

## ROYAL COMMISSION INTO THE MANAGEMENT OF POLICE INFORMANTS

### SUBMISSIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE OFFICE OF PUBLIC PROSECUTIONS

#### INTRODUCTION

- I. These submissions respond to the three volumes of the 'Counsel Assisting submissions with respect to Terms of Reference 1 and 2'. They provide as follows:
  - (i) First, they identify the evidence that clearly establishes that no person at the Office of Public Prosecutions (the **OPP**), including the Director of Public Prosecutions (the **Director**), had any knowledge that Ms Gobbo was a police informer;
  - (ii) Secondly, they provide a case study which demonstrates the ways in which, despite the otherwise close working relationship between Victoria Police and the OPP, Victoria Police were able successfully to avoid any prosecutor learning of Ms Gobbo's role as a police informer;
  - (iii) Thirdly, they outline the ways that problems identified by this Commission would be addressed by the incremental reforms directed to improving compliance with the obligation of disclosure and improved regulation of legal representatives to deal with conflicts of interest. These reforms were outlined in the Director's submissions of 19 December 2019;
  - (iv) Fourthly, they explain the need for caution in making findings concerning the existence, and duration, of lawyer-client relationships between Ms Gobbo and persons who may have been affected by her conduct; and
  - (v) Fifthly, these submissions deal with the form of any recommendation the Commission might make if it makes findings that criminal offences may have been committed.

## **1 THE OPP AND THE DIRECTOR HAD NO KNOWLEDGE OF MS GOBBO'S ROLE**

### **A Introduction**

2. The evidence outlined below at paragraphs 4 to 19 establishes that Victoria Police did not inform any person at the OPP (including the Director) of Ms Gobbo's role as a police informer at any point during the periods in which Victoria Police used her as:

- (i) a human source; or
- (ii) a witness (including in any proceedings that the OPP was prosecuting).

3. On any view of the evidence, it was not until well into 2012 that the OPP and the Director were advised of the possibility that Ms Gobbo had provided information to police about persons for whom she had acted.

### **B Evidence that the OPP/the Director was not told of Ms Gobbo's role as a human source**

4. Many of the witnesses from Victoria Police who gave evidence to the Royal Commission were asked whether they ever informed a person at the OPP that Ms Gobbo was being used as a human source. The answers that were given were consistently: 'no'.

5. The evidence was also that Victoria Police made a conscious decision not to disclose Ms Gobbo's role to the OPP for the reason that 'that would disclose her as a human source'.<sup>1</sup>

6. **Mr Simon Overland** joined Victoria Police in February 2003 as Assistant Commissioner of Crime. He was Deputy Commissioner between June 2006 and February 2009 and Chief Commissioner between March 2009 and June 2011. In giving evidence before the Commission, Mr Overland explained the extent to which the statement that he had previously made in a statement to IBAC about the DPP's knowledge was wrong.<sup>2</sup>

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<sup>1</sup> Evidence of Det Sgt Paul Rowe, T9181.5-9.

<sup>2</sup> T12238.19-12339.9, T12339.26-28.

*'That's what I come to now. "I immediately stressed that all undertakings under my leadership were done with the full knowledge and agreement of the then Director of Public Prosecutions Mr Paul Coghlan QC and Chief Crown Prosecutor Geoff Horgan"?'---Yes.*

*That's in your statement to IBAC?'---Yes.*

*And indeed, we've seen that you've had a number of meetings with Mr Coghlan and with Mr Horgan?'---Yes.*

*And they're set out in both your diary and Jim O'Brien's diary?'---Yes.*

*And you went with him on occasions?'---On occasions.*

*Now, I take it it's your evidence that you did not tell Mr Horgan or Mr Coghlan of Ms Gobbo's involvement in the Purana exercise?'---No.*

*Can you help the Commissioner with that? Because you said during the course of your evidence that you felt it was the obligation of the investigators to inform the DPP of the involvement of a human source in an investigation?'---Yes.*

*You've had a number of opportunities where you as the head, really, of the investigators, could have done that?'---Yes, well I had meetings with Paul Coghlan and Geoff Horgan, yes.*

*Geoff Horgan is the prosecutor in relation to all these trials, isn't he?'---Mainly the homicides he was, yes.*

*I just want to understand why it is you didn't tell them?'---Because it wasn't relevant to the matters that we were discussing, which initially were primarily around dealing with the various people who rolled and the manner in which their cooperation would be secured.*

...

*Did you discuss source involvement with Mr Rapke at any stage when he was DPP, or senior Crown Prosecutor?'---The source, no.'*

7. **Assistant Commissioner Luke Cornelius** was the Commander of the Legal Services Division from 2003 to December 2005 and Assistant Commissioner at the Ethical Standards Department between December 2005 and May 2010. Between April 2007 and May 2010, he chaired the Investigations Management Committee for Taskforce Briars. Mr Cornelius was admitted as a barrister and solicitor of the ACT Supreme Court in 1999.<sup>3</sup> Mr Cornelius' evidence was that he never informed the then DPP, Mr Rapke QC, of Ms Gobbo's role as an informer:<sup>4</sup>

<sup>3</sup> Statement of Cornelius at [14], VPL.0014.0057.0002.

<sup>4</sup> T12445.41-12446.6.

*'Did you have any conversations with Rapke, as the Director, about Ms Gobbo as an informer?---No.*

*So to the best of your knowledge, on your evidence, he didn't know that she was a registered informer during 2005-2009?---I don't think he would have known that from me. He certainly understood from me that she was a witness for both - originally Petra and then potentially for Briars and he was also aware that she'd assisted us by covertly recording a conversation, but in relation to her being - me disclosing that she was a human source, to use your term, to Mr Rapke, I certainly didn't make such a disclosure to Mr Rapke.'*

8. **Mr James (Jim) O'Brien** was at the Major Drug Investigation Division (**MDID**) between January 2002 and 13 September 2005 and at Purana between September 2005 and 1 September 2007. He gave the following evidence when cross-examined about a diary entry for 15 August 2006 in respect of a meeting at the OPP at 8:25am with the then DPP Mr Coghlan QC, Crown Prosecutors Mr Horgan and Mr Tinney and OPP solicitors regarding <sup>Mr Thomas</sup> :<sup>5</sup>

*'You were at that meeting along with Deputy Commissioner Overland?---Yes. And with four of your detectives, Bateson, L'Estrange, Hatt and Kerley?---Yes.*

...

*Did anyone advise the OPP, advise the Director or the Crown Prosecutors or any of the solicitors present that police held relevant material relating to Ms Gobbo and her involvement?---Not that I believe.*

*Was there ever any discussion that the OPP should be so advised?---I don't recall any such discussion.*

*There was never any intention to advise the OPP; is that right?---No.*

*Are you agreeing with me?---That's right, in the normal course of events you wouldn't disclose an informer.'*

9. Mr O'Brien repeated and expanded on that evidence when cross-examined by counsel for Ms Gobbo:<sup>6</sup>

*'...as far as you were concerned did anyone at the OPP know?---As far as I'm concerned, no.*

*You were at meetings on occasion with either the members of the OPP or in fact prosecutors?---Yes.*

*Discussing matters relevant to certain people where 3838 was involved?---Yes.*

<sup>5</sup> T5707.40-5708.7, T5708.40-5709.8.

<sup>6</sup> T5962.40-5963.5.

*Those meetings must have had some discussion about 3838, do you agree with that?---Look I don't recall any mention of the source as a human source to the OPP.'*

10. **Inspector Boris Buick** is a former Purana investigator and the informant for Mr Orman concerning the murder of Victor Peirce. He was asked questions concerning the memorandum dated 13 March 2008 (OPP.0011.0005.0021) drafted by OPP instructing solicitor Ms Vicky Prapas for Mr Horgan in preparation for Mr Orman's committal concerning the murder of Victor Peirce. That memorandum referred to 'the role Nicola Gobbo has played in the lead up proceeding in this matter.'<sup>7</sup> In response to questioning by Counsel Assisting, Mr Buick then gave evidence that he had no knowledge of Victoria Police informing Ms Prapas of Ms Gobbo's role as a police informer:<sup>8</sup>

*'Now the OPP instructor wasn't also told that Ms Gobbo was a police agent?--Not by me.*

*To your knowledge was she told by anyone?---I don't know.'*

11. **Officer Fox** (pseudonym) was a [REDACTED] <sup>PII</sup> in the Source Development Unit (SDU) and was Ms Gobbo's handler between June 2007 and January 2009. In paragraph 70 of his statement dated 31 May 2019 he stated that:

*'There was no other law enforcement agency aware of 3838. I am not aware of the OPP or Commonwealth Director of Public Prosecutions being aware of the use of 3838 as a human source. I was not involved in the prosecution process.'*

12. **Det Sgt Paul Rowe** was at the MDID between 2004 and 2005. In late 2005, he moved to Purana. He was an informant in respect of the prosecutions of Mr Milad Mokbel, Mr Barbaro Mr Agrum and <sup>Mr Cooper</sup> in the Operation Posse matters. He gave this evidence:<sup>9</sup>

*'Did you ever raise Ms Gobbo's conflict with the OPP, the conflict being she was a human source in relation to a matter and therefore couldn't act as a lawyer in relation to a matter?---No, because that would disclose her as a human source.*

*Did it ever occur to you that not disclosing it would therefore compromise the ability for any accused charged with an offence to receive an appropriate*

<sup>7</sup> T8786.3-5.

<sup>8</sup> T8786.12-15.

<sup>9</sup> T9181.5-18.

*defence?---Well, you know, hindsight is really easy but I think at the time, you know, I think we were, there was things in place to try and, you know, deal with that aspect of it. I mean she was being managed daily and that was, you know, an issue. An issue that was unsuccessfully managed.'*

13. Det Sgt Rowe also gave this evidence about meetings that he had with the OPP in respect of an upcoming bail application in relation to Mr Milad Mokbel:<sup>10</sup>

*'On 28 July 2006 in your diary there's a meeting at 11 o'clock at the OPP with Andrew Tinney?---Yes.*

*Who's a Crown prosecutor?---Yes.*

*And Vaile Anscombe and Colleen Bell who were instructing solicitors?---Yes.*

*In relation to, well your diary says, "Re Mokbel bail app. PII and Supreme Court appeal"?---Yes.*

*Do you know if you attended that with anyone?---I don't know. I suspect I would have but I don't know.*

*Do you know what PII was discussed?---Like I don't from my memory. I mean I can probably, you know, suggest what would have been covered, you know, in the context of those charges on Milad.*

*Was there any discussion with them about Ms Gobbo's role as an informer?---No.*

*Was there any discussion with them about Ms Gobbo's role as a legal advisor?---No.*

*Did you ever have any discussion with anyone from the OPP or prosecuting for the OPP about those matters?---No, not in relation to being an informer...not at this stage and not ever.'*

14. **Gavan Ryan** was a Det Snr Sgt at Purana between September 2003 and November 2005. He was then Det Insp at MDID from November 2005 to 2008. He returned to Purana occasionally when O'Brien went on leave. He also headed the Petra Taskforce in relation to the Hodson murders. On 14 August 2019, he gave this evidence in relation to a meeting that he had with the OPP on 16 July 2004 (and which Ryan 'guess[ed]' was about <sup>Mr McGrath</sup> ):<sup>11</sup>

*'Was there discussions about Ms Gobbo with Mr Horgan and Ms Anscombe at these meetings, do you know?---Do you mean as in relation to an informer? Yes?---No. She wasn't registered then.'*

<sup>10</sup> T9234.19-9235.3.

<sup>11</sup> T4484.16-20.

15. On the next day, the Commissioner and then Counsel Assisting had the following exchanges with Mr Ryan:<sup>12</sup>

*'COMMISSIONER: Just before we take a mid-morning break, could I just ask you a couple of questions. You were asked yesterday about your discussions with Mr Horgan about Nicola Gobbo and her role and so forth. Could I just get you to clarify: did you recall ever telling Mr Horgan or anybody else at the OPP or the DPP that Nicola Gobbo was a police informer?---No, never told him.*

*Never told anyone that?---No.*

*Did you ever give information to anybody at the OPP or the DPP which tended to show that she was a police informer?---No.*

...

*WOODS: Just before we break I might just ask another question about that. Was there a deliberate decision made by Victoria Police not to tell members of the OPP about her status as an informer?---Yes, you just don't declare it to anyone. As few people as possible.*

*Do you remember that decision being made or are you keeping that information to yourself?---It's taught to you, you know, you never declare to anyone who's an informer because then it places that person in jeopardy.*

*Was it discussed amongst any of you that it might be the fact that they really should know about her status as an informer given her significant involvement in these things?---Not that I recall.*

*Was it told to the OPP by Victoria Police about what Ms Gobbo's involvement in the taking of statements from <sup>Mr</sup> and <sup>Mr</sup> had been?---I'd say that, I don't know. Sergeant Bateson – Commander Bateson may know.*

*Was the decision – you say that as a matter of course it was the case that they wouldn't be told because she's a human source, was it in part also because the reputation of Victoria Police had to be protected?---No, you just don't, you don't declare a human source to anyone unless you have, you know, really have to.*

*If the prosecutors don't know how does it happen that a claim of public interest immunity can be properly ventilated by the parties in the court and then decided by the court?---I'm a bit lost on that one.*

*You know what a claim of public interest immunity is?---Yep.*

*It's typically made in a situation where there's a human source?---Yeah.*

*And the identity of that human source needs to be protected?---Yeah.*

*And police will make that claim?---Yeah.*

*If it's the case that the prosecutors aren't told and don't know, you'd accept that there's a difficulty in properly ventilating that argument in court if they don't know that there is a human source or who the human source is?---Um,*

<sup>12</sup> T4523.33-45, T4524.26-4525.28.

*well they're never told to my experience, any prosecutors are told any human source's identity.'*

16. **Officer Sandy White** (pseudonym), who was the SDU handler who gave the most detailed oral evidence to the Commission, gave this evidence.<sup>13</sup>

*'What I'm trying to get to, Mr White, is what steps did you take to ensure that this issue was brought to the attention of the appropriate people?---I didn't take any steps to advise the prosecution of her involvement in this matter.'*

17. Mr White also explained that his failure to inform the OPP arose out of a practice of not informing the OPP of Victoria Police's use of human sources.<sup>14</sup>

*'In any event what you can be quite clear about is that you were not going to tell the OPP that she was an informer?---I was not going to tell the OPP, that's right.*

...

*So you had made a conscious decision not to do that in contravention of your SOP?---Well, it was – I never thought it was my responsibility to talk to the prosecutor about cases that involved informers. ... I never in relation to any informer approached the prosecutor and said, "There's an informer involved in this case".*

*Why not?---It just was never done. It's never been part of the process in managing informers.'*

18. Mr White even gave evidence that he agreed with Mr Flynn and Ms Gobbo that, in the event that Mr Flynn had to produce his notes to the OPP in relation to the committal or trial of Mr Horty Mokbel, Mr Flynn's notes would be 'blacked out' so that '[t]hey would be redacted in relation to her presence'.<sup>15</sup>
19. The fact that Ms Gobbo told her handlers in April 2006 that her 'reputation with Court and (probably) with OPP is intact'<sup>16</sup> is further evidence that Ms Gobbo and Victoria Police actively cooperated to ensure that the OPP acquired no knowledge of her role as a police informer.

<sup>13</sup> T4666.44-47.

<sup>14</sup> T4665.24-26, T4665.34-37, T4666.3-8.

<sup>15</sup> T4661.31-32.

<sup>16</sup> Exhibit RC0281 ICR3838 (028), 21 April 2006, 258, VPL.2000.0003.1844.



**2 A CASE STUDY DEMONSTRATING VICTORIA POLICE CONCEALMENT OF MS GOBBO'S ROLE FROM THE OPP**

20. In 2011, during the course of Mr Cvetanovski's trial for the Operation Posse charges, Mr Cvetanovski's counsel (Mr Pena-Rees) cross-examined <sup>Mr Cooper</sup> about his relationship with Ms Gobbo. In so doing, he alluded to her having a relationship with Victoria Police. Notwithstanding that the prosecutor, Mr Champion SC, held a conference with Victoria Police officers (including the informant) to ascertain the likely direction of the cross-examination, none of the officers informed Mr Champion SC that the questioning could be alluding to Ms Gobbo's role as a police informer, or that the conjecture that underpinned that questioning was in fact true.

21. **Inspector Dale Flynn** was a Detective Sergeant at the MDID between February 2002 and November 2005, a Purana investigator between November 2005 and 2008, a Detective Senior Sergeant at the Drug Task Force between 2008 and 2012 and an Acting Inspector at the Briars Taskforce between 2012 and 2014. Inspector Flynn was asked about Ms Gobbo's role as a police informer in respect of <sup>Mr Cooper</sup>

<sup>Mr Coop</sup> In the context of that questioning, Inspector Flynn was asked:<sup>17</sup>

*'If I stop there and ask you this: I take it -- perhaps let me ask you, was it raised with Mr Horgan the complexities or the issues with respect to Ms Gobbo or not?--I wasn't part of that conversation.*

*All right?--But I'd be reasonably confident to say that I don't think it was ever be suggested that it was mentioned that Ms Gobbo was human source with Victoria Police.'*

22. Inspector Flynn then gave evidence that, as a matter of general practice, Victoria Police avoids, as far as possible, informing prosecutors of the involvement of a human source in an investigation.<sup>18</sup>

*'These discussions can be had with permanent prosecutors and they are had on occasions, are they?--Yes.*

*About a person being an informer?--Well certainly when it gets to a stage where we're seeking discounts and things like that it becomes, we discuss that with the OPP, yes.*

<sup>17</sup> T6845.46-6846.6.

<sup>18</sup> T6846.8-28.

*When it comes to questions of public interest immunity is that normally done with your own legal advisors or the VGSO? ---It would depend on the circumstances I suppose.*

*Yes?---If it was just relevant to an ongoing prosecution it would probably be done with a prosecutor. If it was something that we didn't want it to get to that stage, well then we'd seek legal advice.*

*There's sort of an intermediate position where you don't want to put it out to the prosecution if you can avoid it and you go to the VGSO to get an advice from them or to an internal police lawyers: is that right?---That's correct, yes.'*

23. Inspector Flynn also gave evidence that, notwithstanding Mr Pena-Rees' cross-examination of <sup>Mr Cooper</sup> in Mr Cvetanovski's trial in 2011 in respect of the Operation Posse charges (which potentially alluded to Ms Gobbo's role as a police informer), Victoria Police did not proceed to inform the prosecutor in that trial, Mr Champion SC, of Ms Gobbo's role. Counsel Assisting the Commission read transcript from Mr Cvetanovski's 2011 Posse trial where Mr Pena-Rees alleged that Ms Gobbo and <sup>Mr Cooper</sup> were concocting statements and working with police.<sup>19</sup> Inspector Flynn then confirmed that Mr Champion SC called a meeting at the conclusion of proceedings on 11 April 2011 which was attended by Inspector Flynn, an OPP solicitor (Mr David Bosso), Informant Hayes and 'Officer Pearce'.<sup>20</sup>
24. Inspector Flynn gave evidence that he was alarmed during the meeting with Mr Champion SC because the discussion was heading toward divulging Gobbo's role as a human source. Nonetheless, he did not disclose Ms Gobbo's role to Mr Champion by reason that 'she was a human source'.<sup>21</sup>

*'What was being alleged was that Ms Gobbo was in an arrangement or an agreement with <sup>Mr Cooper</sup> and/or the police, right?---Yes.*

*What your notes say is that you discussed these defence allegations, one of which was that Ms Gobbo was in an agreement with <sup>Mr Cooper</sup> and/or, so, and, or, the police?---Yes.*

*I suggest to you that that note makes it quite plain that Mr Champion was asking you whether or not Nicola Gobbo was acting in an agreement with the police?---I'm not going to sit here and admit to something that I don't recall. I don't recall specifically getting to that question.*

<sup>19</sup> T7197.11-7198.30.

<sup>20</sup> T7200.46-7202.7.

<sup>21</sup> T7203.22-45.

*Right? ---I do remember attending this meeting. I do remember alarmed by it.*

*Why were you alarmed? ---Because it was obviously heading towards divulging Ms Gobbo's role as a human source.*

*Exactly. Why didn't you divulge ...?---For that reason.*

*Why? ---Because she was a human source.'*

25. When Inspector Flynn was cross-examined by counsel for Ms Gobbo, he gave this evidence:<sup>22</sup>

*'As far as you were concerned, when you had meetings with the OPP and prosecutors, were there ever any discussions in relation to Ms Gobbo's role as a human source?---No'*

26. When Inspector Flynn was cross-examined by counsel for Ms Gobbo about the meeting on 11 April 2011, he gave this evidence:<sup>23</sup>

*'During those 90 minutes [of the meeting on 11 April] there must have been, do you agree, questions relevant from Mr Champion about what was going on that you could have answered but chose not to because it would reveal Ms Gobbo?---That's probably correct, yes. ... [I]f I was asked any questions about Ms Gobbo, I just would have deflected or remained silent.'*

27. **Det Sgt Craig Hayes** was at MDID between March 2004 and November 2005 and at Purana between November 2005 and July 2011. He was also the informant in Mr Cvetanovski's Operation Posse charges. He was present at the meeting on 11 April 2011 between prosecutor Mr Champion SC and Victoria Police during Mr Cvetanovski's 2011 trial for the Operation Posse charges. His evidence was that Mr Champion SC was not informed of Ms Gobbo's role during the meeting on 11 April 2011:<sup>24</sup>

*'The Commission understands that the prosecutor, Mr Champion, was never advised by the police that Ms Gobbo was an informer. Does that accord with your recollection and your notes of the meeting? ---So I don't address that topic in my notes as far as the meeting.*

*Yes?---Mr Champion was not aware as far as I understand.'*

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<sup>22</sup> T7242.31-33.

<sup>23</sup> T7243.44-7244.7.

<sup>24</sup> T9123.22-28.

28. In the ‘DPP’s Response to Commission’s enquires’, Ms Judd QC notes that ‘Justice Champion confirms that he was never advised by police that Gobbo was an informer’.<sup>25</sup>

### **3 QUESTIONS OF POLICY**

#### **A Summary**

29. The submissions of Counsel Assisting identify several ways in which the inherent risks in the use of Ms Gobbo as a human source were manifested over time. The failures to manage these risks frequently related to two main issues: the failure to disclose information to accused persons and Ms Gobbo’s conflicts of interest. These issues raise questions of policy, which the Royal Commission is required to consider pursuant to terms of reference 4, 5 and 6.
30. In her submissions of 19 December 2019, the Director proposed a number of incremental reforms directed at improving compliance with the obligation of disclosure and better regulation of legal representatives. These proposals can now be assessed in light of all the evidence before the Commission and the submissions of Counsel Assisting, which set out a detailed factual narrative of Ms Gobbo’s engagement as a human source and reveal systemic problems with her management.
31. The Director’s policy proposals provide means of addressing the cultural and systemic problems exposed by this Royal Commission. These proposals include measures which will promote an understanding of disclosure obligations among police, and which are capable of addressing the underlying cultural deficiencies which lead to failures in making proper disclosure.
32. The facts surrounding Ms Gobbo’s use as a human source also highlight practical difficulties with any expectation that prosecutors should fulfil a role policing the compliance of defence practitioners with their ethical duties to avoid conflicts of interest. As the Director has submitted, the starting point in addressing the issue of conflicts of interest must be the rules governing those conflicts, and the powers

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<sup>25</sup> Exhibit RC1096 (‘Statement of Ms Kerri Judd, Director of Public Prosecutions, 8 November 2019’) RCMP10104.0001.0001 @ .0004, footnote 1.

of regulatory bodies to investigate and remedy breaches of professional obligations.

33. In short, the evidence the Commission has heard provides further grounds for it to recommend that the policy proposals suggested by the Director be adopted by Government.
34. An assumption which underlies the submissions of Counsel Assisting is that material which is not disclosed on the basis of a claim for public interest immunity (PII) should, at least as a general rule, be assessed by the Director. This assumption conflicts with the Director's Policy on disclosure, and recent Supreme Court authority.<sup>26</sup> When the rationale for the Director's Policy is fully appreciated, it becomes apparent that a requirement for the Director to assess material subject to claims of PII is unnecessary and a potential source of unfairness. The need for Victoria Police to obtain independent legal advice in the assessment and litigation of such claims is properly met by the VGSO.

#### **B Failures of disclosure: causes**

35. After a series of notable failures of prosecuting authorities in the UK to make adequate disclosure to accused persons, a number of reviews of disclosure policy and performance have been conducted in recent years. Two consistent themes which emerged from these reviews were:
- (i) A lack of understanding on the part of police of the nature of the disclosure obligation, and in particular how to identify and deal with sensitive material;<sup>27</sup> and
  - (ii) The absence of an organisational culture of compliance with the disclosure obligation.<sup>28</sup>

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<sup>26</sup> *R v Westbrook* [2020] VSC 290.

<sup>27</sup> DPP Submission on Disclosure Issues at [85]. See also HMCPSI and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (July 2017); Richard Horwell QC, *Mouncher Investigation Report* (July 2017). The problems were recognised in a joint improvement plan adopted by NPCC (National Police Chief's Council), College of Policing and CPS, *National Disclosure Improvement Plan* (January 2018).

<sup>28</sup> DPP Submission on Disclosure Issues at [93]. See also House of Commons Justice Committee, *Disclosure of Evidence in Criminal Cases* (2018) which states that resolving problems with disclosure requires a fundamental change in culture driven by clear leadership (p 3; ch 3 [71]ff); Attorney-General's Office, *Review of the Efficiency and Effectiveness of Disclosure* (2018) at pp 22-23; National Disclosure

36. Perhaps unsurprisingly, the same themes can be identified as underlying the failures of disclosure which are before this Commission.

(i) *Understanding of the disclosure obligation*

37. The evidence reveals important respects in which the obligation of disclosure was not well understood by members Victoria Police. Counsel Assisting rightly identify one of these respects as relating specifically to human sources:<sup>29</sup>

*'[T]here was an incorrect view, held by a number of members of the SDU and other police officers, that the identity of a human source should never be revealed – no matter what.'*

38. A closely related misconception is that where PII might apply, it allows police to refrain from disclosing the *existence* of the protected material to either the defence or the prosecution.<sup>30</sup> The evidence suggests this misconception was widespread. Where the very existence of material which may assist the defence is not disclosed on the basis of PII, the role of the Courts in adjudicating claims for PII is, as Counsel Assisting has submitted, usurped.<sup>31</sup>

39. Similarly problematic is the view that several officers evidently held that material relevant to the defence need not be disclosed unless and until it was subject to a subpoena or other request by the defence. To take an example, when asked about disclosure of Mr Cooper's record of interview to another accused, Mr Flynn agreed it would be relevant but said: *"if we were asked for it we would provide it, but if we weren't asked for it we wouldn't provide it."*<sup>32</sup> Mr Flynn's answers in this portion of his evidence made it clear that this reflected his understanding of the obligation of disclosure: that it was dependent on a request by the defence. Mr Flynn holds the rank of Inspector and has been a police officer for 32 years. The fact that an officer of that level of experience and seniority could hold this

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Improvement Plan Progress Update, which acknowledged disclosure had been devalued within the culture of investigations (*Review of the Efficiency and Effectiveness of Disclosure*, Annex D at p 1).

<sup>29</sup> Counsel Assisting submissions with respect to Terms of Reference 1 and 2, Volume 2: Narrative at [4776]. See also the following paragraphs from Vol 2: [1002], [2650], [2972], [2999], [3017].

<sup>30</sup> See, eg, the evidence of O'Brien at T5708-5709, to the effect that, even though there was relevant and otherwise disclosable material of Ms Gobbo's role, the DPP was not informed because in the "normal course of events" police would not disclose an informer.

<sup>31</sup> Counsel Assisting submission, Volume 2 at [1675].

<sup>32</sup> T7125.46-7126.2.

view is itself a clear indication that the nature of the obligation of disclosure needs to be better understood within Victoria Police.

40. Another example can be found in the evidence of Mr Buick. He gave evidence to the effect that, at least “practically speaking”, police would wait for a subpoena to be issued before disclosing the existence of material the subject of a claim for PII.<sup>33</sup> He was also asked about a transcript of a conversation he had with Ms Gobbo in which they discussed the possibility of material which bore on her credit being disclosed to the defence. The following exchange occurred with Counsel Assisting:<sup>34</sup>

*Ms Tittensor: She's discussing this issue and she finishes off by saying, "But isn't all this based on the assumption that if somebody asks me a question it comes out"?*

*Mr Buick: Yes.*

*Ms Tittensor: And you say, "Not just that, based on the assumption that material relevant to your credit will be asked for" and Ms Gobbo, "But you haven't got a subpoena". You respond, "That's right but the Commonwealth have this disclosure principle or disclosure philosophy which is broader than ours". Now, is that right or do you accept that the Commonwealth disclosure policy was based on legal principles that equally applied to the running of State prosecutions?*

*Mr Buick: No, I accept that.*

*Ms Tittensor: You accept that the Commonwealth disclosure principles equally apply to State prosecutions?*

*Mr Buick: Yes.*

*Ms Tittensor: Was it the case that Victoria Police at that stage were applying disclosure principles more narrowly than they should have been?*

*Mr Buick: No, not more narrowly but I've come to learn having worked in a number of joint Commonwealth/State Task Forces that the Commonwealth have a different approach in that they'll produce all relevant material with a brief of evidence. Victoria Police tend to produce a brief of evidence because of a tight time frame surrounding arrest and brief service and thereafter compile disclosable material...*

41. While Mr Buick went on to say that he considered the differences in the requirements for disclosure between the State and Federal levels to concern only timing, it is difficult to resist the conclusion that, at least at the time his

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<sup>33</sup> T8914.44-8915.19.

<sup>34</sup> T8922.32-8923.11.

conversation with Ms Gobbo, he considered the obligation to be narrower or less onerous in State prosecutions.

42. Mr Buick has been a police officer for 31 years and is, like Mr Flynn, an Inspector. Although it is beyond the scope of the Commission's inquiry to examine the compliance of Victoria Police with disclosure obligations more broadly, the Commission can safely infer that the misapprehensions of Inspectors Buick and Flynn about the content of the disclosure obligation must be widely shared within the organisation, and are not restricted to the context of disclosure relating to human sources.

(ii) *Cultural acceptance of the disclosure obligation*

43. Counsel Assisting have also correctly identified instances of the obligation of disclosure being ignored, or deliberately breached, by officers who understood it. As Counsel Assisting submit, there was evidently an overarching plan to avoid disclosing Ms Gobbo's role as a human source to the defence, prosecution and the Court, even after she became a witness.<sup>35</sup> More specific examples identified by Counsel Assisting include police:

- (i) considering how to avoid the disclosure of Ms Gobbo's role in Mr Cooper's case, which might have been revealed by her use of the phone Cooper passed to her;<sup>36</sup>
- (ii) failing to provide relevant notes, and deliberately sanitising notes to avoid reference to Ms Gobbo's true role and activities;<sup>37</sup>
- (iii) failing to retain draft statements;<sup>38</sup> and
- (iv) providing artificially narrow responses to subpoenas issued by the defence.<sup>39</sup>

44. These examples illustrate how cultural problems within a law enforcement agency can create insidious and intractable difficulties for compliance with the obligation of disclosure. Because most of the material which needs to be

<sup>35</sup> Counsel Assisting submissions, Vol 2, p 846 at [3569].

<sup>36</sup> Counsel Assisting submissions, Vol 2, p 313 at [1414]-[1416].

<sup>37</sup> Counsel Assisting submissions, Vol 2 at [4785], [2683], [2692], [2697], [2718], [2738]-[2740], [2748], [2975]-[2976].

<sup>38</sup> Counsel Assisting submissions, Vol 2, p 1089 at [4751.4].

<sup>39</sup> Counsel Assisting submissions, Vol 2, p 741 at [3011].



disclosed to an accused begins in the possession of investigating police, the attitude within the police force to the duty to disclose relevant material is of critical importance.<sup>40</sup> The centrality of organisational culture in encouraging adherence to ethical and legal obligations such as disclosure was emphasised in the evidence of Sir Jonathan Murphy.<sup>41</sup>

45. A deficient culture of compliance is not remediable only by making the obligation of disclosure clearer, or by providing further education about it. It is not to be supposed, however, that measures of this kind will have no effect on the general attitude of officers of Victoria Police to their obligations of disclosure. One of the likely effects of better education about the nature of the duty of disclosure is that the *importance* of compliance with that duty is better understood, which will in turn lead to a greater shared belief in the duty as an integral part of a police officer's role in the justice system.
46. Beyond education, other measures proposed by the Director are likely to contribute to fostering a culture of adherence to the duty of disclosure within Victoria Police.

### **C Educational and cultural benefits of the Director's proposals**

47. We refer to the 'Summary of proposals' in Chapter 11 of the Director's submissions on disclosure issues. Each of those proposals is capable of promoting better understanding of the disclosure obligation, and a stronger culture of compliance.
48. The need for further training of Victoria Police officers about the nature and content of the disclosure obligation is evident. In the case of material which may give rise to more complex questions of PII, such as information relating to human sources, officers need to be made aware of the importance of obtaining legal advice from VGSO, as prescribed by the Victoria Police Disclosure Manual,

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<sup>40</sup> T15007.3-5 (evidence of Sir Jonathan Murphy), and T14928 (evidence of Deputy Commissioner Steendam).

<sup>41</sup> Statement of Sir Jonathan Murphy dated 28 April 2020 at [42]; and evidence at T15015. See also the evidence of Deputy Commissioner Steendam at T14983.

and Human Source Policy. These aspects of police procedure should form part of specific training each Victoria Police member receives on disclosure.

49. Police members' understanding of the disclosure obligation would be improved by the inclusion in the *Criminal Procedure Act 2009* (Vic) of specific categories of material which satisfy the definition of "relevant to the offence." This list should include descriptions of material not included in the hand-up brief because of a claim for PII. The need for compliance with the obligation to disclose the existence of material of this kind would, on the Director's proposals, be reinforced by the introduction of a requirement for certification of disclosure, modelled on s 15A of the *Director of Public Prosecutions Act 1986* (NSW).
50. A formal requirement for certification would serve to remind police informants of categories of material which must be disclosed and reinforce the critical principle that it is not for them to make unilateral decisions to withhold material. Over time, it could be expected that the process of certification would improve not only the understanding of investigating police, but their attitude toward compliance. In Western Australia, the certification requirement for disclosure is reinforced by the creation of an offence of knowingly or recklessly signing a false certificate.<sup>42</sup> In his oral evidence, Sir Jonathan Murphy agreed that a requirement for certification would be the kind of reform which would promote both an understanding of the duty of disclosure, and a culture of adherence to that duty.<sup>43</sup> Victoria Police has stated that it is open to this reform.<sup>44</sup>
51. Where police are concerned about highly sensitive material over which they claim PII, such as the involvement of a human source, the Director's proposals allow for a procedure which may be used by police to bring the matter before the Courts without compromising the safety of the source. The Director has recommended the introduction of a procedure modelled on s 138 of the *Criminal Procedure Act 2004* (WA), which would allow for an investigating agency to make application to a Court, at any time during a criminal proceeding, to be relieved of a disclosure requirement. The application may be made *ex parte*. The availability of a clear

<sup>42</sup> See Director's Submission on Disclosure Issues at [128].

<sup>43</sup> T15017.30-36.

<sup>44</sup> Victoria Police response to Consultation Paper [58]-[61]; T14931 (evidence of Deputy Commissioner Steendam).

procedure of this kind for the handling of sensitive PII claims would undermine the perception that evidently exists among police that there is a need, in some cases, to make unilateral decisions to withhold information about the very existence of highly sensitive material.

52. In his statement, Sir Jonathan Murphy said that rules about the proper management of human sources needed “*to be supported by strong leadership and culture that encourages adherence to the highest ethical standards and welcomes external oversight.*”<sup>45</sup> Sir Jonathan gave oral evidence to the effect that reviews of compliance with disclosure conducted in the UK by the Inspectorate of the Crown Prosecution Service (HMCPSP) and the Inspectorate of the Constabulary (HMIC) provided the kind of external oversight he regarded as welcome, and likely to promote a culture of compliance with the obligation of disclosure.<sup>46</sup>
53. The Director’s proposals include the establishment of a Disclosure Monitor: an independent statutory body tasked with the conduct of regular reviews in order to identify systemic problems with the disclosure practices of Victoria Police.<sup>47</sup> The kind of audit the Director has suggested be conducted by the Disclosure Monitor would mimic those which have been carried out in the UK.<sup>48</sup> The Disclosure Monitor would consider finalised matters and present de-identified data and conclusions. The reports of the Disclosure Monitor would not name individual police officers, but be directed at the diagnosis of chronic or systemic failures. The Disclosure Monitor could be tasked with reviewing classes of cases: for example, cases in which information has been provided by an informer with obligations of confidentiality.<sup>49</sup> It would not be the function of the Disclosure Monitor to review individual cases, or disclosure decisions (particularly in proceedings yet to be finalised). Among other problems it may create, this kind of function would risk intruding into prosecutorial independence.<sup>50</sup>

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<sup>45</sup> Statement of Sir Jonathan Murphy dated 28 April 2020 at [42].

<sup>46</sup> T15017-15018.

<sup>47</sup> As the Director’s Submission on Disclosure noted at [214], the Disclosure Monitor’s function could be vested in an existing body (such as IBAC).

<sup>48</sup> HMCPSP and HMIC, *Making It Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (2017).

<sup>49</sup> Director’s Submissions on Disclosure Issues at [217].

<sup>50</sup> Director’s Submissions on Disclosure Issues at [228]-[234].

54. A Disclosure Monitor of the kind proposed will inevitably create a greater sense of accountability among police investigators and Command. It would also perform an educational function. The removal of identifying features from the review outcomes would promote a more open approach to the auditing process, which would in turn foster a candid engagement with the issues raised. For Victoria Police to embrace and welcome this kind of external oversight would be an indication of a movement toward the kind of policing culture of which Sir Jonathan Murphy spoke.

#### **D Disclosure and public interest immunity**

55. Counsel Assisting submit that in numerous instances, Victoria police should have had matters of PII considered by the Director, or VGSO.<sup>51</sup> These submissions assume that material the subject of a PII claim can and should be disclosed to the Director, and that the Director could always provide advice about that material. These assumptions are contrary to the longstanding policy of the Director in relation to materials the subject of a claim for PII. The Director's policy on disclosure requires that she be informed by police of the *existence* of material the subject of a PII claim and the basis for the claim. The policy allows for the Director to request the material, if it is necessary to do so in the exercise of her functions, but provides that material subject to a PII claim should generally not be provided in the absence of such a request.
56. Recently, the Director's policy on the receipt of material the subject of a PII claim by police was considered by the Supreme Court of Victoria in *DPP v Westbrook* [2020] VSC 290. In that decision, Beale J held that the Director's policy was consistent with the common law obligation of disclosure, and had a number of advantages.<sup>52</sup> His Honour refused the application brought by the Chief Commissioner of Police, the effect of which would have been to require the Director to receive and consider material the subject of a PII claim, and to participate in the litigation of that claim (likely in the absence of the accused). Beale J held that it was unnecessary for the Director to become involved in the

<sup>51</sup> See, eg, Counsel Assisting submissions, Vol 1 at [241]; [382], [453]-[456]; Vol 2 at [1041.3], [1044], [1047], [1047], [1050], [1878.3], [1881], [1884], [1885], [1887], [4379]-[4381].

<sup>52</sup> [2020] VSC 290 at [21].

litigation of the PII claim in order for the Court to properly perform its function in determining the merits of the PII claim.<sup>53</sup>

57. Given the significance of this issue, and its prominence in the submissions of Counsel Assisting, it is worth reviewing the Director's Policy on materials subject to claims of PII, and its rationale. The Policy relevantly states:

17. If material is not disclosed under paragraph 15 above<sup>54</sup> on the basis of a claim of public interest immunity or legal professional privilege or a statutory prohibition, any application or submission to a court in support of that claim should be made by the person or body which holds the material or the privilege, as the case may be. A prosecutor should not represent that person or body, except in relation to a privilege held by the DPP or OPP.
18. Subject to paragraph 19 below, if an investigative agency has not disclosed to the accused relevant material on the basis that it is subject to a claim of public interest immunity or legal professional privilege or a statutory prohibition, the agency should inform the prosecutor:
  - i. of the nature of the material and the basis of the claim;
  - ii. whether a ruling has been made by a court on the claim and, if so, provide to the prosecutor a copy of the ruling and the reasons given by the court (unless the prosecutor was present in court or a non-publication order prevents the information being provided); and
  - iii. whether, in the opinion of the agency, the material, on a sensible appraisal, substantially weakens the case for the prosecution or substantially strengthens that of the defendant.
19. So far as practicable, the prosecutor should not be provided with, or informed of the content of, any material to the extent that it is subject to a claim of public interest immunity, unless the prosecutor so requests.

58. The Policy reflects the fact that there will be cases in which there will be good reasons why a prosecutor should not be provided with all material held by police. As the Court put it in *Gould v Director of Public Prosecutions (Cth)* (2014) 359 ALR 142:

“There were two issues sought to be raised by the applicant. The first was that it was the prosecutor, not the police, by whom the documents should have been assessed. However, no authority was relied on in support of that proposition and it was not part of the disclosure obligations, as articulated by the applicant before the primary judge, nor in the terms of the Director's published Statement. No submission was made as to why the duty should be formulated in that way. Indeed, there are good reasons not to formulate a duty in such terms

<sup>53</sup> [2020] VSC 290 at [19] and [22].

<sup>54</sup> The requirement to disclose relevant material.

given the importance, in some circumstances, of quarantining particular material from the prosecution.”<sup>55</sup>

59. One of the circumstances in which material should be quarantined from the prosecution, which is specifically referred to in that passage from *Gould*,<sup>56</sup> is where the defendant has been subject to a compulsory examination. There are others. In some cases, material the subject of a claim of PII might be relevant to the cross-examination of a defendant.<sup>57</sup> If the prosecutor has seen the material, and the defendant has not, any deployment of that material in cross-examination would be manifestly unfair.<sup>58</sup> This is not just a matter of what the prosecutor might expressly raise. It is a matter of what the prosecutor knows. Whether being privy to additional evidence gives the prosecution any unfair advantage over the defence, especially where the accused gives evidence, may be difficult to determine. More fundamentally, even the appearance of an unfair advantage must be avoided.
60. Another example of material which should, out of prudence, be withheld from prosecutors is material which derives from human sources with obligations of confidentiality. Where information from an accused is relayed by such a human source, there is a risk that a prosecutor who is provided with the content of that material might derive an unfair forensic advantage over the accused. Again, it may be difficult to assess the potential impact such an advantage may have at a trial. Even in the UK, which has a very different system for disclosure, it is recognised that some material obtained by investigators, such as privileged material, should be kept from the sight of prosecutors.<sup>59</sup>
61. In *R v Westbrook* [2020] VSC 290, Beale J accepted these reasons for the Director’s policy and practice.<sup>60</sup> His Honour added that it would be ‘fraught’ to rely on investigative agencies to make an assessment of whether the provision of confidential material might give the prosecution an unfair forensic advantage at

<sup>55</sup> (2014) 359 ALR 142 at [16]; citing *Lee v R* (2014) 253 CLR 455.

<sup>56</sup> By its citation of *Lee v R* (2014) 253 CLR 455.

<sup>57</sup> If, for example, a related or ongoing investigation revealed relevant information about the activities of the accused, but police were concerned to avoid compromising that investigation.

<sup>58</sup> See *Ex parte Brown; Re Tunstall* (1966) 67 SR (NSW) 1.

<sup>59</sup> See Revised Code of Practice: Covert Human Intelligence Sources (Home Office, August 2018) at [8.76]-[8.78]. Evidence of Sir Jonathan Murphy, T15012-15014.

<sup>60</sup> [2020] VSC 290 at [16]-[21].

trial.<sup>61</sup> Beale J also recognised that the Director’s policy promotes the efficient use of prosecutorial resources.<sup>62</sup> A default rule that requires the Director to consider all relevant material the subject of PII claims is likely to result, in the long term, in a significant diversion of prosecutorial resources, and in some cases an unnecessary duplication of work between the OPP and VGSO.

62. As an independent body with no role in conducting criminal prosecutions, VGSO is well placed to advise Victoria Police, at least in the first instance, on claims for PII and to agitate these claims before the Court. As the Director has submitted,<sup>63</sup> for police members to utilise VGSO in this way helps preserve the independence of the OPP from Victoria Police. The Disclosure Manual recently produced by VGSO, at the request of Victoria Police, directs officers to seek advice from VGSO if they are uncertain whether material gives rise to a PII claim.<sup>64</sup> Similarly, the new Human Source policy in the Victoria Police Manual provides for VGSO (Police Branch) to be engaged wherever human source related material may be disclosable.<sup>65</sup> These practices should be encouraged.
63. The litigation of claims for PII by counsel instructed by VGSO is an orthodox practice in Victoria. It is common in such cases for the Court to be closed for at least part of the hearing, to both the prosecution and the defence.<sup>66</sup> VGSO is particularly well suited to litigate claims for PII which are based on operational considerations, such as the need to preserve the integrity of police methodology or ongoing investigations. Unlike VGSO, the OPP and Crown Prosecutors’ Chambers do not have particular experience or expertise in these areas. VGSO, by contrast, has a dedicated Police Branch which regularly advises police, and appears in Court, on matters related to PII.
64. During the litigation of a claim for PII, the prosecution can, and often does, assist the Court to understand how the Crown case is put. This role can be performed

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<sup>61</sup> [2020] VSC 290 at [17].

<sup>62</sup> [2020] VSC 290 at [18].

<sup>63</sup> Director’s Submission on Disclosure Issues at [136].

<sup>64</sup> T14945 (evidence of Deputy Commissioner Steendam).

<sup>65</sup> Exhibit RC 1529b, Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, at [369].

<sup>66</sup> See, eg, *R v Mohamed, Chaarani and Moukhaiber* [2019] VSC 188 at [39] (Tinney J).

with the defence remaining in Court, and without the prosecution having access to material which may never be made available to defence.

65. After a claim for PII has been litigated, there are circumstances in which the Director may need, in the proper discharge of her functions, to review material which has not been provided to the defence. One such circumstance is where the Court indicates a stay of proceedings may be a condition on which the PII claim would be upheld.<sup>67</sup> Another such circumstance is where the PII claim is rejected and the material to be disclosed warrants reconsideration of whether the prosecution should proceed.
66. Seemingly in support of the proposition that material subject to a PII claim should be assessed by the Director, the submissions of Counsel Assisting refer to the position in South Australia and New South Wales, by reference to the decisions in *R v Solomon* (2005) 92 SASR 331 and *R v Lipton* (2001) 82 NSWLR 123.<sup>68</sup> In so far as these decisions are authority for that proposition at all,<sup>69</sup> they were not followed by Beale J in *Westbrook*. Further, the statutory regimes for disclosure in those jurisdictions do not require the Director to review and consider all materials the subject of claims for PII.
67. The disclosure obligation in Section 10A of the *Director of Public Prosecutions Act 1991* (SA) is conditional on a requirement from the Director and specifically provides that one of the things the Director can require is a *list* of documentary material collected.
68. The decision in *Lipton* turned on the construction of s 15A of the *Director of Public Prosecutions Act 1986* (NSW) as it then was. Following that decision, the Act was promptly amended to reverse its effect. The introduction of subsections (6) and (7) into s 15A preserved the practice of police officers disclosing to the Director only the existence of information subject to a PII claim, and only

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<sup>67</sup> *Evidence Act 2008* (Vic), s 130(5)(f).

<sup>68</sup> Counsel Assisting submissions, Vol 1 at [373], [381]-[382].

<sup>69</sup> The Court in *Solomon* did not deal comprehensively with the question of the extent of the disclosure which will be 'adequate' in a given case, and whether a list of material the subject of PII claims could ever suffice. The decision in *Lipton* turned on the construction of s 15A of the *Director of Public Prosecutions Act 1986* (NSW), which has since been amended.



providing the material itself on request. This reflects the practice in Victoria, which the Director's Policy preserves.

69. In the recommendations it makes concerning the issue of disclosure, it would be appropriate for this Commission to recognise the Director's Policy on Disclosure and allow for its continuing operation. The clear need for independent legal advice to be available to Victoria Police, particularly on questions of disclosure and PII, is appropriately met by VGSO.

### **E Conflicts of interest**

70. Counsel Assisting are right to submit that Ms Gobbo breached her ethical duties to her clients in numerous matters where she had conflicts of interest. Those conflicts were created by her representation of multiple clients with inconsistent interests, and by the inherent conflict in her representation of persons on whom she was informing. The submissions of Counsel Assisting suggest that Victoria Police officers should have raised Ms Gobbo's conflicts of interest with Crown Prosecutors, or the OPP.<sup>70</sup>
71. It is one thing to suggest that there should have been disclosure of Ms Gobbo's role as a human source, to enable the prosecution, and the Courts, to ensure that the fairness of criminal prosecutions was not compromised by her conduct. It is another to imply that the OPP, and Crown Prosecutors, could monitor or control the conflicts of interest of a criminal defence lawyer. As the Director has previously submitted: "from a practical point of view, the prosecution is ill-equipped to take on a role as a de facto regulator of the conduct of legal practitioners."<sup>71</sup>
72. The evidence before the Commission concerning the conduct of Ms Gobbo, and Victoria Police, illustrates some of reasons why prosecutors are so ill-equipped for such a role. Prosecutors will often not be in a position to know important facts which inform the nature and extent of a defence lawyer's conflict of interest.<sup>72</sup> In this case, the most fundamental piece of information concerning

<sup>70</sup> See, eg, Counsel Assisting submissions, Vol 2 at [769], [890], [898], [1185], [2672], and [2689].

<sup>71</sup> Director's Submissions on Disclosure Issues, Chapter 10, [363].

<sup>72</sup> Director's Submissions on Disclosure Issues, Chapter 10, [366].

Ms Gobbo's conflicts of interest was deliberately kept from the prosecution: that she was a human source for Victoria Police.<sup>73</sup> While this central fact renders this case highly unusual, other features of the evidence highlight problems which might arise more often if there were a general expectation that prosecutors would intervene to cure conflicts of interest on the part of defence counsel.

73. One example from the evidence concerns 7 December 2003, when Ms Gobbo visited Mr McGrath with her instructor, Mr Magazis.<sup>74</sup> Ms Gobbo's court book records an offer she made for Mr McGrath to engage other lawyers because she and Mr Magazis acted for Mr Andrews. If a prosecutor had become aware of Ms Gobbo's involvement with both Andrews and McGrath, they would not, particularly in the early stages of a matter, have been in a position to know:

- (i) the scope of the work or advice she was engaged to provide to Mr Andrews;
- (ii) the extent of the disclosure she made to either client of her engagement by the other;
- (iii) whether either client had given informed instructions that they wished for her to continue to act;
- (iv) what role, if any, her instructing solicitor played in advising the client, taking instructions, and providing instructions to Ms Gobbo; and
- (v) to what extent, based on the charges, evidence and instructions, there was a substantive conflict of interest between the two clients.

74. The nature and extent of a conflict of interest may be difficult to assess without information from one, if not both, of the clients for whom a lawyer has acted. For reasons which will be readily apparent, the prosecution will generally not be in a position to obtain this information. It would be improper for the prosecution to make inquiries of an accused person.

75. Any action taken by a prosecutor to deal with the apparent conflicts of interest of a defence practitioner risks giving rise to a perception of interfering with the defence of an accused person. Even if a prosecutor were acting properly, such a perception could still damage confidence in the impartiality of the prosecution, and in the fairness of the criminal justice system. These considerations emphasise

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<sup>73</sup> See Counsel Assisting submissions, Vol 2 at [769], [890], [898], [928]-[929], [961], [1002], [1055.5], [1672], [2629], [3909], [4772]-[4772], and [4776].

<sup>74</sup> See Counsel Assisting submissions, Vol 2, p 112 at [528].

the need for a body or person independent from the criminal proceedings to investigate, and deal with, serious conflicts of interest in the rare cases where they are not managed appropriately by legal practitioners themselves.

76. It follows, as the Director previously submitted, that the appropriate policy response to the kinds of conflict of interest exposed before this Commission is to examine the powers and functions of the Legal Services Board, and Legal Services Commissioner.<sup>75</sup>

#### **4. FINDINGS AS TO LAWYER-CLIENT RELATIONSHIPS**

77. The Director submits that caution is required by the Commission in making any factual findings about the existence and duration of any lawyer-client relationships of Ms Gobbo, and the matters in respect of which that relationship existed. Findings of that kind would need to be based upon clear, cogent and objective evidence.

78. While the DPP has not conducted a thorough review of all cases potentially affected by Ms Gobbo's informing, it is apparent from those that have been carefully considered that the very existence and duration of Ms Gobbo's lawyer-client relationships, as opposed to her personal and social relationships, is a matter of significant contention. It is a matter of contention in appeals that have been filed, and may arise as a point of dispute in future appeals. The submissions of Counsel Assisting rightly recognise that this Commission's function is separate from that being performed by the Court of Appeal in reviewing the convictions of affected persons.<sup>76</sup> Further, the Letters Patent establishing this Commission expressly contemplated that the Commission would not prejudice any ongoing judicial proceedings.<sup>77</sup> There is a risk of prejudice of this kind being created by this Commission making definitive findings about the nature and duration of Ms Gobbo's lawyer-client relationships with her clients, and the specific legal matters in respect of which she had such relationships.

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<sup>75</sup> Director's Submissions on Disclosure Issues, Chapter 10, [369]-[370].

<sup>76</sup> Counsel Assisting submissions, Vol 1 at [12]-[13].

<sup>77</sup> Recital A, page 2.

79. The DPP submits that the Commissioner ought to acknowledge the inherent difficulties in making a factual finding about the existence and duration of any lawyer-client relationships of Ms Gobbo, given the blurred professional and personal boundaries she shared with potentially affected persons. From the fact that Ms Gobbo had a number of professional interactions with a person over a period of time, it cannot be concluded that, a legal relationship endured between those dates. For example, the fact that Gobbo appeared at a hearing in 2006 and another hearing in 2008, should not lead to a factual finding concluding that a lawyer-client relationship existed for the intervening period.
80. The DPP submits that factual findings on this issue require a more nuanced and careful analysis than simply stating that a legal relationship existed for a period of years when the vast majority of Ms Gobbo's communications with a person were based upon her personal relationship with them, rather than a professional one. Regularly sharing meals, consuming alcohol, meetings at carwashes, cafes and bars after hours, babysitting their children, and participating in general gossip are all examples of the types of behaviour Ms Gobbo engaged in with persons described as her "clients". The DPP submits that Ms Gobbo blurred professional boundaries to such an extent that it is not possible for this Commission to make findings of fact, to the requisite *Briginshaw* standard, as to the legal relationship Gobbo maintained with her clients at various times in the absence of clear, objective evidence.
81. This need for caution arises in a number of cases which are the subject of specific submissions by Counsel Assisting. Examples include the cases of Cvetanovski,<sup>78</sup> Cooper,<sup>79</sup> and Mokbel.<sup>80</sup>

## 5. ALLEGATIONS OF CRIMINAL OFFENCES: FORM OF RECOMMENDATIONS

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<sup>78</sup> Counsel Assisting submissions, Vol 3, p 130 at [19]-[24].

<sup>79</sup> Counsel Assisting submissions, Vol 2, p 450 at [1876.1].

<sup>80</sup> Counsel Assisting submissions, Vol 3, p 425-431 at [37]-[50].

- [REDACTED]
83. If the Commission is minded to make any findings of possible criminal conduct, then in considering the terms of any referral it might make, it should be aware of the practical and procedural constraints on the Director of Public Prosecutions.
84. While s 22(1)(a) of the *Public Prosecutions Act 1994* (Vic) confers on the Director the function of instituting proceedings for indictable offences, that provision must be read together with the provisions of the *Criminal Procedure Act 2009* (Vic) (CPA) governing the commencement of criminal proceedings. The CPA requires informants to file charge sheets on an accused,<sup>81</sup> and to serve hand-up briefs of evidence on the accused, which will form the basis of committal proceedings.<sup>82</sup> The bypassing of committal proceedings by the filing of a direct indictment is exceptional, and proceedings commenced in this way are liable to be stayed by the Courts as an abuse of process.<sup>83</sup>
85. However a criminal proceeding is commenced, a brief of admissible evidence is required. The evidence gathered by the Royal Commission is generally inadmissible in any criminal proceedings.<sup>84</sup> [REDACTED] and other [REDACTED] and other investigative steps would be required in order to gather admissible evidence, and to assess the true strength of any case against them. These investigative steps are not within the functions of the Director and the OPP. The only function conferred on the Director which may be relevant is conferred by s 22(1)(ce) of the *Public Prosecutions Act*, which provides:

“if the Director considers it desirable to do so, to provide advice to an agency, body or person that has a power to investigate or prosecute criminal offences, or a class of criminal offences, in relation to an investigation (including a reinvestigation of an offence of which a person has previously been acquitted) or a prosecution.”

<sup>81</sup> Section 6(3).

<sup>82</sup> Part 4.4.

<sup>83</sup> *Barton v R* (1980) 147 CLR 75 at 95-96 (Gibbs ACJ and Mason J, Aickin J agreeing); *R v Dupas* (2006) 14 VR 228 at 231-232 [17]-[25]; *Williams v DPP* (2004) 151 A Crim R 42.

<sup>84</sup> *Inquiries Act 2014* (Vic) s 40(1).

86. There would, it is submitted, be little point in the Commission recommending that the Director provide advice to an investigative agency with respect to possible criminal offences. Any recommendation that an investigative agency consider any such offences is better effected by a direct referral to the agency itself.