

Transcript of closing remarks by Commissioner Margaret McMurdo 30 November 2020

Background

On 3 December 2018, the High Court of Australia published its judgement upholding the decisions of Victorian courts to allow the Victorian Director of Public Prosecutions to disclose to a group of convicted people that criminal defence barrister, Ms Nicola Gobbo, was a human source. The Court stated that her

‘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 set up this Commission to inquire into and report on:

- the number and extent to which cases may have been affected by Ms Gobbo’s conduct as a human source;

- the conduct of current and former members of Victoria Police in their disclosures about and recruitment, handling and management of her as a human source;
- the adequacy of Victoria Police's current handling and management of human sources subject to legal obligations of confidentiality or privilege;
- the current use of such information in the criminal justice system; and
- recommended measures to address failures in Victoria Police's processes for dealing with these matters.

The Commission's work

I have previously described the work of this Commission 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's work was hampered by Victoria Police's persistent late provision of often incomplete material and witness statements, and its inadequate record-keeping. These challenges lead me to describe my role at times as a boxer fighting with one hand tied behind my back. These challenges did not stop the Commission completing its work.

After 717 days of information gathering and analysis, I present the Commission's final report and 111 recommendations.

Those recommendations broadly fall into three categories:

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

I reiterate that the Commission has no judicial power. It cannot overturn convictions, change sentences, order retrials or release people from custody. Only courts have those powers. Nor does the Commission have the power to initiate criminal or disciplinary charges. If there is conduct that could give rise to criminal or disciplinary charges, it will be for the relevant prosecuting or regulatory authorities to determine whether charges should be brought.

Primarily for this reason and to avoid the risk of unfairly prejudicing possible future investigations or trials, I have not made specific findings in the report as to whether Ms Gobbo or any current or former Victoria Police officers may have engaged in criminal conduct.

Key findings – Ms Gobbo

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 after her third registration as a human source for Victoria Police in 2005.

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.

Mr Orman and Mr Cvetanovski have already successfully appealed their convictions based on the improper conduct of Ms Gobbo and police. There are other appeals in progress with the prospect of many more to come.

Ms Gobbo belatedly admitted to this Commission that aspects of her conduct were wrong. The breach of her obligations as a lawyer was inexcusable. Her behaviour in concert with Victoria Police undermined the administration of justice, compromised criminal convictions, and damaged the standing of Victoria Police officers uninvolved in this debacle. It has shaken public trust and confidence in Victoria's legal profession and criminal justice system.

As a result, a key recommendation is for the Victorian Government to establish a Special Investigator with full powers to examine whether Ms Gobbo may have

committed any criminal offences connected with her conduct as a human source for Victoria Police.

Key findings – police officers

The duties and obligations of police officers when exercising their very considerable powers arise from their oath or affirmation, legislation, prosecutorial guidelines and the common law.

In their recruitment, use and management of Ms Gobbo as a human source, a number of Victoria Police officers fell short of their legal, ethical and professional duties and obligations when they:

- encouraged, or at least condoned, Ms Gobbo acting as counsel for an accused person, knowing that she was a human source
- failed to disclose these matters or to properly claim public interest immunity (PII), although this evidence may potentially have assisted the defence of accused persons
- failed to seek legal advice on these matters.

The Commission accepts that these failures stemmed in large part from concerns for Ms Gobbo's safety. But they were also to avoid reputational damage to Victoria Police and the officers involved, external inquiries, judicial

criticism and appeals against convictions. By placing these factors ahead of their duties and obligations, they corrupted the criminal justice system.

I therefore also recommend that the Special Investigator examines the conduct of current and former Victoria Police officers to determine whether there is sufficient evidence to establish the commission of disciplinary and/or criminal offence or offences related to their use of Ms Gobbo as a human source.

As Victoria Police recognised in their belated apology, the use of Ms Gobbo as a human source was also a systemic failure. It continued unchecked for years, even though many Victoria Police officers, including very senior officers, were aware of it but did nothing to investigate or prevent it.

The Commission accepts Victoria Police's concessions that there were several organisational conditions, structures, cultures, and processes that contributed to these events. These included failures of leadership and governance, of management and supervision, of policy and training, and of processes to properly identify, assess, and manage risk.

There was also room for personal responsibility amongst the critical deficiencies in the human source management policy framework, with instances of SDU officers and investigators failing to comply with parts of that policy and associated procedures. This went largely unchecked by more senior officers. It suggested an unacceptable willingness throughout the organisation to tolerate bending the rules to help solve serious crime.

Another organisational factor was the inadequacy of policies, procedures and training related to police disclosure obligations. This grave shortcoming has been highlighted by other recent inquiries into Victoria Police practices. But these organisational failures did not absolve individual officers from the responsibilities flowing from their duties as police officers.

Police disclosure

Victoria Police has long been on notice about the need to make proper disclosure to people whose cases may have been affected by Ms Gobbo's use as a human source. The Commission is concerned about the slowness with which Victoria Police has acquitted its disclosure obligations and provided people with the information that they should have received many years ago before their trials.

I am therefore recommending that Victoria Police immediately commence reporting monthly on their progress towards meeting their long overdue disclosure obligations.

Policy recommendations

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

While these improvements are commendable, I recommend legislation with similarities to that operating successfully in the United Kingdom to regulate Victoria Police's use of human sources.

Equally necessary is a tiered external oversight model to ensure secure transparency and accountability.

The Commission also considers that the Victorian Government should undertake a review of the broader police oversight system. This will improve the coherence and consistency of an essential element of Victoria's integrity regime.

Other human sources

In relation to Victoria Police's human sources other than Ms Gobbo with legal obligations of confidentiality or privilege, the Commission found no evidence they provided confidential or privileged information that may have affected the validity of any criminal prosecutions or convictions.

While this finding appears encouraging, only three days before the final report was to be delivered, Victoria Police produced, for the first time, apparently significant documents relevant to a Notice to Produce issued in January 2019 and Victoria Police did not give the Commission access to 11 human source files, deeming them too sensitive for me to review.

As a priority, I recommend that the Victorian Government appoint a suitably qualified person to thoroughly review these files to determine whether there is evidence to suggest that any criminal prosecutions may have been affected.

Public Interest Immunity (PII)

Another significant challenge for the Commission was the mass of information subject to Victoria Police Public Interest Immunity (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. These claims complicated and delayed the production, review, and publication of material, hindering the Commission's ability to inquire into subject matter highly relevant to its terms of reference. The Commission recognised that its inquiry involved highly sensitive matters that are not typically subject to public scrutiny. To ensure public hearings and a public report, the Commission came to understand the nature of Victoria Police PII claims (none of which were determined by a court).

For this reason, the Commission recommends the amendment of the Inquiries Act to remove the excuse to refuse production of material to a royal commission on the basis that it is subject to PII.

Final comments

It has been a great privilege to work with the many fine people who have been part of this Commission including Counsel Assisting, Solicitors Assisting, Commission CEO and our hardworking and talented policy and research, investigations, operations, enquiries and media and communications teams.

The Victorian media also played a critical role leading up to and in this inquiry. I thank the Commission's accredited media for conscientiously complying with the many complex non-publication orders, for testing applications to close hearings, and for increasing community awareness of the Commission's work.

The conduct of Ms Gobbo and Victoria Police had wide-ranging detrimental consequences, not least the heavy financial impost on the Victorian people of this inquiry and the considerable litigation arising from it. The Commission's recommendations for future reforms aim to ensure the events that lead to this Commission will not be repeated. But even the best systems can be undermined by deliberate or grossly negligent conduct. The Commission's recommended independent oversight model will ensure any such future conduct is exposed promptly, although constant vigilance will always be needed. With the exposure of the conduct of Ms Gobbo and police to those affected by it, the Special

Investigator's independent examination of that conduct, and the implementation of all other complementary recommendations, Victorians can be satisfied their criminal justice system is again working as it should, now and into the future.

I thank the Victorian Government for its commitment to implement all the Commission's recommendations.

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