

**AT THE ROYAL COMMISSION****INTO****THE MANAGEMENT OF POLICE INFORMANTS****SUBMISSIONS ON BEHALF OF NICOLA GOBBO****RE: PUBLICATION/DISCLOSURE OF DRAFT STATEMENT AND PRIVATE TELEPHONE CALLS**

1. Commissioner McMurdo has indicated that it is the intention of the Royal Commission to disclose/publish the 3 private phone calls between Ms Gobbo and the Commission as well as a draft statement of Ms Gobbo. That proposal is opposed for the reasons set out herein.

**Relevant Chronology**

2. The following matters are relevant for consideration of these submissions (emphasis added below where appropriate):

<b><u>Date</u></b>	<b><u>Relevant Matter</u></b>
26/02/19	<ul style="list-style-type: none"> <li>• Notice to Attend on 12 March 2019</li> </ul>
08/03/19	<ul style="list-style-type: none"> <li>• Notice extended to 19 March 2019</li> </ul>
15/3/19	<ul style="list-style-type: none"> <li>• Letter from Minter Ellison to Solicitors for the Royal Commission (<b>Commission</b>)</li> <li>• That letter sets out why Ms Gobbo has "a reasonable excuse" in not appearing on 19 March 2019 based upon her health and circumstances</li> <li>• It also encloses some evidence supporting these claims</li> <li>• Given Ms Gobbo's desire to assist the Commission it was proposed that an initial telephone conversation be scheduled involving Mr Rapke and Commission representatives.</li> </ul>
18/03/19	<ul style="list-style-type: none"> <li>• Letter from the Commission to Minter Ellison</li> <li>• The letter acknowledged the contents of the 15 March letter and commented that <i>"the Commission accepts that on account of these</i></li> </ul>

	<p><i>matters, your client has a reasonable excuse for failing to comply with the Commission's Notice to Attend."</i></p> <ul style="list-style-type: none"> <li>• Notwithstanding this, the Commission remained keen to speak to Ms Gobbo and so a telephone hearing was scheduled.</li> <li>• The letter indicated that Counsel for the Commission would be present along with some of the solicitor's instructing.</li> <li>• It was indicated that the conversation would be recorded and transcribed for use by the Commission.</li> <li>• The letter concludes that the Commission was looking forward to making arrangements in the future (beyond the phone call scheduled) where Ms Gobbo could <b>give evidence</b> by way a of private hearing in the near future.</li> </ul>
18/03/19	<ul style="list-style-type: none"> <li>• By email at 7pm, Mr Rapke replied to the request for the areas to be discussed during the telephone call.</li> <li>• In that email, Mr Rapke stated "<i>Commissioner McMurdo would like to be involved in the <b>phone conference</b>. She would welcome the opportunity to speak with your client and explain some of the matters she is required to investigate under her terms of reference. Is there any objection from your client to the Commissioner being involved? We wish to make clear that Wednesday's phone conference is not on oath but, as mentioned in our letter of earlier today, it is our intention to record the conversation.</i>"</li> </ul>
19/03/19	<ul style="list-style-type: none"> <li>• Email from Howard Rapke to Minter Ellison</li> <li>• Details of conference call provided with note that "<i>Commissioner McMurdo will be in the room with us, as she would like to speak to your client. We also advise that we will be taking a transcript of the phone call as that will assist the Commission's task.</i>"</li> </ul>
20/03/19	<ul style="list-style-type: none"> <li>• Telephone Conference</li> </ul>
21/03/19	<ul style="list-style-type: none"> <li>• Letter from Solicitors for the Commission to Minter Ellison – "<i>thank you for coordinating yesterday's telephone conference... The Commission found it to be beneficial as part of its enquiries.</i>"</li> <li>• It then set out a process to obtain Miss Gobbo's answers/comments to certain questions or issues.</li> </ul>
7/04/19	<ul style="list-style-type: none"> <li>• Email from Howard Rapke to Minter Ellison</li> </ul>

	<ul style="list-style-type: none"> <li>• It confirms the availability of the Commission for 10 April 2019 phone conference as <b><i>“it will assist the Commission with further hearings commencing next Monday 15 April.”</i></b> It then outlines the topics for discussion, which related to the witnesses to be called on 15 April. The email continued that <b><i>“we would want to approach the proposed discussion in the same way as the previous discussion.”</i></b></li> <li>• On 9 April Richard Murphy responded indicating that the 10<sup>th</sup> was not suitable due to psychological appointments.</li> <li>• Mr Rapke responded that the 11 April was fine and reiterated that arrangements <b><i>“will mirror the last occasion we spoke”</i></b>.</li> </ul>
11/04/19	<ul style="list-style-type: none"> <li>• Conference call</li> </ul>
12/06/19	<ul style="list-style-type: none"> <li>• Email from Howard Rapke for the Commission</li> <li>• Outlines the Telephone Conference answers will be then incorporated into a statement by Ms Gobbo’s legal team and then eventually sworn by Ms Gobbo as being correct.</li> </ul>
13/06/19	<ul style="list-style-type: none"> <li>• Conference Call</li> </ul>
14/06/19	<ul style="list-style-type: none"> <li>• Howard Rapke email</li> <li>• Transcript of all calls attached. Request to provide a statement answering 51 questions posed by the Commission.</li> </ul>

### Submissions

#### Unfit/Reasonable Excuse

3. On 15 March 2019, those instructing us wrote to the Commission setting out a number of factors as to why Ms Gobbo was not in a position to appear as requested on 19 March 2019. A central feature of those reasons was that Ms Gobbo was “in poor physical and mental health, suffering from considerable pain for which she is being medicated.” That letter also went on to describe her other circumstances that prevented compliance with the notice to attend. To evidence that position, some medical evidence was provided (contrary to previous suggestions that no medical evidence was provided until September of this year).
4. The 18 March 2019 letter of the Commission stated that at that time Ms Gobbo’s circumstances amounted to a reasonable excuse not to attend. It follows that the Commission

accepted, at least to some degree, Ms Gobbo was not fit enough to provide evidence on oath; that is, evidence that could be relied upon on used against her. It was partly on that basis that all parties (including the Commission) agreed it was not required that the evidence be on oath.

5. It is respectfully submitted that for the Commission to now use the telephone conversations, when the Commission itself had found Ms Gobbo had a reasonable excuse, would be grossly unfair.
6. In fact, during the telephone conference of the 20 March 2019, the Commissioner identified that the hearing was not under oath and it meant that (i) Ms Gobbo was not provided the protections under the Inquiries Act 2014<sup>1</sup>, and (ii) any weight that could be attached to what Ms Gobbo said would be limited at best as it was not under oath<sup>2</sup>.
7. To exacerbate this issue, it was made clear to the Commission that Ms Gobbo had not been provided with any of the relevant material to review prior to answering questions<sup>3</sup>. It is submitted that for her answers now to be published, relied upon/practised, would not be affording Ms Gobbo procedural fairness, as at the time of giving the answers not only was she deemed to have a reasonable excuse, she had also not been provided the material to consider prior to giving her answers. Section 12 Of the Inquiries Act 2014 retains the importance of procedural fairness, even in a Royal Commission.
8. Ms Gobbo would be the only person during the currency of the Commission to date who would not have been provided this fairness in circumstances where Ms Gobbo has the most material to consider and has been criticised during throughout the months of hearings to date.

*Ms Gobbo's Perceived Purpose of the Conference Calls*

9. It is apparent from the correspondence that whilst Ms Gobbo was not well enough on 15 March 2019, she still wished to assist the Commission by providing information, akin to instructions, to assist the Commission with its task during hearings.
10. The Commission accepted the offer of a conference call (not a private hearing). By letter of 18 March this was clear; perhaps best evidenced by the fact that the Commissioner was not

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<sup>1</sup> Transcript of 20 March 2019, page 210, line 36-38;

<sup>2</sup> Ibid, line 22-28.

<sup>3</sup> Ibid, page 166, lines 25-41 and then again, page 213, line 39 – page 214, line 8.

originally envisaged to be included in the telephone conference. That letter also appears to identify the distinction by commenting separately in the future there will be a private hearing by telephone where Ms Gobbo could give evidence. This provides an insight into the views of all parties as to the purpose and nature of the telephone conference.

11. It was only by email at 7pm that same evening that it was indicated that Commissioner McMurdo was to be a part of the conference call. In that same email when explaining this development, Mr Rapke reiterated that whilst Commissioner McMurdo would be present the conference call would not be on oath. This is relevant as it tended to emphasise the informal nature of the conference call and the fact that Ms Gobbo was deemed to have a reasonable excuse, which included her health. She of course did not have any of the material she was being asked questions about.
12. This message was repeated by Mr Rapke on 19 March and that the transcript would assist the Commission's task.
13. Consequently, Ms Gobbo and her legal representatives understood the telephone communications would be Ms Gobbo providing details/instructions relating to certain matters that would allow Counsel assisting the Commission to prepare cross-examination for witnesses due to be called (indeed, some of what Ms Gobbo said was in fact used in cross-examination). Given the correspondence, the content of the calls was akin to privileged material. It was not on oath and was provided to "assist the Commission". Given the criticisms made of Ms Gobbo and legal professional privilege, it would be unfortunate if this material was disclosed in breach of it.
14. The correspondence that followed this first telephone conference reinforces that the nature of these calls was to provide Counsel assisting the Commission with information so as to then consider other material and also question witnesses; in other words, to provide instructions:
  - a. On 21 March 2019, the Commission set out the process going forward for obtaining instructions: Providing material to Ms Gobbo to comment upon.
  - b. On 7 April 2019, Mr Rapke confirmed the wish for a further telephone conference to assist the Commission (Counsel) in advance of upcoming public hearings. The letter sets out the topics to be discussed which corresponded with the witnesses to be called.

- c. That the next call would mirror the previous telephone conference: i.e. not on oath and providing assistance to the Commission.
  - d. The transcripts were then provided to be incorporated into a statement for Ms Gobbo to consider and eventually swear as the truth.
15. The email of 7 April 2019 in particular demonstrates the purpose of the calls, despite Ms Gobbo's limitations (health, circumstances, lack of material considered) was to provide some information to the Commission to assist in the public hearings. It is therefore submitted that the information was akin to instructions that Ms Gobbo understood to be in confidence. To disclose this information would breach that confidence. It may be doubted whether Ms Gobbo would have provided the assistance she did had she been told from the outset of an intention to publish the contents of the telephone calls, despite the limitations set out herein.
16. The informal, non-evidential nature of the hearings is perhaps best evidenced by the fact Ms Gobbo's children were present and could be heard during one of the calls. Ms Gobbo also took pain killers during the course of the hearings. For her answers in those circumstances to be used is inconsistent with procedural fairness.

#### The Draft Statement

17. The same principles apply to the draft statement the Commission wishes to publish.
18. In addition, the statement was prepared by counsel considering the transcripts, earlier statements made by Ms Gobbo and other material in existence. It has not been sworn or signed by Ms Gobbo or affirmed by her to be true and accurate. The statement does not therefore have the protections afforded under the Act. Furthermore, Ms Gobbo has not had the opportunity to consider relevant material. As evidenced by medical statements, her health has deteriorated from 15 March 2019 (when she was found to have a reasonable excuse) and as such, she has not been well enough to provide detailed instructions. It is submitted that to now publish the statement, in circumstances where it will be considered to be the truth of its contents, would be grossly unfair and not afford Ms Gobbo procedural fairness.
19. The statement was provided to the Commission purely to indicate some progress was being made.

20. It is also noted that during the hearings, criticism has been made of lawyers drafting statements that are not signed by the client and amended without the client's approval. To publish this statement would be publishing a document created in analogous circumstances.

Relevance & Reliability

21. The limitations of the telephone transcripts and the draft Paul Dale statement have already been referred to above and are not repeated. It follows that reliability should not be placed upon the answers unless the subject of procedural fairness and declaration on oath as to the veracity of the contents.

22. It is also noted that some at the Bar table have pushed for access to this material. The SDU handlers have sought disclosure on the basis that any material considered by the Commission should be provided to any party adversely impacted. In response:

- (i) The contents of the calls are not relevant to the SDU. Ms Gobbo makes very few comments about the handlers. Sandy White is mentioned a few times. However, Mr White was already questioned in line with what is said about him and so it cannot be said he has not had an opportunity to deal with anything raised.
- (ii) The Commissioner in the first call outlined the limitations of the telephone calls as they were not on oath and carried little or no weight.
- (iii) We are aware an SDU member also gave information to the Commission during a private phone call. That has not been disclosed as having occurred by the Commission yet should be disclosed if the Commission is to use it as evidence in its fact finding process.

Conclusion

23. For the reasons outlined herein, namely that Ms Gobbo was unfit at the time of the telephone calls (and medical evidence demonstrates her mental health deteriorated over time), that the phone calls were informal in nature (and akin to instructions) as well as the issues of relevance and reliability, it is submitted the telephone transcripts should remain private as they were meant to be. This is in particular given the transcripts are not on oath and so not protected under the Inquiries Act. As to the draft statement, that document has not even been affirmed by Ms Gobbo to be accurate.

**P.W. Collinson**

**Rishi Nathwani**

**21 October 2019**

**Instructed Messrs Minter Ellison Solicitors**