

ROYAL COMMISSION INTO THE MANAGEMENT OF POLICE INFORMANTS

SUBMISSIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE OFFICE OF PUBLIC PROSECUTIONS IN REPLY TO INTERESTED PARTIES – SEPTEMBER 2020

INTRODUCTION

1. These submissions reply to those recently filed by interested parties in response to the submissions of counsel assisting. They deal with certain matters which require correction or clarification, or have an important connection with submissions already made by the DPP and the OPP. This reply does not deal with every submission or assertion of fact with which the Director of Public Prosecutions (the **Director**) or Office of Public Prosecutions (the **OPP**) takes issue.

KNOWLEDGE OF MS GOBBO'S ROLE

2. The submissions of the interested parties tend to confirm the submission previously made, that the DPP and the OPP were not informed of Ms Gobbo's role as a police informer at any point during the periods in which Victoria Police used her as a human source or a witness. If there were evidence of a member of Victoria Police informing a prosecutor of Ms Gobbo's role, one would expect this to have been mentioned in the submissions filed by Victoria Police or on behalf of its current or former members. No such submission has been made.
3. Rather, the submissions filed by Victoria Police tend to confirm that police members followed a policy of never disclosing the identity of human sources, even to prosecutors.¹
4. Oddly, an exceptional allegation that the DPP was informed of Ms Gobbo's role as a source is to be found in the submissions filed on behalf of Ms Gobbo herself. In a criticism of Counsel Assisting for failing to follow where the evidence is said

¹ Victoria Police Responsive Submissions - Tranche 1 - Submission of Detective Inspector Ryan at [28.14]-[28.15]; Submission of Superintendent Kelly at [34.6]; Submission of Jim O'Brien at [48.20], [51.6], [51.18], [52.82] and [52.176]; Submission of Inspector Flynn at [63.8], [67.18], [68.69]-[68.71].

to have led, Ms Gobbo's submissions refer to an entry in a Source Management Log which "appeared to indicate that during the prosecution of Mr Mokbel for the murder of Mr Lewis Moran, Mr Rapke was made aware that Ms Gobbo was potentially involved in Operation Briars (as a human source)..."² The submission goes on to cite Mr Wilson's "evidence" that it was obvious from the material that Mr Rapke knew of Ms Gobbo's role as a source in October 2008.³

5. This submission proceeds from a mistake. The Source Management Log it relies on does not attribute any knowledge that Ms Gobbo was a source to Mr Rapke. It attributes knowledge to Mr Rapke that she was a witness. Needless to say, there is a significant difference. The Source Management Log, dated 1 July 2009, says: "*Inf by SW that Rapke aware HS is a witness.*"⁴
6. The same misstatement of the contents of the log is itself the source of Mr Wilson's "evidence". Mr Wilson did not write the entry, was not present for the communication it records, and was not the subject of the note. As the transcript reveals, Ms Gobbo's counsel misstated the contents of the log when putting to Mr Wilson a question about it. Mr Wilson did no more than adopt the mistake in counsel's puttage when he interpreted the log.⁵ On analysis, this amounts to no evidence at all.
7. The log was written by Sandy White, who gave no evidence of Mr Rapke being aware of Ms Gobbo's status as a source.⁶ The 'SW' he refers is Stephen Waddell, who gave evidence that he didn't speak to Mr Rapke at all.⁷ As Mr Waddell clarified in his oral evidence, he had a practice of referring to the Office of Public Prosecutions as "the DPP".⁸ This practice is common. Mr Waddell was not challenged in cross-examination about his evidence on the contents of the log, by counsel for Ms Gobbo,⁹ or anyone else. Mr Waddell's reference to the OPP being aware of Ms Gobbo's status as a witness is understandable, in light of the fact

² Responsive Submissions of Ms Nicola Gobbo with respect to Terms of Reference 1 and 2 at [78].

³ Ibid, referring to T10225- 10226.

⁴ VPL.2000.0001.9306

⁵ T10225-10226

⁶ T4731-4733

⁷ Exhibit RC1196b Statement of Stephen Waddell at [56]-[57].

⁸ T14085-14086

⁹ T14080

that she had at that point signed a statement for the purposes of the Petra taskforce, and the Briars taskforce was treating her as a potential witness.

8. Counsel Assisting were right not to pursue a theory that the Source Management Log somehow indicated that Mr Rapke, or anyone at the OPP, was aware of Ms Gobbo's status as a human source in July 2009. The theory involves a basic misreading of the document that is not supported by the evidence of relevant witnesses and is contradicted by Mr Rapke himself.¹⁰
9. Finally, Ms Gobbo's submissions refer to evidence indicating that Mr Horgan SC was consulted about a change to Mr McGrath's statement.¹¹ It is important to note that this related only to what Mr Bateson refers to as an "indemnity type paragraph" which concerned whether or not the statement could be used against Mr McGrath.¹² For a prosecutor to have some input into a clause of this kind is entirely unremarkable.
10. Mr Horgan SC had no role in the revisions to Mr McGrath's draft statement, the concealment of which is the focus of submissions made by Counsel Assisting.¹³ The depositions from the relevant matter provide clear evidence that day book and diary entries of both Officers Bateson and Hatt, the police members who dealt with Ms Gobbo in relation to the changes to McGrath's statement, were withheld from the parties and the Magistrate.

CONFLICTS OF INTEREST

11. The submissions of Ms Gobbo and Victoria Police are right to point out that a range of facts are relevant to an evaluation of the nature and extent of Ms Gobbo's conflicts of interest. Those submissions refer to evidence, for example, that Ms Gobbo's role in acting for Mr McGrath was known to Mr Thomas, her instructing solicitor Mr Valos, and her leader, Mr Lovitt QC.¹⁴ They also refer to the fact that there was evidently a plan to manage Ms Gobbo's conflict by having her

¹⁰ Exhibit RC1096 Information provided to the RCMP by Kerri Judd QC, DPP, 8 November 2019 at p 68, item 108.

¹¹ Responsive Submissions of Ms Gobbo at [507(n)].

¹² T10090-10091; see also Exhibit RC1512 Supplementary information provided to the RCMP by Kerri Judd QC, DPP dated 26 February 2020 at [8]-[10].

¹³ Counsel Assisting Submissions – Volume 2 at [628] and [764].

¹⁴ See Responsive submissions of Ms Gobbo at [520]-[527]; Victoria Police Responsive Submissions - Tranche 1 - Submission of Commander Bateson at [13.6]-[13.8].

appear for Mr Thomas only in proceedings where Mr McGrath was not to be called as a witness.¹⁵ As the submissions for Victoria Police point out, just what prosecutors may have been told about the nature of the conflict, and how it was being managed, is not clear.¹⁶

12. It is clear that Mr Horgan QC raised the issue of conflicts with Ms Gobbo on more than one occasion, but neither of them recall details of the conversations.¹⁷
13. These facts tend to underscore the difficulties prosecutors would face if they were expected to monitor, and remedy, the conflicts of defence practitioners. If Mr Horgan SC had been informed, for example, that Ms Gobbo had a carefully circumscribed role in relation to both Mr McGrath and Mr Thomas, both clients were fully informed, and senior counsel and her instructor were aware of her position, he would have been in no position to look behind those assurances and investigate further. As the Director has submitted, the regulators of the profession are the proper monitors of compliance with ethical obligations, including the obligation to avoid conflicts of interest.
14. There is one matter raised on Ms Gobbo's behalf on the topic of conflicts of interest which requires correction. Ms Gobbo submits that Mr Horgan SC may have been conflicted in continuing to act in Mr Thomas' prosecution, having cross-examined him at a coercive hearing.¹⁸ This was not a conflict of interest. The submission appears to allude to the case law concerning the potential unfairness in the prosecution being armed with the evidence of an accused obtained under compulsion.¹⁹ The leading of authority of *X7 v Australian Crime Commission* (2013) 248 CLR 92, which established the basis for this principle in Australian jurisprudence, was decided in 2013, nearly 9 years after the examination conducted by Mr Horgan SC. At the relevant time, there was no

¹⁵ Victoria Police Responsive Submissions - Tranche 1 - Submission of Commander Bateson at [20.35]-[20.44]. Given this last aspect of the evidence, it is probably not "astonishing" that Mr Horgan SC may have assumed Ms Gobbo might remain involved in Mr Thomas' matter if he pleaded guilty (cf Submissions of Ms Gobbo at [507(cc)]). Indeed, that is precisely what she endeavoured to do until she withdrew after Mr Faris QC threatened to have her restrained from acting.

¹⁶ Victoria Police Responsive Submissions - Tranche 1 - Submission of Commander Bateson at [20.48].

¹⁷ See Exhibit RC1096 Information provided to the RCMPI by Kerri Judd QC, DPP dated 8 November 2019 at p 23-24; Exhibit RC1512 Supplementary information provided to the RCMPI by Kerri Judd QC, DPP dated 26 February 2020 at [10]; Exhibit RC0336 Court Book of Gobbo October 2003 to July 2004; and evidence of Ms Gobbo at T13205.

¹⁸ Responsive submissions of Ms Gobbo at [504].

¹⁹ See *Lee v The Queen* (2014) 253 CLR 455.

recognised constraint on a prosecutor conducting a case against an accused where they had been privy to evidence given by the accused at a compulsory hearing.

INFORMATION PROVIDED TO THE DPP AND THE OPP

15. There is broad agreement between the DPP and OPP and Victoria Police on the sequence of events which led to the progressive disclosure of Ms Gobbo's role as a human source. However, there are some aspects of the factual assertions made by Victoria Police that are inaccurate or mischaracterise what occurred.

Meeting of 1 June 2012

16. In submissions concerning the meeting on 1 June 2012 with the then DPP, John Champion SC, and Bruce Gardner, Victoria Police suggest, based on Mr Fryer's recollection, that the Director indicated an awareness that Ms Gobbo was an informer based on the Cvetanovski trial in 2011.²⁰ This suggestion contradicts the concession properly made by Victoria Police that Mr Champion SC was not informed of Ms Gobbo's true role at any stage during the Cvetanovski trial.²¹ In submissions made on behalf of Mr Flynn, it is put that informing Mr Champion SC of Ms Gobbo's role was not only something he did not do, but something he never would have done due to his rigid adherence to Victoria Police policy of never disclosing the identity of informers.²²
17. Officer Pearce, a member of the SDU seconded to Purana at the time, was present at the meeting on 11 April 2011 with Mr Champion SC during the Cvetanovski trial. His submissions provide that not only did the SDU's operating procedures require him to keep Ms Gobbo's role as a human source confidential but that disclosure of it would be likely to result in him facing a criminal charge.²³
18. In the face of these and other submissions to this effect, and the uncontroverted evidence on which they are based, it is not open to accept Mr Fryer's account of the meeting of June 2012. Mr Fryer produces no notes in support of that account.

²⁰ Victoria Police Responsive Submissions - Tranche 2 - Initial disclosure to the DPP at [121.6]-[121.7].

²¹ Victoria Police Responsive Submissions - Tranche 2 - Trial of Zlate Cvetanovski at [109.4]; Submission of DS Hayes at [38.2] (p 461 of 564).

²² Victoria Police Responsive Submissions - Tranche 1 - Submission of Inspector Flynn at [68.66]-[68.77].

²³ Responsive submissions of Mr Pearce dated 7 August 2020 at [7]-[8].

19. Bruce Gardner's notes of the June 2012 meeting are contemporaneous and detailed. They reveal that Mr Gobbo's role as a witness, and the permissible limits of her compensation, were the primary topics of discussion at that meeting. Mr Gardner's notes contain no indication of any prior knowledge on the part of himself, or Mr Champion SC, of Ms Gobbo's role as a human source. Nor do they contain any clear statement as to exactly what Mr Fryer and Mr McRae conveyed about her status as an informer for Victoria Police during that meeting.

Meeting of 4 September 2012

20. Victoria Police asserts that on 4 September 2012, the DPP was briefed on the "out of scope" issues that had been identified during the Comrie Review and set out in a document prepared by Steve Gleeson.²⁴ Again, this assertion is based solely on a witness' recollection and is unsupported by any record. Victoria Police concedes that "the evidence does not establish which of the out of scope issues Supt. Gleeson raised."²⁵ Given this concession, it is unclear what kind of finding is actually being sought by Victoria Police about what was conveyed at this meeting about the 'out of scope' issues.
21. Again, Bruce Gardner took a contemporaneous file note documenting the meeting. It is a detailed record of what was discussed, which was clearly focussed on a single issue: the possibility of Ms Gobbo having provided information enabling Mr Mokbel's arrest in Greece. Mr Gardner's note says: "Fin could not tell us more at present. Agreed at present he has nothing concrete to tell us." The very specific and concrete examples outlined in paragraphs (a)-(k) of Mr Gleeson's list of 'out of scope' issues are highly unlikely to have been raised in light of Mr Gardner's note.

Internal meeting of 17 October 2012

22. On 17 October 2012, Mr Gardner and Mr Champion SC met with Tom Gyorffy SC, who was senior counsel appearing for the DPP on Tony Mokbel's appeal proceedings, to discuss the information Mr McRae had provided about Ms Gobbo's potential role in assisting to facilitate Mokbel's arrest. Mr Gardner's note states: "All agree – even if true, could not affect appeal issues. Nor is it clear

²⁴ Victoria Police Responsive Submissions - Tranche 2 at [134.3].

²⁵ Ibid at [126.6]

or certain enough to require disclosure.” Victoria Police suggest that the reference to ‘appeal issues’ in Bruce Gardner’s notes of the meeting might be a reference to multiple appeals, and an indication the Ms Gobbo had been informing on clients generally.²⁶ There is no basis for this suggestion. Read in context, the note is clearly referring to the Mokbel appeal only.²⁷ This was the only specific matter Mr McRae had raised in the meeting of 4 September 2012.

Meeting of 25 November 2014

23. It is clear that at this meeting, Mr Leane, Mr McRae, Mr Gardner and Mr Champion SC discussed five ‘case studies’ which had been prepared as part of Operation Bendigo. In advance of the meeting, a single page document listing the matters which were the subject of the case studies was sent to Bruce Gardner.²⁸ The DPP and the OPP differ from Victoria Police on what occurred during this meeting in a narrow respect: whether there is a basis to find that the case studies were offered to the DPP (in the sense that he was being offered the folders comprising the case studies and supporting material, to retain and read) and that he declined. There should be no finding that this occurred.
24. As Counsel Assisting rightly point out,²⁹ the claim that Mr Leane and Mr McRae tried to hand over the case studies is inconsistent with the evidence in Mr McRae’s statement that if the DPP had required access to the case studies “there would be lengthy PII arguments”.³⁰ Mr McRae confirmed this aspect of his statement in oral evidence, where he said that he wasn’t necessarily authorised to provide the case studies, and would have handed them over for “perusal” only, because they weren’t in a proper form for disclosure.³¹ Counsel Assisting allowed Mr McRae to clarify his evidence:

Mr Winneke: If [the DPP had] have said to you, "Can I have the case studies, I want to see them", you'd say, "No, I can't give them to. We'll have

²⁶ Ibid at [126.9]-[126.10].

²⁷ See Exhibit RC1096 Information provided to the RCMPI by Kerri Judd QC, DPP dated 8 November 2019 at [39].

²⁸ Ibid at [58]-[59] and Annexure 22.

²⁹ Submissions of Counsel Assisting the RCMPI, Vol 2 at [4643].

³⁰ RC1067 Statement of Findlay McRae dated 13 November 2019 at [7.37(b)].

³¹ T12951

to have a PII fight about it". Is that what you're meaning to suggest in that paragraph in your statement?

Mr McRae: Handing over the case studies would have meant reshaping them into a PII analysis in a proper form for disclosure.

25. Mr Leane agreed that the case studies were subject to a PII assessment.³² Mr McRae's file also described the work on the case studies as "ongoing".³³
26. These facts would explain why the DPP was sent a single page with some names on it as a primer for the meeting of 25 November 2014, and why Mr McRae said that he had read from the case studies during the meeting,³⁴ rather than providing them to Mr Champion to read for himself in his own time. These facts also explain why the DPP was not provided with the case studies until November 2016,³⁵ when they were produced pursuant to subpoena during the litigation before Ginnane J, and thereafter were required to be securely stored in safes and accesses only be legal representatives under strict conditions.³⁶

Characterisation of the DPP's response

27. On 9 December 2014, Mr Champion SC convened a meeting of the Director's Committee, attended by Gavin Silbert SC (Chief Crown Prosecutor), Mr Gardner and Craig Hyland (Solicitor to the DPP). Mr Gardner's notes of that meeting record an agreement among the participants that there was: 'presently, no duty of disclosure by DPP to defence because unclear information' but that the position may alter on the production of the IBAC Report, which was expected within two weeks. By email on 11 December 2014 Mr Gardner advised Mr McRae that the DPP had insufficient information to invoke the miscarriage of justice policy, due to uncertainty over the nature, extent and timing of Ms Gobbo's conduct.
28. At this time, and subsequently, the DPP was open to receiving further information about Ms Gobbo's conduct. Victoria Police and IBAC were both involved in gathering information about the nature and extent of Ms Gobbo's role as a source, and how it may have affected criminal proceedings involving her clients.

³² T14298 - 14299

³³ RC1067 Statement of Findlay McRae dated 13 November 2019 at [7.46].

³⁴ T1250.36-39

³⁵ Exhibit RC1096 Information provided to the RCMPPI by Kerri Judd QC, DPP dated 8 November 2019 at [63].

³⁶ T14299.28-38

Investigations of this kind are not the function of the DPP or the OPP. Despite the efforts of Mr McRae and others, progress in Operation Loricated was slow, as Counsel Assisting have pointed out.³⁷ It has taken this Royal Commission to expose the full extent to which Ms Gobbo was used as a source by Victoria Police. Even with the powers available to this Commission, that process has not been quick, or easy.

29. Before the IBAC Report was produced, it was always open to Victoria Police to obtain its own legal advice, particularly where it was concerned about disseminating sensitive material to external agencies (including the DPP and the OPP, as Mr McRae and Mr Leane indicated).³⁸
30. Once the IBAC Report was provided in February 2015, the Director acted diligently, and with due care, in conducting the kind of examination Mr Kellam had recommended. The process Mr Champion SC undertook was described in detail in his Report to the Attorney-General.³⁹ In summary, Mr Champion SC:
 - (a) consulted OPP solicitors and prosecuting counsel, and tasked them to review prosecution files and prepare reports;
 - (b) personally reviewed the material from the prosecution of Zlate Cvetanovski as a result of his involvement in Mr Cvetanovski's drug trafficking trial in 2011 and correspondence received directly from Mr Cvetanovski; and
 - (c) obtained legal advice from senior counsel on two separate occasions, one of which resulted in further reviews of prosecution files, to ensure the assessment of possible miscarriages had been done comprehensively, and in accordance with legal principle.
31. Mr Champion SC provided his final report to the Attorney-General on 5 February 2016, advising that, consistent with his common law obligations and policies on disclosure, he was "firmly of the opinion that I am obliged to disclose the contents of the Kellam Report to those that may be affected by the matters discussed therein. That disclosure should occur expeditiously." He also noted that while he

³⁷ Submissions of Counsel Assisting the RCMPI, Vol 2 at [4562].

³⁸ cf. Victoria Police Responsive Submissions - Tranche 2 at [138.20].

³⁹ Untendered Exhibit JRC-3 (Champion Report) to the Confidential Affidavit of John Ross Champion SC dated 2 August 2016; COR.1000.0001.0139.

was unable to conclude that miscarriages of justice had occurred, the extent of his examination had been necessarily limited as he did not have knowledge of, or access to, all the evidence and information relating to the activities of Ms Gobbo. In making his decision to disclose Ms Gobbo's role, Mr Champion SC explained that he was acutely aware of the extremely serious risk this posed to her safety.

32. In light of these facts, the suggestion by Victoria Police that there was inexplicable inaction by the DPP⁴⁰ should be rejected.

POLICY – HUMAN SOURCE MANAGEMENT, DISCLOSURE, AND PUBLIC INTEREST IMMUNITY

Human source management and disclosure

33. Victoria Police's responsive submissions set out measures taken by Victoria Police in response to the failures in human source management and disclosure that led to the circumstances under consideration by the Royal Commission. Significant gaps remain in those measures, creating a real risk of inadequate disclosure in cases involving human sources with obligations of confidence.
34. The VPM Human Sources Policy⁴¹ continues to contemplate that human sources with obligations of legal privilege or confidentiality can be registered. Responsibility for decisions as to whether such "category 1" human sources should be registered sits primarily with the Human Sources Ethics Committee (HSEC), which is comprised entirely of Victoria Police members. In cases where it is proposed to task a human source to obtain information subject to a legal obligation of privilege or confidentiality because of exceptional and compelling reasons, the matter must first be considered by HSEC and then, if approved, by the Deputy Commissioner, Specialist Operations.⁴²
35. Thus under the VPM Human Sources Policy, the decision to register a human source with obligations of legal privilege or confidentiality is one internal to Victoria Police, without external oversight and without legislative imprimatur. This is in contrast to the United Kingdom model established under the *Regulation*

⁴⁰ See, for example, Victoria Police Responsive Submissions - Tranche 2, section 143.

⁴¹ VPL.0005.0285.0001

⁴² Victoria Police Responsive Submissions - Tranche 2 at [22.5], [22.8], [23.1]. See also RC1529 Statement of Wendy Steendam dated 16 April 2020 at [113]-[118] and VPM Human Sources Policy (VPL.0005.0285.0001).

of Investigatory Powers Act 2000 (UK) (RIPA) and described in the evidence of Sir Jonathan Murphy.

36. Two particular features of HSEC require further examination. First, the Chair of HSEC is the Assistant Commissioner of the Intelligence and Covert Support Command (**ICSC**).⁴³ Human Source Management is part of the ICSC; arguably, the AC of that Command does not have the objective independence required of a person charged with the responsibility of making decisions to approve the registration of, and supervise the management of, high risk sources. Further, given the ‘Chain of Command’ structure in Victoria Police, there is a risk that others will defer to the AC and his view will be followed.
37. Second, the model contains limited safeguards in terms of ensuring adequate legal advice is obtained. While the VPM Human Sources Policy requires HSEC to obtain “appropriate legal advice” prior to approving a category 1 human source,⁴⁴ that legal advice may be internal or external.⁴⁵ Given the events under examination by this Commission, the proposition that internal advice may be sufficient in respect of category 1 human sources must be closely interrogated.
38. The lack of external oversight of HSEC, and the absence of any independent person in its composition, creates ongoing risk. As the DPP’s previous submission observed, deficiencies in organisational culture are often the root cause of a failure to adhere to ethical standards. It may be doubted whether the new HSEC model is robust enough to ensure the ethical handling human sources and human source material in the face of any cultural deficiencies in adherence to ethical standards.
39. The fact that oversight of the registration and management of human sources with legal obligations of confidentiality is entirely internal to Victoria Police also has significant implications for disclosure. If a human source registered by Victoria Police provides material in breach of a legal obligation of privilege or confidence, then the material and any evidence derived from its use is prima facie improperly obtained and liable to exclusion in any criminal proceeding in which that evidence is sought to be relied upon. The circumstances in which the material was obtained

⁴³ VPM Human Sources Policy, [8.2].

⁴⁴ VPM Human Sources Policy, [8.4].

⁴⁵ Evidence of Wendy Steendam, T14876.43-22.

therefore become prima facie disclosable in that proceeding. The fact that the registration of the source, or the use of information provided by the source, was approved by HSEC and/or the Deputy Commissioner, Specialist Operations does not detract from the obligation of disclosure. This can be contrasted with the situation in the UK where the external authorisation process for covert intelligence human sources provided by RIPA is coupled with an express legislative provision that renders lawful all conduct carried out in accordance with those authorisations.⁴⁶

40. Under the VPM Human Sources Policy, all category 1 human sources must be managed in a sterile corridor: the source is managed by a specialist handling team that is separate from the investigators of offences where information from the source is used.⁴⁷ As the Policy contemplates, that means investigators may very well be unaware of the existence of the human source (full sterile corridor), or aware of the existence of the source but unaware of matters relating to the identity or management of the source that might indicate evidentiary material has been obtained improperly (partial sterile corridor).⁴⁸ In other words, the informant responsible for disclosure may be unaware of the existence of relevant material that must be disclosed to the accused. The VPM Human Sources Policy provides no specific process or guidance to address this serious risk, other than a general statement that:⁴⁹

“There will be times when disclosable material is held on a human source file. This creates challenges because such material is, for good reason, highly confidential and is kept secure and is considered protected information. Informants and other investigators may well not know of the existence of the material or even of the existence of the particular human source. This means that it is critical that members involved in the handling and management of human sources and human source information are proactive about identifying and considering potentially disclosable material.

What being “proactive” entails is not explained.

⁴⁶ RIPA, s 27(1). In *McE v Prison Service of Northern Ireland* [2009] 1 AC 908, the House of Lords observed that the clear and broad language of s 27(1) rendered lawful conduct that might otherwise be contrary to, for example, the common law principle of legal professional privilege: see, eg, [108] (Lord Neuberger).

⁴⁷ Victoria Police Responsive Submissions - Tranche 2 at [22.5(e)(iii)]; VPM Human Sources Policy (VPL.0005.0285.0001) at [5.2], [6.6].

⁴⁸ VPM Human Sources Policy at [6.6]. See also Evidence of Wendy Steendam T14938.38-14939.26.

⁴⁹ VPM Human Sources Policy at [9].

41. In evidence to the Royal Commission, Deputy Commissioner Steendam indicated that this risk was currently being addressed through the trial of two dedicated disclosure officers, one on each side of the sterile corridor.⁵⁰ However, it is at present unclear how these disclosure officers, who (for the officer on the human source side of the sterile corridor) may not have detailed knowledge of the management of a particular source or (for the officer on the investigation side of the sterile corridor) may not have detailed knowledge of the investigation, are expected to identify relevant disclosable material. It is apparent that the effectiveness of the disclosure officers is heavily dependent upon informants being aware of the possibility of relevant information on the human source side, and through enquiries with the investigation-side disclosure officer, initiating the exchange across the sterile corridor.⁵¹ But, as already stated, there may often be situations where the informant does not know that there are questions to be asked.
42. For these reasons, the Commission is entitled to query the assertion by Victoria Police that the steps taken to address failures make it “essentially impossible for the situation that occurred with Ms Gobbo to happen again.”⁵²

Public Interest Immunity and Disclosure

43. Victoria Police has rightly acknowledged that one of the reasons for the failures of disclosure revealed by the Commission is that the process for making a claim for public interest immunity was not well understood among its members.⁵³ Victoria Police has re-iterated its submission that there needs to be a mechanism for greater involvement of the OPP in decisions about PII claims.⁵⁴
44. In light of this submission, one aspect of the submissions of the DPP and the OPP concerning claims for PII should be clarified. The DPP and the OPP support consultation between Victoria Police and prosecutors concerning PII, from an early stage in proceedings. As the DPP and OPP have previously submitted, it is crucial that police members understand that *the existence* of material the subject

⁵⁰ RC1529 Statement of Wendy Steendam dated 16 April 2020 at [372]-[375]; Evidence of Wendy Steendam T14939.28-14941.17. See also Victoria Police Responsive Submissions - Tranche 2 at [32.10]-[32.14].

⁵¹ Victoria Police Responsive Submissions - Tranche 2 at [32.13]; Evidence of Wendy Steendam, T14940.20-37.

⁵² Victoria Police Responsive Submissions - Tranche 2 at [32.2].

⁵³ See for example, Victoria Police Responsive Submissions - Tranche 2 at [30.8], [30.17] and [40]ff.

⁵⁴ Victoria Police Responsive Submissions - Tranche 2 at [29.4].

of a PII claim be brought to the attention of prosecutors. In cases affected by Ms Gobbo, there were numerous failures of disclosure at this initial stage, which did not depend at all on OPP solicitors taking a greater role in reviewing and assessing for themselves the material subject to PII claims.

45. OPP solicitors and police informants work together closely on indictable matters. Current practice involves informants being expressly invited, after the first hearing of an indictable matter, to contact OPP solicitors in relation to any doubts or concerns about disclosure.⁵⁵ From this point, where PII is in issue, OPP lawyers are available to assist police members, their legal representatives, and the Courts, in understanding the way in which the Crown case is put, and issues raised by the defence. Performance of this role will usually not require prosecutors to review for themselves material over which PII is claimed, and which the defence may never see. As a general rule it is appropriate, for reasons set out in detail in previous submissions, for prosecutors to retain their independence (both real and perceived) from the police in the litigation of PII claims.
46. A reliance on prosecutors to become involved in PII claims also carries a danger. The police, and not the prosecutors, have access to a body of material gathered during an investigation that may shed light on the significance of material over which PII is claimed. Ultimately, this means that proper disclosure will always depend on the work done by police. This work is best done in consultation with independent lawyers who act on behalf of the police. Co-opting prosecutors into a greater involvement in PII litigation might encourage a perception that disclosure is more likely to be complete, without any actual improvement in practice.

⁵⁵ Statement of Abbey Hogan dated 11 September 2020 at [3]-[4] and Annexure B.