sources

### INTRODUCTION

Term of reference 3 required the Commission to inquire into and report on the current adequacy and effectiveness of Victoria Police's processes for the management of human sources subject to legal obligations of confidentiality or privilege. As noted in Chapter 4, the Commission was primarily concerned with legal obligations of confidentiality and privilege arising from professional relationships, and by extension, confidential and privileged information derived from those relationships. In this chapter, the Commission uses the term 'confidential or privileged information' in this context.

Term of reference 5b required the Commission to inquire into and report on recommended measures that may be taken to address any systemic or other failures in Victoria Police's processes for its disclosures about and recruitment, handling and management of this category of human sources. As part of its inquiry into these terms of reference, the Commission considered the need for, and potential benefits of, an external oversight regime for Victoria Police's use of human sources.

Independent, external oversight encourages police to use their significant powers fairly and to develop and maintain consistently high ethical and professional standards. It also helps to hold police to account when this does not occur and provides critical public assurance that even when police are acting covertly, they are also acting lawfully. In this way, external oversight can help to build, maintain and improve both public trust and confidence in policing, and the quality of work done by police.

This chapter explains why external oversight of police powers and actions is important; describes different oversight models; outlines oversight arrangements for other police powers in Victoria; and identifies the key bodies that make

up the current police oversight system—in particular, the Public Interest Monitor (PIM), Victorian Inspectorate (VI) and Independent Broad-based Anti-corruption Commission (IBAC). It then looks at the limited external oversight currently in place for Victoria Police’s use of human sources, along with oversight regimes in other Australian jurisdictions and the United Kingdom.

The chapter also outlines the views of stakeholders consulted by the Commission, including views about the need for stronger external oversight of Victoria Police’s use of human sources, the benefits external oversight offers and the concerns it raises. It then considers evidence heard by the Commission on the features of an effective external oversight model, and the resources and expertise required to administer it.

Taking that research and evidence into account, the Commission concludes that the current lack of external oversight of Victoria Police’s use of human sources is an undesirable gap in the police oversight system. While the use of human sources is a powerful, legitimate tool to detect and prevent crime, the case of Ms Nicola Gobbo amply demonstrates that, used improperly, it can adversely affect individual rights and the administration of justice. External oversight provides a powerful safeguard to ensure that police act ethically, lawfully and with due regard to human rights. The absence of an independent check on Victoria Police’s use of human sources is also at odds with the oversight regimes in place for its use of other covert powers and methods, including surveillance devices, telecommunication intercepts and controlled operations.

Guided by lessons learned in other jurisdictions, and principles of proportionality and accountability, the Commission recommends the establishment of a tiered external oversight model that applies generally to Victoria Police’s use of human sources, with greater scrutiny of decisions about human sources who are reasonably expected to have access to confidential or privileged information (‘reportable human sources’).

The oversight model recommended by the Commission consists of three tiers:

- The PIM would test the appropriateness and rigour of Victoria Police decision making related to the registration of reportable human sources.
- IBAC would monitor Victoria Police’s compliance with the human source management framework recommended by the Commission (outlined in Chapter 12).
- IBAC would retain its current role to review and investigate complaints against Victoria Police officers, including any complaints that may relate to officers’ use of human sources.

The Commission also considers that there may be merit in the Victorian Government reviewing the broader system for external oversight of Victoria Police, particularly the oversight of its use of covert powers, with a view to achieving greater system consistency and coherence.

## CURRENT CONTEXT AND PRACTICE

This section discusses why police and other law enforcement agencies are subject to external oversight and examines the current institutional and legislative framework for the oversight of Victoria Police.

It outlines:

- the role of independent external oversight of police
- the current police oversight system in Victoria
- approaches to external oversight of the use and management of human sources in Australian and international jurisdictions.

These topics are discussed in turn below.

## The role of independent external oversight of police

Independent, external oversight of police is an important check and balance on the use of their wide and significant powers. It aims to ensure that police treat people fairly and act ethically, lawfully and with high professional standards. It balances power with accountability, building public trust and confidence in police.

External oversight of police is necessary and important because, as noted in the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct report into police corruption in Queensland, police officers hold 'extensive authority over all other citizens, however powerful, coupled with wide discretions concerning its exercise'.<sup>1</sup> As the Royal Commission into the New South Wales Police Service described it:

*The powers entrusted to police to carry arms, to use coercive force in the proper course of their duties (and, in extreme circumstances, to take lives), to inquire into personal affairs and to eavesdrop (pursuant to a warrant) on private conversations, to deprive citizens of their liberty, to enter and search their premises, to seize and hold their property, and to initiate proceedings that will require them to defend themselves before the courts, are very substantial powers—possessed by no other class of employee.<sup>2</sup>*

In Victoria, police authority over citizens includes a range of common law and legislative powers to prevent and investigate crime and maintain public order. Often, these powers intrude upon certain human rights in order to uphold others, like a person's right to life and security and property rights. For example, powers to arrest, preventatively detain, move on and restrict association can limit personal freedoms of movement and association. Investigative powers, such as searches of property, telecommunications interception and use of surveillance devices, curtail personal privacy rights, often without a person's knowledge.

In Victoria and elsewhere, police officers have significant discretion to decide how and when they use their powers.<sup>3</sup> Such discretion is vulnerable to being used arbitrarily, unfairly or in a corrupt manner.<sup>4</sup> When police powers are used improperly, it can negatively affect not only the individuals subject to them, but also the broader community and its institutions, by reducing trust in the police service and in the criminal justice system.<sup>5</sup>

Governments and academic commentators have recognised the need for external oversight of covert police powers; that is, powers exercised without the knowledge of affected persons. Former police officer, Professor Clive Harfield, University of Queensland, explained:

*... the arena of covert investigation is potentially more vulnerable [to corruption], since such investigation, by definition, cannot be challenged by the subject of the investigation in ways that overt investigation powers can be.<sup>6</sup>*

More specifically, serving Western Australian police officer and Adjunct Associate Professor, Dr Charl Crous, APM has identified that the covert relationships between police and human sources can lead to corruption and unethical behaviour.<sup>7</sup>

In 2011, risks inherent to the exercise of covert powers prompted the Victorian Parliament to establish an additional oversight and accountability mechanism in the form of the PIM, which commenced operations in 2013. The then responsible Minister described the policy rationale for the PIM as follows:

*Covert investigations and coercive powers ... are among the most intrusive powers available to integrity and law enforcement bodies in Victoria.*

*Strong accountability measures should exist for the use of such significant powers. It is critical that the Victorian community has full confidence that applications for covert investigation and coercive powers are subject to optimal safeguards and oversight.<sup>8</sup>*

External oversight complements internal governance and control mechanisms, which are critical to ensuring proper and lawful conduct among police, and improving accountability and organisational performance.<sup>9</sup> As with any organisation, Victoria Police has primary responsibility for ensuring the integrity and professional conduct of its employees, consistent with legislative requirements, the organisation's code of conduct and values, and broader public sector standards.<sup>10</sup>

## Current external oversight of Victoria Police

Victoria's current institutional structure for external oversight of Victoria Police has been in place since 2013. Although there have not been any significant legislative changes since then, the Victorian Parliament has given additional functions to oversight agencies when new police powers have been introduced or existing powers increased.

Within this structure, Victoria Police is subject to external oversight by several agencies:

- IBAC exercises a broad police integrity and oversight jurisdiction by assessing and investigating allegations of police misconduct and corruption.
- IBAC, the VI, PIM, courts and tribunals and the Commonwealth Ombudsman oversee Victoria Police's use of specific powers and functions, including various powers that are exercised covertly.

Other than Victoria Police itself, IBAC is the only Victorian public sector agency that can investigate allegations against police officers.<sup>11</sup>

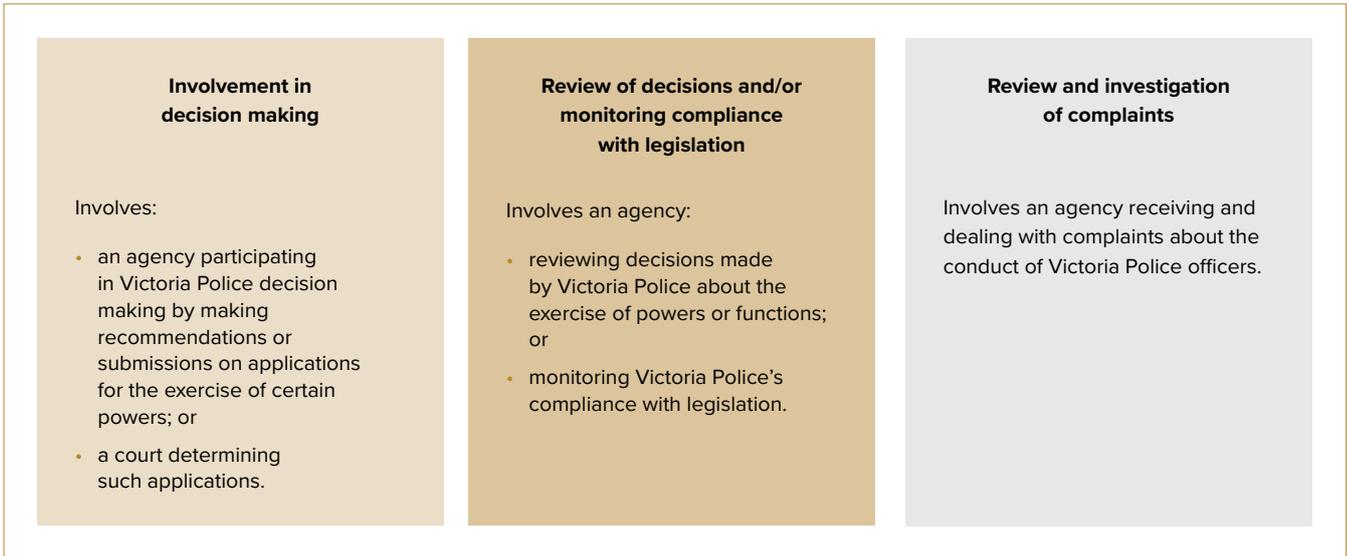
There is currently no external oversight of Victoria Police's use of human sources, other than potentially through the investigation of a complaint by IBAC, an IBAC own motion investigation (that is, an investigation IBAC initiates itself), or an inquiry or royal commission established under the *Inquiries Act 2014* (Vic) to examine a particular issue. This is discussed further below.

The current external oversight arrangements reflect the Victorian and Commonwealth Parliaments' recognition of the need for independent scrutiny of, and accountability for, Victoria Police's exercise of extensive powers to prevent and investigate crime.<sup>12</sup>

While there is considerable variation in powers, functions, obligations and enabling legislation, external oversight in Victoria falls into three broad categories: involvement in decision making; review of decisions and/or monitoring compliance with legislation; and review and investigation of complaints.

These three categories are outlined in Figure 13.1 and discussed below.

**Figure 13.1: Three categories of external oversight of Victoria Police**



Some police powers are subject to one type of oversight only; for example, monitoring of Victoria Police's compliance with DNA sampling laws is overseen by IBAC and no other body.<sup>13</sup> Other powers are subject to a tiered approach, with different agencies performing different oversight functions.

Figure 13.2 below provides a snapshot of how the three oversight categories apply across various Victoria Police powers and functions, some of which are comparable to the use of human sources due to their covert nature and/or their lawful limitation of human rights. Certain other Victorian law enforcement and integrity bodies can also use some of these powers.<sup>14</sup>

The enabling legislation for all of these powers and functions requires the agency exercising the power or function and/or the oversight agency to report to the responsible Minister or Parliament about their exercise and, in some cases, the effectiveness or appropriateness of their use.

Figure 13.2: External oversight of certain Victoria Police powers and functions<sup>15</sup>

	Involvement in decision making	Review of decisions and/or monitoring compliance with legislation	Review and investigation of complaints
<p><b>Surveillance devices</b></p> <p>Police power, requiring a warrant, to install and use surveillance through listening devices, cameras and tracking devices</p>	Public Interest Monitor	Commonwealth Ombudsman Victorian Inspectorate	Independent Broad-based Anti-corruption Commission
<p><b>Telephone intercepts</b></p> <p>Police power, requiring a warrant, to record communications passing over a telecommunications network</p>		Victorian Inspectorate	
<p><b>Controlled operations</b></p> <p>Police power to conduct covert operations that may involve officers or civilians engaging in conduct that would otherwise constitute an offence</p>			
<p><b>Covert searches</b></p> <p>Police power, requiring a warrant, to conduct a covert search of a location connected to a terrorist act</p>	Public Interest Monitor		
<p><b>Police preventative detention decisions</b></p> <p>Police decisions to authorise the detention of a person in order to prevent an imminent terrorist act or preserve evidence of, or relating to, a recent terrorist act</p>			
<p><b>Firearm prohibition orders</b></p> <p>Police power to prohibit specified individuals from acquiring, possessing, carrying or using a firearm or firearm-related item</p>			
<p><b>Sex Offenders Register</b></p> <p>Police function to monitor individuals who have committed a relevant sexual offence or who have restrictions on their freedom for the purpose of protecting the community</p>			
<p><b>Witness protection</b></p> <p>Police power to covertly relocate, establish new identities, provide accommodation or transport for witnesses and/or family in order to protect their safety and welfare</p>	Public Interest Monitor	Independent Broad-based Anti-corruption Commission	
<p><b>DNA profile sampling</b></p> <p>Police power to take DNA samples from a suspect in an indictable matter without a court order or the consent of the suspect</p>			
<p><b>Assumed identities</b></p> <p>Police power to take on a false identity for the purpose of their investigative, witness protection or related activities</p>			

<b>LEGEND</b>	Authorised by the courts	Authorised by Victoria Police

## Involvement in decision making

The first category of external oversight in Victoria is involvement in decisions about the use of certain powers by police.

Victoria Police is often required to apply to a court for authorisation to use covert powers. These applications are heard *ex parte*—that is, without notice to, or hearing from, the person proposed to be subject to the use of these powers (often referred to as the ‘target’). In some cases, the PIM has a statutory role to test the content and sufficiency of police applications to use such powers; for example, in relation to surveillance devices, telecommunications interceptions and covert search warrants.

As the decision maker, the court must weigh up the evidence supporting the police application and decide whether the legal test for granting the authorisation has been met. For example, a judge or magistrate may issue a surveillance device warrant if satisfied that there are reasonable grounds for the suspicion or belief that an offence has or will occur, and that a surveillance device will help gather evidence. In making this decision, the court has regard to:

- the nature and gravity of the alleged offence in respect of which the warrant is sought
- the extent to which the privacy of any person is likely to be affected
- the existence of any alternative means of obtaining the evidence or information sought to be obtained
- the evidentiary or intelligence value of any information sought to be obtained
- any previous warrant sought or issued in connection with the same offence
- any submissions the PIM has made.<sup>16</sup>

As noted above, since 2013, the PIM has provided an additional safeguard for certain covert powers and functions exercised by police.<sup>17</sup> The PIM’s role in *ex parte* applications is to ‘represent the public interest and provide greater accountability in the collection of evidence from warrants and orders that intrude on the privacy and civil liberties of Victorian citizens.’<sup>18</sup>

This safeguard operates by:

- Victoria Police notifying the PIM of relevant applications to the court and providing the PIM with documents relating to the application
- the PIM appearing at a hearing to test the sufficiency of the information relied upon and the circumstances of the application; and making submissions as to the appropriateness of granting the application.<sup>19</sup>

An example of this form of oversight is the PIM’s involvement in applications for covert search warrants under the *Terrorism (Community Protection) Act 2003* (Vic), outlined in Box 13.1.

**BOX 13.1: THE PUBLIC INTEREST MONITOR'S INVOLVEMENT IN THE COVERT SEARCH WARRANT DECISION-MAKING PROCESS**

A covert search warrant authorises a police officer to enter and search a premises and seize things without the knowledge of the owner or resident. Victoria Police must apply to the Supreme Court of Victoria for a covert search warrant.<sup>20</sup>

When an application is made, Victoria Police must:

- notify the PIM of the application<sup>21</sup>
- provide all relevant information that relates to the application, including adverse information that might result in the rejection of the application.<sup>22</sup>

The PIM is then entitled to:

- appear at the hearing of the application to test the content and sufficiency of the information relied on and the circumstances
- ask questions of any person who is giving information in relation to the application
- make submissions to the Supreme Court about the appropriateness of granting the application.<sup>23</sup>

The Supreme Court must consider the PIM's submissions when deciding whether to grant a covert search warrant.<sup>24</sup>

Since commencing operation in 2013, the PIM's role has expanded to include involvement in decisions made by Victoria Police (in addition to decisions made by a court) about its exercise of certain powers and functions; specifically, police detention decisions relating to terrorism suspects and administration of the witness protection scheme. The role of the PIM in relation to the witness protection scheme is outlined in Box 13.2 below.<sup>25</sup> Procedural requirements for the PIM's involvement in these decisions broadly mirror those that underpin its involvement in court decisions about Victoria Police's use of other covert powers.

**BOX 13.2: THE PUBLIC INTEREST MONITOR'S INVOLVEMENT IN POLICE DECISION MAKING UNDER THE WITNESS PROTECTION ACT 1991 (VIC)**

Under the Witness Protection Act, Victoria Police must:

- notify the PIM if it is considering whether to admit or exclude a person from the Witness Protection Program
- provide the PIM relevant information and supporting documents.<sup>26</sup>

The PIM must be involved in decisions to:

- include a person in the Witness Protection Program
- provide alternative protective arrangements.

The PIM can choose whether it will be involved in a decision to suspend or terminate protection and assistance provided to a witness.

The PIM can also test the sufficiency of the information relied on by Victoria Police and the witness' circumstances.<sup>27</sup>

The Chief Commissioner must have regard to the recommendations put forward by the PIM.<sup>28</sup> The Chief Commissioner must also either:

- take the recommended action; or
- if the recommended action has not been taken or Victoria Police does not intend to take it, provide a report to the PIM stating the reasons why.<sup>29</sup>

Following the PIM's involvement, Victoria Police will sometimes withdraw its application or add further information to the application.<sup>30</sup>

Both Victoria Police and the PIM are required to provide a report to the Minister for Police about the performance of their functions under the Witness Protection Act.<sup>31</sup> The Minister must then table the Victoria Police report in Parliament.<sup>32</sup>

## Review of decisions and/or monitoring compliance with legislation

The second category of external oversight in Victoria is reviewing decisions and/or monitoring compliance with legislation. While arrangements vary across regimes, in Victoria this type of oversight often focuses primarily on Victoria Police's compliance with procedural requirements, such as record keeping.

The VI and IBAC have primary responsibility for compliance monitoring under Victorian law. The VI currently monitors Victoria Police's and IBAC's compliance with legislation regulating covert or intrusive powers that both of these agencies are able to use in conducting their investigations, such as telecommunications interception and use of surveillance devices.<sup>33</sup> IBAC monitors Victoria Police compliance with legislation regulating certain powers and functions that are conferred on Victoria Police alone; for example, DNA sampling and making of firearm prohibition orders. In some cases, IBAC has a deeper oversight function that goes beyond assessing compliance with record-keeping requirements and involves reviewing the appropriateness of Victoria Police decisions.

Table 13.1 outlines some of the key compliance-monitoring regimes relevant to Victoria Police powers and functions. There are also other statutory schemes that provide for external oversight of Victoria Police powers and functions. For example, IBAC also has a range of other compliance-monitoring responsibilities under the *Firearms Act 1996* (Vic) (Firearms Act), *Sex Offenders Registration Act 2004* (Vic), *Crimes Act 1958* (Vic), *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and the *Terrorism (Community Protection) Act 2003* (Vic).

**Table 13.1: Examples of compliance monitoring regimes in relation to Victoria Police<sup>34</sup>**

Power or function	Agency	Functions	Powers	Reporting and recommendations
<b>Surveillance devices</b>	Victorian Inspectorate (VI)	Inspect records to determine extent of compliance with the legislation, which prescribes records to be kept	Enter Victoria Police premises	VI must report to Parliament at six monthly intervals on the results of inspections  Chief Commissioner must report annually to the Minister for Police on, among other things, the number of applications submitted and warrants issued and effectiveness of these, eg arrests, prosecutions
			Have full and free access to all records  Request information  Chief Commissioner of Victoria Police to ensure assistance given	
<b>Controlled operations</b>	VI	Inspect records at least annually to assess compliance with the legislation, which prescribes records to be kept	Enter Victoria Police premises	VI must report annually on the comprehensiveness and adequacy of Victoria Police's reporting and Victoria Police activities, with a copy of the report to be provided to the Minister for Police and Chief Commissioner and tabled in Parliament  VI's report must not include information that could 'endanger a person's safety, prejudice an investigation or prosecution, or compromise any law enforcement agency's operational activities or methodologies'  Chief Commissioner must report annually to VI on the number of applications granted and refused, the nature of the controlled operations conducted and the number of authorities cancelled or expired
			Have full and free access to documents  Request information  Chief Commissioner to ensure assistance given	
<b>Witness protection</b>	Independent Broad-based Anti-corruption Commission (IBAC)	Monitor compliance with record-keeping requirements and conduct inspections at least once every financial year	Enter Victoria Police premises	At any time, IBAC may make recommendations to Chief Commissioner  At any time, IBAC may report to the Minister for Police and must report annually on the results of inspections as well as any recommendations it has made and any action taken by Victoria Police  IBAC's report must not prejudice proceedings or compromise the operational activities or methodologies of Victoria Police, or the identity, location or security of a person under protection  Chief Commissioner must report annually to the Minister for Police on the general operations, performance and effectiveness of its activities under the Act
			Copy documents  Do anything necessary or convenient to be done to enable an inspection to be carried out  Chief Commissioner to ensure reasonable assistance given	

As detailed in Box 13.3, the VI also undertakes compliance monitoring of Victoria Police's use of powers relating to telecommunications interception; that is, where an agency can intercept the communication passing over a telecommunications system without the knowledge of the people engaged in the communication.

**BOX 13.3: MONITORING VICTORIA POLICE'S COMPLIANCE WITH THE TELECOMMUNICATIONS INTERCEPTION REGIME**

Under the *Telecommunications (Interception) (State Provisions) Act 1988* (Vic), Victoria Police must keep certain records related to the issuing of warrants, including but not limited to:

- each warrant a court has issued under the Act to Victoria Police
- any instrument revoking a warrant issued to Victoria Police
- a copy of each authorisation issued by the Chief Commissioner for a person to receive information obtained by interceptions under warrants issued to Victoria Police.<sup>35</sup>

In turn, the VI may inspect records of Victoria Police to assess the extent to which the Chief Commissioner has complied with these record-keeping provisions.<sup>36</sup> The VI must inspect the records of Victoria Police at least twice every 12 months.<sup>37</sup>

To assist with the VI's functions under the Act, it has the power to enter Victoria Police premises; have full and free access to all records (including the ability to copy and take extracts of relevant documents); and to request information or answers to questions. The Chief Commissioner must ensure Victoria Police gives assistance to the VI in carrying out its functions.<sup>38</sup>

The VI must report to the Minister for Police and the Victorian Attorney-General on the results of the inspection and can include information about whether it considers that Victoria Police has contravened any specific provisions of the Act.<sup>39</sup> The Minister must then ensure a copy of the report is given to the Commonwealth Attorney-General.<sup>40</sup>

Box 13.4 below outlines IBAC's oversight role in relation to Victoria Police's making of firearm prohibition orders. These orders prohibit a person from acquiring a firearm or related item. IBAC's oversight role involves reviewing not just Victoria Police's compliance with record-keeping or other procedural requirements, but also the appropriateness of its decisions about issuing such orders and its administration of the broader scheme.

**BOX 13.4: ASSESSING THE APPROPRIATENESS OF VICTORIA POLICE DECISIONS ABOUT FIREARM PROHIBITION ORDERS**

IBAC has a role in reviewing the appropriateness of the Chief Commissioner's decision to issue a firearm prohibition order, having regard to the legislative criteria for making an order and the information relied upon to make the order.<sup>41</sup> Every three months, IBAC reviews a representative sample of firearm prohibition orders made.<sup>42</sup>

To facilitate these reviews, IBAC has powers to enter Victoria Police premises without notice, to inspect and copy any documents and to obtain information from employees. The Chief Commissioner must give IBAC reasonable assistance and access to all relevant information.<sup>43</sup>

After the review, IBAC can make recommendations to the Chief Commissioner about any actions that it considers appropriate, and the Chief Commissioner must respond within 45 days.<sup>44</sup>

Every two years, IBAC must provide a report to the Minister for Police on the administration of the firearm prohibition order scheme and the Chief Commissioner's exercise of powers, and their performance of functions and duties. The report may also recommend improvements to the operation of the scheme.<sup>45</sup>

The Minister for Police must table the report in Parliament but must not include any information identified by the Chief Commissioner that could reasonably be expected to endanger a person's safety, prejudice an investigation or prosecution, or compromise operational activities or methodologies.<sup>46</sup>

## Review and investigation of complaints

The third category of external oversight in Victoria is the review and investigation of complaints. This involves IBAC's review and investigation of complaints under its broad police integrity jurisdiction. Under the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act), IBAC's functions include:

- identifying, exposing and investigating corrupt conduct and police misconduct
- assessing police conduct
- ensuring the highest ethical and professional standards are maintained by police officers, and that police officers have regard to human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- investigating complaints about corrupt conduct or misconduct of police
- undertaking education and prevention functions to achieve the objects of the IBAC Act.<sup>47</sup>

## Complaints, notifications and investigations

IBAC can conduct investigations in response to complaints from members of the public, notifications from Victoria Police or on its own motion.<sup>48</sup> IBAC can also receive public interest disclosures about police, sometimes known as 'whistle-blower complaints'. These are assessed by IBAC and the complainant may be afforded protections under the *Public Interest Disclosures Act 2012* (Vic).<sup>49</sup>

On receiving a complaint or notification, IBAC assesses whether the matter should be referred to Victoria Police for internal action, investigated by IBAC or dismissed.

While IBAC must give priority to the investigation and exposure of serious and systemic corruption, it has the discretion to investigate any corrupt conduct or police misconduct.<sup>50</sup> In practice, IBAC 'primarily investigates police matters that involve serious, systemic and/or sensitive allegations, and which [it has] the capacity and capability to best handle'.<sup>51</sup>

In its 2018 *Inquiry into the external oversight of police corruption and misconduct in Victoria*, the IBAC Committee of the Victorian Parliament (IBAC Committee Inquiry) described the system for handling complaints and disclosures about police as 'extremely complex'.<sup>52</sup> The IBAC Committee noted that the vast majority of complaints are referred back to Victoria Police for investigation.<sup>53</sup> Where this occurs, IBAC receives and monitors the outcomes.<sup>54</sup> IBAC also reviews a sample of internal investigations to ensure that they were handled appropriately and audits Victoria Police's complaint-handling system.<sup>55</sup>

## Approaches to external oversight of the use of human sources in Australia

In Victoria, no external oversight agency has a specific, legislated function to oversee Victoria Police's or other agencies' use and management of human sources.

Under IBAC's broad mandate to oversee Victoria Police's integrity, IBAC could examine Victoria Police's use of human sources if:

- it was the subject of a complaint, notification or disclosure; or
- IBAC initiated an own motion investigation into suspected serious or systemic police misconduct or corruption regarding the use of human sources.<sup>56</sup>

Similarly, the VI could investigate suspected or alleged improper use of human sources by IBAC if it fell within its general jurisdiction to investigate and assess the conduct of IBAC and its officers.

The Commission consulted with nine police oversight agencies in other Australian jurisdictions during its inquiry. A list of the oversight agencies consulted can be found at Appendix G.

Consistent with the current approach in Victoria, these Australian agencies do not have specific functions to oversee the use of human sources by police. Like IBAC, agencies can generally investigate matters relating to the use of human sources as part of their broader police integrity functions.<sup>57</sup> For example, some oversight agencies have investigated allegations of improper conduct by police in their use of human sources, such as corrupt relationships with sources or the provision of inappropriate financial rewards to sources.<sup>58</sup>

The Commonwealth Inspector-General of Intelligence and Security (IGIS) oversees six national intelligence agencies, including the Australian Security Intelligence Organisation (ASIO) and Australian Secret Intelligence Service. IGIS monitors agencies' operational activities through regular inspections, and reviews human source management processes to ensure agencies act legally and with propriety, comply with ministerial guidelines and directives, and respect human rights.<sup>59</sup> For example, IGIS reviewed ASIO human source case files in 2018–19 and met with ASIO staff to discuss related activities.<sup>60</sup>

## Approaches to external oversight of the use of human sources internationally

The Commission understands that, with the exception of the Investigatory Powers Commissioner's Office (IPCO) in the United Kingdom and certain federal agencies in the United States of America, oversight agencies in comparable countries do not have specific functions to oversee the use of human sources by police services. As is the case in Australia, these agencies could examine the use of human sources as part of their broader complaint-handling,<sup>61</sup> inspection<sup>62</sup> and audit jurisdictions.<sup>63</sup>

As noted in Chapter 12, the Commission paid particular attention to the United Kingdom's legislative and external oversight framework for human source management due to the specific requirements in place for the use of human sources and the similarities between the legal and human rights systems of Victoria and of the United Kingdom.

### Investigatory Powers Commissioner's Office, United Kingdom

In the United Kingdom, IPCO provides external oversight of public authorities' use of investigatory powers, including their use of human sources. Public authorities are defined to include police services. IPCO consists of the Investigatory Powers Commissioner, a team of Judicial Commissioners and IPCO staff.<sup>64</sup> Chapter 12 outlines

the regulatory framework for public authorities' use of investigatory powers in the United Kingdom. This chapter focuses on the aspects of this regulatory framework that are relevant to external oversight.

### **Oversight by the Investigatory Powers Commissioner's Office and Commissioner**

Among IPCO's oversight functions under the *Investigatory Powers Act 2016* (UK) (Investigatory Powers Act) is the requirement to review—by audit, inspection or investigation—public authorities' exercise of functions relating to human sources under the *Regulation of Investigatory Powers Act 2000* (UK) and their adherence to the practices and processes prescribed in the *Covert Human Intelligence Sources Revised Code of Practice* (Code of Practice).<sup>65</sup> IPCO can undertake inspections on its own initiative or it can be asked to investigate a specific issue by the Prime Minister. It can also produce guidance to public authorities on the use of investigatory powers.<sup>66</sup>

The Investigatory Powers Act also gives IPCO powers to discharge its oversight functions.<sup>67</sup> The Code of Practice notes that the Investigatory Powers Commissioner 'will have unfettered access to all locations, documentation and information systems as are necessary to carry out their full functions and duties'.<sup>68</sup>

Public authorities are required to keep detailed and extensive records relating to the registration and use of human sources.<sup>69</sup> This includes records about:

- a human source's identity
- the officers responsible for managing the source
- the tasks given and demands made of the source
- all contacts and communications between the source and the authority
- the information obtained and disseminated
- any payment, benefit or reward given or offered to the source
- copies of key documents, including registrations, reviews, renewals and risk assessments.

The Commission consulted with IPCO and understands that:

- On-site inspections of law enforcement agencies generally occur annually, though there may be more frequent inspections of larger public authorities.
- Following an inspection, IPCO provides the agency with a report identifying any areas of legal non-compliance, its recommendations and any broader observations, drawing attention to relevant legislation and any other available guidance.
- If any ongoing compliance issues are observed, IPCO may conduct a focused revisit.
- While focusing on compliance, IPCO also considers authorities' internal policies and processes and shares information with them about good practice.<sup>70</sup>

Public authorities can seek general advice from the Investigatory Powers Commissioner about any issue that falls within the Commissioner's responsibilities as regards to the law and the applicability of investigatory powers, though IPCO does not issue formal advice on operational decisions given the critical need to maintain its independence from the authorities it oversees.<sup>71</sup>

### **Approval of a Judicial Commissioner**

In the United Kingdom, there are enhanced registration procedures where a public authority intends to use a human source to obtain, provide access to or disclose knowledge of legally privileged material.<sup>72</sup> Where the public authority is a law enforcement agency, an IPCO Judicial Commissioner must approve the use of a human source in these circumstances.<sup>73</sup>

The legal test for registration of a human source in these circumstances is also stricter. In addition to the normal considerations of proportionality and necessity, as discussed in Chapter 12, an IPCO Judicial Commissioner can only approve the registration of a human source in these circumstances if there are reasonable grounds for believing it is necessary on grounds of national security, the prevention or detection of serious crime, or the economic wellbeing of the United Kingdom.<sup>74</sup>

The Code of Practice states that registration of a human source for these purposes should only be sought in 'exceptional or compelling' circumstances:

*Circumstances which can be regarded as 'exceptional and compelling' will only arise in a very restricted range of cases, where there is a threat to life or limb or in the interests of national security. The exceptional and compelling test can only be met when the public interest in obtaining the information sought outweighs the public interest in maintaining the confidentiality of legally privileged material, and when there are no other reasonable means of obtaining the required information.*<sup>75</sup>

### **Requirement to report relevant errors relating to the use of a human source**

Under the Investigatory Powers Act, the Investigatory Powers Commissioner must report any 'relevant error' to an affected person if the Commissioner thinks it is a serious error (that is, one causing significant prejudice or harm to the person concerned) and it is in the public interest to do so.<sup>76</sup>

A 'relevant error' is an error in complying with any requirement of an Act that is subject to review by an IPCO Judicial Commissioner or an error described in the Code of Practice.<sup>77</sup> Examples of a relevant error include the use of a human source without lawful authorisation, and non-adherence to the safeguards in relevant legislation and the Code of Practice.<sup>78</sup>

Relevant errors must be reported 'as soon as reasonably practicable' and no later than 10 working days after they are identified (or in such other timeframe as agreed with the Investigatory Powers Commissioner) along with:

- information on the cause of the error
- the human source's activities
- how any material obtained from the human source is being managed
- a summary of the steps taken to prevent recurrence of the error.<sup>79</sup>

### **The Investigatory Powers Tribunal, United Kingdom**

The Investigatory Powers Tribunal in the United Kingdom can consider and investigate complaints about law enforcement agencies' use of certain investigatory powers, including human sources. Members of the public can make a complaint if they believe they are a victim of unlawful action, or that their rights have been breached by any unlawful activity or a contravention of the *Human Rights Act 1998* (UK).<sup>80</sup> For example, in 2019, the Tribunal heard a case concerning the legality of an intelligence agency's policy in respect of human sources who participate in criminality.<sup>81</sup>

## CHALLENGES AND OPPORTUNITIES

This section discusses key issues identified by the Commission and raised by stakeholders regarding external oversight of the use and management of human sources in Victoria, including:

- opportunities for external oversight of Victoria Police’s use and management of human sources
- potential models of external oversight that might be suitable
- key features of an effective external oversight framework
- opportunities for the alignment of any new external oversight model with Victoria’s current police oversight system.

These topics are discussed in turn below.

### Opportunities for external oversight of Victoria Police’s use of human sources

#### Benefits of external oversight

As noted in Chapters 11 and 12, recent internal audits and historical external and internal reviews have identified non-compliance among some Victoria Police officers with the organisation’s human source management policy and procedures.<sup>82</sup>

A broad consensus emerged from evidence and information provided to the Commission that external oversight is needed for the use and management of human sources by Victoria Police, although views on the most appropriate model differ. In summary, there was broad agreement that external oversight would:

- encourage compliance with legal and policy requirements for the registration and use of human sources
- raise policing standards, including by assisting police to balance competing public interests and make ethical decisions
- mitigate risks to Victoria Police, human sources and the criminal justice system
- support transparency and improve community confidence in Victoria Police’s use of human sources
- address a gap in Victoria’s current oversight system, noting that other covert police powers and methods are subject to external oversight.

IBAC told the Commission:

*There is a significant gap in the present oversight system in respect to Victoria Police’s registration and use of human sources. It is concerning that this area of covert operation by all Victorian law enforcement bodies (including IBAC) is currently not subject to any express statutory oversight.*

...

*IBAC also considers that the management of human sources, as with other areas of covert and intrusive operations, is strengthened by oversight by an independent body or bodies.<sup>83</sup>*

This sentiment was shared by the International Commission of Jurists Victoria, which referred to the covert nature of human source management and suggested that Victoria Police has long exercised broad discretionary powers without external oversight to act as a check and balance against the improper use of such powers.<sup>84</sup>

Some members of Victoria Police Executive Command also saw merit in external oversight as a means of encouraging compliance and helping police balance competing public interests.

Deputy Commissioner Wendy Steendam, APM, Specialist Operations, told the Commission, 'Victoria Police agrees that external oversight may be appropriate for the registration, use and management of human sources who have a legal obligation of privilege or confidentiality'.<sup>85</sup> In her statement to the Commission, Ms Steendam noted that 'the benefits of external oversight are clear and supported by Victoria Police', pointing to the role it can play in supporting Victoria Police's compliance with legal requirements and internal policy.<sup>86</sup>

Assistant Commissioner Thomas (Luke) Cornelius, APM told the Commission that he has long been a 'strong advocate for independent oversight'. He explained:

*... the best disinfectant ... is daylight and I just think in fraught areas such as these ... that [an] open and transparent framework that might support the balancing of potentially competing public interest considerations would be of significant benefit to us, and independent oversight is a very healthy way of supporting that process.*<sup>87</sup>

Dr John Buckley, former police officer and now a provider of human source training and consultancy services, told the Commission that external oversight in the United Kingdom has raised standards and helped police services mitigate risk. Dr Buckley noted that IPCO's role:

*... had a positive impact on raising policing standards and ensuring that senior officers pay attention to their directions ... From a police perspective, it protects the organisation from damage, offers an advisory and objective perspective and provides independent oversight.*<sup>88</sup>

The VI told the Commission that external oversight would support ethical decision making, manage risk, and promote public confidence in Victoria Police's use of human sources:

*... an ethical perspective on the use of human sources, as well as an objective to control the serious risks involved in those activities, would favour ongoing external oversight ...*

*Victorians might reasonably expect that police activities that generate these risks should be subject to ongoing external oversight. Beyond any expectation in usual circumstances, the events that have led to the Royal Commission require public confidence in Victoria Police's use of human sources to be repaired. The VI suggests that this can only be achieved by some form of external oversight.*<sup>89</sup>

Professor Alexandra Natapoff, University of California, told the Commission that 'transparency and external oversight are key' to the use of human sources and that 'it is not sufficient for mechanisms to better regulate the use of [human sources] to be triggered by an exceptional event; they should be routine'.<sup>90</sup> Similarly, Mr Arthur Moses, SC, former president of the Law Council of Australia, considered that oversight agencies 'should, if they do not already, conduct annual audits of the human sources used by law enforcement agencies'.<sup>91</sup>

The Law Council of Australia, noting the High Court of Australia's decision regarding Victoria Police's use of Ms Gobbo as a human source, highlighted 'the need for strong and properly resourced oversight bodies to supervise the activities of law enforcement'.<sup>92</sup> In a submission to the Commission, Victoria Legal Aid suggested the Commission should recommend stronger transparency, accountability and external oversight mechanisms to ensure that, as a starting point, legal practitioners (or those in similar occupations) are not used as human sources and are only used in exceptional circumstances with the endorsement of an independent oversight body.<sup>93</sup>

## Concerns about external oversight

Some stakeholders expressed concerns that an external oversight regime may undermine the effectiveness of police services' use of human sources in the prevention, detection and investigation of criminal activity.

As noted in Chapter 12, most Australian law enforcement and intelligence agencies told the Commission they have robust internal governance and oversight mechanisms in place to mitigate the risks associated with the use and management of human sources. Some of those agencies expressed concerns that a legislative framework—which would be required to facilitate external oversight—may compromise the operational flexibility and efficiency required for effective policing.

The Australian Institute of Policing told the Commission that Victoria Police's current processes for human sources with legal obligations of confidentiality or privilege are 'adequate and effective', noting the changes to these processes since the use of Ms Gobbo as a human source.<sup>94</sup>

Ms Steendam told the Commission there are risks associated with external oversight:

*The main risk is that the sharing of any information about human sources makes it more likely that the identity of the human source will become known. In turn, the prospect of information about a human source being made known to an oversight body may need to be disclosed to a potential human source. This risks creating a chilling effect [in that it discourages this human source and others from providing information to police for fear for their safety]. Victoria Police would support safeguards to limit the nature of any information about a human source provided to that which is genuinely needed.<sup>95</sup>*

In contrast, Professor Sir Jonathan (Jon) Murphy, QPM, DL, Liverpool John Moores University, told the Commission that, in his experience, the potential disclosure of human source identities or information to IPCO in the United Kingdom has not deterred people from becoming human sources.<sup>96</sup>

Stakeholders suggested that the following factors can create and strengthen positive relationships between law enforcement and oversight agencies to help overcome concerns:

- law enforcement and oversight agencies working collaboratively on implementation of the oversight regime<sup>97</sup>
- oversight agencies having robust security arrangements in place for handling sensitive information<sup>98</sup>
- oversight agencies adopting an open, transparent and constructive approach with law enforcement agencies during inspections or audits<sup>99</sup>
- oversight agencies seeking to understand the law enforcement agency's operational objectives and operating environment.<sup>100</sup>

## Scope of external oversight

The Commission heard differing views on the appropriate scope of any external oversight regime for the use of human sources by Victoria Police—in terms of both the categories of human sources and the aspects of the police–human source relationship that should be subject to oversight.

Victoria Police submitted that external oversight should have a narrow application, limited to human sources with legal obligations of confidentiality or privilege:

*Victoria Police does not consider that there is good evidence to support extending external oversight to other categories of human sources, given the level of internal governance and oversight, the risks to those sources and the fact that no issues have been identified that would justify such oversight.<sup>101</sup>*

IBAC told the Commission that oversight should be tailored to risk, with more 'intensive oversight where it is going to be most effective'.<sup>102</sup> According to IBAC, this could involve compliance monitoring and outcome reporting for all human sources used by Victoria Police and, for high-risk, vulnerable and complex human sources, external involvement in decision making (including reviewing proposed registrations to ensure they are appropriate and justified) and the capacity to review and make recommendations on relevant decisions.<sup>103</sup> IBAC also suggested that high-risk human sources who should be subject to more stringent oversight include lawyers, medical professionals, journalists, Members of Parliament and clerics, along with children and people with an intellectual or other mental impairment or physical disability.<sup>104</sup> The VI suggested that high-risk human sources might also include people in particularly compromised situations due to their relationship with targets of Victoria Police's investigations, and people with other forms of vulnerability.<sup>105</sup>

In relation to the aspects of the police–human source relationship that should be subject to external oversight, Victoria Police advocated for limiting oversight to decisions about the registration of human sources and said that oversight of their subsequent use and management would require further consideration.

In a statement to the Commission, Ms Steendam noted:

*There will be many operational decisions that should be properly left to Victoria Police, for example, how human sources are tasked, how their cover is managed and the like.*<sup>106</sup>

IBAC suggested that external oversight should involve access to comprehensive information about the police–human source relationship, including the recruitment and registration, tasking, length and scope of registration, and deregistration of human sources.<sup>107</sup>

This appears to align with the United Kingdom approach. IPCO told the Commission that it assesses the following aspects of human source use and management:

- the recruitment process
- risk assessments
- the human source's taskings and rewards, and details of any contact
- whether useful intelligence was gained from the human source
- the relationships between police officers who manage human sources
- training maintained by police officers who manage human sources
- internal oversight arrangements.<sup>108</sup>

IPCO also told the Commission that it:

*... looks particularly for evidence from the handler, controller and authorising officer, and at the documented decision making, to see that the key issues of necessity, proportionality, collateral intrusion and risk have been suitably addressed individually for each [human source].*<sup>109</sup>

## Models of external oversight

### Involvement in decision making to register human sources

As outlined above, Victoria Police must obtain external approval, usually from a judge or magistrate, to use a range of covert powers such as telecommunications intercepts and surveillance devices. Whether to register a human source, however, is an internal police decision.

The United Kingdom's legislative regime requires an IPCO Judicial Commissioner to authorise the use of a human source from whom public authorities intend to obtain legally privileged information, in recognition of the important relationship between a lawyer and their client and the associated protections afforded to legally privileged information.<sup>110</sup>

Former police officer Dr Adrian James, Liverpool John Moores University, told the Commission that external involvement in law enforcement agency decisions about human sources is essential and can resolve the challenges that arise from purely internal registration processes, including that the applicant and the authorising officer are immersed in the same organisational cultures, values and behaviours and may share the same organisational goals.<sup>111</sup> Sir Jon told the Commission that the United Kingdom's regime—including IPCO's involvement in registrations—provides officers with a clear and consistent process for making challenging ethical decisions and gives them more confidence that they are making the right decisions.<sup>112</sup>

As noted earlier, some stakeholders told the Commission that, in certain situations, an external agency should be involved in decisions related to Victoria Police's registration of human sources.

The VI suggested that 'a proposal to recruit a high-risk source should trigger an external decision-making process, as in the [United Kingdom] model'.<sup>113</sup> Victoria Legal Aid suggested that a lawyer should not be registered or used as a human source unless an external oversight agency can be satisfied that there is no risk of a breach of professional obligations.<sup>114</sup>

IBAC and the PIM suggested that, should external oversight of human sources be introduced, an external agency could review or test certain applications or proposed decisions when dealing with prospective or registered human sources with legal obligations of confidentiality or privilege. This would be similar to the role that the PIM plays in the witness protection regime, where Victoria Police is the final decision maker.<sup>115</sup> IBAC also suggested this role could extend to other vulnerable and complex sources.<sup>116</sup>

The PIM noted that this involvement in decision making or 'active oversight' could be complemented by other mechanisms performed by a different agency, such as independent retrospective reviewing of Victoria Police's decision making and/or monitoring of its compliance. The PIM suggested that active oversight would be most effective if it included involvement both in the decision to register a human source with legal obligations of confidentiality or privilege, and in the decision to disseminate any confidential or privileged information received.<sup>117</sup>

The PIM also noted it would probably be the most suitable agency to undertake this type of external oversight (that is, involvement in decision making or 'active oversight') due to:

- its extensive experience in testing applications for covert powers
- its operating hours (24 hours a day, seven days a week)
- its existing governance and security to manage highly sensitive information
- the success of its involvement in the witness protection regime, which could provide a model for any comparable involvement in Victoria Police's decisions about the use and management of human sources with legal obligations of confidentiality or privilege.<sup>118</sup>

Victoria Police told the Commission it had considered a model in which the PIM would sit on the Human Source Ethics Committee, the internal decision-making body for certain high-risk sources, and provide 'external advice', but acknowledged that this would not constitute external oversight, which 'should properly occur completely separately from Victoria Police, that is, not by membership of the decision making body'.<sup>119</sup>

As noted above, Victoria Police told the Commission that the design of any external oversight model must consider associated risks, explaining that sharing any information about a human source makes it more likely that their identity will become known. It cautioned that appropriate safeguards would be needed to manage this risk.<sup>120</sup>

Victoria Police also stated that the current police oversight bodies may not currently have the expertise, operational knowledge and experience to oversee this specialised policing activity.<sup>121</sup>

In her evidence to the Commission, Ms Steendam explained that current internal decision-making processes within Victoria Police provide for registrations to occur more quickly in urgent circumstances, and noted that any external involvement in decision making would need to include processes for expediting registrations of human sources where it is appropriate to do so.<sup>122</sup>

## Review of decisions and monitoring compliance with the regulatory framework

As noted above, models for compliance monitoring and review of decisions in relation to the exercise of police powers in Victoria vary in form and intensity. The Commission heard different views about the utility of this type of oversight generally, and about the approach that could be adopted in any external monitoring of Victoria Police's use of human sources.

Some stakeholders emphasised the importance of monitoring an agency's records to assess compliance with legislative and regulatory requirements. IBAC told the Commission that this is a 'powerful tool in ensuring transparency and rigour' and that it requires engagement and consultation between the oversight and law enforcement agency, which can in turn drive positive organisational change.<sup>123</sup> The VI noted that external oversight involving inspections is effective where proper record keeping strongly encourages compliance with the substantive aim of a legislative requirement, such as prohibitions on, or permissions for, the use and communication of information. The VI said such an approach is particularly suitable where the actions being tested are performed using systems, such as telecommunications interception activities.<sup>124</sup>

Sir Jon identified several benefits arising from law enforcement agencies in the United Kingdom being subject to compliance inspections by IPCO and its predecessor, including:

- objective external scrutiny by experienced inspectors
- reducing the chance of poor and unprofessional record keeping
- providing a means of learning through analytical examination of the law enforcement agency's registrations to use human sources.<sup>125</sup>

Compliance monitoring can, however, have limitations. The IBAC Committee Inquiry noted that compliance-monitoring legislation often limits oversight bodies to assessing only whether an agency is acting in accordance with the law, rather than assessing how agencies perform their functions or directly examining its policies and procedures.<sup>126</sup> The VI suggested that inspection of a limited set of records may not reveal systemic or significant breaches of the law, particularly breaches that result from, or are enabled by, actions that are not required to be documented in that set of records.<sup>127</sup>

Sir Jon also highlighted the difficulties an oversight agency can encounter in assessing whether a law enforcement agency's formal records reflect operational practice. He explained that:

*... understanding what lies beneath the formal records is a continual challenge, not just for authorising officers but for wise and discerning independent regulators as well.<sup>128</sup>*

As noted earlier in this chapter, IBAC's role in relation to firearm prohibition orders provides an example of a more intensive form of monitoring that extends beyond whether records have been kept adequately, to whether police decisions made about the exercise of their powers are appropriate and justified.

The Firearms Act gives IBAC a broad remit to monitor Victoria Police's use of powers and the performance of its duties and functions relating to firearms prohibition orders.<sup>129</sup> It requires IBAC, among other things, to review a sample of firearm prohibition orders each quarter and determine whether each order should have been made,

having regard to the statutory criteria for making such orders and the information considered in making the order.<sup>130</sup> The Firearms Act also empowers IBAC to recommend any action it considers appropriate in relation to a reviewed order and requires the Chief Commissioner of Victoria Police to give a written response to that recommendation within 45 days.<sup>131</sup> It also requires IBAC to include in its annual report:

- the number of firearm prohibition orders it has reviewed
- the number of such reviews where it recommended action to the Chief Commissioner
- the number of recommendations the Chief Commissioner accepted (and, by implication, rejected).<sup>132</sup>

This arrangement seeks to balance the public interest in protecting police intelligence and methodology with the public interest in assuring the community that such orders, which limit the rights of those subject to them, are appropriate and justified.

Some compliance-monitoring regimes for the use of human sources also appear to have a broader scope than inspecting and reporting on record keeping:

- In the United Kingdom, IPCO monitors compliance with legislative requirements and other applicable guidance, including assessing the quality of human source management documentation and a law enforcement agency's assessment of necessity and proportionality.<sup>133</sup>
- In Australia, IGIS monitors intelligence agencies' human source management processes to ensure the agencies act legally and with propriety, comply with ministerial guidelines and directives, and respect human rights.<sup>134</sup>

External review of the appropriateness of police decisions and the related use of their powers and functions is a more in-depth form of compliance monitoring than records inspection. It is, however, a more time and resource intensive model and requires greater understanding of the various legal, operational and procedural factors relevant to decisions made.

The Commission heard that the timing, as well as the form of compliance monitoring is relevant to its effectiveness in holding police to account. For example, Victoria Legal Aid submitted that stronger, external oversight of Victoria Police's use of human sources should include oversight that occurs in 'real time' as investigations proceed, arguing that this would promote transparency and accountability.<sup>135</sup> Others have suggested that retrospective oversight is 'likely to be less rigorous than prior scrutiny' (that is, real-time oversight) and that it is easier for a law enforcement agency to prove that powers have been used appropriately during a retrospective inspection, once it has already obtained relevant evidence or intelligence from the use of those powers.<sup>136</sup>

## Reviewing and investigating complaints

Some stakeholders told the Commission that where there is no dedicated external oversight of the use of human sources by police services, oversight bodies should have jurisdiction to deal with complaints about police actions or decisions related to human sources (including, for some oversight agencies, own motion powers). In this context, Dr Adrian James emphasised that an independent complaints mechanism is an essential element of any oversight regime.<sup>137</sup>

However, the Commission also heard that there are limitations to a model of external oversight of police use of human sources that relies entirely on complaints. IBAC told the Commission:

*It is highly unlikely that persons adversely affected by Victoria Police's decisions or conduct in this highly covert area of operation would complain to IBAC (or any other agency) about any potential police misconduct, due to the secrecy and high level of risk to personal safety that is inherent in the human source relationship with law enforcement officers and bodies. In IBAC's view, this reality only makes external oversight over the management of human sources by Victoria Police all the more critical.*<sup>138</sup>

## Features of an effective external oversight model

This section outlines evidence before the Commission about the functions, powers and capabilities an oversight agency would need in order to provide effective external oversight of Victoria Police's use of human sources, if such a regime were introduced.

### Powers and governing framework

As outlined earlier in the chapter, external oversight arrangements for many Victoria Police powers and functions are set out in legislation. This ensures that the scope of oversight functions and powers, and corresponding police obligations, is clear. This is also the case in relation to oversight of human sources in the United Kingdom, with IPCO's functions and powers set out in the Investigatory Powers Act.

The Commission's review of relevant legislative regimes in Victoria and elsewhere indicated that the key elements of a legislative framework for external oversight are:

- a clear statement of the objectives of the oversight regime
- a clear statement of the oversight agency's functions and duties
- adequate powers for the oversight agency to perform its functions
- a corresponding obligation for Victoria Police and its officers to cooperate and assist the oversight agency
- an ability for the oversight agency to report on its work and make recommendations to Victoria Police
- the public release of reports, with sensitive information likely to jeopardise any person's safety, an investigation, a prosecution or national security, excluded.

### An oversight agency's objectives, functions and duties

Clearly setting out an oversight agency's objectives, functions and duties in legislation is important to:

- provide clarity to the agency and Victoria Police
- support transparency to the public
- ensure, to the extent possible, consistency in approach with the oversight regime for other covert powers exercised by Victoria Police.

Broadly, the functions of existing oversight agencies are outlined in similar terms across statutory oversight regimes in Victoria.

For example, the *Public Interest Monitor Act 2011 (Vic)* outlines the PIM's role in applications for police to use a range of covert and intrusive powers.<sup>139</sup> Similarly, the legislative regimes that enable the use of specific covert and intrusive powers and methods also set out the PIM's role.<sup>140</sup>

In the case of IBAC's and the VI's compliance-monitoring roles, common functions include:

- monitoring compliance with legislative requirements (with varying scope and intensity)
- conducting inspections
- in some cases, reviewing decisions and actions
- providing reports and, in some cases, making recommendations relating to the exercise of its functions.<sup>141</sup>

## An oversight agency's powers and Victoria Police's obligations to assist

Oversight agencies have similar types of powers across the various oversight regimes.

The PIM, in fulfilling its functions to test police applications or to inform police decisions, generally has the power to appear at hearings, access relevant records and/or ask questions and make submissions.<sup>142</sup>

Similarly, to fulfil their compliance-monitoring functions, the VI and IBAC generally (with some variations in the details) have powers to:

- enter premises of the law enforcement agency, after giving notice<sup>143</sup>
- access records, including to take copies and extracts<sup>144</sup>
- request relevant officers to give information, and/or attend before an inspecting officer and answer questions.<sup>145</sup>

Victoria Police has corresponding legislative obligations to assist oversight agencies in the performance of their functions, including:

- in relation to the PIM, an obligation to notify the PIM of a relevant application and provide copies of the application and of supporting material, along with copies of material that is adverse to the approval of the application<sup>146</sup>
- in relation to the VI and IBAC, an obligation to assist the agency in discharging its compliance-monitoring functions.<sup>147</sup>

Victorian oversight agencies told the Commission that powers to access law enforcement agencies' records and databases are critical to effective external compliance monitoring.

The VI identified the 'lack of access to information regarding the operational context for oversighted activities' as one of the challenges facing oversight agencies.<sup>148</sup> IBAC cautioned that while a prescriptive legislative inspection regime may be useful in defining an oversight agency's inspection functions, it would not be advantageous to provide an exhaustive list of materials that it may request.<sup>149</sup>

This sentiment was echoed during the Commission's consultations with agencies from interstate and international jurisdictions. For example, IPCO told the Commission that, under its legislative framework, it has unfettered access to all human source records and databases during inspections. It explained that it:

*... also has access to any associated [documents] used to record decisions and information falling outside the statutory considerations, which are viewed to enable deeper insight of how the [human source] is being operationally utilised and managed.*<sup>150</sup>

Similarly, Western Australia's Corruption and Crime Commission noted that it has undertaken reviews of Western Australia Police's use of human sources and was granted access to the police human source management database, including working expenses, rewards, letters of recognition, policy logs and critical decision logs. This allowed it to review police communications with each human source, where necessary.<sup>151</sup>

At the Commonwealth level, IGIS is empowered to inquire into any matter relating to ASIO's compliance with publicly available guidelines, which are issued by the Minister for Home Affairs under sections 8A(1) and 8A(2) of the *Australian Security Intelligence Act 1979* (Cth). To facilitate this, the guidelines require ASIO to ensure that IGIS and its authorised staff have effective access to all information held by ASIO (including relevant policies and procedures) and can retain information required to demonstrate its propriety and compliance with applicable laws.<sup>152</sup>

In terms of obligations on police, the Commission heard that it would be important for any external agency to 'be supported by powers to require Victoria Police officers to provide assistance to the oversight body in the exercise of its monitoring functions'.<sup>153</sup>

### Reporting requirements and recommendation-making powers

The Commission heard from a range of stakeholders about the reporting and recommendation-making powers and functions of external oversight agencies.

External oversight regimes in Victoria generally involve public reporting, with key features relating to:

- *Frequency*—compliance-monitoring reports are usually required annually, but under some regimes, the oversight agency can make special reports where it considers it necessary and/or at the request of the responsible Minister.<sup>154</sup>
- *Content*—generally, reports must cover the compliance or performance of the agency subject to oversight as well as the performance of the external oversight agency.
- *Recipient*—generally, the recipient is the responsible Minister and sometimes a copy is provided to the Chief Commissioner or Parliament.
- *Tabling in Parliament*—some legislative regimes specify that reports must be tabled in Parliament.<sup>155</sup>
- *Vetting*—mechanisms exist to remove from the report information that may endanger a person, prejudice a prosecution or compromise an investigation or methodology, before any public release of the report.<sup>156</sup>
- *Recommendations*—some regimes have specific provisions for the external oversight agency to make recommendations relating to the exercise of its functions.

The Commission heard that public reporting of compliance offers advantages including greater accountability and transparency in otherwise opaque areas of law enforcement practice, promoting community confidence in law enforcement agencies' practices, and informing the public about whether an agency is implementing necessary reforms or recommendations.<sup>157</sup> Sir Jon also noted that publishing an oversight agency's annual reports is a means to spread best practice.<sup>158</sup>

Some stakeholders stressed the need to ensure that public reporting does not expose human sources to increased safety or security risks, reveal law enforcement agencies' operational processes, or impose an unnecessary administrative burden.<sup>159</sup> IBAC, for example, noted that a public report might need to contain less detail than the reports provided in private to Victoria Police, to ensure the protection of sensitive police information.<sup>160</sup>

The Commission also heard from stakeholders regarding the ability of external oversight agencies to make and enforce recommendations.

IBAC told the Commission that the legislative power for external oversight agencies to make recommendations is most effective if accompanied by the power to require Victoria Police to act on, or respond to, those recommendations.<sup>161</sup> The VI told the Commission that, while engagement can be an effective way to encourage implementation, the ability to require Victoria Police to report on implementation within a reasonable timeframe would also be beneficial.<sup>162</sup>

The power to direct or recommend action, including within specified timeframes, is not without precedent in Victoria's oversight regimes. For example:

- The judge or magistrate responsible for issuing a surveillance device warrant 'may order any information obtained from or relating to the execution of the warrant or any record of that information be dealt with in the way specified in the order'.<sup>163</sup>
- The PIM may make recommendations to the Chief Commissioner about matters arising from the PIM's functions under the *Witness Protection Act 1991 (Vic)* and the Chief Commissioner must take the recommended action within a reasonable period or provide a written explanation to the PIM as to why that action has not or will not be taken.<sup>164</sup>
- After reviewing a firearm prohibition order to determine whether or not it should have been issued, IBAC may recommend to the Chief Commissioner that certain action should be taken and the Chief Commissioner must respond to that recommendation in writing within 45 days.<sup>165</sup> Additionally, IBAC is required to record how many recommendations it has made and how many the Chief Commissioner has accepted in IBAC's annual report.<sup>166</sup>

## Organisational capability and relationships

While the knowledge, experience and capabilities required by an external oversight agency's personnel depends on the agency's specific functions and powers, some stakeholders shared their views with the Commission about the broad capabilities that an oversight agency should have if it were responsible for overseeing the use of human sources. This included, for example, an understanding of the operating context in which human sources are engaged to gather intelligence and information.<sup>167</sup>

The International Commission of Jurists advocated for a judicially led oversight commission for human source management in Victoria similar to the United Kingdom's model, where IPCO consists of the Investigatory Powers Commissioner and a team of Judicial Commissioners.<sup>168</sup> Dr Buckley, former police officer in the United Kingdom, noted that one of the benefits of having judicial officers involved in the process of registering human sources is they 'ask the right questions'.<sup>169</sup>

The VI noted the importance of oversight agencies understanding, or having experience in, law enforcement functions.<sup>170</sup> It submitted that oversight agency personnel could be seconded to Victoria Police in the early stages of implementation to 'learn its systems, operational context, and contribute to its procedural development'.<sup>171</sup> The VI also told the Commission that it relies on good working relationships with Victoria Police to develop operational knowledge, which can otherwise be difficult to obtain.<sup>172</sup>

The United Kingdom Home Office told the Commission that police respond positively when oversight agencies take a pragmatic approach that shows understanding of operational requirements and pressures.<sup>173</sup> IPCO echoed this, noting that its Judicial Commissioners sometimes accompany inspectors to interact with agencies and obtain a clearer understanding of the operational practices related to activities they oversee. IPCO also told the Commission that before finalising inspections, it meets face-to-face with the handling team and senior officers to discuss its proposed findings, areas for improvement and positive feedback. In addition, as part of its commitment to fostering best practice human source management, IPCO attends training and other forums with public authorities and informs officers of the importance of legislative compliance and IPCO's role and functions.<sup>174</sup>

Stakeholders told the Commission that it is important for oversight agencies to have an open, collaborative and educative relationship with the agencies they oversee, but also stressed that maintaining the oversight agency's independence is critical.<sup>175</sup> For example, as noted earlier, while public authorities can seek general advice from IPCO on issues that fall within its legislative remit, it will not issue formal advice about specific operational decisions or issues, which could compromise or otherwise conflict with its independent oversight role.<sup>176</sup>

## Security arrangements

The Commission heard that it is essential for external oversight agencies to have robust security arrangements in place to handle sensitive and confidential information, such as information about or provided by human sources. For instance, strong security arrangements are required for similar covert methods and functions so that oversight bodies have appropriate access to databases and records, while also protecting the integrity and security of police investigations and the safety of members of the public they involve.<sup>177</sup> Ms Steendam noted the PIM and VI's current oversight of Victoria Police already navigate the sensitivities and issues associated with these similar methods.<sup>178</sup>

The PIM told the Commission that robust security arrangements could include appropriate clearances for staff and secure environments to store information.<sup>179</sup> The VI expressed similar views, adding that 'proper resourcing is pivotal, not just of inspection staff, but also of infrastructure and security—information management, personnel integrity, security vetting processes'.<sup>180</sup> The VI also observed the long lead times for security vetting for certain clearance levels for staff and suggested that setting and obtaining the appropriate clearance levels must be factored in to implementation timeframes for any external oversight regime.<sup>181</sup> Likewise, IBAC explained that due to the risk associated with additional agencies and individuals learning of the identity of a human source, external oversight should be clear, contained and safeguarded through appropriate processes and security settings.<sup>182</sup>

The Commission also notes that information security can be built into legislative and regulatory frameworks. For example, both the *Surveillance Devices Act 1999* (Vic) and Witness Protection Act require the PIM to return certain materials to police once it has fulfilled its functions.<sup>183</sup>

## Alignment with Victoria's current police oversight system

The Commission is mindful that it is desirable for any external oversight of Victoria Police's use of human sources to fit within Victoria's existing police oversight system, rather than introducing yet another body in an already crowded space.

This section outlines the challenges posed by the existing oversight framework, and opportunities to streamline police oversight in Victoria.

### Benefits of the current framework

The Commission heard that there are some benefits in dispersing police oversight functions across multiple agencies. For example, the VI noted that the current system:

- develops specialised knowledge and entities
- enables oversight entities to focus on their specific functions
- largely avoids conflicts of interests that could arise either from an agency overseeing powers it can also use, or from an agency reviewing or investigating a matter it had previously been involved in through its decision-making function
- provides consistent, system-wide oversight of a specific covert or intrusive power; for example, the VI oversees five agencies' use of controlled operations.<sup>184</sup>

IBAC noted that the VI and PIM's oversight functions and powers complement its own oversight functions and powers. Further, it observed that this 'tiered approach to oversight (or separation of roles between oversight bodies) strengthens the impartiality and independence of each agency by avoiding the centralisation of power in a single agency'.<sup>185</sup>

## Shortcomings of the current framework

The Commission also heard that the current oversight framework has shortcomings; specifically, that the institutional framework can cause duplication and fragmentation, and that legislation takes an inconsistent approach to oversight functions, powers and obligations.

IBAC told the Commission that the current system:

*... contains elements of fragmentation caused by a lack of role clarity around some areas of oversight, as well as inconsistencies in the type and level of oversight exercised by each agency. Broadly, this reflects a lack of [a] cohesive framework based on established oversight principles, the expansion of law enforcement powers and the ad hoc development of the integrity system as a check and balance on those increasing powers. Further, there are jurisdictional overlaps with the Commonwealth Ombudsman who has oversight of telecommunications interceptions along with VI. Different approaches are taken by different agencies to oversight often making it more onerous to meet or reconcile approaches.<sup>186</sup>*

IBAC stated that the lack of an overarching policy framework has the following consequences:

- *difficulties and inefficiencies for Victoria Police in implementing a planned response to compliance oversight and risk management*
- *dispersed effort across a range of agencies that undermines consistent, proportionate and planned compliance monitoring geared towards prevention and capability building*
- *a lack of transparency and consistency, alongside increased risks of monitoring [gaps], that undermines public confidence in the oversight of covert and intrusive powers of Victoria Police.<sup>187</sup>*

The VI also identified potential challenges with the current framework, including that it:

- may not provide an overall picture across the system or identify systemic problems
- may pose challenges for identifying and assessing connections between the use of different powers or activities
- may lead to the application of inconsistent oversight methodologies
- risks being complicated or confusing in practice.<sup>188</sup>

The VI pointed out that reporting obligations of oversight bodies are inconsistent, noting that ‘some Acts require public reports, some not, and the different Acts vary in their description of reporting obligations without clear reason’.<sup>189</sup> The Commission notes there are also inconsistencies in the prescribed content of reports, and in the VI and IBAC’s powers to monitor compliance.<sup>190</sup>

The VI also commented on information-sharing difficulties, a view shared by the PIM, who stated that:

*A disadvantage (perhaps inevitable) of this separation of functions is that it limits the scope for the sharing of information and experience that may be of interest to more than one agency.<sup>191</sup>*

## Streamlining oversight of investigatory powers

Given some of the shortcomings identified by stakeholders, the Commission considered the benefits and risks of streamlining or centralising oversight of certain covert powers used by Victoria Police.

IPCO told the Commission that its replacement of three predecessor agencies provided benefits including clarity, consistency and the ability to examine law enforcement agencies' powers more holistically.<sup>192</sup>

Victorian oversight agencies did not consider such an approach to be viable here. IBAC noted that while a centralised oversight model could provide a comprehensive response to the issues raised during the Commission, the creation of a new statutory entity is unnecessary because:

- a number of existing agencies already oversee Victoria Police's use of covert and intrusive powers and functions
- the cost and complexity of creating a United Kingdom style model far outweigh the benefits when balanced against the risks
- much of the legislation governing controlled operations, assumed identities and witness protection is based on national model laws, making a single Victorian statutory framework regulating all covert and intrusive powers infeasible.<sup>193</sup>

The VI agreed that consolidating oversight powers in one body is unlikely to be possible, given that relevant powers are contained in both state and Commonwealth legislation. However, the VI did identify potential advantages, noting that because existing legislation enables certain powers to be used together, consolidation would give the oversight body an overall picture of the use of covert and intrusive powers.<sup>194</sup>

While stakeholders agreed that consolidation of oversight is not viable, some suggested that there is a need for greater consistency in the approach to the oversight of covert and intrusive powers in Victoria.<sup>195</sup> For example, IBAC told the Commission:

*The development of a cohesive framework based on established principles that looks to the desired outcomes of police oversight in this context should exist to ... guide policy and legislative reform that [harmonise] the current patchwork of agencies and laws. Such a framework would create a basis for a more targeted oversight program design which would support greater efficiency and effectiveness through consistency, proportionality and responsiveness of oversight activity that prevents and detects risks and non-compliance.*<sup>196</sup>

## CONCLUSIONS AND RECOMMENDATIONS

Based on stakeholder views and other evidence obtained during its inquiry, the Commission concludes that the police oversight system in Victoria would be strengthened by establishing a dedicated external oversight regime for Victoria Police's use and management of human sources.

The Commission considers there are compelling reasons for such external scrutiny, including the potential intrusiveness of and inherent risks in the covert nature of human source management; and the need for greater accountability and transparency in Victoria Police's use of human sources.

It recommends the establishment of a tiered external oversight model, with the nature and intensity of oversight aligned to the level of risk associated with the use of different human sources and the information they provide. It proposes that:

- The highest level of scrutiny should apply to Victoria Police decisions relating to the registration of 'reportable human sources' (that is, human sources who are reasonably expected to have access to confidential or privileged information). A final decision to register such a source should involve the PIM (Tier 1 oversight).
- External monitoring of Victoria Police's legislative and regulatory compliance should apply to its use of all human sources and be conducted by IBAC (Tier 2 oversight).

- IBAC's existing jurisdiction to investigate and oversee complaints about serious police misconduct or corruption, including in relation to Victoria Police's use and management of human sources, should remain (Tier 3 oversight).

The Commission also considers that there may be merit in the Victorian Government undertaking a principle based review to bring greater coherence to the broader police oversight system, but notes that wholesale change is not warranted.

These conclusions and recommendations are discussed in turn below. The Commission also outlines key considerations regarding implementation of the proposed external oversight model, should this be introduced.

## **Introducing dedicated external oversight of Victoria Police's use of human sources**

Although the police oversight system in Victoria is more comprehensive now than when Ms Gobbo was a human source, there is still no legislated, external oversight regime for Victoria Police's use of human sources. This is the case even though, like other covert and intrusive methods, the use of human sources poses risks to human rights, individuals and the administration of justice.

The Commission is persuaded by the view put by several stakeholders that the absence of dedicated oversight of Victoria Police's use of human sources represents a significant gap in Victoria's police oversight system. Reasons to fill this gap, as outlined in this chapter and elsewhere in this report, are as follows:

- The use of human sources is a critical tool to prevent, detect and solve crime, and is likely to be increasingly important in the future as the effectiveness of other investigative methods diminishes through technological change and the growing sophistication of criminal networks.
- Over 20 reviews in as many years, both internal and external to Victoria Police, have consistently identified human source management as a high risk for Victoria Police, along with evidence of non-compliance with human source management policies and procedures and, in some cases, corrupt or improper conduct among officers.
- IBAC's jurisdiction to investigate police misconduct, triggered in large part by complaints or notifications, has limited utility given the covert nature of human source management and the unlikelihood of human sources, fearful for their and others' safety, making a complaint.
- External oversight would encourage Victoria Police compliance with procedural requirements and enable issues to be identified and addressed at an earlier stage.
- The greater accountability and transparency that external oversight brings would help to restore public confidence in Victoria Police's use of human sources.
- More broadly, external oversight would foster community confidence in Victoria Police and provide reassurance that it is not misusing its powers or infringing human rights.
- Given the covert nature of Victoria Police's use of human sources, there is a risk that without dedicated external oversight, future aberrant conduct—such as that examined by this Commission—would not be reported to Victoria's oversight agencies in a timely way.

The Commission acknowledges Victoria Police's view that current internal governance arrangements provide adequate safeguards in all but the highest-risk cases (namely, human sources involving legal obligations of confidentiality or privilege), and further that external oversight raises security concerns and risks discouraging people from becoming human sources.

The Commission is unconvinced by the first point. It notes, for example, the historical and ongoing concerns about Victoria Police's compliance with internal policies and procedures.

The second point requires careful attention in the design and implementation of the oversight model. The Commission draws comfort from evidence that external oversight of human sources in the United Kingdom does not appear to have affected the willingness of people to assist police<sup>197</sup> or to have led to the identities of human sources being leaked or becoming otherwise improperly known. In the Victorian context, there are also examples of mechanisms to ensure that external oversight of highly sensitive police work does not compromise individual safety and security, police methods, investigations or current prosecutions.

The Commission recommends that, to complement the legislative regime recommended and outlined in Chapter 12, the Victorian Government establishes a dedicated external oversight regime for Victoria Police's use and management of human sources to:

- provide assurance to the Victorian Government, Victorian Parliament and community that Victoria Police is using and managing human sources in a manner that is appropriate, ethical and effective
- foster continuous improvement in Victoria Police's human source management practices.

The Commission recommends that the external oversight regime be implemented within two years, recognising that the Government will need to consult with Victoria Police, Victorian oversight agencies and other relevant stakeholders, and further that it is desirable for the regime to commence at the same time as the commencement of the legislative framework for Victoria Police's use of human sources, as recommended in Chapter 12.

#### RECOMMENDATION 44

That the Victorian Government, within two years, implements legislation for external oversight of Victoria Police's registration, use and management of all human sources.

### A principle and risk-based external oversight model

The Commission heard that an oversight model should be underpinned by a clear set of principles. In Chapter 12, the Commission outlines a series of design principles to underpin its proposed human source management framework. Some of the principles articulated in that chapter are also relevant to the design of external oversight arrangements. For example, the Commission considers that any external oversight of Victoria Police's human sources should be guided by:

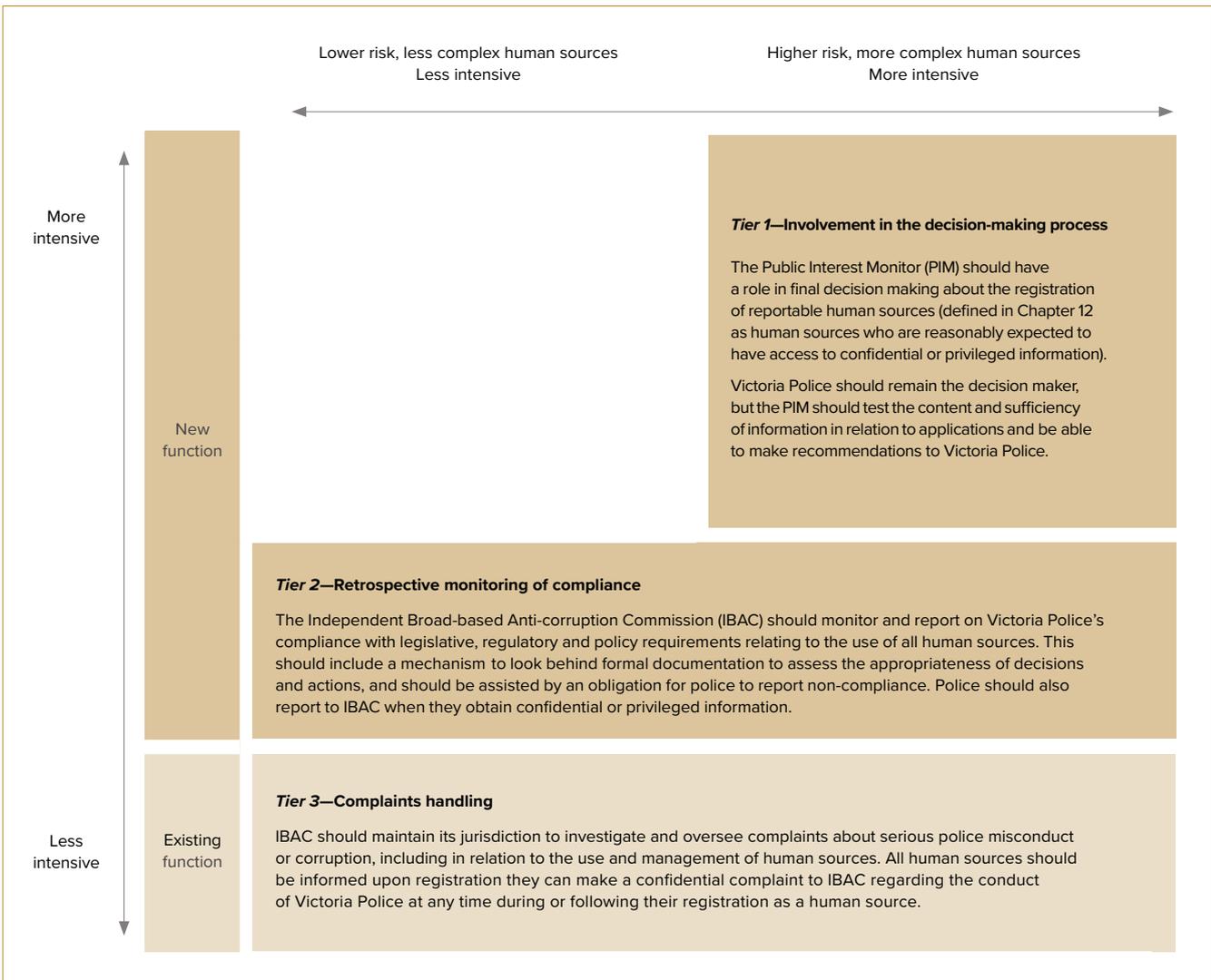
- *Necessity and proportionality*—more intensive oversight should be applied to higher-risk human sources and/or information from human sources, balancing the public interest in police having workable tools to prevent, investigate and prosecute crime, with the public interest in ensuring that the use of such tools is necessary, proportionate and justified.
- *Accountability*—the framework should support Victoria Police being accountable for its decisions about human sources and provide transparency to the public around the administration of human source management.
- *Effectiveness*—oversight functions should not only facilitate technical compliance, but also contribute to ethical decision-making and use of human sources; and oversight agencies should have the powers, capabilities and resources to fulfil their functions effectively.

- *Safety and sensitivity*—the oversight model should achieve its objectives without compromising the safety of any individual, exposing sensitive police methods, or prejudicing investigations or prosecutions.
- *Consistency*—to the extent possible, the oversight framework for human source management should align with the broader police oversight system.

### Overview of the proposed external oversight model

Figure 13.3 below summarises the tiered model for external oversight of Victoria Police’s use of human sources recommended by the Commission. It illustrates that the intensity of external oversight should be correlated to the level of risk involved in using a human source or the information they provide.

**Figure 13.3: Proposed external oversight model for the use of human sources by Victoria Police**



A tiered approach is supported by both IBAC and the VI and is broadly consistent with other Victorian oversight regimes.<sup>198</sup>

The Commission recommends that Tier 1 oversight be limited to the proposed registration of human sources who are reasonably expected to have access to confidential or privileged information (referred to by the Commission as ‘reportable human sources’).

This would allow for independent input in Victoria Police's decisions about the use of human sources in circumstances where there are greater risks to the administration of justice—that is, where the use of a human source could result in a prosecution being withdrawn, a trial being stayed or a conviction overturned.

The Commission considers that Tier 2 oversight should apply to *all* human sources used by Victoria Police, not just those involving legal obligations of confidentiality or privilege, because:

- an oversight model that is broader in scope would help to identify and remedy any circumstances where Victoria Police fails to identify, at the registration phase, that a human source falls into the 'reportable human source' category
- previous reviews and inquiries have highlighted risks and concerns surrounding the use of human sources other than those involving legal obligations of confidentiality or privilege (for example, risks related to improper handler–source relationships)
- external oversight would encourage sound, ethical and lawful practice across the entire Victoria Police human source program and, in so doing, make it more likely that appropriate standards will be observed in all cases
- an oversight model would provide assurance to human sources that their police handler is complying with relevant legislative and policy requirements, while also providing assurance to the police handler about the lawfulness of their actions
- the approach is supported by Victorian oversight bodies and other stakeholders
- external oversight of the use of all human sources is critical to restoring community confidence in this program and Victoria Police.

#### RECOMMENDATION 45

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, adopts a model comprised of the following three tiers:

- a. The Public Interest Monitor should be involved in Victoria Police's decision-making process for registering reportable human sources.
- b. The Independent Broad-based Anti-corruption Commission should retrospectively monitor Victoria Police's compliance with the human source management framework recommended by the Commission, including the proposed legislation, any regulations, Victoria Police's Human Source Policy and related procedures.
- c. The Independent Broad-based Anti-corruption Commission should continue to receive, handle and investigate complaints about Victoria Police, including any complaints about Victoria Police's use of human sources.

The Commission makes further recommendations related to each tier of the proposed external oversight model below.

The Commission is mindful that IBAC and a small number of other Victorian agencies also use human sources, and that regimes regulating the use of investigative powers and methods in Victoria typically apply to all law enforcement agencies with such powers. While outside the scope of its terms of reference, the Commission suggests, as outlined in Chapter 12, that the recommended new legislation for Victoria Police's use of human sources should apply to all Victorian agencies that use human sources subject to appropriate consultation. A logical extension of that

suggestion, if the Victorian Government accepts it, would be for the recommended external oversight regime to also apply to those agencies.

The Commission urges the Government to take these steps, following consultation with IBAC and other relevant stakeholders. The suggested extension of the external oversight regime to other agencies is discussed further later in this chapter.

## **Increasing scrutiny of Victoria Police decisions related to ‘reportable human sources’ (Tier 1)**

The Commission considers that the PIM should be involved in final decisions to register reportable human sources, noting that:

- stakeholder views support more intensive oversight for certain higher-risk human sources
- robust scrutiny at this early phase provides an opportunity to test the necessity and proportionality of the registration, and to identify and address any risks
- failure to follow a rigorous process and apply critical judgement at the registration phase can have significant consequences for the ongoing management of the human source, as Victoria Police’s experience with Ms Gobbo illustrates.

The Commission considered the possible adoption of the United Kingdom model, where an IPCO Judicial Commissioner approves the registration of human sources where an agency intends to obtain legally privileged information. This approach is similar to that adopted in relation to applications for surveillance device warrants, telecommunications interception warrants and other warrants in Victoria, which are determined by a magistrate or judge.

On balance, the Commission is not attracted to this approach. It considers that an appropriate level of scrutiny and rigour can be achieved without the formality of an independent agency, person or court making the final decision about whether to register a human source. In addition, casting the PIM in a decision-making rather than public interest advocacy role would be a significant departure from its current role in relation to other covert police powers (and from the roles of other Victorian oversight agencies).

Instead, the Commission considers that:

- Victoria Police, via the Chief Commissioner or delegate of or above the rank of Assistant Commissioner, should make registration decisions relating to reportable human sources.<sup>199</sup>
- The PIM should have a role in this decision making; namely, to advocate the community’s interest in a process that is necessarily private and shielded from public scrutiny and can result in decisions limiting a person’s human rights.

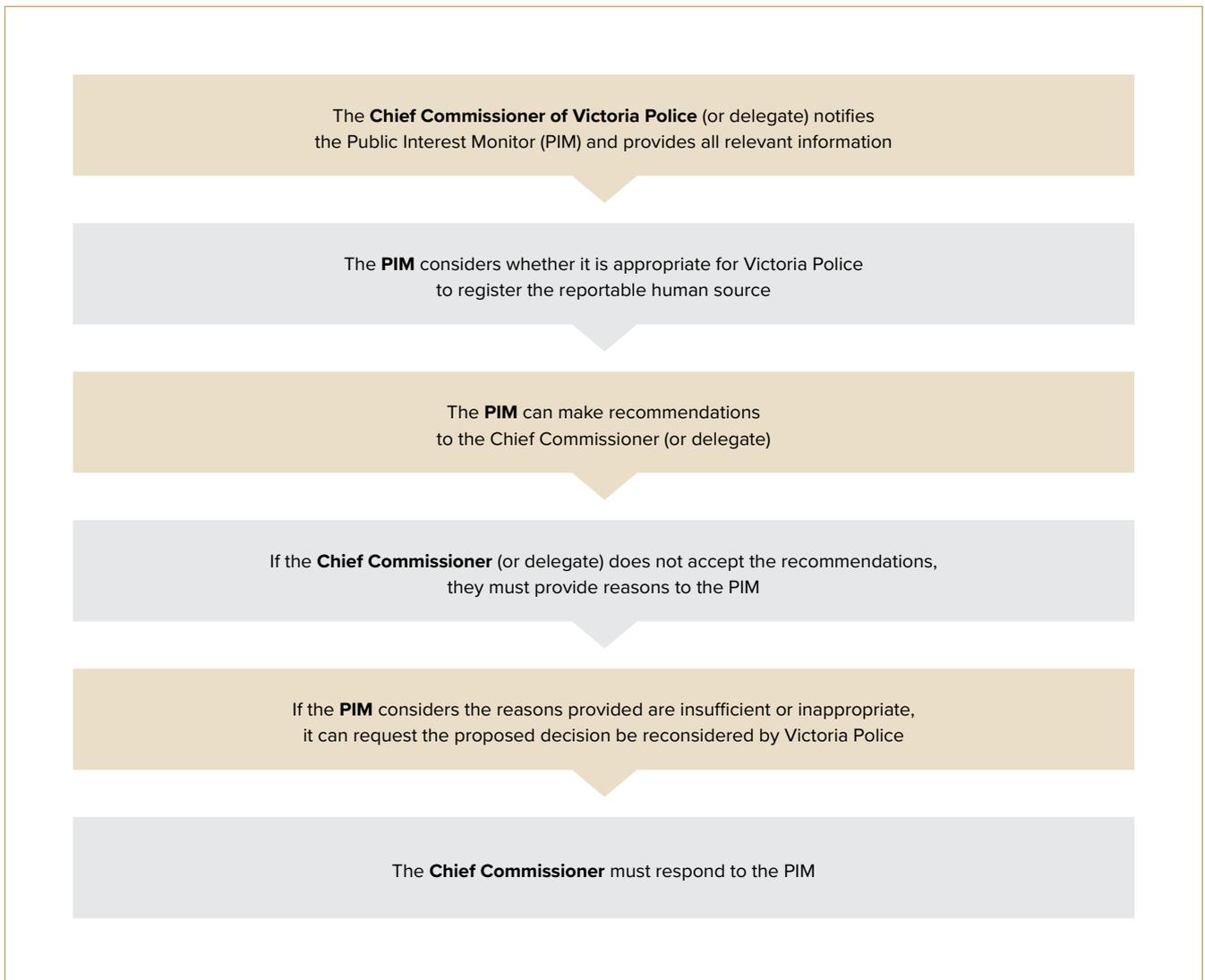
The Commission proposes that the PIM would fulfil its role by:

- testing whether applications for the registration of reportable human sources are necessary and proportionate to the law enforcement objective sought to be achieved
- testing whether the circumstances are sufficiently exceptional and compelling to warrant the registration of a reportable source where it is intended to obtain or disseminate confidential or privileged information (that is, where there is a serious threat to national security, the community, or the life and welfare of a person; and further, where the information is not able to be obtained through any other reasonable means)
- making recommendations to Victoria Police on the appropriateness of such decisions.

The PIM's proposed role is set out in Figure 13.4 below.

This model has precedent in Victoria, with the PIM performing a similar role in relation to Victoria Police decisions about witness protection, and a somewhat comparable public interest advocacy role in court applications relating to applications for surveillance devices and telecommunications interception.

**Figure 13.4: Overview of proposed role of the Public Interest Monitor in Victoria Police decisions to register reportable human sources**



### Scope of the Public Interest Monitor's involvement in the registration of reportable human sources

The PIM's involvement in the decision-making process is only recommended for the registration of reportable human sources. The Commission considers that it would be disproportionate and unnecessary for all human source registrations to be subject to this external oversight measure, noting the comprehensive compliance-monitoring scheme for 'Tier 2' proposed below.

As outlined in Chapter 12, the Commission considers that other complex or higher-risk human sources, such as people under the age of 18 years or with a serious mental or medical health condition, should also be defined as reportable human sources. This would mean any application for the registration of such a person as a human source would be subject to the more rigorous authorisation process, including the PIM's advice.

The Commission has not formally recommended the PIM's involvement in decisions relating to these types of human sources, as it falls outside the terms of reference and the Commission has not canvassed the views of key stakeholders from the youth and mental health sectors. Nevertheless, the Commission urges the Victorian Government to consult with relevant stakeholders, with a view to bringing registration and oversight requirements for these human sources into line with those for human sources potentially involving legal obligations of confidentiality and privilege.

Figure 12.4 in Chapter 12 sets out the Commission's recommended process for registering human sources. In summary, this process would involve the following steps for PIM involvement in final decisions regarding the registration of reportable human sources:

- The Victoria Police handling team submits an application for the registration of a human source to the Human Source Management Unit (HSMU).
- If identified as potentially a prospective reportable human source, the HSMU must obtain formal legal advice from the Victoria Police Legal Services Department or Victorian Government Solicitor's Office and submit the application and legal advice to the Central Source Registrar (CSR) for review and endorsement.
- If endorsed, the CSR progresses the application and advice to the Chief Commissioner (or delegate) for consideration.
- The Chief Commissioner (or delegate) notifies the PIM of the proposed registration of a reportable source and provides the PIM with all material relevant to the application (including the legal advice and any material adverse to the application).
- The Chief Commissioner (or delegate) decides whether to register the human source, taking into account whether their use is necessary and proportionate, and any recommendations of the PIM (as set out in Figure 13.4 above).

The Commission is aware that the requirement for the HSMU to obtain legal advice and for the PIM's involvement may seem duplicative; however, it considers that:

- The legal advice should assist the HSMU, CSR and Chief Commissioner to determine the nature of the information the prospective source has access to, or is reasonably expected to have access to (including whether it may be confidential or privileged information), and whether the proposed registration is necessary and proportionate.
- In cases where the CSR or Chief Commissioner is satisfied that registration is not appropriate, there would be no need to engage the PIM.
- In other cases where Victoria Police considers the registration is justified, the PIM would provide a critical external perspective on the merits of that proposed decision. The PIM's consideration would take into account the legal advice and other material related to the application, which should help expedite the PIM's assessment and resultant submissions or recommendations.

As noted in Chapter 12, the Commission recognises the importance of Victoria Police being able to act without delay in genuine emergency situations, such as where there is a serious and imminent threat to public safety. The procedures for registering a reportable human source in these circumstances are set out in more detail later in this chapter.

### **The Public Interest Monitor's functions relating to the registration of reportable human sources**

The Commission considers that the legislative functions of the PIM in relation to Victoria Police decisions to register reportable human sources should be based on its functions under the Public Interest Monitor Act and related legislation. This is for the same reasons set out there; to represent the public interest in what is necessarily a non-public decision-making process about the use of covert, intrusive and human rights-limiting powers and functions.

The PIM's functions should include:

- testing the content and sufficiency of information relied on in the application to register a reportable human source, including the risk assessment and any other material accompanying the application
- asking questions of any person giving information in relation to the application
- making submissions and recommendations on the appropriateness of, or justification for, registering the proposed human source.

In undertaking these functions, the PIM should consider whether the information supporting the application satisfies the test for registration of a human source set out in Chapter 12; that is, whether the registration is appropriate and justified.

In cases where it is specifically intended to acquire confidential or privileged information, the PIM should also consider whether there are sufficiently exceptional and compelling circumstances to justify the extraordinary step of obtaining or disseminating the information.

The PIM should also have regard to any other legislative, regulatory or policy requirements, and the risk posed by, and mitigation strategies proposed for, the registration of the human source.

#### **The Public Interest Monitor's functions where there are changes in the scope of the registration**

The Commission recognises that any human source could inadvertently or unexpectedly provide confidential or privileged information to Victoria Police.

In the case of a person registered as a non-reportable human source, this would in effect make them a prospective reportable human source. As set out in Chapter 12, the Commission recommends that the information should be quarantined and the human source's registration suspended. Victoria Police would need to commence a new application so that the person is subject to the more rigorous registration process associated with reportable human sources, including the PIM's involvement.

Similarly, where a reportable source was registered with no expectation that they would provide confidential or privileged information but ends up doing so, the information should be quarantined.

If, in either of these circumstances, Victoria Police wished to disseminate the confidential or privileged information, it would need to commence a new application seeking the Chief Commissioner or delegate's authorisation (informed by legal advice and the PIM's recommendation) that there are exceptional and compelling circumstances.

#### **RECOMMENDATION 46**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides the Public Interest Monitor with the following legislative functions in relation to Victoria Police applications to register reportable human sources:

- a. test the sufficiency and adequacy of information relied on by Victoria Police in its application to register a reportable human source
- b. ask questions of any person giving information about the application
- c. assess the appropriateness of, and make recommendations or submissions on, the application to the Chief Commissioner of Victoria Police or their delegate
- d. such other functions as considered necessary or appropriate.

## The Public Interest Monitor's powers

The Commission considers that the proposed new legislation must clearly set out all the PIM's powers, to ensure that both the PIM and Victoria Police have a clear understanding of their respective roles and responsibilities.

The PIM requires free and unfettered access to all documents and the power to ask questions of Victoria Police officers and decision makers, in line with its powers under other regimes. The PIM should also have clear powers to make submissions and recommendations to the Chief Commissioner (or delegate).

In Chapter 12, the Commission recommends that, when considering whether to register a reportable source, the Chief Commissioner (or delegate) should be required to have regard to the PIM's recommendations. As discussed further below, the legislation should also require the Chief Commissioner (or delegate) to, within a reasonable time, take the PIM's recommended action or advise the PIM as to why they have not taken, or do not intend to take, the recommended action.

Where, as is likely, the Chief Commissioner has delegated his or her power to make relevant decisions to a delegate of or above the rank of Assistant Commissioner, and that delegate has declined to take the recommended action, and the PIM is not satisfied with the delegate's reasons, the PIM should be able to escalate the matter administratively to the Chief Commissioner for re-consideration.

### RECOMMENDATION 47

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides the Public Interest Monitor with all necessary and reasonable powers required to fulfil its functions under the new legislation, including the power to:

- a. request, access and receive relevant documents, information or other material from Victoria Police
- b. require the Chief Commissioner of Victoria Police or other relevant Victoria Police personnel to answer questions relevant to an application to register a reportable human source
- c. make recommendations to the Chief Commissioner or their delegate regarding Victoria Police's decisions relating to human sources
- d. refer to the Chief Commissioner for reconsideration a delegate's decision not to accept a recommendation of the Public Interest Monitor relating to an application to register a reportable human source.

### Emergency authorisations

As noted in Chapter 12, the Commission recognises the importance of Victoria Police being able to act without delay in genuine emergency situations. In line with other police powers, such as those relating to surveillance devices, the Commission considers that Victoria Police should be able to register reportable human sources without PIM involvement in emergency situations.

The Commission considers that this would only be justifiable where there are both exceptional and compelling circumstances and the threat is imminent. As noted above, 'exceptional and compelling circumstances' means there is a serious threat to national security, the community or the life and welfare of a person, and the information is not able to be obtained through any other reasonable means.

Where this occurs, application materials should be provided to the PIM as soon as possible after registration and the PIM should be empowered to make submissions or recommendations to the Chief Commissioner or delegate about the adequacy of any decisions made or actions taken.

#### RECOMMENDATION 48

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, empowers the Public Interest Monitor to make retrospective submissions or recommendations to the Chief Commissioner of Victoria Police or their delegate about the adequacy of any decisions made or actions taken by Victoria Police in relation to an emergency authorisation (made in line with the process proposed in Recommendation 18).

### The Public Interest Monitor's reporting functions

The Commission recommends that the PIM should report at least annually to the Attorney-General, with a copy provided to the Minister for Police and Chief Commissioner, on the performance of its functions in relation to human sources. The PIM should also be empowered to make 'special reports' to the Attorney-General as it deems necessary or on the request of the Attorney-General. These provisions would promote accountability for, and transparency of, Victoria Police's use and management of human sources and align with the PIM's functions in relation to the witness protection regime.<sup>200</sup>

The annual report should include:

- the number of occasions on which Victoria Police notified the PIM of an application to register a reportable human source
- the number of occasions on which Victoria Police notified the PIM of an application to register a reportable human source where it intended to obtain or disseminate confidential or privileged information
- the number of occasions on which the Chief Commissioner notified the PIM of an urgent decision made to register a reportable human source, and whether the PIM was satisfied the circumstances warranted an emergency authorisation
- the number of occasions on which Victoria Police accepted or did not accept a recommendation made by the PIM
- the PIM's view of the adequacy of reasons given by Victoria Police where the PIM's recommendation was not accepted
- any other matter relevant to the PIM's functions.

To ensure transparency and accountability, the Attorney-General should be required to table any report by the PIM in Parliament and cause it to be published on an appropriate Victorian Government website. This is consistent with report tabling requirements under other oversight regimes in Victoria.

The Commission acknowledges that some information contained in reports might be sensitive or risk revealing the identity of the human source. It therefore proposes that the legislation should require the PIM not to include, in any version of a report to be tabled or published, information that may jeopardise the safety of any person, or compromise Victoria Police investigative methods or any current investigations or prosecutions. This obligation is the same as that applying to the PIM's reporting obligations under the Witness Protection Act.<sup>201</sup>

**RECOMMENDATION 49**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, requires the Public Interest Monitor to:

- a. report to the Attorney-General annually on, among other things, the performance of its legislative functions, Victoria Police's acceptance or rejection of its recommendations and its views about the adequacy of actions taken by Victoria Police
- b. provide special reports to the Attorney-General on other occasions if it deems necessary, or on the Attorney-General's request
- c. provide copies of these annual and special reports to the Minister for Police and the Chief Commissioner of Victoria Police.

**RECOMMENDATION 50**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, requires the Attorney-General to:

- a. table in the Victorian Parliament annual and special reports prepared by the Public Interest Monitor
- b. cause the reports to be published on a Victorian Government website, subject to any redactions that the Public Interest Monitor considers necessary on safety and security grounds.

**Victoria Police's obligations**

The Commission has carefully considered the obligations that should be placed on Victoria Police to comply with the proposed new oversight regime. Guidance in this regard can be taken from other regimes where Victoria Police has obligations to the PIM.

In Chapter 12, the Commission recommends that the Chief Commissioner (or delegate) must have regard to the submissions or recommendations of the PIM in making a decision to register a reportable human source.

To support the PIM's role in this process, the Commission recommends that Victoria Police be subject to additional obligations to notify the PIM of an application and intention to register a reportable human source and to provide the PIM with copies of all information supporting the application, including any content that is adverse to the registration or proposed use of the reportable human source. This would allow the PIM to make a proper assessment and test all relevant information.

Where the Chief Commissioner makes an emergency authorisation without engaging the PIM, Victoria Police should provide the PIM with details of the registration as soon as practical after it occurs. This would include the application, supporting material, any content adverse to the registration, and the reasons why an emergency authorisation was necessary. In these circumstances, the Chief Commissioner should also be required to explain to the PIM how the circumstances of the registration met the threshold for an emergency authorisation.

Consistent with requirements under other external oversight regimes, the Commission also considers that Victoria Police should be subject to a general obligation to provide reasonable assistance to the PIM to support it in exercising its functions.

**RECOMMENDATION 51**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides that the Chief Commissioner of Victoria Police has obligations to:

- a. notify the Public Interest Monitor of any application to register a reportable human source
- b. provide all information relevant to the application, whether supportive or adverse, to the Public Interest Monitor
- c. ensure that any relevant Victoria Police personnel provide information and answer questions relevant to an application when requested by the Public Interest Monitor
- d. provide the Public Interest Monitor with all information relevant to an emergency authorisation of a reportable human source and a report explaining why the circumstances were exceptional and compelling and why the threat was imminent
- e. respond to the Public Interest Monitor within a reasonable time after a recommendation has been made as to whether the recommended action has been or will be taken, or provide reasons as to why the recommendation is not accepted
- f. ensure that Victoria Police personnel provide all reasonable assistance to support the Public Interest Monitor in the performance of its functions.

## Monitoring compliance of Victoria Police's use of all human sources (Tier 2)

Tier 2 of the Commission's recommended oversight model involves retrospective monitoring of compliance with the human source management framework. As displayed in Figure 13.5 and discussed in further detail below, this aspect of the external oversight regime would:

- involve an external oversight agency conducting periodic inspections of Victoria Police records to monitor compliance with the framework governing the registration, use and management of all human sources
- allow the external oversight agency to look behind documentation to assess the appropriateness of Victoria Police decisions, ensure practice reflects formal records, and assess the adequacy of administrative policies and procedures
- require Victoria Police to report at regular intervals (for example, every three or six months) to the oversight agency when it has obtained confidential or privileged information from a human source, outlining how it has been or will be dealt with
- require Victoria Police to report to the oversight agency at regular intervals any material non-compliance with the human source management framework, along with steps taken to remedy any impact in the individual case and to avoid future recurrence
- allow the external oversight agency to make recommendations to the Chief Commissioner regarding any matter relating to its oversight functions

- require the external oversight agency to report to the Attorney-General annually (and at other times as it deems necessary or when requested by the Attorney-General) on Victoria Police compliance and related matters
- be tailored to ensure oversight mechanisms are proportionate to risk and benefits of the use and management of various types of human sources, and to avoid an unnecessary administrative burden on Victoria Police.

As noted above, the Commission recognises that Victoria already has a number of oversight agencies and it does not wish to add to this already crowded arena. As such, the Commission has considered which of the existing oversight agencies would be most appropriate to undertake this Tier 2 oversight function. It identified IBAC and the VI as the two most likely candidates.

The benefits of IBAC performing this role include that:

- It already monitors Victoria Police’s compliance with various legislative regimes enabling the use of covert and other investigative powers and functions, and some of its compliance-monitoring functions are more intensive than those exercised by the VI.
- The human source oversight function would sit comfortably with IBAC’s broader police integrity functions, noting that it can already conduct own motion investigations and may receive complaints about Victoria Police’s use of human sources.

By contrast, the advantages of the VI undertaking this role are:

- It already has compliance-monitoring functions in respect of certain other Victoria Police covert powers and functions, such as controlled operations, which sometimes involve the use of human sources.
- Unlike IBAC, it does not use human sources itself; consequently, there is no potential for a perceived or actual conflict arising from an agency overseeing the use of powers by Victoria Police that it also uses itself.

On balance, the Commission considers that the benefits of IBAC monitoring Victoria Police’s compliance with the human source management framework outweigh the benefits of the VI undertaking the role. It considers that any risk of conflict between IBAC’s own use of human sources and its monitoring of Victoria Police’s compliance should be manageable, particularly given the already existing ability for Victoria Police or members of the public to make complaints to the VI should there be any concerns about IBAC’s use of human sources.

An overview of IBAC’s proposed compliance monitoring role is displayed in Figure 13.5 below.

**Figure 13.5: Overview of proposed retrospective compliance-monitoring regime**



While outside the Commission’s terms of reference, in Chapter 12 the Commission urges the Victorian Government to extend the proposed new legislation to all Victorian agencies using human sources, including IBAC. As a logical extension, the Commission has also proposed that the recommended external oversight regime should also apply to those agencies. The significant risks, together with the benefits associated with Victoria Police’s use of human sources also exist for other agencies that use sources, even though their programs are of a lesser scale.

Should the Government accept this suggestion, the choice of agency to perform the function is a challenging one. In part, that is a measure of the complexity of the integrity framework that has evolved in Victoria. While not having consulted on this specific issue given the constraints of the terms of reference, the Commission suggests that, based on the current configuration of Victoria's integrity and oversight system, the VI is arguably the most appropriate compliance monitor of IBAC and the other agencies' use of human sources. The Commission acknowledges that this would result in both IBAC and the VI overseeing human source use in Victoria, and also that complexities could arise where, for example, Victoria Police uses a human source in a controlled operation, with IBAC responsible for overseeing the use of the human source and the VI the controlled operation.

The Commission does not want to see these complexities impede the swift implementation of the necessary reforms it has recommended in respect of Victoria Police. Whether the recommended legislative and oversight regime should apply to agencies other than Victoria Police, and which agency or agencies would be best suited to perform this oversight function, could be considered further alongside the broader review of the institutional and legislative framework for external police oversight that the Commission recommends later in this chapter.

The Commission is mindful that some stakeholders were critical of a retrospective compliance-monitoring approach, as it may not allow issues to be identified or external scrutiny applied in real time (that is, it may be too late to identify and rectify any issues of concern). The proposed 'Tier 1' oversight role of the PIM as an advocate in the decision-making process for the most sensitive and high-risk human source management decisions is intended in part to address this concern at the 'front end'; that is, before any use is made of a reportable human source. More extensive use of real-time monitoring, would, in the Commission's view, be:

- unworkable, given the sometimes extensive level of interaction between police and human sources and the need for police to respond quickly when taking actions or making decisions about a source's day-to-day management
- undesirable, as it would 'second-guess' police operational decision making, create a significant administrative burden, and dilute Victoria Police's primary responsibility for ensuring effective, efficient and ethical practice in the use of human sources
- unnecessary, as the proposed oversight model ensures transparency and encourages compliance and high professional and ethical standards.

## **Scope of IBAC's compliance-monitoring function**

For the reasons outlined above, the Commission considers that IBAC's compliance-monitoring functions should apply to Victoria Police's use and management of all human sources. To ensure proportionality, the intensity of compliance monitoring should be commensurate with the risk posed by categories of human sources and/or the information they provide, so that the purpose of external oversight can be achieved with the minimum possible administrative burden on Victoria Police.

## IBAC's compliance-monitoring functions

The Commission considers that IBAC should have legislative functions to monitor, make recommendations about and report on Victoria Police's compliance with the framework for the registration, use and management of all human sources. Consistent with other compliance-based oversight regimes in Victoria, these legislative functions should include conducting periodic inspections of Victoria Police records (for example, every six months).

The compliance-monitoring function should apply to the entire period of a human source's registration, not just the initial registration decision. The circumstances and risks associated with a human source can change over the period of their registration. The approach recommended by the Commission reflects that the use and management of a source—particularly where they are to be tasked and rewarded—involves significant risks throughout the entire period of registration, and sometimes, even after the source has been deactivated.

The Commission is mindful of evidence that traditional compliance-monitoring regimes focusing on matters such as record-keeping requirements, while beneficial, have their limitations. For example, if IBAC's role were limited to monitoring whether a risk assessment had been undertaken and documented, without considering the quality and adequacy of the risk assessment, its external oversight function may be of limited utility. The Commission therefore considers that IBAC should be able to look behind formal documentation to assess whether decisions made by Victoria Police are sound.

The Commission understands that this approach aligns with IPCO's oversight of human source management in the United Kingdom and IGIS' focus on the lawfulness and propriety of Australian intelligence agencies' use of human sources; and, in the Victorian context, bears some similarity to IBAC's existing compliance-monitoring functions in relation to firearm prohibition orders.

As the Commission proposes that compliance-monitoring should apply to all human sources (not just reportable human sources), and include an element of qualitative assessment in addition to technical compliance, it considers that the legislative framework should permit IBAC to discharge its functions by examining a representative sample of human source files for each reporting period. This approach is similar to IBAC's existing oversight of firearm prohibition orders, and with IPCO's compliance-monitoring approach in the United Kingdom,<sup>202</sup> and would provide IBAC with the ability to target its inspection activities; for example, based on common risks and themes identified in previous inspections.

The Commission notes that in the United Kingdom, public authorities are required to report compliance errors to IPCO, and to explain what is being done to prevent recurrence. This serves a specific purpose, as the Investigatory Powers Commissioner is required by law to disclose certain serious errors to affected persons. The Commission considers that reporting compliance errors or breaches to IBAC could have several benefits; namely, it could:

- provide additional rigour by requiring IBAC to assess whether any breaches or deviations warrant investigation or remedial action
- enable IBAC to assess whether appropriate remedial steps have been taken
- assist IBAC in discharging its compliance-monitoring functions
- help ensure early identification and rectification of emerging issues or concerns
- encourage Victoria Police to adopt cultural change and invest in and proactively manage internal compliance.

The Commission is mindful, however, that reporting all breaches or deviations could impose a significant administrative burden on Victoria Police and may be a disproportionate requirement for minor breaches. This reporting obligation should therefore be confined to material breaches of, or material deviations from, the human source management framework. The terms 'material breach' and 'material deviation' should be defined in consultation with IBAC and Victoria Police in developing the proposed new legislation, focusing on matters

that could have a significant adverse impact on the integrity of human source management, community confidence and/or the administration of justice. The Commission considers that Victoria Police should report regularly to IBAC on the occurrence of any such material breaches or material deviations (for example, every three or six months).

The Commission has also considered whether additional safeguards should apply to confidential or privileged information. This type of information, and its unintentional receipt, use, dissemination or retention by Victoria Police, has been a key focus of the Commission's work. Its improper use and management raise legal and ethical issues for Victoria Police and other agencies (such as the Office of Public Prosecutions). It can also have significant impacts on individuals and the broader criminal justice system. As discussed in Chapter 12, it is not always easy or possible for a police officer or the human source to determine whether information is confidential or privileged, and whether it is appropriate to provide, obtain or disseminate such information.

Consequently, as an added safeguard, the Commission considers that Victoria Police should report to IBAC at regular intervals (for example, every three or six months) on any confidential or privileged information it has obtained from a human source. This report should include how police have dealt with, or propose to deal with, that information (including the PIM's advice on the source's registration, how Victoria Police responded to it and any other measures it may have put in place). IBAC's role would include assessing such reports, confirming that mandated controls are in place and, if these measures are considered inadequate, making recommendations to improve internal procedure.

The Commission notes that law enforcement agencies in the United Kingdom must report the receipt from a human source of confidential and privileged information to IPCO, whose functions include ruling on whether privileged information should be destroyed or may be retained.<sup>203</sup> The Commission does not recommend IBAC be involved in these decisions, noting that it would not be consistent with IBAC's existing functions, and further that under the recommended model, the PIM would be engaged in final decisions about the registration of reportable sources and provide advice on the proposed use of that source and any confidential or privileged information they may provide. In addition, IBAC's regular review, as proposed above, would further assist Victoria Police to ensure this sensitive information is managed appropriately.

#### RECOMMENDATION 52

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides the Independent Broad-based Anti-corruption Commission with legislative functions to:

- a. monitor Victoria Police's compliance with the human source management framework recommended by the Commission
- b. conduct inspections of Victoria Police human source records at least once every six months
- c. receive and consider reports from Victoria Police regarding material breaches of compliance with, or material deviations from, the human source management framework
- d. receive and consider reports from Victoria Police regarding its management of confidential or privileged information obtained from a human source
- e. make findings and recommendations to the Chief Commissioner of Victoria Police.

## IBAC's powers and Victoria Police obligations

The Commission considers that IBAC should have the full suite of powers normally associated with compliance-monitoring and inspection regimes, including powers to enter premises; inspect, copy and take extracts from documents; ask questions; and request additional information. Further, the Chief Commissioner should have a legislative obligation to ensure that all officers and employees of Victoria Police give IBAC all reasonable assistance to discharge its functions.

In addition to the power to make recommendations to Victoria Police outlined above, IBAC should also have the power to examine whether and how they are implemented.

As noted above, the Chief Commissioner should also have specific legislative obligations, including to report at regular intervals on certain compliance breaches and on the management of confidential or privileged information obtained from human sources.

### RECOMMENDATION 53

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides the Independent Broad-based Anti-corruption Commission with all necessary and reasonable powers required to fulfil its legislative functions, including the power to:

- a. enter any Victoria Police premises, after notifying the Chief Commissioner of Victoria Police
- b. have full and free access to Victoria Police human source records and systems
- c. make copies of records, in accordance with appropriate security measures
- d. request Victoria Police personnel to answer questions and provide documents
- e. request further inspection outside the legislative inspection period to monitor and assess Victoria Police's implementation of any of its recommendations
- f. do any other thing reasonably necessary to discharge its legislative functions effectively.

**RECOMMENDATION 54**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, provides that the Chief Commissioner of Victoria Police has obligations to:

- a. report regularly (every three or six months) to the Independent Broad-based Anti-corruption Commission on any material breach of, or material deviation from, the human source management framework recommended by the Commission, and explain the circumstances of that breach and steps taken or planned to rectify the breach and prevent it recurring
- b. report regularly (every three or six months) to the Independent Broad-based Anti-corruption Commission on confidential or privileged information that Victoria Police has obtained from any human source and how that information has been or will be dealt with
- c. respond in writing within a reasonable time of receiving a recommendation of the Independent Broad-based Anti-corruption Commission, either to accept the recommendation or explain why it has not been accepted
- d. implement a recommendation of the Independent Broad-based Anti-corruption Commission within a reasonable time of receiving and accepting it
- e. ensure that Victoria Police personnel provide all reasonable assistance to the Independent Broad-based Anti-corruption Commission in the performance of its functions.

**IBAC's reporting functions**

The Commission considers that IBAC should have reporting and recommendation-making functions to foster transparency, accountability and a culture of continuous improvement in the use and management of human sources by Victoria Police.

The Commission considers that IBAC should be required to report annually to the Attorney-General on the performance of its legislative functions in relation to the use of human sources. The report should include:

- Victoria Police's compliance with the human source management framework, including the appropriateness of its decisions, based on a representative sample of cases
- the number and nature of material breaches or deviations reported by Victoria Police, and the nature and adequacy of remedial actions
- the dissemination of confidential or privileged information by Victoria Police
- any recommendations made by IBAC to Victoria Police and Victoria Police's response and progress in implementing them
- any other matters relevant to IBAC's compliance-monitoring functions under the proposed legislation.

To ensure that emerging issues can be raised in a timely manner, IBAC should also have the power to report to the Attorney-General at any other time it considers necessary. In addition, the Attorney-General should

be able to request a report when the Attorney-General considers it warranted. A copy of these reports should also be provided to the Chief Commissioner and the Minister for Police.

To ensure transparency and accountability and consistent with tabling requirements under other oversight regimes in Victoria, the Attorney-General should be required to table the IBAC's report in Parliament, and cause it to be published on an appropriate Victorian Government website.

Victoria's compliance-monitoring regimes already require oversight agencies, such as the VI and IBAC, to make public reports on sensitive police operational areas, such as controlled operations and surveillance devices. To minimise any risk to personal security, investigative methods or current investigations and prosecutions, the proposed legislation should require the IBAC to remove or redact any such content from the version of the report to be tabled or published.

In addition to reporting, IBAC's ability to recommend improvements to the administration of Victoria Police's human source management framework will be critical to the effectiveness of the oversight regime. IBAC's power to make recommendations should be comprehensive, including, for example, improvements to police policies and procedures. The Commission envisages that IBAC and Victoria Police would work closely and cooperatively on formulating and implementing recommendations, underpinned by the legislative requirements for the Chief Commissioner to either accept IBAC's recommendations or respond in writing explaining why they have not been accepted.

The Commission notes IBAC's compliance-monitoring role in respect of Victoria Police's use of firearm prohibition orders provides a good basis for such a model. In this scheme, the making of recommendations in individual cases occurs in private and is shielded from public scrutiny on account of the sensitive information involved, which, if released, could endanger a person, disclose police methods or compromise a current investigation or prosecution. Nevertheless, the scheme provides the community with a general insight into whether the exercise of police powers was appropriate and justified through the mandatory public reporting of the number of recommended actions and how often Victoria Police took these actions.

#### RECOMMENDATION 55

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, requires the Independent Broad-based Anti-corruption Commission to:

- a. report to the Attorney-General annually on, among other things, the performance of its legislative functions and Victoria Police's compliance with the human source management framework recommended by the Commission
- b. provide special reports to the Attorney-General on other occasions if the Independent Broad-based Anti-corruption Commission deems necessary, or on the Attorney-General's request
- c. provide copies of these annual and special reports to the Minister for Police and the Chief Commissioner of Victoria Police.

**RECOMMENDATION 56**

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, requires the Attorney-General to:

- a. table in the Victorian Parliament annual and special reports prepared by the Independent Broad-based Anti-corruption Commission
- b. cause the reports to be published on a Victorian Government website, subject to any redactions that the Independent Broad-based Anti-corruption Commission considers necessary on safety and security grounds.

## Reviewing and investigating complaints (Tier 3)

The Commission acknowledges that the investigation of complaints made about Victoria Police's use and management of human sources will remain a necessary part of the external oversight framework. IBAC's existing complaints-based jurisdiction would be complemented by the additional oversight arrangements proposed by the Commission in this chapter. Additionally, the Commission recommends that Victoria Police be required to inform human sources upon registration that they are able, at any time during or following their period of registration, to make a complaint to IBAC about the conduct of police officers, and that they may be afforded the protections available under the *Public Interest Disclosure Act 2012* (Vic).

Due to the different areas of focus between this Commission and the IBAC Parliamentary Committee, there is no significant overlap or intersection between this Commission's recommendations and those of the 2018 IBAC Committee Inquiry; nor are any recommendations from this Commission and the Committee's reports inconsistent.

The Commission does note that any efforts to strengthen IBAC's oversight functions and powers in relation to Victoria Police—to the extent that this will raise standards, ethical decision making and public confidence—will have collateral benefits for Victoria Police's human source management. The Commission therefore urges the Government to respond to the IBAC Parliamentary Committee's report, and implement any relevant recommendations, as a matter of priority.

**RECOMMENDATION 57**

That Victoria Police, within three months, implements changes to its Human Source Policy to require that all human sources are informed upon registration that they are able to make complaints to the Independent Broad-based Anti-corruption Commission, which may be confidential if they wish.

## Information sharing

Victorian oversight agencies told the Commission that constraints on the sharing of information between agencies can pose challenges.

To ensure that external agencies responsible for overseeing human source management have all relevant information to perform their functions, legislation should allow the PIM and external oversight agencies to share information where they reasonably believe such information is relevant to another agency's functions.

In the context of the Commission's recommended external oversight model, IBAC would undertake reviews after a reportable human source has been registered or after confidential or privileged information has been used or disseminated. The PIM would have been involved in making recommendations or submissions on these matters before the decisions are made (or soon after in emergency circumstances) and, therefore, would have an interest in the external oversight agency's review. This is both in terms of the specific case and the lessons it may contain for the PIM's consideration of, and recommendations in, future cases. This arrangement already exists for both these agencies in their respective oversight roles in Victoria's Witness Protection Program.<sup>204</sup>

The Commission is aware that information shared could be highly sensitive. It is therefore important that the external agencies are provided with sufficient capacity and infrastructure, and have appropriate protocols, to securely share, store and dispose of sensitive information. Additionally, external oversight agencies must have staff with the appropriate security clearances to receive and review the information provided by Victoria Police.

#### RECOMMENDATION 58

That the Victorian Government, in developing legislation for external oversight of Victoria Police's registration, use and management of human sources, allows the Public Interest Monitor and Independent Broad-based Anti-corruption Commission to securely share information relevant to their respective legislative functions regarding Victoria Police's use and management of human sources.

#### RECOMMENDATION 59

That the Public Interest Monitor and the Independent Broad-based Anti-corruption Commission, within two years and prior to the commencement of the proposed new legislation for external oversight of Victoria Police's registration, use and management of human sources, implement appropriate security protocols and infrastructure to securely receive, share, store and dispose of sensitive human source information.

## Implementation of the new oversight model

The Commission agrees with stakeholder views about the importance of careful, comprehensive and coordinated implementation planning and delivery to establish a successful new oversight model. Implementation planning would need to consider lead times and resources required to build organisational capacity and capability, develop secure systems and establish operating procedures.

### Capability, expertise and capacity

The Commission heard that external oversight regimes are most effective where the oversight agency understands the environment in which law enforcement agencies operate. This understanding is in addition to the technical capability required to discharge the oversight agency's functions.

The Commission notes that the PIM has the technical legal capability required to discharge its proposed functions of testing the content and sufficiency of applications to register a reportable human source.

A PIM (whether the Principal PIM or a Deputy PIM) must be an Australian lawyer<sup>205</sup> and the Commission observes that the Governor in Council has always appointed senior legal figures to these roles. This legal expertise may be supplemented by building the PIM's specific knowledge in relation to human source management; for example, through training and/or engagement with Victoria Police and IBAC. Modelling would also need to be undertaken

to determine whether the PIM has capacity, under its current resourcing model, to deal with the increased demand from this new jurisdiction; however, the Commission does not expect the increase to be substantial, noting that, as discussed in Chapter 12, of the approximately 1,200 human source registration applications submitted between July 2017 and June 2020, only about 4.4 per cent were potentially subject to legal obligations of confidentiality or privilege.<sup>206</sup>

The Commission notes that IBAC has the audit and compliance-monitoring capability required to discharge the functions recommended under the proposed model. Given that IBAC's jurisdiction is proposed to have more qualitative aspects than other covert powers monitoring regimes—in that it should inquire into the rigour and judgement applied in the making of decisions—it would be important for it to build organisational expertise around human source management in an operational policing context. This may occur through recruitment, training and/or engagement with Victoria Police and interstate or federal oversight agencies. As this would be a substantial new jurisdiction for IBAC, both in breadth and depth, modelling would need to be undertaken to ensure IBAC has the necessary staffing capacity, capability and resources to discharge its functions. Similarly, the Commission appreciates the VI may require similar planning and resourcing should it be given new oversight functions over IBAC and other agencies' use of human sources.

Stakeholders have mentioned the benefits of a cooperative model, whereby the external oversight agency could embed staff with Victoria Police to obtain a more in-depth understanding of its systems and procedures. The Commission believes that this could be a valuable approach to explore, but also emphasises the need to avoid developing an overly familiar relationship that could compromise the independence of the oversight agency.

## Security, funding and implementation governance

The Commission agrees with stakeholder views that security needs to be a primary focus in implementing external oversight of Victoria Police's use of human sources. The PIM and IBAC are accustomed to handling highly sensitive material under their existing legislative functions. Leveraging off these foundations, planning would be required to ensure that ICT systems and applications, operating procedures and clearance levels of personnel are robust and meet the risk profile required of human source management. These matters would need to be worked through by oversight agencies and Victoria Police.

IBAC told the Commission that any external oversight regime for human sources 'would need to be supported by legislation and ... sufficient investment by Government to both implement and maintain independent oversight'.<sup>207</sup> The Commission considers that the PIM and IBAC would require additional funding to fulfil their new oversight functions. Cost drivers may include additional staffing, training, infrastructure, information technology and personnel security, business applications and the development of new operating procedures. Victoria Police would also likely incur costs in adapting and responding to the new oversight model, which may not be able to be met through existing funding or internal reprioritisation.

Similar considerations of resourcing needs would apply to the VI, should it be given new oversight functions of IBAC and other agencies' use of human sources.

Chapter 17 deals with governance structures to monitor implementation of the Commission's recommendations. It will be important that, as part of this process, there is strong, central coordination of the implementation of the human source oversight arrangements proposed in this chapter.

**RECOMMENDATION 60**

That the Victorian Government, within two years, ensures that the Public Interest Monitor, the Independent Broad-based Anti-corruption Commission and Victoria Police are appropriately funded and resourced to undertake the additional legislative functions and fulfil associated obligations that the Commission has recommended for the external oversight of the use of human sources.

## A principle-based review of external oversight of police powers in Victoria

As outlined above, Victoria Police exercises investigatory and associated powers under a range of statutes that also establish specific external oversight regimes. The Commission heard that despite common themes (such as compliance monitoring and reporting), variation across these oversight regimes creates a system that is:

- fragmented—with different agencies performing like functions under the different regimes applicable to Victoria Police
- inconsistent—with variation in the form and substance of oversight agencies' functions, powers and reporting arrangements, and thus the type and level of oversight exercised
- limited—with a somewhat technical and procedural focus on compliance, rather than a more substantive assessment of whether decisions and actions are necessary, proportionate, ethical and justified.

The Commission heard that to some extent, the current configuration of the oversight system is not underpinned by principle or a sound policy rationale. Rather, to reiterate IBAC's view quoted above, the current oversight system:

*... contains elements of fragmentation caused by a lack of role clarity around some areas of oversight, as well as inconsistencies in the type and level of oversight exercised by each agency. Broadly, this reflects a lack of [a] cohesive framework based on established oversight principles, the expansion of law enforcement powers and the ad hoc development of the integrity system as a check and balance on those increased powers.<sup>208</sup>*

The Commission is mindful that the recommended oversight regime for the use of human sources unavoidably adds to the ad hoc development of Victoria's oversight system. The Commission also notes that the external oversight regime recommended in relation to human sources is in many ways more robust than regimes that apply to other police powers and methods.

Consequently, the Commission considers that there would be merit in the Victorian Government undertaking a principle-based review of the institutional and legal structure for the oversight of police powers in Victoria. It may be timely to undertake this review in tandem with the policy response to the 2018 IBAC Committee Inquiry. The potential benefits of such a review include:

- streamlining, consolidating or rebalancing oversight jurisdiction between existing integrity bodies to ensure clarity and coherence around roles, responsibilities and areas of specialisation, so that system design can best achieve the desired outcomes (such as good, ethical and accountable police practice, transparency and public confidence)
- shifting to a more meaningful, outcome-focused form of monitoring where the necessity, proportionality and justification of decisions made and actions taken is the focus of the assessment and reporting

- where possible and justified, ensuring that functions, powers and obligations are consistent across different oversight regimes, and proportionate to the level of intrusiveness and/or risk associated with the use of the police power
- easing the compliance burden for Victoria Police, while improving accountability.

The Commission recognises that such a review would not be a trivial undertaking. It would require extensive consultation with integrity bodies, law enforcement agencies, experts and stakeholders. Further, implementing any reforms arising from such a review would likely require legislative amendment and have a range of organisational and funding implications. These reforms would take time to complete.

Consequently, the Commission considers that its recommendations for external oversight of Victoria Police's use of human sources should be developed and implemented simultaneously with the proposed principle-based review, and not deferred pending the outcome of this review and any resultant reforms to the broader police oversight system.

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**RECOMMENDATION 61**

That the Victorian Government, within two years, undertakes a review of institutional and legislative structures for the oversight of Victoria Police's exercise of powers, to ensure that Victoria's police oversight system is consistent and coherent and contributes to improved police accountability, including through outcome-focused monitoring of police decisions and actions.

# Endnotes

- 1 *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Report, July 1989) 214. This Commission of Inquiry is also commonly known as the 'Fitzgerald Inquiry'.
- 2 *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 1 22 [2.13]. This Royal Commission is also commonly known as the 'Wood Royal Commission'.
- 3 Simon Bronitt and Philip Stenning, 'Understanding Discretion in Modern Policing' (2011) 35 *Criminal Law Journal* 319, 320.
- 4 Simon Bronitt and Philip Stenning, 'Understanding Discretion in Modern Policing' (2011) 35 *Criminal Law Journal* 319, 325.
- 5 Dr Cindy Davids, 'The Importance of Robust, Independent Police Oversight', *Independent Broad-based Anti-corruption Commission* (Web Page) <[www.ibac.vic.gov.au/publications-and-resources/ibac-insights/edition-9/the-importance-of-robust-independent-police-oversight](http://www.ibac.vic.gov.au/publications-and-resources/ibac-insights/edition-9/the-importance-of-robust-independent-police-oversight)>; Independent Broad-based Anti-corruption Commission, *Special Report Concerning Police Oversight* 2015 (Report, August 2015) 8; *Royal Commission into whether there has been Corrupt or Criminal Conduct by any Western Australian Police Officer* (Interim Report, 2002) 11 [3.1]; Crime and Misconduct Commission, *Police Move-on Powers: A CMC Review of their Use* (Report, December 2010) 12; *Royal Commission into the New South Wales Police Services* (Final Report, May 1997) vol 1, 27.
- 6 Clive Harfield, 'The Governance of Covert Investigation' (2010) 34(3) *Melbourne University Law Review* 773, 778.
- 7 Charl Crous, 'Human Intelligence Sources: Challenges in Policy Development' (2009) 5(3) *Security Challenges* 117.
- 8 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 October 2011, 4833 (Andrew McIntosh, Minister Responsible for the Establishment of an Anti-Corruption Commission).
- 9 United Nations On Drugs and Crime, *Handbook on Police Accountability, Oversight and Integrity* (United Nations Publications, 2011) 13, 16.
- 10 See, eg, 'Victoria Police Manual—Police Rules, Professional and Ethical Standards', *Victoria Police* (Web Page, 5 October 2016) <[https://content.police.vic.gov.au/sites/default/files/2019-01/VPMP\\_ProfStand.pdf#\\_ga=2.209753235.705653376.1567129626-1546423508.1559878996](https://content.police.vic.gov.au/sites/default/files/2019-01/VPMP_ProfStand.pdf#_ga=2.209753235.705653376.1567129626-1546423508.1559878996)>.
- 11 An exception to this is an allegation of any act or practice by Victoria Police against the *Privacy and Data Protection Act 2014* (Vic)—an allegation of this type must be made to the Office of the Victorian Information Commissioner.
- 12 Victoria, *Parliamentary Debates*, Legislative Assembly, 1 April 2004, 533 (Rob Hulls, Attorney-General).
- 13 *Crimes Act 1958* (Vic) s 464ZM.
- 14 For example, IBAC, the Game Management Authority, Victorian Fisheries Authority and Department of Environment, Land, Water and Planning can conduct controlled operations and use surveillance devices: *Crimes (Controlled Operations) Act 2004* (Vic); *Fisheries Act 1995* (Vic); *Wildlife Act 1975* (Vic); *Surveillance Devices Act 1999* (Vic).
- 15 Based on *Surveillance Devices Act 1999* (Vic) ss 12D, 30P–30R; *Surveillance Devices Act 2004* (Cth) ss 49A, 54–61A; *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 4D, pt 3 div 3; *Telecommunications (Interception and Access) Act 1979* (Cth) ss 44, 186B–186J; *Crimes (Controlled Operations) Act 2004* (Vic) ss 39, 42; *Fisheries Act 1995* (Vic) s 131W; *Wildlife Act 1975* (Vic) s 74S; *Terrorism (Community Protection) Act 2003* (Vic) ss 4F–G, 13AZZZB; *Firearms Act 1996* (Vic) ss 173, 174E–I; *Sex Offenders Registration Act 2004* (Vic) ss 70L–70O; *Witness Protection Act 1991* (Vic) ss 20C, 20J; *Crimes Act 1958* (Vic) ss 464ZM–464ZS; *Crimes (Assumed Identities) Act 2004* (Vic); *Public Interest Monitor Act 2011* (Vic) s 14; *Victorian Inspectorate Act 2011* (Vic) s 11; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 15.
- 16 *Surveillance Devices Act 1999* (Vic) s 17.
- 17 An application for a surveillance device warrant under the *Surveillance Devices Act 1999* (Vic); an application for a telecommunications interception warrant under the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Telecommunications (Interception) (State Provisions) Act 1988* (Vic); applications for a covert search warrant, a preventative detention order and a prohibited contact order under the *Terrorism (Community Protection) Act 2003* (Vic). Agencies are also required to notify the PIM when they make applications to use other powers, including applications for a coercive powers order, a retrieval warrant, an assistance order and an approval of an emergency authorisation: *Public Interest Monitor Act 2011* (Vic) ss 4, 14.
- 18 Public Interest Monitor, *Annual Report 2017–2018* (Report, August 2018) 4–5.
- 19 *Public Interest Monitor Act 2011* (Vic) s 14; Public Interest Monitor, *Annual Report 2017–2018* (Report, August 2018) 4; Department of Premier and Cabinet, *DPC Portfolios, Entities and Agencies* (Web Page, 28 August 2019) <[www.vic.gov.au/dpc-portfolio-entities-and-agencies#office-of-the-public-interest-monitor](http://www.vic.gov.au/dpc-portfolio-entities-and-agencies#office-of-the-public-interest-monitor)>.
- 20 *Terrorism (Community Protection) Act 2003* (Vic) s 6.
- 21 *Terrorism (Community Protection) Act 2003* (Vic) s 7A.
- 22 *Terrorism (Community Protection) Act 2003* (Vic) ss 4D–4E.
- 23 *Terrorism (Community Protection) Act 2003* (Vic) s 4F(1).
- 24 *Terrorism (Community Protection) Act 2003* (Vic) s 8(2)(e).

- 25 *Terrorism (Community Protection) Act 2003* (Vic) ss 4G–4I; *Witness Protection Act 1991* (Vic) ss 20I–20M. A police detention decision is a decision police make that enables them to take a person into custody and detain them for a period not exceeding four days (or not exceeding 36 hours in the case of a child) in order to: (a) prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days; or (b) preserve evidence of, or relating to, a recent terrorist act: *Terrorism (Community Protection) Act 2003* (Vic) ss 13AA–13AB.
- 26 *Witness Protection Act 1991* (Vic) ss 20K–20L.
- 27 *Witness Protection Act 1991* (Vic) s 20J.
- 28 *Witness Protection Act 1991* (Vic) s 20M.
- 29 *Witness Protection Act 1991* (Vic) s 20O.
- 30 Consultation with Public Interest Monitor, 28 November 2019.
- 31 *Witness Protection Act 1991* (Vic) ss 20R, 20P.
- 32 *Witness Protection Act 1991* (Vic) s 20R. There is no similar requirement for the Minister to table the PIM's report.
- 33 The VI has compliance functions in relation to the powers of Victoria Police, IBAC, the Game Management Authority, Victorian Fisheries Authority and Department of Environment, Land, Water and Planning.
- 34 Based on Victorian Inspectorate, *Annual Report 2017–2018* (Report, September 2018) 20; *Surveillance Devices Act 1999* (Vic) ss 30L, 30P–30Q; Victorian Inspectorate, *Report to the Parliament of Victoria pursuant to section 30Q of the Surveillance Devices Act 1999* (Report, February 2017) 5; Victorian Inspectorate, *Report to the Parliament of Victoria on Controlled Operations 1 July 2017 to 30 June 2018* (Report, March 2019) 4; *Crimes (Controlled Operations) Act 2004* (Vic) ss 38, 39, 42; *Witness Protection Act 1991* (Vic) ss 20B–G, 20R; *Terrorism (Community Protection) Act 2003* (Vic) s 37F. The Commonwealth Ombudsman also has a compliance-monitoring and reporting role in relation to Victoria Police's use of surveillance devices: see *Surveillance Devices Act 2004* (Cth) ss 55–61A.
- 35 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 5.
- 36 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 10(a).
- 37 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 11.
- 38 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 18.
- 39 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) ss 12–13.
- 40 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 21.
- 41 *Firearms Act 1996* (Vic) ss 174F–174H.
- 42 *Firearms Act 1996* (Vic) s 174F.
- 43 *Firearms Act 1996* (Vic) ss 174M–174N.
- 44 *Firearms Act 1996* (Vic) s 174I.
- 45 *Firearms Act 1996* (Vic) ss 174B–174C.
- 46 *Firearms Act 1996* (Vic) s 174D.
- 47 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 15.
- 48 Parliament of Victoria, Independent Broad-based Anti-corruption Commission Committee, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Report, September 2018) 56–8. Victoria Police sends IBAC 'notifications' when a complaint is made directly to Victoria Police or when it has commenced an investigation into police personnel misconduct or corruption: see, eg, *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 57(2)–(6); *Victoria Police Act 2013* (Vic) ss 169(2)–(3); *Public Interest Disclosure Act 2012* (Vic) s 22.
- 49 *Public Interest Disclosure Act 2012* (Vic) pt 6.
- 50 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 15.
- 51 Parliament of Victoria, Independent Broad-based Anti-corruption Commission Committee, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Report, September 2018) 56, 93–4.
- 52 Parliament of Victoria, Independent Broad-based Anti-corruption Commission Committee, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Report, September 2018) 5.
- 53 Parliament of Victoria, Independent Broad-based Anti-corruption Commission Committee, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Report, September 2018) 5.
- 54 *Victoria Police Act 2013* (Vic) ss 170, 179.
- 55 Parliament of Victoria, Independent Broad-based Anti-corruption Commission Committee, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Report, September 2018) 56.
- 56 A relevant example of IBAC's 'own motion' investigation powers that focused on Victoria Police's use of human sources was its 2015 Kellam Report: Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015).

- 57 Consultation with Australian Commission for Law Enforcement Integrity, 18 June 2019; Consultation with Queensland Crime and Corruption Commission, 19 August 2019; Consultation with South Australia Independent Commissioner Against Corruption, 13 June 2019; Consultation with New South Wales Law Enforcement Conduct Commission, 5 September 2019; Consultation with Tasmania Integrity Commission, 11 June 2019; Consultation with Northern Territory Ombudsman, 19 August 2019; Consultation with Northern Territory Independent Commission Against Corruption, 18 June 2019; Consultation with Western Australia Crime and Corruption Commission, 17 June 2019; Consultation with Commonwealth Ombudsman, 20 June 2019; New South Wales Ombudsman, *Operation Prospect* (Report, December 2016) vol 4; New South Wales Police Integrity Commission, *Operation Abelia: Research and Investigations into Illegal Drug Use by Some NSW Police Officers* (Report, September 2005) vol 2; Crime and Misconduct Commission Queensland, *Dangerous Liaisons—A report arising from a CMC investigation into allegations of police misconduct (Operation Capri)* (Report, July 2009).
- 58 New South Wales Ombudsman, *Operation Prospect* (Report, December 2016) vol 4; New South Wales Police Integrity Commission, *Operation Abelia: Research and Investigations into Illegal Drug Use by Some NSW Police Officers* (Report September 2005) vol 2; Crime and Misconduct Commission Queensland, *Dangerous Liaisons—A report arising from a CMC investigation into allegations of police misconduct (Operation Capri)* (Report, July 2009).
- 59 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 4.
- 60 Inspector-General of Intelligence and Security, *Annual Report 2018–2019* (Report, September 2019) 27. Following the 2017 *Independent Intelligence Review*, it was proposed that the IGIS' jurisdiction be expanded to cover the intelligence functions of four additional agencies: the Australian Federal Police, Australian Transaction Reports and Analysis Centre, the Australian Criminal Intelligence Commission and Home Affairs. See Department of Prime Minister and Cabinet, *2017 Independent Intelligence Review* (Report, June 2017); Inspector-General of Intelligence and Security, *Corporate Plan 2019–2020* (Report, August 2019) 4. At 30 October 2020, the recommendations of the 2017 Independent Intelligence Review were yet to be implemented.
- 61 Consultation with Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, 25 July 2019; Consultation with Canada Office of the Independent Police Review Director (Ontario), 6 November 2019; Consultation with New Zealand Independent Police Conduct Authority, 31 July 2019; Consultation with Police Ombudsman for Northern Ireland, 17 October 2019; Consultation with United Kingdom Independent Office for Police Conduct, 1 October 2019.
- 62 Consultation with Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, 18 September 2019; Consultation with Her Majesty's Inspectorate of Constabulary in Scotland, 4 October 2019; see, eg, Her Majesty's Inspectorate of Constabulary, *Inspection of HM Revenue & Customs Handling of Human Intelligence Sources* (Report, 2007); Her Majesty's Inspectorate of Constabulary, *Handling of Human Intelligence Sources—Revisited* (Report, 2010).
- 63 United States Department of Justice, Office of the Inspector General, *Audit of the Drug Enforcement Administration's Confidential Source Policies and Oversight of Higher-Risk Confidential Sources* (Report, July 2015); United States Department of Justice, Office of the Inspector General, *Audit of the Drug Enforcement Administration's Management and Oversight of its Confidential Source Program* (Report, September 2016); United States Department of Justice, Office of the Inspector General, *Public Summary of the Addendum to the Audit of the Drug Enforcement Administration's Management and Oversight of its Confidential Source Program* (Report, March 2017); United States Department of Justice, Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines* (Report, September 2005).
- 64 In the United Kingdom, a Judicial Commissioner is member of the senior judiciary and provides independent authorisation of applications for the use of certain investigatory powers. Judicial Commissioners cannot be appointed unless they hold or have held 'a high judicial office': *Investigatory Powers Act 2016* (UK) s 227(2).
- 65 *Investigatory Powers Act 2016* (UK) s 229(3)(e); Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 55 [9.2].
- 66 *Investigatory Powers Act 2016* (UK) ss 229–230; Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 55 [9.3], 56 [9.9].
- 67 *Investigatory Powers Act 2016* (UK) s 235.
- 68 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 56 [9.4].
- 69 *Regulation of Investigatory Powers (Source Records) Regulations 2000* (UK) SI 2000/2725; Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 36 [7.6].
- 70 Consultation with Investigatory Powers Commissioner's Office, United Kingdom, 12 September 2019.
- 71 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 56 [9.9].
- 72 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 48 [8.54]; *Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010* (UK), SI 2010/123, ss 3–4(2), 6.
- 73 Intelligence agencies, the Ministry of Defence and prisons must seek such authorisation from the United Kingdom's Secretary of the State instead of from a Judicial Commissioner. See Investigatory Powers Commissioner's Office, 'What is a Judicial Commissioner?', *FAQs* (Web Page, 27 February 2020) <[www.ipco.org.uk/default.aspx?mid=21.19](http://www.ipco.org.uk/default.aspx?mid=21.19)>.
- 74 *Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010* (UK), SI 2010/123, s 6(3).
- 75 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 49 [8.56].

- 76 A breach of human rights in itself is not necessarily a serious error: see *Investigatory Powers Act 2016* (UK) ss 231(1)–(3).
- 77 *Investigatory Powers Act 2016* (UK) s 231(9).
- 78 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 36–7 [7.10].
- 79 *Investigatory Powers Act 2016* (UK) s 231(9); Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 37 [7.12], [7.14].
- 80 Exhibit RC1541 Regulation of Investigatory Powers Act 2000 (UK) ss 65–9; *Regulation of Investigatory Powers (Scotland) Act 2000* (Scot) s 23; ‘How we fit in’, *The Investigatory Powers Tribunal* (Web Page, 5 July 2016) <[www.ipt-uk.com/content.asp?id=20](http://www.ipt-uk.com/content.asp?id=20)>.
- 81 *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2019] UKIPTrib 17\_186-CH.
- 82 Exhibit RC1952 Statement of Assistant Commissioner Neil Paterson, 5 March 2020, 13–14 [102]–[107]. A draft internal document prepared in 2018 also conveyed concerns about non-compliance with Victoria Police’s human source management policy requirements and procedures. While this draft document did not receive final endorsement by Victoria Police Executive Command, it was based on an assessment by a senior officer whose primary function is leadership and governance of the human source program: Exhibit RC1532b Victoria Police, *Human Source Strategy 2018–2022* (draft v 7), 2, 6–7, 13.
- 83 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 84 Submission 98 International Commission of Jurists, Victoria, 4–5.
- 85 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 76 [324], [326]–[327].
- 86 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 76 [324], 76–7 [327]–[328].
- 87 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 24 January 2020, 12358.
- 88 Consultation with Dr John Buckley, 12 September 2019. ‘HSM Training’ is a consultancy firm in the United Kingdom that provides human source training and consultancy services to law enforcement and other agencies.
- 89 Consultation with Victorian Inspectorate, 2 April 2020.
- 90 Consultation with Professor Alexandra Natapoff, 11 September 2019.
- 91 Arthur Moses, ‘Opinion Piece: Breach of Duties from Lawyer X, Police an Attack on Democracy and Justice’, *Law Council of Australia* (Web Page, 22 February 2019) <[www.lawcouncil.asn.au/media/news/opinion-piece-breach-of-duties-from-lawyer-x-police-an-attack-on-democracy-and-justice](http://www.lawcouncil.asn.au/media/news/opinion-piece-breach-of-duties-from-lawyer-x-police-an-attack-on-democracy-and-justice)>.
- 92 Law Council of Australia, ‘Lawyer X’s Conduct Unethical and Clear Breach of Rules’ (Media Release, 4 December 2018); Consultation with Law Council of Australia, 3 October 2019.
- 93 Submission 112 Victoria Legal Aid, 3.
- 94 Submission 101 Australian Institute of Policing, 13–14.
- 95 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 77 [328].
- 96 Transcript of Sir Jonathan (Jon) Murphy, 13 May 2020, 14983. Sir Jon was also a former Chief Constable at Merseyside Police, former Assistant Chief Constable at the National Crime Squad and a member of the Association of Chief Police Officers, United Kingdom.
- 97 Consultation with Public Interest Monitor, 28 November 2019.
- 98 Consultation with Public Interest Monitor, 28 November 2019; Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 99 Consultation with Independent Broad-based Anti-corruption Commission, 25 November 2019; Consultation with United Kingdom Investigatory Powers Commissioner’s Office, 12 September 2019.
- 100 Consultation with Public Interest Monitor, 28 November 2019; Consultation with United Kingdom Investigatory Powers Commissioner’s Office, 12 September 2019.
- 101 Exhibit RC1529 Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 76 [326].
- 102 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 103 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 104 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 105 Consultation with Victorian Inspectorate, 2 April 2020.
- 106 Exhibit RC1529 Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 76–7 [327].
- 107 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 108 Consultation with United Kingdom Investigatory Powers Commissioner’s Office, 12 September 2019; Investigatory Powers Commissioner’s Office (UK), *Annual Report 2017* (Report, January 2019) 17–18.
- 109 Consultation with United Kingdom Investigatory Powers Commissioner’s Office, 12 September 2019; Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 16 [3.9]. The Code of Practice describes ‘collateral intrusion’ as interference with the private or family life of persons other than the human source.

- 110 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 48–9 [8.55]–[8.57]; United Kingdom, *Parliamentary Debates*, Grand Committee, 15 December 2011, col GC363 <<https://publications.parliament.uk/pa/ld201011/ldhansrd/text/111215-gc0001.htm>>.
- 111 Consultation with Dr Adrian James, 6 November 2019.
- 112 Transcript of Sir Jonathan (Jon) Murphy, 13 May 2020, 14981–2.
- 113 Consultation with Victorian Inspectorate, 2 April 2020.
- 114 Submission 112 Victoria Legal Aid, 2.
- 115 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020; Consultation with Public Interest Monitor, 11 March 2020.
- 116 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 117 Consultation with Public Interest Monitor, 11 March 2020.
- 118 Consultation with Public Interest Monitor, 11 March 2020.
- 119 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 49–50 [229], 78 [329].
- 120 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 77 [328].
- 121 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 78 [331].
- 122 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14882.
- 123 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 124 Consultation with Victorian Inspectorate, 2 April 2020.
- 125 Consultation with Sir Jonathan (Jon) Murphy, 11 October 2019.
- 126 Parliament of Victoria, Independent Broad-based Anti-corruption Commission Committee, *A Framework for Monitoring the Performance of the Independent Broad-based Anti-corruption Commission* (Report, November 2017) 31.
- 127 Consultation with Victorian Inspectorate, 2 April 2020.
- 128 Consultation with Sir Jonathan (Jon) Murphy, 11 October 2019.
- 129 *Firearms Act 1996* (Vic) s 173.
- 130 *Firearms Act 1996* (Vic) s 174F.
- 131 *Firearms Act 1996* (Vic) s 174I.
- 132 *Firearms Act 1996* (Vic) s 172(2). The firearms prohibition order regime was introduced in May 2018. At 30 October 2020, there had been two IBAC annual reports since the regime commenced operation. The 2018/19 Annual Report indicated ‘IBAC case-reviewed 30 firearms prohibition orders and made no recommendations for action’. In 2019/20, this increased to 35 case-reviews and one recommendation: Independent Broad-based Anti-corruption Commission, *Annual Report 2018–19* (Report, 29 October 2019) 70; Independent Broad-based Anti-corruption Commission, *Annual Report 2019–20* (Report, 29 October 2020), 65.
- 133 Investigatory Powers Commissioner’s Office (UK), *Annual Report 2017* (Report, January 2019) 21; Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 45 [8.36].
- 134 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 4.
- 135 Submission 112 Victoria Legal Aid, 3.
- 136 G Ferguson and J Wadham, ‘Privacy’ [2003] EHRLR, Special Issue, as cited in Simon McKay, *Covert Policing: Law and Practice* (Oxford University Press, 2nd ed, 2015) 384.
- 137 Consultation with Dr Adrian James, 6 November 2019.
- 138 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 139 *Public Interest Monitor Act 2011* (Vic) ss 3, 14.
- 140 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 4D; *Surveillance Devices Act 1999* (Vic) s 12D; *Terrorism (Community Protection) Act 2003* (Vic) s 4F.
- 141 An overview of IBAC and VI’s compliance-monitoring functions and powers are contained in this chapter, under ‘Current external oversight of Victoria Police’.
- 142 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 4D; *Surveillance Devices Act 1999* (Vic) s 12D; *Terrorism (Community Protection) Act 2003* (Vic) s 4F.
- 143 See, eg, *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 18; *Surveillance Devices Act 1999* (Vic) s 30P; *Witness Protection Act 1991* (Vic) s 20E; *Firearms Act 1996* (Vic) s 174M.
- 144 See, eg, *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 18; *Surveillance Devices Act 1999* (Vic) s 30P; *Witness Protection Act 1991* (Vic) s 20E; *Firearms Act 1996* (Vic) s 174M.

- 145 See, eg, *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) ss 18–19; *Surveillance Devices Act 1999* (Vic) s 30P; *Witness Protection Act 1991* (Vic) s 20E; *Firearms Act 1996* (Vic) s 174M.
- 146 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) ss 4A–4B; *Surveillance Devices Act 1999* (Vic) ss 12B–12C; *Terrorism (Community Protection) Act 2003* (Vic) ss 4D–4E; *Witness Protection Act 1991* (Vic) s 20L.
- 147 See, eg, *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 18; *Surveillance Devices Act 1999* (Vic) s 30P; *Witness Protection Act 1991* (Vic) s 20D; *Firearms Act 1996* (Vic) s 174N.
- 148 Consultation with Victorian Inspectorate, 2 April 2020.
- 149 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 150 Consultation with United Kingdom Investigatory Powers Commissioner's Office, 12 September 2019.
- 151 Consultation with Western Australia Corruption and Crime Commission, 17 June 2019; Consultation with Western Australia Police, 24 September 2019.
- 152 Minister for Home Affairs, *Minister's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functions and the exercise of its powers* (August 2020) 5–6 [1.12]–[1.13].
- 153 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 154 See, eg, *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 12; *Firearms Act 1996* (Vic) s 174; *Sex Offenders Registration Act 2004* (Vic) s 700.
- 155 *Crimes (Controlled Operations) Act 2004* (Vic) s 39; *Crimes (Assumed Identities) Act 2004* (Vic) s 31; *Sex Offenders Registration Act 2004* (Vic) s 700; *Firearms Act 1996* (Vic) s 174D; *Terrorism (Community Protection) Act 2003* (Vic) s 37d; *Surveillance Devices Act 1999* (Vic) ss 30R, 30Q; *Surveillance Devices Act 2004* (Cth) s 61; *Crimes Act 1958* (Vic) s 464zp; *Telecommunications (Interception and Access) Act 1979* (Cth) s 186J.
- 156 The public release of a report most commonly occurs after it has been tabled in Parliament.
- 157 Consultation with Independent Broad-based Anti-corruption Commission, 11 September 2020; Consultation with Victorian Inspectorate, 15 September 2020.
- 158 Consultation with Sir Jonathan (Jon) Murphy, 11 October 2019.
- 159 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 77 [328]; Consultation with Independent Broad-based Anti-corruption Commission, 25 November 2019; Consultation with Victorian Inspectorate, 15 September 2020.
- 160 Consultation with Independent Broad-based Anti-corruption Commission, 25 November 2019.
- 161 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 162 Consultation with Victorian Inspectorate, 2 April 2020.
- 163 *Surveillance Devices Act 1999* (Vic) s 30K.
- 164 *Witness Protection Act 1991* (Vic) s 20O.
- 165 *Firearms Act 1996* (Vic) s 174I.
- 166 *Firearms Act 1996* (Vic) s 172(2).
- 167 See, eg, Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 77 [328]; Consultation with Victorian Inspectorate, 15 September 2020.
- 168 Submission 98 International Commission of Jurists, Victoria, 20.
- 169 Consultation with Dr John Buckley, 12 September 2019.
- 170 Consultation with Victorian Inspectorate, 2 April 2020.
- 171 Consultation with Victorian Inspectorate, 2 April 2020.
- 172 Consultation with Victorian Inspectorate, 2 April 2020.
- 173 Consultation with United Kingdom Home Office, 13 November 2019.
- 174 Consultation with United Kingdom Investigatory Powers Commissioner's Office, 12 September 2019.
- 175 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020; Submission 117 Adjunct Professor, Colleen Lewis, 5–6; Consultation with Public Interest Monitor, 28 November 2019.
- 176 Consultation with United Kingdom Investigatory Powers Commissioner's Office, 12 September 2019; Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 56 [9.9].
- 177 For example, the PIM has security structures and systems in place to ensure it can carry out its functions in relation to the Witness Protection Program: see Frank Vincent, *Review of the Witness Protection Act 1991* (Report, March 2016) 51.
- 178 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14878–9.
- 179 Consultation with Public Interest Monitor, 28 November 2019.

- 180 Consultation with Victorian Inspectorate, 2 April 2020.
- 181 Consultation with Victorian Inspectorate, 20 November 2019; Consultation with Victorian Inspectorate, 15 September 2020.
- 182 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 183 *Surveillance Devices Act 1999* (Vic) s 12D(3); *Witness Protection Act 1991* (Vic) s 20N.
- 184 Consultation with Victorian Inspectorate, 2 April 2020.
- 185 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 186 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 187 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 188 Consultation with Victorian Inspectorate, 2 April 2020.
- 189 Consultation with Victorian Inspectorate, 2 April 2020.
- 190 See, eg, *Sex Offenders Registration Act 2004* (Vic) s 70N. To assist with its role in monitoring Victoria Police's compliance with reporting obligations and managing of the Sex Offenders Register, IBAC can enter premises, inspect or copy any document found and 'do anything necessary or convenient to do to enable an inspection to be carried out'. Conversely, while the VI has inspection powers under section 30P of the *Surveillance Devices Act 2004* (Vic), it has no powers of entry but is entitled to full and free access of records and may require a member of staff of the agency being inspected to give the VI any information the VI considers necessary.
- 191 Consultation with Victorian Inspectorate, 2 April 2020; Consultation with Public Interest Monitor, 11 March 2020.
- 192 Consultation with United Kingdom Investigatory Powers Commissioner's Office, 12 September 2019.
- 193 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 194 Consultation with Victorian Inspectorate, 2 April 2020.
- 195 Consultation with Victorian Inspectorate, 2 April 2020; Consultation with Independent Broad-based Anti-corruption Commission, 20 April 2020.
- 196 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.
- 197 Exhibit RC1540 Statement of Sir Jonathan (Jon) Murphy, 28 April 2020, 6 [42]; Transcript of Sir Jonathan (Jon) Murphy, 13 May 2020, 14983.
- 198 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020; Consultation with Victorian Inspectorate, 2 April 2020.
- 199 Subsequent references in this chapter to the Chief Commissioner (in the context of decision making about reportable human sources) mean the Chief Commissioner or their senior delegate of or above the rank of Assistant Commissioner.
- 200 *Witness Protection Act 1991* (Vic) s 20P.
- 201 *Witness Protection Act 1991* (Vic) s 20P.
- 202 Investigatory Powers Commissioner's Office (UK), *Annual Report 2017* (Report, January 2019) 18.
- 203 Home Office (UK), *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) 45 [8.36], 47 [8.48], 53 [8.72]–[8.75].
- 204 *Witness Protection Act 1991* (Vic) s 20C(c). The Act specifies that one of IBAC's functions is to provide to the Public Interest Monitor 'any information that the IBAC reasonably considers is relevant to the performance of the functions' under the Act.
- 205 *Public Interest Monitor Act 2011* (Vic) s 8(1).
- 206 As discussed in Chapter 12, this data is based on people identified as either a lawyer, doctor, parliamentarian, court official, journalist or priest (described by Victoria Police as 'Category 1' human sources or the 'Kellam Occupations'); or belonging to one of the following occupation categories: medical, parliament, government, religious, journalist (based on a manual search of human source files by Victoria Police). The Commission has manually adjusted the data to eliminate double counting of people belonging to both categories (for example, a doctor also identified as belonging to the 'medical' category). The data does not include people identified as having a 'connection to' a Category 1 human source (for example, the spouse of a lawyer), as introduced under the May 2020 version of the Human Source Policy.
- 207 Responsive submission, Independent Broad-based Anti-corruption Commission, 15 September 2020, 5.
- 208 Consultation with Independent Broad-based Anti-corruption Commission, 24 April 2020.



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**Royal Commission  
into the Management of Police Informants**

# Final Report

Volume IV

NOVEMBER 2020

**Royal Commission  
into the Management of Police Informants**

**Final Report**  
**Volume IV**

**The Honourable Margaret McMurdo, AC**  
Commissioner

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**ORDERED TO BE PUBLISHED**

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# 14

## The use and disclosure of information from human sources in the criminal justice system

### INTRODUCTION

Term of reference 4 required the Royal Commission to inquire into and report on the current use of information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege. Term of reference 4 also directed the Commission to examine a very specific aspect of disclosure in criminal cases; namely, the appropriateness of Victoria Police's practices for the disclosure or non-disclosure of the use of such human sources to prosecuting authorities.

Term of reference 5b required the Commission to consider measures that may be necessary to address any systemic or other failures arising from the use of information obtained from human sources subject to legal obligations of confidentiality or privilege in the criminal justice system, and how such failures may be avoided in the future.

It is important to acknowledge that the disclosure practices that existed throughout the period that Ms Nicola Gobbo was providing information to Victoria Police differ in many respects to current practices. Some of those historical practices and their application to the events relevant to terms of reference 1 and 2 are discussed in Chapter 9.

This chapter does not address these historical practices but instead sets out how the current law and policy operate and the Commission's conclusions about the adequacy and appropriateness of current practices. As required by term of reference 4, this chapter also considers whether there are adequate safeguards for how:

- Victoria Police prosecutes summary proceedings
- the Victorian Office of Public Prosecutions (OPP) prosecutes indictable proceedings on behalf of the Victorian Director of Public Prosecutions (DPP).

Prosecutors play a vital role in ensuring that criminal proceedings are conducted fairly. They have several well-defined duties, including the duty of disclosure. For a prosecutor to fulfil their role effectively, it is critical that they have knowledge of material that is relevant to an accused person's case. This includes any information that could undermine that person's right to a fair trial. The prosecution needs all relevant information to assess whether a fair trial can occur. Without this information, the prosecution is unable to safeguard against the risk of an unfair trial.

The importance of the prosecution being aware of all matters relevant to an accused person's case is starkly illustrated in the events that led to this inquiry. The Court of Appeal of the Supreme Court of Victoria observed that because the matters relating to Ms Gobbo's role as a human source were subject to a public interest immunity (PII) claim and Victoria Police did not disclose this information to the DPP or the court before the relevant convictions, there was no possibility of a prosecution being withdrawn or trial being stayed (stopped either temporarily or indefinitely). As the Court of Appeal stated, the failure of the Chief Commissioner to disclose the relevant matters to the DPP resulted in a 'very difficult and unfortunate situation'.<sup>1</sup>

In Victoria, the law of PII typically operates to prevent the police and the prosecution from disclosing to an accused person that a human source has provided information relevant to their case. This is based on the need to protect the safety of the human source as well as the community benefits to be gained from the continued use of human sources, who may only provide information to police if confident that their identities will be protected. In most criminal proceedings in Victoria, police do not generally disclose to the prosecution the existence of a human source.<sup>2</sup>

Victoria Police's practices for disclosing information from human sources who have legal obligations of confidentiality or privilege are essentially covered by the same laws and policies that regulate the use of human source information more generally in the criminal justice system. To address this term of reference, the Commission has therefore had to examine:

- how disclosure operates in the criminal justice system more broadly
- general principles that apply to the disclosure of human source information.

It is important to note the limits of term of reference 4 and therefore the discussion in this chapter. Human sources can be used in the criminal justice system as either sources of information only or sources of information who are also witnesses. Term of reference 4 related to the use of human sources with legal obligations of confidentiality or privilege as sources of information only. Situations when a human source is involved as a co-accused in the criminal acts of the accused person, or when a human source becomes a witness, are outside the scope of term of reference 4.

Having reviewed the current law and practice in this area and considered stakeholders' views and experience, as well as the approach taken in other jurisdictions, the Commission considers that there is scope for reform in the conduct of criminal proceedings when an investigation has involved information from a human source. In particular, the Commission considers that Victoria Police's processes for disclosing relevant material to prosecuting authorities should be strengthened. It recommends that disclosure certificates be introduced to remind Victoria Police officers of their disclosure obligations and encourage them to provide information to prosecuting authorities clearly and transparently.

The Commission also considers that there is scope to improve disclosure practices more broadly; in particular, positive cultural change, effective leadership and improved training of Victoria Police officers are crucial to achieving sustained and long-term improvements in disclosure practices.

## CURRENT CONTEXT AND LAW

This section sets out current law and practice in Victoria regarding the use and disclosure of information from human sources who are subject to legal obligations of confidentiality or privilege.

It outlines:

- the prosecution's duty of disclosure in Victoria, including how disclosure operates more broadly in the criminal justice system and the key principles that govern the disclosure of human source information
- the current processes and procedures for the disclosure of information subject to a PII claim
- how police disclose information to prosecuting authorities in other Australian jurisdictions.

### The prosecution's duty of disclosure

In Victoria, as in other Australian jurisdictions, the prosecution's duty of disclosure comes from a combination of legislation, common law and professional guidelines.<sup>3</sup> Further, the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Charter) recognises that a person charged with a criminal offence in Victoria is entitled to be 'informed promptly and in detail of the nature and reason for the charge'.<sup>4</sup>

Prosecutors have a significant role in the proper administration of justice. They represent and exercise the powers of the state; therefore, they have a duty to ensure that the prosecution's case is presented fairly and impartially.<sup>5</sup> The High Court of Australia recently described this duty as involving the prosecutor presenting to the court all 'available, cogent and admissible evidence'.<sup>6</sup> In criminal proceedings, the prosecutor's role is not to obtain a conviction by any means necessary. Instead, it is to give the court all relevant and reliable evidence surrounding a case and to address the jury about how to use that evidence according to the law.<sup>7</sup>

The duty of disclosure is a key part of the prosecution's duty to conduct cases fairly and to make an accused person aware of the case against them. Accordingly, the prosecution has a duty to disclose all evidence that is relevant to the case against the accused person, even if that evidence might undermine the prosecution's case or help the accused person.<sup>8</sup>

For example, in a case where an accused person is charged with an armed robbery at a convenience store and their defence is that they were not present at the time of the robbery, evidence from a witness that identifies the accused person as the person who committed the robbery is relevant and supports the prosecution case. If another witness asserts that a different person committed the robbery, the prosecution should also disclose this information to the accused person, even if it undermines the prosecution case by showing that someone else may have committed the robbery.

The duty of disclosure applies to 'the prosecution' in a broad sense. This includes police prosecutors, the DPP and other lawyers who act on behalf of the DPP to prosecute a criminal offence. This also means that for the purposes of the prosecution's duty of disclosure, police are part of the prosecution.<sup>9</sup> The reason for this is that the prosecutor can only fulfil their duty of disclosure to the extent that they know about the information that must be disclosed to the accused person, because they have been given the information.<sup>10</sup> The prosecution therefore has a duty to disclose all relevant material that the police possess, regardless of whether the individual prosecutor is also aware of that information.

Disclosure helps to make the legal system more equitable. Police and the prosecution have the resources of the state behind them, so requiring the prosecution to disclose all relevant material to an accused person helps achieve 'equality of arms' between the prosecution and the defence, and therefore a fair trial for the accused person.<sup>11</sup>

The prosecution must disclose to an accused person any material that is known to them that, on their assessment:

- is relevant or possibly relevant to an issue in the case
- raises or possibly raises a new issue that is not apparent from the evidence the prosecution proposes to use
- holds out a 'real as opposed to fanciful prospect' of providing a line of inquiry that may lead to material that is relevant to an issue in the case or raise a new issue.<sup>12</sup>

There are exceptions to this duty to disclose all relevant known material. These are:

- claims of PII
- claims of legal professional privilege
- laws that restrict providing certain information (also known as statutory prohibitions).<sup>13</sup>

This chapter is primarily concerned with exceptions to disclosure based on PII claims. The significance of PII to the disclosure of human source information is discussed further below.

The consequences of the prosecution failing to disclose relevant material to an accused person can be serious. It can result in a conviction being successfully appealed with a resulting retrial, an acquittal or an order for a 'permanent stay', which means the proceedings are stopped by the court. This may occur even when there is an 'innocent failure to disclose relevant material'; that is, when the failure to disclose was not intentional.<sup>14</sup>

## **The police and prosecutor's roles in fulfilling disclosure requirements**

The prosecution does not play an investigative role in the criminal justice system. Prosecutors must act based on the evidence that police supply: that is, they rely on police investigators providing all relevant information to enable them to comply with their duties of disclosure to an accused person and the courts.<sup>15</sup> This is why the duty of disclosure extends to police.<sup>16</sup>

The relationship between the police and the prosecution is one of interdependence and cooperation and it starts early in the prosecution process. There are some differences between the process for indictable offences, which must be prosecuted by the OPP and the process for summary offences, which can be prosecuted by police.

Some of the key differences between summary and indictable proceedings are outlined in Box 14.1.

**BOX 14.1: SUMMARY AND INDICTABLE PROCEEDINGS**

A summary proceeding is one that is conducted in the Magistrates' Court of Victoria. Summary proceedings deal with criminal charges for less serious offences, such as motor vehicle offences and minor assaults. If a case before the Magistrates' Court raises complex issues, the Court may decide that it would be more appropriately dealt with in the County Court of Victoria (if that Court has the authority to hear cases of that kind) and order the case to be heard there.

In Victoria, most summary prosecutions are conducted by Victoria Police prosecutors. The Victoria Police prosecutions service is called the Prosecutions Unit. The DPP also has the power to take over and conduct a summary prosecution.<sup>17</sup> In doing so, the DPP must consider several matters including the seriousness of the offence and the complexity of the prosecution.<sup>18</sup>

Most criminal offences in Victoria are prosecuted as summary prosecutions in the Magistrates' Court. In the year 2018–19, there were 150,282 criminal cases commenced in the Magistrates' Court. In comparison, over that same period, there were 2,467 criminal cases lodged in the County Court and 100 criminal cases lodged in the Supreme Court of Victoria.<sup>19</sup>

An indictable proceeding is one that is conducted in the County Court or the Supreme Court. Indictable proceedings involve criminal charges for more serious offences, such as murder, rape and armed robbery. Indictable proceedings are prosecuted by the DPP, and the OPP and Crown Prosecutors, on behalf of the DPP. Crown Prosecutors are experienced criminal barristers who work exclusively for the DPP.

Regardless of the type of proceeding, summary or indictable, the law specifies the disclosure obligations of police. In Victoria, these are primarily set out in the *Criminal Procedure Act 2009 (Vic)* (Criminal Procedure Act) and help ensure that disclosure occurs in an efficient and timely way.<sup>20</sup>

A police officer who is responsible for fulfilling the disclosure obligations in the Criminal Procedure Act is referred to as an 'informant'.<sup>21</sup>

The informant is responsible for starting criminal proceedings and has a range of responsibilities. The scope of an informant's disclosure responsibilities varies depending on the nature of the criminal proceedings (that is, whether it is an indictable or a summary proceeding). There are slightly less onerous disclosure obligations in summary proceedings than in indictable proceedings.<sup>22</sup> The next section explains the disclosure obligations for both types of proceedings.

**Disclosure requirements in summary proceedings**

In summary proceedings, police can disclose material to an accused person through a preliminary brief and, if the accused person requests it, through a full brief.

A preliminary brief must include materials such as a copy of the charge-sheet, which outlines the alleged offence; a notice about legal representation; the informant's statement of the evidence that supports the charge; and a copy of the accused person's criminal record, if they have one.<sup>23</sup> Even at this early stage, a police officer should disclose an outline of any material helpful to the accused person.

The informant must check boxes on a form indicating that the brief contains all required information available at the time the brief is prepared.<sup>24</sup> This form is prescribed by the *Magistrates' Court Criminal Procedure Rules 2019 (Vic)*.

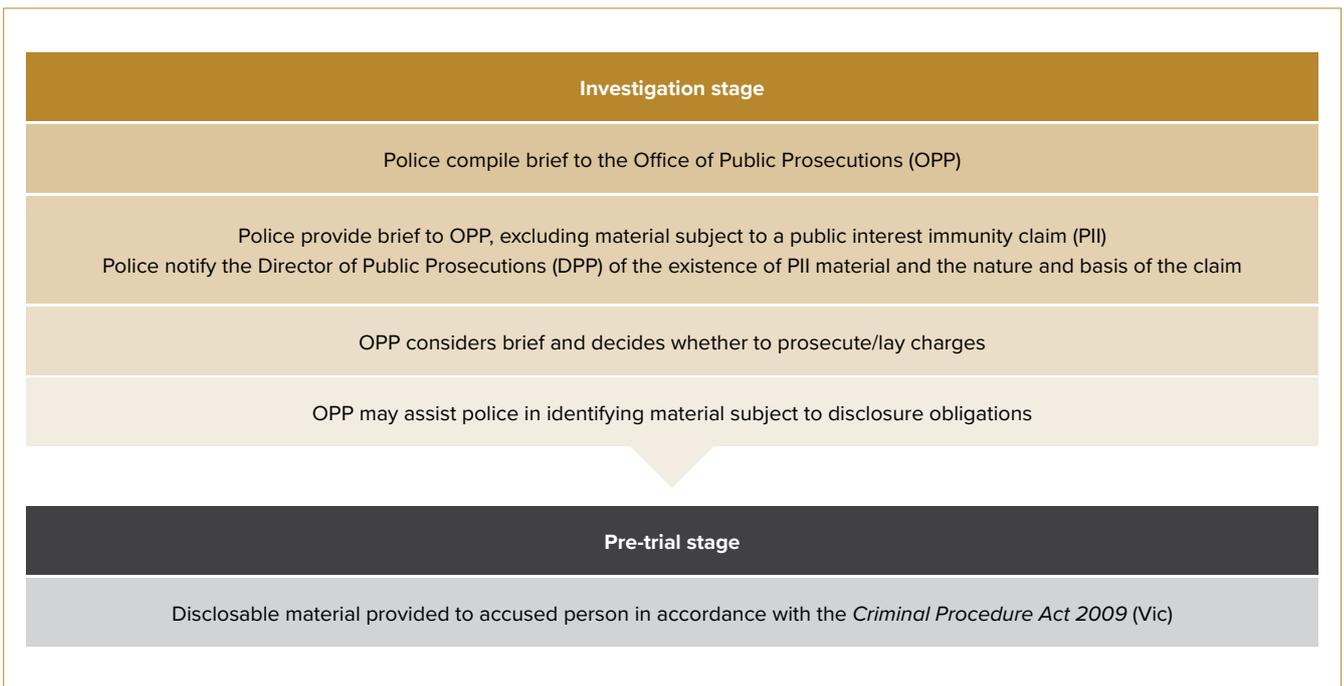
An accused person can also request a full brief. A full brief is a more comprehensive form of disclosure. It must include basic material that has to be given in all cases (for example, the charge-sheet and a notice about legal representation), all material that the prosecution intends to rely on, and—crucially—material relevant to the charge that the prosecution possesses but does not intend to rely on at court.<sup>25</sup>

**Disclosure requirements in indictable proceedings**

Generally, in indictable proceedings, after police have concluded their investigation, they will provide a brief to the OPP containing the material the police consider relevant to the charges. The brief will not include any material that the police consider is subject to a PII claim. The ordinary process of dealing with material that police identify as subject to a PII claim is described later in this chapter.

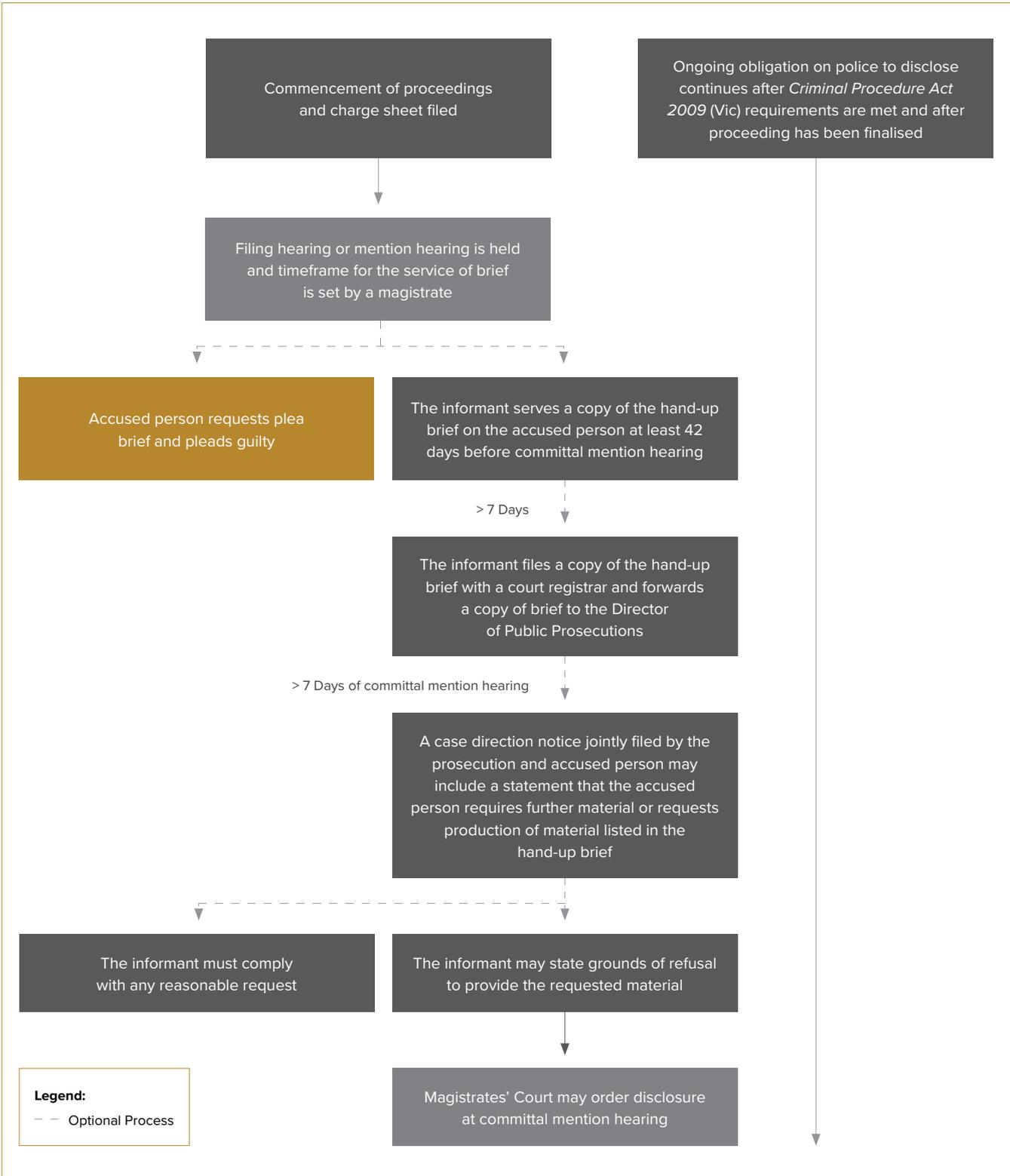
After charges are laid, the police and the prosecution continue to work together to ensure that all the relevant material that must be disclosed to the accused person is identified and then disclosed in accordance with the applicable legislation. For example, the Commission was advised that after the first hearing of an indictable matter, the OPP sends an information sheet to the police officer with responsibility for the case to help them fulfil their disclosure obligations. The information sheet also invites the officer to contact OPP solicitors about any questions or concerns they have about disclosure.<sup>26</sup> The pre-trial consultation process is outlined in Figure 14.1.

**Figure 14.1: Pre-trial consultation between police and the prosecution<sup>27</sup>**



In indictable proceedings, police disclose relevant material to an accused person through a hand-up brief. The hand-up brief must include material such as a copy of the charge-sheet, a summary of the key facts, any information or document that the prosecution intends to rely on (including diaries and notes kept by police investigating the offence, photos, statements from witnesses and transcripts of interviews) and any other relevant material that the prosecution possesses but does not intend to rely on.<sup>28</sup> The hand-up brief process is outlined in Figure 14.2.

Figure 14.2: Hand-up brief process<sup>29</sup>



If the accused person consents, the informant may also serve—that is, formally deliver—a plea brief to the accused person. The informant can do this at any time before a hand-up brief is served. The plea brief can be used instead of the full hand-up brief in cases when the prosecution and the accused person have had early discussions and the accused person has agreed that they will plead guilty to a charge or charges. The content of a plea brief will usually be much less extensive than a hand-up brief.

A plea brief must also include a copy of any statement from an alleged victim about the circumstances of the offence and any other statement relevant to the charge.<sup>30</sup>

### **Continuing obligation of disclosure**

Police have a continuing obligation of disclosure regardless of the nature of the proceedings.<sup>31</sup> That obligation requires an informant to serve on the accused person and provide to the court any information that must be disclosed when it comes into the informant's possession or notice. This needs to be done as soon as practically possible. The duty continues after the prosecution has completed the disclosure requirements under the Criminal Procedure Act outlined above.<sup>32</sup>

The duty of disclosure starts when police first lay a criminal charge against an accused person. During the court proceedings, the duty requires police to provide to the accused person (or to the prosecution to provide to the accused person) any information that is relevant or possibly relevant to the case. This means that if the case against an accused person changes in the course of the proceedings, sometimes the information that must be disclosed to the accused person will likewise change as new issues arise.

The duty of disclosure continues even after the proceeding has been finalised.<sup>33</sup> For example, if an accused person has been convicted and police later become aware that a pivotal prosecution witness lied, police must provide this information to the DPP so that it can be disclosed to the accused person. Information that should have been, but was not, disclosed prior to conviction can lead to that conviction being set aside by a court.<sup>34</sup>

## **Public interest immunity and the prosecution's duty of disclosure**

As noted earlier, both the common law and legislation outline exceptions to disclosure obligations. For the Commission, the most significant exception to disclosure obligations and the one that has featured in this inquiry concerns material that is subject to a PII claim.

PII is a principle recognised by the common law and is also a rule of evidence that allows relevant material not to be disclosed when:

- disclosing it would damage the public interest; and
- the need to avoid this damage outweighs the accused person's right to have all relevant material made available to them.<sup>35</sup>

The court is responsible for determining whether material should be withheld. In doing so, it must engage in a balancing exercise, considering whether the public interest in withholding disclosure outweighs the public interest in the proper administration of justice. If the court determines that the PII claim is made out, the material is not disclosed to the accused person and cannot become evidence in the case.

If the court finds the material is covered by PII, but it would assist an accused person to defend themselves in criminal proceedings, the proper course may be for the prosecution to abandon the prosecution or for the court to stay proceedings rather than to risk an unfair trial.<sup>36</sup>

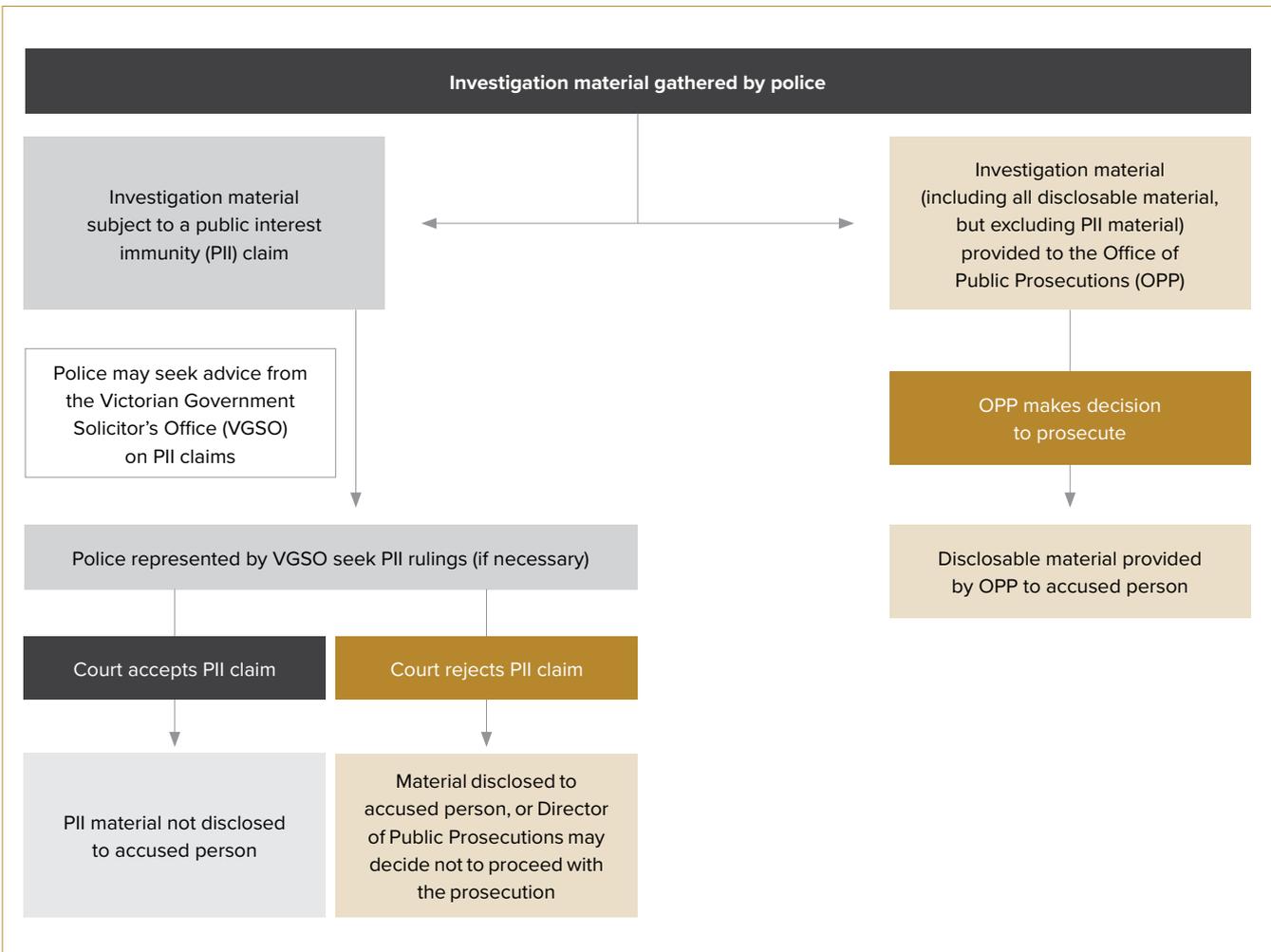
### **Process for claiming public interest immunity**

As part of their disclosure obligations, police are required to inform the prosecutor and the accused person of the existence of material that is subject to a PII claim. As noted above, that material is ordinarily not provided to prosecutors in the brief prepared by police, unless it is requested by the prosecutors at the conclusion of the

investigation stage. Rather, any PII claims made over that material are managed separately by Victoria Police, which may seek advice from the Victorian Government Solicitor’s Office (VGSO).

Often a court will hold a hearing about that material, in which it will decide whether to uphold the PII claims police have made. If a PII claim is litigated, the police are typically assisted by the VGSO in that proceeding. In some cases, Victoria Police invites the prosecutors to review the material, either before or after a PII claim has been determined by a court, in order to determine what, if any, significance it may have to a criminal proceeding. When police do this before a court has determined the PII claim, the material will generally be provided on the basis that it be treated confidentially until the claim is determined.<sup>37</sup> The prosecutors may decline to accept this invitation, consistent with their discretion to decide when it is appropriate to review PII material (explained below). Key steps in the ordinary process for the treatment of PII material in indictable proceedings are depicted in Figure 14.3.

**Figure 14.3: Treatment of public interest immunity material in indictable proceedings<sup>38</sup>**



The *Policy of the Director of Public Prosecutions for Victoria (DPP Policy)* provides that if police have not disclosed to the accused person relevant material because it is subject to a PII claim, police should inform the prosecutor:

- about the nature of the material and the basis of the claim
- whether a court has ruled on the claim—if so, police should give the prosecutor a copy of the ruling and the court’s reasons<sup>39</sup>
- whether, in the opinion of police, the material, on a sensible appraisal, substantially weakens the prosecution’s case or substantially strengthens the accused person’s case.<sup>40</sup>

In addition to the common law doctrine of PII outlined above, the Criminal Procedure Act sets out a number of public interest grounds on which the police officer who commences the criminal proceeding may refuse to disclose information to an accused person that they would otherwise need to disclose.<sup>41</sup> This includes if the police officer considers that the disclosure would, or would be reasonably likely to:

- reveal the identity of a confidential source of information in relation to the enforcement or administration of the law or enable a person to find out that identity<sup>42</sup>
- reveal policing methods in a way likely to compromise their effectiveness<sup>43</sup>
- endanger the lives or physical safety of persons engaged in law enforcement or persons who have provided confidential information.<sup>44</sup>

If police have material that is relevant to an accused person's case but consider that the material should be withheld pursuant to a claim for PII, they can describe on a document the grounds for refusing disclosure. They do not have to specify the nature of the material. For instance, if police take a statement from a witness that refers to a meeting with a human source, this information could alert the accused person that there is a human source, and place the human source in danger. In these circumstances, police can describe the document—in this case, a witness statement—more generally, without specifying its nature. For example, the police could simply note that 'other material relating to the proceeding has been withheld because of claims of PII'.

Police then provide this document to the accused person with the brief of evidence. The requirements for summary and indictable proceedings differ:

- In summary proceedings, the informant must provide the accused person with:
  - a document known as the 'Form 10' when the informant is required to serve a preliminary brief
  - a document known as the 'Form 11' when the informant is required to serve a full brief.<sup>45</sup>
- In indictable proceedings, this document is known as the 'Form 30' and the informant must provide it to the accused person with the hand-up brief.<sup>46</sup>

In all cases, the form should indicate that the brief accompanying it contains a written notice of 'any information, document or thing' that is relevant to the alleged offence but that the prosecution does not intend to use at the hearing.<sup>47</sup>

In both summary and indictable proceedings, the form must be completed and signed by the informant. In indictable proceedings, in addition to providing the accused person with a hand-up brief and a Form 30, the police officer must also provide copies of both documents to the DPP.<sup>48</sup>

If the accused person wishes to obtain further information about certain materials that police hold, including materials identified on the form, they can issue a subpoena seeking more information or request further disclosure. The Criminal Procedure Act sets out processes for an accused person to request further disclosure in both summary and indictable proceedings.

In summary proceedings, an accused person may apply to the Magistrates' Court for an order requiring disclosure if the informant:

- has served on the accused person a statement of grounds for refusing disclosure; or
- has failed to disclose in accordance with the relevant provisions in the Criminal Procedure Act.<sup>49</sup>

In indictable proceedings, further disclosure of the prosecution case may take place through the case direction notice process. A case direction notice, known as a 'Form 32', must be jointly completed by the accused person and the prosecution.<sup>50</sup> It outlines whether the accused person seeks any item listed in the hand-up

brief that the informant has refused to produce. The Magistrates' Court usually resolves these matters at a committal mention hearing.<sup>51</sup> The County Court or the Supreme Court may exercise similar powers at a directions hearing as well as prior to and during trial.<sup>52</sup>

## **Confidentiality of human source information**

PII generally applies to prevent the disclosure of information identifying a human source, except when the identity of the human source needs to be disclosed because it is relevant to an accused person's defence.<sup>53</sup> As noted earlier, this principle is based on the need to protect the human source's identity and safety as well as the community benefits to be gained from the continued use of human sources, who require confidence that their identities will be protected.

The DPP Policy explains that a prosecutor's disclosure obligations to an accused person are subject to any PII claim.<sup>54</sup> The prosecution may refuse to disclose material on the basis of PII, when, for example, disclosure of the material may place a person in danger or reveal the identity of a human source. The exception is where, as in Ms Gobbo's case, the public interest in disclosing the human source's identity and conduct is greater than the public interest in the human source's anonymity.<sup>55</sup>

In most Victorian criminal proceedings, police do not tell prosecutors whether human sources are being used, unless the source is involved in the accused person's criminal acts (that is, they are a co-accused person or a witness).<sup>56</sup> In many cases, the informant who brings the charges against the accused person will also be unaware that a human source is involved. This may occur because the information has been deliberately quarantined within a separate area of Victoria Police of which the informant is not a part. As discussed further below, this occurred in relation to some cases affected by Ms Gobbo's conduct, as the police officers who obtained information from Ms Gobbo about certain individuals' criminal offending were often not the police informants or officers preparing the brief to the DPP.

This practice of police protecting the identity of a human source is consistent with the public interest position outlined above. Ms Gobbo's role as a human source plainly demonstrates the tension between two key principles. On the one hand, the prosecution must disclose material of assistance to the defence, but on the other, they must ensure the human source is protected.<sup>57</sup>

## **Resolving public interest immunity claims**

PII claims can be brought before a court for determination in several ways. One way in Victoria, as in other Australian jurisdictions, is when an accused person challenges a PII claim where police have refused to disclose material that is relevant to the accused person's case. Another way is when police apply to a court to seek a PII ruling.

Current practice is that, when a PII claim is argued in court, Victoria Police is typically represented by the VGSO. Within the VGSO, there is a police advisory branch (PAB) that focuses exclusively on matters related to Victoria Police. The PAB in most cases advises police on matters involving PII claims, as well as assisting police to litigate PII claims.

The DPP does not advise Victoria Police on PII issues; nor is it involved in resolving these claims in court. The DPP Policy specifically provides that when material is withheld from an accused person on the basis of a PII claim or other statutory prohibition, the person or agency that holds the material—not the prosecutor—must make any application or submission to a court to support that claim.<sup>58</sup>

If the DPP knows what type of material police have withheld and believes that the material should be disclosed to the accused person as a matter of fairness, police can apply to the court to prevent the DPP from making such a disclosure.<sup>59</sup>

In certain circumstances, the court can hear PII claims in an *ex parte* application (when an accused person is not notified and does not participate in the court proceedings). This approach is used rarely by courts, because it is effectively a hearing that the accused person has no knowledge or notice of, with a resulting risk of denying them a fair hearing.<sup>60</sup> When a PII application is heard *ex parte*, a court may appoint a special counsel or *amicus curiae* (friend of the court) to assist the court, making submissions conscious of the interests of the accused person.

If a PII claim is successful, the prosecution will not be required to disclose otherwise relevant material to the accused person. If the claim is rejected, as noted earlier, the prosecution may need to withdraw the case, or the court may need to stay proceedings, rather than risk an unfair trial with the information undisclosed.<sup>61</sup>

This is because the law recognises that there is a public interest in certain information remaining secret, but that there is also a public interest in the proper administration of justice. As outlined earlier in this chapter, the proper administration of justice involves ensuring that an accused person is aware of the case against them and that criminal proceedings are conducted fairly. The High Court has stated that the processes of criminal justice should not be distorted to prevent an accused person from defending themselves properly.<sup>62</sup>

## The prosecution's duty of disclosure in other jurisdictions

Requirements for police disclosure of information to prosecuting authorities are broadly similar across all Australian jurisdictions. There are, however, some variations and each jurisdiction has its own statutory framework, practices and procedures.

The following section provides an overview of how police disclose information to prosecuting authorities across Australia.

### Commonwealth

The Commonwealth Director of Public Prosecutions (CDPP) requires the informant to provide a list or copy of all materials that are disclosable. The informant is also required to notify the prosecutor if there is any material that is subject to a PII claim or other statutory prohibition.<sup>63</sup> In addition, the informant needs to complete a disclosure certificate, certifying their compliance with their disclosure obligations, and provide this to the prosecution.<sup>64</sup>

The CDPP has its own procedures for disclosing to the defence that relevant material has been withheld from the accused person.<sup>65</sup> Often, the prosecution will disclose to the accused person the existence of the material and the nature of the claim through a letter.<sup>66</sup> How much information they can provide depends on the nature of the material.<sup>67</sup>

### Australian Capital Territory

In all matters where an accused person enters a plea of not guilty, the Australian Capital Territory Office of the DPP requires the informant to complete a certificate that is prepared with and attached to the full brief of evidence.<sup>68</sup> The certificate must provide information about any evidence not contained in the brief that may be relevant to the accused person, as well as any information about relevant witnesses who have not provided a statement.<sup>69</sup>

The accused person is provided with a copy of the certificate. If the prosecution is aware of the existence of disclosable material that has been withheld and not referred to in the certificate, the prosecution must write to the accused person to notify them of this material.<sup>70</sup>

## New South Wales

The *Director of Public Prosecutions Act 1986* (NSW) (New South Wales DPP Act) requires police to notify the New South Wales DPP of the existence of all relevant ‘information, documents or other things’ that might reasonably be expected to assist the case for the prosecution or the case for the accused person.<sup>71</sup> If requested, police must disclose material to the prosecution, including material subject to a PII claim.<sup>72</sup>

Police must also sign a disclosure certificate certifying that they have notified the prosecution of all such material and other information. This rule applies whenever a brief of evidence is provided to the DPP for advice, regardless of whether the matter is summary or indictable.<sup>73</sup>

The disclosure certificate is not provided to the accused person. Instead, the accused person is notified by a letter of disclosure drafted by the prosecution. The letter of disclosure informs the accused person about the existence of material relevant to their case, including material that may be subject to a PII claim.<sup>74</sup>

## Northern Territory

The Northern Territory Office of the DPP requires police to provide a schedule—a list of extra information—itemising any potentially disclosable material that they consider is immune from disclosure to the defence. It must outline why it believes the particular material is immune from disclosure on public interest grounds, together with why it believes that the material is subject to PII.<sup>75</sup> Police also need to complete a disclosure certificate certifying that they have notified the prosecution of the existence of all relevant material.<sup>76</sup>

If the prosecutor decides not to disclose material on the basis of a PII claim, the prosecutor should notify the accused person that material has been withheld and claim an immunity against disclosure in respect of that material.<sup>77</sup>

## Queensland

The *Director of Public Prosecutions Act 1984* (Qld) requires a police officer investigating an alleged offence to disclose to the DPP all relevant ‘information, document or other things’ that might tend to help the case for the prosecution or the case for the accused person.<sup>78</sup> The Queensland Office of the DPP requires police to disclose to the prosecution material that is part of the brief of evidence and is relevant to the accused person’s case.<sup>79</sup> When police alert the prosecution to material that is subject to a PII claim, the prosecution decides whether to disclose that material to the accused person.

If the prosecution decides to withhold the material, it must inform the accused person in writing that this has occurred.<sup>80</sup>

## South Australia

The South Australian Office of the DPP requires the police officer in charge of an investigation in indictable matters to provide a list of ‘all documentary material collected or created’ during an investigation that may reasonably be expected to assist the case for the prosecution or the accused person.<sup>81</sup> Police also need to complete a disclosure certificate that certifies they have complied with their disclosure obligations and provide it to the prosecution.<sup>82</sup>

The prosecution does not provide the accused person with the disclosure certificate. When there is material relevant to the accused person’s case that is subject to a PII claim, the prosecution advises the defence of this in a letter.<sup>83</sup>

## Tasmania

The Tasmanian Office of the DPP requires police to disclose to the prosecution all material that is relevant to the case of the accused person, even if the material is subject to a PII claim.<sup>84</sup>

Prosecutors must disclose to the accused person all material they believe to be relevant to the person's case.<sup>85</sup> If a PII claim is made over the material, though, the prosecution will not disclose the material without first consulting the investigating officer in charge of the case.<sup>86</sup>

## Western Australia

The Western Australia Office of the DPP requires police to disclose to the prosecution all material that is relevant to the accused person's case and to certify that they have done so.<sup>87</sup>

The prosecution gives the accused person a list of all relevant material. If material is subject to a PII claim, the prosecution must provide to the accused person a short description of the material, the nature of the claim and the reason for the claim.<sup>88</sup>

There is a detailed statutory regime for disclosure in Western Australia, and an application can be made to the court for a non-disclosure order under section 138 of the *Criminal Procedure Act 2004 (WA)* (Western Australia Criminal Procedure Act).<sup>89</sup>

# CHALLENGES AND OPPORTUNITIES

This section sets out the main issues that were raised with the Commission about the appropriateness of Victoria Police practices in relation to disclosure of human source information to prosecuting authorities. The section also highlights relevant aspects of the disclosure regimes in New South Wales, the United Kingdom and Western Australia. The Commission examined the models in these jurisdictions because stakeholders suggested that aspects of them could be applicable in Victoria. The United Kingdom has also introduced significant reforms to improve disclosure practices in recent years.

Before outlining these issues, challenges and opportunities, it is important to address two other Victorian reviews in 2020 that explored issues relevant to disclosure obligations and processes:

- *Committals Review*—a review by the Victorian Law Reform Commission (VLRC) of the committals process.<sup>90</sup> Under its terms of reference, the VLRC was asked to consider several matters, including ways of improving early disclosure processes in indictable criminal proceedings. Some matters considered by the VLRC overlapped with aspects of the Commission's inquiry. Unlike the VLRC, however, this Commission is concerned with disclosure specifically as it relates to the use of human source information in criminal proceedings.
- *Operation Gloucester*—a review by the Independent Broad-based Anti-corruption Commission (IBAC) into police conduct in the Victoria Police Lorimer investigation, which concerned the murders of Sergeant Gary Silk and Senior Constable Rodney Miller in 1998.<sup>91</sup> IBAC's public hearings, held from 4 February to 1 March 2019, focused on Victoria Police's witness statement-taking practices and compliance with the obligation to disclose evidence during the Lorimer investigation. The review also examined police statement-taking and disclosure practices in other Victoria Police investigations.

The conclusions and recommendations of the Committals Review and Operation Gloucester are outlined below where relevant.

## Police disclosure obligations to prosecuting authorities

As noted earlier in this chapter, police have a general duty to provide the prosecution with all relevant material and information required for the prosecution case.<sup>92</sup> This duty extends to advising the prosecution of the existence of any other material not relied upon that might be relevant to the accused person's case.

Some stakeholders drew the Commission's attention to perceived deficiencies in how police fulfil their disclosure obligations to prosecuting authorities.<sup>93</sup> For example, in a submission to the Commission, the Criminal Bar Association stated:

*The Commission's inquiry illuminates the deficiencies in proper and ongoing disclosure by police, particularly in the area of public interest immunity (PII), under which police fail to disclose to prosecutors relevant aspects of the investigation. The consequence is that prosecutors are ill-equipped to comply with their duty of disclosure.*<sup>94</sup>

As well as identifying perceived deficiencies, stakeholders also suggested reforms to improve police disclosure obligations. Several submissions supported the approach to police disclosure that operates in New South Wales.<sup>95</sup>

### A statutory duty to disclose relevant material to prosecuting authorities

In a submission to the Commission, the DPP stated that:

*For the purpose of conducting proceedings on indictment and the performance by the DPP of its other functions, it is essential that investigators disclose to the prosecution the existence of all information that is relevant to an alleged offence, so that the prosecutor can then make the requisite disclosure to the defence (if it has not already been made).*<sup>96</sup>

The DPP emphasised that investigators should not decide to conceal the existence of relevant information on their own. Instead, they should inform the DPP when relevant information exists, even if investigators believe that this information cannot be disclosed (whether because of PII, a statutory prohibition or for some other reason).<sup>97</sup> The DPP submitted that the DPP Policy reflects this position.<sup>98</sup>

To avoid potential disclosure failings arising from information not being provided to prosecutors, the DPP submitted that a provision should be introduced in Victoria similar to section 15A of the New South Wales DPP Act but adapted so that it is consistent with the disclosure requirements in the Criminal Procedure Act.<sup>99</sup>

The requirements of section 15A are outlined in Box 14.2.

**BOX 14.2: NEW SOUTH WALES POLICE STATUTORY DUTY TO DISCLOSE ALL RELEVANT MATERIAL TO THE DIRECTOR OF PUBLIC PROSECUTIONS**

Similar to Victoria, the prosecution's disclosure obligations in New South Wales are regulated by several different laws and policies, including the *Criminal Procedure Act 1986 (NSW)*, the *Director of Public Prosecutions Act 1986 (NSW)*, the prosecution policies of the New South Wales DPP and the rules of the law society and bar association.<sup>100</sup>

As in Victoria, in New South Wales the prosecution must disclose all relevant material to the accused person, subject to any exceptions.<sup>101</sup> Unlike in Victoria, however, the police also have a specific statutory duty to disclose all relevant material obtained during an investigation to the New South Wales DPP. A statutory duty is a duty imposed by legislation. It imposes a stronger obligation than a requirement imposed by a guideline or policy only.

The statutory duty is specifically provided for in section 15A of the New South Wales DPP Act.

In New South Wales, in all matters prosecuted by the DPP, police must provide the brief of evidence and:

- notify the DPP of the existence of, and when requested, disclose all other material and other information that might be relevant to either the prosecution or the defence
- certify that they have notified the DPP of all such material and other information.<sup>102</sup>

This statutory obligation applies whenever police provide a brief of evidence to the DPP for advice, whether the matter is summary or indictable.<sup>103</sup> There is no equivalent to section 15A in Victorian legislation, though the DPP Policy does include a similar requirement.<sup>104</sup> This is discussed further below.

Section 15A does not require police to provide the New South Wales DPP any material or information that is subject to a PII claim.<sup>105</sup> In such a case, police must inform the DPP of the existence of any material or other information, the nature of that material or information, and the claim they are making or the 'statutory publication restriction' (a prohibition or restriction on publication that is imposed by or under legislation) they are relying upon. It is only if the DPP requests the material or other information that the police must provide it to the DPP to assess.<sup>106</sup>

The DPP then decides case by case whether to request additional information or, when police have identified sensitive material and claimed PII over it, to seek access to that material.

When deciding whether to request access to material, the prosecution considers whether they need the material to meet their disclosure obligations to the accused person. They are also guided by the facts, circumstances and issues in the case that the defence is disputing.<sup>107</sup>

According to the Victorian DPP, introducing a provision similar to section 15A of the New South Wales DPP Act in Victoria would encourage better decision making about relevant material that is subject to a claim of privilege or immunity or a statutory publication restriction. The DPP further stated that the need to identify such material, and the basis of the claim, would remind investigators of the relevant legal principles—in particular, that they have no right to make unilateral decisions to conceal the existence of relevant material, and that even material that a court finds to be privileged or immune from disclosure may affect prosecution decisions.<sup>108</sup>

In an initial submission to the Commission, Victoria Police submitted that there is no need to introduce a provision such as section 15A, on the basis that the existing statutory framework adequately provides for appropriate disclosure from Victoria Police to the DPP.<sup>109</sup> In a later submission, Victoria Police supported the adoption of a provision similar to section 15A, but considered that the accompanying legislation would need to impose relevant obligations on both police and the prosecution to maintain confidentiality of the material (for example, to only disclose that material if the court determines that PII does not apply and police believe that the matters should continue to trial). Victoria Police considered that these safeguards would ensure that a charge could be withdrawn in circumstances when PII is not granted, without jeopardising the safety of a human source.<sup>110</sup>

Other stakeholders, including the Criminal Bar Association, said that police alone and unassisted should not decide whether relevant information should be disclosed to an accused person.<sup>111</sup> The Criminal Bar Association stated that police should be required to disclose all potentially disclosable material to the DPP so that there is some oversight of police views about what is relevant or irrelevant to an accused person and what material should be disclosed, and whether police are making a valid PII claim.<sup>112</sup>

In its Committals Review, the VLRC recommended that the Criminal Procedure Act be amended to provide that the informant's disclosure obligations to the DPP apply regardless of claims of privilege, PII or statutory immunity, but where such claims are made, the material that is subject to these claims need not be produced to the DPP. The VLRC recommended that the informant must also indicate to the DPP the grounds on which they are refusing to produce the material.<sup>113</sup>

In its report on Operation Gloucester, IBAC recommended that the Victorian Government introduces a statutory obligation of disclosure in similar terms to section 15A, to reinforce the common law duty of disclosure.<sup>114</sup> The report noted that section 15A specifically clarifies that New South Wales law enforcement officers investigating alleged offences have an ongoing duty to disclose to the New South Wales DPP all relevant information that might reasonably assist the case for the prosecution or the accused person.<sup>115</sup> The report concluded that while the introduction of such a provision would not materially change the current common law duty of disclosure, recognising it in legislation would be a further means to ensure compliance with that duty.<sup>116</sup>

## **Disclosure certificates and disclosure documentation**

A number of stakeholders also submitted that police should be required to certify that they have disclosed all relevant material to the prosecution.<sup>117</sup>

There was substantial support among stakeholders for the introduction of a disclosure certificate similar to that used in New South Wales,<sup>118</sup> although some stakeholders said that the introduction of a disclosure certificate regime would not by itself resolve all of the issues relating to disclosure.<sup>119</sup>

The New South Wales disclosure certificate regime is outlined in Box 14.3 below, and a similar system used in Western Australia and a separate New South Wales Supreme Court procedure are outlined in Box 14.4.

**BOX 14.3: DISCLOSURE CERTIFICATES IN NEW SOUTH WALES**

Police in New South Wales are required to certify that they have notified the DPP of all relevant material and other information. This is provided in the form of a disclosure certificate, as prescribed in Schedule 1 of the *Director of Prosecutions Regulation 2015* (NSW).

There are two parts to the disclosure certificate. The first part requires the investigating police officer to acknowledge their duty of disclosure, certify the accuracy of what they are disclosing, and undertake to disclose any additional relevant material they become aware of.

The second part contains three separate schedules that require the investigating officer to list any relevant material not included in the brief of evidence and to describe that material.<sup>120</sup> The material must be listed as follows:

**Schedule 1: relevant protected material that is subject to a claim of privilege or immunity—**

this schedule describes material that:

- the investigating officer has identified as relevant
- is not contained in the brief of evidence because it is subject to a claim of privilege, PII or statutory immunity.

**Schedule 2: relevant material that is subject to a statutory publication restriction—**

this schedule describes material that:

- the investigating officer has identified as relevant
- is not contained in the brief of evidence because it is subject to a statutory publication restriction.

The material would only be described as far as the statutory publication restriction allows.

**Schedule 3: relevant unprotected material that is not subject to a claim of privilege or immunity or statutory publication restriction—**this schedule describes material that:

- the investigating officer has identified as relevant
- is not contained in the brief of evidence
- is unprotected material; that is, it is not subject to a claim of privilege, immunity or a statutory publication restriction.

The police officer who is responsible for the investigation completes, signs and dates the disclosure certificate.<sup>121</sup> It must also be signed and dated by the police officer's relevant superior officer.<sup>122</sup>

The disclosure certificate also requires the police officer responsible for the investigation to acknowledge that any claim of privilege, public interest or statutory immunity is directed through the police officer's Commander to the Manager, Information Access and Subpoena Unit of the New South Wales Police.<sup>123</sup>

The *NSW Police Force Handbook* states that material that may be subject to a PII claim includes material that reveals, or might reveal, the identity of an undercover police officer, the existence or identity of a human source, or police methodology. The material could reveal this information either directly or indirectly.<sup>124</sup>

In these circumstances, police must include a description of the material and the nature of the immunity or privilege claimed in the relevant schedule. If a human source was involved in an investigation and was relevant to the accused person's case, police would be expected to reveal the human source's existence to the New South Wales DPP without revealing the source's identity.

#### **BOX 14.4: OTHER DISCLOSURE DOCUMENTATION USED IN WESTERN AUSTRALIA AND NEW SOUTH WALES**

Like the approach in New South Wales, section 45 of the Western Australian *Criminal Procedure Act 2004* (WA) provides that after an accused person is committed for trial on a charge, the prosecutor (typically the informant) must give the relevant authorised officer (typically the Western Australian DPP):

- copies of disclosure material already provided to the accused person
- a signed certificate stating that the prosecutor has complied with their disclosure obligations to date.

It is an offence to sign a certificate that is false in a 'material particular', regardless of whether this is done deliberately or without reasonable care. The penalty for this offence is \$5,000.<sup>125</sup> The section 45 certificate must be provided to the accused person.<sup>126</sup>

Another type of disclosure documentation is used in the New South Wales Supreme Court. In Supreme Court matters, the officer in charge of an investigation must swear an affidavit regarding their disclosure obligations. This is Supreme Court practice rather than a requirement of legislation.<sup>127</sup>

Both the DPP and Victoria Police suggested to the Commission that they consider the use of disclosure certificates in Victoria, as in New South Wales, as a way to facilitate the disclosure process in indictable matters.<sup>128</sup> The DPP also pointed to the disclosure certificate requirements in Western Australia as a model for Victoria.<sup>129</sup>

In a submission to the Commission, the DPP noted that adding a requirement for informants to certify to a court that there has been full disclosure would focus their minds on the need for full compliance with their disclosure obligations.<sup>130</sup> The DPP also considered that it may be desirable to include an obligation to provide the accused person with an updated list of material withheld on grounds of privilege or immunity or statutory prohibition grounds if that list has changed since the hand-up brief was served.<sup>131</sup>

Deputy Commissioner Wendy Steendam, APM, Specialist Operations, in her evidence to the Commission on behalf of Victoria Police, said that having different schedules in a disclosure certificate would help informants work through the complexities of what is relevant and what is not, as well as making sure that they have properly considered the issues that need to be disclosed.<sup>132</sup>

The DPP also submitted that any legislative requirement to provide these schedules of withheld material should be accompanied by appropriate Victoria Police internal policies or procedures that provide guidance to police investigators on how to describe withheld material and on the corresponding claims of privilege, immunity or statutory prohibition.<sup>133</sup>

Other stakeholders, including Victoria Legal Aid, the Law Institute of Victoria and the Criminal Bar Association, also supported introducing a requirement for police to complete disclosure certificates.<sup>134</sup> Some, however, cautioned that the success of any certification process would depend on police making complete disclosure in a timely manner.<sup>135</sup>

In a submission to the Commission, Victoria Police identified that the introduction of a disclosure certificate would not by itself resolve all issues relating to disclosure. Like the DPP, it submitted that the introduction of a disclosure certificate must be accompanied by other measures. These measures include dedicated disclosure officers and improvements in information technology systems.<sup>136</sup>

While Victoria Police indicated support for using disclosure certificates in indictable matters, it did not consider them necessary for summary matters. It noted that this requirement would place considerable strain on the resources of Victoria Police and the criminal justice system, especially given the huge volume of summary matters.

### **Recommendation of the Victorian Law Reform Commission**

In its Committals Review, the VLRC considered whether a disclosure certificate based on the New South Wales disclosure certificate should be introduced in Victoria. The report noted that some stakeholders (including the Law Institute of Victoria, the County Court and Victoria Legal Aid) supported the introduction of a disclosure certificate.<sup>137</sup>

The VLRC indicated that a benefit of introducing such a certificate in Victoria would be to reiterate police disclosure obligations and routinely remind police of those obligations.<sup>138</sup> On the other hand, the VLRC noted that inadequate disclosure by police remains a problem in New South Wales, despite the use of disclosure certificates.<sup>139</sup> The VLRC further stated that disclosure certificates are frequently signed by police despite disclosure not being complete.<sup>140</sup>

Accordingly, the VLRC considered that introducing a disclosure certificate requirement in Victoria may be a costly reform that is also hard to administer, with little real benefit.<sup>141</sup>

Instead, the VLRC recommended that the Criminal Procedure Act be amended to require informants to provide evidence at an 'issues hearing' (a proposed replacement for a committal mention hearing).<sup>142</sup> This would require informants to give sworn evidence that they have met their disclosure obligations and provide an opportunity for the accused person to cross-examine them regarding disclosure.<sup>143</sup>

### **Disclosure to accused persons**

As set out earlier in this chapter, for both summary and indictable matters in Victoria, currently police must complete a form to accompany either the full brief in the case of a summary hearing (Form 11) or the hand-up brief in the case of an indictable proceeding (Form 30). In either case, the form should list anything relevant to the alleged offence that the prosecution does not intend to use. As with a disclosure certificate, police can use the Form 11 and the Form 30 to indicate that they are withholding relevant information from the accused person, and their reasons.

The Commission heard from some stakeholders that there is scope to improve how accused persons are informed that relevant material has been withheld.

According to Victoria Legal Aid, the existing mechanisms (Forms 11 and 30) are inadequate, as police rarely provide reasons to justify PII claims.<sup>144</sup> In a submission to the Commission, Victoria Legal Aid submitted that Forms 11 and 30 are rarely used to their full extent and do not adequately draw informants' attention to their disclosure obligations. It considered that this may be linked to the weight police give to their disclosure obligations. In particular, Victoria Legal Aid noted that:

- often, police believe disclosure only extends to witness statements that lead to establishing the criminal charges and not to other material
- police give limited weight to the need to disclose all evidence in their possession and even less weight to evidence that may mitigate the accused person's involvement in the offending or assist them to defend charges.<sup>145</sup>

In a submission to the Commission, the Criminal Bar Association stated that Forms 11 and 30 are appropriate if police complete them properly and consider carefully all the material they have that is, or may be, relevant.<sup>146</sup> The Association also noted, however, that investigating police often appear to fill in these forms as an afterthought, once they have compiled the brief. It submitted that ideally, police should prepare these forms progressively while compiling a brief, so that all relevant materials that do not end up in the brief are properly listed in the forms.<sup>147</sup>

In New South Wales, although police do not serve a copy of a disclosure certificate on the accused person, the *NSW Police Force Handbook* states that the DPP may show the disclosure certificate to the accused person.<sup>148</sup> In practice, after receiving the disclosure certificate and associated schedules of materials from police, the New South Wales DPP assesses the material identified and works with police to ensure that all relevant material and other information is accurately documented and disclosed. The DPP then drafts a letter of disclosure to the defence that includes information about all relevant materials included in the schedules of materials and disclosure certificate that the police have provided.

In contrast to the position in New South Wales, in Western Australia, the section 45 certificate of disclosure must be provided to the accused person.<sup>149</sup>

In its Operation Gloucester report, IBAC noted that despite existing disclosure obligations in Victoria, there is a significant risk that some police officers do not understand their disclosure obligations, especially that they must disclose all relevant material regardless of whether it helps or hinders the prosecution's case.<sup>150</sup>

## **Court processes for determining public interest immunity claims**

As discussed above, if police make a PII claim, it is for the court to determine whether that claim should be upheld. The DPP usually plays no part in determining the claim, although it might be involved to the extent that it is necessary for the court to understand how the prosecution is putting its case.<sup>151</sup>

The Commission heard from some stakeholders that the existing process for resolving PII claims is unclear and should be clarified in legislation. Stakeholder views about the potential for reform in this area are discussed below, along with the relevant case law.

### **Adequacy of current processes for determining public interest immunity claims**

The present practice in Victoria is to disclose to an accused person the existence of relevant material that is privileged or subject to a PII claim, if this can be done without revealing its confidential contents, usually through the Form 11 in summary proceedings or the Form 30 in indictable proceedings.<sup>152</sup> If relevant material is withheld and is not disclosed, an accused person can issue a subpoena and seek to have the court determine the issue. This means that ordinarily a court does not test or determine a PII claim unless an accused person is aware that material is being withheld and initiates a court challenge.

In a submission to the Commission, the DPP submitted that the procedure in Victoria for resolving disclosure issues is unsatisfactory for a number of reasons.<sup>153</sup>

It submitted that there should be a clear process for investigating agencies or the prosecution to initiate a court determination of PII, privilege and disclosure issues.<sup>154</sup> The current statutory and subpoena processes under the Criminal Procedure Act are initiated as defence challenges to a PII claim. The DPP considered that the prosecution or an investigating agency should be able to initiate determinations of such claims.

The DPP referred to human source-related material as a prime example of material about which it is important for an investigating agency to be able to actively obtain early guidance from the courts.<sup>155</sup>

The DPP further noted that in some circumstances, revealing the material may risk disclosing its contents. To deal with this, the DPP proposed that there could be legislation enabling the claim of privilege or immunity to be determined in court *ex parte*; that is, without the defence present or knowing about the application.<sup>156</sup>

In Australia, there is common law suggesting that *ex parte* applications can be used to determine PII.<sup>157</sup> This draws on the approach that courts in the United Kingdom have taken. This approach is outlined in Box 14.5.

#### **BOX 14.5: DETERMINING PUBLIC INTEREST IMMUNITY CLAIMS *EX PARTE*—UNITED KINGDOM AND AUSTRALIAN AUTHORITIES**

In *R v Davis*, the English Court of Appeal held that the Crown may make an *ex parte* application to a court to determine a claim of privilege or PII, if disclosing to the accused person the existence and the general nature of the material would reveal its contents.<sup>158</sup> The Court, however, stressed that *ex parte* applications are contrary to the general principle of open justice. It allowed the application solely to enable the court to test a claim that PII justifies non-disclosure of material in the possession of the Crown.<sup>159</sup>

In *R v H; R v C*, the House of Lords noted it is only ‘in truly borderline cases’ that the prosecution should seek a court ruling on disclosure to be heard *ex parte*.<sup>160</sup> The House of Lords modified the procedure set down in *R v Davis*.<sup>161</sup> It also considered that in such *ex parte* applications, ‘special counsel’ might be briefed to ensure that the defence case for disclosure is properly aired. The House of Lords did not, however, rule out the possibility of an exceptional case where an *ex parte* application could be made without notifying the defence.<sup>162</sup>

These authorities have been given some consideration in Australia.<sup>163</sup> For example, in *R v Andrews*, the Full Court of the Supreme Court of South Australia dismissed an appeal from a decision in which the trial judge followed *R v Davis* and heard an *ex parte* application for non-disclosure on the basis of PII.<sup>164</sup> One part of the appeal argued ‘the defendant was inappropriately excluded from that part of the trial and his exclusion was compounded by a want of procedural fairness by a lack of disclosure to his counsel.’<sup>165</sup> The appeal was not successful. In its decision, the Court applied *R v Davis*, arguing that:

*An ex parte application for public interest immunity may be made, where advising the defence of the existence of the material, its general nature and of the asserted right to withhold the material, would reveal that which the prosecution contends should not in the public interest be revealed. In other words, where advising the defence as above would fundamentally undermine the purpose for which the claim was made, an ex parte application may be appropriate.*<sup>166</sup>

Australian courts have also applied the case of *R v H; R v C* and held that the court has power to appoint special counsel on a PII claim being heard *ex parte*.<sup>167</sup>

Several aspects of the law of disclosure in the United Kingdom are similar to the law in Australia. For example, the legislation in the United Kingdom imposes a duty on the prosecution in equivalent terms to those imposed under the relevant Australian legislation, like the Criminal Procedure Act discussed above.<sup>168</sup>

When engaging in a comparison between the jurisdictions it is important to note, however, that there are some key differences between Australian and United Kingdom disclosure practices. One is that in the United Kingdom the prosecutors, not the police, are responsible for making PII applications. This makes it even more important that prosecutors are made aware of all the material that is relevant to an investigation, including all material that may be subject to PII. Guidelines assist in ensuring this occurs, even in relation to particularly sensitive information derived from human sources.<sup>169</sup>

In Scotland, for example, where a police investigation resulting in prosecution has been informed by intelligence from a human source, the police must reveal that intelligence to the prosecution if it is relevant to the investigation.<sup>170</sup> The prosecutor does not need to be advised of the true identity of a human source as a matter of routine, though they might request this information in certain circumstances.<sup>171</sup>

## A statutory scheme for determining public interest immunity claims

In a submission to the Commission, the Supreme Court suggested that, if the Commission were to consider a statutory scheme that provides for court rulings on PII issues, it should be mindful of the need to preserve a court's ability to:

- regulate its own procedures to ensure fairness and ensure that proceedings are compatible with an accused person's applicable Charter rights
- make orders that meet the needs of different cases and to address changing circumstances.<sup>172</sup>

Options that are presently available to the courts in hearing and determining PII claims include:

- requiring that the accused person be joined in the proceedings (and if appropriate, placing restrictions on an accused person's access to material that is the subject of the PII claim)
- requiring that a special advocate or special counsel be appointed to represent the accused person in the PII application proceedings only (and requiring that appointed person to give non-disclosure undertakings)
- allowing the proceedings to be determined *ex parte*, but appointing a contradictor or *amicus curiae* to assist the court to make submissions in the interests of the accused person
- making suppression orders or closed court orders for part of the proceedings.<sup>173</sup>

In its submission, the Supreme Court stressed the need to ensure that any new statutory scheme introduced to deal with PII issues is compatible with the existing provisions in the Criminal Procedure Act. It also emphasised the need to consider whether the scheme is in all cases optional for the prosecutor or law enforcement agency, or if it becomes mandatory when another avenue of dealing with PII is not used.<sup>174</sup>

The DPP submitted that there should be a clear statutory power for the prosecution to make an *ex parte* application to resolve disclosure issues in circumstances where giving the accused person notice would risk disclosing the material in question. The DPP noted that sometimes revealing the mere fact that information is held would allow an accused person to work out what the information is or where it came from.<sup>175</sup> For example, the DPP noted that even an apparently bland reference to a diary entry made by a particular police officer on a particular day could, together with other knowledge that the accused person has, confirm their suspicion that an associate has provided information to police.<sup>176</sup>

The DPP considered that:

*The existence of a flexible and effective procedure by which disclosure issues can be resolved, ex parte if necessary, would provide a valuable safeguard in relation to the disclosure of sensitive material generally, and of human source material in particular.*<sup>177</sup>

According to the DPP, a statutory procedure in Victoria should allow police to apply to the court to determine legal professional privilege or PII claims. If police could make the application *ex parte*, the DPP submitted that they should be provided with a copy of any order made so that they can independently assess its impact on the prosecution.<sup>178</sup> The DPP also argued that the court should be able to make an order subject to any conditions it considers necessary.<sup>179</sup> For example, the court may wish to order that material be made available for inspection only by the accused person's lawyers.<sup>180</sup>

The DPP further submitted that the Public Interest Monitor could be authorised to act as contradictor in *ex parte* applications made by police. Such a role would be similar to the Public Interest Monitor's functions in relation to warrants under the *Major Crimes (Investigative Powers) Act 2004* (Vic) and the *Surveillance Devices Act 1999* (Vic).<sup>181</sup>

Victoria Police similarly indicated that courts should have a clear way to identify complex and controversial PII issues at an early stage.<sup>182</sup> It suggested that, in appropriate cases, it should be possible to make applications in the absence of the accused person and defence lawyers and with an affected person (such as a human source) being able to appear. Victoria Police submitted that having a procedure to allow early judicial oversight of particularly complex PII issues would help build confidence in the administration of criminal justice.<sup>183</sup>

The DPP and Victoria Police referred to section 138 of the Western Australia Criminal Procedure Act as a possible model from which to develop a statutory procedure for Victoria.<sup>184</sup> Section 138 is described in Box 14.6.

#### **BOX 14.6: SECTION 138 OF THE CRIMINAL PROCEDURE ACT 2004 (WA)**

In Western Australia, section 138 of the *Criminal Procedure Act 2004* (WA) permits a court, either on its own initiative or on the application of a party, to dispense with all or part of a disclosure requirement under the Act, if it is satisfied that there is good reason to do so and no miscarriage of justice will result.<sup>185</sup>

Section 138 also empowers a court to shorten or extend the time to amend or cancel a previous order made under this section, or to make an order about any other matter that the court considers just.<sup>186</sup>

In a submission to the Commission, the DPP submitted that, similar to the Western Australian example, any new statutory provision in Victoria should give the court power to make a wide range of orders in relation to disclosure requirements, including powers to dispense with disclosure requirements and shorten or extend the time allowed for obeying requirements. It proposed that such a power should provide that a court could dispense with disclosure requirements on specific recognised grounds, such as PII, privilege, a statutory provision or a court order.<sup>187</sup>

The CDPP also referred to section 138 of the Western Australia Criminal Procedure Act, suggesting that it provides a fast and effective procedure for disclosure rulings. It noted that this procedure has been used effectively in federal criminal cases and that a similar procedure in Victoria may be useful.<sup>188</sup>

Other stakeholders, such as Victoria Legal Aid, endorsed the approach taken in the United Kingdom to determining PII claims. It submitted that prosecutors are well placed to recognise whether sensitive evidence should be protected or disclosed, to have responsibility for establishing the charges, and to ensure the procedures are fair.<sup>189</sup> This approach is outlined in Box 14.7.

### BOX 14.7: THE UNITED KINGDOM APPROACH TO DETERMINING PUBLIC INTEREST IMMUNITY CLAIMS

As previously discussed, in the United Kingdom, the prosecution, not the police, asks the court to determine whether material is subject to a PII claim.

When the prosecutor identifies sensitive material that requires disclosure, and is sure that disclosure would create a real risk of serious prejudice to an important public interest, they can:

- disclose the material in a way that does not compromise public interest or safety
- obtain a court order to withhold the material
- discontinue the case
- disclose the material because the overall public interest in pursuing the prosecution is greater than abandoning it.<sup>190</sup>

Before the prosecutor makes any application to the court to withhold material on the basis of PII, they must consult the police. When the prosecutor considers that sensitive material should be disclosed to the defence because it satisfies the disclosure test, they should consult the police before final conclusions are reached.<sup>191</sup>

The prosecution can only apply for PII when:

- they have identified material that fulfils the disclosure test (that is, it requires disclosure), but disclosing it would create a real risk of serious prejudice to an important public interest, and the prosecutor believes that the public interest in withholding the material outweighs the public interest in disclosing it to the defence; or
- the above conditions are not fulfilled, but the police, other agencies or investigators, after consulting at a senior level, do not accept the prosecutor's assessment; or
- in exceptional circumstances, the prosecutor has made all relevant enquiries of the police and the accused person and yet is still unable to determine whether sensitive material satisfies the disclosure test, and seeks the court's guidance.<sup>192</sup>

The *Criminal Procedure Rules 2015* (UK), Part 15, distinguish between three 'categories' of PII application:

**Type one:** The prosecutor must notify the accused person that they have applied for PII and indicate at least the category of the material held. The accused person must have the opportunity to make representations, and a hearing is conducted in open court with all parties present.

**Type two:** The prosecutor must notify the accused person that they have applied for PII, but they do not reveal the nature of the material held, because doing so would disclose information that the prosecutor argues should not in the public interest be disclosed. The accused person has the opportunity to address the court on the procedure to be adopted, but the application is made without the accused person or their legal representative present.

**Type three:** This is a 'highly exceptional' category of PII application. The prosecutor makes an application to the court without notifying the accused person, because to do so would disclose information that the prosecutor argues should not in the public interest be disclosed.<sup>193</sup>

## Early involvement of the prosecution in resolving public interest immunity claims

As explained above, consistent with the DPP Policy, Victoria Police and the OPP consult on issues relating to disclosure and PII from early in the prosecution process. Some stakeholders suggested that Victoria Police and the prosecution should engage with each other even earlier and to a greater extent in relation to PII claims made by Victoria Police.

Victoria Police told the Commission that the system of disclosure in Victoria could be improved by enhancing the degree of consultation between investigators and prosecutors.<sup>194</sup>

In a submission to the Commission, Victoria Police submitted that early engagement between its officers and the DPP in relation to complex legal issues concerning disclosure, relevance and PII, would strengthen the overall approach to disclosure in the system. Victoria Police also noted that the early involvement of prosecutors would provide the opportunity for Victoria Police officers to consult with and seek advice from prosecutors in relation to these matters.<sup>195</sup> Victoria Police further observed that one benefit of the approach in the United Kingdom, outlined in Box 14.7, is that it makes clear that the Crown Prosecution Service may be consulted on questions of disclosure.<sup>196</sup>

In Victoria, the DPP Policy does not provide any specific guidance about police consultation with the OPP in relation to PII claims or questions of disclosure more broadly. In a submission to the Commission, Victoria Police indicated it would not be necessary to consult with the prosecution in relation to all disclosure or all PII issues and did not propose that the Chief Commissioner of Victoria Police should stop independently making PII claims. Rather, Victoria Police suggested that when it identifies especially complex disclosure issues that might impact on the fairness of the prosecution, there should be a clear and consistent process enabling Victoria Police to engage with the DPP at the earliest possible time.<sup>197</sup>

Victoria Police submitted that it does not routinely discuss assessments relating to disclosure with DPP prosecutors. It told the Commission that, unlike in New South Wales, the policy of the DPP does not provide for conferences to take place between prosecutors and police officers to consider PII claims, and that it would welcome the DPP's early involvement.<sup>198</sup>

### New South Wales model

In New South Wales, the initial decision about whether material should be subject to a PII claim is made by police. That decision will only be reviewed if the DPP asks to review the material itself. As in Victoria, where the VGSO argues PII claims on Victoria Police's behalf, in New South Wales, the Crown Solicitor's Office, not the DPP, asserts and argues PII on behalf of the police.

Under the New South Wales model, if a prosecutor receives information or material that may be subject to a PII claim, the prosecutor should not disclose that information or material to an accused person without first consulting with the officer in charge of the case. The purpose of the consultation is to give that officer the opportunity to raise any concerns about such disclosure. The officer should be allowed a reasonable opportunity to seek advice if there is any concern or dispute.<sup>199</sup>

If, in a case being prosecuted by counsel, a prosecutor and the police disagree about what, if any, of the sensitive information or material should be disclosed and there is no PII claim, the matter must be referred to the New South Wales DPP or a Deputy DPP. In cases being prosecuted by lawyers, the matter is referred to the New South Wales Solicitor for Public Prosecutions or Deputy Solicitor.<sup>200</sup> In cases where police pursue a PII claim, the question of disclosure will depend on the outcome of that claim.<sup>201</sup>

While the process in Victoria also provides for some consultation between police and prosecutors, there is no formal equivalent to the process in New South Wales.

The *Prosecution Guidelines of the Office of the Director of Public Prosecutions for NSW* state that rare occasions may arise when the overriding interests of justice—for example, a need to protect the integrity of the administration of justice or the identity of a human source (covered by PII) or a need to prevent danger to life or personal safety—require disclosable information to be withheld. Such a course would only be taken with the approval of the New South Wales DPP or a Deputy Director.<sup>202</sup>

In a submission to the Commission, Victoria Police noted that the New South Wales disclosure certificate provides that police officers may request a conference with the responsible prosecuting solicitor to discuss the reasons why the police officer objects to disclosure.<sup>203</sup> In completing the disclosure certificate, officers must tick ‘yes’ or ‘no’ to the question of whether they have requested a meeting with the prosecuting solicitor.<sup>204</sup>

## Commonwealth model

Victoria Police observed that there is inconsistency between approaches taken by the Victorian OPP and the CDPP on early engagement with investigators on questions of disclosure.<sup>205</sup> Victoria Police argued that it is important for any proposed reforms to set out clearly the respective roles of police and prosecutors in the disclosure regime, making the division between these roles clear. It also argued that such reforms should facilitate a greater degree of consultation between the agencies.<sup>206</sup>

The Australian Federal Police (AFP) told the Commission that it communicates the existence of all potentially disclosable material to the CDPP in accordance with the CDPP’s disclosure guidelines.<sup>207</sup> The AFP case officer and the prosecutor will regularly communicate in relation to all matters concerning the case.<sup>208</sup> The AFP, in partnership with the CDPP, has developed a ‘Model Brief’ that contains templates that conform with the CDPP’s guidelines for preparing briefs of evidence in each state and territory.<sup>209</sup>

The CDPP informed the Commission of its approach to early engagement with law enforcement agencies on PII issues. An investigative agency advises the CDPP, usually at an early stage, if relevant material is subject to a PII claim.<sup>210</sup> When necessary and appropriate, the CDPP may consider the material in question and discuss PII and disclosure issues with the investigative agency. Those discussions may include matters such as:

- the basis for the PII claim
- the significance of the material for the case
- appropriate procedures for resolving the claim.

Consideration is also given to whether and when the existence of the material can be disclosed to the accused person and how much information can be provided about it and the basis for the claim.<sup>211</sup>

The CDPP, however, is not itself involved in pursuing claims for PII.<sup>212</sup> As in Victoria, the practice in Commonwealth prosecutions is for police to make and argue their own PII claims.

The CDPP stated that there are very good reasons for this practice; namely:

- it is doubtful that the CDPP has power to appear on behalf of another agency to make a PII claim<sup>213</sup>
- a conflict may arise between the interests of the CDPP as prosecutor and those of the relevant agency<sup>214</sup>

- there may be circumstances in which the CDPD cannot have access to the material in question without compromising its position as prosecutor<sup>215</sup>
- PII claims being pursued by the relevant agency with its own legal representation tends to better maintain the prosecution authority's independence and the appearance of that independence. It is therefore more likely to promote public confidence in the administration of justice.<sup>216</sup>

## Commentary on the Victorian model

In a submission to the Commission, the Criminal Bar Association supported the DPP being involved at an early stage in assessing material over which police may wish to make a PII claim, stating that this would assist Victoria Police to grapple with the often difficult issues surrounding PII.<sup>217</sup>

Victoria Legal Aid similarly expressed support for the early involvement of the DPP in assessing and advising police about making a PII claim.<sup>218</sup> Victoria Legal Aid indicated that, presently, when police seek to claim PII over evidence, they enlist the VGSO. Victoria Legal Aid has observed that the VGSO is often engaged at a late stage, just prior to significant hearings. It further noted that, frequently, once the VGSO is engaged to consider evidence, the information is disclosed because PII does not apply, or the information is released in a way that mitigates any PII risks.<sup>219</sup> Victoria Legal Aid argued that the VGSO should be engaged at an early stage, prior to the initial directions hearing, to enable discussion of the matter at a special pre-trial hearing.<sup>220</sup>

The DPP and OPP submitted that in cases potentially affected by Ms Gobbo's use as a human source, there were numerous failures to make proper disclosure to the accused persons at the initial stage of the proceedings due to police not alerting prosecutors to the existence of material that may have been subject to a PII claim.<sup>221</sup> The DPP noted that these failures did not result from the OPP solicitors not taking a greater role in assessing the actual content of the material subject to the PII claims, but because the police did not bring the existence of information potentially covered by PII to the prosecutors' attention. The DPP and OPP submitted that it is therefore crucial that police understand the kinds of material that need to be subject to a PII claim so that the existence of that material is brought to prosecutors' attention.<sup>222</sup>

The DPP submitted that many of the problems that emerged from the recruitment and use of Ms Gobbo as a human source, and from the failure to disclose her conduct, could have been avoided had the police obtained timely legal advice from the VGSO or other experienced counsel.<sup>223</sup>

The DPP further stated that in more routine investigations, officers may benefit from obtaining early independent legal advice about their disclosure obligations during the investigation.<sup>224</sup> It suggested that an advantage of doing this is that police would be better prepared to promptly take any necessary steps to protect information subject to PII.<sup>225</sup> It argued that Victoria Police should encourage officers to obtain independent advice and increase their opportunities to do so.<sup>226</sup>

The DPP submitted that OPP solicitors and police informants already work together closely on indictable matters. Current practice involves informants being expressly invited by email, after the first hearing of an indictable matter, to contact OPP solicitors in relation to any doubts or concerns about disclosure.<sup>227</sup> The DPP also emphasised that OPP solicitors can and do respond to certain police queries about prosecutions, including those where PII is in issue; about the way in which the Crown case is to be put; and about issues raised by the accused person.<sup>228</sup> In providing that assistance to police, prosecutors are not usually required to review the PII material itself.<sup>229</sup> The DPP submitted that legal advice about complex disclosure issues, including PII, should be sought from Victoria Police's own independent legal advisers, such as the VGSO, and not from the DPP.<sup>230</sup>

The DPP also submitted that there should be no general rule that all material that is not disclosed due to a PII claim must be assessed by the DPP.<sup>231</sup> It stated that this would be inconsistent with the DPP Policy, unnecessary and a potential source of unfairness, because:

- it would not be consistent with an efficient use of the DPP's resources
- it risks undermining the DPP's independence
- in some circumstances, providing this information to the DPP may lead to the DPP deriving an unfair advantage over the accused person.<sup>232</sup>

In relation to the last point, the DPP submitted that material should be withheld by police from the prosecution if the material derives from human sources with obligations of confidentiality. The DPP suggested that is because it may be difficult to assess the potential impact of any unfair advantage on the trial if the prosecutor has knowledge of that material.<sup>233</sup>

## Police ability to fulfil disclosure obligations

The Commission heard from some stakeholders that the ability of police to fulfil their disclosure obligations is constrained by factors including:

- their understanding of their disclosure obligations, including their understanding and assessment of relevant material and PII
- the informant's awareness of all relevant material that investigators hold
- the volume and complexity of material that must be reviewed and disclosed.

These issues are discussed in turn below.

## Police understanding of their disclosure obligations

### Understanding and assessing relevance

The DPP told the Commission that police investigators sometimes struggle to determine whether material satisfies the broad test of whether it is relevant to the accused person's case. The DPP noted that it is inherently challenging for investigators to look critically at information obtained during an investigation and identify material that may undermine the prosecution case or strengthen the accused person's case.<sup>234</sup>

In a submission to the Commission, Victoria Police informed the Commission that assessing whether material is 'relevant to the case of the accused' often involves a complex and time-consuming analysis of the factual and legal elements of a criminal prosecution.<sup>235</sup> Victoria Police noted that these complexities are typically compounded in the case of human source information.<sup>236</sup>

Victoria Police suggested that, in such circumstances, the OPP may be able to assist Victoria Police officers to make appropriate assessments about the relevance of material for disclosure.<sup>237</sup> It also noted that, in certain circumstances, given the importance of ensuring the safety of human sources, it may be appropriate for Victoria Police to provide prosecutors with only relevant extracts of human source files.<sup>238</sup>

Victoria Police also indicated in a submission to the VLRC's Committals Review that the OPP's assistance in assessing material for relevance and advising police is crucial in the disclosure process. This is particularly the case given that police officers may not be legally trained and consequently rely on the OPP's guidance and advice in determining relevance.<sup>239</sup>

## Understanding public interest immunity

In a submission to the Commission, the DPP commented that investigators sometimes inappropriately withhold otherwise relevant material on the basis of PII. The DPP explained that this is particularly problematic when the existence of such material is not disclosed to the prosecutor or the accused person, as it means that the asserted claim of PII cannot be tested by the accused person.<sup>240</sup> The DPP further stated that underlying this problem is a common misconception that an investigative agency may determine for itself whether relevant material is subject to PII.<sup>241</sup>

In a submission to the VLRC's Committals Review, Victoria Police stated:

*The increased involvement of the OPP in assessing public interest immunity (PII) material at an early stage and assisting with appropriate court applications would also improve efficiencies in the disclosure process. The common law requires police to provide prosecutors with material subject to a claim of PII so that the prosecutor is aware of any exculpatory material in the possession of investigating agencies and can consider the effect of a successful claim of PII on the overall fairness of a trial. For example, considerations of fairness may require the prosecutor to charge a lesser or different offence if the accused would not receive a fair trial without the material subject to PII.*<sup>242</sup>

The Victorian Aboriginal Legal Service, in a submission to the VLRC, noted that problems with disclosure practices may be accentuated in regional and rural areas, where police may have less experience in disclosure.<sup>243</sup>

## Informant's awareness of all relevant material

An informant may not be aware of all relevant material the police hold.

The DPP told the Commission that its public hearings have shown that those Victoria Police officers who had information or material relating to certain prosecutions of people connected to Ms Gobbo were not the same as the informants or those helping to put together the brief to the OPP.<sup>244</sup>

These issues arise as a result of information being quarantined between different areas within a policing agency. This situation, called the 'sterile corridor', can occur when one section of the police service obtains information in an intelligence operation and the investigating officer works in a different section of the police service. The sterile corridor is often considered a necessary safeguard in police work involving human sources. A consequence of this, however, is that the police officer responsible for preparing the brief of evidence may only hold fragments of information relevant to an investigation.

The need for, and issues surrounding the maintenance of a sterile corridor in using and managing human sources, are discussed in Chapter 12.

## Volume and complexity of material

Some stakeholders told the Commission that the volume of material that may be obtained during an investigation can make it more difficult for police to comply with their disclosure obligations.

The Criminal Bar Association observed that there is little doubt that due to the complexity and size of modern criminal investigations, along with advancements in technology, police and prosecutors find it more challenging to meet their obligations when PII issues arise.<sup>245</sup> In a submission to the Commission, the Association further stated that generally, briefs of evidence have greatly increased in size over the last 20 years. In addition, the volume of material that is disclosable but that the prosecution does not rely on has grown exponentially. By way of example, the Criminal Bar Association pointed to cases involving drug importations, drug trafficking, white collar fraud, foreign bribery and terrorism.<sup>246</sup>

The DPP also stated that police may be overwhelmed by the volume of material obtained during an investigation (for example, data downloaded by mobile phones, or recordings of telephone conversations). Because of the volume of material, police may not adequately assess all of it for relevance. This can mean that police do not provide relevant material with a hand-up brief, or subsequently, as required by the Criminal Procedure Act. The DPP indicated that this is an increasing problem, particularly because the volume of electronic data obtained during an investigation, even in relatively simple cases, is growing rapidly.<sup>247</sup>

## Police training and guidance on disclosure obligations

Training on disclosure obligations for Victoria Police officers is embedded within certain training modules provided to new recruits at the Police Academy.<sup>248</sup> Additional training on disclosure is also delivered to newly appointed detectives and Sergeants and Senior Sergeants.<sup>249</sup> Police prosecutors also receive additional, and more specific, training on disclosure as part of attaining the Graduate Certificate in Police Prosecutions.<sup>250</sup>

The VGSO provides ongoing training on disclosure and PII issues to officers in the Victoria Police Detective Training School several times a year. The VGSO has also delivered presentations on these topics to other relevant work units within Victoria Police. With these and some other limited exceptions, it appears that most of the current training on disclosure within Victoria Police is provided by police officers, rather than external providers with legal training and experience with disclosure and PII issues.<sup>251</sup>

Victoria Police told the Commission that a dedicated project team is examining its existing disclosure training to identify and analyse training needs and gaps. Following this analysis, the existing training will be strengthened.<sup>252</sup>

Some guidance for police on disclosure obligations has also been set out in the *Victoria Police Manual—Human Sources* (Human Source Policy) since May 2020.<sup>253</sup> The scope of this guidance is relatively limited. It addresses, at a high level, the circumstances in which information from a human source can be disseminated, including for the purpose of a legal process. It also deals with the procedural steps that Victoria Police officers must take when they are asked to confirm or deny the existence of a human source in a court or tribunal.<sup>254</sup>

A number of stakeholders informed the Commission that the training and guidance police officers receive in relation to their disclosure obligations could be improved.

The DPP submitted that substantial improvements could be made to the training and guidance available for Victoria Police officers in relation to their disclosure obligations, and that senior officers' efforts to introduce improvements in these areas should be supported.<sup>255</sup>

The Law Institute of Victoria, in a submission to the VLRC's Committal Review, suggested that poor disclosure practices may be addressed with targeted education and training for police officers and more rigorous oversight by the DPP.<sup>256</sup>

The Criminal Bar Association suggested that improving the current system relies on properly training all police who investigate and compile briefs in relation to:

- relevance (to the prosecution case and for an accused person's defence to that case)
- when it is proper and appropriate to make a claim of PII or legal professional privilege
- the duty of disclosure
- ethical approaches to investigating criminal conduct—in other words, the end result does not always justify the means used to get there.<sup>257</sup>

These stakeholder comments echo some of the conclusions reached by IBAC in its Operation Gloucester report regarding Victoria Police's inadequate policies and training about disclosure practices and the use of evidence. IBAC found that this had reinforced improper practices, which had been at least tacitly supported by the culture of Victoria Police over a long period of time.<sup>258</sup> While IBAC's investigation spanned police practices over three decades, it found that 'significant gaps' in policy and guidance remained at the time of Operation Gloucester.<sup>259</sup>

IBAC made two recommendations for Victoria Police to review and improve its policies and training to ensure that police officers understand and comply with their disclosure obligations under the laws of evidence.<sup>260</sup>

Victoria Police officers who participated in focus groups conducted by the Commission also highlighted the challenges involved in managing disclosure when using a human source. They suggested that officers should be provided with more training on the interaction between disclosure and human source management. The outcomes of the focus groups held by the Commission are discussed further in Chapter 12.

Victoria Police informed the Commission that it is introducing a number of measures to enhance its disclosure practices and has developed an Action Plan that outlines steps that have been completed or are underway.<sup>261</sup> Measures taken by Victoria Police include:

- development of an instructional model and video presentation that highlight the importance of disclosure
- revising human source management training to specifically cover issues related to:
  - the use of human source information in prosecutions
  - human sources becoming witnesses.<sup>262</sup>

In addition, Victoria Police is currently rolling out an organisation-wide disclosure handbook. This handbook is intended to provide general guidance on disclosure obligations to police officers acting as informants in criminal proceedings. It highlights the importance of disclosure in the criminal justice system. It also provides guidance in assessing and identifying relevant material, emphasising that:

- the duty of disclosure extends not only to material that helps the prosecution but also to material that could help the accused person
- material can be relevant even if it was obtained solely for investigative (rather than evidentiary) purposes
- both police and prosecution carry the obligation of disclosure
- if an informant is unsure about what to disclose, they should seek further legal advice.<sup>263</sup>

## **Improvement to disclosure practices in the United Kingdom**

Efforts to improve disclosure practices in the United Kingdom have also focused on the importance of guidance and training. A 2020 report by Her Majesty's Crown Prosecution Service Inspectorate observed that, however good police training on disclosure is, unless those tasked with putting together the files are regularly and frequently exposed to disclosure issues, the benefits of training will not become embedded and improvements may not happen.<sup>264</sup>

The Commission has also heard that using dedicated disclosure officers, as is done in the United Kingdom, may improve disclosure practices. This model is outlined in Box 14.8.

**BOX 14.8: DISCLOSURE OFFICERS IN THE UNITED KINGDOM**

In the United Kingdom, a dedicated disclosure officer must be appointed in all investigations. In larger cases, one or more deputies can also be appointed.<sup>265</sup> A disclosure officer performs different functions to an investigator, but the roles of disclosure officer and investigator can be undertaken by one person.<sup>266</sup>

The Chief Officer of each police service is responsible for ensuring that disclosure officers have sufficient skills and authority, appropriate to the complexity of the investigation, to discharge their functions effectively.<sup>267</sup> They are not required to have any additional training or accreditation.

The dedicated disclosure officer's role is to ensure that disclosure principles are embedded in the investigation process, including ensuring that the investigating officer complies with their disclosure obligations. They have a range of duties including:

- examining material retained during the investigation
- 'revealing' material to the prosecutor and certifying that this has been done (the disclosure officer 'reveals' material to the prosecutor by drawing their attention to material that is potentially disclosable and providing copies of certain categories of material—this does not mean that the material will necessarily be disclosed to the accused person)
- disclosing unused material to the accused person, at the request of the prosecutor.

Disclosure officers produce a number of schedules and provide these to the prosecution, including a schedule for all non-sensitive unused material (known as the MG6C Schedule) and a schedule for all sensitive unused material (known as the MG6D Schedule).

According to the Code of Practice that supplements the *Criminal Procedure and Investigations Act 1996* (UK), sensitive material covered by PII (that is, material that would be included in the MG6D Schedule) includes material that relates to the identity or activities of those supplying information to the police who may be in danger if their identities are revealed, including human sources, undercover police officers, witnesses or others.<sup>268</sup>

The disclosure officer is also responsible for drawing the prosecutor's attention to any material that they consider might undermine the prosecution case or assist the defence. This notification is included in a separate schedule, the MG6E Schedule. The prosecution is then in an informed position to consider their duty of disclosure.

To determine what material should be disclosed to the accused person, the prosecutor must review the MG6C Schedule of all non-sensitive unused material and the MG6D Schedule of all sensitive unused material and either confirm or alter the disclosure officer's recommendations on which items are disclosable and sensitive.

A different procedure applies in exceptional circumstances, when an investigator considers that material is so sensitive that revealing it to the prosecutor on a schedule is inappropriate. In this case, the investigator—not the disclosure officer—must reveal the existence of that material to the prosecutor separately. This will only apply in circumstances when revealing the material would likely lead directly to the loss of life, or directly threaten national security.<sup>269</sup>

In such cases, the investigator must act as soon as reasonably practicable after sending the file containing the prosecution case to the prosecutor. The investigator must also ensure that the prosecution is able to inspect the material so that they can access information that is disclosable and, if it is, decide whether it needs to be brought before the court for a ruling on disclosure.<sup>270</sup>

The disclosure officer's duties do not cease once they have submitted the schedules, but rather continue throughout the investigation and prosecution. The disclosure officer must conduct an ongoing review of the material during the prosecution and provide the prosecutor with updated disclosure schedules when appropriate.

In a submission to the Commission, the CDPP suggested that dedicated disclosure officers may be beneficial when used appropriately, and noted that some federal investigative agencies already use these officers. As part of its recent updating of disclosure practices, the CDPP specifically noted that prosecutors should encourage the appointment of dedicated disclosure officers in large and complex matters.<sup>271</sup>

Victoria Police submitted to the Commission that in cases involving human sources, it is important to have disclosure officers embedded in investigations teams, the Human Source Management Unit (HSMU) (the unit responsible for overseeing human source registrations and management) and dedicated source teams (units specifically responsible for managing and interacting with human sources). Victoria Police suggested that disclosure officers may overcome the challenge to effective disclosure that can result from the implementation of a sterile corridor, when police investigators are not aware of the source of information, let alone whether the source has legal obligations of confidentiality or privilege and the circumstances in which those obligations may be engaged.<sup>272</sup>

Victoria Police informed the Commission that it is piloting the use of disclosure officers, who will be embedded on both sides of the sterile corridor and be responsible for compiling documents and conducting assessments of relevance, including seeking legal advice and liaising with the informant and/or the OPP when appropriate.<sup>273</sup> Victoria Police advised the Commission that two dedicated disclosure officers have been appointed for a 12-month period to test the value of the model. These officers are legally qualified sworn members and report to the Superintendent, Legal Prosecutions Specialist Branch.<sup>274</sup>

## Monitoring police compliance with disclosure obligations

The DPP noted that at present, Victoria Police's compliance with its disclosure obligations is not subject to any system of auditing or monitoring.<sup>275</sup> According to the DPP, the lack of independent monitoring of the disclosure process has contributed to the compliance failures that this Commission has highlighted.<sup>276</sup>

The DPP stated that an effective system for independent auditing and review of Victoria Police compliance with disclosure obligations is essential to any system-wide response to the failures the Commission has identified. The DPP believes that without such auditing and review, it will never be known whether other measures to change police culture and to improve compliance with disclosure obligations are working.<sup>277</sup>

In a submission to the Commission, the DPP proposed that the Commission should recommend an independent body responsible for monitoring and reporting on Victoria Police disclosure of (a) disclosable material to accused persons; and (b) the existence of potentially disclosable unused material to the OPP.<sup>278</sup> The main aims of the proposed independent body, described as the ‘Disclosure Monitor’ in the DPP’s submission, should be to improve overall compliance by Victoria Police with its disclosure obligations, identify general shortcomings in disclosure practices and improve guidance to police for future cases.<sup>279</sup>

Among other things, the DPP suggested that the Disclosure Monitor could be tasked with reviewing cases in which evidence came from a human source with an obligation of confidentiality.<sup>280</sup>

The DPP further submitted that the Disclosure Monitor should be a body created by legislation with the powers it needs to conduct its own affairs. To ensure its independence it should not be part of, or report to, the DPP or Victoria Police. In addition, neither the Disclosure Monitor nor its staff should hold positions with the OPP or Victoria Police.<sup>281</sup>

Under the model proposed by the DPP, the Disclosure Monitor’s reports would be expected to address overall police compliance with disclosure requirements, identify specific areas for improvement and suggest changes to police practices, procedures and guidelines as appropriate.<sup>282</sup> In addition to its auditing role, the Disclosure Monitor would be involved in training Victoria Police to properly identify PII claims and to comply with the certification process proposed.<sup>283</sup>

## Leadership and cultural change to improve disclosure practices

During the Commission’s consultations, some stakeholders emphasised the need for leadership and cultural change within Victoria Police to improve disclosure practices.

Victoria Legal Aid indicated that the present culture of Victoria Police gives limited weight to the need for police to disclose all of the evidence in their possession and even less weight to evidence that may mitigate the accused person’s involvement in the offending.<sup>284</sup> The DPP also stated that the most important goal of any measures to improve police compliance with disclosure is to improve the culture of compliance with disclosure obligations within Victoria Police.<sup>285</sup>

In its Committals Review, the VLRC stressed that cultural change is needed within Victoria Police so that the importance of early disclosure of all relevant materials, and the obligation to inquire about the existence of relevant material, is recognised and becomes entrenched in its operating procedures.<sup>286</sup>

In her evidence to the Commission on behalf of Victoria Police, Ms Steendam said that Victoria Police is focused on creating a ‘culture of confident humility’, which she submitted comprises an ‘ethical culture and a culture that’s committed to good service delivery’.<sup>287</sup> She noted that the disclosure reforms being undertaken by Victoria Police are informed by these cultural values.<sup>288</sup>

Additionally, Victoria Police emphasised that it is ‘absolutely committed’ to ensuring that it meets its disclosure obligations, and to enhancing its own processes to improve disclosure in the Victorian criminal justice system.<sup>289</sup>

Victoria Police is currently considering the establishment of a disclosure governance committee.<sup>290</sup> The role of this proposed committee is ‘to achieve a consistent and transparent approach to disclosure ... by promoting the effective management of disclosure’.<sup>291</sup> Victoria Police indicated that this committee would consist of relevant internal stakeholders, such as the HSMU and Crime Command, and that ‘extending to external stakeholders such as the Office of Public Prosecutions will be considered’.<sup>292</sup>

Various reviews conducted in the United Kingdom have also recognised the importance of cultural change. The United Kingdom House of Commons Justice Select Committee report, *Disclosure of Evidence in Criminal Cases*, and evidence gathered in the Attorney-General's *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System*, assert that to resolve problems with disclosure there needs to be a shift in culture, driven by clear leadership.<sup>293</sup>

The House of Commons Justice Committee report did not propose any fundamental changes to the legislation or the principles of disclosure. Instead, the report recommended a shift in culture towards viewing disclosure as a core justice duty, and not as an administrative add-on.<sup>294</sup> This echoes a growing concern in the United Kingdom that police tend to see their core function as investigating criminal offences and that they regard disclosure as a less important, administrative task to be completed at the end of the investigation, rather than as a duty that is central to ensuring fairness to an accused person. The report also reflects the findings of the *Mouncher Investigation Report*, which concluded:

*... disclosure errors were not designed to pervert the course of justice; they were the consequence of inexperience, poor decision making and inadequate training, leadership and governance.*<sup>295</sup>

As a result of these reviews, reforms to disclosure practices in the United Kingdom have focused on the importance of leadership and cultural change.

A key United Kingdom initiative, the National Disclosure Improvement Plan (NDIP) was introduced in January 2018 by the Crown Prosecution Service, the National Police Chiefs' Council and the College of Policing.<sup>296</sup> The NDIP represents a commitment between police and the Crown Prosecution Service to work together in governing disclosure in the United Kingdom. The stated purpose of the NDIP is to bring together the shared commitment of police and the Crown Prosecution Service to make sustainable changes to the way they meet their disclosure duties.<sup>297</sup>

A key action the NDIP facilitated was the creation of the *National Disclosure Standards*, a statement of national standards for completing disclosure schedules and certificates. The standards state that:

*We must foster a culture in which disclosure is not a separate exercise, discrete from the criminal investigation. Investigators must apply their minds to disclosure from the very outset of the case and not view disclosure as an adjunct to be undertaken only once they have formed the view that a suspect should be charged with an offence. Proper disclosure of unused material is vital if there is to be a fair trial, which is in the interests of the complainant, the accused and the whole community.*<sup>298</sup>

The NDIP has provided an unprecedented level of senior leadership and oversight to disclosure improvements in the United Kingdom. Collectively, police and the Crown Prosecution Service acknowledged that an investigation culture had developed in which disclosure was devalued. Likewise, the NDIP suggested that a mindset had developed in which disclosure had been viewed as an administrative add-on to investigations. It also noted that confidence in the disclosure process had been further undermined by a series of high-profile cases in which disclosure had not been done as it should, and that these brought into sharp focus the very serious consequences of not getting disclosure right.<sup>299</sup>

The Attorney-General's *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* stated that:

*Police and [Crown Prosecution Service] leadership must ensure that the practical steps taken to deliver culture change that have started to be driven through the NDIP are sustained and permanently embedded in both services.*<sup>300</sup>

One of the main benefits of the NDIP program is said to be its joint ownership by police and prosecution senior leaders.<sup>301</sup> The success of the NDIP reflects the need for consistent leadership in the area of disclosure.<sup>302</sup>

## Disclosure in summary proceedings

Most of the submissions that the Commission received related to potential reform in relation to indictable proceedings. The Commission's terms of reference also required consideration of current practices and the adequacy of safeguards in relation to summary proceedings—that is, the cases Victoria Police typically prosecutes in the Magistrates' Court.

Although summary prosecutions make up the majority of Victorian prosecutions, Victoria Police has indicated that use of human sources in summary prosecutions is rare.<sup>303</sup> Victoria Police also informed the Commission that, although not impossible, the use of information from a human source with legal obligations of confidentiality or privilege in a summary proceeding is extremely unlikely.<sup>304</sup>

Victoria Legal Aid indicated that it supports procedures that would assist in ensuring the timely disclosure of all evidence in summary prosecutions.<sup>305</sup> It also noted that as the vast majority of criminal matters are heard summarily, it is essential that any oversight and monitoring systems developed for indictable proceedings are also effective for summary investigations and prosecutions.<sup>306</sup>

As noted above, Victoria Police submitted that while disclosure certificates might be used in Victoria to facilitate disclosure for indictable proceedings, it does not consider these certificates to be necessary for summary proceedings.<sup>307</sup>

Victoria Police informed the Commission that a major challenge officers face is the sheer volume of summary matters. It noted that without a document management system capable of linking all relevant investigation material to a brief, effective disclosure will remain an inefficient and time-consuming process.<sup>308</sup> Victoria Police noted that without appropriate systemic support, any introduction of heavier disclosure obligations may make managing large volumes of material even more challenging—and that this is particularly so in relation to summary matters. It noted that this could result in significant delays in finalising summary matters, especially in uncontested cases.<sup>309</sup>

The Criminal Bar Association stated that introducing a disclosure certificate along the lines of the New South Wales model and requiring its completion in both indictable and summary prosecutions would mean police have to deal with these issues consistently.<sup>310</sup>

## Other disclosure issues raised with the Commission

While the Commission has not been asked to review disclosure more generally, during the Commission's consultations, some stakeholders raised broader issues regarding disclosure. These issues are outlined below.

### Legislative clarity in relation to disclosable material

The DPP informed the Commission that the subjective perception of experienced prosecutors in Victoria is that failures to disclose the existence of relevant unused witness statements, unused telephone or listening device material or unused forensic tests have become less common over time. This, they believe, is due to developments in criminal procedure and investigators' increasing awareness of their obligations. The DPP contended that such problems may still arise, but do not appear to be widespread or systemic issues in Victoria.<sup>311</sup>

According to the DPP, the harder to solve problems tend to concern material that may be relevant to a prosecution witness' credibility, such as relevant criminal history (including outstanding charges), or the provision of letters of assistance, charge reductions or other favourable treatment in criminal proceedings as a result of cooperation with investigators.<sup>312</sup>

The DPP recommended that this material should be specifically listed in section 110(e) of the Criminal Procedure Act as disclosable with a hand-up-brief, to make it clear that this type of material should be disclosed.

As outlined earlier in this chapter, section 110 applies in indictable proceedings (see especially Figure 14.2). Section 41 is a similar provision that applies in summary proceedings and lists the material that the prosecution must include in a full brief to an accused person. Like section 110(e), section 41(e) requires that any information, document or thing in the possession of the prosecution that is relevant to the alleged offence must be in the full brief, and specifies the kinds of material subject to the requirement.

### **Early and appropriate disclosure to the accused person**

In a submission to the Commission, Victoria Legal Aid drew the Commission's attention to its submission to the VLRC Committals Review, in which it recommended introducing several mechanisms to improve early and appropriate disclosure.<sup>313</sup>

Victoria Legal Aid emphasised that delays resulting from late disclosure of evidence in summary proceedings have a more profound impact on accused persons who are in custody. When an accused person is unlikely to apply successfully for bail and chooses to challenge the prosecution case, the delays associated with disclosure could result in the accused person's time on remand exceeding the period they are ultimately sentenced to serve, if they are convicted.<sup>314</sup>

### **Upgrade of information systems**

A major theme arising from reviews of disclosure issues in the United Kingdom is that better use of technology is critical in improving disclosure.<sup>315</sup>

Victoria Police does not have a single repository for all information that forms part of a criminal investigation. Victoria Police submitted that in part this is because its existing ICT systems are not able to support an organisation-wide document management system. As a result, information and documents created during an investigation may be spread over different locations, making it difficult for an informant or other Victoria Police officers to identify all relevant information.<sup>316</sup>

Increasingly, as noted earlier, the use of modern reporting and data recording means that investigations tend to produce large volumes of material. New forms of data and documentation, such as mobile phone applications and body-worn camera footage, are now created in investigations. As recently as a decade ago, these were uncommon.<sup>317</sup>

Noting that this large volume of material forms part of the challenge officers face in complying with disclosure obligations, Victoria Police submitted that technology should be a major part of any reform to strengthen the Victorian disclosure regime.<sup>318</sup>

The DPP submitted that more efficient, effective, stable and secure information management systems should be developed across Victoria Police.

Victoria Police submitted that it currently has over 30 information capture technology initiatives in progress that are aimed at reducing waste, improving efficiency and modernising its operations, including a business case for a new case management system that would ultimately integrate with an electronic document and record management system.<sup>319</sup>

Some of the information and document management issues are being addressed to a degree by the implementation of an intelligence management system that connects some data sources across the organisation. This assists in managing disclosure obligations by enabling broader searches to identify disclosable information.<sup>320</sup>

Victoria Police acknowledged, however, that this new system is not a substitute for a fit for purpose electronic information and document management system that would best help it meet its disclosure obligations.<sup>321</sup>

As a well-designed system of this kind would enable Victoria Police to better capture, use, manage and share information right through the investigation and prosecution processes, Victoria Police submitted that a system of this kind is critical to achieving its broader objectives (including meeting demands associated with inquiries and royal commissions) but the costs of implementing it are likely to be significant.<sup>322</sup> It emphasised that any significant reform to the disclosure framework should take into account the current limitations of Victoria Police's information systems, and the investment required to address these limitations.<sup>323</sup> Victoria Police did not tell the Commission what level of investment would be required to address these limitations.

## CONCLUSIONS AND RECOMMENDATIONS

If everything else is done properly in recruiting, handling and managing a human source, risks relating to the use of human source information in the criminal justice system should be significantly reduced. For example, if police had obtained legal advice about whether it was appropriate to register Ms Gobbo as a human source, it is conceivable that she would never have been registered, or if registered, so carefully monitored that her misuse as a human source would have been avoided.<sup>324</sup>

In Chapters 12 and 13, the Commission makes several recommendations aimed at strengthening safeguards relating to Victoria Police's use and management of human sources. If these changes are introduced, the Commission considers that the risks of improperly using a human source to obtain confidential or privileged information would be substantially reduced.

Even with these changes, however, it is important to consider whether there are adequate safeguards in place for the prosecution of cases in Victoria when the investigation has involved information from a human source, including those where legal obligations of confidentiality or privilege may arise.

In effect, current policy and practice allow Victoria Police to determine whether PII should apply to the disclosure of human source information. A court may well uphold a PII claim made by Victoria Police, because—as observed earlier—PII generally prevents the existence of human sources being disclosed. But the issue should not be determined by police. Victoria Police should notify prosecuting authorities of the existence of PII material and, if necessary, the question of whether PII applies should be determined by the court. If the DPP has no knowledge that Victoria Police is withholding information on the basis of a PII claim, it is not in a position to understand the grounds for that claim or to prevent any arising unfairness to the accused person.

If Victoria Police had made timely and frank disclosure to the DPP of Ms Gobbo's role as a human source, it is far less likely that the Victorian criminal justice system would have been corrupted in the way identified by the High Court. Defence lawyers also play a vital role in safeguarding against the improper use of human source information in the criminal justice system. An accused person's lawyer can challenge a PII claim, provided they know that information is being withheld on PII grounds. This important safeguard of independent legal representation was often absent in the cases in which Ms Gobbo acted as a human source.

The circumstances that have given rise to this Commission are unprecedented. The Commission is reluctant to recommend safeguards that apply only to the narrow category of human sources with legal obligations of confidentiality or privilege. To do so may create anomalies, ineffective policy outcomes or unintended consequences: applying different protocols and requirements to this narrow category of information may lead to a distortion in how existing legal principles and administrative practices concerning the law of disclosure are applied.

The Commission heard that there are several areas where improvements can be made. It makes a number of recommendations aimed at:

- strengthening police disclosure obligations to prosecuting authorities
- improving training and support for Victoria Police in meeting its disclosure obligations
- ensuring effective leadership and cultural change within Victoria Police.

These recommendations are interconnected and interdependent. Measures to strengthen police disclosure obligations to prosecuting authorities, such as the introduction of a disclosure certificate, are unlikely to improve disclosure practices unless police officers are provided with appropriate training, guidance and support, including from senior leadership across the justice system.

The Commission has set timeframes for each recommendation, having regard to several factors, including the urgency and complexity of the reforms, whether they involve legislative change and the extent of stakeholder consultation required.

The recommendations to amend aspects of the current legislative regime governing disclosure in Victoria are relatively straightforward. As such, the Commission considers they can be implemented within 12 months, alongside complementary changes to Victoria Police and DPP policies.

While the recommendation regarding the adequacy of court powers to make non-disclosure orders raises complex issues, the Commission considers that six months provides sufficient time to review these issues and consult with relevant stakeholders about the need for legislative reform. It also considers this an appropriate timeframe for Victoria Police to implement training and various other measures and supports aimed at improving disclosure practices, noting that some of these measures are already underway.

This section sets out the Commission's conclusions and recommendations.

## **Strengthening and clarifying Victoria Police's disclosure obligations**

As a matter of principle, Victoria Police should inform prosecuting authorities of the existence of all material that is relevant to the case of an accused person, including material that is subject to a PII claim. The prosecution has a duty to disclose relevant material to an accused person and a duty to conduct proceedings fairly. If the prosecution does not know about all relevant material, its ability to fulfil these duties is constrained. The Commission is aware that this involves several practical challenges, including:

- the complexity and volume of material police obtain in many investigations and their ability to review this material
- the difficulties associated with determining whether material is relevant and needs to be disclosed.

Disclosure of human sources involves the additional complexity of the need to protect the source's identity.

The Commission considers that there is scope to strengthen and clarify Victoria Police's disclosure obligations to prosecuting authorities. One way to achieve this is to introduce a statutory requirement for police to:

- provide the DPP with all material obtained during an investigation that may be relevant to either the prosecution or the accused person's case, except any material that is subject to a claim of PII, privilege or a legislative immunity or publication restriction
- notify the DPP of the existence and nature of any material subject to a claim of PII, privilege or a legislative immunity or publication restriction, and provide the DPP with that material if requested.

This follows the New South Wales approach outlined above. The Commission notes that the VLRC made a similar recommendation, namely that the Criminal Procedure Act be amended to provide that:

- the informant's disclosure obligations to the DPP apply regardless of privilege, public immunity or statutory immunity claims
- when immunity claims are made, the informant does not have to provide to the DPP the material that is subject to these claims
- the informant must tell the DPP why they object to providing the material.<sup>325</sup>

The Commission further recommends that police should be required to disclose the withheld material to the DPP (or if necessary, in highly sensitive matters, a court) if the DPP requests that material. This requirement is important to ensure that the DPP or a court can assess whether that material should be disclosed to the accused person or whether a failure to disclose the material affects the DPP's ability to conduct a fair trial.

The Commission also recommends that police disclosure obligations to prosecuting authorities be supported through the use of a disclosure certificate, as in New South Wales (see Box 14.3 above). Currently, the existence of material relevant to an accused person's case but subject to a PII claim can be disclosed to an accused person and the DPP through the Form 30 (for indictable proceedings) or the Form 11 (for summary matters). The Commission agrees with some stakeholders' submissions that these forms do not adequately draw informants' attention to their disclosure obligations, and considers that they should be accompanied by a separate disclosure certificate.

The disclosure certificate would require the police officer completing the form to indicate the existence of the material that is being withheld and to describe that material. The Commission is aware that when a PII claim is made, care needs to be taken to ensure that the description of the item withheld does not reveal to the accused person the information over which the claim is made. This is particularly relevant when police are seeking to protect the identity of a human source.

A copy of the disclosure certificate should be provided to the accused person and the DPP in indictable proceedings.

The Commission agrees with the DPP's submission that the legislative requirement to provide these schedules of withheld material in a disclosure certificate should be accompanied by complementary Victoria Police internal policies or procedures. These would guide police investigators on how to describe withheld material and on the corresponding claims of PII, privilege or a legislative immunity or publication restriction.

The Commission believes that providing such guidance will be integral to the effective operation of the proposed new disclosure certificate regime.

The Commission is mindful that the VLRC's Committals Review did not recommend introducing a disclosure certificate regime for Victoria, noting that inadequate disclosure remains a problem in New South Wales despite the use of disclosure certificates. Instead, the VLRC recommended other measures that are similarly aimed at strengthening police disclosure practices. These included requiring informants to give sworn evidence in court that they have met their disclosure obligations and allowing the accused person to cross-examine.

While understanding the reasons for the VLRC's views, the Commission is concerned that the implementation of the recommendations may present practical issues, unnecessarily prolong the court process and require significant resources. It may also disadvantage some self-represented accused persons.

The Commission accepts that introducing a disclosure certificate regime alone is not enough to adequately strengthen disclosure practices, but considers that it is a simple and clear mechanism for police to provide effective disclosure of relevant withheld material to the DPP and the accused person if it is accompanied by rigorous training, guidance and support on how to comply with disclosure obligations. It would enable those relatively rare cases requiring the court's determination to be identified. The need for effective training of police officers in disclosure obligations is discussed in more detail below.

The VLRC recommended other measures aimed at strengthening police disclosure to the DPP and the accused person in cases where police withhold relevant material on the basis of claims of PII, legal professional privilege or a statutory prohibition.<sup>326</sup> The Commission notes that, in this regard, the goals and principles underlying the VLRC's recommendations and this Commission's recommendations are broadly aligned.

### **Application to summary proceedings**

Victoria Police has informed the Commission that the use of human source information in summary proceedings is rare. It has also advised that the use of information from a source with legal obligations of confidentiality or privilege, while not impossible, is extremely unlikely.

Even so, the same principles apply to police disclosure in both summary and indictable matters. In summary proceedings, police should inform police prosecutors of the existence of all material relevant to the accused person's case, including the existence of material subject to a PII claim.

Victoria Police submitted that the volume of summary matters presents a major challenge in relation to disclosure and that more onerous disclosure obligations may make managing this workload even more challenging without appropriate system supports.

The Commission appreciates that disclosure obligations must be practical and workable. The proposed disclosure certificate broadly reflects existing police obligations under the Criminal Procedure Act regarding the provision of relevant information. It would not alter the obligation to disclose material but rather clarify how police inform prosecuting authorities and the accused person of: (a) the existence of relevant withheld material; and (b) the reasons why they are withholding that material. Properly trained police officers should find the concept of full disclosure so embedded in the investigative process that it will not be an arduous additional task, even in summary proceedings.

The Commission is mindful that the whole notion of summary proceedings is that they be dealt with quickly. It therefore considers that in summary proceedings, police should only use the proposed new disclosure certificate when required to provide the accused person with a full brief. That is not to undermine, however, the importance of police officers' disclosure obligations in all summary cases, even where an accused person pleads guilty.

It is important that police take their disclosure obligations seriously in all summary matters, including properly completing the forms and statements they are required to provide to an accused person as part of the preliminary brief procedure.

Any proposed legislative changes should be preceded by meaningful consultation with legal stakeholders and Victoria Police.

**RECOMMENDATION 62**

That the Victorian Government, within 12 months, introduces a legislative requirement for the responsible Victoria Police officer to:

- a. provide the Victorian Director of Public Prosecutions with all material obtained during an investigation that may be relevant to either the prosecution or the accused person's case, except for material that is subject to a claim of privilege, public interest immunity, a legislative immunity or publication restriction
- b. notify the Director of the existence and nature of any material subject to a claim of privilege, public interest immunity, a legislative immunity or publication restriction
- c. where requested, provide the Director with any material subject to a claim of privilege, public interest immunity, legislative immunity or publication restriction.

The provision proposed in Recommendation 62 is based on section 15A of the *Director of Public Prosecutions Act 1986* (NSW).

**RECOMMENDATION 63**

That the Victorian Government, within 12 months, introduces a legislative requirement for Victoria Police to complete a disclosure certificate in summary proceedings when a full brief is served and in indictable proceedings when a hand-up brief is served, which describes:

- a. relevant material not contained in the brief of evidence that is subject to a claim of privilege, public interest immunity, a legislative immunity or publication restriction
- b. the nature of the privilege or immunity claim or publication restriction in relation to each item.

A copy of the disclosure certificate should be provided to the Victorian Director of Public Prosecutions and served on accused persons.

The provision proposed in Recommendation 63 is based on the New South Wales disclosure certificate in Schedule 1 of the *Director of Public Prosecutions Regulation 2015* (NSW).

**RECOMMENDATION 64**

That Victoria Police, within 12 months, amends its internal policies and procedures to align with the legislative changes proposed in Recommendations 62 and 63. These amendments should include guidance for the responsible Victoria Police officer on disclosure obligations and how to describe withheld materials in the proposed disclosure certificate.

Victoria Police should consult with the Victorian Director of Public Prosecutions in developing these amendments.

**RECOMMENDATION 65**

That the Victorian Director of Public Prosecutions, within 12 months, amends the *Policy of the Director of Public Prosecutions for Victoria* to align it with the legislative changes proposed in Recommendations 62 and 63.

**Greater legislative clarity about certain kinds of disclosable information**

The Commission agrees with the DPP that there appear to be ongoing issues in the identification of relevant disclosable material relating to the credibility of a prosecution witness (such as relevant criminal history, or the provisions of letters of assistance, charge reductions or other favourable treatment in criminal prosecutions as a result of the witness' cooperation with police). The Commission considers it critically important for police to understand that this category of information is disclosable. To that end, the Commission recommends that the Criminal Procedure Act be amended to provide greater clarity on this issue.

**RECOMMENDATION 66**

That the Victorian Government, within 12 months, amends sections 41(e) and 110(e) of the *Criminal Procedure Act 2009* (Vic) to clarify that any information, document or thing that is relevant to an alleged offence includes any material relevant to the credibility of a prosecution witness.

**A statutory procedure for courts to determine public interest immunity claims in relation to disclosure**

The Commission heard from the DPP that:

- a statutory procedure for a court to determine disclosure issues should be introduced in the Criminal Procedure Act
- this power should provide that a court can dispense with disclosure requirements on specific grounds, including PII.

Victoria Police also submitted that there should be a clearer mechanism to have complex PII claims determined by a court at an early stage. Both the DPP and Victoria Police proposed that there should be a statutory procedure to enable the prosecution or police to apply to a court to determine a PII claim.

Currently, courts most commonly determine police PII claims when the accused person issues a subpoena for the production of material, or challenges a decision not to disclose, rather than in response to an application from the party claiming PII.

Some stakeholders suggested models for Victorian courts to determine a PII claim on an application by the prosecution or police. For example, the DPP and Victoria Police referred to section 138 of the Western Australia Criminal Procedure Act a possible model—see Box 14.6 above.

The Commission has examined the Western Australian provision and considers that it provides only limited guidance for Victoria. First, the test courts apply when determining whether to dispense with a disclosure requirement differs from that used to determine PII claims in Victoria, and second, it would limit the power of police to apply for non-disclosure orders in summary proceedings.

To elaborate, in the Western Australian provision, the test for deciding whether to dispense with a disclosure requirement is whether:

- there is a good reason to dispense with it; and
- no miscarriage of justice will result.

On its face, this broad and simple test is not the more nuanced test Victorian courts use to determine whether material is covered by PII (and, as outlined earlier in this chapter, therefore does not have to be disclosed).

In addition, the Western Australian provision allows a party to a proceeding to apply for a non-disclosure order. Police are not a party to indictable proceedings; therefore, the provision does not easily allow police to apply for a non-disclosure order in indictable proceedings. In Victoria, as the police not the prosecutor litigate PII claims, the Western Australian procedure is not a useful analogy.

The approach taken in the United Kingdom to the prosecutor making a PII application to a court (outlined in Box 14.7 above) also provides only limited guidance for Victoria, for a similar reason. This is because, unlike in the United Kingdom, Victorian PII claims are brought by lawyers representing the police, not the DPP.

The Commission suggests caution before introducing a statutory procedure for a court to determine disclosure issues when the law operating in Victoria appears adequate. It was not an inadequacy in Victorian law but Victoria Police's failure to adhere to that law that led to this inquiry. Further, given the VLRC's recommendations relating to the determination of pre-trial issues as part of its Committals Review, the Commission considers that any changes to court powers relating to disclosure should be reviewed in the context of any broader reforms to the committals system in Victoria.

The Commission is also reluctant to recommend a statutory provision that would empower Victoria Police to routinely apply to dispense with disclosure requirements without giving notice to the accused person. Such applications in criminal proceedings without notifying the accused person are apt to present very real risks to the proper administration of justice. In the Commission's view, these applications should be made only in exceptional cases, and the court should have flexibility to control those proceedings to take steps to minimise unfairness to the accused person. The common law in Victoria already allows for this.

When applying the law to determine PII claims, courts perform a balancing exercise. This is an evaluative process. As outlined earlier in this chapter, in deciding whether relevant material should be withheld, the court must consider whether the public interest in withholding disclosure is in the interests of the administration of justice. A court's ability to engage in this evaluative exercise is likely to be more difficult if it only hears submissions from Victoria Police. While a court may appoint a special counsel or *amicus curiae* (friend of the court) and provide some protection to the interests of the accused person, these roles do not directly represent the interests of an accused person.

Moreover, the Commission considers that if laws were enacted to specifically allow Victoria Police to apply to a court to determine a PII claim in the absence of the accused person, it should consult with the DPP before making any such application. The desirability of early consultation with the DPP is discussed further below.

**RECOMMENDATION 67**

That the Victorian Government, within six months, in consultation with the Victorian Director of Public Prosecutions, Victoria Police, the Victorian courts, Victoria Legal Aid and other relevant stakeholders:

- a. reviews the adequacy of existing court powers to make non-disclosure orders
- b. considers whether a legislative power should be introduced to empower Victoria Police and/or the Director to initiate applications for a court to determine public interest immunity claims without giving notice to an accused person.

## Encouraging involvement of the prosecution in assisting police with public interest immunity claims

Victoria Police indicated that an effective way to improve the system of disclosure in Victoria would be to enhance the degree of consultation between police investigators and prosecutors. In particular, Victoria Police submitted that early engagement between its officers and the OPP in relation to complex legal issues concerning questions of disclosure, relevance and PII would strengthen disclosure practices. For Victoria Police, the early involvement of prosecutors would include the opportunity for officers to consult and seek advice from prosecutors about these matters.

The DPP emphasised that prosecutors and police already consult early in the prosecution process regarding PII issues, in accordance with the DPP Policy.<sup>327</sup> The DPP also submitted that current practice involves the OPP and Victoria Police working together in indictable matters and considered that these practices are sufficient.<sup>328</sup> That view of the current practice was not universally held among key stakeholders. The Commission considers that, for this reason alone, there is scope to reflect on the current practices and consider opportunities for improvement.

Victoria Police, as well as other stakeholders, identified a number of matters, including the nature of disclosure obligations, PII and assessing relevance of disclosable material, that police officers routinely find complex to assess and resolve.<sup>329</sup> These elements overlap and are crucial to the proper functioning of the criminal justice system.

It is critical that key stakeholders work together and develop disclosure processes and procedures that support Victoria Police to navigate and make decisions about these complex issues, including through the provision of legal advice. That support may be provided by the VGSO (for example, in relation to Victoria Police's PII claims) and/or the OPP (for example, in relation to disclosure issues and obligations more generally). Most importantly, there must be a clear understanding by Victoria Police officers that these are not matters that they should, or are expected to, navigate alone. The Commission is not satisfied that the existing processes and policies provide that clarity.

Because of their interdependent roles, a cooperative, respectful and functional working relationship between the DPP and Victoria Police is essential to the operation of an effective and fair criminal justice system. The Commission considers that the DPP and Victoria Police must jointly establish clearer and more transparent protocols and procedures to facilitate early and effective discussion of issues relating to PII claims.

The Commission considers that these protocols and procedures should:

- ensure Victoria Police has adequate and early support, including legal advice, when making complex decisions about relevant and disclosable information that may be subject to PII
- tailor the level of support provided to Victoria Police so that greater support is provided in respect of complex PII and disclosure issues, recognising the potential resourcing implications
- ensure the DPP's independence is maintained (for example, by specifying that Victoria Police will continue to be responsible for litigating PII claims assisted by separate legal representation such as the VGSO).

The VLRC Committals Review also considered that the DPP should provide greater assistance to informants in relation to their disclosure obligations, noting, as the Commission does, that OPP practitioners are legally trained and have the relevant expertise.

The Commission appreciates that there are important reasons why prosecutors may not consider it necessary or appropriate to review the actual material that is the subject of a PII claim. Chief among those reasons is the need to protect the independence of the DPP's role in fulfilling its prosecutorial functions.

Generally, it will be sufficient for the DPP to be aware of the existence of PII material and the nature of the claim. Although, as the events the subject of this inquiry demonstrate, there will be cases where police are required to deal with complex and atypical PII issues. The Commission encourages police to promptly obtain independent legal advice on issues relating to PII, for example from the VGSO, including to assist it in understanding whether, and how, material should be brought to the attention of prosecutors. In such circumstances, it may be appropriate for the DPP to consider relevant material that is subject to a PII claim and to discuss PII issues and disclosure issues with police.

The Commission notes that at the Commonwealth level, consultation between police and prosecutors commences soon after a charge is laid and involves early engagement and discussion of disclosure and PII issues. Those discussions may cover:

- the basis for the PII claim
- the significance of the material to the case
- appropriate procedures for resolving the PII claim.

The Commission notes that the DPP Policy is regularly reviewed and updated to reflect relevant changes to the law. It is a valuable public document that helps to promote an open and accountable prosecution service and supports members of the public to understand how important aspects of the criminal justice system operate. To help the DPP and police work together, the Commission considers that the DPP should amend the DPP Policy to provide clearer guidance on what is expected of police and the DPP in relation to consultation about claims of PII, with a particular focus on PII matters that potentially raise complex issues—for example, matters involving information from a human source where legal obligations of confidentiality or privilege may arise.

The policy could also set out processes and procedures to better guide and facilitate discussion of relevant issues between police and the OPP. This would complement the recommendations made above to strengthen police disclosure obligations to prosecuting authorities and supplement the proposed new legislative requirements. It would also provide clarity and transparency about when and how police should engage with the OPP.

The Commission notes the DPP's concerns about the resourcing implications if its prosecutors were to have greater and earlier engagement with police in relation to PII and disclosure issues. The Commission acknowledges that substantially increased engagement and any structural changes to facilitate this would likely require additional resources. As noted above, however, this more in-depth engagement need only occur in limited cases involving complex PII and disclosure issues, not in all cases. Consequently, the Commission is of the view that it should not pose significant resourcing issues.

**RECOMMENDATION 68**

That the Victorian Director of Public Prosecutions, Victoria Police, the Victorian Government Solicitor's Office and any other relevant stakeholders work together to establish clear protocols and procedures, within 12 months, to facilitate effective engagement with, and resolution of, complex issues arising from disclosure obligations and public interest immunity claims.

These protocols and procedures should:

- a. ensure Victoria Police has adequate and early support, including legal advice, when making complex decisions about relevant and disclosable information that may be subject to public interest immunity
- b. tailor the level of support provided to Victoria Police, to enable greater support in cases involving complex public interest immunity and disclosure issues
- c. ensure the Director's independence is maintained and potential conflicts of interest are avoided.

**RECOMMENDATION 69**

That the Victorian Director of Public Prosecutions, within 12 months, amends the *Policy of the Director of Public Prosecutions for Victoria* to provide appropriate guidance on when and how the Director can be consulted by Victoria Police in relation to complex issues arising from disclosure obligations and public interest immunity claims. These amendments should reflect the protocols and procedures proposed in Recommendation 68.

**RECOMMENDATION 70**

That Victoria Police, within 12 months, amends its internal policies and procedures to provide appropriate guidance on when and how Victoria Police can consult the Victorian Director of Public Prosecutions in relation to complex issues arising from disclosure obligations and public interest immunity claims. These amendments should reflect the protocols and procedures proposed in Recommendation 68 and the need for police officers to obtain early legal advice when potentially complex disclosure and public interest immunity issues arise; and provide a clear framework for seeking that advice.

## Improving training and support

Ensuring that police have a proper understanding of their disclosure obligations as well as the capacity to fulfil these obligations is an essential safeguard against unfairness to an accused person.

The Commission accepts that disclosure can be a complex and time-consuming task. To assess whether material is relevant to the case of the prosecution or the case of the accused person, police officers need to have a good understanding of issues related to relevance, legal professional privilege and PII, all of which can be legally complex and technical.

The Commission considers that ongoing training and support should be provided to enable Victoria Police officers to properly understand and meet their disclosure obligations to prosecuting authorities and to accused persons. Stakeholders suggested a number of possible initiatives to improve the training and support provided to Victoria Police, including:

- improved training resources
- piloting the use of dedicated disclosure officers
- strengthening Victoria Police's information management systems.

Each of these initiatives is discussed further below.

## **Improving training for Victoria Police**

Disclosure is not necessarily straightforward. On the contrary, it can be very complex and difficult. To ensure that police have the capability and capacity to meet their disclosure obligations properly, it is imperative that Victoria Police provides its recruits and officers with initial and ongoing training and support. Victoria Police recognises that its current disclosure training needs improvement. The Commission acknowledges, and is encouraged by, Victoria Police's plans to achieve this, including:

- the development and implementation of an appropriate training video on the Victoria Police internal video portal
- finalisation and roll-out of a comprehensive organisation-wide disclosure handbook
- plans for human source management training to be changed so that it specifically and effectively covers issues related to using human source information in prosecutions, and human sources becoming witnesses.

It is also critical that Victoria Police provides comprehensive and ongoing disclosure training and support not only to police investigators but also to officers who work in human source management. A lack of understanding of disclosure obligations on the part of officers who work in human source management may result in unfairness to the accused person, an unsuccessful prosecution or a miscarriage of justice.

Those who work in human source management need to approach their work with a thorough understanding of the importance of disclosure to the integrity of the criminal justice system. Training should be delivered by external providers with legal expertise who have an understanding of both the law relating to disclosure and PII and its practical application to modern policing; for example, the VGSO, the OPP and criminal law defence practitioners.

While Victoria Police's new proposed training initiatives look promising, given that they are either in the planning stage or in the very early stages of implementation, it is too soon to determine whether they will be effective in improving police understanding and delivery of their disclosure obligations. The value of these initiatives can only be properly assessed when they have been trialled over a period of time. For this reason, the Commission recommends that these initiatives be independently reviewed two years after their implementation to ensure they are effective in improving police understanding and delivery of their disclosure obligations. It also considers that an additional external review should be conducted five years after the initial review to ensure that the effectiveness of the measures can be properly assessed over a longer period.

**RECOMMENDATION 71**

That Victoria Police, within six months, implements the measures it has proposed to improve training and support for police officers regarding their disclosure obligations, across all levels of the organisation.

**RECOMMENDATION 72**

That Victoria Police commissions two independent reviews of the measures implemented in Recommendation 71, to ensure that they adequately reflect any applicable changes to law and policy and are effective in improving police officers' understanding of their disclosure obligations. The reviews should be undertaken as follows:

- a. an initial independent external review within two years of implementation
- b. an additional independent external review within five years of the initial review.

**Piloting the use of disclosure officers**

The Commission heard that, during Victoria Police investigations, information is collected from human sources by officers in a separate area of the organisation to officers who investigate offences and prepare briefs of evidence, and the information provided is 'sanitised' (deidentified) before it is disseminated to investigating officers (as mentioned earlier, this process is called the sterile corridor). As a result, the police officer who is responsible for disclosing relevant material to an accused person may not have all the information relevant to the investigation. This lack of awareness can fundamentally impede police ability to disclose to the defence, the DPP and the courts the existence of all relevant material.

The existence of the sterile corridor and the associated need to protect the identity of human sources presents one of the most significant challenges to ensuring that police disclose all relevant human source information to prosecuting authorities.

Victoria Police's proposal to have dedicated disclosure officers working across the HSMU and the investigation team has merit. It could help facilitate continuity throughout an investigation and during any criminal proceeding that results from that investigation. The Commission therefore supports Victoria Police's piloted use of dedicated disclosure officers but notes that exactly how the model will operate is yet to be determined. The Commission also notes that the pilot is currently limited to two disclosure officers and investigations involving human sources (as opposed to, for example, the United Kingdom model, which uses dedicated disclosure officers across a much broader range of investigations).

Given that this initiative is in its very early stages, the Commission considers that it will be important for it to be independently reviewed after it has been in operation for 12 months. If it proves to be successful in the view of both the police and other stakeholders in the criminal justice system, it should be expanded. The Commission believes it is important for the initiative to be reviewed again after an additional five years, to ensure it adequately achieves its objectives. Given that, to the best of the Commission's knowledge, this proposed approach of having dedicated disclosure officers working across the HSMU and the investigation team is not replicated in other similar jurisdictions, these independent reviews will be particularly important.

**RECOMMENDATION 73**

That Victoria Police commissions two independent reviews of the implementation of its dedicated disclosure officer initiative, to ensure that it is effective in improving disclosure processes and practices. The reviews should be undertaken as follows:

- a. an initial independent external review within two years of implementation
- b. an additional independent external review within five years of the initial review.

**Strengthening Victoria Police's information management systems**

The success of any measures to strengthen police disclosure practices depends largely on the extent to which Victoria Police prioritises and emphasises the importance of disclosure across the organisation. This includes having the necessary information and document management systems in place.

Victoria Police told the Commission that a key factor affecting its disclosure practices is the lack of a comprehensive electronic information and document management system; however, it did not specify with precision the limitations in the existing systems, nor the functionality any new system would need to address the current problems. As a result, the Commission is not in a position to make specific recommendations for reform in this area.

The Commission acknowledges that Victoria Police's ability to improve its disclosure practices may rely on enhancements to its information management capability. It therefore considers that Victoria Police should undertake further work, to assess with specificity:

- the extent to which the implementation of recent systems reforms will adequately enable it to fulfil its disclosure obligations (for example, the introduction of an intelligence management system that connects some data sources across the organisation)
- remaining gaps and issues in the current systems
- the necessary functionality to address any identified gaps and issues
- the investment required to develop and implement any additional required functionality.

This will enable Victoria Police to advise the Victorian Government clearly on the reforms needed in this area and the resourcing required.

**RECOMMENDATION 74**

That Victoria Police, within six months, reviews the information management systems it relies on to fulfill its disclosure obligations, to assess with specificity:

- a. the extent to which the implementation of recent system reforms will enable Victoria Police to fulfil its disclosure obligations adequately
- b. remaining system gaps and issues
- c. system functionality needed to address any identified gaps and issues
- d. investment requirements to develop and implement any additional system functionality needed.

## Enhancing oversight, leadership and cultural change

Embedding within Victoria Police a strong awareness and understanding of how disclosure is essential to a functional and fair criminal justice system is one of many important safeguards that would help to prevent the misuse of human source information.

Victoria Police has emphasised its commitment to working cooperatively with other stakeholders to improve disclosure practices. During this inquiry, Victoria Police introduced some measures to strengthen these practices. It has also outlined a number of training measures that it proposes to implement. The Commission is encouraged by these proposals, but emphasises the importance of continuous review and improvement beyond the conclusion of this inquiry.

As discussed earlier in this chapter, the Commission considers that current police disclosure practices could be strengthened through increased cooperation and communication between the DPP and Victoria Police. These agencies are best placed to lead and facilitate this cooperation.

The Commission is fortified in this view by the United Kingdom's efforts to improve disclosure practices, which highlight the importance of change being led by the agencies who are responsible for implementation.

The Commission hopes that the conduct of this inquiry has contributed to a stronger awareness of the importance of police disclosing the existence of relevant human source information to prosecuting authorities. This did not occur in the cases that gave rise to this inquiry.

Overall, the Commission believes that its recommendations—including the introduction of disclosure certificates, improving police training and support and encouraging the earlier involvement of the prosecution in resolving complex PII claims—should contribute to a culture within Victoria Police where disclosure obligations are an integral part of officers' duties and the organisation's commitment to upholding a functional and fair criminal justice system.

Long-lasting cultural change regarding the importance of disclosure will take time to permeate across the organisation, as better training practices and systemic changes take root. Chapter 17 makes recommendations aimed at establishing effective governance, monitoring and reporting mechanisms to drive and oversee implementation of the Commission's recommendations. These mechanisms will be important in facilitating effective implementation and regular review of the recommendations made in this chapter, and in so doing, will help to bring about the necessary cultural shift.

The Commission has carefully considered the DPP's proposal for the establishment of an independent Disclosure Monitor to conduct ongoing system-wide audits and reviews of Victoria Police's compliance with its disclosure obligations. The DPP submitted that the proposed Disclosure Monitor would not have the power to review the merits of individual police disclosure decisions, but rather would focus on systemic reviews in order to improve guidance to police for future cases. The DPP also submitted that the proposed Disclosure Monitor would have a role in training police officers about disclosure.

The Commission was not asked to review Victoria Police's disclosure practices more broadly but has heard during its inquiry that there is scope to improve present police disclosure practices in Victoria. Given the Commission's limited terms of reference it has not heard evidence of systemic failures in current disclosure practices.

Accordingly, based both on the terms of the Commission's inquiry and the information received, the Commission does not consider it is in a position to recommend establishing an independent Disclosure Monitor.

The Commission notes Victoria Police has recently implemented, or is in the process of implementing, some systemic changes to its disclosure practices. These include the potential establishment of a disclosure governance committee to monitor disclosure issues and failures and to implement systemic improvements across the organisation. The Commission notes that at the time of finalising this report, Victoria Police has not confirmed the committee's terms of reference or its membership.

The Commission considers that this committee would greatly benefit from the membership of external stakeholders such as the OPP, the VGSO, the Department of Justice and Community Safety and Victoria Legal Aid, all of which have expertise in the complex legal issues around disclosure and PII in the context of modern policing and prosecutions.

While the governance and other disclosure reforms proposed by Victoria Police appear promising, they are all in very early stages. The Commission considers it important that Victoria Police commits to establishing a governance mechanism so that the committee can inform and monitor the implementation of Victoria Police's proposed reforms, along with the reforms recommended by the Commission. The Commission considers that this will help to promote lasting cultural change and an effective and cooperative inter-agency approach to improving disclosure processes and practices.

#### **RECOMMENDATION 75**

That Victoria Police, within three months, establishes a disclosure governance committee that has responsibility for identifying and monitoring systemic disclosure issues and overseeing the development and implementation of reforms to improve disclosure processes and practices.

The committee's membership should consist of stakeholders with expertise in policing, disclosure, public interest immunity and the conduct of criminal prosecutions, including the Victorian Office of Public Prosecutions, the Victorian Government Solicitor's Office, the Department of Justice and Community Safety, Victoria Legal Aid and any other relevant legal profession representatives.

# Endnotes

- 1 *AB v CD & EF* [2017] VSCA 338, [66] (Ferguson CJ, Osborn and McLeish JJA).
- 2 See John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 21 [124].
- 3 See *Criminal Procedure Act 2009* (Vic) ss 42, 111, 185; *Roberts v The Queen* (2020) 60 VR 431, [57]. See also *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 87–8.
- 4 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(a).
- 5 See *Nguyen v The Queen* (2020) 94 ALJR 686; *R v Puddick* (1865) 176 ER 662; *R v Apostilides* (1984) 154 CLR 563. See also Christopher Corns and Steven Tudor, *Criminal Investigation and Procedure: The Law in Victoria* (Thomson Reuters, 2009) 322 [10.210].
- 6 *Nguyen v The Queen* (2020) 94 ALJR 686, [36].
- 7 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020) 7 [21].
- 8 *Cannon v Tahche* (2002) 5 VR 317; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; *R v Garofalo* [1999] 2 VR 625; *Clarkson v DPP* [1990] VR 745; *Mallard v The Queen* (2005) 224 CLR 125; *Grey v The Queen* (2001) 75 ALJR 1708.
- 9 See *Cannon v Tahche* (2002) 5 VR 317, 339–41 [56]–[60]; *R v Mallard* (2005) 224 CLR 125, 132–3. See also David Plater and Lucy De Vreeze, 'Is the "Golden Rule" of Full Prosecution Disclosure a Modern "Mission Impossible"?' (2012) 14 *Flinders Law Journal* 133, 141.
- 10 *R v Ernst* [2020] QCA 150, [34].
- 11 *Ragg v Magistrates' Court of Victoria* [2008] VSC 1, [45]–[62].
- 12 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019) 7 [15]. 'A real as opposed to fanciful prospect' is one that is realistic and is not hopeless or bound to fail: *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27, [29] (Warren CJ and Nettle JA) (Neave JA agreeing). This includes material that if investigated further, may realistically lead to new material relevant to the case or raise new issues that are not apparent from the evidence that the prosecution proposes to use.
- 13 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019) 7 [15]. An example of a statutory prohibition on disclosure is a restriction on disclosing to the accused person the address and telephone numbers of any person: *Criminal Procedure Act 2009* (Vic) ss 48, 114.
- 14 *Clarkson v Director of Public Prosecutions* [1990] VR 745, 755 (Murphy J). See also *R v Farquharson* [2009] VSCA 307.
- 15 Christopher Corns, *Public Prosecutions in Australia: Law Policy and Practice* (Thomas Reuters, 2009) 225.
- 16 *Grey v The Queen* (2001) 184 ALR 593.
- 17 *Public Prosecutions Act 1994* (Vic) s 22(1)(b)(ii).
- 18 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020), 19 [56].
- 19 Australian Government Productivity Commission, *Report on Government Services 2020* (Report, 29 January 2020), 7 Courts data tables, 7A.1 <[www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/courts](http://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/courts)>. Figures for 2019–20 were not available at time of finalising this report.
- 20 Section 27 of the *Public Prosecutions Act 1994* (Vic) also specifies that police must provide the DPP with all relevant documents and certain other material in limited circumstances. This includes where a person has been charged with an offence or class of offence that the DPP or Director's Committee has directed should be referred to them for starting and conducting proceedings: see Explanatory Memorandum, *Public Prosecutions Bill 1994* (Vic).
- 21 An informant is responsible for starting criminal proceedings and has a range of responsibilities, including signing the charge-sheet.
- 22 *Criminal Procedure Act 2009* (Vic) ss 36, 40, 106. See also *R v Garofalo* [1999] 2 VR 625, [63], [67] (Ormiston JA).
- 23 *Criminal Procedure Act 2009* (Vic) s 37.
- 24 *Magistrates' Court Criminal Procedure Rules 2019* (Vic), r 19: This document is known as 'Form 10'.
- 25 *Criminal Procedure Act 2009* (Vic) s 41.
- 26 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 11 September 2020, 14 [45]; Exhibit RC1938 Statement of Ms Abbey Hogan, 11 September 2020, [3]–[4], Annexure B.
- 27 Based on 'The prosecution process', *Office of Public Prosecutions Victoria* (Web Page) <[www.opp.vic.gov.au/getattachment/4201036f-eadf-4b1f-bf12-23e8c777e530/The-prosecution-process.aspx](http://www.opp.vic.gov.au/getattachment/4201036f-eadf-4b1f-bf12-23e8c777e530/The-prosecution-process.aspx)>.
- 28 *Criminal Procedure Act 2009* (Vic) s 110. If the charges are for a sexual offence and the complainant is a child or cognitively impaired, additional 'Standard Disclosure items' must also be served together with the brief.

- 29 Based on 'Criminal Procedure Act 2009—Legislative Guide by chapter', *Department of Justice and Community Safety*, (Web Page) <[www.justice.vic.gov.au/criminal-procedure-act-2009-legislative-guide-by-chapter](http://www.justice.vic.gov.au/criminal-procedure-act-2009-legislative-guide-by-chapter)>.
- 30 *Criminal Procedure Act 2009* (Vic) s 117.
- 31 *Criminal Procedure Act 2009* (Vic) s 111.
- 32 *Criminal Procedure Act 2009* (Vic) ss 42, 111; *R v Farquharson* (2009) 26 VR 410.
- 33 *Roberts v The Queen* (2020) 60 VR 431, [56]; *R v Ward* [1993] 1 WLR 619.
- 34 *Grey v The Queen* (2001) 75 ALJR 1708; *Mallard v The Queen* (2005) 224 CLR 134.
- 35 *Evidence Act 2008* (Vic) ss 130, 131A; *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).
- 36 *Alister v The Queen* (1984) 154 CLR 404, 431 (Murphy J), 457 (Brennan J).
- 37 Email from Victorian Government Solicitor's Office to the Commission, 21 October 2020.
- 38 Based on information provided to the Commission by the Victorian Government Solicitor's Office; Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020) 7 [17]–[19].
- 39 Unless the prosecutor was present in court for the PII proceedings or a non-publication order prevents the information being provided.
- 40 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020) 7 [18]. The DPP Policy and whether it complies with the prosecutor's obligations under the common law was recently discussed in *Director of Public Prosecutions v Kent Westbrook (A Pseudonym)* [2020] VSC 290, 6 [14]–[21].
- 41 The common law doctrine of PII as it applies in court proceedings is largely replicated in section 130 of the *Evidence Act 2008* (Vic).
- 42 *Criminal Procedure Act 2009* (Vic) s 45(1)(c).
- 43 *Criminal Procedure Act 2009* (Vic) ss 45(1)(c), 122(2).
- 44 *Criminal Procedure Act 2009* (Vic) ss 45(1)(e), 122(2).
- 45 Rule 19 of the *Magistrates' Court Criminal Procedure Rules 2019* (Vic) provides that for the purpose of section 37(1)(b) of the *Criminal Procedure Act 2009* (Vic), the prescribed form of notice to be included in the preliminary brief is notice in Form 10. Rule 20 of the *Magistrates' Court Criminal Procedure Rules* provides that for the purposes of section 41(1)(a) of the *Criminal Procedure Act* the prescribed form of notice to be included in the full brief is notice in Form 11.
- 46 Rule 57(2) of the *Magistrates' Court Criminal Procedure Rules 2019* (Vic) provides that a list of information or other documents contained in a hand-up brief under section 110 of the *Criminal Procedure Act 2009* (Vic) must be in Form 30.
- 47 *Criminal Procedure Act 2009* (Vic) ss 37(1)(f), 41(1)(f).
- 48 *Criminal Procedure Act 2009* (Vic) s 109.
- 49 *Criminal Procedure Act 2009* (Vic) s 46(1).
- 50 The 'Form 32' is prescribed for the purposes of section 119(a) of the *Criminal Procedure Act 2009* (Vic).
- 51 *Criminal Procedure Act 2009* (Vic) s 125(1)(e).
- 52 *Criminal Procedure Act 2009* (Vic) s 181(1).
- 53 See, eg, *Marks v Beyfus* (1890) 25 QBD 494; *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84; *Signorotto v Nicholson* [1982] VR 413, 419; *R v XZ* (2000) 116 A Crim R; *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 34 [50] (Maxwell P), 46 [102]–[103] (Charles JA); *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 218 (Diplock LJ), cited by Meagher JA in *Derbas v The Queen* [2012] NSWCCA 14, [22].
- 54 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020) 6 [15].
- 55 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 5 [12] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 56 See John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 21–2 [124].
- 57 John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016) 21–2 [124].
- 58 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020) 7 [17]. The exception is when the DPP holds the privilege (for example, if the material is protected by legal professional privilege and the DPP is the client that received the legal advice).
- 59 See, eg, *AB v CD & EF* [2017] VSCA 338.
- 60 See, eg, *R v Mokbel (Ruling No 1)* (2005) VSC 410, 7 [24].
- 61 *Alister v The Queen* (1984) 154 CLR 404, 431 (Murphy J), 457 (Brennan J).

- 62 *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ) citing *Bunning v Cross* (1978) 141 CLR 54 and *R v Sang* [1980] AC 402; *Dietrich v The Queen* (1992) 177 CLR 292, 299–300 (Mason CJ and McHugh J).
- 63 Submission 143 Commonwealth Director of Public Prosecutions, 4 [24].
- 64 Submission 143 Commonwealth Director of Public Prosecutions, 4 [24].
- 65 Submission 143 Commonwealth Director of Public Prosecutions, 8 [44].
- 66 Submission 143 Commonwealth Director of Public Prosecutions, 8 [44].
- 67 Submission 143 Commonwealth Director of Public Prosecutions, 8 [44].
- 68 Office of the Director of Public Prosecutions, *The Prosecution Policy of the Australian Capital Territory* (13 April 2015) 13 [4.9].
- 69 Office of the Director of Public Prosecutions, *The Prosecution Policy of the Australian Capital Territory* (13 April 2015) 13 [4.9].
- 70 Office of the Director of Public Prosecutions, *The Prosecution Policy of the Australian Capital Territory* (13 April 2015) 13 [4.9].
- 71 *Director of Public Prosecutions Act 1986* (NSW) s 15A(1).
- 72 *Director of Public Prosecutions Act 1986* (NSW) s 15A(7).
- 73 *New South Wales Police Force Handbook* (2 October 2019) 61.
- 74 Consultation with New South Wales Office of Director of Public Prosecutions, 16 September 2019.
- 75 Northern Territory Office of the Director of Public Prosecutions, *Guidelines of the Director of Public Prosecutions* (2016) 12 [8.12].
- 76 Northern Territory Office of the Director of Public Prosecutions, *Guidelines of the Director of Public Prosecutions* (2016) 13 [8.19].
- 77 Northern Territory Office of the Director of Public Prosecutions, *Guidelines of the Director of Public Prosecutions* (2016) 11 [8.6].
- 78 *Director of Public Prosecutions Act 1984* (Qld) s 24C(2).
- 79 Queensland Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2016) 41 [29(viii)].
- 80 Queensland Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2016) 41 [29(viii)].
- 81 *Director of Public Prosecutions Act 1991* (SA) s 10A(1).
- 82 *Director of Public Prosecutions Act 1991* (SA) s 10A(2)(a).
- 83 Director of Public Prosecutions South Australia, *Statement of Prosecution Policy and Guidelines* (October 2014) 21.
- 84 Tasmania Director of Public Prosecutions, *Prosecution Policy and Guidelines* (23 October 2019) 120.
- 85 Tasmania Director of Public Prosecutions, *Prosecution Policy and Guidelines* (23 October 2019) 120.
- 86 Tasmania Director of Public Prosecutions, *Prosecution Policy and Guidelines* (23 October 2019) 121.
- 87 Western Australia Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines* (1 September 2018) 15 [97].
- 88 Western Australia Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines* (1 September 2018) 15 [97].
- 89 *Criminal Procedure Act 2004* (WA) s 138.
- 90 Victorian Law Reform Commission, *Committals* (Report, March 2020).
- 91 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020).
- 92 *Mallard v The Queen* (2005) 224 CLR 125.
- 93 Submission 097 Criminal Bar Association, [10]; Submission 145 Victorian Legal Aid, 7–8; Submission 146 Law Institute of Victoria, 5.
- 94 Submission 097 Criminal Bar Association, [10].
- 95 Submission 142 Director of Public Prosecutions (Victoria), 44–6; Submission 146 Law Institute of Victoria, 5; Submission 147 Criminal Bar Association, 3–4.
- 96 Submission 142 Director of Public Prosecutions (Victoria), 44 [168].
- 97 Submission 142 Director of Public Prosecutions (Victoria), 44 [169].
- 98 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020) 7 [18].
- 99 Submission 142 Director of Public Prosecutions (Victoria), 48 [184].
- 100 See, eg, Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (1 June 2007) 30–2.
- 101 See, eg, *Criminal Procedure Act 1986* (NSW) ss 141, 147; *Director of Public Prosecutions Act 1986* (NSW) s 15A; Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (1 June 2007) (Guideline 18); *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, r 29.5; *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 87.

- 102 *Director of Public Prosecutions Act 1986* (NSW) s 15A(1); *Director of Public Prosecutions Regulation 2015* (NSW), sch 1.
- 103 *New South Wales Police Force Handbook* (2 October 2019) 61.
- 104 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020) 7 [18].
- 105 *Director of Public Prosecutions Act 1986* (NSW) s 15A(6).
- 106 *Director of Public Prosecutions Act 1986* (NSW) s 15A(7).
- 107 Consultation with New South Wales Office of Public Prosecutions, 16 September 2019.
- 108 Submission 142 Director of Public Prosecutions (Victoria), 49 [188].
- 109 Submission 144a Victoria Police, [41].
- 110 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 90–1 [385]–[387].
- 111 Submission 147 Criminal Bar Association, 1.
- 112 Submission 147 Criminal Bar Association, 2.
- 113 Victorian Law Reform Commission, *Committals* (Report, March 2020) 106 (Recommendation 33).
- 114 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020) 19 (Recommendation 3).
- 115 The Operation Gloucester Report also drew attention to section 10A of the *Director of Public Prosecutions Act 1991* (SA), which imposes a very similar statutory duty: Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020) 61.
- 116 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020), 61.
- 117 Submission 144a Victoria Police, [58]; Submission 145 Victoria Legal Aid, 6; Submission 147 Criminal Bar Association, 3.
- 118 Submission 142 Director of Public Prosecutions (Victoria), 52 [205]; Submission 144a Victoria Police, [60].
- 119 Submission 144a Victoria Police, [58].
- 120 *New South Wales Police Force Handbook* (2 October 2019) 61.
- 121 *Director of Public Prosecutions Regulation 2015* (NSW) cl 5(b).
- 122 *Director of Public Prosecutions Regulation 2015* (NSW) cl 5(c).
- 123 *Director of Public Prosecutions Regulation 2015* (NSW) sch 1.
- 124 *New South Wales Police Force Handbook* (2 October 2019) 61.
- 125 *Criminal Procedure Act 2004* (WA) s 45(6).
- 126 *Criminal Procedure Act 2004* (WA) s 95(6).
- 127 Supreme Court of New South Wales, *Practice Note SC CL 2: Criminal Proceedings*, 15 December 2016, [9].
- 128 Submission 142 Director of Public Prosecutions (Victoria), 52 [198]; Submission 144a Victoria Police, [58].
- 129 Submission 142 Director of Public Prosecutions (Victoria), 52 [196].
- 130 Submission 142 Director of Public Prosecutions (Victoria), 50 [192].
- 131 Submission 142 Director of Public Prosecutions (Victoria), 52 [205].
- 132 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14933.
- 133 Submission 142 Director of Public Prosecutions (Victoria), 40 [149].
- 134 Submission 145 Victoria Legal Aid, 6; Law Institute of Victoria, Submission to the Victorian Law Reform Commission, *Committals* (2 October 2019) [4.12]; Submission 147 Criminal Bar Association, 3.
- 135 See, eg, Submission 145 Victoria Legal Aid, 5.
- 136 Submission 144a Victoria Police, [63].
- 137 Victorian Law Reform Commission, *Committals* (Report, March 2020) 108 [9.73].
- 138 Victorian Law Reform Commission, *Committals* (Report, March 2020) 108 [9.76].
- 139 Victorian Law Reform Commission, *Committals* (Report, March 2020) 108 [9.77].
- 140 Victorian Law Reform Commission, *Committals* (Report, March 2020) 108 [9.77].
- 141 Victorian Law Reform Commission, *Committals* (Report, March 2020) 108 [9.77].
- 142 Victorian Law Reform Commission, *Committals* (Report, March 2020) 105 (Recommendation 32).
- 143 Victorian Law Reform Commission, *Committals* (Report, March 2020) 108 [9.78].
- 144 Submission 145 Victoria Legal Aid, 4.
- 145 Submission 145 Victoria Legal Aid, 4–5.

- 146 Submission 147 Criminal Bar Association, 2.
- 147 Submission 147 Criminal Bar Association, 2.
- 148 *New South Wales Police Force Handbook* (2 October 2019) 62–3.
- 149 *Criminal Procedure Act 2004* (WA) s 95(6).
- 150 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020) 61.
- 151 *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020) [17]–[18].
- 152 Submission 142 Director of Public Prosecutions (Victoria), 62 [251].
- 153 Submission 142 Director of Public Prosecutions (Victoria), 63 [255].
- 154 Submission 142 Director of Public Prosecutions (Victoria), 63 [256].
- 155 Submission 142 Director of Public Prosecutions (Victoria), 63 [256].
- 156 Submission 142 Director of Public Prosecutions (Victoria), 63 [257].
- 157 *R v Andrews* (2010) SASCF 3, [25] (Gray J); *R v Reardon* (No 2) (2004) 60 NSWLR 454, 468 [47] (Hodgson JA); *R v Lipton* (2011) 82 NSWLR 123, 149 [89]–[91] (McColl JA); *AB v CD & EF* [2017] VSCA 338, [65]. While technically the PII claims in *AB v CD & EF* [2017] VSC 350 were inter-party proceedings (that is, there was an active respondent to those proceedings), the proceedings and the appeal proceedings were all determined without the persons affected being notified of the applications and/or having the opportunity to be heard by the Court. The Court appointed *amici curiae* to make submissions in the interests of the individuals not given notice of the proceedings.
- 158 *R v Davis* [1993] 2 All ER 643, 647 (Lord Taylor CJ).
- 159 *R v Davis* [1993] 2 All ER 643, 647–8; *R v Keane* [1994] 2 All ER 478, 483 (Lord Taylor CJ).
- 160 *R v H; R v C* [2004] 1 All ER 1269, 1284 [35].
- 161 *R v H; R v C* [2004] 1 All ER 1269, 1283 [35]–[36]. This view was influenced by the conclusion of the European Court of Human Rights that an *ex parte* application by the prosecution may contravene the right to a fair and public hearing in article 6 of the European Convention on Human Rights. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that a person charged with a criminal offence has the right to a fair and public hearing. Section 25 of the Charter elaborates on the minimum requirements for a fair hearing in criminal proceedings.
- 162 *R v H; R v C* [2004] 1 All ER 1269, 1280 [22], 1285 [37].
- 163 See, eg, *R v Reardon* (No 2) (2004) 60 NSWLR 454, 468–9 [46]–[54] (Hodgson JA); *R v Lipton* (2011) 82 NSWLR 123, especially at 149 [89]–[91] (McColl JA). In both cases, as McColl JA noted, it was said that ‘the few Australian cases that have commented on the English cases have not suggested they are not applicable in Australia’.
- 164 *R v Andrews* [2010] SASCF 5.
- 165 *R v Andrews* [2010] SASCF 5 [29] (Gray J).
- 166 *R v Andrews* [2010] SASCF 5 [25] (Gray J).
- 167 See *R v Lodhi* (2006) 163 A Crim R 475 [12]–[13]; *Sands v State of South Australia* [2015] SASR 195, 238–9 [169]–[172]; *State of New South Wales v Public Transport Ticketing Corporation (No 3)* [2011] 81 NSWLR 394.
- 168 For example, *Criminal Procedure and Investigations Act 1996* (UK) ss 3(1)(a), 7A; *Criminal Justice and Licensing (Scotland) Act 2010* (UK) s 121.
- 169 See generally Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice* (March 2015); Crown Office and Procurator Fiscal Service (Scot), *Disclosure Manual* (December 2014) ch 25.
- 170 Letter from the Lord Advocate, Crown Office and Procurator Fiscal Service (Scotland) to the Commission, 30 October 2019, 4.
- 171 Letter from the Lord Advocate, Crown Office and Procurator Fiscal Service (Scotland) to the Commission, 30 October 2019, 4.
- 172 Submission 154 Supreme Court of Victoria, 9.
- 173 Submission 154 Supreme Court of Victoria, 8–9.
- 174 Submission 154 Supreme Court of Victoria, 9–10.
- 175 Submission 142 Director of Public Prosecutions (Victoria), 63 [257].
- 176 Submission 142 Director of Public Prosecutions (Victoria), 63–4 [257].
- 177 Submission 142 Director of Public Prosecutions (Victoria), 64 [258].
- 178 Submission 142 Director of Public Prosecutions (Victoria), 68 [274].
- 179 Submission 142 Director of Public Prosecutions (Victoria), 70 [281].
- 180 Submission 142 Director of Public Prosecutions (Victoria), 70 [8.4.6].
- 181 The DPP suggests that the Public Interest Monitor’s powers and functions could reflect those set out in section 3D of the *Major Crimes (Investigative Powers) Act 2004*. See Submission 142 Director of Public Prosecutions (Victoria), 70 [282].

- 182 Submission 144a Victoria Police, [35].
- 183 Submission 144a Victoria Police, [35].
- 184 Submission 142 Director of Public Prosecutions, 64 [259]; Submission 144a Victoria Police, [81].
- 185 *Criminal Procedure Act 2004* (WA) s 138(3)(a).
- 186 *Criminal Procedure Act 2004* (WA) s 138(3)(b)–(d).
- 187 Submission 142 Director of Public Prosecutions (Victoria), 96–7 [371].
- 188 Submission 143 Commonwealth Director of Public Prosecutions, 10 [52].
- 189 Submission 145 Victoria Legal Aid, 3–4.
- 190 Crown Prosecution Service, *Disclosure Manual* (2018) 41.
- 191 Crown Prosecution Service, *Disclosure Manual* (2018) 35.
- 192 Crown Prosecution Service, *Disclosure Manual* (2018) 41.
- 193 Crown Prosecution Service, *Disclosure Manual* (2018) 41–2.
- 194 Submission 144a Victoria Police, [26].
- 195 Submission 144a Victoria Police, [26].
- 196 Submission 144a Victoria Police, [34].
- 197 Submission 144a Victoria Police, [27].
- 198 Submission 144a Victoria Police, [62]–[63].
- 199 Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (1 June 2007) 30.
- 200 Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (1 June 2007) 30–1.
- 201 Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (1 June 2007) 31.
- 202 Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (1 June 2007) 31.
- 203 Submission 144a Victoria Police, [60].
- 204 Submission 144a Victoria Police, [61].
- 205 Submission 144a Victoria Police, [28].
- 206 Submission 144a Victoria Police, [28].
- 207 Consultation with Australian Federal Police, 10 July 2020, [50].
- 208 Consultation with Australian Federal Police, 10 July 2020, [60].
- 209 Consultation with Australian Federal Police, 10 July 2020, [51].
- 210 Submission 143 Commonwealth Director of Public Prosecutions, 11 [54].
- 211 Submission 143 Commonwealth Director of Public Prosecutions, 11 [55].
- 212 Submission 143 Commonwealth Director of Public Prosecutions, 11 [56].
- 213 Submission 143 Commonwealth Director of Public Prosecutions, 11 [58].
- 214 Submission 143 Commonwealth Director of Public Prosecutions, 12 [59].
- 215 Submission 143 Commonwealth Director of Public Prosecutions, 12 [60].
- 216 Submission 143 Commonwealth Director of Public Prosecutions, 12 [61].
- 217 Submission 147 Criminal Bar Association, 5.
- 218 Submission 145 Victoria Legal Aid, 1.
- 219 Submission 145 Victoria Legal Aid, 7.
- 220 Submission 145 Victoria Legal Aid, 7.
- 221 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 11 September 2020, 13–14 [44].
- 222 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 11 September 2020, 13–14 [44].
- 223 Submission 142 Director of Public Prosecutions (Victoria), 36 [133].

- 224 Submission 142 Director of Public Prosecutions (Victoria), 36 [134].
- 225 Submission 142 Director of Public Prosecutions (Victoria), 36 [134].
- 226 Submission 142 Director of Public Prosecutions (Victoria), 36 [135].
- 227 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 11 September 2020, 14 [45].
- 228 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 11 September 2020, 14 [45]; Exhibit RC1938 Statement of Ms Abbey Hogan, 11 September 2020, [3]–[4], Annexure B.
- 229 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 11 September 2020, 14 [45].
- 230 Submission 142 Director of Public Prosecutions, 36 [136]. See also Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 7 August 2020, 23 [62].
- 231 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 7 August 2020, 13 [34].
- 232 Responsive submission Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 7 August 2020, 13 [34], 21–3 [58]–[61].
- 233 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 7 August 2020, 22 [60]. The responsive submission noted that the rationales behind this policy were accepted in the recent decision of *R v Westbrook* [2020] VSC 290: Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 7 August 2020, 22–3 [61].
- 234 Submission 142 Director of Public Prosecutions (Victoria), 17 [65].
- 235 Submission 144a Victoria Police, [44].
- 236 Submission 144a Victoria Police, [44].
- 237 Submission 144a Victoria Police, [45].
- 238 Submission 144a Victoria Police, [46].
- 239 Victoria Police, Submission to the Victorian Law Reform Commission, *Committals* (4 October 2019) 6.
- 240 Submission 142 Director of Public Prosecutions (Victoria), 18 [65].
- 241 Submission 142 Director of Public Prosecutions (Victoria), 18 [65].
- 242 Victoria Police, Submission to the Victorian Law Reform Commission, *Committals* (4 October 2019) 6.
- 243 Victorian Aboriginal Legal Service, Submission to the Victorian Law Reform Commission, *Committals* (9 September 2019) 7.
- 244 Submission 142 Director of Public Prosecutions (Victoria), 17–18 [65].
- 245 Submission 147 Criminal Bar Association, 5.
- 246 Submission 147 Criminal Bar Association, 5–6.
- 247 Submission 142 Director of Public Prosecutions (Victoria), 18 [65].
- 248 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 58 [267].
- 249 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 58 [268], 59 [271], 60 [276]–[277].
- 250 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 59–60 [267]–[275].
- 251 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 58–60 [267]–[278]. Some ad hoc training days and sessions were run by the VGSO.
- 252 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 58 [278].
- 253 Victoria Police’s changes to Human Source Policy dated 15 April 2020 came into effect on 4 May 2020.
- 254 Exhibit RC1531b Victoria Police Manual—Human Sources, 15 April 2020, 27–8 [7.6].
- 255 Submission 142 Director of Public Prosecutions (Victoria), 36 [132].
- 256 Law Institute of Victoria, Submission to the Victorian Law Reform Commission, *Committals* (2 October 2019) 13 [4.3].
- 257 Submission 147 Criminal Bar Association, 5.
- 258 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020), 63.
- 259 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020), 63.
- 260 Independent Broad-based Anti-corruption Commission, *Operation Gloucester* (Special Report, July 2020), 80 (Recommendations 1 and 2).
- 261 Exhibit RC1536a Victoria Police and Prosecution Specialist Branch Disclosure Action Plan, 19 March 2020.
- 262 Submission 144a Victoria Police, [13].
- 263 Victorian Government Solicitor’s Office, *Victoria Police Disclosure Handbook* (undated).

- 264 Her Majesty's Crown Prosecution Service Inspectorate (UK), *Disclosure of Unused Material in the Crown Court* (Report, January 2020) 7 [1.10].
- 265 Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice* (March 2015) [3.1].
- 266 Crown Prosecution Service (UK), *Disclosure Manual* (2018) 11.
- 267 Crown Prosecution Service (UK), *Disclosure Manual* (2018) 11.
- 268 Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice* (March 2015) [6.15].
- 269 Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice* (March 2015) [6.16].
- 270 Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice* (March 2015) [6.17].
- 271 Submission 143 Commonwealth Director of Public Prosecutions, 11 [53].
- 272 Submission 144a Victoria Police, [36].
- 273 Submission 144a Victoria Police, [37].
- 274 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 87 [372].
- 275 Submission 142 Director of Public Prosecutions (Victoria), 54 [209].
- 276 Submission 142 Director of Public Prosecutions (Victoria), 54 [209].
- 277 Submission 142 Director of Public Prosecutions (Victoria), 54 [210].
- 278 Submission 142 Director of Public Prosecutions (Victoria), 54 [213].
- 279 Submission 142 Director of Public Prosecutions (Victoria), 55 [215].
- 280 Submission 142 Director of Public Prosecutions (Victoria), 55 [217].
- 281 Submission 142 Director of Public Prosecutions (Victoria), 59 [235].
- 282 Submission 142 Director of Public Prosecutions (Victoria), 60 [246].
- 283 Submission 142 Director of Public Prosecutions (Victoria), 61 [248].
- 284 Submission 145 Victoria Legal Aid, [5].
- 285 Submission 142 Director of Public Prosecutions (Victoria), 20 [72].
- 286 Victorian Law Reform Commission, *Committals* (Report, March 2020) [9.58].
- 287 Transcript of Deputy Commissioner Wendy Steendam, 7 May 2020, 14924.
- 288 Responsive submission, Victoria Police, 20 September 2020, 19 [1.4(a)].
- 289 Responsive submission, Victoria Police, 20 September 2020, 20 [1.5]–[1.6].
- 290 Exhibit RC1536a Victoria Police and Prosecution Specialist Branch Disclosure Action Plan, 19 March 2020, 14.
- 291 Exhibit RC1536a Victoria Police and Prosecution Specialist Branch Disclosure Action Plan, 19 March 2020, 14.
- 292 Exhibit RC1536a Victoria Police and Prosecution Specialist Branch Disclosure Action Plan, 19 March 2020, 14.
- 293 House of Commons Justice Committee, *Disclosure of Evidence in Criminal Cases* (Report, 20 July 2018) 23 [71]; Attorney-General's Office (UK), *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (Report, November 2018), 22.
- 294 House of Commons Justice Committee, *Disclosure of Evidence in Criminal Cases* (Report, 20 July 2018) 49 [18].
- 295 Richard Horwell, *Mouncher Investigation Report* (Report, July 2017) 81–2 [14.6].
- 296 National Police Chiefs' Council, College of Policing and Crown Prosecution Service, *National Disclosure Improvement Plan* (January 2018).
- 297 National Police Chiefs' Council, College of Policing and Crown Prosecution Service, *National Disclosure Improvement Plan, Progress Update* (October 2018) 1.
- 298 National Police Chiefs' Council and Crown Prosecution Service (UK), *National Disclosure Standards* (May 2018) 3 [2.1.3].
- 299 National Police Chiefs' Council, College of Policing and Crown Prosecution Service, *National Disclosure Improvement Plan, Progress Update* (October 2018) 1.
- 300 Attorney-General's Office (UK), *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (Report, November 2018) 46.
- 301 Attorney-General's Office (UK), *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (Report, November 2018) 45.
- 302 Attorney-General's Office (UK), *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (Report, November 2018) 3.
- 303 Submission 144a Victoria Police, [66].

- 304 Submission 144a Victoria Police, [66].
- 305 Submission 145 Victoria Legal Aid, 6.
- 306 Submission 145 Victoria Legal Aid, 6.
- 307 Submission 144a Victoria Police, [58].
- 308 Submission 144a Victoria Police, [72].
- 309 Submission 144a Victoria Police, [73].
- 310 Submission 147 Criminal Bar Association, 3.
- 311 Submission 142 Director of Public Prosecutions (Victoria), 19 [68].
- 312 Submission 142 Director of Public Prosecutions (Victoria), 19 [69].
- 313 Submission 145 Victoria Legal Aid, 4.
- 314 Submission 145 Victoria Legal Aid, 5.
- 315 See, eg, Attorney-General's Office (UK), *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (Report, November 2018) ch 6.
- 316 Submission 144a Victoria Police, [47].
- 317 Submission 144a Victoria Police, [48].
- 318 Submission 144a Victoria Police, [31].
- 319 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 66 [293].
- 320 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 66 [294]–[296].
- 321 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 67 [297]–[298].
- 322 Exhibit RC1529b Statement of Deputy Commissioner Wendy Steendam, 16 April 2020, 67 [301].
- 323 Responsive submission, Victoria Police, 20 September 2020, 20 [1.4(b)].
- 324 The Comrie Review recommended that Victoria Police human source policy, associated instructions and practice guidelines be revised to clearly reflect that before registering any human source who may have a professional duty, appropriate legal advice must be obtained: Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012) 20 (Recommendation 3(c)). The Comrie Review also recommended that when there are complex legal and ethical considerations, such as a human source having professional duties, then consultation must occur with the Victoria Police Director Legal Services before completing the risk assessment process: (Recommendation 5(b)). The same recommendations were made in the Kellam Report: Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) (Recommendations 1(c) and 3(b)).
- 325 Victorian Law Reform Commission, *Committals* (Report, March 2020) 106 (Recommendation 33).
- 326 See Victorian Law Reform Commission, *Committals* (Report, March 2020) 68–8 (Recommendations 11 and 12).
- 327 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions (Victoria), 11 September 2020, 14 [45]; Responsive submission, Director of Public Prosecutions (Victoria), 15 September 2020, 6 [19].
- 328 Responsive submission, Director of Public Prosecutions (Victoria), 15 September 2020, 3–6 [9]–[14].
- 329 See Submission 144a Victoria Police, [44]–[46]; Submission 147 Criminal Bar Association, 5; Submission 142 Director of Public Prosecutions (Victoria), 17–18 [65].

# 15

## Legal profession regulation

### INTRODUCTION

Lawyers have considerable authority and power when representing a client. They have expert knowledge of the law and legal system, and access to their client's confidential information. A lawyer's advice and actions can have a direct and significant influence on a client's future, their wellbeing and the outcomes they are able to achieve. When lawyers knowingly and deliberately betray their client's trust or act in ways contrary to their interests, it can have a negative impact on the client. It can also, as the Commission's inquiry has shown, have a negative impact on the integrity of the criminal justice system and community confidence in the administration of justice and the legal profession.

Term of reference 6 required the Commission to inquire into any matters necessary to satisfactorily resolve the matters set out in its other terms of reference. As part of its inquiry into term of reference 6, the Commission examined aspects of legal profession regulation and the way that it supports, promotes and monitors lawyers' ethical conduct.

In Chapter 7, the Commission outlines the number of cases that may have been affected by the use of former criminal defence barrister Ms Nicola Gobbo as a human source. In Chapters 12 and 13, the Commission makes recommendations to strengthen Victoria Police's use of human sources involving legal obligations of confidentiality or privilege, including recommending a new legislative and oversight regime. While Victoria Police must do better to strengthen its human source management framework, members and regulators of the legal profession also have a role to play in preventing and deterring the kind of conduct that led to this Commission.

The purpose of legal profession regulation is twofold: to protect the integrity of the administration of justice and to protect consumers and the public.

Victoria's legal profession regulatory framework consists of legislation, the common law, professional rules, ongoing education and support services. These elements work together, requiring lawyers to understand and adhere to high standards of ethical and legal practice. When lawyers fail to uphold these standards, a framework of complaints procedures, investigations and disciplinary mechanisms act to correct and deter the behaviour.

Given the scope of its terms of reference, the Commission has not conducted an extensive review of legal profession regulation in Victoria. Rather, it has focused on the specific aspects of legal profession regulation that support the ethical conduct of lawyers, and related issues raised by stakeholders the Commission consulted.

Since Ms Gobbo was admitted to the legal profession in 1997, Victoria's legal profession regulatory framework has changed significantly. The Commission considers, however, that there is scope to further strengthen and improve aspects of this framework.

It identified that there are opportunities to provide more comprehensive guidance to lawyers about their ethical duties and obligations, particularly relating to the duty of confidentiality, exceptions to this duty, and maintaining appropriate professional boundaries. Regulators and professional associations could also do more to make lawyers aware of the supports available to them in upholding their ethical obligations.

The Commission also recommends the introduction of a mandatory reporting requirement for lawyers to report suspected misconduct of other lawyers, and in doing so, support high ethical standards in the legal profession, better protect consumers of legal services and enhance public confidence in the Victorian profession.

The public can be assured that Ms Gobbo's improper conduct is the exception rather than the norm. Undoubtedly, the majority of Victorian lawyers are competent, diligent, ethical professionals who take their duties to the court and to their clients very seriously. Unfortunately, it is likely that Ms Gobbo's conduct has caused at least some community members to wonder whether they are able to trust a lawyer, or whether confidential information they supply to a lawyer might be disclosed to others in breach of their trust.

As such, the Commission considers that legal profession regulators and professional associations must work together to communicate effectively with the public about lawyers' professional and ethical obligations, with the aim of restoring and maintaining public confidence in the legal profession and the broader criminal justice system.

## CURRENT CONTEXT AND PRACTICE

This section summarises aspects of legal profession regulation in Victoria. It focuses on the ethical duties and obligations imposed on lawyers, along with:

- the legal profession regulatory framework
- admission to the legal profession
- the requirements to practise as a lawyer, including continuing professional development (CPD)
- ethical and practice support available for lawyers.

These topics are discussed in turn below.

## The legal profession regulatory framework

Legal profession regulation serves a range of purposes. It seeks to promote the administration of justice by ensuring that, among other things, lawyers act competently and maintain high ethical standards so that members of the public are protected.<sup>1</sup>

The legal profession plays a central role in the administration of justice. Lawyers owe a range of ethical duties and obligations—to the court, their clients and other lawyers—all of which help promote the integrity of the justice system, and trust between lawyers and their clients. When standards are not upheld, they can be enforced by a regulator or the justice system, which may impose sanctions in response to unsatisfactory, improper or criminal behaviour.

As the relationship between lawyers and their clients is based on trust, regulation also supports members of the public to confidently engage the services of a lawyer without needing to independently verify their credibility and qualifications.<sup>2</sup>

The two branches of the legal profession in Victoria—solicitors and barristers—are often collectively referred to as ‘lawyers’. Solicitors provide legal advice to individuals and organisations and will sometimes refer matters to barristers, while barristers tend to specialise in representing people in court and may give specialist advice on complex legal matters. Barristers generally receive their instructions through solicitors. In 2018–19, there were 23,477 registered lawyers in Victoria, comprising 21,348 solicitors and 2,129 barristers.<sup>3</sup>

### Overview of the regulatory framework

The legal profession regulatory framework encompasses all aspects of being admitted to legal practice and practising as a lawyer. It also establishes bodies responsible for overseeing the framework itself, and for managing complaints and disciplinary outcomes in cases of misconduct.

The legal profession regulatory framework draws on legislation, rules and the common law. In Victoria, the *Legal Profession Uniform Law Application Act 2014 (Vic)* (Uniform Law) governs the practice of law and regulation of the legal profession. The Uniform Law was introduced with the aim of promoting greater consistency in how the legal profession is regulated across jurisdictions.<sup>4</sup> It also operates in New South Wales, and will potentially apply in Western Australia if enabling legislation currently under consideration by the Western Australian Parliament is passed.<sup>5</sup> Local professional conduct rules apply in those jurisdictions that have not signed up to the Uniform Law.

A framework of rules sets out how the Uniform Law operates in Victoria, including:

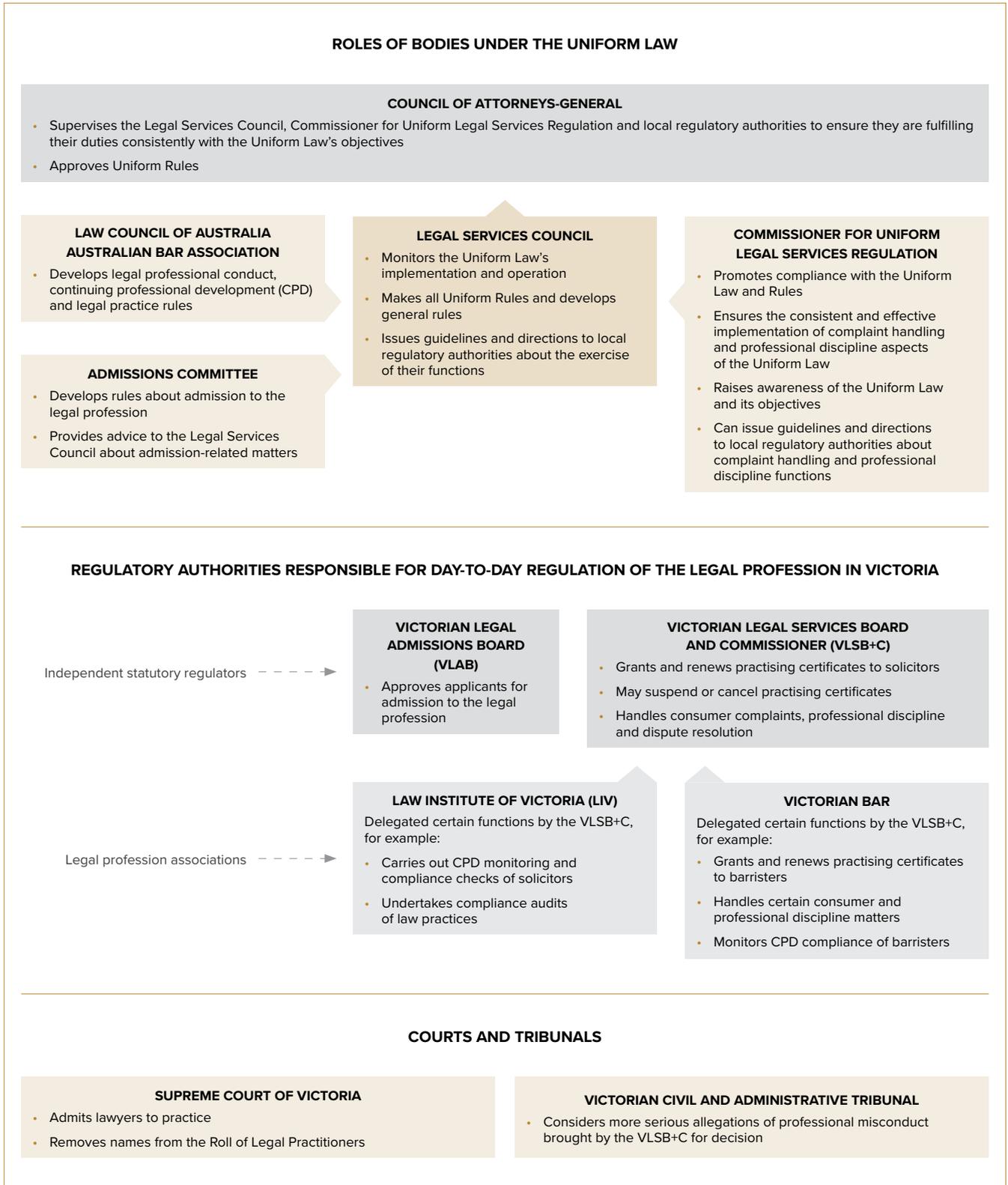
- *Legal Profession Uniform Admission Rules 2015* (Admission Rules)—outline the requirements for admission to the legal profession
- *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (Solicitors’ Conduct Rules) and the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Barristers’ Conduct Rules)—outline professional obligations and ethical principles for lawyers. This chapter sometimes refers to these rules collectively as the ‘professional conduct rules’.

The professional conduct rules are an important source of lawyers’ ethical and professional responsibilities, but they are not exhaustive. Lawyers also owe ethical duties and obligations that flow from the operation of other legislation; for example, in relation to civil procedure.<sup>6</sup> Further, the professional conduct rules reflect ethical principles that have developed over time and that are drawn from a range of sources, including the common law. Courts and tribunals play an important role in interpreting and enforcing lawyers’ ethical duties and obligations when handing down decisions in disciplinary matters.

## Key regulatory and other bodies

Several bodies work together to regulate the legal profession and oversee the operation of the Uniform Law, as set out in Figure 15.1.<sup>7</sup>

**Figure 15.1: Roles of regulators and professional associations under the Uniform Law<sup>8</sup>**



As Figure 15.1 shows, the Legal Services Council and the Commissioner for Uniform Legal Services Regulation oversee the Uniform Law in Victoria. These bodies are in turn overseen by the Council of Attorneys-General, which is made up of the Attorneys-General of the states that participate in the Uniform Law.<sup>9</sup>

The Law Council of Australia, which represents the legal profession at a national level, issues the Solicitors' Conduct Rules and, in conjunction with the Australian Bar Association (which represents barristers nationally), the Barristers' Conduct Rules. The rules were adopted under the Uniform Law in Victoria and New South Wales and have also been adopted in some jurisdictions that do not yet participate in the Uniform Law scheme: South Australia, Queensland and the Australian Capital Territory. The Law Council of Australia has issued commentary to accompany the Solicitors' Conduct Rules, which assists solicitors by providing 'additional information and guidance in understanding how particular rules might apply in some situations'.<sup>10</sup>

The Law Council of Australia also issues rules relating to CPD for solicitors and barristers, and supports the Uniform Law and the legal profession generally.<sup>11</sup>

At the state level, the *Good Conduct Guide: Professional Standards for Australian Barristers* (Good Conduct Guide) provides additional information about the professional conduct rules in relation to barristers.<sup>12</sup> The Law Institute of Victoria also publishes ethics guidelines to support solicitors with guidance on particular ethical or conduct situations.<sup>13</sup>

Regulation of Victoria's legal profession has changed significantly over time, having moved from self-regulation<sup>14</sup> to co-regulation,<sup>15</sup> with the introduction of independent regulators.<sup>16</sup> The aim of these changes has been to improve both transparency in the legal profession, and accountability of the legal profession to the public.<sup>17</sup>

As Figure 15.1 shows, in Victoria, the Victorian Legal Admissions Board (VLAB) and the Victorian Legal Services Board and Commissioner (VLSB+C) are the two designated local regulatory authorities:<sup>18</sup>

- The VLAB oversees the admission of lawyers in Victoria, including assessing the suitability of applicants (which is formally undertaken by the Victorian Legal Admissions Committee (VLAC) under a delegation).<sup>19</sup>
- The VLSB+C is comprised of two separate bodies that effectively operate as one:<sup>20</sup>
  - The Victorian Legal Services Board grants and renews lawyers' practising certificates, and can vary, suspend or cancel practising certificates.<sup>21</sup>
  - The Victorian Legal Services Commissioner is responsible for the receipt, management and resolution of complaints about the professional conduct of lawyers. The investigation of a complaint may result in a variety of disciplinary actions, including imposing fines, issuing reprimands and requiring further education or counselling.<sup>22</sup>

The VLSB+C also plays an important role in educating lawyers and the community about regulatory and other issues relevant to the legal profession, and the delivery of legal services to the community.<sup>23</sup>

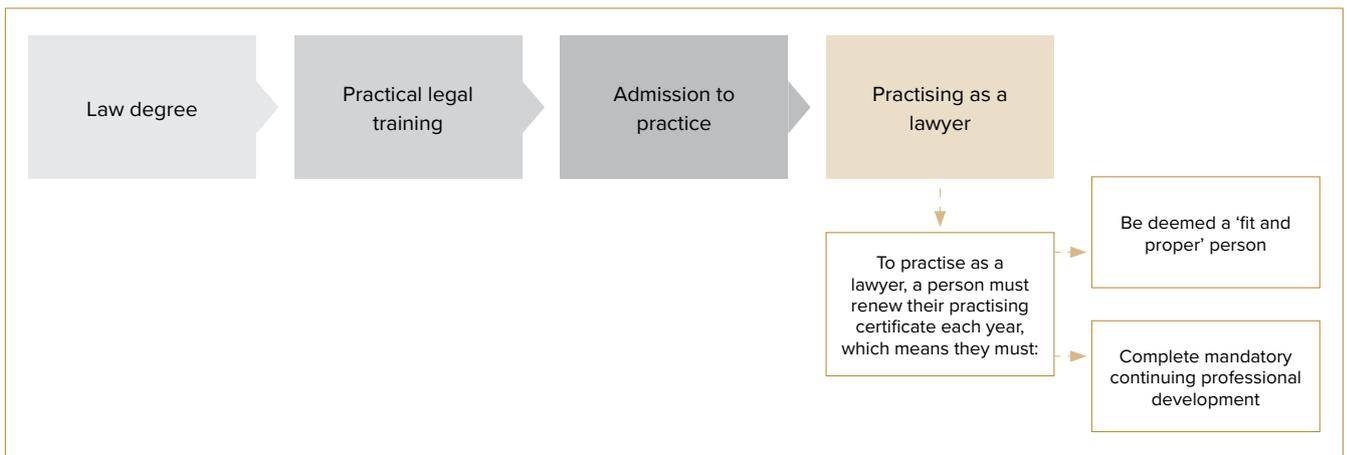
The Victorian Bar and the Law Institute of Victoria are the professional associations for Victorian barristers and solicitors respectively. The VLSB+C works closely with these bodies, and delegates some regulatory functions to them. For example, the Victorian Bar has a delegation from the Victorian Legal Services Commissioner that allows it to handle complaints concerning barristers, in recognition that barristers are a discrete, specialised cohort of the legal profession.<sup>24</sup> The Victorian Legal Services Commissioner determines which complaints to refer to the Victorian Bar; oversees the conduct of all investigations; and is ultimately responsible for making the final decisions on their outcome.<sup>25</sup>

The Supreme Court of Victoria plays an important overarching role in the admission of lawyers to the legal profession. It is the only body that may admit and remove a lawyer from the Roll of Legal Practitioners.<sup>26</sup> Removal from the Roll of Legal Practitioners means that a lawyer is no longer able to practise.

## Admission to the legal profession

To become a lawyer, a person must meet the requirements outlined in the Admission Rules. The broad steps involved in the admission process are displayed in Figure 15.2.

**Figure 15.2: Requirements to practise as a lawyer**



In summary, to become a lawyer, it is necessary to:

- hold an approved degree, which requires completing compulsory ‘academic areas of knowledge’ or subjects, including legal ethics<sup>27</sup>
- undertake practical legal training, which is designed to give legal practitioners the necessary day-to-day skills to practise, including understanding and applying legal ethics requirements<sup>28</sup>
- formally join the legal profession, known as ‘admission to practice’, being admitted to the legal profession essentially means that a person has completed the required education and training, is considered a ‘fit and proper person’ by the VLAB and the Supreme Court, and has signed the Roll of Legal Practitioners.

### ‘Fit and proper person’ for admission to the legal profession

While satisfying the education and practical legal training requirements to become a lawyer is reasonably straightforward, the question of what makes a fit and proper person is more complicated.<sup>29</sup> When joining the legal profession, an applicant must be able to show that they can uphold the integrity of the profession and maintain the confidence of the public. Many factors are considered when determining whether a person is fit and proper.

The term ‘fit and proper person’ means that the applicant:

*... must have the personal qualities of character which are necessary to discharge the important and grave responsibilities of being a barrister and solicitor.*<sup>30</sup>

The test for whether someone is considered a fit and proper person for admission to the legal profession is broad. The Admission Rules require the applicant to provide a range of documents to support their application, including a police report and two statutory declarations confirming the applicant’s character.<sup>31</sup>

Based on the evidence provided, the VLAB takes into account whether the applicant is of ‘good fame and character’, whether they have been found guilty of an offence, and other factors.<sup>32</sup> Further information may be requested to support an application and the VLAB may also require that the applicant attends a meeting with the Chair and Chief Executive Officer of the VLAB, who may ask questions about the matters that have been disclosed and examine the applicant’s insight into why the VLAB may have concerns about anything disclosed. The discussion is intended to be frank and honest, though informal.<sup>33</sup>

If satisfied that the applicant meets the admission requirements, the VLAB may recommend to the Supreme Court that they be admitted to the legal profession, and issue the applicant with a ‘compliance certificate’.<sup>34</sup> The applicant then attends a ceremony at the Supreme Court, where they are officially admitted to legal practice and where they sign the Roll of Legal Practitioners.

If a person wishes to practise as a barrister, they must meet additional requirements. To become a barrister, an applicant must:

- be admitted to the legal profession<sup>35</sup>
- achieve a minimum passing grade of 75 per cent in the Victorian Bar Entrance Exam to demonstrate legal knowledge in civil and criminal procedure, evidence and ethics<sup>36</sup>
- complete a 9–10-week Bar Readers’ Course, which is focused on skills specific to the practice of a barrister, such as advocacy in court, the rules of ethics and principles of good conduct<sup>37</sup>
- work under the guidance of a mentor at the Victorian Bar for nine months (in addition to this initial mentor, by the end of the Readers’ Course, all Readers must have a senior mentor who is either a Queen’s or Senior Counsel).<sup>38</sup>

## Practising as a lawyer

Once a person has been admitted to the legal profession, they are not immediately eligible to provide legal advice or legal representation.<sup>39</sup> They must first apply for a practising certificate, which must be renewed each year.<sup>40</sup> A practising certificate essentially operates as a lawyer’s ‘licence’ to provide legal advice and represent clients.

In order to renew their practising certificate each year, a lawyer must still be considered a ‘fit and proper person’ by the VLSB+C (for solicitors) or the Victorian Bar (for barristers),<sup>41</sup> and must also maintain their knowledge of the law through 10 hours of CPD per year.<sup>42</sup>

Lawyers have ongoing obligations to disclose certain events that may affect whether they are a fit and proper person after they have been admitted. The Uniform Law describes these as ‘automatic show cause’ events; and, if they arise, lawyers are required to provide relevant information to the VLSB+C or the Victorian Bar. Examples of ‘show cause’ events are when a lawyer becomes bankrupt; is charged with or found guilty of certain criminal offences; or fails to hold appropriate insurance.<sup>43</sup>

If the VLSB+C or the Victorian Bar is not satisfied that a lawyer is a fit and proper person, it can suspend, cancel or impose conditions on the lawyer’s practising certificate. Conditions can include requiring the lawyer to undergo counselling or complete specific legal education or training.<sup>44</sup>

## Duties owed to clients and the court

- Lawyers owe a fundamental duty to their client to act in the client's best interests,<sup>45</sup> including:
  - a broad duty of confidentiality
  - a duty to uphold legal professional privilege, which protects confidential communications between a lawyer and a client that are made for the purpose of the lawyer providing legal advice or for use in existing or anticipated legal proceedings.<sup>46</sup>

Lawyers' duties to their clients promote trust and remedy the imbalance of power between lawyers and their clients. These obligations protect clients from conduct by their lawyer that might adversely affect their interests.

In addition to their duties to clients, lawyers have other, paramount, obligations as 'officers' of the court. Lawyers must not only obey the law; they must also act ethically, to support the efficient and proper administration of justice.<sup>47</sup> As the third arm of government in a democratic society, the court has a role to protect the independence of legal practitioners to support the justice system to operate fairly and effectively.

Lawyers' duties to the court, based in common law and now specified in professional conduct rules, include:

- not misleading the court
- acting with competence, honesty and courtesy towards other solicitors, parties and witnesses
- being independent and free from bias
- being frank in their responses and disclosures to the court.<sup>48</sup>

## Continuing professional development

Lawyers' education requirements do not stop once they are admitted to the legal profession. The law is a complex area that is constantly developing through changes to legislation and new decisions of courts and tribunals.

Ethics education throughout a lawyer's career is particularly important because, as seen in other types of professional settings, lawyers can become desensitised or unquestioning of accepted ways of doing things, and stop thinking through the ethical implications of a given scenario or new issue that they have not faced before. Lawyers therefore need to maintain and update their skills and knowledge of the law, including its ethical dimensions, throughout their career.

The *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (Solicitors' Continuing Professional Development Rules) and the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* set out the minimum requirements for CPD for lawyers.

As noted above, to renew their practising certificate, a lawyer must complete 10 units (or hours) of CPD each year, including at least one unit in each of the four compulsory fields:

- ethics and professional responsibility
- practice management and business skills
- professional skills
- substantive law.<sup>49</sup>

A CPD unit can be completed in various ways, including by attending seminars, preparing an article for a legal publication or conducting relevant postgraduate studies.<sup>50</sup>

Lawyers are required to self-assess whether the activities they undertake for the purposes of CPD comply with the relevant rules. The Victorian Bar and the Law Institute of Victoria do not assess CPD course content, but they may require a barrister or solicitor (respectively) to provide evidence that they have met the CPD requirements.<sup>51</sup>

### **Compliance and follow-up action relating to continuing professional development**

Each year, lawyers may voluntarily disclose that they have not met their CPD obligations, by the required annual assessment date of 31 March. The Victorian Bar and the Law Institute of Victoria work with these lawyers to establish rectification plans, or to assist them to complete their CPD obligations in an allowed timeframe. A rectification plan sets out the steps that a lawyer intends to take so that they will comply with their CPD requirements.

In addition, each year the Victorian Bar and the Law Institute of Victoria randomly audit a number of lawyers' compliance with their CPD obligations.

In its 2019 Annual Report, the VLSB+C reported that the Victorian Bar worked with 34 barristers who had disclosed they had not met their CPD obligations during 2018–19. All but one completed the requirements subsequently and one barrister was exempted on medical grounds. The Victorian Bar also conducted random audits of 105 barristers and found that two members had not met their CPD requirements: one member had retired and another was exempt due to medical reasons.<sup>52</sup>

Across the same reporting period, 265 solicitors disclosed to the Law Institute of Victoria that they had not met their CPD obligations. These solicitors were required to complete rectification plans, with 13 failing to complete these successfully. The 2019 Annual Report does not detail the outcome for these 13 solicitors, aside from noting that appropriate action was taken in line with the CPD policy.<sup>53</sup> In addition, the Law Institute of Victoria conducted a random audit of 550 solicitors. Nineteen solicitors had not met their CPD requirements and the Law Institute of Victoria 'commenced follow-up action'.<sup>54</sup>

In 2018–19, these non-compliant solicitors represented 1.4 per cent of all solicitors in Victoria. The number of solicitors who failed to complete a rectification plan leading to further enforcement action was only 0.16 per cent of all solicitors. Corresponding analysis was not provided for barristers; however, given that just over 2,000 lawyers were reported as practising as barristers for 2018–19, non-compliant barristers over this period represent approximately 1.5 per cent of all practising barristers.<sup>55</sup>

Both the VLSB+C and the Victorian Bar are currently reviewing or have recently reviewed the educational services offered as part of CPD. This is discussed further below.

### **Complaints about lawyers**

Lawyers are held to account for their professional conduct in several ways, including through complaints to the relevant regulatory bodies. Complaints can be about:

- disciplinary matters, which involve unsatisfactory professional conduct or professional misconduct
- consumer matters, such as those relating to disputes about lawyers' costs.<sup>56</sup>

Unsatisfactory professional conduct includes 'conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer'.<sup>57</sup>

The more serious matter of professional misconduct includes:

- a. *unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and*
- b. *conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.*<sup>58</sup>

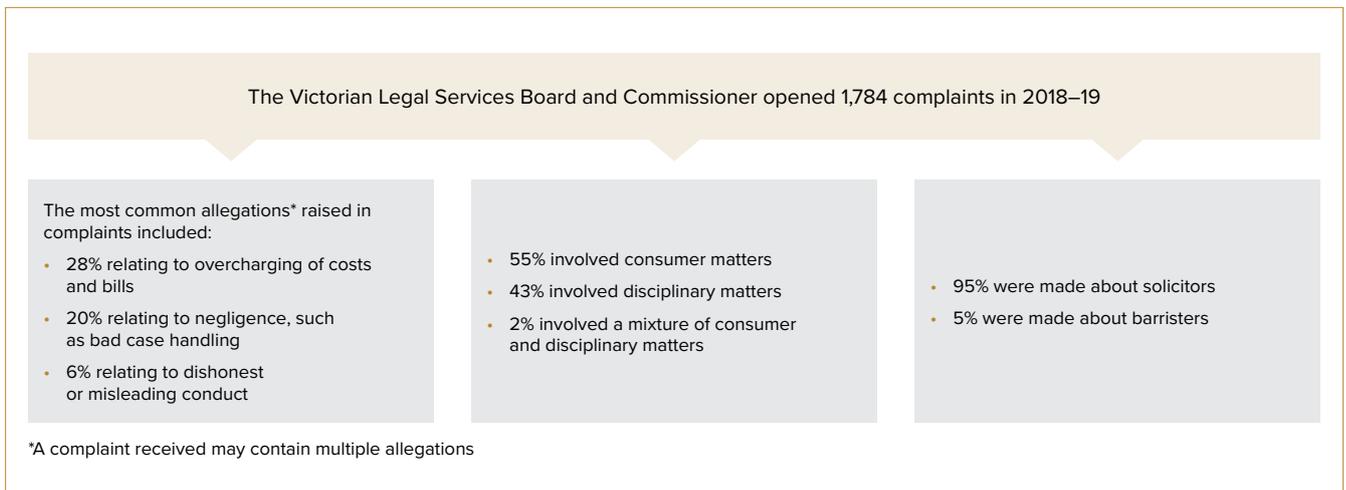
A variety of conduct may amount to unsatisfactory professional conduct or professional misconduct, including breaches of professional rules, committing a serious offence or charging more than a fair and reasonable amount for legal costs.<sup>59</sup>

Complaints or information about the misconduct of lawyers can be received in a number of ways, including as a result of lawyers' obligations to disclose 'show cause' events (outlined earlier), complaints lodged by clients or complaints lodged by other members of the legal profession.<sup>60</sup> Regulators can also initiate 'own motion' investigations into lawyers' conduct, based on their own concerns or referrals from other bodies, such as the courts.<sup>61</sup>

As noted earlier in this chapter, the relevant body for handling complaints is the Victorian Legal Services Commissioner, which has delegated this role in part to the Victorian Bar in the case of barristers.

Figure 15.3 gives an overview of the complaints made about lawyers in Victoria in 2018–19.

**Figure 15.3: Complaints about lawyers, Victoria, 2018–19**<sup>62</sup>



Regulators have several tools available when considering the most appropriate approach to resolving a complaint. The VLSB+C outlines a 'Compliance and Enforcement Pyramid' setting out the graduated use of interventions: education and informational activities; negotiated or agreed penalties; disciplinary penalties; and finally, regulatory penalties, including cancelling a practising certificate or removing a lawyer from the Roll of Practitioners.<sup>63</sup>

The VLSB+C considers several factors when determining which regulatory tool is appropriate, including the nature and seriousness of the behaviour and its consequences, and the circumstances of each case.<sup>64</sup>

## Reporting misconduct of other lawyers

Solicitors in Victoria have discretion to report suspected misconduct of another lawyer to the VLSB+C. The Solicitors' Conduct Rules require that a solicitor must have 'reasonable grounds' to report another lawyer and the allegation must be made in good faith. That is:

*... a solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide [in good faith] and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.*<sup>65</sup>

The Barristers' Conduct Rules do not contain a similar rule in relation to reporting suspected barrister misconduct to the Victorian Bar or VLSB+C.

Lawyers are currently only required to report very limited misconduct matters. A lawyer must report to a regulator if they 'believe on reasonable grounds that there is an irregularity in connection with the receipt, recording or disbursement of any trust money received by a law firm'.<sup>66</sup>

## Ethical and practice support

Lawyers are often required to deal with complex, sensitive matters. Ethical issues can arise in a variety of situations during the course of a lawyer's everyday work; for example, in relation to a potential conflict of interest between two different clients or between a lawyer's own interests and those of their client. Ethical issues may also involve circumstances where a lawyer is concerned that their client may present a risk to someone's safety.

The professional conduct rules provide some guidance about how lawyers should approach such matters, but given the many situations in which ethical issues can arise, a number of support services, resources and guidance materials are also available through the Law Institute of Victoria and the Victorian Bar for members. There are also services that provide broader wellbeing and practice support to lawyers, such as assistance with mental health issues.

Solicitors in Victoria can seek assistance from the Law Institute of Victoria's Ethics Support Line, which provides telephone advice on ethical issues.<sup>67</sup> Assistance is also available from the Law Institute of Victoria's Ethics Committee, which considers solicitors' requests for rulings on ethical issues.<sup>68</sup> The Law Institute of Victoria also produces Ethics Guidelines, which contain further information on specific ethical issues that may arise in the course of a lawyer's practice, including case studies on particular circumstances and scenarios.<sup>69</sup> An Ethics Information Hub, available on the Law Institute's website, provides solicitors with online information about various ethical issues, including links to relevant court decisions, frequently asked questions about ethics and ethics rulings from disciplinary proceedings.<sup>70</sup>

In addition, the Law Institute of Victoria offers the *LIVwell Program*, which is 'designed to help members build and develop their wellbeing skillset and resources through a range of events, activities, services and support',<sup>71</sup> as well as a mentoring program that connects lawyers to more experienced colleagues to discuss issues that arise through their practice.<sup>72</sup>

The Victorian Bar Ethics Committee assists barristers with managing ethical issues they may face in their practice. Guidance from the Ethics Committee can be obtained by requesting a formal resolution on the proper way to deal with an ethical dilemma, seeking urgent individual advice and informal discussions with a barrister prior to a formal request being made for a resolution.<sup>73</sup> Bulletins from the Ethics Committee are also published to provide guidance on common ethical issues, particularly in circumstances where similar issues have arisen on numerous occasions.<sup>74</sup>

The Victorian Bar's Health and Wellbeing Committee also assists the Victorian Bar with the provision of education, encouragement and support to barristers.<sup>75</sup> A counselling service is available for members (or immediate family members who are supporting a member in need) who are experiencing mental health and wellbeing issues. The service offers sessions with a clinical psychologist who has specialist knowledge of the particular stresses faced by barristers in the work they undertake.<sup>76</sup> The Victorian Bar has implemented several health and wellbeing initiatives during 2020, including mental health awareness training, and is developing a health and wellbeing online portal.<sup>77</sup>

## CHALLENGES AND OPPORTUNITIES

The Commission consulted with legal professional associations and regulators in Victoria and across Australia to gain an understanding of the current framework and opportunities for reform. A list of agencies consulted can be found at Appendix G.

The Commission also undertook literature reviews and assessed alternative models and approaches in other Australian and international jurisdictions, including aspects of legal profession frameworks in the United Kingdom, Canada and New Zealand.

This section outlines the main issues identified by the Commission through these consultations and reviews. There are six broad issues:

- public trust and confidence in the legal profession
- adequacy of the admission process
- ethical and professional conduct rules, including the duty of confidentiality, conflict of interest and maintaining professional boundaries
- legal ethics education and support services
- complaints about lawyers and reporting and investigation mechanisms
- access to lawyers for people in police custody.

These topics are discussed in turn below.

### Public trust and confidence in the legal profession

As noted above, lawyers' ethical duties and obligations support the integrity of the criminal justice system and the administration of justice more broadly.

The Law Council of Australia has noted the importance of these obligations, reinforcing that lawyers 'are vested with a unique, paramount duty to the court and to promote the rule of law, which goes to the very heart of our democracy'.<sup>78</sup> The Victorian Bar highlighted Justice Brennan's observation that the 'law is administered more frequently and more directly by legal advisers than it is by judges', pointing to the unique role lawyers play in promoting the administration of justice.<sup>79</sup>

Professor Gino Dal Pont, professor of law at University of Tasmania, has stated that '[t]rust in the legal profession ... may translate to trust in the administration of justice'.<sup>80</sup> This sentiment was reflected in Victoria Legal Aid's submission to the Commission, which noted that lawyers' duties to their clients:

*... are a necessary precondition for maintaining a relationship of trust and confidence between lawyers and their clients, as well as general trust in the integrity of the legal profession and the legal system.*<sup>81</sup>

The use of Ms Gobbo as a human source involved fundamental breaches of crucial safeguards that support the fair operation of the criminal justice system. While stakeholders such as the Law Institute of Victoria noted that Ms Gobbo's conduct is not representative of the conduct and attitudes of the legal profession, it has been acknowledged that her conduct may have diminished the public's confidence in the profession and the administration of justice.<sup>82</sup>

Since revelations of Ms Gobbo's conduct, the potential for such detrimental impacts on public trust has been noted in many media articles.<sup>83</sup> The Law Institute of Victoria has recognised that Ms Gobbo's conduct 'will contribute to potential public concern about whether [clients] can trust their lawyer to keep their communications confidential'.<sup>84</sup>

Former President of the Law Council of Australia, Mr Arthur Moses, SC, has commented that any threats to legal professional privilege may negatively affect a client's willingness and confidence to interact openly and honestly with their lawyer and may have a 'chilling effect' on the lawyer/client relationship and the administration of justice. He explained:

*Clients should know their legal adviser will not disclose information they provide. This confidence is necessary for them to develop a full understanding of their rights and responsibilities under Australia's complex, ever-changing system of laws.*<sup>85</sup>

Community distrust in lawyers may not only affect trust in the justice system, but also act as a barrier to people accessing legal services, particularly in the case of vulnerable groups, such as young people, people from culturally and/or linguistically diverse backgrounds and Aboriginal and Torres Strait Islander people.<sup>86</sup>

## Adequacy of the admission process

In Chapter 7, the Commission notes that in 1997, Ms Gobbo likely misled the then Board of Examiners in seeking admission to the legal profession.<sup>87</sup> The Commission has examined the current admissions process as part of its inquiry into aspects of legal profession regulation.

As noted above, applicants for admission as a lawyer are required to disclose certain information to the VLAC (acting on the VLAB's behalf) to confirm that they are a 'fit and proper person'.<sup>88</sup>

Under the Uniform Law, the VLAB may 'communicate with, and obtain relevant information from Australian or foreign authorities or courts in connection with the consideration of an application for a compliance certificate'.<sup>89</sup> The VLAB told the Commission that it has experienced challenges with requesting documents from agencies such as Centrelink (in relation to failures to provide information on income from other sources) and Victoria Police (where information may not be released if charges are not laid) to support its assessment of the fitness of the applicant for admission. Privacy restrictions have prevented documents being released to both the applicant themselves and the VLAB.<sup>90</sup>

The VLAB noted that while such circumstances are uncommon, it would be useful for it to have a power to obtain information and/or documents from Victoria Police and other agencies such as Centrelink.<sup>91</sup> The VLAB considered that it would have benefited from such a power in six to eight instances in the past three years, and that such information could assist to determine whether an applicant is a fit and proper person to be admitted to the legal profession.<sup>92</sup>

The VLAB advised that no other equivalent admissions authority in Australia has a similar power to seek information and/or documents.<sup>93</sup>

## Ethical and professional conduct rules

As described above, the professional conduct rules are a key source of lawyers' ethical duties and obligations.

The Commission received submissions on potential areas for improvement in three main areas of the professional conduct rules: the duty of confidentiality; conflict of interest; and maintaining professional boundaries. These are discussed in turn below.

### The duty of confidentiality

Lawyers owe a broad duty of confidentiality to their clients, enshrined in the professional conduct rules, which means they are not permitted to disclose confidential information learned from a lawyer–client relationship.<sup>94</sup> As discussed in Chapter 4, together with legal professional privilege, the duty of confidentiality is central to facilitating and preserving the trust between a client and their lawyer. It also supports the operation of the justice system by ensuring that people can obtain frank legal advice and provide all relevant information to their lawyer without fear of such information being misused.<sup>95</sup> In turn, this assists lawyers in providing better advice and representation to their clients, and ultimately supports the public's long-term trust in lawyers and the justice system.<sup>96</sup>

Given the significance and importance of confidentiality to the lawyer–client relationship, there are only very limited circumstances in which lawyers can release information that is subject to the duty.

Some of the key exceptions to the duty of confidentiality relate to lawyers disclosing information to prevent the commission of criminal offences or harm being caused. These are outlined in Table 15.1.<sup>97</sup>

**Table 15.1: Key exceptions to the duty of confidentiality in the professional conduct rules<sup>98</sup>**

Professional conduct rules	Exception to the duty of confidentiality
<b>Solicitors' Conduct Rules</b>	<ul style="list-style-type: none"> <li>• may disclose information for the sole purpose of avoiding the probable commission of a serious criminal offence</li> <li>• may disclose information for the purpose of preventing imminent serious physical harm to the client or to another person.</li> </ul>
<b>Barristers' Conduct Rules</b>	<ul style="list-style-type: none"> <li>• where a client informs their barrister that the client intends to disobey a court's order and the barrister believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety, the barrister can advise the court or the opponent</li> <li>• where a client threatens the safety of any person and the barrister believes on reasonable grounds that there is a risk to any person's safety, the barrister may advise the police or other appropriate authorities.</li> </ul>

### The exceptions to confidentiality in the Solicitors' Conduct Rules

As outlined in Table 15.1, under the Solicitors' Conduct Rules, a solicitor may disclose information where it is done for the purpose of preventing 'imminent serious physical harm' to a client or another person. A solicitor may also disclose information where it is done 'for the sole purpose of avoiding the probable commission of a serious criminal offence'. The rules do not specify to whom the information may be disclosed, focusing on the permitted purposes for disclosure.

The VLSB+C noted that the concepts of ‘imminent’ and ‘serious’ physical harm are vague:

*On a plain reading of the rule, it appears that a solicitor may not disclose information for the purpose of preventing physical harm that is serious (but not imminent) or physical harm that is imminent (but not serious).<sup>99</sup>*

The VLSB+C also noted that it is unclear what constitutes a ‘serious criminal offence’, querying the practical utility of the rule.<sup>100</sup>

The Law Institute of Victoria considered that exceptions to the duty of confidentiality within the Solicitors’ Conduct Rules are well understood in the profession. In its experience, solicitors seek guidance on their obligations and proposed approach to disclosing information, including through its Ethics Support Line service.<sup>101</sup> It observed that issues relating to the exceptions to the duty of confidentiality ‘frequently’ arise for solicitors, particularly where a client indicates that they are at risk of harming themselves. It also noted, though, that its members reported that there were rarely scenarios where they would be conflicted as to whether to disclose confidential information.<sup>102</sup>

Ultimately, the Law Institute of Victoria suggested there is a need for further guidance and that the matters examined by the Commission are unique, requiring careful, targeted ethics guidance for the legal profession. It suggested such guidance could take the form of an Ethics Guideline issued by the Law Institute, as the profession and courts are familiar with these and find them helpful, although such guidelines are not conduct rules and are not enforceable.<sup>103</sup>

The Legal Services Council considered that the terms ‘imminent’, ‘serious physical harm’ and ‘serious criminal offence’ in rule 9 of the Solicitors’ Conduct Rules are clear. It argued that ‘attempts to improve “clarity” may limit the scope for sensible, practical interpretations that might well vary according to the particular circumstances’.<sup>104</sup>

The Law Council of Australia commented that the Solicitors’ Conduct Rules are intended to be higher-level principles of general application.<sup>105</sup> The commentary to the rules, also developed by the Law Council of Australia, provides additional information and in-depth guidance to aid solicitors’ understanding of the application of the rules in certain situations, including through case studies and practical examples. The commentary is itself intended to be supplemented by guidance developed by law societies to assist solicitors to apply the rules in daily practice.<sup>106</sup>

The Law Council of Australia reviewed the rules in 2018. The review did not consider the specific matters that were raised with the Commission regarding the clarity of exceptions to the duty of confidentiality, but did consider whether the definition of ‘harm’ should be extended to include psychological harm or where the client is at significant risk of financial exploitation.<sup>107</sup> The Law Council of Australia’s Professional Ethics Committee, which conducted the review, determined that no specific rule changes were required to address the professional conduct issues that led to this Commission. Following feedback from regulatory bodies, legal assistance organisations, government agencies and professional bodies, however, the Law Council has said it will expand the commentary, to provide further guidance to practitioners and explain how to interpret and apply the rules.<sup>108</sup>

Following the review, the revised rules were endorsed by Law Council of Australia Directors in March 2020. The Law Council of Australia has advised it will progress implementation of the revised rules before expanding the commentary.<sup>109</sup> At the time of writing this final report, there is no additional guidance or information about the exceptions to the duty of confidentiality in the commentary, although the glossary does define the term ‘serious criminal offence’.<sup>110</sup>

In June 2020, the VLSB+C published a regulatory guideline for the legal profession to assist lawyers to understand the circumstances in which they may provide information to police, such as where a client has advised them that they are going to seriously injure someone.<sup>111</sup> The guideline outlines the VLSB+C’s position on the scenarios where lawyers should and should not provide information to police, and encourages lawyers to seek the advice of the Law Institute of Victoria’s Ethics Support Line or the Victorian Bar’s Ethics Committee.<sup>112</sup>

## The exceptions to confidentiality in the Barristers' Conduct Rules

The Victorian Bar told the Commission that the exceptions to the duty of confidentiality are deliberately expansive, given the wide circumstances in which they might operate and the degree of judgement the individual lawyer must exercise in different circumstances. The Victorian Bar also observed that barristers can obtain assistance in the form of individual advice or formal rulings from its Ethics Committee as needed.<sup>113</sup>

The Victorian Bar recommended that further guidance, if developed, should take the form of supporting commentary to complement the professional conduct rules, as this would enable inter-jurisdictional consistency and guard against the risk of different interpretations.<sup>114</sup>

The VLSB+C noted that the exceptions in the Barristers' Conduct Rules are unclear about the degree of risk to a person's safety that would justify reporting the risk to the authorities.<sup>115</sup>

The Criminal Bar Association, the peak body for criminal barristers in Victoria, highlighted that barristers who are considering disclosing information in accordance with an exception to the duty of confidentiality will usually seek the advice of a colleague, a senior barrister or the Ethics Committee. The Criminal Bar Association stated that further guidance regarding the term 'authorities' used in the rules, and a protocol or agreement about how to provide such information, would be beneficial.<sup>116</sup>

The New South Wales Bar Association has issued guidance to assist its members to consider whether it may be appropriate to breach confidentiality, outlined in Box 15.1.

### BOX 15.1: NEW SOUTH WALES BAR ASSOCIATION GUIDANCE NOTE

In a guidance note published in late 2019, the New South Wales Bar Association noted that the term 'safety' used in the Barristers' Conduct Rules is 'vague' and 'would encompass a range of risks of injury or harm of widely varying degrees of severity'.<sup>117</sup> It also noted that the Barristers' Conduct Rules through the scope of the term 'safety' appear to envisage a lower threshold of severity of harm than that contemplated by the Solicitors' Conduct Rules.<sup>118</sup> That is, it appears that barristers may breach confidentiality, where required, to prevent lower levels of harm.

The guidance note also states that the Barristers' Conduct Rules 'appear to recognise that a level of [judgement] and discretion is available to barristers ... when considering whether to breach confidentiality to report threats to the safety of others'.<sup>119</sup>

The guidance note advises its members that where a barrister forms the view that there is a real risk to a person's safety, and it is safe and practicable to do so, they should:

- attempt to dissuade the client from, or advise them against, taking the course of conduct they are threatening
- if the client gives no satisfactory reassurance, raise the circumstances with the Bar Association's ethical guidance panel
- after having sought advice and concluded that disclosure is warranted, discuss the proposed disclosure with the client (where safe to do so), and explain the need to withdraw from representing the client
- where possible, help the client to access alternative legal representation
- stop acting for the client.<sup>120</sup>

In Canada, the *Model Code of Professional Conduct* sets out the minimum standard of ethical conduct expected of Canadian lawyers as well as associated guidance.<sup>121</sup> The parts of the Code relating to the disclosure of confidential information by lawyers are outlined in Box 15.2.

#### **BOX 15.2: THE POSITION IN CANADA RELATING TO LAWYERS' DUTY OF CONFIDENTIALITY**

The Canadian *Model Code of Professional Conduct* states that a lawyer may disclose confidential information where they believe 'on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm'.<sup>122</sup>

The Model Code provides additional commentary on the application of this rule, including guidance for lawyers on:

- the factors they should consider when assessing whether a disclosure of confidential information is justified
- contacting a local law society for ethical advice when contemplating making a disclosure
- steps lawyers should take to document their actions regarding the information they have received and disclosure they have made.<sup>123</sup>

#### **Differences in approach in the Solicitors' and Barristers' Conduct Rules**

As noted above, there appear to be differences in how the Solicitors' and Barristers' Conduct Rules express the exception to the duty of confidentiality relating to potential harm. One commentator explains the difference as follows:

*... the exception for barristers is limited to threats of harm from the client, whereas the exception for solicitors focuses on whether the disclosure of the confidential information may prevent imminent serious harm or a serious offence.*<sup>124</sup>

Some stakeholders consulted by the Commission suggested that the different wording within the exceptions may have arisen because different organisations held responsibility for drafting each set of rules<sup>125</sup> and it may be an 'accident of history'.<sup>126</sup>

Although the VLSB+C noted that there is no specific evidence of practical consequences arising from the lack of clarity in the two sets of rules, it argued that there is nonetheless:

- a lack of clarity in some of the terms and concepts used in the Solicitors' Conduct Rules and the Barristers' Conduct Rules
- an unclear rationale for the different approach to how they are expressed, in the context of a 'fused profession' (that is, where there is a single admission to practise as a barrister and solicitor, as is the case in Victoria).<sup>127</sup>

The VLSB+C noted that given the 'crucial role that obligations of confidentiality play in underpinning client confidence in their lawyers, the limits and exceptions to those obligations should be clear and unambiguous'.<sup>128</sup> The VLSB+C suggested that it would be appropriate for the legal profession to have the same, singular rule regarding the disclosure of information about the commission of a serious criminal offence or to prevent physical harm.<sup>129</sup>

The Law Institute of Victoria told the Commission that the underlying principle supporting the duty of confidentiality and its exceptions are consistent across the Solicitors' Conduct Rules and the Barristers' Conduct Rules, despite the differences in language used in the exceptions. In its experience, there are no practical issues arising from the lack of harmony between the rules, given the consistency of the underlying principle.<sup>130</sup>

The Victorian Bar views the difference between the rules to be 'inconsequential' on the basis that they would likely operate the same way in practice.<sup>131</sup> The Criminal Bar Association agreed, stating that it is unaware of any current issues in relation to the rules being interpreted differently.<sup>132</sup> Both indicated, however, that it would be sensible to harmonise the rules.<sup>133</sup>

The Australian Bar Association noted that the expressions used in the Solicitors' Conduct Rules are more prescriptive and potentially set a higher threshold; for example, physical and imminent harm. Although it considered it unlikely that there are differences in practical application, the Australian Bar Association noted that there is an opportunity to improve the formulation of these exceptions, with a focus on the principle that disclosing confidential information is an extraordinary step that must be measured against the threat to public safety.<sup>134</sup>

The Legal Services Council indicated that there may be a case to harmonise the rules to improve clarity, noting that the lawyer is likely to have the same considerations whether they are a barrister or solicitor.<sup>135</sup>

## Conflicts of interest

Like adhering to the duty of confidentiality, avoiding conflicts of interest is a fundamental obligation enshrined in the professional conduct rules that lawyers must uphold. Conflicts of interest can arise when a lawyer's duty to their client conflicts with the ethical duties and obligations they owe to another current or former client, or with the lawyer's own personal interests.<sup>136</sup> Such conflicts may affect the ability of a lawyer to act independently and in their client's best interests.

The Victorian Director of Public Prosecutions (DPP) suggested that the professional conduct rules relating to conflicts of interest could be improved to better address specific issues that can arise for criminal defence lawyers.<sup>137</sup> The DPP suggested that the rules should be amended to clarify that in criminal proceedings:

- instructions should only be obtained from a client, even when another person is paying the lawyer's fees
- if there is a conflict between the interests of the client and the interests of the person paying the lawyer's fees, the lawyer should act in the best interests of the client
- if there is a real possibility of conflict between the interests of the client and the interests of the person paying the lawyer's fees, the lawyer should cease acting.<sup>138</sup>

The DPP also suggested that a rule should be introduced for criminal proceedings that would prohibit defence lawyers from acting in a matter where: (a) they are aware that a witness will give evidence in proceedings concerning their client; and (b) they have acted for that witness in a previous proceeding.<sup>139</sup>

Regulators and professional associations consulted by the Commission did not raise any specific concerns regarding lawyers' understanding of their obligation to avoid conflicts of interest.

The Law Institute of Victoria considered that a professional conduct rule covering fee payments for criminal defence lawyers would be unnecessary because existing professional conduct rules regarding a solicitor's duty to act in the best interests of a client are adequate.<sup>140</sup>

The VLSB+C suggested that the existing rules are clear that a lawyer is required to act in the best interests of their client. In the VLSB+C's view, when a client's interests conflict with those of the person paying their costs, there is little doubt that the client's interests are to prevail. The VLSB+C was concerned that the prohibition proposed by the DPP could be problematic and prevent lawyers from acting in cases where there is no potential for the misuse of information; for example, where they have acted for a witness in an entirely unrelated matter.<sup>141</sup>

The Law Council of Australia examined the professional conduct rules relating to conflicts of interest in its 2018 review as discussed above, and concluded that rule 11, which deals with conflicts of interest concerning current clients, was too lengthy, cumbersome and in some areas repetitive. The Law Council recommended that the rule be simplified to express the scope of the duties that might come into conflict (for example, duties relating to trusts, contracts or confidentiality) and the ethical principles involved, such as informed consent.<sup>142</sup> As noted above, the revised rules were being implemented at the time of writing this final report.

The Commission understands that in addition to the specific professional conduct rules, a range of general guidance and supporting materials are available for lawyers regarding conflicts of interest, including the commentary to the Solicitors' Conduct Rules, guidance published by the VLSB+C in June 2020, rulings of the Law Institute of Victoria's and the Victorian Bar's Ethics Committees, and the Good Conduct Guide for barristers.<sup>143</sup>

## Maintaining professional boundaries

The VLSB+C succinctly outlined the importance of maintaining appropriate professional boundaries:

*A lawyer's position in the justice system is assisted by the lawyer ensuring that they maintain a professional relationship with their clients. That is because fitness to practise law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges.*<sup>144</sup>

The Victorian Bar also highlighted the importance of barristers maintaining appropriate professional boundaries, noting that professional detachment is essential for a barrister to maintain objectivity and independence.<sup>145</sup>

As noted in Chapter 7, the Commission heard evidence that Ms Gobbo socialised extensively with some of her clients. Some former peers of Ms Gobbo, including barristers with whom she shared chambers, made observations about her interactions with both clients and police officers.<sup>146</sup> In a statement provided to the Commission, Mr Robert Richter, QC, who shared chambers with Ms Gobbo and worked with her on various matters, said:

*There were observations as well as rumours circulating about Ms Gobbo's personal intimacy with her clients, other people's clients and police officers—in professional as well as private contexts—which we considered had the potential to give rise to conflicts of interest because her conduct seemed to lack discretion and a sense of what was appropriate.*<sup>147</sup>

The Commission explored the regulatory approach and the nature of the guidance provided to lawyers about maintaining appropriate professional boundaries, and asked stakeholders about their views on the current regulatory approach to professional boundaries.

There is no specific professional conduct rule that outlines the appropriate parameters for a lawyer's relationship with their clients or other people with whom they interact on a frequent basis, such as police officers. The Australian Bar Association and the Criminal Bar Association agreed that guidance in this area could be improved.<sup>148</sup>

The Criminal Bar Association considered that guidance should be provided to lawyers about how socialising with clients intersects with their ethical duties and obligations, and the need to exercise caution. It suggested greater specificity about what constitutes an appropriate relationship between a barrister and a client, which could take the form of a specific rule or further guidance and education on professional boundaries.<sup>149</sup>

The Victorian Bar has been addressing the issue of professional relationships through several recent initiatives, including:

- a review of the Victorian Bar’s education services
- implementing a targeted CPD seminar on ‘professional relationships with clients’
- developing guidance notes on the specific ethical issues that might arise in the context of barristers’ professional relationships
- educating mentors about expressly addressing the topic with those they mentor
- reminding members that where they have concerns about the nature of their relationship with a client, they are able to seek guidance from the Ethics Committee.<sup>150</sup>

The Law Institute of Victoria noted that issues relating to maintaining appropriate professional boundaries are currently addressed in ethical seminars and that lawyers understand these boundaries in their interactions with clients.<sup>151</sup>

As noted earlier in this chapter, the VLSB+C has published a guideline about lawyer conduct in providing information to police.<sup>152</sup> The guidance also addresses the importance of maintaining professional independence and offers practical guidance on how to limit social interactions with clients, their family members and associates.<sup>153</sup>

## Legal ethics education and support services

As noted above, lawyers’ ethical duties and obligations are drawn from a range of sources, including the common law, legislation and professional conduct rules. The requirement for lawyers to undertake ongoing legal education seeks to ensure that they understand these ethical duties and obligations and how they should be applied in practice.

The Australian Law Reform Commission has noted the importance of legal education:

*Education is vital to ensuring lawyers are aware of their legal ethical obligations and are able to consider and apply their obligations in practice. It also plays a key role in shaping legal culture.*<sup>154</sup>

In their joint submission, Emeritus Professor Adrian Evans and his colleagues were critical of the teaching of legal ethics in CPD, stating that legal ethics education in this environment is ‘unregulated and arguably, of minimal benefit’.<sup>155</sup>

The Commission focused specifically on legal ethics education and did not explore legal education in general, which is beyond its terms of reference. Further, given the constraints of the Commission’s terms of reference, it did not conduct a detailed examination of how legal ethics education is delivered, but rather focused more specifically on how such professional education supports a lawyer’s understanding of and adherence to their ethical duties and obligations.

## Legal ethics education throughout a lawyer's career

Lawyers in Victoria have been required to undertake compulsory CPD since 2004.<sup>156</sup> CPD was developed as a means of ensuring that lawyers maintain a certain level of knowledge so that clients can be sure they are receiving sound and current legal advice.<sup>157</sup> The topic of legal ethics is a required component of both eligible university degrees for legal admission and as part of ongoing CPD for lawyers.

A range of bodies provide CPD activities that lawyers may access. Professional associations also play a role in CPD, including the delivery of CPD sessions relating to ethics, and the production of formal guidelines and other resources. For example, the Victorian Bar conducts regular training and CPD seminars on legal ethics and professional responsibilities.<sup>158</sup>

Concerns raised with the Commission regarding CPD requirements included that, while every lawyer must complete 10 hours of CPD each year, the CPD activities undertaken need not have a strong link to the lawyer's practice or professional needs.<sup>159</sup> The VLSB+C and the Law Institute of Victoria observed that the CPD market seems to be geared towards lawyers gaining the 'points' they need to fulfil the CPD requirements, rather than encouraging lawyers to engage with the material, gain knowledge and address their professional needs.<sup>160</sup>

During the Commission's inquiry, the VLSB+C commenced a review of the current CPD arrangements in Victoria, to examine matters such as:

- the accessibility, quality, relevance and costs of CPD activities
- views of the Victorian legal profession, and other relevant stakeholders, on the value of the current CPD scheme (in particular, whether it is meeting the current and future needs of the legal profession)
- the VLSB+C's effectiveness in regulating CPD
- any problem areas in the current CPD scheme
- any opportunities for potential improvements, and the risks and challenges of these opportunities.<sup>161</sup>

Emerging themes from the VLSB+C's CPD review included:

- opportunities for the VLSB+C to issue additional guidance about CPD expectations, including how CPD content and delivery needs to improve and what practical matters are included in the four compulsory fields: ethics and professional responsibility; practice management and business skills; professional skills; and substantive law
- feedback from stakeholders that ethics CPD units are traditionally dry and rules-based, without practical, content-rich scenarios
- recognition that education provided to junior lawyers is particularly important, to shape and guide their future career in the law.<sup>162</sup>

The review is expected to be finalised by the VLSB+C's Board in late 2020.<sup>163</sup>

The VLSB+C told the Commission that, while it holds the power to make policies about CPD content, approve CPD activities, make CPD categories subject to certain requirements and require additional CPD for barristers, similar powers do not exist for solicitors' CPD and would be useful.<sup>164</sup>

## Support services and resources for lawyers on ethical issues

Support services and resources are important for helping lawyers understand their ethical duties and obligations under the professional conduct rules. Advisory bodies such as ethics committees can act in a preventative way—by helping lawyers to discuss and resolve ethical dilemmas before they escalate and potentially result in misconduct or detrimental impacts on the lawyer’s wellbeing.

Issues that can arise for a lawyer may often converge; for example, there is often a relationship between wellbeing issues and professional misconduct.<sup>165</sup> Consequently, it is important that lawyers also have access to support services that focus on wellbeing. The Law Institute of Victoria has recently undertaken work focused on assisting solicitors through a combination of ethics, wellbeing and practice support—recognising the different aspects of legal practice, and how they intersect and interact.<sup>166</sup>

The Commission heard that in circumstances where Ms Gobbo was acting for clients about whom she had also provided information to Victoria Police, she did not seek the assistance of established support services, such as a ruling from the Ethics Committee of the Victorian Bar, to check whether her conduct was appropriate.<sup>167</sup>

As part of its examination of legal profession regulation, the Commission considered the nature and extent of professional supports available to lawyers in Victoria.

### Ethical and wellbeing support services for Victorian barristers

The Victorian Bar told the Commission that it seeks to ensure that barristers faced with ethical issues have access to sufficient support services and resources to navigate those issues carefully. It also seeks to embed a comprehensive understanding of professional duties and obligations among all members so that they are equipped to deal with the ethical issues that will inevitably arise in their practice.<sup>168</sup> As noted above, barristers may access support from the Victorian Bar Ethics Committee, which has issued approximately 300 resolutions since January 2015. Since 2015, 18 Ethics Committee Bulletins have been published and the Victorian Bar is currently reviewing the ethics resources it makes available.<sup>169</sup>

The Victorian Bar has focused on a range of health and wellbeing initiatives in 2020, including:

- delivering 19 virtual wellbeing events, mental health awareness training, COVID-19 webinars and inclusive virtual social activities to keep members connected during the COVID-19 pandemic
- working to establish an online health and wellbeing portal, which is anticipated to be completed in late 2020
- undertaking literature reviews of studies into mental health in the legal profession.<sup>170</sup>

The Criminal Bar Association advised that the supports available to assist with an ethical issue are ‘sufficient, sound and strong’. It noted that the support services available to barristers are outlined in the Bar Readers’ Course and are reinforced during a barrister’s initial period of practice with a mentor.<sup>171</sup>

### Ethical and wellbeing support services for Victorian solicitors

Solicitors in Victoria access support services to help them understand and deal with ethical issues. The Commission heard from the Law Institute of Victoria that the number of queries received through its Ethics Support Line indicates a high level of engagement with the profession on these issues.<sup>172</sup> In its 2019–20 annual report, the Law Institute of Victoria noted that it received more than 5,300 enquiries to its ethics and practice support enquiries line, with practice support calls making up 55 per cent of the enquiries, and ethics-related calls 45 per cent. The Law Institute’s Ethics team delivered 73 seminars on topics derived from the queries received on the ethics and practice support lines.<sup>173</sup>

The Law Institute's Ethics Committee met seven times in 2019–20 and provided rulings on 15 matters and informal advice on other matters that did not require a formal ruling. The Law Institute's Guidelines Review Sub-Committee is in the process of developing three ethics guidelines for the profession.<sup>174</sup>

A number of other ethics-related projects were implemented by the Law Institute of Victoria from 2019 to 2020, including re-commencing the publication of de-identified Ethics Committee rulings in the *Law Institute Journal* and a series of short videos addressing ethical issues.<sup>175</sup>

### **Awareness of ethical and wellbeing support services among lawyers**

The Law Council of Australia noted that, while it supports the efforts of professional associations in providing guidance, there could be more widespread awareness of and/or education about the availability of these services.<sup>176</sup>

The Law Institute of Victoria told the Commission that it is difficult to estimate levels of awareness about its services among the legal profession. While there is no current data available in relation to awareness of the services offered, it noted that there is information about the frequency of access to some services.<sup>177</sup> In addition to the number of enquiries received by the Ethics Support Line (noted above), in 2019, more than 100 solicitors participated in the Law Institute of Victoria's Mentoring Program.<sup>178</sup>

The Australian Bar Association believes that barristers are aware of the services they can access.<sup>179</sup> The available data shows that 53 barristers and six immediate family members accessed the Victorian Bar's counselling service between July and December 2019.<sup>180</sup>

The VLSB+C noted that notwithstanding the number of enquiries received on ethics and practice support, there is room to improve the profession's awareness of available ethics assistance. It told the Commission it intends to publicise support services on its website and develop targeted communications along with guidance on key themes arising from disciplinary actions.<sup>181</sup>

## **Complaints about lawyers and reporting and investigation mechanisms**

As outlined above, any person can make a complaint about the conduct of a lawyer. There are various ways in which matters relating to unsatisfactory professional conduct or professional misconduct can be raised with a regulator. These include: a client making a complaint; a lawyer reporting certain matters (such as a 'show cause' event); and a lawyer voluntarily reporting the suspected misconduct of another lawyer.

A complaint can lead to an investigation and potentially to sanctions, including a lawyer no longer being permitted to practise.

In Ms Gobbo's case, one of her former clients, Mr Carl Williams, complained to regulators about her conduct and a potential conflict of interest in 2006.<sup>182</sup> Ms Roberta Williams also made a complaint about Ms Gobbo in 2008.<sup>183</sup> Some lawyers also informed the Commission that they were concerned about her professional behaviour.<sup>184</sup>

Mr Williams' complaint was unsuccessful and was considered 'misconceived and lacking in substance'.<sup>185</sup> Ms Williams' complaint was summarily dismissed.<sup>186</sup> It may be that regulators preferred Ms Gobbo's deceptive account given Mr Williams' criminal history. It is worth contemplating, however, if Mr Williams' complaint had been corroborated by lawyers who also held concerns about Ms Gobbo's conduct, whether a more thorough regulatory investigation might have occurred and her unethical conduct exposed much earlier.

## Mandatory reporting of suspected misconduct in the legal profession

The Commission examined whether it should be mandatory for lawyers to report the suspected misconduct of their peers.

This issue is relevant because, as noted above, the Commission understands that some of Ms Gobbo's fellow members of chambers and other colleagues, while not aware of her activities as a human source, held concerns about aspects of her conduct, including socialising with clients and police officers.<sup>187</sup>

Despite these concerns, the Commission could find no evidence that any of her fellow lawyers or colleagues made complaints about Ms Gobbo to a regulator around that time.<sup>188</sup>

Different perspectives were put to the Commission in relation to mandatory reporting. These are outlined below, along with some of the approaches taken in other jurisdictions and professions.

### Arguments for and against mandatory reporting

Some stakeholders suggested that a reporting obligation is an important aspect of regulation—one that is best pursued by a mandatory requirement, rather than a voluntary, opt-in approach. The rationale for this view is that the integrity of the legal profession can be maintained only if the conduct of lawyers in breach of the professional conduct rules is reliably brought to the attention of regulators. Such reporting works 'to remove bad lawyers from the practice, deter others from engaging in misconduct, [and foster] public confidence in the profession'.<sup>189</sup> It enhances the public image of the legal profession and promotes professionalism.<sup>190</sup>

It has been suggested that lawyers are well placed to report suspected misconduct of other lawyers:

*Lawyers, because of their training in the law, and their day-to-day interactions with other lawyers, are better situated than most to observe and evaluate the conduct of other [lawyers].*<sup>191</sup>

A 2019 study of around 15,800 disciplinary complaints made against 4,180 Victorian lawyers over a 10-year period found that while 7 per cent of complaints were made by other lawyers, 91 per cent were lodged by clients or members of the public, and 2 per cent were lodged by the VLSB+C itself.<sup>192</sup> The research noted that while lawyers are well placed to observe and assess the misconduct of their peers, 'this finding raises questions about barriers to lawyers speaking up about poor performance within the profession'.<sup>193</sup>

It has been argued that a mandatory reporting requirement could, in part, address the general reluctance of lawyers to report the misconduct of their peers. Professor Dal Pont, for example, has observed that unless there are sufficient protections in place in the process of reporting, it is unlikely that lawyers will report on other lawyers' misconduct, especially given the collegial culture of the legal profession.<sup>194</sup>

A concern raised in relation to mandatory reporting is the risk that reports may be made vexatiously; that is, a report made falsely without evidence or not in good faith. Similar concerns have been raised regarding the introduction of mandatory reporting requirements in other professions, such as health practitioners.<sup>195</sup> A 2018 study, however, found that the number of vexatious health practitioner complaints dealt with in Australia and internationally is very small (less than 1 per cent) and that under-reporting of well-founded concerns is likely a far greater problem.<sup>196</sup>

Both the New South Wales Office of the Legal Services Commissioner (OLSC) and the Bar Association of Queensland noted barriers to the self-reporting of potential misconduct by lawyers and for lawyers reporting the conduct of other lawyers. The Bar Association of Queensland noted that there is a reluctance in the legal profession to report colleagues.<sup>197</sup> It also noted that there is no significant difference between lawyers and medical practitioners, who are currently obliged to report suspected misconduct of their peers.<sup>198</sup>

The OLSC considered that a mandatory reporting mechanism would help to prevent conduct similar to Ms Gobbo's occurring again. The OLSC and Bar Association of Queensland noted, however, that if mandatory reporting obligations were introduced, it would be important to set the requirement at an appropriate threshold, such as serious misconduct.<sup>199</sup>

The Law Council of Australia stated that there is an argument for mandatory reporting of suspected misconduct but added that comprehensive consultation with relevant stakeholders would need to occur to ensure that all potential ramifications were considered.<sup>200</sup>

The Legal Services Council noted that the introduction of mandatory reporting requirements would need careful consideration due to the practical, evidentiary and other issues that may impact on such reporting.<sup>201</sup>

The Law Institute of Victoria does not support a mandatory reporting requirement, suggesting it would create more problems than it would solve, and would be damaging for the profession and ultimately detrimental to the justice system. Particularly, the Law Institute highlighted the potential for a mandatory reporting requirement to erode professional collegiality, and to dissuade lawyers from seeking advice and guidance from their peers to prevent and resolve ethical issues, which may lead to an unsatisfactory outcome for their clients and ultimately the community.<sup>202</sup>

Similarly, the Victorian Bar does not support introducing mandatory reporting due to concerns about how such a mechanism might affect both the reporter of the conduct and the lawyer being reported. The Victorian Bar's concerns include the:

- risk (perceived or actual) of the reporter suffering victimisation, which could lead to a lack of reports
- disruptions to the conduct of hearings if the obligation to report is used as a weapon
- impact on the mental health of the reported barrister where mental health and wellbeing is already challenged by the nature of the job.<sup>203</sup>

The Victorian Bar further noted that any such requirement would be followed by an increase in reports. This in turn would require increased resources to deal with investigations and create flow-on impacts, because disclosures would then be required for insurance and practising certificate renewals (and, for barristers, silk applications).<sup>204</sup>

The Victorian Bar argued that lawyers should be empowered to use their own judgement in deciding whether to report conduct or make complaints about their peers, and noted that barristers can currently make such reports and complaints under the Victorian Bar's conduct policies or its Grievance Protocol.<sup>205</sup>

If a mandatory reporting mechanism were introduced, however, the Victorian Bar recommended that it be confined to situations where a lawyer reasonably believes that serious misconduct has occurred, reflecting the requirements that apply to barristers in the United Kingdom and New Zealand. The Victorian Bar noted that serious misconduct would need to be defined carefully and not include issues of competence or impairment unless they posed a serious risk to the public or would diminish public trust and confidence in the profession. The Victorian Bar also noted that any mandatory reporting mechanism would need to be subject to rules or exceptions that recognise the lawyer's duty of confidentiality to their clients. To ensure clarity about any new mechanism, it suggested that guidance could be included in the supporting commentary to the professional conduct rules, such as a non-exhaustive list of the types of conduct that would meet the reportable threshold.<sup>206</sup>

The Australian Bar Association noted that significant complexities and challenges would be associated with imposing a mandatory reporting obligation on the legal profession, particularly for barristers.<sup>207</sup> It raised several concerns, including that:

- the collegial nature of the Bar could be undermined and conduct driven underground, with barristers less likely to seek assistance and guidance from their colleagues
- there is an inherent potential for abuse; the requirement could encourage reports for a collateral purpose such as in litigation
- it could impact on the orderly progress of litigation while complaints are investigated or alternative counsel briefed, leading to delays, costs and wasted court resources
- it could result in breaches of legal professional privilege, as the conduct could arise from instructions or matters subject to privilege.<sup>208</sup>

The VLSB+C noted that while a mandatory reporting requirement could lead to a range of benefits, the key question is whether such a requirement is necessary. It observed that the legal profession and regulators have a shared role in upholding professional standards and a shared responsibility in maintaining integrity and public confidence in the profession. These stem from a lawyer's fundamental duty to the court and the administration of justice.<sup>209</sup> The VLSB+C considered that lawyers should already be reporting genuine suspected misconduct, even in the absence of a mandatory reporting obligation.<sup>210</sup>

The VLSB+C noted that there would be practical impacts from a new reporting obligation, including lawyers' time spent documenting, reporting and providing statements to the VLSB+C, along with regulators' time and resources spent assessing and investigating reports and potentially bringing disciplinary actions. Like other stakeholders, the VLSB+C expressed concern that mandatory reporting could weaken the collegiality of the profession and reduce the amount of informal but valuable 'intelligence' it currently receives about potentially worrying lawyers or firms.<sup>211</sup>

The VLSB+C suggested that while a mandatory reporting obligation would have benefits such as reinforcing lawyers' shared responsibility to guard the integrity of the profession and a degree of protection for the reporter, overall, the potential benefits of such an obligation would not outweigh the challenges it would create.<sup>212</sup>

### International approaches to mandatory reporting

Mandatory reporting requirements for lawyers have been considered extensively and implemented in similar jurisdictions overseas. Jurisdictions that require lawyers to report on the suspected misconduct of other lawyers include the United States of America, the United Kingdom, New Zealand, Canada and Hong Kong.<sup>213</sup>

Mandatory reporting requirements in the United Kingdom are outlined in Box 15.3.

#### BOX 15.3: MANDATORY REPORTING IN THE UNITED KINGDOM

In 2018–19, the Solicitors Regulation Authority (SRA) in the United Kingdom emphasised the important role of mandatory reporting obligations, stating that it is:

*... critically important in a profession founded on trust and integrity, for the development of personal accountability, for shared values, and a culture of openness which allows for learning from mistakes. It is also important to ensure effective regulation, enabling us to have timely receipt of potential risks and issues and to identify whether we need to take any action.*<sup>214</sup>

It further asserted that:

*... reporting behaviour that presents a risk to clients, the public or the wider public interest, goes to the core of the professional principles of trust and integrity. All solicitors and firms have a role in helping maintain trust in the profession.*<sup>215</sup>

Through consultations, the SRA found that it was important for the obligation to be drafted so that the decision maker, and not the lawyer reporting, decides whether conduct is a serious breach. The obligation states that reports should comprise ‘facts or matters’ that may equate to a serious breach, ‘rather than allegations identifying specific and conclusively determined breaches’. The SRA noted that it does not consider this leads to over reporting, and that early reporting helps to ensure that the SRA is aware of trends and can respond appropriately.<sup>216</sup>

The SRA also agreed with stakeholders that the obligation should contain both a subjective element and an objective element—meaning that it is necessary to hold the belief and that the belief was reasonable, ‘bearing in mind the circumstances, information and evidence available to the decision-maker’.<sup>217</sup> The SRA considered that the obligation should contain both elements to prevent reporting of ‘mere allegations or suspicion’.<sup>218</sup>

The SRA also noted that it was important for the obligation to protect the people who report.<sup>219</sup> The updated obligation thus states that no person can be subjected to ‘detrimental treatment’ for making a report, regardless of the outcome.<sup>220</sup>

The SRA has prepared guidance to support the operation of the mandatory reporting obligation.<sup>221</sup>

The United States also has mandatory reporting requirements in some of its jurisdictions. The mandatory reporting requirements in the United States are outlined in Box 15.4.

#### **BOX 15.4: MANDATORY REPORTING IN THE UNITED STATES OF AMERICA**

In the United States, a mandatory reporting requirement is contained in rule 8.3 of the American Bar Association’s *Model Rules of Professional Conduct*.<sup>222</sup>

A 2003 comprehensive analysis of mandatory reporting in the legal profession in the United States found that the vast majority of the states and the American Bar Association favoured mandatory reporting and would continue to do so in the absence of a more compelling case to dispense with such rules.<sup>223</sup>

Although there is not complete consensus about mandatory reporting in the United States, Professor Arthur Greenbaum observed that previous reliance on a voluntary reporting system was found to be a failure and that mandatory reporting was seen as necessary to overcome the general reluctance of barristers to report the misconduct of their peers.<sup>224</sup>

Guidance to support the operation of mandatory reporting obligations has also been prepared in other jurisdictions with mandatory reporting requirements. For example, the New Zealand Law Society provides information on its website, including about when a report should be made, to whom, the information that must be included, and the types of support available to those making a report.<sup>225</sup>

## Mandatory reporting in other professions

Other professions have introduced requirements to report suspected misconduct of their colleagues to regulators, including in the health and policing fields.

Requirements were created for medical practitioners to report suspected misconduct of their peers in New South Wales and Queensland in 2008 and 2009, respectively.<sup>226</sup> The proposal to introduce mandatory reporting requirements for medical practitioners in hospitals in Queensland was described as ‘a very practical way to improve the safety of patients in [Queensland] hospitals and ensure that problems are identified early and acted on’.<sup>227</sup>

In Victoria, since 2010, the health practitioner national regulation scheme has required health practitioners (including psychologists, nurses and doctors) to notify the relevant regulator of ‘notifiable conduct’ once they reasonably believe the conduct is occurring.<sup>228</sup> Notifiable conduct includes a practitioner ‘placing the public at risk of harm by practising the profession in a way that constitutes a significant departure from accepted professional standards’.<sup>229</sup>

The Australian Health Practitioner Regulation Agency has developed guidelines to accompany this requirement, which explain:

- the mandatory notification requirements
- the role of the relevant regulator
- protection available for those making a report.<sup>230</sup>

Closer to the events that led to this Commission, Victoria Police officers are required to make a complaint to a police officer of a more senior rank to that officer, or to the Independent Broad-based Anti-corruption Commission, about the conduct of another police officer if they have reason to believe that the other officer is guilty of misconduct.<sup>231</sup> Misconduct includes conduct likely to bring Victoria Police into disrepute; disgraceful or improper conduct; or conduct that constitutes an offence punishable by imprisonment.<sup>232</sup>

## Investigation of complaints about barristers

As discussed earlier, the Victorian Legal Services Commissioner has delegated authority to the Victorian Bar to investigate complaints regarding barristers; however, the Commissioner retains the power to decide, for each complaint, which body—the VLSB+C or the Victorian Bar—will undertake the investigation.<sup>233</sup>

The VLSB+C noted that all complaints are generally transferred to the Victorian Bar for investigation where they relate to barristers, unless there is a related complaint regarding a solicitor.<sup>234</sup> In comparison, all complaints about solicitors in Victoria are managed by the VLSB+C; its powers are not delegated to the Law Institute of Victoria.<sup>235</sup>

In 2019, the Victorian Bar and the VLSB+C reviewed the Victorian Bar’s processes, including those covering the management of complaints and investigations. The review considered whether the governance structures and operational arrangements helped to ensure that the Victorian Bar was effectively discharging its powers, performing its duties and implementing its delegated functions.

The review made several observations about the Victorian Bar's management of its delegated complaints function, including that:

- processes for gathering information for the purpose of investigating complaints were inefficient (including a culture of 'letter swapping', where complainants, respondents and third parties were rarely spoken to for the purpose of eliciting information or testing written statements)
- investigation reports containing recommendations to the VLSB+C had insufficient detail to explain the basis for those recommendations
- reporting deadlines stipulated by the VLSB+C were often not complied with, and complainants and respondents were not provided with timely closure of their complaints.<sup>236</sup>

As a consequence of the review, changes to improve and strengthen the Victorian Bar's performance of its delegated functions have been developed to:

- ensure that the processes and procedures used by the Victorian Bar to investigate complaints are aligned with those of the VLSB+C
- bolster the rigour of the regulatory process, including through the appointment of a special investigator to the Victorian Bar to conduct investigations.<sup>237</sup>

To strengthen the relationship between the two organisations, the VLSB+C and the Victorian Bar have agreed on a set of principles to govern the co-regulation of barristers in Victoria. The principles set out shared aims, expectations, roles and responsibilities, risk management matters, governance and review processes.<sup>238</sup> The two organisations have also developed a joint risk register, along with monitoring and evaluation measures covering delegated functions and projects and plans for annual internal reviews. After two years, an external expert will be engaged to evaluate the collaboration and assess its effectiveness.<sup>239</sup>

The Victorian Bar noted that a key benefit of it having responsibility for investigating complaints made against barristers is its ability to draw upon the practical insights of its members regarding the accepted standards of advocacy and conduct. It also noted that its model for investigating complaints has the checks and balances of an external regulator, combined with the benefits of utilising the expertise of the legal profession itself.<sup>240</sup>

The VLSB+C highlighted that key benefits of the current arrangements are the esteem in which the Victorian Bar is held by its members, and its subject matter expertise. It noted that the main challenge arising from these arrangements is the risk that the Victorian Bar may be perceived as lacking—or may in fact lack—the independence necessary to investigate its members.<sup>241</sup>

The VLSB+C suggested that any risk of an actual lack of independence is largely mitigated by:

- the VLSB+C retaining responsibility for making all final decisions on investigations regarding barristers
- the VLSB+C's oversight of the conduct of investigations
- the Victorian Bar's recent employment of a non-member to investigate complaints involving barristers<sup>242</sup>
- the Victorian Bar adopting the VLSB+C's investigative procedures, policies and training for the independent investigator
- increased reporting to the VLSB+C on investigations.<sup>243</sup>

In 2016, the Solicitors Regulation Authority (SRA) in the United Kingdom undertook research into the ways in which public trust and confidence in the legal profession can be impacted by regulatory independence. The research ascertained the views of 1,810 members of the public regarding the importance of solicitors' regulatory independence. Sixty-eight per cent of those who responded reported that they would be more likely to trust a profession that is independently regulated, and 69 per cent said they would be more comfortable making a complaint if the regulator was fully independent of solicitors.<sup>244</sup>

There has not been significant research examining the independence of legal regulatory agencies in the Australian context, perhaps due to the co-regulatory or self-regulatory models that have primarily been adopted to date.

## Access to lawyers for people in police custody

As noted throughout this final report, lawyers support the integrity and proper operation of the broader justice system and help to ensure that accused persons receive a fair trial. Defence lawyers provide independent advice to, and represent, accused persons at various stages of the criminal justice process, including at the point of being arrested and taken into custody by police.

Some evidence before the Commission suggested that there were occasions when Victoria Police charged a person and officers referred them to Ms Gobbo specifically.<sup>245</sup> As part of its inquiry into term of reference 6, the Commission examined current Victoria Police processes to support people taken into custody to communicate with a lawyer.

### The right to communicate with a lawyer

The involvement of a criminal defence lawyer often begins when a person suspected of committing a crime is arrested and taken into custody by the police. Under section 464C of the *Crimes Act 1958* (Vic) (Crimes Act), before police can question a suspect, they must:

- inform the person that they may communicate, or attempt to communicate with a lawyer
- afford the person reasonable facilities as soon as practicable to enable the person to do so
- allow the person's lawyer to communicate with the person in custody in circumstances in which, as far as practicable, the communication will not be overheard.<sup>246</sup>

The police officer must defer questioning for a time that is reasonable in the circumstances to enable the person to make contact or attempt to communicate with a lawyer. This is unless the police officer believes on reasonable grounds that the communication would result in an accomplice escaping or evidence being fabricated or destroyed, or the questioning is so urgent, having regard to the safety of other people, that it should not be delayed.<sup>247</sup>

The Crimes Act obligations are important safeguards to ensure that people taken into custody by police are treated fairly and that their interests are protected from the beginning of their contact with the criminal justice system.

The right of a person charged with a criminal offence to communicate with a lawyer is also enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter), which provides that an accused person is entitled 'to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her'.<sup>248</sup>

Victoria Police provided an extract of the *Victoria Police Manual* to the Commission entitled 'Exercising their rights to communicate with a friend, relative or legal practitioner'. This section of the manual requires officers to:

*Provide the person with reasonable time and facilities to make any required communication. The communication, as far as practicable, should not be overheard (s.464C, Crimes Act), except if the investigating member believes, on reasonable grounds, that communication would result in any of the following:*

- *the escape of an accomplice*
- *the fabrication or destruction of evidence*
- *danger to the safety of other people, if questioning is delayed.*

*If reasonable grounds do not exist to refuse a person an opportunity to exercise their rights, an interview may be ruled inadmissible.*

*If the investigating member or supervisor refuses access to communication, the details of such refusal should be recorded in the Attendance Module.<sup>249</sup>*

The *Victoria Police Manual* does not outline the requirement under section 464C of the Crimes Act to defer questioning for a reasonable time to enable the person to make or attempt to make the communication.<sup>250</sup> It does not mention Victoria Police's obligations under the Charter; nor does it mention a person's right to independent legal advice or set out procedures for officers to facilitate a person's access to a lawyer. Similarly, training material for Victoria Police recruits outlines the Crimes Act requirements, but does not emphasise the importance of a person's right to obtain independent legal advice, or refer to the Charter.<sup>251</sup>

Victoria Police advised the Commission that aside from these materials, there are no other current policies, procedures or manuals related to referring people charged with criminal offences to a legal practitioner.<sup>252</sup>

Victoria Legal Aid told the Commission that practical and operational challenges mean that the right of a person in custody to speak with a lawyer before police questioning is not adequately protected. It noted that because there is no centralised pre-interview or referral service, it is difficult for Victoria Police to efficiently connect people with the most appropriate lawyer for their circumstances.

Both the Law Institute of Victoria and Victoria Legal Aid advised that in practice, when a person in custody would like to communicate with a legal practitioner but does not have an existing relationship with a specific lawyer or law firm, Victoria Police will usually provide the person with a telephone book to help them make contact with a lawyer.<sup>253</sup>

Victoria Legal Aid identified the following issues with providing the telephone book as a means of facilitating access to a lawyer:

- entries are not arranged by the language spoken, geographic location or what area of law a firm specialises in, making it difficult for people to select a lawyer best suited to their circumstances
- entries do not display which lawyers are available 24 hours a day, seven days a week, or which services can be accessed at no cost
- the information may not be current, as many lawyers no longer maintain contact details in hard copy telephone books.<sup>254</sup>

Victoria Legal Aid commented:

*The process of being arrested and taken to a police station is often overwhelming. When presented with a phone book to choose a lawyer to speak with, people find it very difficult to independently find a lawyer who is suited to their presenting legal issue, location or language needs. It is our experience that many people will ask police for a recommendation or guidance.<sup>255</sup>*

To address identified issues, Victoria Legal Aid suggested a range of measures to strengthen requirements and processes, including:

- stronger obligations to enable people in custody to exercise their right to access pre-interview advice, with clearer requirements to provide a closed, private and safe space, such as an interview room rather than a cell
- a training course, which could be jointly developed and delivered by Victoria Police and Victoria Legal Aid, on pre-interview advice, addressing the importance of police processes to support people in custody to communicate with a lawyer

- a newly funded and created centralised telephone number, available 24 hours a day, seven days a week, that would link callers directly to existing services, including to Victoria Legal Aid; the Law Institute of Victoria; and the Youth Referral and the Independent Person Program
- a dedicated after-hours, pre-interview legal advice telephone service for adults and children in custody or at police stations for questioning, to cover service gaps.<sup>256</sup>

Recognising that these services and processes would require time and funding to establish, Victoria Legal Aid suggested that in the meantime, adults should be routinely provided with the Victoria Legal Aid Legal Help telephone number, as well as the existing Law Institute of Victoria directory, and that these should regularly be circulated to all police stations.<sup>257</sup>

The Law Institute of Victoria suggested developing a list of all lawyers in the state who nominate themselves as practising in the field of criminal law, together with their office and out of hours phone number, which could be made available to Victoria Police.<sup>258</sup>

## CONCLUSIONS AND RECOMMENDATIONS

When they are admitted to the legal profession, lawyers agree to uphold high standards of ethical behaviour, reflecting the importance of their independent role in the administration of justice.

The most important ethical duty owed by lawyers is to the court. This duty overrides all others and is designed to maintain the integrity of the administration of justice. It helps ensure that the public interest is being served and not undermined by dishonest or obstructive practices.<sup>259</sup> Accordingly, the justice system cannot operate effectively unless lawyers adhere to their ethical duties and obligations. Legal profession regulation exists to ensure that lawyers maintain these high ethical and professional standards. This, in turn, protects consumers of legal services, and supports public trust in the justice system.

The Commission has been mindful of the parameters of its inquiry. It has not conducted a comprehensive review of legal profession regulation, but rather focused on aspects of the regulatory framework that are most relevant to the events it has examined, including whether lawyers' ethical conduct is appropriately supported and safeguarded, and whether additional measures are needed to effectively prevent, detect and deter improper or unethical conduct.

The Commission is conscious that Ms Gobbo's conduct does not reflect that of the vast majority of lawyers in Victoria, almost all of whom pride themselves on acting ethically and professionally in the interest of their clients and the community. The Commission is also aware that Ms Gobbo's aberrant behaviour occurred over a decade ago. It would be unwarranted and disproportionate to recommend sweeping reforms based on the improper conduct of one individual. Instead, the Commission has focused on the operation of the current legal profession regulatory framework and opportunities to strengthen it, informed by a range of stakeholder perspectives and other evidence.

The Commission makes recommendations aimed at:

- restoring community confidence in the legal profession through targeted communications on lawyers' ethical duties and obligations
- enhancing the clarity and consistency of key professional conduct rules, such as the duty of confidentiality, conflict of interest and maintaining professional boundaries
- promoting awareness and access to ethical support offered to lawyers throughout their careers, including through CPD
- strengthening the independence of complaints investigations into barristers, so that there is a single consistent approach to the management of complaints regarding all lawyers in Victoria.

Combined with a new requirement for lawyers to report suspected misconduct, these changes will support the continued maintenance of high ethical standards in the legal profession, both to protect consumers and strengthen public confidence in it. The Commission has also identified improvements required to better protect individuals' rights to communicate with a lawyer while in police custody.

In making the recommendations outlined below, the Commission appreciates that some of the changes may involve divergence from aspects of the Uniform Law, which seeks to harmonise legal profession regulation in the participating states of Victoria and New South Wales. The Commission acknowledges the benefits of consistency in the legal profession regulatory framework across Australia, but notes that, ultimately, it will be a matter for the other participating states to determine whether they could benefit from these recommendations. The Commission is nonetheless satisfied that reforms to certain relevant aspects of the regulatory framework in Victoria are justified.

Reforms to legislation and professional conduct rules will require sufficient time for consultation and drafting; accordingly, the Commission recommends that these be completed within 12 months from the delivery of this final report. Updates to the professional conduct rules should be implemented in the same timeframe. Changes to the delegations for investigating complaints about barristers will require implementation planning for a smooth transfer of functions and may also require up to 12 months.

Communications materials on lawyers' ethical duties can be prepared more quickly and there is greater urgency, given the need to rebuild public trust and confidence in the legal profession. As such, the Commission recommends these be completed within six months. The Commission also considers that further guidance on the treatment of ethics as part of CPD requirements and enhancement of ethical support services can be completed within six months.

## **Ensuring community confidence in the legal profession**

The ability to access legal assistance and advice is vital to a fair and inclusive society. Lawyers are an important source of support and assistance for people who need to engage with the justice system. They provide advice on rights and responsibilities, and how these can be exercised; and they advocate for people in court. Accordingly, it is imperative that members of the public feel confident in accessing the services of a lawyer when needed.

The Commission is concerned that the use of Ms Gobbo as a human source may have diminished the public's confidence in the legal profession and generated distrust of lawyers. In particular, the Commission is concerned that members of the public may question whether information they provide to their lawyer will remain confidential and whether their lawyer will act in their best interests. If a client has doubts that sensitive information they provide to their lawyer will be kept confidential, they might choose not to provide relevant information or not to obtain legal advice at all, to the detriment of the justice system and our democracy. Stakeholders have acknowledged the potential impact of Ms Gobbo's conduct on public trust in the legal profession. The Victorian Bar, the Law Institute of Victoria and the Law Council of Australia publicly addressed these issues when the Commission commenced.<sup>260</sup>

With the inquiry having now concluded, the Commission recommends that legal profession regulators and professional associations in Victoria, in partnership with community legal centres and Victoria Legal Aid, prepare and distribute communications to the public about lawyers' ethical duties and obligations, and their rights as consumers if dissatisfied with their lawyer, thus providing the community assurance they can have confidence in the conduct of the legal profession.

These communications should be multifaceted to meet the needs of all community members from a range of culturally and linguistically diverse backgrounds. It is especially important that the communications are tailored to those who may be more vulnerable or disadvantaged, and who may already face barriers in accessing legal services. It is vital that such groups are not discouraged from engaging with the legal system and that they understand they can trust their lawyer to advocate for them.

**RECOMMENDATION 76**

That the Victorian Legal Services Board and Commissioner, the Law Institute of Victoria and the Victorian Bar work with community legal services and Victoria Legal Aid to, within six months, prepare and distribute communications aimed at restoring and promoting public and client confidence in the legal profession.

These communications should:

- a. educate clients and the public on lawyers' ethical duties and obligations, particularly in relation to confidentiality, conflicts of interest and legal professional privilege
- b. inform clients and the public about where they can seek help or advice regarding concerns they may have about their lawyer.

## Strengthening the admission process

The legal profession regulatory framework ensures that each individual is assessed as a fit and proper person when they are admitted to the legal profession and as they continue to practise as a lawyer.

A pivotal part of this framework is the admission process governed by the VLAB, which, as noted earlier, has delegated its function to assess admission applications to the VLAC.

Under the supervision of the Supreme Court, the VLAB is the 'gatekeeper' to the legal profession, charged with making a proper assessment of applicants. The process of admissions depends on each applicant self-disclosing facts that are relevant to the consideration of whether they are a fit and proper person. This involves applicants disclosing relevant information to the VLAB.

The Commission heard that it may be beneficial to provide the VLAB with the power to request documentation from Victoria Police and other agencies, relevant to its assessment of whether an applicant is a fit and proper person. This would enable it to more rigorously and efficiently perform its function in the admission process. The VLAB told the Commission that the absence of such a power has sometimes resulted in delays in processing admission applications.

It is possible that, if the admitting authority had such powers in Ms Gobbo's case, it may have obtained her accurate police record, determined she had supplied false information, and questioned whether she was a fit and proper person for admission as a lawyer. If ultimately admitted, she may have been more closely supervised and mentored. The unfortunate course of events leading to this inquiry may have been averted.

The Commission considers there may be merit in introducing such a power to improve the rigour of legal admission processes in Victoria. Before granting such a considerable power, however, further consultation and more detailed work is required to ascertain the extent of the problem, and to ensure that any additional powers are appropriately targeted and balanced against applicants' privacy and other relevant Charter rights.

The VLAB advised the Commission that it was unaware of any authorities responsible for governing admissions processes in other jurisdictions in Australia holding such powers. Victoria's participation in the Uniform Law and the desirability of harmonised admission rules and reciprocal admission across jurisdictions should be taken into account in considering whether to give the VLAB this power.

If such a power is introduced, the Commission considers that there would be value in the Council of Attorneys-General examining whether an equivalent power could be adopted in other Australian jurisdictions through a working group of officials.

**RECOMMENDATION 77**

That the Victorian Government, within six months, considers whether the Victorian Legal Admissions Board requires any additional powers to request and consider documentation from other agencies for the purpose of assessing applications for admission to the legal profession.

If such powers are conferred in Victoria, a Council of Attorneys-General working group should consider whether a harmonised approach could be adopted in all Australian jurisdictions.

## Harmonising lawyers' ethical duties and obligations

### Exceptions to the duty of confidentiality

The Commission heard that it would be beneficial to clarify the exceptions to the duty of confidentiality that relate to disclosures for the purpose of preventing the commission of criminal offences, or preventing harm or injury being caused.

Given the importance of confidentiality to a client's trust in their lawyer, the Commission considers that the exceptions should be clear and that a lawyer should be able to apply them in their work. The Commission considers that harmonising the Solicitors' Conduct Rules and the Barristers' Conduct Rules in relation to the exceptions to the duty of confidentiality would strengthen the consistency of their interpretation by practitioners and the courts.

The Commission acknowledges that some stakeholders believe that the differences in expression between the conduct rules in this area do not have significant practical consequences. Nonetheless, the Commission is concerned that there are different perspectives about the scope of the exceptions, and further that the variations in the rules could be perceived as intentional—that is, it could be perceived that solicitors are subject to a higher threshold than barristers in relation to the circumstances that may warrant disclosure of confidential information.

It is often difficult for a lawyer to decide whether to disclose information that is the subject of the duty of confidentiality, and it is a significant decision to make. Disclosing such information may be urgent, and lawyers may need to decide whether to disclose in complex circumstances involving safety and security risks. Further, disclosure may require contact with law enforcement agencies.

The Commission considers that, given the significance of the duty of confidentiality, it is imperative that exceptions to this duty are clear and unambiguous. Accordingly, the Commission recommends harmonising the exceptions to the duty of confidentiality related to disclosures for the purpose of preventing the commission of criminal offences or preventing harm or injury.

The professional conduct rules should outline:

- the circumstances that give rise to the exceptions
- the type and degree of potential harm
- the categories of offences that are intended to be captured by the exceptions.

The Commission recognises the need for flexibility within the professional conduct rules and encourages close consultation with professional bodies through the Law Council, to ensure that amendments to harmonise the rules are practical. The Commission notes that the Uniform Law provides for consultation processes where amendments are proposed to the professional conduct rules.<sup>261</sup>

## Guidance for lawyers on the duty of confidentiality

Compared with certain other professional conduct rules, there is less guidance regarding exceptions to the duty of confidentiality within the legal profession.

As noted above, the Commission believes that harmonising and clarifying the exceptions to the duty of confidentiality in the professional conduct rules would improve their operation. The Commission also considers that there is a need for additional guidance to support lawyers who are considering whether they should disclose information in accordance with these exceptions.

The professional conduct rules are not designed to cater for every individual situation that may arise in practice. While it is impossible for the rules' supporting commentary to specify every circumstance that may give rise to an exception, it can provide lawyers with advice and guidance about how to apply the principles expressed in the rules in a variety of situations.

The Commission acknowledges that the VLSB+C has recently released guidance to support lawyers regarding the provision of information to police.<sup>262</sup> The Commission welcomes this guidance but considers that guidance in the commentary to the Solicitors' Conduct Rules is also warranted. This would ensure that solicitors who consult their professional conduct rules as a primary source of authority about their obligations of confidentiality would receive appropriate assistance.

Similarly, additional guidance for barristers regarding the exceptions to the duty of confidentiality would be useful. As there is no commentary to the professional conduct rules for barristers, the Commission considers that guidance should be developed by the Victorian Bar.

In preparing such commentary, the Commission considers that Canada's comprehensive approach provides a useful model for the scope of information that could be included. That is, it would be beneficial for an update to the commentary to include guidance about:

- the factors to be considered when assessing whether a disclosure of confidential information is justified
- where and how a lawyer can obtain advice on ethics when they are considering making a disclosure
- steps to be taken to document the actions taken by the lawyer regarding the information received and disclosure made
- any further actions the professional association considers would be appropriate where a lawyer is considering making, or has made, a disclosure.<sup>263</sup>

### RECOMMENDATION 78

That the Legal Services Council, Law Council of Australia and Australian Bar Association work together to, within 12 months, clarify and harmonise the duty of confidentiality and its exceptions, as contained in the Solicitors' Conduct Rules and the Barristers' Conduct Rules.

**RECOMMENDATION 79**

That the Law Council of Australia, within 12 months, updates the commentary to the Solicitors' Conduct Rules in relation to the duty of confidentiality and its exceptions, to include guidance on:

- a. the factors to be considered when assessing whether a disclosure of confidential information is justified
- b. where and how a solicitor can obtain advice on ethics when considering making a disclosure
- c. steps to be taken to document the actions taken by a solicitor regarding the information received and the disclosure made
- d. any further actions that a solicitor should take when considering making a disclosure.

**RECOMMENDATION 80**

That the Victorian Bar, within 12 months, prepares guidance in relation to the duty of confidentiality and its exceptions, including:

- a. the factors to be considered when assessing whether a disclosure of confidential information is justified
- b. where and how a barrister can obtain advice on ethics when considering making a disclosure
- c. steps to be taken to document the actions taken by a barrister regarding the information received and the disclosure made
- d. any further actions that a barrister should take when considering making a disclosure.

**Managing conflicts of interest**

The DPP proposed that the professional conduct rules be amended to clarify a range of matters, particularly to support the unique role of criminal defence lawyers, their fee arrangements and potential conflict of interest scenarios. After careful consideration, the Commission concludes that such specific amendments would be inconsistent with the professional conduct rules, which are intended to be broad and apply to lawyers generally.

Therefore, the Commission does not consider that there is sufficient evidence to warrant any changes to the professional conduct rules in respect of conflicts of interest at this time. It does consider, however, that there is scope for more tailored guidance for criminal defence lawyers, especially those early in their career, on the issues raised by the DPP.

**RECOMMENDATION 81**

That the Victorian Bar, within six months, develops ethics guidance on specific conflict of interest issues and scenarios that can arise for criminal defence barristers.

The Victorian Bar should prepare this guidance in consultation with the Criminal Bar Association, Victoria Legal Aid and other relevant stakeholders.

**Maintaining appropriate professional boundaries**

Professional boundaries are key to the effective administration of justice and the reputation of the legal profession. Lawyers must be, and must be seen to be, independent. A lawyer must maintain clear professional boundaries with clients, other lawyers and courts, tribunals or other decision makers, acting independently and in their client's best interests at all times.

There are no specific professional conduct rules that define the appropriate parameters of a lawyer's relationship with their clients, police officers or other associates with whom they may interact on a regular basis. There are, however, a range of rules that a lawyer would potentially be at risk of breaching if they formed an inappropriate relationship; including, for instance, in relation to conflicts of interest.

The Commission believes there is merit in providing clearer guidance about lawyers' professional boundaries, especially regarding their relationships with clients, other lawyers and, in criminal cases, police officers involved in a case in which the lawyer is involved.

The Commission considers that such guidance would be particularly useful for new lawyers entering the legal profession. It would help lawyers identify situations that may involve a risk of engaging in inappropriate conduct and, ideally, inform them about where they can go to obtain advice and assistance. The Commission believes that this guidance would encourage ethical behaviour, better protect the public and promote community confidence in the legal profession.

The Commission notes that some steps have already been taken with respect to this issue, including a CPD seminar by the Victorian Bar and the guideline recently published by the VLSB+C. The Commission is of the view, however, that it is essential for guidance to be included within the commentary to the Solicitors' Conduct Rules in relation to lawyers' professional boundaries, and that the Victorian Bar should do likewise.

**RECOMMENDATION 82**

That the Law Council of Australia, within 12 months, includes specific guidance on maintaining appropriate professional boundaries in the commentary to the Solicitors' Conduct Rules.

**RECOMMENDATION 83**

That the Victorian Bar, within 12 months, develops specific guidance for barristers on maintaining appropriate professional boundaries.

## Improving ethics education and training for lawyers

Legal ethics education is integral to supporting lawyers' understanding and application of their ethical duties and obligations in practice, as well as their ongoing professional development.

The Commission believes that CPD plays a vital role in reinforcing and supporting the ethical conduct of lawyers. It provides opportunities for lawyers to learn about the ethical problems that commonly arise in legal practice, discuss ethical education with peers, and develop the knowledge and tools necessary to manage ethical challenges that may arise in their own professional life.

Stakeholders consistently told the Commission that the current model of CPD may not be meeting its intended aims. In particular, some stakeholders told the Commission that the practical operation of the current system emphasises compliance with the process and requirements—that is, obtaining the necessary CPD units—rather than encouraging meaningful professional development and improved knowledge.

CPD should support lawyers to maintain and enhance their capacity to provide ethical legal services to their clients. Ethical conflicts arise in every area of legal practice, whether that be commercial law, personal injury, environmental or criminal law. Given the concerns raised by stakeholders during the inquiry and the themes emerging from the VLSB+C's current review of CPD, it is clear that there is room for improvement to the current approach to CPD on legal ethics.

Some of the ethics education issues examined by the Commission are being considered in the VLSB+C's CPD review, which was underway at the time of writing this final report. The Commission encourages the VLSB+C to implement reforms seeking to improve the quality of CPD on ethical issues for lawyers. The Commission considers that legal ethics education should be more routinely embedded into subject specific CPD activities, rather than continuing to be delivered in isolation.

To support the VLSB+C to drive these changes, the Commission recommends changes to the CPD rules, to align regulatory powers between barrister and solicitor CPD requirements. If agreement to these changes cannot be achieved at the national level through the Uniform Law framework, the Commission recommends that the Victorian Government progresses legislative change so that the VLSB+C has the power to regulate solicitors' CPD in the same way that it can for barristers.

### RECOMMENDATION 84

That the Victorian Legal Services Board and Commissioner, within six months, issues clear guidance about how legal ethics education should be embedded in the four compulsory fields of continuing professional development, including through the use of practical, scenario-based learning.

### RECOMMENDATION 85

That the Legal Services Council, Law Council of Australia and Australian Bar Association work together to, within 12 months, harmonise the powers held by local regulatory authorities through the Solicitors' Continuing Professional Development Rules, so that policies and requirements for continuing professional development can be made for solicitors as they can already for barristers.

If this change has not been made within 12 months, the Victorian Government should, within a further 12 months, provide the Victorian Legal Services Board and Commissioner with the power to regulate solicitors' continuing professional development, as it is currently able to do in respect of barristers.

## Reporting suspected misconduct

When lawyers engage in professional misconduct, clients and the broader community rightly expect that this will be promptly and appropriately managed by regulators. Therefore, a respected, functional system to deal with complaints about lawyers is essential to protect consumers of legal services and maintain public confidence in the legal profession.

Lawyers are often better placed than clients to recognise potential breaches of the professional conduct rules and ethical obligations, given their greater familiarity with them. The legal profession regulatory framework recognises this expertise through the existing mandatory requirement for a lawyer to report to a regulator if they believe ‘on reasonable grounds that there is an irregularity in connection with the receipt, recording or disbursement of any trust money received by a law practice’.<sup>264</sup>

Currently, a large proportion of disciplinary matters brought to the attention of regulators arise from complaints made by clients.

As noted earlier in this chapter, in Ms Gobbo’s case, a client, Mr Carl Williams, complained to regulators about her conduct, with good reason as it turned out. Some lawyers told the Commission that they had observed Ms Gobbo’s unethical behaviour but did not make formal complaints, instead informally raising these concerns with Ms Gobbo, or in some cases, not raising them at all. Had they too complained to regulators, a more thorough investigation may have been undertaken and the unethical conduct exposed much earlier.

If disciplinary and regulatory action had been taken earlier, Ms Gobbo could also have been removed from the Victorian Bar Roll. At the time of writing this final report, although Ms Gobbo had been struck off the Roll of Legal Practitioners by the Supreme Court, she remained on the Victorian Bar Roll’s list of retired counsel, due to the Victorian Bar Council’s inability to remove barristers from this list. In Chapter 7, the Commission recommends that this be addressed as a priority.

Whether there should be a mandatory requirement to report suspected misconduct within the legal profession has been the subject of significant debate in Australia and in other jurisdictions. In Australia, it has been suggested that the legal profession regulatory framework focuses too much on self-reporting. Indeed, the collegial culture of the legal profession may well have been a factor in the reluctance of Ms Gobbo’s peers to report their concerns to the regulator.

The Commission notes that other jurisdictions, such as the United States, the United Kingdom, New Zealand, Hong Kong and Canada, have taken steps to introduce mandatory reporting requirements.

After examining the approach to mandatory reporting requirements adopted in comparative legal systems and analysing the strengths and weaknesses of the current regulatory framework, the Commission concludes that lawyers have an important role to play in reporting suspected misconduct of their peers.

Some stakeholders raised concerns that the introduction of mandatory reporting was unnecessary, given that the legal profession and its regulators have a shared responsibility to uphold professional standards and the integrity of the legal profession. Stakeholders also suggested that mandatory reporting could:

- lead to vexatious complaints
- result in unintended consequences, such as negative repercussions or counter-complaints about the reporting lawyer
- undermine the collegial nature of the legal profession.

The Commission notes that any vexatious complaints made would constitute unsatisfactory professional conduct or professional misconduct. Similarly, any unjustified countercomplaints made about the reporting lawyer would exacerbate the seriousness of the original offending conduct and ultimate penalty.

Members of other professions, such as medical practitioners, are required to report suspected misconduct by their peers. There are of course differences between these two professions. While lawyers are not generally dealing with imminent risks to a person's health or physical wellbeing, their misconduct can still have dreadful consequences, including loss of liberty, financial loss, substantial miscarriages of justice, mental anguish for clients and diminished public confidence in the justice system. It seems incongruous that medical practitioners, police officers and others are required to report the misconduct of their peers, while lawyers are not.

The Commission notes that similar reporting requirements in the Australian health sector have not produced a large volume of vexatious complaints and as mentioned above, a 2017 University of Melbourne study found that less than 1 per cent of complaints were vexatious.<sup>265</sup>

Also, as noted earlier in this chapter, Victoria Police officers have, for many years, been subject to a mandatory reporting requirement. It is the Commission's view that if a workforce such as law enforcement can operate effectively under mandatory reporting requirements, then members of the legal profession, who hold extremely high ethical responsibilities to their clients and the courts, should also have a positive obligation to report suspected misconduct.

The Commission believes that the existing ethical duties and obligations of lawyers operate as a safeguard against actions such as lodging a vexatious complaint. This is particularly so if a complaint leads to the abuse of a court's process, as this would be a serious breach of a lawyer's ethical duties.

The Commission appreciates stakeholders' views that many details would need to be considered before introducing mandatory reporting. The Commission agrees that the threshold for mandatory reporting should be balanced appropriately—so that lawyers are required to report only significant suspected misconduct, not minor or trivial complaints.

The Commission heard concerns that, given the importance of reputation in the legal profession, there is the potential for repercussions or adverse consequences for lawyers making a report. Stakeholders noted that there could be a chilling effect in relation to reporting due to the fear of repercussions. The Commission notes that if a lawyer subjected another lawyer to detrimental treatment because the second lawyer had complied with their professional obligations by reporting suspected misconduct, this would itself be a breach of those obligations. It agrees that the possibility of such detrimental treatment needs to be considered and sensitively managed; however, the primary concern must be protecting clients and the public and developing a culture where help with ethical matters is sought early.

Introducing mandatory reporting may deter misconduct. It would certainly contribute to increasing and maintaining public confidence in the legal profession. The Commission believes that the trust placed in lawyers by their clients must be matched by lawyers' accountability. The public should be able to expect that a lawyer who becomes aware of another lawyer's misconduct will promptly report that behaviour to a regulator for consideration and action.

Mandatory reporting would contribute to increasing and maintaining high ethical standards within the legal profession. It would help protect the public and the administration of justice; strengthen public confidence in the legal profession; and:

- reinforce the accountability of every lawyer to the administration of justice and the public
- reinforce the accountability of the legal profession collectively to uphold professional standards
- support greater public confidence in the legal profession
- address a current gap in the regulatory framework.

Any mandatory reporting requirement would need to specify:

- an appropriate reporting threshold
- any necessary protections for those making the complaint
- how legal professional privilege and the duty of confidentiality affect lawyers' provision of information to the regulator
- the consequences for non-compliance with mandatory reporting.

The VLSB+C, in its capacity as the main complaints-handling body in Victoria, is the appropriate body to hear complaints or reports of suspected misconduct.

In making this recommendation, the Commission has also taken into account Victoria's participation in the Uniform Law framework. The Commission is aware that the objectives of the Uniform Law are to achieve consistency in the regulation of the legal profession. Accordingly, the Commission recommends that the Victorian Government should firstly pursue the introduction of a mandatory reporting requirement through the framework for amendments provided by the Uniform Law, in consultation with the other participating jurisdictions.

If such a requirement is not supported by the other jurisdictions participating in the Uniform Law, the Commission considers that the Victorian Government should implement a mandatory reporting requirement for lawyers in Victoria. To this end, the Commission notes that the Uniform Law already contains matters specific to the operation of the law in Victoria.

While this recommendation could give rise to the potential for inconsistency in the legal profession regulatory framework, on balance the Commission considers that the value of a mandatory reporting requirement in supporting both the Victorian public's trust and confidence in the legal profession, and the ability of regulators to respond effectively to suspected misconduct, would outweigh any possible divergence from the Uniform Law. It would also address the existing apparent inconsistency whereby a solicitor must have 'reasonable grounds' to report suspected misconduct of another lawyer and the allegation must be made in good faith, which is not mirrored in the Barristers' Conduct Rules.<sup>266</sup>

To support the introduction of a mandatory reporting requirement, the Commission also considers that the VLSB+C, the professional associations and other relevant stakeholders should develop guidance and CPD activities on how it can be applied, in particular:

- the elements of the mandatory reporting requirement
- when lawyers are likely to need to report suspected misconduct
- the consequences of not reporting suspected misconduct; making vexatious counter-complaints; or subjecting a lawyer who reports suspected misconduct to detrimental treatment
- the role of the VLSB+C in receiving the reports.

**RECOMMENDATION 86**

That the Victorian Government, within 12 months, pursues through the Council of Attorneys-General and the Legal Services Council, an amendment to the Legal Profession Uniform Law introducing a mandatory requirement for lawyers to report the suspected misconduct of other lawyers. The Victorian Government should ensure the Victorian Legal Services Board and Commissioner is appropriately resourced to implement this recommendation.

If the amendment incorporating a mandatory reporting obligation has not been agreed within 12 months, the Victorian Government should, within a further 12 months, introduce a mandatory reporting requirement for Victorian lawyers to report the suspected misconduct of other lawyers.

**RECOMMENDATION 87**

That the Victorian Legal Services Board and Commissioner, the Victorian Bar and the Law Institute of Victoria, in consultation with other relevant stakeholders and prior to the commencement of the mandatory reporting obligation proposed in Recommendation 86, prepare harmonised guidance and continuing professional development activities for the legal profession to accompany and support the introduction of a mandatory reporting requirement.

## Enhancing the independence of investigating complaints

The efficient and effective management of complaints against lawyers is vital for public confidence in the legal system and its effective operation.

There are different approaches to managing and handling complaints regarding lawyers in Victoria. Complaints regarding solicitors are handled exclusively by the VLSB+C, whereas complaints regarding barristers are generally delegated to the Victorian Bar for investigation.

The Commission was advised that the current co-regulatory approach recognises the specialist skills and experience necessary to consider complaints against barristers, and allows the practical expertise of barristers to be drawn on in considering complaints. As discussed above, the delegated function to the Victorian Bar to investigate complaints was recently reviewed, and several changes have been made to improve and strengthen the co-regulatory model, after some shortcomings were identified.<sup>267</sup>

The Commission believes that a key challenge with the current framework for investigating complaints about Victorian barristers is the perception of insufficient independence. This perceived absence of independence could lead to consumers lacking confidence in the complaints-management process generally, as well as the public believing that barristers operate with a lack of transparency and accountability.

The Commission was told that the risk of a perceived lack of independence is currently mitigated by the VLSB+C's oversight of investigations into barristers and the fact that it makes the final decision about complaint outcomes.

The Commission acknowledges that this oversight provides a degree of public accountability and assurance, but considers that there is still a risk that the public would perceive that the Victorian Bar's dual function of both investigating complaints and advocating on behalf of its members involves competing interests—one, the administration of justice and the public, and the other, its members.

The Commission notes the current legal profession regulatory framework already recognises the significance and importance of complaints regarding solicitors being independently investigated and considers that there should be a consistent approach to the management and investigation of complaints regarding lawyers in Victoria. While the Commission acknowledges the benefits of drawing upon the skills and expertise of barristers in resolving complaints, it believes that given the VLSB+C's experience and capability in investigating complaints about solicitors, this experience can also be developed and maintained within the VLSB+C.

Further, there would be efficiencies in consolidating the investigation of complaints, given the VLSB+C's established complaints processes and expertise. This would also reduce the potential for double handling, given that the VLSB+C must consider the recommendations made by the Victorian Bar regarding the outcome of a complaint under the current system.

The Commission is acutely conscious of the critical role of the independent legal profession, particularly advocates in the courts, in upholding the rule of law, in providing access to justice and in supporting the independence of the judicial arm of government. But the Commission is satisfied that this independence would not be compromised by the VLSB+C, specifically the Victorian Legal Services Commissioner, resuming the role of receiving and handling all complaints against barristers.

#### RECOMMENDATION 88

That the Victorian Legal Services Commissioner, within 12 months, revokes the Instrument of Delegation conferred on the Victorian Bar for receiving and handling complaints regarding barristers and resumes that function.

## Improving awareness of supports for lawyers

Professional associations and the VLSB+C provide a range of important support services and resources to lawyers to assist them to understand their ethical duties and obligations. The Commission heard from stakeholders that such supports are important in helping to ensure that lawyers comprehend and follow the professional conduct rules. Broader services are also available to support lawyers' personal wellbeing and their professional practice.

The Commission appreciates that the current range of support services and resources already cover a wide range of topics. It would be beneficial, however, for the professional associations to better understand the extent to which their members are aware of, use and find helpful the various services and resources. This would help ensure that the services currently offered can be more widely accessed, improved and refined and increase the likelihood that they would be used when needed. While the professional associations advised the Commission that there is data about how often their services are accessed, there was no data to quantify the level of awareness among members regarding the availability of such services, or their effectiveness.

The Commission understands that the Victorian Bar is currently reviewing the ethics support resources it makes available to barristers. The Commission considers this to be an appropriate opportunity to also review its members' awareness, use and views of broader support services covering health and wellbeing.

The Commission also recommends that the Law Institute of Victoria conducts a similar review of its members' awareness, use and views of its support services and resources for solicitors.

These reviews should be followed by any necessary targeted measures, such as an awareness campaign, or CPD units, should the level of awareness be found to be low. As part of continuous improvement, support services and resources should also be reviewed and modernised to ensure they continue to be of use to members.

**RECOMMENDATION 89**

That the Victorian Bar and the Law Institute of Victoria, within six months, assess the awareness level, use and views of the ethical, health and wellbeing support services and resources offered to their members. If the awareness levels and usage are found to be low, the Victorian Bar and the Law Institute of Victoria should review the quality of the services and resources and improve marketing and communications to ensure members are aware of the useful supports available.

The Victorian Bar and the Law Institute of Victoria should regularly review the effectiveness of these services and resources (at least every two years) and update them as required to meet the needs of members.

## Supporting access to lawyers for people in police custody

People who have been taken into custody by police should be made aware of their right to communicate with a lawyer and obtain independent legal advice and representation. They should also be provided with reasonable facilities to do so. Given the events leading to this inquiry, it is important that Victoria Police never recommends a particular lawyer, in case it calls into doubt the lawyer's independence.

Victoria Legal Aid told the Commission that a person's right to seek legal advice before they are questioned in criminal proceedings is not adequately protected. It observed that people in custody often do not exercise their right to seek legal advice, sometimes because they have difficulty finding a lawyer through the methods offered by the police officer or because private space for a confidential discussion is not facilitated.<sup>268</sup>

The Commission reviewed Victoria Police policy and training materials and identified that they do not appear to set out all the rights and safeguards under section 464C of the Crimes Act for people taken into custody. Further, the materials do not refer to the relevant rights and safeguards under section 25 of the Charter, or the importance of a person having access to independent legal advice.

There do not appear to be any procedures specified in either the *Victoria Police Manual* or the training material about how to provide information to people in custody about accessing a lawyer. It is likely that this has led to the default practice that the Law Institute of Victoria and Victoria Legal Aid observed of police providing people with a telephone book.<sup>269</sup>

Without more specific procedural and policy guidance, there is a risk that police officers may take inconsistent approaches to the fundamental obligation of enabling a person in custody to communicate with a lawyer, including the importance of providing a private space for a confidential discussion. The development of policies and procedures would help to support adherence to these important criminal justice safeguards and more effectively connect people in custody with appropriate legal services.

Earlier in this report, the Commission recommended improved training and education for police about duties of confidentiality and privilege, including those held by lawyers. In addition, the Commission considers that Victoria Police should, in consultation with relevant stakeholders, amend the *Victoria Police Manual* and its training to incorporate advice about the rights of people in custody to speak with an independent lawyer; and Victoria Police's responsibilities to support access to legal advice.

The Commission believes that these rights under the Crimes Act and the Charter would be better protected if accompanied by revised policies and procedures that help officers understand, in practical terms, how to support a person in custody to access legal advice. As submitted by stakeholders, the Commission considers that the revised procedures could require that Victoria Police provides people in custody with a list jointly issued by the Law Institute of Victoria and Victoria Legal Aid and updated annually, setting out:

- contact details for lawyers working in the field of criminal law
- any relevant specialist free services
- any assistance required because of particular vulnerabilities; for example, illiteracy, English language difficulties, or mental or physical health issues.

The Commission notes that some stakeholders highlighted a broader need to consolidate and modernise the mechanisms by which people in custody are linked to legal services. Reforms to address this need would require time and resources to implement. The Commission suggests that the Victorian Government considers this issue further, in consultation with Victoria Police, Victoria Legal Aid, the Law Institute of Victoria and other relevant stakeholders.

#### RECOMMENDATION 90

That Victoria Police, within 12 months, amends the *Victoria Police Manual* and relevant training materials to comprehensively set out obligations under section 464C of the *Crimes Act 1958* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) related to the right of a person in police custody to communicate with a lawyer.

Victoria Police should undertake this work in consultation with relevant stakeholders including Victoria Legal Aid, the Department of Justice and Community Safety, Law Institute of Victoria, Victorian Bar, Federation of Community Legal Centres and Victorian Aboriginal Legal Service.

# Endnotes

- 1 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 3.
- 2 See generally Arie Freiberg, 'Re-Stocking the Regulatory Toolkit' (Conference Paper, Regulation in the Age of Crisis, 17 June 2010) 10.
- 3 Victorian Legal Services Board and Commissioner, *Annual Report 2019* (Report, 2019) 43.
- 4 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 December 2013, 4662 (Robert Clark, Attorney-General); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 3.
- 5 *Legal Profession Uniform Law Application Bill 2020* (WA).
- 6 See, eg, *Civil Procedure Act 2010* (Vic); *Supreme Court (General Civil Procedure) Rules 2015* (Vic).
- 7 The Uniform Law establishes the Legal Services Council and the Commissioner for Uniform Legal Services Regulation to oversee its operation, while state regulatory bodies are responsible for the day-to-day regulation of the legal profession, including admissions: see *Legal Profession Uniform Law Application Act 2014* (Vic) s 10; sch 1 pts 8.2–8.5.
- 8 Based on the 'Roles of Bodies under the Legal Profession Uniform Law', *Legal Services Council* (Web Page) <[www.legalservicescouncil.org.au/Pages/about-us/about-us.aspx](http://www.legalservicescouncil.org.au/Pages/about-us/about-us.aspx)>.
- 9 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 6(1) (definition of 'Standing Committee'), 391.
- 10 Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Commentary* (August 2013) 3.
- 11 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 427.
- 12 Róisín Annesley, *Good Conduct Guide: Professional Standards for Australian Barristers* (Federation Press, 2nd ed, 2019).
- 13 Consultation with Law Institute of Victoria, 4 June 2020.
- 14 Self-regulation means that legal professional associations—rather than independent bodies—play a direct role in regulating the legal profession.
- 15 Co-regulation means that legal professional associations and independent bodies work together to regulate the legal profession.
- 16 Submission 116 Victorian Legal Services Board and Commissioner, 5.
- 17 Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 3rd ed, 2007) 46. Increasing transparency and accountability was identified as an objective in introducing the *Legal Practice Act 1996* (Vic): see Victoria, *Parliamentary Debates*, Legislative Assembly, 20 June 1996, 983–4 (Jan Wade, Attorney-General).
- 18 *Legal Profession Uniform Law Application Act 2014* (Vic) s 10.
- 19 'About the Victorian Legal Admissions Board', *Victorian Legal Admissions Board* (Web Page) <[www.lawadmissions.vic.gov.au/about-the-victorian-legal-admissions-board](http://www.lawadmissions.vic.gov.au/about-the-victorian-legal-admissions-board)>.
- 20 Submission 116 Victorian Legal Services Board and Commissioner, 1.
- 21 Submission 116 Victorian Legal Services Board and Commissioner, 1. The Victorian Legal Services Board can suspend or cancel a lawyer's practising certificate at any time if it reasonably believes that the lawyer is unable to fulfil the requirements of being a legal practitioner: *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 82.
- 22 *Legal Profession Uniform Law Application Act 2014* (Vic) s 10; sch 1 ch 5.
- 23 Submission 116 Victorian Legal Services Board and Commissioner, 3.
- 24 Victorian Legal Services Commissioner, *Instrument of Delegation* (28 August 2015); Submission 116 Victorian Legal Services Board and Commissioner, 4.
- 25 Submission 116 Victorian Legal Services Board and Commissioner, 4, 7; Consultation with Victorian Legal Services Board and Commissioner, 8 January 2020.
- 26 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cls 16, 23.
- 27 *Legal Profession Uniform Admission Rules 2015* r 5, sch 1. This requirement is satisfied by, for example, obtaining a law degree at either undergraduate (Bachelor of Laws) or postgraduate (Juris Doctor) level.
- 28 *Legal Profession Uniform Admission Rules 2015* r 6, sch 2.
- 29 Applicants must provide the Victorian Legal Admissions Board with an academic transcript from their university as evidence of their legal qualifications and a certificate of completion of a Practical Legal Training course: *Legal Profession Uniform Admission Rules 2015* r 15.
- 30 *Frugtniet v Board of Examiners* [2002] VSC 140, [10].
- 31 *Legal Profession Uniform Admission Rules 2015* rr 10, 16–20.
- 32 *Legal Profession Uniform Admission Rules 2015* r 10.

- 33 *Legal Profession Uniform Admission Rules 2015* rr 16, 22; 'Appearing Before the Board', Victorian Legal Services Board (Web Page) <[www.lawadmissions.vic.gov.au/about-us/appearing-before-the-board](http://www.lawadmissions.vic.gov.au/about-us/appearing-before-the-board)>.
- 34 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 19.
- 35 Victorian Bar, *Application and Reading Regulations* (3 May 2018) reg 3(2).
- 36 Victorian Bar, *Application and Reading Regulations* (3 May 2018) regs 2(1) (definition of 'required grade'), 6; Victorian Bar, *Victorian Bar Entrance Examination General Information* (22 August 2019) 1.
- 37 Victorian Bar, *Application and Reading Regulations* (2 May 2018) reg 4(1); 'Bar Readers' Course', *Victorian Bar* (Web Page) <[www.vicbar.com.au/public/about/becoming-barrister/bar-readers-course](http://www.vicbar.com.au/public/about/becoming-barrister/bar-readers-course)>.
- 38 Victorian Bar, *Application and Reading Regulations* (3 May 2018) regs 2(1) (definition of 'reading period'), 7(1). The regulations require that the mentor has the needed seniority, be 'in active practice' and 'likely to be substantially in attendance in chambers in Victoria during the whole of the Reading Period'.
- 39 There are some exceptions, including licensed conveyancers doing conveyancing work: *Legal Profession Uniform General Rules 2015* r 10.
- 40 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cls 43–5.
- 41 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 45(2).
- 42 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 52; *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* r 6; *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* r 8.
- 43 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cls 86, 90.
- 44 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 53; *Legal Profession Uniform General Rules 2015* r 16.
- 45 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.1; *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 4(d), 35.
- 46 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 9.1; *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 114, 116; *Evidence Act 2008* (Vic) ss 118, 119; *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, 414–15 (Bowen CJ); *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 589 (Kirby J).
- 47 David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 63.
- 48 Chief Justice Thomas Balthurst, 'Duties to the Court, Duties of the Court' (Speech, Law Society Planning Conference, Bowral, 14 November 2014).
- 49 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 52; *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* r 6; *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* r 8.
- 50 *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* r 8; *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* r 6A.
- 51 *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* r 14; *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* r 15. Rule 7 of the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* requires the CPD activity to be of significant intellectual or practical content and deal primarily with matters related to the solicitor's practice of law; conducted by qualified persons; and extend the solicitor's knowledge or skills in areas related to their practice needs or professional development.
- 52 Victorian Legal Services Board and Commissioner, *Annual Report 2019* (Report, 2019) 9.
- 53 Actions that may be taken to address CPD non-compliance include: a notice requiring rectification; conditions imposed on the practising certificate; annual monitoring; individual verification audits; referral to the Legal Services Commissioner and ultimately failure to have a practising certificate reissued: 'Continuing Professional Development Policy', *Victorian Legal Services Board and Commissioner* (Web Page) <[www.lsb.vic.gov.au/resources/continuing-professional-development-policy](http://www.lsb.vic.gov.au/resources/continuing-professional-development-policy)>, 4–5.
- 54 Victorian Legal Services Board and Commissioner, *Annual Report 2019* (Report, 2019) 9.
- 55 Victorian Legal Services Board and Commissioner, *Annual Report 2019* (Report, 2019) 9, 43.
- 56 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cls 268–270. See also Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed, 2017) 790.
- 57 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 296.
- 58 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 297(1).
- 59 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 298.
- 60 Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed, 2017) 782–3, 796.
- 61 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 266(2).
- 62 Based on Victorian Legal Services Board and Commissioner, *Annual Report 2019* (Report, 2019) 51, 53.
- 63 Victorian Legal Services Board and Commissioner, *Policy: Compliance and Enforcement* (2017) 3–4.

- 64 Victorian Legal Services Board and Commissioner, *Policy: Compliance and Enforcement* (2017) 1, 3.
- 65 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 32.1.
- 66 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 154. Trust money is money held on behalf of a client by a law firm. This can include, for example, money that is held by a law firm for the purpose of paying stamp duty in connection with the purchase of a property. See 'Trust and Controlled Money Accounts', *Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-client-relationship/trust-and-controlled-money-accounts](http://www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-client-relationship/trust-and-controlled-money-accounts)>.
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- 76 Consultation with Victorian Bar, 28 January 2020.
- 77 Consultation with Victorian Bar, 2 October 2020.
- 78 Arthur Moses, 'Opinion Piece: Breach of Duties from Lawyers X, Police an Attack on Democracy and Justice', *Law Council of Australia* (Web Page, 22 February 2019) <[www.lawcouncil.asn.au/media/news/opinion-piece-breach-of-duties-from-lawyer-x-police-an-attack-on-democracy-and-justice](http://www.lawcouncil.asn.au/media/news/opinion-piece-breach-of-duties-from-lawyer-x-police-an-attack-on-democracy-and-justice)>.
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- 80 Gino Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) [9.10].
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- 82 Consultation with Law Institute of Victoria, 4 June 2020.
- 83 See, eg, Patrick Durkin, 'Revealed: Lawyer X is Gangland Barrister Nicola Gobbo', *Australian Financial Review* (online, 1 March 2019) <[www.afr.com/companies/professional-services/revealed-lawyer-x-is-gangland-barrister-nicola-gobbo-20190301-h1bvs1](http://www.afr.com/companies/professional-services/revealed-lawyer-x-is-gangland-barrister-nicola-gobbo-20190301-h1bvs1)>.
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- 98 Based on *Legal Profession Uniform Law Australian Conduct Solicitors' Rules 2015* rr 9.2.4, 9.2.5; *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 81, 82.
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- 100 Submission 116 Victorian Legal Services Board and Commissioner, 10.
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- 104 Consultation with Legal Services Council, 1 June 2020.
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- 106 Law Council of Australia, *Australian Solicitors' Conduct Rules and Commentary* (August 2013) 3.
- 107 Law Council of Australia, 'Review of the Solicitors' Conduct Rules' (Discussion Paper, February 2018) 43, 44, 49.
- 108 Consultation with Law Council of Australia, 4 October 2019.
- 109 Consultation with Law Council of Australia, 17 June 2020.
- 110 Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Commentary* (August 2013) 41. The commentary defines 'serious criminal offence' as an indictable offence against a law of the Commonwealth or any jurisdiction; an offence against the law of another jurisdiction that would be an indictable offence against a law of this jurisdiction; or an offence against the law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction (whether or not the offence can be dealt with summarily in all cases). Indictable offences are often heard in higher courts with more severe penalties while summary offences are less serious and heard in Magistrates' Court.
- 111 Victorian Legal Services Board and Commissioner, *Regulatory Guideline: Lawyer conduct in providing information to police* (9 June 2020) 4.
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- 126 Consultation with Victorian Bar, 28 January 2020.
- 127 Submission 116 Victorian Legal Services Board and Commissioner, 10.
- 128 Submission 116 Victorian Legal Services Board and Commissioner, 11.
- 129 Consultation with Victorian Legal Services Board and Commissioner, 8 January 2020.
- 130 Consultation with Law Institute of Victoria, 15 January 2020.
- 131 Consultation with Victorian Bar, 28 January 2020.

- 132 Consultation with Criminal Bar Association, 10 February 2020.
- 133 Consultation with Victorian Bar, 28 January 2020; Consultation with Criminal Bar Association, 30 January 2020.
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- 135 Consultation with Legal Services Council, 1 June 2020.
- 136 See *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* rr 10–12; *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 35, 101, 119.
- 137 Submission 142 Director of Public Prosecutions (Victoria), 86–7.
- 138 Submission 142 Director of Public Prosecutions (Victoria), 87.
- 139 Submission 142 Director of Public Prosecutions (Victoria), 87.
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- 141 Consultation with Victorian Legal Services Board and Commissioner, 11 March 2020.
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- 144 Submission 116 Victorian Legal Services Board and Commissioner, 9.
- 145 Consultation with Victorian Bar, 28 January 2020.
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- 166 Consultation with Law Institute of Victoria, 15 January 2020.
- 167 Transcript of Ms Nicola Gobbo, 6 February 2020, 13305–6.
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- 171 Consultation with Criminal Bar Association, 30 January 2020.
- 172 Consultation with Law Institute of Victoria, 15 January 2020.
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- 175 Law Institute of Victoria, *Annual Report 2020* (Report, 2020) 14.
- 176 Consultation with Law Council of Australia, 4 October 2019.
- 177 Consultation with Law Institute of Victoria, 15 January 2020.
- 178 Law Institute of Victoria, *Annual Report 2020* (Report, 2020) 38.
- 179 Consultation with Australian Bar Association, 9 March 2020.
- 180 Consultation with Victorian Bar, 28 January 2020.
- 181 Consultation with Victorian Legal Services Board and Commissioner, 11 March 2020.
- 182 See Exhibit RC0187 Letter from Carl Williams to the Legal Services Commissioner, 4 September 2006; Exhibit RC0188 Letter from Carl Williams to the Victorian Bar Ethics Committee, 5 September 2006. Mr Williams' complaint to the Legal Services Commissioner was referred to the Victorian Bar Ethics Committee to investigate.
- 183 See, eg, Exhibit RC0209 Letter from Legal Services Commissioner to Roberta Williams, 14 March 2008; Exhibit RC0210 Letter from Legal Services Commissioner to Roberta Williams, 6 May 2008.
- 184 See, eg, Exhibit RC0977b Statement of Mr Robert Richter, 25 November 2019, [3]; Exhibit RC0974b Statement of Mr Colin Lovitt, 14 November 2019, 5.
- 185 The Victorian Bar Ethics Committee considered the complaint and reported back to the Legal Services Commissioner: Exhibit RC0203 Letter from the Victorian Bar Ethics Committee to the Legal Services Commissioner, 4 October 2006, 1–2.
- 186 Exhibit RC0212 Letter from the Legal Services Commissioner to Nicola Gobbo, 30 May 2008.
- 187 See Exhibit RC0977b Statement of Mr Robert Richter, 25 November 2019, 1 [3]; Exhibit RC0974 Statement of Mr Colin Lovitt, 14 November 2019, 1; Exhibit RC0968b Statement of Mr Alistair Grigor, 9 May 2019, 1; Exhibit RC0972b Statement of Mr Alex Lewenberg, 20 May 2019, 3 [11]; Exhibit RC0980b Statement of Mr Warren Peacock, 2 October 2019, 2 [12].
- 188 On 8 March 2019, the Commission issued a notice to produce to the VLSB+C to produce all documents between 1 January 1995 and 31 December 2013 relating to Ms Gobbo. No information was produced to the Commission to indicate that Ms Gobbo's fellow lawyers or colleagues made a formal complaint about her.
- 189 Arthur Greenbaum, 'The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform' (2003) 16(2) *Georgetown Journal of Legal Ethics* 2, 4; see also Eric H Steele and Raymond T Nimmer, 'Lawyers, Clients, and Professional Regulation' (1976) 1(3) *American Bar Foundation Research Journal* 917, 999.
- 190 Arthur Greenbaum, 'The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform' (2003) 16(2) *Georgetown Journal of Legal Ethics* 2, 4.
- 191 Arthur Greenbaum, 'The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform' (2003) 16(2) *Georgetown Journal of Legal Ethics* 1, 4 citing Douglas Richmond, 'The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation' (1999) 12 *Georgetown Journal of Legal Ethics* 175, 175.
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- 193 Tara Sklar et al, 'Characteristics of Lawyers Who Are Subject to Complaints and Misconduct Findings' (2019) 16(2) *Journal of Empirical Legal Studies* 318, 333.
- 194 Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed, 2017) 786.
- 195 Sophie McNamara, 'Mandatory Reporting "Misused"', *MJA Insight* (Web Page, 31 October 2011) <[www.mja.com.au/insight/2011/41/mandatory-reporting-misused](http://www.mja.com.au/insight/2011/41/mandatory-reporting-misused)>.
- 196 Jennifer Morris, Rachel Canaway and Marie Bismark, 'Reducing, Identifying and Managing Vexatious Complaints', *Melbourne School of Population and Global Health Centre for Health Policy*, University of Melbourne, (November 2017), 4–5.
- 197 Consultation with Bar Association of Queensland, 2 September 2019.
- 198 Consultation with Bar Association of Queensland, 2 September 2019.
- 199 Consultation with New South Wales Office of the Legal Services Commissioner, 26 August 2019; Consultation with Bar Association of Queensland, 2 September 2019.
- 200 Consultation with Law Council of Australia, 4 October 2019.

- 201 Consultation with Legal Services Council, 1 June 2020.
- 202 Consultation with Law Institute of Victoria, 4 June 2020.
- 203 Consultation with Victorian Bar, 11 June 2020.
- 204 Consultation with Victorian Bar, 11 June 2020.
- 205 Consultation with Victorian Bar, 11 June 2020. Complaints under the Victorian Bar's conduct policies cover matters such as bullying, discrimination, sexual harassment and other inappropriate conduct.
- 206 Consultation with Victorian Bar, 11 June 2020.
- 207 Consultation with Australian Bar Association, 9 March 2020.
- 208 Consultation with Australian Bar Association, 9 March 2020.
- 209 Consultation with Victorian Legal Services Board and Commissioner, 8 January 2020.
- 210 Consultation with Victorian Legal Services Board and Commissioner, 11 March 2020.
- 211 Consultation with Victorian Legal Services Board and Commissioner, 11 March 2020.
- 212 Consultation with Victorian Legal Services Board and Commissioner, 11 March 2020.
- 213 See Solicitors Regulation Authority (UK), *Code of Conduct* (30 May 2018) 7.7; *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008* (NZ) rr 2.8, 2.9, 8.2; Federation of Law Societies of Canada, *Model Code of Professional Conduct* (19 October 2019) r 7.13; The Law Society of Hong Kong, *Hong Kong Solicitors' Guide to Professional Conduct* (1995) r 11.03.
- 214 Solicitors Regulation Authority (UK), *Reporting Concerns: Our Post-Consultation Position* (Report, January 2019) 4 [11].
- 215 Solicitors Regulation Authority (UK), *Reporting Concerns: Our Post-Consultation Position* (Report, January 2019) 3 [4].
- 216 Solicitors Regulation Authority (UK), *Reporting Concerns: Our Post-Consultation Position* (Report, January 2019) 8.
- 217 Solicitors Regulation Authority (UK), *Reporting Concerns: Our Post-Consultation Position* (Report, January 2019) 9 [31].
- 218 Solicitors Regulation Authority (UK), *Reporting Concerns: Our Post-Consultation Position* (Report, January 2019) 9 [31].
- 219 Solicitors Regulation Authority (UK), *Reporting Concerns: Our Post-Consultation Position* (Report, January 2019) 3.
- 220 Solicitors Regulation Authority (UK), *Code of Conduct* (30 May 2018) 7.9.
- 221 Solicitors Regulation Authority (UK), *Enforcement Strategy* (25 November 2019) 1.2; Solicitors Regulation Authority (UK), *Reporting Concerns: Our Post-Consultation Position* (Report, January 2019) 6.
- 222 American Bar Association, *Model Rules of Professional Conduct*, r 8.3. Rule 8.3 provides that 'a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority'.
- 223 Arthur Greenbaum, 'The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform' (2003) 16(2) *Georgetown Journal of Legal Ethics* 2, 3.
- 224 Arthur Greenbaum, 'The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform' (2003) 16(2) *Georgetown Journal of Legal Ethics* 2, 6 citing American Bar Association Standing Committee on Ethics and Professional Responsibility, *Informal Opinion 1279* (1973).
- 225 'Reporting Unacceptable Conduct', *New Zealand Law Society* (Web Page) <[www.lawsociety.org.nz/for-lawyers/confidential-report](http://www.lawsociety.org.nz/for-lawyers/confidential-report)>.
- 226 *Medical Practice Act 1992* (NSW) s 71A(1); *Medical Practitioners Registration Act 2001* (Qld) s 166.
- 227 Queensland Minister for Health, 'Health Minister Releases HQCC Report into Mackay Hospital' (Media Statement, 4 August 2008), 1.
- 228 *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic), which applies, by reference, the *Health Practitioner Regulation National Law Act 2009* (Qld) ss 5, 141 as the law in Victoria.
- 229 *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic), which applies, by reference, the *Health Practitioner Regulation National Law Act 2009* (Qld) s 140 as the law in Victoria.
- 230 Australian Health Practitioner Regulation Agency, *Guidelines: Mandatory Notifications about Registered Health Practitioners* (March 2020).
- 231 *Victoria Police Act 2013* (Vic) s 167(3).
- 232 *Victoria Police Act 2013* (Vic) s 166.
- 233 Victorian Legal Services Commissioner, *Instrument of Delegation* (28 August 2015).
- 234 Consultation with Victorian Legal Services Board and Commissioner, 8 January 2020.
- 235 Submission 116 Victorian Legal Services Board and Commissioner, 4.
- 236 Victorian Bar, *Summary of Review of Delegated Functions* (2019) 1-2.
- 237 Consultation with Victorian Legal Services Board and Commissioner, 8 January 2020.
- 238 Consultation with Victorian Bar, 11 June 2020.

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- 241 Consultation with Victorian Legal Services Board and Commissioner, 11 March 2020.
- 242 Consultation with Victorian Legal Services Board and Commissioner, 11 March 2020.
- 243 Consultation with Victorian Legal Services Board and Commissioner, 11 March 2020.
- 244 Solicitors Regulation Authority, *Headline Findings: Solicitors Regulation Authority* (18 January 2016) 3.
- 245 See Exhibit RC0788b Transcript of conversation between Ms Nicola Gobbo and the Commission, 11 April 2019, 935–6.
- 246 *Crimes Act 1958* (Vic) ss 464C(1)–(2).
- 247 *Crimes Act 1958* (Vic) ss 464C(1)(c)–(d).
- 248 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(b).
- 249 Email from solicitors for Victoria Police to Solicitors Assisting the Commission, 11 June 2020.
- 250 Email from solicitors for Victoria Police to Solicitors Assisting the Commission, 11 June 2020.
- 251 Victoria Police, 'Foundational Training Division Centre for Law and Operational Development: Caution and Rights' 11, 1 October 2019, produced by Victoria Police in response to a Commission Notice to Produce.
- 252 Email from solicitors for Victoria Police to Solicitors Assisting the Commission, 12 June 2020.
- 253 Consultation with Law Institute of Victoria, 15 January 2020; Consultation with Victoria Legal Aid, 17 June 2020.
- 254 Consultation with Victoria Legal Aid, 17 June 2020.
- 255 Consultation with Victoria Legal Aid, 17 June 2020.
- 256 Consultation with Victoria Legal Aid, 17 June 2020.
- 257 Consultation with Victoria Legal Aid, 17 June 2020.
- 258 Consultation with Law Institute of Victoria, 4 June 2020.
- 259 David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 63, 65.
- 260 See, eg, Victorian Bar, 'Statement by the Victorian Bar regarding Lawyer X' (Media Release, 1 March 2019) <[www.vicbar.com.au/news-events/media-release-%E2%80%93-statement-victorian-bar-regarding-lawyer-x](http://www.vicbar.com.au/news-events/media-release-%E2%80%93-statement-victorian-bar-regarding-lawyer-x)>.
- 261 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 427(5).
- 262 Victorian Legal Services Board and Commissioner, *Regulatory Guideline: Lawyer conduct in providing information to Police* (9 June 2020).
- 263 Federation of Law Societies of Canada, Model Code of Professional Conduct (19 October 2019) r 33 [1]–[5].
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# 16

## Issues arising during the conduct of the Commission's inquiry

### INTRODUCTION

Chapters 3 and 5 describe how the Commission conducted its inquiry, including the methods it used to gather information, make findings and recommendations and meet its procedural fairness and other obligations under its Letters Patent and the *Inquiries Act 2014* (Vic) (Inquiries Act).

This chapter discusses some of the issues that the Commission faced in conducting its inquiry. It proposes reforms aimed at improving these processes for future royal commissions and, where applicable, boards of inquiry.

The needs of each royal commission are different. This is because the work of each commission and the way it conducts its inquiry depend on the subject matter and the nature of its terms of reference.

This Commission had both an investigative task, focused on examining events that happened many years ago, and a policy reform task, focused on assessing current policies and processes and identifying ways that they could be strengthened. Both tasks required the Commission to use its powers under the Inquiries Act and to gather information from a range of sources, including, in particular, information from Victoria Police and other law enforcement agencies, statutory bodies and office holders, the courts and government departments.

A range of practical and legal constraints impeded the Commission's ability to access relevant information in a timely way. Under the Inquiries Act, it is a reasonable excuse for a person not to comply with the Commission's power to compel the production of documents on the basis that the information is subject to public interest immunity (PII).<sup>1</sup> This legislative exception, combined with the volume of material over which Victoria Police claimed

PII and the broad nature of many claims, complicated and delayed the production, review and publication of pertinent material. Other challenges arose from the exemption of certain office holders from the requirement to comply with the Commission's coercive powers.<sup>2</sup>

The Commission sought to conduct its work openly and with the participation of the Victorian community; in particular, those potentially affected by Victoria Police's use of Ms Nicola Gobbo as a human source. For many years, the events that led to the establishment of the Commission were hidden from public view. It was therefore especially important for the Commission to conduct its inquiry as transparently as possible, both to restore community confidence in the integrity of the justice system and to demonstrate the fairness of the Commission's processes. Historical suppression orders and the *Witness Protection Act 1991 (Vic)* (Witness Protection Act) at times made it difficult for the Commission to meet these objectives and communicate its work to the Victorian community.

This chapter discusses the impact of these issues on the Commission's work and, where possible, suggests ways to remedy and manage them for future Victorian royal commissions. It also proposes some amendments to the Inquiries Act to clarify and modernise procedural aspects of the legislation.

## THE NATURE OF THE COMMISSION'S INQUIRY

As noted earlier in this final report, the Commission had several tasks: to examine cases potentially affected by the conduct of Ms Gobbo as a human source; examine the conduct of Victoria Police officers involved in the use of Ms Gobbo as a human source; and consider the adequacy and effectiveness of current Victoria Police processes relating to human sources with legal obligations of confidentiality or privilege.

In undertaking these tasks, the Commission also aimed to fulfil several related and important objectives: to identify potential miscarriages of justice arising from this conduct; find out why the conduct occurred; assess whether existing laws, policies and practices are sufficient to prevent such conduct reoccurring; and support and restore community confidence in Victoria's criminal justice system.

The Inquiries Act, in operation since 2014, gives Victorian royal commissions significant powers to seek and obtain information relevant to their terms of reference.

As noted in Chapter 3, the Commission sought to gather evidence in five key ways:

- requesting the production of information from, and attendance by, individuals and organisations by issuing formal notices to produce and/or attend and requests for information
- engaging with members of the public to provide them with an opportunity to contribute to the inquiry and follow the Commission's work
- conducting public hearings to examine evidence and promote the inquiry's transparency
- undertaking a comprehensive research program, including consultation with agencies and people with expertise in matters relevant to the terms of reference
- reviewing submissions from Counsel Assisting, and submissions from affected people and organisations received in response to Counsel Assisting submissions.

The Commission's inquiry involved highly sensitive matters that are not typically subject to public scrutiny. There are many good reasons for this. For example, as noted throughout this report, it is ordinarily critical that the identities of human sources are kept confidential, both for the safety of those sources and for the continued willingness of others to assist the police in solving crimes. It is also important that the precise details of covert police methods and tactics are generally not revealed to the public, because doing so might enable criminals to evade detection, and it might also hinder police in their efforts to disrupt and prevent criminal activity.

Similarly, people in witness protection or the subject of suppression orders have their identities protected because if they are exposed, there may be harmful or even fatal consequences for them or those close to them. Accordingly, the nature of matters examined by the Commission created some unavoidable obstacles to accessing, using, sharing and publishing material.

To a significant degree, the Commission was able to manage and resolve these issues. In many cases, it developed protocols and arrangements that enabled access to and publication of relevant information in a way that mitigated the legal, operational and safety risks involved. It was also aided by the advice and cooperation of many people and agencies. A range of Victorian, interstate and international stakeholders provided information voluntarily to the Commission, including sensitive and confidential information. Through court applications the Commission was also able to have certain orders varied to give it greater discretion and flexibility in the ways it conducted and reported on the inquiry and shared information with affected parties.

Below, the Commission expands on these issues, before proposing some options to support the effective and efficient operation of future royal commissions in Victoria.

## CONSTRAINTS AND CHALLENGES

During its inquiry, the Commission experienced some constraints and challenges related to:

- the exemption of certain office holders from the coercive powers of a royal commission
- the resolution of PII claims
- historical suppression orders and non-publication orders
- the operation of the Witness Protection Act
- access to information from some Commonwealth agencies
- certain procedural requirements under the Inquiries Act
- the production of documents, particularly by Victoria Police.

These are addressed in turn below.

### Scope of the Commission's coercive powers

As noted above, the Inquiries Act gives extensive powers to royal commissions, including the power to compel a person to produce a document and/or to attend and give evidence.<sup>3</sup>

There are certain limitations and exceptions to the coercive powers of royal commissions in Victoria. Section 123 of the Inquiries Act provides that a royal commission cannot inquire into or exercise any powers in relation to various Victorian independent bodies and office holders, including:

- a Victorian court
- the Victorian Civil and Administrative Tribunal
- a judicial officer or a staff member of Court Services Victoria in relation to the performance of judicial or quasi-judicial functions of a Victorian court
- the Director of Public Prosecutions (DPP)
- a Crown Prosecutor
- the Independent Broad-based Anti-corruption Commission (IBAC)<sup>4</sup>
- the Ombudsman
- the Auditor-General.<sup>5</sup>

These limitations aim to ensure that the powers of royal commissions do not impede the independence and status of certain independent bodies and officers.<sup>6</sup>

This principle reflects the doctrine of the 'separation of powers', which describes the way that the law gives power to the institutions of the state in Australia. This doctrine is set out in the Victorian Constitution and seeks to ensure that the government's powers are lawful and subject to checks and balances.

The exclusion of the DPP from a royal commission's investigative authority is also consistent with its independence from government in relation to decisions about commencing and conducting criminal prosecutions. The Victorian approach to the exemptions under the Inquiries Act, however, is unique. No equivalent inquiries legislation in any other Australian jurisdiction includes a provision similar to section 123 of the Inquiries Act; that is, a provision preventing a royal commission from exercising coercive powers in relation to persons or bodies who hold specified independent statutory offices.<sup>7</sup>

Some legislation for investigatory bodies and independent offices in other Australian jurisdictions does, however, limit how far certain individuals and organisations can be required to assist proceedings and inquiries.<sup>8</sup> For example, the Commonwealth Ombudsman and their delegates cannot be compelled to provide information acquired during their investigations.<sup>9</sup> In addition, the uniform evidence law recognises that judges are not compellable witnesses, meaning they cannot be required to give evidence in relation to the exercise of their judicial functions.<sup>10</sup>

## Impact on the Commission

The section 123 exemptions limited the Commission's power to compel these office holders to attend or produce documents to the Commission. Exempt office holders relevant to the Commission's inquiry included the DPP, certain Crown Prosecutors, the Ombudsman, the former Office of Police Integrity, and members of the judiciary (that is, judges or magistrates) who presided over certain court proceedings during the time that Ms Gobbo acted as a human source.

While the Commission understands why some office holders are exempt from the coercive powers of a royal commission, different interpretations of the exemption's scope posed challenges for the inquiry. Some office holders involved in the events examined by the Commission—who did not hold that office at the time of these events—believed that they were exempt from the Commission's powers under section 123.<sup>11</sup> If it is accurate, that view gives section 123 a very broad operation: it effectively immunises any person who has held one of the prescribed offices from complying with a royal commission's coercive powers, regardless of when they held that office.

Section 123 does not prevent a person or body from giving evidence or producing material *voluntarily* to a royal commission,<sup>12</sup> and in many cases, limits on the Commission's power to compel certain office holders to give evidence were overcome by their voluntary cooperation. The Victorian courts, the Office of Public Prosecutions, Victorian oversight and integrity agencies, the Commonwealth Director of Public Prosecutions, Commonwealth intelligence and law enforcement agencies and some members of the judiciary contributed to the Commission's inquiry in this way.

These voluntary contributions included providing documents and evidence, responding to requests for information and notices to produce, making written submissions on policy issues and giving informal briefings to Commission staff. This assistance was vital to the Commission's ability to conduct its inquiry. For example, IBAC disclosed approximately 3,400 relevant records (including over 130 records from the Victorian Ombudsman's holdings) to the Commission. Without the documents and evidence these organisations provided, the Commission's ability to fulfil its terms of reference would have been significantly impeded.

## Public interest immunity claims

PII is a common law doctrine but also has a statutory basis in the uniform evidence law.<sup>13</sup> When a PII claim is established, it allows the State to withhold information in legal proceedings or executive inquiries.<sup>14</sup>

Resolving a PII claim in the context of a royal commission involves balancing competing interests:

- the public interest that requires certain types of material and information to stay confidential
- the public interest in inquiries such as the commission being able to access, use and publish information relevant to its terms of reference and to conduct its inquiry transparently.

While the Commissioner, having regard to these public interests, formed a view on PII claims made over material relevant to the inquiry, ultimately the legitimacy of a PII claim is a matter for a court.

Section 18(1)(a) of the Inquiries Act provides that a person or organisation on whom a notice to produce or notice to attend is served may claim that they have, or will have, a reasonable excuse for not complying with the notice.

Section 18(2) of the Inquiries Act sets out a non-exhaustive list of the circumstances that are a reasonable excuse for failing to comply with a notice. Under this provision, it is reasonable to refuse to give information to a royal commission if the information is the subject of PII.<sup>15</sup>

In contrast to the approach taken in the Inquiries Act, most Australian and international legislation governing royal commissions, and the legislation governing standing crime and corruption commissions, does not mention the application of PII.<sup>16</sup> Of the legislation that does address PII, some appears to abrogate (override) it for the purposes of a Commission conducting its inquiry.<sup>17</sup> For example, the *Royal Commissions Act 1968 (WA)* provides that a Commission may require a public authority to produce information despite any rule of law that might justify an objection to its production ‘on grounds of public interest’.<sup>18</sup>

The *Royal Commissions Act 1923 (NSW)* also appears to override the application of PII. It gives royal commissions, when they are constituted or chaired by a judge or experienced legal practitioner, the power to prevent a person relying on the privilege against self-incrimination, ‘or on the ground of privilege or on any other ground’.<sup>19</sup>

The Victorian *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)* (IBAC Act) also overrides the application of PII in relation to certain documents or information that IBAC can compel production of for the purposes of undertaking an investigation.<sup>20</sup> For example, the IBAC Act provides that the Crown cannot assert any privilege in response to IBAC exercising certain powers. This includes the power to compel police to provide information or documents when IBAC is investigating police conduct.<sup>21</sup>

Similarly, the legislation relating to New South Wales crime and corruption commissions also provides that the privilege against self-incrimination, a duty of secrecy ‘or other restriction on disclosure’ are not available grounds to refuse to disclose information at a hearing.<sup>22</sup>

### Public interest immunity claims over material relevant to the inquiry

As explained further below, timely and complete production of material relevant to the Commission’s terms of reference was an issue from the start of the inquiry and continued throughout it. In large part, this difficulty arose because a significant amount of material that the Commission was required to examine was sensitive and subject to PII claims.

Victoria Police and other law enforcement agencies made thousands of PII claims to limit the disclosure of information presented before, and published by, the Commission.

The Inquiries Act expressly sets out that a PII claim is a reasonable excuse for not complying with a notice in relation to a royal commission<sup>23</sup> but does not provide any guidance on the process for managing and resolving PII claims. In particular, the Inquiries Act does not outline the grounds on which the State can rely on a PII claim (this could include, for example, that a PII ruling in relation to the material has previously been made by a court).

### **Public interest immunity protocol**

In 2019, the Commission, the State of Victoria and Victoria Police initially adopted a protocol to facilitate Victoria Police providing information to the Commission on a rolling basis. This protocol stated that PII claims 'should be articulated with precision and supported by the evidence' that justified the claims.<sup>24</sup> When Victoria Police considered that relevant documents or evidence likely to be referred to in the Commission's hearings were subject to a PII claim, the Commission was provided with documents in unredacted form prior to the claim being made, except for materials that would identify a human source or an individual subject to the Witness Protection Act.<sup>25</sup> The Witness Protection Act is discussed further below.

The PII protocol stated that if the Commission was unable to resolve PII claims with Victoria Police, the documents the subject of the claims and the material explaining the basis for those claims were to be provided to the State of Victoria (represented by the Department of Justice and Community Safety) for the purpose of attempting to resolve the dispute.<sup>26</sup> If agreement was not reached through this process, the Commissioner would determine the claim at a hearing as soon as possible. This aspect of the protocol was never activated, as the Commission tried to resolve PII disputes—which arose regularly during hearings, often many times a day—as quickly as possible.

When the Commissioner provided her preliminary view on PII claims relating to exhibits and transcripts that the Commission intended to publish immediately, Victoria Police routinely failed to respond promptly or at all. To end this deadlock and publish the documents as soon as possible after the related hearings, the Commissioner accepted the many Victoria Police PII claims on an interim basis and published the materials to the Commission's website with the interim claims applied, without involving the State. She reserved her position on claims she considered were not substantiated and that may be critical to the Commission's work.

Even after the Commission adopted this generous position to deal with Victoria Police's large number of PII claims, long delays continued. Victoria Police repeatedly told the Commission that its ability to make and address PII claims was hampered by a lack of resources, particularly a shortage of experienced officers with the knowledge to do this work.<sup>27</sup> The Commission notes, however, that Victoria Police expedited this process when the Commission aired these matters in public directions hearings and this resulted in media criticism of Victoria Police's tardiness.

### **Public interest immunity claims over exhibits and transcripts**

After the conclusion of the Commission's hearings in May 2020, Victoria Police was again slow in making PII claims on documents the Commission sought to tender as exhibits, even though it was aware of the importance the Commission placed on the public having access to those documents. At 30 October 2020, the Commission was unable to publish 155 exhibits, as Victoria Police had not provided its PII claims or had not responded to questions from the Commission regarding redactions to the exhibits.<sup>28</sup>

Given the sheer number of PII claims and the Commission's budgetary constraints and timeframes, it was generally impractical for disagreements about the scope of PII claims to be resolved in court.

In addition to delaying the PII process, Victoria Police interpreted matters subject to PII very broadly, including in its approach to the concept of a person's 'biodata'. This refers to all the features of a person that may allow them to be differentiated from others (including information about their character, physical features or activities). Victoria Police's approach to claiming PII over 'biodata' also had an impact on the operation of certain provisions of the Witness Protection Act, discussed in more detail below.<sup>29</sup>

Victoria Police made numerous PII claims on the basis that the relevant information constituted biodata and that disclosing the information could enable the identification of a person and endanger their safety. Frequently, Victoria Police asserted that this biodata extended beyond the most obvious types of information that might identify a person, such as their name, address, names of family members, or specific details of their criminal history. For example, Victoria Police asserted that biodata would include details such as the name of a prison or the name of a suburb where certain conversations or meetings occurred. In these and many other cases, Victoria Police contended that, while the disclosure of that particular detail alone might not result in the identification of a person, it would be possible to piece together this detail and other information in the public domain to ascertain the person's identity.

During the Commission's inquiry, Victoria Police also produced several 'confidential' affidavits and statements to the Commission that it said could only be viewed by the Commissioner and designated members of the Commission's legal team. This included documents related to Victoria Police's policies and processes for the use and management of human sources subject to legal obligations of confidentiality or privilege.

The provision of information in this way meant that critical senior Commission staff and members of its legal team did not have access to information necessary to perform their duties. Ongoing negotiation with Victoria Police was required to obtain consent for these staff to access the materials, and/or to request that the material be produced in a form suitable for it to be used and referenced in the Commission's reports. After the Commission explained that this was impeding the inquiry, Victoria Police eventually agreed to liaise with the Commission before producing 'confidential' material. Despite this agreement, Victoria Police continued to do so and to impose limits on information use and access.

## Impact on the Commission

While Victoria Police's general practice of providing unredacted documents before making a PII claim greatly assisted the Commission, the lack of procedural precision under the Inquiries Act for resolving competing interests limited the efficiency of the inquiry. This was particularly so when there was a disagreement between Victoria Police and the Commission about what constituted a legitimate claim.

As noted above, Victoria Police took a very broad interpretation of PII. Often, the Commission faced difficulties when considering the basis for Victoria Police's PII claims because they were articulated in very general terms. In addition to asserting that information included biodata that could reveal the identity of a human source, Victoria Police also frequently asserted that information could reveal 'confidential police methodology', often without any details or rationale to support the claim. Victoria Police also frequently claimed PII over material that was publicly available in media reports and court records.

Additionally, Victoria Police's PII claims were sometimes inconsistent. Often, information was discussed in a public hearing and counsel acting for Victoria Police did not raise a claim, only to subsequently request that the information be redacted from an exhibit or transcript before being published on the Commission's website.

On many occasions, the Commissioner did not make the PII determination that Victoria Police sought because the claim was too broad and/or the information relied on for the claim did not support the initial submission.

This was also the case in relation to Victoria Police's approach to making applications for non-publication orders under section 26 of the Inquiries Act, which allows the Commissioner to make an order restricting the release of information that might endanger a person's life or safety. Not every potential risk to safety falls within the terms of the Commission's power to prohibit the publication of information under section 26 of the Inquiries Act. The risk must be more than fanciful and must be in substance real or realistic.<sup>30</sup> Victoria Police made numerous applications for non-publication orders that, in the Commissioner's view, did not satisfy this threshold.<sup>31</sup>

As noted above, there were often long delays between documents being tendered before the Commission and Victoria Police completing its PII review. On several occasions, parties who had standing leave to appear before the Commission requested copies of documents in their original, unredacted form.<sup>32</sup> Sometimes Victoria Police agreed to provide these documents, subject to those parties providing undertakings to keep the material confidential, but on many occasions it refused to do so.<sup>33</sup> Some parties have submitted that this impacted upon the fairness of the Commission's processes.<sup>34</sup>

On many occasions, after the Commission had published exhibits to its website with all of the requested redactions, Victoria Police would request that the exhibits be removed from the Commission's website so that it could conduct a further PII review. The Commission had to ensure staff were available to remove the exhibits urgently. It then had to devote resources to republishing the exhibits with the additional redactions.

Despite Victoria Police's general willingness to produce unredacted copies of documents in accordance with the protocol, there were several occasions where Victoria Police refused to provide the Commission, including the Commissioner, with unredacted versions of documents that were relevant to the inquiry. In some cases, Victoria Police did not produce relevant documents at all. For example, as discussed in Chapter 10, Victoria Police did not provide the Commission with access to 11 human source files identified as relevant to the Commission's audit on the basis that those files were extremely sensitive and subject to a PII claim.

The Commission appreciates that PII claims can raise complex legal issues. Some of these complexities are explored in detail in Chapter 14. The many lengthy delays in Victoria Police's provision of PII claims to the Commission, with the explanation that only a relatively small number of Victoria Police officers had the requisite knowledge to assess material for PII claims, indicates that more officers should be trained by qualified lawyers in this complex and important task.

The Commission acknowledges that Victoria Police often worked constructively with the Commission to resolve many PII issues as they arose. This occurred by way of conversation between Counsel Assisting the Commission and counsel for Victoria Police or via email correspondence between Solicitors Assisting the Commission and the solicitors for Victoria Police.

Overall, however, the Commission considers that Victoria Police's approach to making PII claims had detrimental consequences on the inquiry. That approach:

- led to a very large number of claims that diverted significant resources and time and added to the inquiry's cost and duration
- suggested that Victoria Police did not give appropriate care or consideration to tailoring its PII claims
- suggested that Victoria Police did not sufficiently value the Commission's processes, the need to provide all relevant material to the inquiry, or the importance of conducting as much of the inquiry as possible in public and the need to give procedural fairness to potentially affected persons.

Previous inquiries have encountered similar issues, often in circumstances when highly sensitive material relating to national security has been relevant to the investigation.<sup>35</sup> Some inquiries have considered whether the governing legislation should provide specific powers and procedures surrounding provision of sensitive material to commissions and inquiries. This has included, for example, whether legislative provisions should be introduced to allow a royal commission's Letters Patent to specify a process for resolving issues relating to privileges and immunities, such as specifying that PII or legal professional privilege does not apply to that inquiry.<sup>36</sup>

## Victoria Police's response to public interest immunity issues

In its submission to the Commission in August 2020, Victoria Police acknowledged that the PII process was difficult for the Commission.<sup>37</sup>

Victoria Police highlighted examples where information that was the subject of a valid PII claim was inadvertently disclosed in correspondence or during a public hearing, or was published to the Commission's website. These examples, Victoria Police submitted, illustrated the need for its careful and cautious approach to PII during the Commission's inquiry.<sup>38</sup> Accordingly, it rejected that its approach to PII claims was too broad.<sup>39</sup>

Victoria Police made the following specific points about its approach to PII in response to the issues identified by the Commission:

- it rejected that there was anything improper about its PII claims with respect to biodata, noting that, viewed in isolation, individual claims over biodata may appear innocuous but even relatively innocuous information can be pieced together to identify someone<sup>40</sup>
- it maintained that it was appropriate to provide confidential affidavits to the Commission on the limited occasions where Victoria Police considered it necessary, and submitted that it was within Victoria Police's rights to refuse to provide that information<sup>41</sup>
- it submitted that one of the great challenges for the Commission and Victoria Police was that PII claims were not resolved prior to hearings, and this meant Victoria Police had to make retrospective claims over the material<sup>42</sup>
- it maintained that it was appropriate for Victoria Police to go back and consider its past claims and to make new claims on that material prior to its publication.<sup>43</sup>

In relation to the PII protocol, Victoria Police did not accept that the position under the Inquiries Act is unclear. It submitted that if the Commission did not accept a PII claim, it could refer the question to the Supreme Court of Victoria for determination.<sup>44</sup>

Victoria Police also submitted that it could have exercised its right under the Inquiries Act to refuse to produce material that was subject to a PII claim, which would have necessitated those claims being referred to the court if the Commission did not accept them. It submitted that it did not adopt this course because it was 'contrary to its desire to fully cooperate with the inquiry' and to ensure that the inquiry was conducted 'as efficiently as possible'.<sup>45</sup> Victoria Police also submitted that its approach to PII claims 'evolved over time' and was developed collaboratively in consultation with the Commission.<sup>46</sup> It also noted that there were 'comparatively very few' documents that it refused to provide in unredacted form to the Commission.<sup>47</sup>

Victoria Police accepted that the PII protocol was never properly used but considered that the departure from the protocol was driven primarily by the Commission, not Victoria Police.<sup>48</sup> While it acknowledged the difficulties it faced in complying with the Commission's deadlines, it submitted that those assisting the Commission very rarely complied with the timeframes for notifying Victoria Police of witnesses to be called and did not take steps to resolve any PII issues before the relevant hearing. It asserted that, as a result, it was impractical for Victoria Police to resolve PII claims in accordance with the protocol.<sup>49</sup>

Victoria Police rejected that its approach to PII demonstrates that those responsible for preparing PII claims require further training. It submitted that it engaged external lawyers and counsel to ensure that its PII claims were appropriate and consistent.<sup>50</sup> It also strongly rejected the Commission's view that Victoria Police's approach to PII demonstrated that it did not sufficiently value the processes of the Commission, the importance of conducting the inquiry as openly as possible or the need to give procedural fairness to potentially affected persons.<sup>51</sup>

Finally, Victoria Police did not accept that its approach to PII hindered the Commission's inquiry.<sup>52</sup> At its highest, it submitted, PII claims caused the Commission 'inconvenience and prevented it from publishing documents at the time that they were tendered'. It contended that, given the subject matter of the inquiry, the public interest favours taking necessary steps to ensure community safety.<sup>53</sup>

## Suppression and non-publication orders

Courts have a range of powers to make orders preventing the publication of harmful or prejudicial material (suppression or non-publication orders) and orders requiring published material to be removed (take-down orders).<sup>54</sup> For clarity, this chapter will use the term 'suppression orders' to describe orders made by courts to prevent the publication or use of information. Royal commissions also have the power to make orders preventing the publication of information. To avoid confusion, these orders are referred to as 'non-publication orders' in this chapter.

Suppression orders serve important public interests, including protecting the fair trial of an accused person and facilitating the proper administration of justice—for example, by keeping certain information secret so that it does not prejudice the deliberations of a jury or put a person in danger. On the other hand, these orders may also limit access to open justice. The principle of open justice is a fundamental common law principle.<sup>55</sup>

### The Open Courts Act

Since December 2013, courts have made suppression orders in relation to proceedings in Victoria using their statutory powers under the *Open Courts Act 2013* (Vic) (Open Courts Act).<sup>56</sup> The purpose of the Act is to create a clearer and more rigorous legislative framework for making suppression orders in Victoria while reinforcing the importance of open justice and the free communication of information relating to proceedings.<sup>57</sup>

Under the Open Courts Act, courts, and some specified tribunals, apply and enforce suppression orders and restrictions on publication of information for a range of reasons. As noted above, these reasons include protecting the identities of people involved in cases and shielding jurors from prejudicial material about an accused person who is on trial.<sup>58</sup> The Open Courts Act applies to some tribunals, including the Victorian Civil and Administrative Tribunal, and can be extended by regulation to apply to other tribunals, persons or bodies.<sup>59</sup> At present, the Open Courts Act does not apply to royal commissions.

Prior to the commencement of the Open Courts Act, the power of Victorian courts to order the restriction of access to, or prevent the publication of, information relating to court proceedings was derived from legislation and common law.<sup>60</sup> In addition, Victorian courts had powers under their governing legislation to depart from open justice in a wide range of circumstances.<sup>61</sup>

Suppression orders made under the Open Courts Act must be of a specified duration and operate for no longer than is reasonably necessary.<sup>62</sup> On the other hand, orders made under the old legislative framework often had no termination or end date. Some of these suppression orders continue to apply today.<sup>63</sup>

In 2017, an independent review of the Open Courts Act was conducted by the Honourable Frank Vincent, AO, QC (Open Courts Act Review).<sup>64</sup> The review considered whether the existing legislative framework, and in particular the Open Courts Act, struck the right balance between the need to preserve open and transparent justice, and the need to protect the interests of victims, witnesses and accused persons and preserve the proper administration of justice.<sup>65</sup>

The Open Courts Act Review made 18 recommendations to ensure that courts make suppression orders only when absolutely necessary. The Victorian Government has committed to supporting, or supporting in principle, 17 of the 18 recommendations.<sup>66</sup>

The terms of reference for the Open Courts Act Review did not require examination of historical suppression orders (that is, suppression orders made before 2013). Accordingly, it made no recommendations in relation to these types of orders. As the Open Courts Act does not apply to non-publication orders made by royal commissions, these also fell outside the review's terms of reference.

## **Impact on the Commission**

A substantial volume of material relevant to the inquiry was subject to suppression orders and non-publication orders associated with court proceedings. This prevented the Commission from accessing, publishing and disseminating evidence that was the subject of these orders.

Numerous people relevant to the Commission's inquiry were convicted of serious crimes and/or gave evidence against others for serious offences, and were the subject of suppression orders. All of these orders were made by the courts prior to the introduction of the Open Courts Act, and some do not have termination dates, instead operating in perpetuity or until a further order is made. Other orders include blanket bans that prohibited the Commission from mentioning that there was a court proceeding at all. This had a significant impact on the case reviews the Commission undertook as part of its inquiry into term of reference 1.

Certain suppression orders required the Commission to use pseudonyms to protect the identities of individuals during public hearings and in documents it produced and published. At times, this caused significant confusion for witnesses and interested people, and potentially also for members of the public, by making it difficult to understand the involvement of individuals in the matters being discussed in the hearings, and the relationships between individuals and events. Throughout the Commission's hearings, Victoria Police maintained that these historical suppression orders remained justified in their terms.

To overcome some of these issues, in 2019, the Commission made three applications to the courts to vary suppression orders so that it could access protected information and enable witnesses to provide evidence at its hearings.<sup>67</sup>

As discussed in Chapter 3, the Commission later applied to the Court of Appeal of the Supreme Court of Victoria in May 2020 to vary a further 52 suppression orders made in the Magistrates', County and Supreme Courts of Victoria, to overcome challenges the Commission faced in its reporting on matters relevant to those orders. The Court of Appeal granted that application on 23 June 2020.<sup>68</sup> These processes caused significant delay, cost and effort for the Commission and all relevant parties.

### **Locating and accessing historical suppression orders**

The Commission also experienced practical issues with locating and accessing historical suppression orders.

In Victoria, there is no publicly accessible register to locate suppression orders that Victorian courts and tribunals have made (including non-publication orders royal commissions and inquiries have made under the Inquiries Act), and find out their terms, duration and the reasons they were made. Similarly, it is unclear whether non-publication orders that previous royal commissions have made and not revoked once their inquiries have ended are retained and able to be searched for.

While Victorian courts have maintained a database of suppression orders for several years, it has limited search capability and there are potential gaps in the coverage of orders. The database was designed as an internal reference tool organised by case name; not as a comprehensive resource for journalists and others.

The Victorian courts gave certain Commission staff access to this existing online database so that they could search for suppression orders that may have been relevant to the inquiry. It became apparent as the Commission's public hearings progressed, however, that the existing database had limited search functionality and did not contain all the relevant orders. Therefore, on many occasions, Commission and court staff undertook painstaking manual searches of court files kept by each Victorian court in an effort to locate all relevant suppression orders. The Commission greatly appreciates the assistance the courts provided in facilitating this process.

Recommendation 7 of the Open Courts Act Review was to establish a central, publicly accessible register of suppression orders made by all Victorian courts and tribunals.<sup>69</sup> The Commission understands that courts are currently implementing a new database. The content of orders on this database will not be accessible by the general public, but it will be accessible by accredited users (for example, journalists). This decision to limit access has been taken because the courts are concerned that open public access would defeat the purpose of the orders.<sup>70</sup>

Initially the database will allow searching only of orders made from 1 January 2020, while the courts complete a process of auditing records dated from 1 December 2013 onwards, to ensure the accuracy and currency of records in the database. Records of orders predating 1 December 2013 from the original database will be maintained, and courts will still be able to conduct searches of these records as needed. In relation to matters that were subject to the Commission's inquiry, the Supreme Court has sought to capture the work undertaken to search for those orders, and to update the historical database records accordingly.<sup>71</sup>

If there had been a comprehensive, central and accessible register for suppression orders while the Commission was conducting its inquiry, significant time and cost would have been saved, confusion and inadvertent breaches avoided and the safety of those who genuinely needed protection better managed.

Despite the steps being taken to implement a suppression order register in Victoria, it appears there will still be difficulties with the accessibility of historical suppression orders and processes to apply to revoke or vary orders. The Victorian Law Reform Commission's (VLRC's) *Contempt of Court* review considered whether there is a need for reform in relation to historical suppression orders (referred to as 'legacy suppression orders' by the VLRC).<sup>72</sup>

The VLRC report, tabled in the Victorian Parliament on 4 August 2020, recommended that:

- the Victorian Government should resource courts to audit all existing historical suppression orders (the report also noted that ideally this audit would allow these orders to be searchable alongside the suppression orders under the Open Courts Act)<sup>73</sup>
- the Open Courts Act should be amended to enable an interested party to apply to a court to revoke a historical suppression order it has made<sup>74</sup>
- the courts should develop processes allowing an applicant and the court to have access to materials that provide evidence of why a historical suppression order was made.<sup>75</sup>

As at 30 October 2020, the Commission understands that the Victorian Government is considering the VLRC's recommendations.

## Operation of the Witness Protection Act

Section 12 of the Inquiries Act provides that a royal commission may conduct its inquiry in any manner that it considers appropriate, subject to:

- the requirements of procedural fairness
- its Letters Patent
- the Inquiries Act, the regulations and any other Act.<sup>76</sup>

The Commission's Letters Patent required the Commission to conduct its inquiry having regard to the safety of Ms Gobbo and other people affected by the matters raised by the inquiry. Because of section 12 of the Inquiries Act, the conduct of the Commission's inquiry was also subject to the Witness Protection Act.<sup>77</sup>

A royal commission has wide powers in relation to how it conducts hearings, including to determine who may be present, and to make non-publication orders.<sup>78</sup> The Witness Protection Act, however, limits a royal commission's ability to conduct its proceedings entirely in public. This is because the Witness Protection Act creates a presumption that the relevant part of the hearing be held in private.<sup>79</sup> There is also a presumption that proceedings will be subject to a non-publication order when either of the following matters are 'in issue' or 'may be disclosed':

- the original or former identity of a participant who is in witness protection
- the fact that a person in witness protection is taking part in proceedings.<sup>80</sup>

The only exception to this is where a royal commission considers that it is not in the interests of justice to keep the hearings private.<sup>81</sup>

Importantly, the Witness Protection Act does not excuse a person from producing documents to a royal commission or attending its hearings.<sup>82</sup> Therefore, the prohibition on disclosure of certain information under the Act is not a reasonable excuse for failing to comply with a royal commission's notice to provide information.<sup>83</sup>

### Impact on the Commission

Numerous people relevant to the inquiry were participants in witness protection. Some of these people were also subject to suppression orders in relation to their involvement in court proceedings.

The limits on disclosure of information arising from the Witness Protection Act compounded the effects of suppression orders on the Commission. This affected the Commission's ability to conduct hearings in public without disruption and ensure all parties with a relevant interest could participate. When information relevant to people subject to the Witness Protection Act was discussed, it was necessary for the Commission to hold hearings in private and make a non-publication order. In addition, Victoria Police restricted access to certain information that it considered subject to the Witness Protection Act to a small number of Commission staff and designated members of its legal team. This was despite the Commission explaining many times that these limitations were hindering its work.

Similarly, the interaction between provisions in the Inquiries Act and Witness Protection Act impaired relevant parties' ability to be involved in the Commission's hearings and required the Commission to apply many pseudonyms in this final report.

Over the objection of Victoria Police, the Commissioner often determined that while the Witness Protection Act operated to exclude the general public from private hearings, it did not require the exclusion of media accredited by the Commission from such hearings.<sup>84</sup>

The Commissioner considered such transparency to be in the public interest. She allowed the media to be present, with an order prohibiting the publication of everything said in the hearings, noting that this construction of 'in private' aligns with the Witness Protection Act's purpose, objective and witness protection principles. The Commissioner noted that, although the media could not publish anything said in these private hearings, it was important that they understood what they could lawfully publish and the context of the narrative.<sup>85</sup> Further, having the media present gave some assurance to the excluded public that the inquiry was being conducted in an accountable way.

Additionally, Victoria Police's broad interpretation of the concept of biodata, as discussed above, also created obstacles for the Commission in determining when the Witness Protection Act provisions requiring the protection of a person's 'identity' were engaged.

In a submission to the Commission, Victoria Police contended that its approach to information that was the subject of the Witness Protection Act was appropriate.<sup>86</sup> The Commission, after carefully considering that submission, maintains the views set out above.

## **Interaction between the Inquiries Act and Commonwealth secrecy provisions**

Generally, royal commissions established under the Inquiries Act can compel the production of evidence in circumstances when statutory secrecy provisions would ordinarily apply in Victorian legislation. This is because the powers under the Inquiries Act may override the operation of those provisions.<sup>87</sup>

The Inquiries Act states that it is not a reasonable excuse for a person to refuse or fail to comply with a requirement to provide information or produce a document because other legislation would either:

- prohibit a person from providing information
- impose a duty of confidentiality on that person, meaning that they cannot provide the information.<sup>88</sup>

The Inquiries Act also states that a person who provides such documents or evidence is protected from any liability for complying with a royal commission's requirement to produce documents or provide evidence.<sup>89</sup>

Secrecy and confidentiality provisions in Commonwealth legislation, however, do not interact with the Inquiries Act in the same way as those in Victorian legislation. The interaction between the Inquiries Act and secrecy and confidentiality provisions contained in Commonwealth legislation raise some difficult constitutional issues; in particular, in some circumstances, Commonwealth secrecy and confidentiality provisions override, or otherwise render inapplicable, those parts of the Inquiries Act that allow a royal commission to compel the production of documents subject to a secrecy or confidentiality provision.

## Impact on the Commission

Secrecy and confidentiality provisions contained in Commonwealth legislation prevented the Commission from obtaining evidence directly from certain parties.

For example, the inconsistency between provisions in the Inquiries Act and those included in the *Australian Federal Police Act 1979* (Cth) (AFP Act) meant that Australian Federal Police staff (including the Commissioner and Deputy Commissioner) were unable to provide evidence directly to the Commission.

The Commission also encountered issues with obtaining relevant documents from the Australian Criminal Intelligence Commission (ACIC) (formerly the Australian Crime Commission—ACC) because of the inconsistency between provisions in the Inquiries Act and the *Australian Crime Commission Act 2002* (Cth) (ACC Act). In particular, section 25A(9) of the ACC Act allows an ACIC examiner to direct that certain information must not be used or disclosed in some circumstances (through ‘confidentiality directions’). Using or disclosing information subject to a confidentiality direction is an offence.<sup>90</sup>

Both Victoria Police and the Commission were bound by ACIC confidentiality directions. Some directions prevented Victoria Police from providing the Commission with ACIC transcripts, while the Commission was prohibited from including certain information covered by a direction in public transcripts or submissions or disclosing it to other parties.

In certain circumstances, parties arranged for the Commission to receive evidence through an alternative party that was not subject to the relevant Commonwealth secrecy or confidentiality provision.<sup>91</sup> The Commission also requested that ACIC vary some confidentiality directions. Despite ACIC’s cooperation, the need to take these steps complicated and delayed the production and receipt of documents.

## General procedural issues

A royal commission must comply with the procedures set out in the Inquiries Act. The Commission encountered several practical issues due to some of these requirements, as discussed below.

### Disclosure of information by the Ombudsman

The *Ombudsman Act 1973* (Vic) (Ombudsman Act) states that the Victorian Ombudsman may provide or disclose information obtained in the performance of their duties and functions to certain persons or bodies specified under the Act.<sup>92</sup> These include IBAC, the Auditor-General, Victoria Police and the DPP—but not royal commissions.<sup>93</sup>

The exclusion of royal commissions from this list of persons and bodies impacted the Commission. During the inquiry, the Ombudsman identified extensive historical records in their holdings that were relevant to the Commission’s terms of reference. To deal with the legislative constraints, which meant these records could not be provided directly to the Commission, an alternative method of obtaining the records was needed. Consequently, the Ombudsman disclosed the relevant material to IBAC in accordance with the IBAC Act, which gives IBAC information sharing powers, including the power to share information with a royal commission.<sup>94</sup> IBAC then assessed the material and disclosed it to the Commission.

## Obtaining written statements

As explained above, the Inquiries Act provides a royal commission with the power to compel the attendance of a witness or compel a person to produce a specified document or other thing to the commission.<sup>95</sup>

This power is limited to documents that are already in existence and may not extend to compelling a person to create a document for production to a royal commission and provide it to the Commission within a specified time; for example, a witness statement.<sup>96</sup>

Consequently, if a person declines to provide a statement, a royal commission must issue a notice to attend so that it can gather information from the person at a hearing.<sup>97</sup> At various points during the inquiry, this posed challenges for the Commission. For example, without a written statement, it was difficult to assess whether the person's evidence was necessary to this inquiry and whether it was appropriate to issue a notice to attend. As such, at times the Commission was required to call witnesses to give evidence and extend hearing dates unnecessarily.<sup>98</sup>

A similar issue was previously raised in relation to the provisions of the *Royal Commission Act 1902* (Cth) by the Royal Commission into the Building and Construction Industry and the Home Insulation Royal Commission. Both commissions noted the difficulties and delays they encountered because that Act prevented them from compelling a person to provide a written statement.<sup>99</sup>

The ability to compel a person to create a written statement without issuing a notice to attend would have enabled the Commission to manage its hearing schedule more efficiently.

## Requirement to place orders in a conspicuous place

The Inquiries Act sets out the circumstances in which a royal commission may make an order excluding access to proceedings or the publication of information.<sup>100</sup> In particular, the Act replicates some provisions included in the Open Courts Act and specifies that copies of orders made by a royal commission must be placed either:

- on the door of the place where hearings are conducted
- in a conspicuous place where notices are usually posted.<sup>101</sup>

As discussed in Chapter 3, the Commission made in excess of 370 exclusion and non-publication orders. Given the large number of orders made, the door of the hearing room was soon covered with orders.

As the number of orders grew, Commission staff implemented various practical solutions in order to comply with the Inquiries Act (including compiling a folder of orders to place near the hearing room, and emailing orders to members of the media so they could create their own databases). In addition, when the Commission conducted its policy hearings in May 2020, the COVID-19 pandemic and related restrictions required these hearings to be conducted remotely, meaning there was no physical hearing room door. The Commission put these orders on the website, which it considered to be another 'conspicuous place'.

## Requirement for personal service of notices

The Inquiries Act provides that service of a notice to produce documents or to attend a royal commission must be by way of personal service (that is, serving the notice on that person personally).<sup>102</sup> The Inquiries Act does not allow for alternative ('substituted') means of service. In contrast, the Supreme Court and the County Court are able to order service of a document by other means where personal service is not reasonably practical.<sup>103</sup>

Often, the Commission engaged with individuals before serving a notice upon them, to ask whether the notice could be served electronically. Fortunately, all those contacted agreed to this course. If the Commission could not contact an individual, it had to engage a process server to serve the notice, which added time and cost to the inquiry.

## Victoria Police's cooperation with the inquiry

As the Commission was tasked with examining the past conduct of Victoria Police officers and the adequacy and effectiveness of its current policies and practices, it relied heavily on Victoria Police's cooperation.

Victoria Police has always maintained that it has done everything possible to assist the work of the Commission. This chapter has already outlined some of the ways that Victoria Police's engagement with the Commission hindered and delayed the inquiry, despite its public assurances.<sup>104</sup> In many respects, Victoria Police's approach to the production of documents also hampered the Commission's work.

### Victoria Police's approach to document production

Shortly after the inquiry commenced, in anticipation of the large volume of documents likely to be received, the Commission established a document management protocol that outlined the method by which all documents were to be prepared and provided to the Commission.<sup>105</sup> This protocol specified various requirements, including the naming and dating of documents, preservation of metadata and removal of duplicated or unusable documents. There were also requirements for producing documents subject to a PII or privilege claim.

The Commission received over 155,000 documents during the inquiry, with some running to thousands of pages. Victoria Police produced over 84,000 documents (consisting of over 740,000 pages).<sup>106</sup>

Difficulties encountered in relation to Victoria Police's production of documents included:

- non-compliance with the document management protocol, including the production of untitled and undated documents, duplicate documents, documents that were not electronically searchable, large batches of unrelated documents, and documents classified incorrectly<sup>107</sup>
- delays in producing documents
- diaries/day books and other significant records being lost due to poor record keeping and document storage practices
- non-compliance with specific categories of documents described in notices to produce.

#### Non-compliance with document management protocol

Victoria Police produced thousands of documents that were undated or had meaningless or inaccurate titles (for example, handwritten documents titled 'diary entries', with no reference to the name of the police officer to whom the diary belonged). The Commission had to follow up with Victoria Police continually; for example, to confirm whether policy and training documents produced were the current versions.

Further, police diaries were often produced in multiple productions, with redactions to multiple pages, or as extracts, making it difficult for the reviewer to determine page numbers and dates of entries. The Commission spent significant time and resources reviewing and ordering these diaries.

## Delays in document production and 'lost' records

Document metadata accessed by the Commission indicated that there was often a significant delay between Victoria Police identifying a document as relevant and producing it to the Commission.<sup>108</sup> For example, around 400 documents were located and reviewed by Victoria Police in April 2019 but not produced to the Commission until July 2019.<sup>109</sup> Counsel for Victoria Police told the Commission that this was because, once a document was identified as being relevant, it was placed in a queue for the processes leading to production. These production processes took significant time and the resulting delays impacted not just the Commission, but the witnesses who appeared before it. These impacts are explained further below.<sup>110</sup>

Frequently, Victoria Police did not produce documents referred to in statements from its officers (such as diary entries and information reports) at the time a statement was provided to the Commission.<sup>111</sup> This made it difficult for Counsel Assisting to assess whether a witness should be called to give evidence.

There were instances where statements and other documents relevant to a witness were produced to the Commission the night before the witness was to give evidence. When documents were produced in this manner, it meant there was little time for Counsel Assisting or the Commissioner to review the information prior to the witness being cross-examined. Several parties appearing before the Commission made complaints about this late production as it hampered their ability (and their counsel's ability) to prepare for hearings.<sup>112</sup>

Victoria Police also produced a significant number of documents when the Commission was nearing the end of its hearings.<sup>113</sup> For example, in late January 2020, Victoria Police identified approximately 970 documents of relevance to the inquiry.<sup>114</sup> Most of these documents fell within the scope of notices to produce that the Commission issued in January 2019. On 27 April 2020, Victoria Police produced 38 hours of tapes of relevant intercepted phone conversations.

Some documents were also produced well after the conclusion of the Commission's hearings—for example, a statement and its annexures produced in August 2020 that covered subject matter that was clearly relevant to issues addressed at the hearings throughout 2019.<sup>115</sup> Victoria Police's late and voluminous productions affected witnesses as well as the Commission. Late production of documents sometimes contained material related to witnesses who had already been examined, which meant that the witnesses did not have an opportunity to consider these materials before their attendance and the Commission did not have an opportunity to put the materials to them during the hearings.<sup>116</sup> Time constraints on the Commission's reporting did not allow for all such witnesses to be recalled. This resulted in some people making procedural fairness complaints. Those complaints were a factor in the Commissioner's decision not to make any findings concerning potential criminal conduct.<sup>117</sup>

There were also significant issues regarding lost police diaries and other important records. The reasons for this varied, but one common reason was Victoria Police's poor document storage practices.

On one prominent occasion, Victoria Police found diaries of former Chief Commissioner Simon Overland, APM after his former chief of staff and now Chief Commissioner Shane Patton, APM remembered packing them up in 2011. Mr Overland had previously given evidence to the Commission that he could not recall keeping a diary during his time at Victoria Police and so had to be re-examined on these matters.<sup>118</sup> On another occasion, Inspector Martin Allison found his diaries in the roof of his house in May 2020, after having given evidence to the Commission in May 2019.<sup>119</sup>

Another example was Victoria Police locating Ms Gobbo's 1995 human source registration documents in June 2018.<sup>120</sup> The belated identification of these key documents led to the expansion of the Commission's inquiry and amendments to the terms of reference.<sup>121</sup>

Some witnesses also gave evidence to the Commission about events recorded in police diaries or day books that Victoria Police could not locate. These witnesses submitted that they were hampered in giving accurate and reliable evidence as a result.<sup>122</sup>

### **Non-compliance with notices to produce**

Victoria Police also took a very narrow view of the scope of various notices to produce.<sup>123</sup> For example, on many occasions, the Commission was not provided with all relevant diary entries of officers. In other circumstances, entries that fell within the scope of notices to produce had been redacted.<sup>124</sup> It became apparent that Victoria Police had interpreted 'relevance' very narrowly and only produced diary pages where there were specific references to Ms Gobbo's name or human source number. Consequently, the Commission requested that the original diaries of witnesses be made available in the hearing room when the witnesses were giving evidence.

Victoria Police also resisted producing several policy-related documents on the grounds that they were not relevant to the Commission's terms of reference; for example, policies relating to Victoria Police's management of confidential or privileged information obtained through the use of certain covert police powers.<sup>125</sup> On some occasions, this diminished the Commission's ability to ensure that its proposed recommendations were consistent with broader Victoria Police processes and operational requirements. On many occasions, in respect of both policy-related material and of information related to Ms Gobbo and the conduct of Victoria Police, the Commissioner had to issue multiple notices to produce of increasing specificity to obtain all relevant documents, after Victoria Police asserted that the material was 'out of scope' of the original notices.<sup>126</sup>

### **Victoria Police's response to document production issues**

In a submission to the Commission in August 2020, Victoria Police asserted that, through the work of Taskforce Landow, it supported the work of the Commission 'proactively and transparently'.<sup>127</sup>

It noted the very large number of documents that were required to be produced and the significant financial and human resources required to coordinate that production.<sup>128</sup> Victoria Police submitted that it 'pursued all reasonable lines of inquiry' to support the work of the Commission and continued to search for and produce material even where it was clear that the production of this information would be 'likely to draw criticism of [Victoria Police] because the material has not been available sooner'.<sup>129</sup> It also submitted that while the time required to locate the material and prepare witness statements was challenging, given the time constraints imposed by the Commission, this 'was a function of the nature of the task, not a reflection on the resources nor commitment to acquitting it'.<sup>130</sup>

Victoria Police also submitted that it took a proactive approach in responding to notices to produce. It stated that over 250 notices to produce were served on Victoria Police and its current and former officers, and that, while some of those notices required only a short investigation of Victoria Police databases, some notices were drafted 'in a very broad-ranging way' meaning the identification, consideration and production of material covered by these notices was a 'substantial undertaking'.<sup>131</sup>

Victoria Police did not accept the Commission's characterisation of its approach to notices to produce and submitted that any delays were a function of the volume and sensitivity of the material that had to be located and reviewed, as opposed to the attitude and commitment of Victoria Police to the task.<sup>132</sup>

### **Victoria Police's cooperation in relation to other parts of the inquiry**

Victoria Police did assist and cooperate with the Commission in several ways during the inquiry. This included preparing witness statements and providing contact information for persons of interest to the inquiry.<sup>133</sup> Victoria Police also attended meetings with Commission staff in the first few months of the inquiry.<sup>134</sup> The purpose of these meetings was to clarify and explain the Commission's priorities as the inquiry progressed.

The Commission would especially like to acknowledge and express its gratitude to Victoria Police officers, Executive Command and Taskforce Landow for supporting the focus groups that the Commission conducted as part of its inquiry into term of reference 3. The focus group objectives and outcomes are outlined in Chapters 11 and 12.

Victoria Police assisted the Commission by identifying possible participants and encouraging and facilitating their participation in the focus groups. The positive engagement and contribution of focus group participants was of great benefit. It helped the Commission understand the practical operation of Victoria Police's human source management framework and the possible operational impacts of system changes and improvements.

In contrast, in November 2019, The Police Association (TPA) advised the Commission that it did not support the focus groups, due to concerns that 'whatever might be adduced during these sessions could subsequently inform the Commissioner's findings in respect of some or all of a cohort of our members'. It further advised that it would communicate this position to any Victoria Police officers who contacted TPA regarding the focus groups.<sup>135</sup>

The Commission considered this position to be unhelpful and unwarranted. In response, TPA reiterated that it was providing legal representation to a particular cohort of its members and considered that their rights and interests may have been significantly affected by the matters being explored in the sessions.<sup>136</sup> It submitted that it took a reactive response to the focus groups; that is, explaining its position to members on an individual basis when and if they sought TPA's advice. It maintained that this approach to the focus groups was appropriate.<sup>137</sup>

The Commission acknowledges TPA's response but also notes that its responsibilities are to all its members, not just those to whom it provided legal representation during this inquiry. The Commission considers it would have been in the interests of the majority of its members if TPA had supported police participation in the focus groups, which gave officers the opportunity to engage constructively with the Commission and contribute to the development of future policy and procedural reforms.

## CONCLUSIONS AND RECOMMENDATIONS

As the Inquiries Act is relatively new, having commenced in 2014, this was the first Victorian royal commission that heavily relied on the use of the investigative and coercive powers the Act provides. This meant the Commission had to tackle novel issues that arose regarding the practical operation of several parts of the Act and its interaction with other areas of law.

The Inquiries Act is intended to provide a royal commission with the flexibility to conduct its inquiry in the manner it considers appropriate, subject to the express requirements of the Act and its Letters Patent. In large measure, it does so.

Below, the Commission makes only one recommendation concerning a proposed amendment to the Inquiries Act, in relation to the issue of PII. That is because the Commission considers that this issue seriously hindered the conduct of the inquiry and had a detrimental impact on the Commission's ability to inquire into subject matter relevant to its terms of reference.

The Commission was generally able to navigate and resolve the other issues regarding the Inquiries Act and the Ombudsman Act, and consequently, does not make formal recommendations to address these issues. Nonetheless, if Government were to introduce legislative amendments to address these issues, the Commission considers that such reform would be in line with the broader objectives of the Act and would help future royal commissions and boards of inquiry operate effectively and efficiently.

In this section, the Commission presents potential reform options for Government's consideration, to improve the legislative framework and processes for future inquiries.

## Clarifying the scope of the Commission’s coercive powers

The exclusion of certain officers from the Commission’s coercive powers under section 123 of the Inquiries Act—and the ambiguity around whether that exclusion applies to conduct of an exempt office holder before they were in that role—presented some challenges for the Commission. Several witnesses who were relevant to the inquiry held multiple offices over the period the Commission was examining, and only some of these roles fell squarely within the terms of the exemption. As a result, several office holders declined to provide information or appear before the Commission voluntarily, and the Commission was unable to compel these officers to do so. There were, however, several exempt office holders and organisations who voluntarily responded to the Commission’s requests and provided documents, written submissions and informal briefings to the Commission’s staff. Their contributions greatly assisted the Commission’s work and the Commission is grateful to them.

The Commission notes the breadth of the exemption under section 123 of the Inquiries Act. In particular, it notes that in virtually all cases, the exemption attaches to the office and not to the office holder in the performance of their functions in that office.<sup>138</sup> This statutory exemption does not align with arrangements in other Australian jurisdictions. No equivalent inquiries legislation includes a provision similar to section 123.

The Commission suggests that the Government considers amending section 123 of the Inquiries Act to clarify the restrictions on the scope and powers of a royal commission or board of inquiry in relation to certain office holders. It suggests that the restrictions should not extend to prevent inquiry into conduct outside the performance of those roles. For the avoidance of doubt, the Commission suggests that the section be amended to allow inquiry into matters that occurred before and after these office holders held the relevant office.

## Removing the ability to claim public interest immunity

As outlined earlier in this chapter, the Commission experienced a range of difficulties due to Victoria Police’s approach to PII. Victoria Police has made a number of points in response to the issues the Commission identified.<sup>139</sup> Overall, while it acknowledged that the PII process was difficult for the Commission, it did not accept that its approach to PII hindered the inquiry and reiterated the importance of taking steps to protect community safety given the subject matter of the inquiry.<sup>140</sup> The Commission has considered Victoria Police’s submissions carefully. It acknowledges the importance of legitimate PII claims to the protection of both individuals’ safety and confidential police methodology. It also acknowledges the difficulties under which Victoria Police was operating in responding to the Commission’s inquiry. Nonetheless, the Commission is firmly of the view that Victoria Police’s approach to PII claims was detrimental to the work of the inquiry for the reasons given earlier in this chapter.

The Commission, and some of those appearing before the Commission, spent considerable time and resources managing and resolving PII claims. While this issue arose due to the sensitivity of matters and material the Commission examined, the process for resolving PII claims hampered its ability to progress the inquiry in an effective, timely and transparent manner. It delayed the publication of hearing transcripts and exhibits on the Commission’s website. It also prevented the Commission from promptly providing documents to potentially affected persons prior to Victoria Police conducting a review and redacting any material over which it claimed PII. At the time of finalising this report, the Commission was unable to assess and resolve many of Victoria Police’s PII claims.

As outlined earlier in this chapter, the Commission set up a protocol to resolve PII claims.<sup>141</sup> However, without legislative guidance in the Inquiries Act, and for the reasons explained earlier in this chapter, the protocol was unable to deal with all the issues that arose in respect of the treatment of documents that were subject to PII claims. In a submission to the Commission, Victoria Police suggested that it did not need to produce anything subject to PII to the Commission because of the Inquiries Act, but it did nonetheless produce unredacted material, and in effect allowed the Commissioner to rule on the PII claims in order to be cooperative.<sup>142</sup>

It is important to note that due to the current approach to PII under the Inquiries Act, if Victoria Police had refused to produce all material it claimed to be subject to PII, it would have been impossible to conduct the inquiry effectively. The Commission would have been required to determine and refer each unresolved PII claim to the Supreme Court before being able to access that material.

Ultimately, the approach to PII under the Inquiries Act impeded the Commission's ability to conduct its inquiry. In particular, although Victoria Police often produced or permitted the Commission to review unredacted copies of documents subject to PII claims, there were several occasions where it declined to do so, either due to the operation of the Witness Protection Act, or where it considered the information was particularly sensitive. This left the Commission in the difficult position of being unable to independently assess the basis of the claim. It also inhibited the Commission's ability to fully interpret the relevance of certain documents and potentially limited legitimate lines of inquiry.

The Commission notes that other jurisdictions appear to have abrogated the common law principle of PII from their inquiries legislation.<sup>143</sup> The IBAC Act also abrogates PII in relation to certain documents or information that are subject to IBAC's coercive powers.<sup>144</sup>

As it is likely that any future royal commission dealing with sensitive material will confront similar difficulties to those encountered in this inquiry, the Commission recommends that the Victorian Government amends the Inquiries Act to remove a PII claim as a reasonable excuse for a person failing to comply with a notice to produce information to, or attend, a royal commission. This would enable a commissioner to determine whether the material should be acted on or published, as for claims of legal professional privilege.<sup>145</sup>

The timeframe the Commission has set for this recommendation reflects the need for Government consultation with the relevant stakeholders on the proposed legislative amendments.

#### RECOMMENDATION 91

That the Victorian Government, within 18 months, amends the *Inquiries Act 2014* (Vic) to:

- a. remove the ability for a person to refuse to comply with a notice to give information to a royal commission on the basis that the information is the subject of public interest immunity
- b. insert a provision to make clear that it is not a reasonable excuse for a person to refuse or fail to comply with a requirement to give information (including answering a question) or produce a document or other thing to a royal commission on the basis that the information, document or other thing is the subject of public interest immunity
- c. specify that any such information or document or other thing does not cease to be the subject of public interest immunity only because it is given or produced to a royal commission in accordance with a requirement under the Act.

## Clarifying arrangements for providing confidential information

On many occasions during the inquiry, Victoria Police produced ‘confidential’ affidavits or statements that it said could only be viewed by the Commissioner and/or specified lawyers assisting the Commission. Providing information in this highly restrictive manner was often unnecessary and inappropriate. It frustrated the inquiry and delayed its work because of the time taken to obtain Victoria Police’s permission to allow other Commission staff and lawyers to view the material.

Victoria Police maintains that it was appropriate to produce information in this manner on these occasions, and that it could have exercised its rights under the Inquiries Act and claimed PII over that material, such that it was not produced in any form.<sup>146</sup> The Commission acknowledges that Victoria Police did have that right in relation to parts of the material that were subject to a legitimate claim of PII. It remains of the view, however, that it was unnecessary to limit access to so few Commission staff and lawyers, particularly given that often Victoria Police later accepted it could be accessed by a much wider group, or advised that its PII claims were confined to smaller portions of that material.

The Commission suggests that in any future inquiry where similar issues are anticipated, it may be beneficial for the royal commission or board of inquiry to develop protocols and procedures that address the provision of information in this form from the outset. The Commission suggests that, if a party participating in an inquiry considers they need to provide information on a confidential basis, they should liaise first with the commission or board of inquiry to discuss the nature of the material and be advised which staff or legal representatives need access to the material in order to effectively carry out their duties.

## Building on reforms to support open justice

As noted earlier in this chapter, because so many individuals relevant to the Commission’s inquiry were the subject of suppression orders made before the Open Courts Act was introduced in 2013, many orders do not have designated termination dates, but rather operate until further order or indefinitely. These orders were often difficult to locate in the existing courts’ database. These issues delayed the Commission’s proceedings and inhibited its ability to access evidence and provide it to people affected by the inquiry.

At times, these historical suppression orders meant that the Commission had to close its hearings. Further, it was often difficult to publicly present a coherent narrative of important past events because critical aspects of the story could not be discussed or published. Some historical suppression orders still in force are so broad that they prohibited the Commission from mentioning even the existence of a court proceeding related to a person potentially affected by Ms Gobbo’s use as a human source.

Some of these issues were overcome by making applications to courts to revoke or vary suppression orders, which took up the Commission’s limited time and resources. In determining the Commission’s application to vary several suppression orders in 2019, the Court of Appeal acknowledged the high public interest in permitting the Commission to conduct a thorough analysis of the matters relevant to the inquiry.<sup>147</sup>

As outlined earlier, before publishing Counsel Assisting submissions and completing this final report, the Commission successfully applied to the Court of Appeal to have 52 further suppression orders varied.<sup>148</sup> These variations were necessary for the Commission to afford procedural fairness to affected parties, to consider responsive submissions from affected parties that referred to information otherwise subject to the orders and, where necessary, to publish that information.

While this enabled the Commission to conduct its inquiry in a more transparent and public way, it also caused significant delay, cost and additional work. It is noted that Victoria Police did not oppose the Commission's application to the Court of Appeal to have the suppression orders varied.

In addition, the lack of a central register or database of suppression orders made the task of identifying all relevant suppression orders challenging, as the Commission and the courts had to perform extensive manual searches of court databases. In many cases, even once the orders were located, it was difficult to identify the grounds upon which they had originally been made, and therefore difficult to determine if it was appropriate to apply to have them varied or revoked.

As noted earlier, the Victorian courts are implementing a new database for suppression orders, along with data entry processes to improve the ability to search for and locate orders. Statistics from the database will be publicly available, and for the first time accredited journalists will have direct access to the database.<sup>149</sup> While the Commission appreciates that the new database must have a mechanism to restrict public access to sensitive information, it also considers it important that the new database has sufficient capability so that all those with a legitimate reason to do so can obtain access to information about suppression orders (such as the grounds on which they were made) so that they can apply to vary or revoke orders. The Commission understands that the new database will have this capability.

While the implementation of this database is a very positive reform, the Commission remains supportive of the VLRC's recommendation for the courts to conduct an audit of all historical suppression orders (that is, in addition to those dated from 2013 onwards),<sup>150</sup> as it would bolster the important principle of open justice in Victoria.

The Commission appreciates, however, the courts' concerns that it may be difficult to justify an audit stretching back before 2013, due to the resources involved; the limited utility given a high percentage of orders are of little interest; and the fact that even the most diligent audit cannot deliver a comprehensive database retrospectively due to the imperfect quality of historical records. These challenges may make an audit of historical suppression orders impractical.

The Commission also supports the VLRC's recommendation to amend the Open Courts Act to enable an interested party to apply to the court for the revocation of a historical suppression order made by that court.<sup>151</sup> This reform would harmonise the process for revoking or varying historic suppression orders with the process that already applies under the Open Courts Act. It would therefore simplify and clarify the law.

In addition, the Commission suggests that Government should consider amending the Open Courts Act so that it applies to royal commissions and boards of inquiry under the Inquiries Act. This would further harmonise the suppression order regime in Victoria.

## **Navigating the interaction of the Inquiries Act and the Witness Protection Act**

The Witness Protection Act and its interaction with the Inquiries Act is complex and, given the subject matter of the Commission, this legal matrix was especially difficult to navigate. The Commission addressed many of the challenges presented by using pseudonyms to protect the identity of witnesses, but not all matters the Commission examined could be fully put into the public domain.

The Witness Protection Act performs an important function and the Commission was mindful of the need to take steps to protect the safety of people in witness protection and of those close to them. The Commission does not consider it necessary to make any amendments to how the Witness Protection Act interacts with the Inquiries Act, but has addressed the issue in this report to assist any future inquiries where Witness Protection Act matters are raised.

## Identifying and managing the impacts of Commonwealth secrecy and confidentiality provisions

The Commission's ability to compel production of evidence was limited by the interaction between provisions in the Inquiries Act and certain secrecy and confidentiality provisions contained in Commonwealth legislation.

As outlined earlier in this chapter, these issues are often legally complex and can give rise to constitutional issues. The Commission notes that reform options aimed at resolving these issues are relatively limited without the cooperation of the Commonwealth, given constitutional constraints. Consequently, the Commission does not propose any reforms. Where it is anticipated that future inquiries will involve engagement with Commonwealth agencies, it may be beneficial for the inquiry to identify the potential impacts of Commonwealth legislation at the outset and consider how best to manage them.

## Addressing procedural issues related to the Inquiries Act

There are three further aspects of the Inquiries Act that the Victorian Government could consider addressing through legislative amendment:

- the power to obtain written statements
- the requirement to place orders on the hearing room door
- the requirement for personal service.

### Introducing a clear power to obtain written statements

As noted earlier in this chapter, some Australian jurisdictions have specific provisions giving royal commissions a power to compel a person to make a written statement without issuing them a notice to attend.

If the Commissioner had been able to rely on an equivalent power during this inquiry, it would have enabled the Commission to obtain and consider a written statement within a specified timeframe, and in so doing, to assess the need to issue a notice to attend to that person. Instead, the Commission was dependent on Victoria Police, its current and former officers, and Ms Gobbo to voluntarily produce statements within their own timeframes. When Ms Gobbo did eventually provide a statement, it did not fully address the Commission's questions. Further, the inability to compel the production of statements from current and former officers delayed the inquiry and increased the overall hearing time. This was unsatisfactory.

It may be arguable that section 17(1) of the Inquiries Act already empowers a royal commission to compel a person to make and produce a written statement, but that submission was not made to this Commission. Given the absence of any clearly stated power to compel a written statement in a specified timeframe, the Commission considers that this could be clarified in the legislation.

Accordingly, the Commission suggests that the Victorian Government considers including a provision in the Inquiries Act to provide that a royal commission or board of inquiry can give a notice requiring a person to produce written information within a specified timeframe and in a specified way.

This suggested provision is modelled on section 5(1)(d) of the *Commissions of Inquiry Act 1950* (Qld).

## **Modernising the requirement to publish non-publication orders**

The Inquiries Act prescribes the circumstances in which a royal commission can make orders excluding access to its proceedings or preventing the publication of information relating to its inquiry. It requires that when an exclusion or non-publication order is made, a copy of the order must be posted on the hearing room door, or in another conspicuous place where notices are usually posted near the hearing room.<sup>152</sup>

The Commission made in excess of 370 exclusion and non-publication orders due to the sensitivity of issues and material it was examining. As the number of these orders grew, the requirement to place copies of all the orders in a conspicuous place became administratively impractical. It is also inconsistent with modern paperless systems and practices.

The requirement in the Inquiries Act is clearly designed to draw public and media attention to the existence of these orders. The Commission considers that this requirement could be modernised by instead providing for orders to be made available on the Commission's website. A notice could still be posted on the hearing room door where practical, alerting people to the existence of the orders and referring them to the inquiry's website or a contact person to obtain access to the orders.

The Commission considers there are several benefits to this approach. The orders would be available online to the public, not only those people who are physically able to attend the hearing venue. Many people viewed the Commission's proceedings online through the live stream. Had the Commission been able to adopt this approach, these viewers could have accessed these orders as they were viewing the live stream. This would also support openness and transparency in a royal commission's proceedings, by providing the public with a better understanding of the orders and why the hearing was closed to the public.

Additionally, making all non-publication orders available online would help the media to determine more easily what information cannot be published and to follow the orders with greater certainty. The Commission circulated non-publication orders to media by email and dealt with multiple media clarification requests regarding whether non-publication orders had been made. This process would have been more efficient if the Commission had been able to direct the media to online versions of the relevant orders.

## **Introducing more flexibility in the requirement for service of notices**

The Inquiries Act requires that a notice to produce or notice to attend must be served on the person personally, with no option under the Act to serve a person through alternative, 'substituted' service when personal service is not practicable.<sup>153</sup>

In circumstances when the Commission was not able to contact a person to arrange service, it had to engage a process server to serve that individual. This added time and cost to the serving process.

Accordingly, the Commission suggests that the Inquiries Act be amended to allow for service of notices to produce and notices to attend through a means of substituted service, such as electronically. This would be in line with developments in how courts are allowing alternative means of service,<sup>154</sup> including where appropriate by electronic means, and would modernise this procedural requirement under the Inquiries Act. It would also provide future inquiries with greater flexibility in the service of documents.

## Enabling disclosure of information by the Ombudsman

The absence of a legislative provision under the Ombudsman Act enabling the disclosure of information to a royal commission meant that, to provide relevant information to the Commission's inquiry, the Ombudsman had to disclose that information to IBAC, which then assessed the material and disclosed it to the Commission.<sup>155</sup> This process was legally and procedurally complex.

Given the Ombudsman's significant role in overseeing Victorian public sector organisations, the Commission suggests that Government considers amending section 26FB of the Ombudsman Act to allow for disclosure of materials to a royal commission. This would simplify future processes and provide consistency with the arrangements for other integrity and oversight agencies such as IBAC, which are able to facilitate disclosure of documents to royal commissions under their governing legislation.<sup>156</sup>

## Addressing document production concerns

As outlined earlier in this chapter, the Commission faced considerable challenges in relation to document production. The Commission considers that these challenges could have been avoided to a significant degree if individuals and organisations participating in the inquiry had complied with the document production protocol established at the start of the inquiry.

As noted earlier, the Commission encountered difficulties arising from Victoria Police's non-compliance with document production and notices to produce. The Commission acknowledges that Victoria Police committed extensive resources to this task. But instead of providing its records to trusted and responsible Commission staff, Victoria Police insisted on controlling the production of the requested documents, and drip feeding them to the Commission only after it had carefully considered, vetted and, on occasions, redacted them. The Commission remains of the view that this approach had a significant and negative impact on the Commission's work.

Victoria Police's frequent failure to produce documents in a timely and comprehensive manner, together with its, at times, narrow view of and obdurate approach to the scope of notices to produce, unnecessarily diverted the Commission's resources and impeded the inquiry.

At the time of finalising this report, the Commission cannot be certain that it received all information from Victoria Police it considered relevant. Therefore, the Commission's findings and recommendations, and the submissions of Counsel Assisting, are based on the material that was available to the Commission at the time of writing.

The Commission acknowledges that Taskforce Landow faced significant challenges in locating material required to be produced to the Commission because Victoria Police has no central repository of material.<sup>157</sup>

The Commission also acknowledges that many individual officers, including many of those involved with Taskforce Landow, made efforts to work effectively within these constraints and support the work of the Commission.

While it was outside the Commission's terms of reference to examine Victoria Police's record-keeping practices and information management systems, the Commission encourages Victoria Police to address some of the issues encountered by the Commission and ensure that they do not impede the conduct of future inquiries involving Victoria Police.

# Endnotes

- 1 *Inquiries Act 2014* (Vic) s 18(2)(c).
- 2 *Inquiries Act 2014* (Vic) s 123.
- 3 *Inquiries Act 2014* (Vic) s 17.
- 4 The Office of Police Integrity is also covered by this section as the predecessor to IBAC: *Independent Broad-Based Anti-corruption Commission Act 2011* (Vic) sch cl 4.
- 5 *Inquiries Act 2014* (Vic) s 123.
- 6 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 August 2014, 2923 (Denis Napthine, Premier).
- 7 *Royal Commissions Act 1923* (NSW); *Special Commissions of Inquiry Act 1983* (NSW); *Commissions of Inquiry Act 1950* (Qld); *Royal Commissions Act 1917* (SA); *Royal Commissions Act 1968* (WA); *Commissions of Inquiry Act 1995* (Tas); *Inquiries Act 1945* (NT); *Royal Commissions Act 1991* (ACT); *Inquiries Act 1991* (ACT).
- 8 See, eg, *Ombudsman Act 1976* (Cth) s 8; *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 211; *Inspector of Transport Security Act 2006* (Cth) s 87; *Transport Safety Investigation Act 2003* (Cth) s 66.
- 9 *Ombudsman Act 1976* (Cth) s 35.
- 10 *Evidence Act 1995* (Cth) s 16. This provision is replicated in the uniform evidence legislation of other Australian jurisdictions including the *Evidence Act 2008* (Vic) s 16.
- 11 For example, a Magistrate and a Justice of the Federal Court of Australia.
- 12 *Inquiries Act 2014* (Vic) s 123(3).
- 13 In Victoria, the *Evidence Act 2008* (Vic) sets out the State's rules of evidence. That Act is in most respects uniform with the Commonwealth and New South Wales Evidence Acts: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW).
- 14 *Sankey v Whitlam* (1978) 142 CLR 1; *Evidence Act 2008* (Vic) s 130.
- 15 *Inquiries Act 2014* (Vic) s 18(2)(c). Sections 32 and 33 of the Inquiries Act expressly state that a person cannot rely on other privileges including legal professional privilege and the privilege against self-incrimination as a reasonable excuse for failing or refusing to give information to a royal commission.
- 16 Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework* (Report No 111, April 2009) 465 [17116].
- 17 Although PII differs from a privilege in that it is not a right of an individual, the courts recognise that, like a fundamental right, it protects an important public interest such that it will only be considered to be abrogated (overridden) by express words or necessary implication. See *Jacobsen v Rogers* (1995) 182 CLR 572, 589.
- 18 *Royal Commissions Act 1968* (WA) s 8A(5)(a). See similarly, the *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5)(e), which provides that a person is not excused from answering a question or producing a document or thing on the basis that it 'would be otherwise contrary to the public interest'.
- 19 *Royal Commissions Act 1923* (NSW) s 17(1).
- 20 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 84.
- 21 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 98.
- 22 *Law Enforcement Conduct Commission Act 2016* (NSW) s 74(2); *Independent Commission Against Corruption Act 1988* (NSW); *New South Wales Crime Commission Act 1985* (NSW) s 18B(1). A similar blanket provision applies in the *Corruption and Crime Commission Act 2003* (WA) s 157(b).
- 23 *Inquiries Act 2014* (Vic) s 18(2)(c).
- 24 Royal Commission into the Management of Police Informants, *Protocol: In relation to claims of public interest immunity over documents required to be produced to the Royal Commission into the Management of Police Informants* (5 June 2019) 2 [19].
- 25 Royal Commission into the Management of Police Informants, *Protocol: In relation to claims of public interest immunity over documents required to be produced to the Royal Commission into the Management of Police Informants* (5 June 2019) 2.
- 26 Royal Commission into the Management of Police Informants, *Protocol: In relation to claims of public interest immunity over documents required to be produced to the Royal Commission into the Management of Police Informants* (5 June 2019) 2.
- 27 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 24 May 2019; Transcript of Directions Hearing, 20 September 2020, 6733–36.
- 28 Of those outstanding exhibits, 54 were tendered in 2019.

- 29 In the context of the *Witness Protection Act 1991* (Vic), Victoria Police relied on judicial statements that observed that a person's 'identity' within the meaning of section 10(5) of that Act can be interpreted broadly to include all features that differentiate a person from others. In identifying these features, however, there must be some 'connection between the information in question and the person's status as a participant' in the Witness Protection Program. See *R v JP* [2008] VSC 86, [17]–[19].
- 30 *Chief Commission of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants* [2020] VSCA 214, [29] (Beach, McLeish and Weinberg JJA).
- 31 Victoria Police only applied for judicial review in relation to one decision of the Commissioner to refuse an application for a non-publication order. The Court of Appeal rejected Victoria Police's application, finding that there was no error in the Commissioner's decision: *Chief Commission of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants* [2020] VSCA 214 (Beach, McLeish and Weinberg JJA).
- 32 Emails from Solicitors Assisting the Commission to solicitors for Victoria Police, 19 December 2019; 9 January 2020; 30 July 2020; 5 August 2020; 21 August 2020.
- 33 Emails from solicitors for Victoria Police to Solicitors Assisting the Commission, 2 December 2019; 5 December 2019; 31 July 2020.
- 34 Responsive submission, Mr Simon Overland, 18 August 2020, 18 [53]; Responsive submission, Ms Nicola Gobbo, 14 August 2020, 15 [59].
- 35 See, eg, Terence Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (November 2006); John Clarke, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008).
- 36 Terence Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (November 2006) 275–6.
- 37 Victoria Police's responsive submission was made in response to the then draft potentially adverse comments set out in this chapter.
- 38 Responsive submission, Victoria Police, 20 September 2020, 26 [5.6]–[5.7].
- 39 Responsive submission, Victoria Police, 20 September 2020, 30 [5.30].
- 40 Responsive submission, Victoria Police, 20 September 2020, 30 [5.33].
- 41 Responsive submission, Victoria Police, 20 September 2020, 31 [5.34].
- 42 Responsive submission, Victoria Police, 20 September 2020, 31 [5.38].
- 43 Responsive submission, Victoria Police, 20 September 2020, 31 [5.39].
- 44 Responsive submission, Victoria Police, 20 September 2020, 26 [5.9].
- 45 Responsive submission, Victoria Police, 20 September 2020, 26–7 [5.10].
- 46 Responsive submission, Victoria Police, 20 September 2020, 27 [5.12].
- 47 Responsive submission, Victoria Police, 20 September 2020, 27 [5.13].
- 48 Responsive submission, Victoria Police, 20 September 2020, 28 [5.25].
- 49 Responsive submission, Victoria Police, 20 September 2020, 29 [5.23]–[5.24].
- 50 Responsive submission, Victoria Police, 20 September 2020, 32 [5.40].
- 51 Responsive submission, Victoria Police, 20 September 2020, 32 [5.41].
- 52 Responsive submission, Victoria Police, 20 September 2020, 32 [5.43].
- 53 Responsive submission, Victoria Police, 20 September 2020, 32 [5.44].
- 54 See *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *Hogan v Hinch* (2011) 243 CLR 506; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47.
- 55 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).
- 56 *Open Courts Act 2013* (Vic) s 3.
- 57 Frank Vincent, *Open Courts Act Review* (Report, September 2017) 38–9; *Open Courts Act 2013* (Vic) s 1.
- 58 *Open Courts Act 2013* (Vic) ss 18, 25–6.
- 59 *Open Courts Act 2013* (Vic) s 3.
- 60 Frank Vincent, *Open Courts Act Review* (Report, September 2017) 37.
- 61 *Supreme Court Act 1986* (Vic) ss 18–19; *County Court Act 1958* (Vic) s 80, 88AA; *Magistrates' Court Act 1989* (Vic) s 126(2)(c).
- 62 *Open Courts Act 2013* (Vic) s 12.
- 63 Some of these orders are still in force under the old legislation that gave each court the power to make suppression orders: *Supreme Court Act 1986* (Vic) ss 18–19; *County Court Act 1958* (Vic) s 80, 88AA; *Magistrates' Court Act 1989* (Vic) s 126(2)(c). The orders under these acts have not been varied or revoked. Suppression orders made under section 126 of the Magistrates' Court Act can be set aside or varied in accordance with that section as if it had not been repealed.

- 64 Frank Vincent, *Open Courts Act Review* (Report, September 2017).
- 65 Frank Vincent, *Open Courts Act Review* (Report, September 2017) 13 [18].
- 66 Victorian Attorney-General, 'First Stage of Suppression Order Overhaul Begins' (Media Release, 19 February 2019). The *Open Courts and Other Acts Amendment Act 2019* (Vic), which commenced on 7 February 2020, and the *Justice Legislation Amendment (Victims) Act 2018* (Vic) implemented in full or in part recommendations 1–3, 6, 9, 13, 15 and 16 of the Review. Recommendation 4 was implemented by the establishment of the Victorian Law Reform Commission's *Contempt of Court* review.
- 67 See, eg, *The Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154 (Whelan, Beach and Weinberg JJA).
- 68 *Chairperson of the Royal Commission into the Management of Police Informants v DPP* [2020] VSCA 184 (Beach, McLeish and Weinberg JJA).
- 69 Frank Vincent, *Open Courts Act Review* (Report, September 2017). At present the *Open Courts Act 2013* (Vic) does not apply to royal commissions or boards of inquiry.
- 70 Email from Solicitors Assisting the Commission to the Supreme Court of Victoria, 29 September 2020.
- 71 Email from Solicitors Assisting the Commission to the Supreme Court of Victoria, 29 September 2020.
- 72 'Legacy suppression orders' are suppression orders made before the commencement of the *Open Courts Act 2013* (Vic) that do not have an end date: Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) 288.
- 73 Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) 289–90, [17.12] (Recommendation 132).
- 74 Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) 291 (Recommendation 133).
- 75 Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) 291 (Recommendation 134).
- 76 *Inquiries Act 2014* (Vic) s 12.
- 77 See especially *Witness Protection Act 1991* (Vic) s 10A.
- 78 *Inquiries Act 2014* (Vic) ss 24, 26.
- 79 *Witness Protection Act 1991* (Vic) s 10A(2)(a).
- 80 *Witness Protection Act 1991* (Vic) ss 10A(1), 10A(1)(b).
- 81 *Witness Protection Act 1991* (Vic) s 10A(2)(a).
- 82 *Inquiries Act 2014* (Vic) ss 18(2)(e), 34(2); *The Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154, [71] (Whelan, Beach and Weinberg JJA).
- 83 See *The Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154, [71] (Whelan, Beach and Weinberg JJA).
- 84 Transcript of Directions Hearing, 21 June 2019, 2722–3; Transcript of Directions Hearing, 20 September 2019, 6733.
- 85 Transcript of Directions Hearing, 21 June 2019, 2723.
- 86 Responsive submission, Victoria Police, 20 September 2020, 33 [6.2].
- 87 *Inquiries Act 2014* (Vic) s 34. A royal commission's ability to compel evidence, however, may not apply when secrecy or confidentiality provisions in other legislation specifically apply to giving evidence to a royal commission: *Inquiries Act 2014* (Vic) s 34(3).
- 88 *Inquiries Act 2014* (Vic) s 34(1).
- 89 *Inquiries Act 2014* (Vic) s 34(2).
- 90 *Australian Crime Commission Act 2002* (Cth) s 14A.
- 91 For example, in February 2020, the Commonwealth Director of Public Prosecutions produced relevant documents to the Commission. The ACIC's legal representatives requested, however, that these be restricted, so access was only provided to certain Commission staff.
- 92 *Ombudsman Act 1973* (Vic) s 26FB. Before amendments that came into effect on 2 January 2020, a mirror provision was at section 16L.
- 93 *Ombudsman Act 1973* (Vic) s 26FB(3). The Victorian Ombudsman may only provide or disclose information to a specified person or body if the Ombudsman considers that the information is relevant to the performance of the duties, functions or powers of the person or body, and that it is appropriate to bring that information to their attention: *Ombudsman Act 1973* (Vic) s 26FB(1).
- 94 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 41(g).
- 95 *Inquiries Act 2014* (Vic) s 17(1)(a).
- 96 Victoria Police told the Commission that its officers were under no legal obligation to prepare written statements to the Commission but they 'did so willingly to support the Royal Commission's task': Responsive submission, Victoria Police, 24 August 2020, 335 [149.7].
- 97 *Inquiries Act 2014* (Vic) s 17(1).

- 98 See, eg, Email from solicitors for Mr ‘Cooper’ to Solicitors Assisting the Commission, 23 September 2019; Email from Solicitors Assisting the Commission to solicitors for Mr ‘Cooper’, 3 October 2019. Ms Gobbo never provided a written statement fully addressing the Commission’s questions: Letter from Solicitors Assisting the Commission to solicitors for Nicola Gobbo (Annexure A), 20 August 2019, 1; Email from counsel for Nicola Gobbo to Counsel Assisting the Commission, 3 February 2020; Exhibit RC1141b Statement of Ms Nicola Gobbo, 3 February 2020.
- 99 *Royal Commission into the Building and Construction Industry* (Final Report, 2003), vol 2, 23 [42]–[43]; *Report of the Royal Commission into the Home Insulation Program* (Final Report, 2014) 22 [1.3.40].
- 100 *Inquiries Act 2014* (Vic) ss 24(1), 26(2).
- 101 *Inquiries Act 2014* (Vic) ss 24(2), 26(3).
- 102 *Inquiries Act 2014* (Vic) s 19(3).
- 103 *Supreme Court (Civil Procedure) Rules 2015* (Vic) r. 6.10; *County Court (Civil Procedure) Rules 2018* (Vic) r 6.10.
- 104 See Responsive submission, Victoria Police, 24 August 2020, 334 [149.1].
- 105 Royal Commission into the Management of Police Informants, *Document Management Protocol* (8 February 2019).
- 106 Responsive submission, Victoria Police, 24 August 2020, 334 [149.5].
- 107 For example, instead of a diary being produced with data indicating that it was a ‘diary’ or ‘diary entry’, it was produced with the document type ‘electronic file’. The Commission had to invest significant resources to review documents that were produced with an incorrectly classified document type.
- 108 Transcript of Officer ‘Sandy White’, 31 July 2019, 3594–5.
- 109 Transcript of Officer ‘Sandy White’, 31 July 2019, 3594.
- 110 Transcript of Directions Hearing, 2 August 2019, 3777.
- 111 Letter from Solicitors Assisting the Commission to solicitors for Victoria Police, 10 May 2019.
- 112 See Responsive submission, Ms Nicola Gobbo, 14 August 2020, 12 [46]–[47]; Responsive submission, Six former officers of the Source Development Unit, 7 August 2020, 9–10 [15].
- 113 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 24 January 2020, 12382.
- 114 See Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 28 January 2020.
- 115 Exhibit RC1933a Statement of Assistant Commissioner Kevin Casey, 15 August 2020.
- 116 Transcript of Assistant Commissioner Thomas (Luke) Cornelius, 24 January 2020, 12383.
- 117 Royal Commission into the Management of Police Informants, *Commissioner’s reasons for decision that the royal commission has jurisdiction to make findings of statutory misconduct by named current or former police officers* (28 August 2020).
- 118 Transcript of Mr Simon Overland, 21 January 2020, 11958, 11961.
- 119 Exhibit RC0089 Statement of Inspector Martin Allison, 17 July 2020, 2 [8].
- 120 This information was provided to the Commission in response to a notice to produce it issued to Victoria Police on 23 January 2019: see Transcript of Opening Statements, 15 February 2019, 10, 19. This is discussed in Chapter 1.
- 121 The amendments to the Commission’s Letters Patent in February 2019 are discussed in Chapter 1.
- 122 Exhibit RC0275b Statement of Officer ‘Sandy White’, undated, [2]–[3]; Exhibit RC0485d Statement of Officer ‘Peter Smith’, 28 May 2019, 1.
- 123 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 27 July 2020.
- 124 Email from Solicitors Assisting the Commission to solicitors for Victoria Police, 16 June 2019; Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 10 October 2019.
- 125 Letter from solicitors for Victoria Police to Solicitors Assisting the Commission, 12 March 2020; Letter from Solicitors Assisting the Commission to solicitors for Victoria Police, 19 March 2020.
- 126 See, eg, Notice to Produce served on Victoria Police, 7 July 2020; Notice to Produce served on Victoria Police, 7 August 2020.
- 127 Responsive submission, Victoria Police, 24 August 2020, 335 [150].
- 128 Responsive submission, Victoria Police, 24 August 2020, 334–5 [149.3]–[149.11], [150.1].
- 129 Responsive submission, Victoria Police, 24 August 2020, 335 [149.8]–[149.9].
- 130 Responsive submission, Victoria Police, 24 August 2020, 335 [149.10].
- 131 Responsive submission, Victoria Police, 24 August 2020, 339 [151.9]–[150.10].
- 132 Responsive submission, Victoria Police, 20 September 2020, 23 [4.2]–[4.3].

- 133 As explained earlier in this chapter, the Commission does not have a power under the Inquiries Act to compel the production of a written statement, so Victoria Police's voluntary cooperation was essential to the Commission having the benefit of these statements: Responsive submission, Victoria Police, 20 September 2020, 33 [7.1].
- 134 Responsive submission, Victoria Police, 20 September 2020, 33 [7.2]–[7.3].
- 135 Letter from The Police Association to Victoria Police, 22 November 2019.
- 136 Responsive submission, The Police Association, 11 September 2020, 1.
- 137 Responsive submission, The Police Association, 11 September 2020, 2.
- 138 The exception is its application to 'a member of the staff of Court Services Victoria in relation to the performance of judicial or quasi-judicial functions of a Victorian court': *Inquiries Act 2014* (Vic) s 123(1)(l).
- 139 Responsive submission, Victoria Police, 20 September 2020, 25–32 [5.1]–[5.44].
- 140 Responsive submission, Victoria Police, 20 September 2020, 32 [5.43]–[5.44].
- 141 Royal Commission into the Management of Police Informants, *Protocol: In relation to claims of public interest immunity over documents required to be produced to the Royal Commission into the Management of Police Informants* (5 June 2019).
- 142 Responsive submission, Victoria Police, 20 September 2020, 26–7 [5.10].
- 143 *Royal Commissions Act 1923* (NSW) s 17(1); *Royal Commissions Act 1968* (WA) s 8A(5).
- 144 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 98.
- 145 *Inquiries Act 2014* (Vic) s 32.
- 146 Responsive submission, Victoria Police, 20 September 2020, 31 [5.35].
- 147 *The Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154, [115] (Whelan, Beach and Weinberg JJA).
- 148 *Chairperson of the Royal Commission into the Management of Police Informants v DPP* [2020] VSCA 184 (Beach, McLeish and Weinberg JJA).
- 149 Email from Solicitors Assisting the Commission to the Supreme Court of Victoria, 29 September 2020.
- 150 Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) 254 (Recommendation 132).
- 151 Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) 255 (Recommendation 133).
- 152 *Inquiries Act 2014* (Vic) ss 24(2), 26(3).
- 153 *Inquiries Act 2014* (Vic) s 19(3). See also the service provision in relation to boards of inquiry in section 66(3).
- 154 *Supreme Court (Civil Procedure) Rules 2015* (Vic) r. 6.10; *County Court (Civil Procedure) Rules 2018* (Vic) r 6.10.
- 155 *Ombudsman Act 1973* (Vic) s 26FB.
- 156 See, eg, *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 41(g).
- 157 Responsive submission, Victoria Police, 20 September 2020, 22 [2.4].

# 17

## Work beyond the Commission

### INTRODUCTION

The Commission's role was to investigate past events, examine current practice, and make recommendations about what steps and actions should be taken to address past failures and ensure they are avoided in future.

Because the conduct of Ms Nicola Gobbo and Victoria Police has had significant consequences, the Commission has had to make wide-ranging recommendations directed to various entities across government, the justice system and the legal profession. Its recommendations fall into three broad categories:

- referrals for investigation to determine whether further action should be taken, including prosecution of criminal offences or disciplinary action (referral recommendations)
- processes to ensure all potentially affected persons receive timely disclosure of information relevant to their cases (disclosure recommendations)
- reforms to laws, policies and procedures governing the use of human sources, disclosure of information in criminal proceedings, and the regulation of the legal profession (policy recommendations).

Now that the Commission has reported, it will fall to others to implement the recommendations according to their full purpose and intent.

This chapter outlines arrangements that the Commission considers are necessary to support the full implementation of its recommendations; namely:

- appointing a Special Investigator to investigate whether there is sufficient evidence to establish the commission of any criminal and/or disciplinary offences connected with Victoria Police’s use of Ms Gobbo as a human source
- facilitating access to the Commission’s records for the Special Investigator and other entities responsible for future investigations and disclosures relevant to the events that led to the Commission’s inquiry
- establishing an Implementation Taskforce and Implementation Monitor to coordinate and report on the implementation of the Commission’s recommendations.

Pleasingly, the Victorian Government and Victoria Police have already indicated their intention to implement any measures recommended by the Commission. In 2018, the Premier of Victoria advised Parliament that the Government intended to implement ‘all the recommendations that are given to us’, and to take any advice or instruction to ensure the culture and practices of Victoria Police do not enable such events to happen again.<sup>1</sup> In 2020, the Chief Commissioner of Victoria Police also committed to taking whatever steps are necessary upon delivery of the Commission’s report to reform Victoria Police, stating that Victoria Police is prepared to learn from its mistakes and do what is needed to be a better organisation.<sup>2</sup>

There have now been four inquiries into Victoria Police’s use of Ms Gobbo as a human source: the Comrie Review, the Kellam Report, the Champion Report and this Commission, as well as protracted court proceedings leading up to the establishment of the Commission.<sup>3</sup> All these processes have involved expenditure of valuable public funds, and the diversion of public sector resources away from their core functions. The Victorian public would rightly expect the delivery of this final report to represent a turning point, marking a shift from inquiry and deliberation, to action and swift finalisation.

Consistent with the approach of other recent royal commissions and inquiries, the Commission considers it desirable for there to be ongoing monitoring and reporting arrangements to support the effective and transparent implementation of its recommendations. Recommendations about these monitoring and reporting arrangements are supported by term of reference 6, which enables the Commission to make recommendations necessary to satisfactorily resolve the matters set out in terms of reference 1–5.

## APPOINTMENT OF A SPECIAL INVESTIGATOR

In Chapters 7 and 8, the Commission recommends that there should be a full and independent investigation of the conduct of Ms Gobbo and current and former Victoria Police officers named in this final report or in the complete and unredacted submissions of Counsel Assisting, to determine whether there is sufficient evidence to establish the commission of any criminal offences. In the case of some serving Victoria Police officers, the Commission also recommends investigation to determine whether there is sufficient evidence to establish the commission of any disciplinary offences.

As explained in Chapter 5, it was not the Commission’s role to undertake this task. Ordinarily, investigations are conducted by investigative agencies such as Victoria Police or, in some circumstances, the Independent Broad-based Anti-corruption Commission (IBAC). Decisions about commencing a criminal prosecution are made by the Victorian Director of Public Prosecutions (DPP), and decisions about initiating disciplinary action against police officers by the Chief Commissioner or their authorised delegate.<sup>4</sup>

The Commission has formed the view that it would be problematic for existing investigative authorities to examine the conduct of Ms Gobbo and current and former Victoria Police officers. Instead, it recommends that the Victorian Government establishes a new statutory office holder: a dedicated Special Investigator with all necessary powers to investigate whether there is sufficient evidence to bring criminal or disciplinary charges arising out of the events leading to this inquiry.

The following sections explain why the Commission has made these recommendations, and the arrangements it proposes to facilitate the work of the Special Investigator.

## Investigation of potential criminal conduct

In their complete and unredacted submissions, Counsel Assisting the Commission invited the Commission to find that Ms Gobbo and a number of current and former police officers may have committed criminal offences.

In response to these submissions, the DPP, Ms Kerri Judd, QC, advised the Commission that she would be unable to determine the question of whether criminal charges should be brought against Ms Gobbo or any former or current Victoria Police officers without an investigative agency preparing a brief of evidence for her consideration.<sup>5</sup>

Usually, Victoria Police has the role of investigating crime and, once a suspect has been charged, preparing a brief of evidence for the DPP.

The Commission, however, considers it would be impossible for Victoria Police to properly perform its traditional investigative role in relation to the conduct of current and former police officers and Ms Gobbo, given:

- its contentions that this Commission should not make findings to substantiate any allegations against the named former and current officers
- its admitted institutional failures
- the fact that Victoria Police’s lawyers before this Commission also represented many of those officers
- its clear position of conflict with Ms Gobbo.

### Need for a special-purpose office holder

The *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, led by the Honourable Gerald Edward (Tony) Fitzgerald, AC, QC (commonly known as the ‘Fitzgerald Inquiry’), resolved a comparable issue in its 1987–89 inquiry into Queensland Police. It recommended the establishment of an anti-corruption body in Queensland, to be independent of the police service and have responsibility for, among other things, investigating official misconduct in public institutions. Given the time it would take to establish such an institution, the Fitzgerald Inquiry also considered that a special prosecutor independent of existing agencies was required to assume the prosecution responsibilities for matters associated with that inquiry’s activities. The staff of the Fitzgerald Inquiry carried out investigations and referred matters suitable for prosecution to the Special Prosecutor, who decided whether to commence action, and if so, conducted the prosecution.<sup>6</sup>

The Commission received a submission from the Honourable Douglas Drummond, QC, who was the Special Prosecutor appointed in Queensland, urging the Commission to recommend the appointment of a special prosecutor—a body separate from Victoria Police ‘resourced with staff and budget ... to complete all investigations necessary to prepare briefs of evidence sufficient both to satisfy ... that prosecution of particular police officers is warranted and complete enough for presentation in a criminal court’.<sup>7</sup>

The Commission is aware that, unlike Queensland in 1989, Victoria has an anti-corruption body, IBAC, with the power to investigate corrupt conduct and police personnel misconduct. IBAC has the power to investigate the alleged corrupt conduct of a public officer (which includes a police officer), and the conduct of anyone that adversely affects the honest (and in some circumstances effective) performance by a public officer or body of their functions.<sup>8</sup> It also has the power to refer matters to the DPP.<sup>9</sup> It follows that IBAC could investigate any potential criminal conduct of current and former police officers. It could also investigate some of the potential criminal conduct of Ms Gobbo identified by Counsel Assisting in their unredacted submissions—namely conduct that may

have ‘adversely affect[ed] the honest performance by a [police] officer or [Victoria Police] of his or her or its functions as a public officer or public body’.<sup>10</sup>

Under section 44 of the *Inquiries Act 2014* (Vic) (Inquiries Act), the Commission forwarded to IBAC the unredacted submissions of Counsel Assisting, including their reply submissions, and the unredacted responsive submissions of relevant current and former police officers and Ms Gobbo. IBAC informed the Commission that, if properly resourced, and subject to resolving some not inconsiderable challenges associated with its capability and capacity to gather admissible evidence, it would be able to investigate those matters within its jurisdiction and, if appropriate, to refer them to the DPP.<sup>11</sup>

The Commission considered IBAC’s submission that it would need additional resources to conduct investigations into the matters referred by the Commission. It also considered the limitations on IBAC’s ability to investigate all potential criminal conduct committed by Ms Gobbo. Finally, it considered the potential inefficiency and impractical disjuncture of different investigations examining different aspects of the potential criminal conduct. That is, were IBAC to investigate these matters, it could consider the conduct of former and current police officers, and some of Ms Gobbo’s conduct, while another agency would need to investigate the other aspects of Ms Gobbo’s conduct because they may fall outside IBAC’s jurisdiction.

In light of these factors and limitations, the Commission considered what arrangements ought to be established to ensure the timely, efficient and independent investigation of any potential criminal conduct arising from Victoria Police’s use of Ms Gobbo as a human source. It focused on whether a special investigator, as distinct from a special prosecutor, might be required.

The Commission was persuaded to recommend the establishment of a ‘Special Investigator’ for three principal reasons. Like IBAC, the Special Investigator would be separate from and independent of Victoria Police; however, unlike IBAC, the Special Investigator would be able to focus solely on any and all conduct arising from the events that led to the establishment of this Commission, including any conduct of Ms Gobbo that may fall outside IBAC’s jurisdiction. Finally, the Special Investigator would only have investigative functions, and not prosecutorial functions. This would appropriately separate the investigative function from the discrete prosecutorial function, minimising the risk of the DPP being ‘tainted’ by the Special Investigator’s access to evidence gathered by this Commission, much of which may be inadmissible in criminal proceedings.<sup>12</sup>

In his submission, Mr Drummond suggested, ‘The agency responsible for the investigations of police conduct and preparation of briefs for the prosecutor should, in the interests of public confidence in the process, be at [arm’s] length from IBAC which has already decided that police did not engage in any criminal conduct’.<sup>13</sup>

The IBAC Commissioner has rejected that assertion and pointed out:

*The Kellam Inquiry identified potential cases where the convictions of individuals could have been undermined due to Victoria Police’s use of Ms Gobbo as a human source. However, how the information obtained by Victoria Police was used in particular prosecutions and the understanding and intention of relevant Victoria Police officers on its use were not subjects which were within the scope of the Kellam Inquiry ...*

*The prior findings of the Kellam Inquiry would not impede upon IBAC’s ability to independently conduct an investigation of this nature [that is, into Ms Gobbo and the named former and serving police officers in this report], if it was deemed to be warranted and in the public interest. Ultimately the Royal Commission’s final report and recommendations, and the response by Government, will determine the necessary scope and resourcing of any further criminal investigations, irrespective of who conducts such investigations.<sup>14</sup>*

The Commission accepts the IBAC Commissioner's submissions and emphasises that its recommendation for the appointment of the Special Investigator is based on the reasons set out above, in particular the desirability of the investigation considering Ms Gobbo's conduct in its entirety, rather than on Mr Drummond's submission that IBAC had in effect 'closed its mind' to the possibility of potential criminal offences arising from Victoria Police's use of Ms Gobbo as a human source.

## Functions and powers

The functions of the Commission's recommended Special Investigator would be to:

- assess the evidence gathered by this Commission to determine:
  - whether there is sufficient evidence to establish the commission of any criminal offences connected with Victoria Police's use of Ms Gobbo as a human source
  - whether any of that evidence is admissible in a criminal proceeding
  - what other evidence may need to be gathered to establish whether any of the possible offences identified may have been committed
- gather admissible evidence in relation to any such potential offences
- compile a brief of evidence and submit it to the DPP (who would then determine whether there is sufficient evidence to warrant, and whether it is in the public interest to institute, a prosecution and, if so, to initiate the prosecution).

The Commission recommends that the scope of the Special Investigator's jurisdiction extends beyond investigating the current and former police officers named in this final report and the complete and unredacted submissions of Counsel Assisting, and should also include the conduct of any other police officers it identifies through its investigation in respect of whom there is evidence that may establish the commission of a criminal offence. The Commission formed this view because:

- it cannot be confident it has identified all the potential wrongdoing by current and former police officers, given Victoria Police's sub-optimal record keeping and production of materials to the Commission
- not every potential witness made a statement to, or gave evidence before, the Commission
- additional information emerged, after the Commission's public hearings had closed and while the Commission was writing its final report, about other conduct by police officers, such as the payment of inducements to a witness in 25 criminal proceedings, which was not disclosed to the defence or court, potentially affecting the safety of the convictions secured in those matters.<sup>15</sup>

The role of the Special Investigator would need to be established by legislation and given the necessary independence, investigative powers and resources to perform their functions. These powers should be necessary and proportionate to the Special Investigator's role. They could include many of the powers that can be exercised by a police officer under the *Crimes Act 1958* (Vic), as well as access to the use of surveillance devices, telecommunications interception and, potentially, Victoria's witness protection system and public interest ('whistleblowers') protection regime. The Commission acknowledges that the Victorian Government would need to seek the support of the Commonwealth Government under the *Telecommunications (Interception and Access) Act 1979* (Cth) to enable the Special Investigator to use telecommunications interception.

As noted above, a key function of the Special Investigator will be to review and assess the admissibility of the evidence given or produced to the Commission in any subsequent legal proceedings. In undertaking this task, it will be important for the Special Investigator to have regard to recent case law relevant to the direct or indirect use of material gathered by investigative bodies in criminal prosecutions.<sup>16</sup> It would also be prudent for these matters to be considered during the development of the legislation establishing the office of Special Investigator.

The Commission recommends that the Special Investigator should be an Australian lawyer with at least 10 years' experience in criminal law or a related field and should be supported in their role by experienced investigators. This will help to ensure the Special Investigator is independent of Victoria Police and has the necessary expertise and ability to undertake this role.

#### RECOMMENDATION 92

That the Victorian Government, within 12 months, develops legislation to establish a Special Investigator with the necessary powers and resources to investigate whether there is sufficient evidence to establish the commission of a criminal offence or offences (connected with Victoria Police's use of Ms Nicola Gobbo as a human source) by Ms Gobbo or the current and former police officers named in the Commission's final report or in the complete and unredacted submissions of Counsel Assisting.

#### RECOMMENDATION 93

That the Victorian Government, in developing the legislation to establish the Special Investigator, requires that the person appointed as the Special Investigator be an Australian lawyer with at least 10 years' experience in criminal law or a related field.

### Prosecution decisions

As noted above, Mr Drummond submitted that, in addition to an investigative function, the special body proposed should have 'the authority to decide who will be prosecuted ... independent of political direction ... reporting to Parliament.'<sup>17</sup> His rationale for proposing that the special body should also perform the prosecutorial function was based on his view that the DPP is not independent of the Government. In support of his contention, Mr Drummond cited section 10(1) of the *Public Prosecutions Act 1994 (Vic)*, under which the DPP 'is responsible to the Attorney-General for the due performance of his or her functions and exercise of his or her powers under this or any other Act'.

While that is true in terms of the DPP's organisational accountability, the following sub-section of the Act makes it clear that the DPP's responsibility to the Attorney-General 'in no way affects or takes away from the authority of the Director in respect of the institution, preparation and conduct of proceedings under this or any other Act'.<sup>18</sup> That provision is fundamental to the DPP's independence in making prosecutorial decisions. In responding to Mr Drummond's submission, the DPP emphatically rejected the suggestion that prosecutorial decisions in Victoria 'are in any way influenced by political considerations.'<sup>19</sup> That view is entirely consistent with, and supplemented by, the *Policy of the Director of Public Prosecutions for Victoria*, which deals with the exercise of the prosecutorial discretion and includes in its list of improper considerations:

- *political pressure or interference ...*
- *personal feelings concerning the offence, the offender or a victim*
- *possible political advantage or disadvantage to the Government or any political group or party*
- *the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.*<sup>20</sup>

The Commission has not received any evidence to suggest that any past actions of any former DPP or their officers have compromised the independence of the current DPP. The Commission considers that the DPP will exercise her statutory responsibilities with independence, including the discretion to prosecute any matters arising from the proposed Special Investigator's investigative work.

#### RECOMMENDATION 94

That, where the Special Investigator compiles a brief of evidence containing sufficient evidence to establish the commission of a criminal offence or offences by Ms Nicola Gobbo or current or former Victoria Police officers, the Victorian Director of Public Prosecutions should be responsible for determining whether to prosecute and, if so, for the prosecution of the matter under the *Public Prosecutions Act 1994* (Vic).

### Reporting on operations and outcomes

The Special Investigator should report to the Implementation Monitor (discussed below) on progress to establish their operations, and on the outcomes of their investigations. Given the sensitivity of certain matters to be examined by the Special Investigator, there are likely to be legitimate limitations on the extent to which they can report in detail on the matters under investigation.

#### RECOMMENDATION 95

That the Victorian Government, in developing the legislation to establish the Special Investigator, requires the Special Investigator to report regularly to the Implementation Monitor proposed in Recommendation 108 on their progress to establish their operations, and on the outcomes of their investigations.

## Investigation of police misconduct and breach of discipline

The Commission has found that the conduct of some current and former Victoria Police officers may at the time have amounted to misconduct or a breach of discipline under the applicable legislation.<sup>21</sup> A police officer who breaches their professional duties may face, among other things, disciplinary action, which may result in a reprimand; a fine; a reduction in rank, seniority or remuneration; dismissal or a requirement to pay compensation or costs.<sup>22</sup>

Former police officers are not subject to the police discipline system.<sup>23</sup> This, however, does not prevent the Commission from adopting the applicable statutory standard of conduct against which to assess and report on those former officers' behaviour. This is consistent with term of reference 2 and, even though the former officers who may have engaged in improper conduct cannot face disciplinary action, the Commission's conclusions about their conduct may assist potentially affected persons in determining whether to exercise their appeal rights.

The Commission has formed the view that the potential breaches of discipline or misconduct by the named serving police officers should be investigated and, if the evidence warrants it, dealt with under the police discipline system. Such disciplinary investigations could conceivably be conducted by the Chief Commissioner, an authorised officer appointed by the Chief Commissioner, IBAC or the Special Investigator recommended by the Commission.

The Commission considers it would be inappropriate for the Chief Commissioner or an authorised officer to conduct those disciplinary investigations for similar reasons to those outlined above in relation to the investigation of potential criminal offences—in short, it would lack the requisite degree of actual or perceived independence. Victoria Police’s decision not to conduct disciplinary investigations into police officers whose conduct was examined by the Kellam Inquiry, despite Mr Kellam finding ‘negligence of a high order’, and his conclusion that Victoria Police had failed to act in accordance with appropriate policies and procedures, underscores why it would be inappropriate for Victoria Police to undertake the disciplinary investigations.<sup>24</sup>

While acknowledging that IBAC could conduct the investigations, the Commission considers it would be more efficient for the recommended Special Investigator to undertake these disciplinary investigations given they will already have reviewed the Commission’s evidence, thereby avoiding duplication of effort.

## Function and powers

The Commission recommends that the legislation establishing the Special Investigator requires that they investigate whether there is sufficient evidence to establish the commission of misconduct or breach of discipline connected with Victoria Police’s use of Ms Gobbo as a human source by current Victoria Police officers named in the Commission’s final report or in Counsel Assisting submissions.

As with the scope of the Special Investigator’s proposed criminal investigation functions, the Commission recommends that the Special Investigator’s disciplinary investigation functions should not be confined to the named serving officers, but also extend to the conduct of any other police officers they identify through their investigation in respect of whom there is evidence that may establish the commission of misconduct or breach of discipline connected with the events that led to this Commission.

If the Special Investigator considers there is sufficient evidence, they should be empowered to lay the appropriate disciplinary charges against the named (or other identified) serving police officers.<sup>25</sup> The Commission recognises that such an arrangement is somewhat unusual in that the head of an agency or designated senior officer would ordinarily be responsible for initiating internal disciplinary proceedings. Importantly, though, it will promote public confidence in the process, by avoiding any perceived conflict if the charging decision were left to the Chief Commissioner or an authorised officer. In addition, the Special Investigator should have powers and procedures equivalent to those that apply in usual police disciplinary matters.<sup>26</sup>

### RECOMMENDATION 96

That the Victorian Government, in developing the legislation to establish the Special Investigator, requires the Special Investigator to investigate whether there is sufficient evidence to establish the commission of misconduct or a breach of discipline under the *Victoria Police Act 2013 (Vic)* (connected with Victoria Police’s use of Ms Nicola Gobbo as a human source) by current Victoria Police officers named in the Commission’s final report or in the complete and unredacted submissions of Counsel Assisting.

**RECOMMENDATION 97**

That the Victorian Government, in developing the legislation to establish the Special Investigator, empowers the Special Investigator to investigate:

- a. whether there is sufficient evidence to establish the commission of a criminal offence or offences (connected with Victoria Police's use of Ms Nicola Gobbo as a human source) by any current or former Victoria Police officers other than those named in the Commission's final report or in the complete and unredacted submissions of Counsel Assisting
- b. whether there is sufficient evidence to establish the commission of misconduct or a breach of discipline under the *Victoria Police Act 2013 (Vic)* (connected with Victoria Police's use of Ms Gobbo as a human source) by any current Victoria Police officers other than those named in the Commission's final report or in the complete and unredacted submissions of Counsel Assisting.

**RECOMMENDATION 98**

That the Victorian Government, in developing the legislation to establish the Special Investigator, provides the Special Investigator with all necessary and reasonable powers required to fulfil their role in investigating misconduct or breaches of discipline, including but not limited to the power to direct any police officer to give any relevant information, produce any relevant document or answer any relevant question during a disciplinary investigation.

Any information, document or answer given in response to such a direction should not be admissible in evidence before any court or person acting judicially, other than in proceedings for perjury or for a breach of discipline.

To support the Special Investigator's powers, the failure of an officer to comply with a direction from the Special Investigator should itself constitute a breach of discipline.

**RECOMMENDATION 99**

That the Victorian Government, in developing the legislation to establish the Special Investigator, empowers the Special Investigator to lay disciplinary charges against relevant police officers if satisfied there is sufficient evidence to do so.

## Hearings and determinations

Again, in the interests of fairness and objective decision making, and consistent with the principle that justice must not only be done but be seen to be done, the Commission strongly advocates that any disciplinary charges laid by the Special Investigator should be heard and determined by a suitably qualified and independent authorised officer who is not a police officer.<sup>27</sup> The Commission understands that police disciplinary hearings are currently conducted by an experienced, legally qualified public servant who is considered independent notwithstanding their appointment by the Chief Commissioner. The Commission considers that this would be an appropriate arrangement for determining any disciplinary charges arising from the Special Investigator's disciplinary investigations, as it would mean that these charges would be determined in the same way as all other disciplinary charges brought under the *Victoria Police Act 2013* (Vic).

In addition, the Commission considers that the legislation establishing the Special Investigator should explicitly provide that the disciplinary charges could proceed even if criminal charges in relation to the same or related conduct have been laid or may be brought. This would accord with a recommendation of the Parliamentary IBAC Committee in its report on *Inquiry into the external oversight of police corruption and misconduct in Victoria* in September 2018.<sup>28</sup> It would avoid the risk of the hearing officer adjourning the matter until it becomes clear whether any related criminal charges will be brought and, if they are, until they have been dealt with, which could result in a lengthy delay in finalising the disciplinary issue.

### RECOMMENDATION 100

That the Chief Commissioner of Victoria Police ensures that a suitably qualified, independent authorised person, who is not a police officer, determines any disciplinary charges laid by the Special Investigator.

## Reporting on outcomes

The Commission recommends that the Chief Commissioner should be required to report to the Special Investigator and the proposed Implementation Monitor (discussed below) on the progress or outcome of any disciplinary proceedings arising from the Special Investigator's work, so that the Implementation Monitor can include the progress or outcomes of these matters in reports to the Attorney-General and Minister for Police and to Parliament.

Such a requirement is somewhat unusual in the context of internal disciplinary regimes;<sup>29</sup> however, the Commission considers it is important to inform the community about the outcomes of the events this Commission has examined, given what the High Court described as 'Victoria Police[s] ... reprehensible conduct in knowingly encouraging [Ms Gobbo] to do as she did and ... sanctioning breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will.'<sup>30</sup> Informing the public of these outcomes will assist in restoring public confidence in Victoria Police.

### RECOMMENDATION 101

That the Chief Commissioner of Victoria Police reports to the Special Investigator and Implementation Monitor proposed in Recommendation 108 on the outcome of any disciplinary proceedings arising from the Special Investigator's investigation of current Victoria Police officers.

## THE COMMISSION'S DOCUMENTS AND MATERIALS

This section focuses on how documents and materials held by the Commission should be dealt with following the conclusion of the Commission. It outlines the process for transferring records held by the Commission at the end of the inquiry and makes recommendations to help facilitate the ongoing work that is required after the Commission concludes.

The Commission assembled extensive documents and materials relating to the matters it investigated. Some of these materials were published on the Commission's website. These included witness statements, exhibits, hearing transcripts and written submissions. The Commission also gathered documents that were not publicly released. Many of these were produced in response to notices to produce issued by the Commission.

As discussed in Chapters 3 and 16, the majority of the material gathered by the Commission was considered sensitive because it related to past and ongoing law enforcement activities and referred to individuals whose safety might be at risk if their names or other information about them were made public. The Commission was therefore unable to publish this material, or at the very least had to redact sensitive sections of some documents before doing so.

The question of public access to documents, exhibits and evidence produced at public hearings was largely addressed during the course of the inquiry by the Commissioner's rulings, which have attempted to strike the appropriate balance between the public interest in openness and transparency against the public interest in protecting the safety of human sources and their families.

### Transfer to Department of Premier and Cabinet and Public Record Office Victoria

At the conclusion of this Commission, all of the records held by the Commission must be transferred to the Department of Premier and Cabinet (DPC).<sup>31</sup> At this point, DPC becomes the responsible agency for the records, and manages their transfer to the Public Record Office Victoria (PROV).<sup>32</sup>

Under section 124(3) of the Inquiries Act, records transferred by the Commission are to be held and dealt with on the same basis, and in the same manner, as the basis on which they were held and the manner in which they could be dealt with by the Commission. The Commission has advised DPC and PROV that, except for publicly available documents, all Commission records including metadata should continue to be treated as 'PROTECTED' in accordance with the requirements of the Australian Government Protective Security Policy Framework.<sup>33</sup>

DPC is also responsible for responding to requests to access the records, including those made under the *Public Records Act 1973 (Vic)* (Public Records Act) and *Freedom of Information Act 1982 (Vic)*.

The Public Records Act allows for records held by PROV to be 'closed', which restricts who can access them.<sup>34</sup> Due to the sensitivity of its records, the Commission recommends they be closed for 75 years. It will still be necessary, however, for the Special Investigator appointed as a result of this Commission to have ongoing access to the Commission's records so that they can fulfil their functions. IBAC might also require access to the Commission's records; for example, if it was investigating a complaint or conducting an own motion investigation separate to the Special Investigator's work. Both the Special Investigator and IBAC should therefore be exempt from the closure of the records and have unrestricted access to them.

The Commission recognises the Special Investigator will require prompt access to the Commission's materials to perform their functions efficiently and effectively, so that they are not stalled through an unnecessary discovery process. They will also need to have appropriate security arrangements in place for access to, and the management of, such material. The Commission recommends that the proposed Special Investigator and IBAC be given a legislative entitlement to obtain unimpeded access to the Commission's records.

The closure of the Commission's records would be subject to any decision of the Minister responsible for PROV made under section 9(2)(b) of the Public Records Act to permit all or any of the records to be open for inspection by any specified person or class of persons. It should also be subject to any order of the Supreme Court of Victoria. Except in relation to requests made by the Special Investigator or IBAC, the Commission recommends that DPC notifies Victoria Police of any court order or request to access the Commission's records. This notification will enable Victoria Police to assert any claims for public interest immunity (PII) prior to records being made available for inspection.

#### RECOMMENDATION 102

That the Victorian Government ensures that under the *Public Records Act 1973 (Vic)*, the Commission's records be unavailable for public inspection for 75 years, subject to: any order of the Supreme Court of Victoria; the legislation providing the Special Investigator and the Independent Broad-based Anti-corruption Commission with access to the records; or any decision of the responsible Minister under section 9(2)(b) of the Act to permit all or any of the records to be open for inspection by any specified person or class of persons.

#### RECOMMENDATION 103

That the Victorian Government, in developing the legislation to establish the Special Investigator, ensures that the legislation:

- a. gives the Special Investigator full and free access to the Commission's records
- b. requires the Special Investigator to establish appropriate security arrangements for access to and the management of such records.

The Victorian Government should also ensure that the Independent Broad-based Anti-corruption Commission has a legislative entitlement to obtain full and free access to the Commission's records.

#### RECOMMENDATION 104

That the Department of Premier and Cabinet notifies Victoria Police of any court order or request to access the closed records of the Commission, except in relation to requests made by the Special Investigator or Independent Broad-based Anti-corruption Commission.

## Ongoing disclosure to potentially affected persons

As discussed in Chapter 9, Victoria Police, along with prosecuting agencies, has ongoing responsibility to disclose information about its use of Ms Gobbo as a human source to people whose cases may have been affected by those events.

Separate from this process, the Commission has also played a role in providing information to people whose cases were potentially affected by the use of Ms Gobbo as a human source. The Commission sought to publish all key materials on its website. Before doing so, it established a process for assessing any claims by Victoria Police that certain information not be made public on the basis of PII.

At the time of drafting this final report, one such process remained incomplete. The Commission formed the view that it was important for 124 potentially affected persons to have access to Counsel Assisting submissions, as the content of those submissions may be relevant to their interests. Victoria Police made extensive PII claims in relation to the submissions. In order to avoid delay, the Commission accepted the claims on an interim basis and, pending their resolution, published redacted versions of the submissions to its website, and provided potentially affected persons with heavily redacted versions of the submissions relevant to them.

The Commissioner later made final determinations in relation to Victoria Police's PII claims, which were communicated to Victoria Police. It remains for these determinations to be applied to Counsel Assisting submissions, and for revised, more detailed versions to be provided to potentially affected persons.

The Commission recommends the following arrangement to complete this process. Under section 44 of the Inquiries Act, the Commission has already forwarded to the DPP the unredacted submissions of Counsel Assisting, including reply submissions. The Commission has also made available to the DPP the Commissioner's final determinations in relation to Victoria Police's PII claims, and the contact details for the 124 potentially affected persons to whom disclosure of the less redacted submissions should now be made.

The Commission recommends that Victoria Police and the DPP should apply the Commissioner's final determinations in relation to any PII claims over Counsel Assisting submissions, and provide copies of those submissions to potentially affected persons.

#### RECOMMENDATION 105

That Victoria Police and the Victorian Director of Public Prosecutions, within three months, in accordance with their ongoing disclosure obligations, apply the Commissioner's determinations in relation to the public interest immunity claims (or as otherwise determined by a court) over the complete and unredacted submissions of Counsel Assisting, and, where relevant, facilitate disclosure of these revised versions of the submissions to potentially affected persons.

Further, as discussed in Chapters 5 and 7, the Commission has found that in addition to the cases that may have been directly affected by Ms Gobbo assisting Victoria Police, there are 887 people whose cases may have been affected solely on the basis that Ms Gobbo failed to disclose to them that she was a human source while also advising or representing them. This category is referred to here as the 'Szabo category' of potentially affected persons, as it relies on the principles discussed in *R v Szabo*.<sup>35</sup>

The Commission has formed the view that the people in the Szabo category should be alerted that their cases may have been affected by Ms Gobbo's role as a human source. The Commission was itself unable to undertake this process between the time the Commissioner determined to accept Counsel Assisting submissions on this point and the publication of this final report. Not only did it not have the time or resources to locate and contact all 887 people, but the disclosure process would have prematurely revealed the Commission's findings before delivery of the final report to the Governor of Victoria. As discussed in Chapter 7, the Commission did, however, place a notification on its website and in prisons, drawing attention to Counsel Assisting submissions about this category of potentially affected cases.

The list of people in the Szabo category has been provided to Victoria Police so that it and the DPP and the Commonwealth Director of Public Prosecutions can facilitate ongoing disclosure of relevant information to them. The Commission has also provided this list to the Department of Justice and Community Safety, which will be responsible for coordinating implementation of the Commission's recommendations once the inquiry concludes and responding to any public enquiries about post-Commission activities.

**RECOMMENDATION 106**

That Victoria Police and prosecuting agencies, within six months, make all reasonable attempts to advise the 887 people whose cases may have been affected in the manner identified in *R v Szabo* that their cases may have been affected by Ms Nicola Gobbo's conduct as a human source, and facilitate ongoing disclosure of relevant information to those persons.

## MONITORING IMPLEMENTATION

It is now standard practice for royal commissions and other inquiries to recommend structures or processes to monitor the implementation of their substantive recommendations.<sup>36</sup> These mechanisms are designed to guard against reports 'sitting on the shelf' and government or agency delay, inaction or obfuscation in undertaking important reform measures.

The Royal Commission into Responses to Institutional Child Sexual Abuse commissioned a report analysing the factors that influence whether recommendations of bodies of inquiry are implemented.<sup>37</sup> The report related primarily to past inquiries about child abuse but its findings have some broader application. The report found that the major factors contributing to successful implementation of an inquiry's recommendations were:

*Establishing processes and structures to facilitate implementation. Some of these could be addressed during the drafting of recommendations. These included governance and coordination mechanisms ranging from whole-of-government strategies to project teams. Implementation planning with timeframes and responsibilities was also important.*

*Strong leadership and stakeholder engagement. These were considered critical to successful implementation. The risk of a loss of momentum due to a change in leadership should be addressed by broadening leadership and championship to more than one individual.*

*An accountability framework and monitoring process. These should be built in to recommended reforms. Monitoring needs to be transparent, independent and sustainable.<sup>38</sup>*

It also concluded that governments and agencies can support implementation by establishing strategies such as ensuring strong leadership, and centrally coordinating and monitoring implementation.<sup>39</sup>

The implementation oversight mechanisms that have been recommended by previous royal commissions and inquiries and/or established in their wake have included:

- dedicated government teams or units to lead and coordinate implementation<sup>40</sup>
- collaborative working groups and stakeholder participation<sup>41</sup>
- indicative timeframes for implementation<sup>42</sup>
- public reporting requirements<sup>43</sup>
- independent monitors to assess and report on the status of implementation<sup>44</sup>
- evaluation of efficacy of reforms once implemented.<sup>45</sup>

The Commission recommends the establishment of two principal mechanisms to oversee the implementation of its recommendations: a cross-agency taskforce to coordinate implementation (the Implementation Taskforce), and an independent monitor to assess and report on the status and adequacy of implementation (the Implementation Monitor).

The Commission's objectives in recommending these arrangements are:

- *Purposeful implementation*: to encourage the Victorian Government and agencies to focus on the objectives sought to be achieved through the Commission's recommendations, rather than adopting a purely compliance-based approach. At the core of the Commission's recommendations are the objectives of redressing past and potential miscarriages of justice, preventing the recurrence of similar events, and restoring the community's faith in the criminal justice system and legal profession.
- *Transparency and accountability*: to see all those concerned with implementation of the Commission's recommendations, and with the events giving rise to the Commission's inquiry, take responsibility for fulfilling the above objectives.
- *Timeliness and finality*: to ensure that implementation occurs without delay and that the public can be assured that the events that were the subject of the Commission's inquiry have been addressed once and for all. The Commission has therefore included indicative implementation timeframes in each of its recommendations.
- *Collaboration and coordination*: to support the engagement of all agencies with an interest in the implementation of the Commission's recommendations, and the efficient acquittal of all implementation tasks. Cross-agency collaboration is also important for fostering a shared commitment to the values and principles that underpin the proper administration of the criminal justice system.
- *Flexibility*: to minimise the administrative and reporting burden for agencies with responsibility for implementation of the Commission's recommendations.

## Implementation Taskforce

The role of the Implementation Taskforce should be to coordinate all implementation tasks, and to ensure the Commission's recommendations are implemented swiftly and in accordance with their purpose and intent.

The Implementation Taskforce should be fully established within three months of the delivery of this final report. It should be chaired by a senior executive of the Department of Justice and Community Safety and its membership drawn from all agencies with responsibility for implementing the Commission's recommendations. The Taskforce should include stakeholders such as IBAC, the Public Interest Monitor (PIM) and legal profession bodies. The Special Investigator should be invited to join the Taskforce, recognising that they will not be able to discuss the detail of any current or anticipated investigations.

The Commission acknowledges that some of its recommendations are directed to independent statutory bodies or office holders, such as the DPP, and non-government legal profession organisations. These entities are therefore not bound by the commitments made by the Victorian Government or Victoria Police to implement the measures recommended by the Commission. The Commission is confident, however, that these organisations are similarly committed to addressing the issues identified by the Commission and are likely to welcome the opportunity to support the recommended reform initiatives. They should therefore be invited to participate in the Implementation Taskforce.

The Implementation Taskforce should report regularly to the Implementation Monitor on progress to implement the Commission's recommendations. Ideally, agencies should be required to satisfy the Implementation Monitor that implementation is complete before they can themselves report that this is the case.

In Chapter 9, the Commission recommends that Victoria Police provides to the Implementation Taskforce monthly progress reports on the steps it has taken to discharge its ongoing disclosure obligations to potentially affected persons. These reports should also be made available to the Implementation Monitor.

## Implementation Monitor

The role of the Implementation Monitor should be to assess and report on the progress and adequacy of implementation of the Commission's recommendations.

The Implementation Monitor should be a statutory appointee so that they are empowered to access all relevant information, and their reports can be tabled in Parliament, ensuring they are available to the Victorian public. They should be appointed within three months of the delivery of this final report, noting that they could be appointed to the role before the legislation governing their appointment is in force, at which point their role would become a statutory one.

Importantly, the Commission envisages that the Implementation Monitor's role would be an interactive one over the course of the implementation process, not restricted to after-the-event reporting.

Interaction between the Taskforce and Monitor should be flexible and premised on minimising the administrative and reporting burden on the Taskforce and its members. For example, the Monitor could attend Taskforce meetings and have access to Taskforce records to ensure they are briefed on implementation activities.

The Implementation Monitor should report to the Attorney-General annually on the progress and adequacy of implementation of the Commission's recommendations. These reports should also be provided to the Minister for Police. The Attorney-General should in turn report to Parliament.

The Implementation Monitor should be supported by a small secretariat located within the Department of Justice and Community Safety; however, as they will report directly to the Attorney-General, they must operate independently of the Taskforce chair and members.

### RECOMMENDATION 107

That the Victorian Government, within three months, establishes an Implementation Taskforce, chaired by a senior executive of the Department of Justice and Community Safety, with responsibility for coordinating and completing implementation of the Commission's recommendations. The Taskforce should:

- a. consist of members from the Department of Justice and Community Safety, Department of Premier and Cabinet, Victoria Police, the Victorian Office of Public Prosecutions, the Special Investigator and other relevant stakeholders
- b. engage regularly with, and report formally and informally to, the Implementation Monitor proposed in Recommendation 108 throughout the implementation process.

### RECOMMENDATION 108

That the Victorian Government, within three months, appoints an independent Implementation Monitor to monitor the implementation of the Commission's recommendations until implementation is completed.

**RECOMMENDATION 109**

That the Victorian Government, in establishing the role of the Implementation Monitor, provides the Implementation Monitor with the support of a small secretariat located within the Department of Justice and Community Safety, and all necessary and reasonable legislative powers required to fulfil their role, including the power to:

- a. assess the implementation of the Commission's recommendations throughout the implementation process, not only once responsible agencies have reported on the completion of implementation
- b. access Implementation Taskforce documents and attend meetings of the Implementation Taskforce
- c. indicate to responsible agencies the extent to which their implementation of the Commission's recommendations is considered adequate
- d. request regular reports from Victoria Police on its progress in fulfilling its ongoing disclosure obligations to potentially affected persons identified by the Commission
- e. request reports from the Special Investigator on progress to establish their operations and the outcomes of their investigations
- f. request reports from the Chief Commissioner of Victoria Police on the progress and outcomes of any disciplinary proceedings arising from the Special Investigator's disciplinary investigations.

**RECOMMENDATION 110**

That the Victorian Government, in establishing the role of the Implementation Monitor, requires it to report to the Attorney-General annually, or more frequently as it deems necessary, on the progress of the implementation of the Commission's recommendations, the adequacy of implementation and what further measures may be required to ensure the Commission's recommendations are implemented fully within the specified timeframes.

**RECOMMENDATION 111**

That the Attorney-General reports annually to the Victorian Parliament on the progress of the implementation of the Commission's recommendations, until implementation is complete.

# Endnotes

- 1 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 10 (Daniel Andrews, Premier).
- 2 See John Ferguson, 'Next Top Cop Vows Return To Basics', *The Australian* (Melbourne, 2 June 2020) 4.
- 3 See Neil Comrie, *Victoria Police Human Source 3838: A Case Review* (Report, 30 July 2012); Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015); John Champion, *Report to the Director of Public Prosecutions in Relation to Recommendation 12 of the Kellam Report* (Report, 5 February 2016).
- 4 Formally referred to as an 'authorised officer': *Victoria Police Act 2013* (Vic) s 130.
- 5 Responsive submission, Director of Public Prosecutions and the Office of Public Prosecutions, 7 August 2020, 29 [83]–[85].
- 6 *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Report, 1989) 26.
- 7 Submission 156 The Honourable Douglas Drummond QC, 2.
- 8 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 4, 60.
- 9 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 74, 75.
- 10 See definition of 'corrupt conduct' in the *Independent Broad-based Anti-corruption Act 2011* (Vic) s 4(1)(a). Section 4(1)(da) may also be relevant; it concerns conduct intended to adversely affect the effective performance or exercise by a public officer or body of their functions or powers.
- 11 Responsive submission, Independent Broad-based Anti-corruption Commission, 15 September 2020.
- 12 See, eg, *Lee v The Queen* [2014] HCA 20. On the general inadmissibility of Royal Commission evidence, see *Inquiries Act 2014* (Vic) s 40(1).
- 13 Submission 156 The Honourable Douglas Drummond QC, 2.
- 14 Submission 157 Independent Broad-based Anti-corruption Commission.
- 15 See, eg, *Cvetanovski v The Queen* [2020] VSCA 272, where the Court of Appeal of the Supreme Court of Victoria quashed the conviction and ordered the acquittal of the accused person on the basis of the failure of the Crown (in its broadest sense, which here included Victoria Police) to disclose the police payments to the key Crown witness.
- 16 See, eg, *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325; *Lee v The Queen* [2014] HCA 20.
- 17 Submission 156 The Honourable Douglas Drummond QC, 2.
- 18 *Public Prosecutions Act 1994* (Vic) s 10(2).
- 19 Kerri Judd, 'Statement of the Director of Public Prosecutions Kerri Judd QC regarding the Submission of Mr Douglas Drummond QC to the Royal Commission into the Management of Police Informants' (Media Release, 20 October 2020).
- 20 Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020), 4.
- 21 See *Victoria Police Act 2013* (Vic) ss 125, 166; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 5.
- 22 *Victoria Police Act 2013* (Vic) s 132.
- 23 Former Victoria Police officers can only be charged with accessing, using or disclosing police information: *Victoria Police Act 2013* (Vic) s 227.
- 24 Murray Kellam, *Report Concerning Victoria Police Handling of Human Source Code Name 3838* (Report, 6 February 2015) 81-2.
- 25 Vesting the power to lay disciplinary charges in a person other than the Chief Commissioner is not without precedent. See, eg, *Victoria Police Act 2013* (Vic) s 130(1)(a).
- 26 See *Victoria Police Act 2013* (Vic) s 171.
- 27 Under the *Victoria Police Act 2013* (Vic) s 130(1)(b), the Chief Commissioner may appoint an authorised officer, who must be a police officer or public servant, to determine disciplinary charges. The Commission has been advised that a former Assistant Victorian Government Solicitor currently performs this role.
- 28 Parliament of Victoria, Independent Broad-based Anti-corruption Commission Committee, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Report, September 2018) 310 (Recommendation 64).
- 29 See, eg, *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 161(6)(a), which prohibits IBAC publishing in a special report 'a finding ... that a specified person is guilty of or has committed ... any ... disciplinary offence.'
- 30 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
- 31 *Inquiries Act 2014* (Vic) s 124(1).

- 32 *Inquiries Act 2014* (Vic) s 124(2). PROV only receives the Commission's 'permanent records' (as defined by 'Retention and Disposal Authority for Records of Royal Commissions, Boards of Inquiry and Formal Reviews' PROS 17/01).
- 33 Attorney-General's Department (Australian Government), Protective Security Policy Framework, Policy 8: Sensitive and security classified information.
- 34 *Public Records Act 1973* (Vic) s 9.
- 35 *R v Szabo* [2001] 2 Qd R 214.
- 36 Michael Mintrom, Deirdre O'Neill and Ruby O'Connor 'Royal commissions and policy influence' 2020, *Australian Journal of Public Administration* 1, 14.
- 37 Parenting Research Centre, *Implementation of recommendations arising from previous inquiries of relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (May 2015).
- 38 Parenting Research Centre, *Implementation of recommendations arising from previous inquiries of relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (May 2015), xv–xvi.
- 39 Parenting Research Centre, *Implementation of recommendations arising from previous inquiries of relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (May 2015), xvi.
- 40 For example, *Royal Commission into Family Violence* (Report, 2016) Summary and Recommendations (Recommendation 198); *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017) vol 4 (Recommendations 43.5–43.6); Australian Government, 'Restoring Trust in Australia's Financial System: Financial Services Royal Commission Implementation Roadmap' (August 2019), 5.
- 41 For example, *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017) vol 4 (Recommendations 43.3, 43.7); *Royal Commission into Family Violence* (Report, 2016) Summary and Recommendations (Recommendation 200).
- 42 For example, *Royal Commission into Family Violence* (Report, 2016) Summary and Recommendations, 15.
- 43 For example, *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report: Recommendations, 2017) (Recommendations 17.1–17.2).
- 44 For example, *2009 Victorian Bushfires Royal Commission* (Final Report, 2010) vol II, (Recommendation 66); *Family Violence Reform Implementation Monitor Act 2016* (Vic); *Hazelwood Mine Fire Inquiry* (Report, 2014) (Recommendation 1).
- 45 For example, *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report: Recommendations, 2017) (Recommendation 17.4); *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017) vol 4, (Recommendation 43.1).



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