

# COMMISSIONER'S REASONS FOR DECISION THAT THE ROYAL COMMISSION HAS JURISDICTION TO MAKE FINDINGS OF STATUTORY MISCONDUCT BY NAMED CURRENT OR FORMER POLICE OFFICERS

## BACKGROUND

1. Counsel Assisting the Commission circulated their closing submissions on 26 June 2020 to parties with standing leave and Mr Simon Overland. The submissions included contentions that I should find various named current and former Victoria Police officers and Ms Nicola Gobbo may have committed criminal offences, and that some police officers may have committed acts constituting breaches of discipline under the *Victoria Police Act 2013*.
2. Between 7 and 25 August 2020 Ms Gobbo, Victoria Police and the current and former police officers against whom those contentions were made (the applicants) delivered their various responsive submissions, which included contentions that this Commission had no jurisdiction to make such findings. They asked that I refer these questions directly to the Supreme Court under s 41 *Inquiries Act 2014* or that I make a determination and provide reasons so that they can challenge it if they wish.
3. After a preliminary consideration of the competing contentions and the relevant legal principles, I decided not to make findings in my final report, which will be publicly available, that any named individuals may have committed criminal offences. My primary concerns were that this Commission is exercising administrative and not judicial power. Whether criminal charges should be brought is a matter for the Victorian Director of Public Prosecutions. Any charges must then be determined in a court on the criminal standard requiring proof beyond reasonable doubt where anything Counsel Assisting or this Commission has said about them is not evidence. Public discussion of whether named individuals may have committed specific criminal offences in submissions or in my final report could unfairly prejudice any future trials and could put at risk the presumption of innocence and Charter rights to a fair trial. I was also concerned about natural justice issues.
4. I did not find that this Commission lacks jurisdiction to make findings of the kind sought by Counsel Assisting concerning possible criminal conduct by named individuals or that the Commission would not or did not have jurisdiction to make findings concerning possible individual statutory police misconduct. The considerations which led me to refrain from making public findings of possible criminal conduct against named individuals and to redact those contentions in Counsel Assisting closing submissions before publication do not carry the same weight in respect of contentions that I make findings against named individuals of potential breaches of the *Victoria Police Act* or its predecessor. These are determined not by courts but by the Chief Commissioner of Police or their authorised delegate: see *Victoria Police Act*, Pt 7, Div 1.
5. On 24 August 2020, the Commission notified the applicants and all those with standing leave before the Commission that I would not make findings in my final report that any individuals may have committed criminal offences, and that Counsel Assisting's

contentions that I should make such findings would be redacted from their submissions prior to publication.

6. The Commission later confirmed to the applicants that I had decided I did have power to consider, and if satisfied to the requisite standard find, that individual police officers may have committed acts constituting statutory breaches.
7. The applicants nevertheless maintained their request for written reasons for this determination. Given the difficult working conditions for the Commission during the current pandemic, the large amount of work ahead of it, and the tight reporting time frames, I will keep them as succinct as appropriate.

## **THE APPLICANTS' CONTENTIONS**

8. The applicants principally emphasise that the Commission's terms of reference do not include an express power to inquire into breaches of laws, regulations or professional standards whereas the terms of reference of other royal commissions which have inquired into such matters have included such expressions.
9. Mr Overland further submits that the making of contentions of misconduct under the *Victoria Police Act* was not authorised by term of reference one which relates to the conduct of Ms Gobbo, not police officers. He also argues that as this legislation did not come into operation until 1 July 2014 and he left Victoria Police in June 2011 it cannot apply to him.
10. The applicants further emphasise the grave reputational risks and unfairness to them that will flow from the allegations being inevitably aired publicly by the media, when those allegations may not ultimately be accepted.
11. They place reliance on *Balog v ICAC* [1990]169 CLR 625, the principle of legality, and *Australian Communications and Media Authority v Today FM (Sydney)* (2015) CLR 352, together with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1) and s32(1).
12. Mr Overland further contends that the Commission's position is not assisted by the catch-all provisions of term of reference 6, relying on *Brinsmead v Commissioner Tweed Shire Council Public Inquiry* (2007)26 NSWLR 438 where a similarly broad term was construed as not permitting findings of criminal or other misconduct.

## **THE BACKGROUND TO THIS COMMISSION AND ITS LETTERS PATENT**

13. A consideration of this Commission's jurisdiction should begin with an understanding of the events leading to the issue of the Letters Patent establishing it, the terms of those Letters Patent and relevant legislative provisions, in this case the Inquiries Act.
14. The trigger for this Commission was the delivery of the High Court of Australia's decision in *AB v CD1* on 5 November 2018. The Court unanimously stated:

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<sup>1</sup> (2018) 93 ALJR 59.

'[ 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] obligation's 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 without favour or affection, malice or ill will<sup>2</sup>. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.'<sup>3</sup>

15. On 13 December 2018, this Commission was established by Letters Patent 'to inquire into and report on the matters specified in the terms of reference. Under the heading 'BACKGROUND', the first dot point referred to '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.....*'.

16. The terms of reference relevantly included that I 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 members of Victoria Police in their recruitment, handling and management of [Ms Gobbo] as a human source  
.....
6. Any other matters necessary to satisfactorily resolve the matters set out in paragraphs 1-5.'

## CONCLUSION

17. The unique circumstances leading to the establishment of this Commission render cases relating to other royal commissions established in a different context with a different purpose, terms of reference and governing legislation, of little assistance in determining this Commission's jurisdiction. I do not find the cases referred to by the applicants, which are all properly distinguishable, of any significant assistance in determining the boundaries of the jurisdiction of this Commission.

18. I accept of course the long line of authority establishing that the principle of legality requires a royal commission's powers to be construed in a way that protects the rights of individual reputations: see *Balog*<sup>4</sup>.

19. I also accept that the findings contended for by Counsel Assisting are serious and will be detrimental to the reputations of those named, without the charges having been brought and proved. The decision maker determining breaches of the *Victoria Police Act*, however, is not a criminal jury but the Chief Commissioner of Police or his delegate. A decision maker of this kind is less likely to be wrongly swayed than a jury by findings of this Commission which they will appreciate may have been made on different evidence.

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<sup>2</sup> See *Victoria Police Act 2013* (Vic), Sch 2, and formerly *Police Regulation Act 1958* (Vic), Second Schedule.

<sup>3</sup> At 62[10]

<sup>4</sup> *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625

20. Given the background to, and purpose and nature of this inquiry, I am satisfied the public interest in ensuring the community understands and has access to the work of this inquiry outweighs those considerations. As the Victorian Court of Appeal recently stated in *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants and Attorney-General for the State of Victoria*<sup>5</sup> when discussing a police officer's application for a pseudonym:

'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>6</sup>

21. Mr Overland's contention that the Commission cannot make a finding he may have breached the *Victoria Police Act* or its predecessor, the *Police Regulation Act*, as he left his position with Victoria Police before the *Victoria Police Act* came into operation is misconceived. Even were he correct in his assertion that the transitional provisions in *Victoria Police Act* Sch 6, Pt7, cl 32 do not apply in his case, whether his conduct in Ms Gobbo's recruitment management and handling as a human source may then have been in breach of regulatory police legislation is relevant to both terms of reference 1 and 2.

22. As noted in this Commission's Progress Report in July 2020:

'Term of reference 1 and term of reference 2 are inextricably linked. Examining the extent to which cases may have been affected by the use of Ms Gobbo as a human source under term of reference 1 may also involve some consideration of the conduct of current and former officers of Victoria Police as required under term of reference 2.'<sup>7</sup>

23. It is also true, as the applicants submit, that this Commission's terms of reference do not in specific words empower me to examine and make findings on police misconduct under the *Victoria Police Act* or its predecessor, the *Police Regulation Act*.

24. The extract from this Commission's Letters Patent under BACKGROUND, set out above, however, makes clear that I am empowered to inquire into conduct of the kind identified by the High Court, the Victorian Court of Appeal and the Victorian Supreme Court in *AB v CD* of both Ms Gobbo and of current and former police officers. The term 'conduct' as used by the High Court and in the Letters Patent includes conduct, whether by positive acts or by failing or omitting to act, which may breach the *Victoria Police Act* or its predecessors. Indeed, the High Court specifically referred to police officers' obligations under that legislation.

25. When considered in its proper context, term of reference 2 is clearly intended to empower me to examine behaviour which may constitute breaches of discipline under the *Victoria Police Act* and its predecessors. As volume three of Counsel Assisting submissions well demonstrate, the question whether such conduct occurred is also highly relevant to term of reference 1 and how Ms Gobbo's conduct as a human source may have affected cases. For example, the nature and extent of any police misconduct

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<sup>5</sup> *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants and Attorney-General for the State of Victoria* 2020 VSCA 214.

<sup>6</sup> At 23 [57].

<sup>7</sup> Royal Commission into the Management of Police Informants Progress Report July 2019, p46.

will be relevant to a court determining if a miscarriage of justice has occurred requiring a conviction to be quashed or a charge permanently stayed.

26. The catch all provision in term of reference 6 only affirms and does not detract from this conclusion.
27. The Letters Patent and terms of reference also require this Commission to look forward in terms of Victoria Police practices. It is important that the work of this Commission assists current and future police officers to understand their obligations to the administration of justice including under the *Victoria Police Act* or its successors and that breaches of those obligations are serious, likely to be publicly exposed and if established will carry detrimental consequences for them.
28. For these reasons, I am satisfied this Commission is empowered by its Letters Patent to inquire into the conduct of current and former police officers in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source. If, after considering the competing contentions and the relevant evidence before this Commission I am satisfied to the necessarily high degree given the seriousness of the finding, they also empower me to conclude and report that a named individual may have committed a breach of the *Victoria Police Act* or its predecessors. Nothing in the *Inquiries Act* or the *Charter* requires a different conclusion. To find otherwise would be to make a mockery of this Commission and of the intent of those who established it.

**28 August 2020**