

Royal Commission into the Management of Police Informants

VICTORIA POLICE RESPONSE TO THE DRAFT FINAL REPORT RELATING TO TERMS OF REFERENCE 3 TO 6

Saul Holt

Adam Purton

Counsel for Victoria Police

Corrs Chambers Westgarth

Solicitors for Victoria Police

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Part A: Victoria Police's implementation of the Kellam Report recommendations

1 Overview

- 1.1 Victoria Police received the completed Kellam Report on 6 February 2015 — it accepted the findings of the Kellam Report and committed to implementing the recommendations.
- 1.2 Victoria Police acknowledges that it could have implemented some of the Kellam Report recommendations faster. However, while Victoria Police accepts that it had not implemented all aspects of each of the Kellam Report recommendations within one year of the completion of the Report, it had implemented the vast majority of recommendations within that time period.¹ Where recommendations had not been fully implemented there were good reasons for that and all are now part of Victoria Police's human source management framework.
- 1.3 Victoria Police agrees with many of the factual observations made by the Commission in relation to the improvements to Victoria Police's human source management framework. It is evident that the framework has improved significantly since the period of Ms Gobbo's registration.² However, in considering Victoria Police's implementation of the Kellam Report recommendations, the Royal Commission should have regard to, and note, the following matters:
- (a) the fact that the information provided by Victoria Police to IBAC in 2015 and 2018 in relation to implementation of the Kellam Report recommendation was accurate and consistent with the measures Victoria Police had taken to implement the recommendations;
 - (b) the process for the development and improvement of the human source management policy framework; and
 - (c) in instances where the Royal Commission has observed shortcoming in Victoria Police's implementation of the Kellam Report recommendations, those shortcomings have already been addressed in the most recent version of the VPM Human Sources Policy.

2 Information provided to IBAC regarding implementation of the Kellam Report recommendations

- 2.1 On 26 June 2015 and 9 May 2018, Victoria Police wrote to IBAC outlining the status of the implementation of the Kellam Report recommendations, advising that the recommendations had been "adopted" and "acquitted".³ Victoria Police appended to the correspondence tables outlining how Victoria Police had at that point in time implemented the Kellam Report recommendations, including details of amendments to relevant policy and risk assessment practices.⁴ IBAC did not at the time query the details of Victoria Police's implementation of the Kellam Report recommendations.
- 2.2 The information provided to IBAC was, at the relevant point in time, an accurate outline of how Victoria Police had sought to implement the Kellam Report recommendations. While

¹ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [190].

² See Tranche 2 of the Closing Submissions on Behalf of Victoria Police and Individual Members, 42–50.

³ Letter from Acting Chief Commissioner Tim Cartwright to Commissioner Stephen O'Bryan QC (26 June 2015) (VPL.0100.0057.0001 at .0065); Exhibit RC0010 - Letter from Deputy Commissioner Shane Patton to Commissioner Robert Redlich QC (9 May 2018) (VPL.0005.0013.0577).

⁴ Victoria Police Response to Recommendations from IBAC Report (VPL.0100.0157.0001 at .0067–.0083); IBAC (Kellam) Report Concerning Victoria Police handling of Human Source Code Name 3838 (VPL.0005.0013.0580).

the Royal Commission has observed that some of those recommendations were not fully implemented until more recently, there was no intention to provide inaccurate information to IBAC — Victoria Police at the time considered that it had fully implemented the Kellam Report recommendations. Throughout its involvement with the Royal Commission's inquiries, Victoria Police has identified some areas in which the human source management policy framework could be improved; some of these areas have overlapped with Kellam Report recommendations which had not been fully implemented. This has been one of the significant benefits of this Royal Commission.

3 Development of Victoria Police's human source policy framework

- 3.1 No process or policy is ever perfect. As noted by Deputy Commissioner Steendam, policy is developed as part of a process of continuous improvement and to adapt to new and emerging issues within Victoria Police's operating environment.⁵ In this sense, Victoria Police agrees with the Royal Commission that it has made substantial amendments to its human source policy framework over many years, particularly since 2014. It will continue to do so as improvements are identified in the future.
- 3.2 Notwithstanding this progress, the Royal Commission has observed that not all amendments have resulted in improvements in operational practice,⁶ and some changes to the policy framework were not accompanied by adequate communication, guidance and training.⁷ The Royal Commission considers that improvements could be made to processes for seeking and incorporating operational input, communicating changes across the organisation, and regularly reviewing and evaluating policy changes.⁸
- 3.3 The Victoria Police Manual — Human Sources Policy sits within and is intended to be read within context of the broader Victoria Police Manual.⁹ The process for development of the Victoria Police Manual (including associated Policy Rules and Guidelines) is articulated in the Victoria Police Manual — Policy Development and Advice (**VPM Policy Development and Advice**). The VPM Policy Development and Advice outlines the agreed frameworks, processes and responsibilities which support Victoria Police's approach to policy development and advice activities. The VPM Human Source Policy is developed in accordance with the VPM Policy Development and Advice, with any necessary adjustments made to allow for sensitivities and the highly specialised nature of human source management activities.
- 3.4 While Victoria Police agrees that, as a general rule, broader input and communication can lead to enhancements to policy, there are further considerations specific to human source management which guide the development of the VPM Human Sources Policy. Human source management is a highly specialised policing activity — only a small proportion of members are actively involved in human source management or have the requisite degree of expertise to provide informed input on development of the policy. Victoria Police already seeks feedback from human source handlers, controllers, Officers in Charge, Local Source Registrars, members of the HSMU and others involved in human source management in developing the VPM Human Sources Policy.¹⁰ Consistent with

⁵ Exhibit RC1529 - Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, [9] (VPL.0014.0113.0019 at .0020).

⁶ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [9].

⁷ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [201].

⁸ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [10].

⁹ The background to the development of the Victoria Police Manual from its implementation in the 1970s is set out in the statement of Assistant Commissioner Kevin Casey dated 15 August 2020 (VPL.0014.0134.0001).

¹⁰ Exhibit RC1529 - Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, [13] (VPL.0014.0113.0019 at .0021).

the VPM Policy Development and Advice, the Policy and Legislation Division, Corporate Strategy and Operation Improvement Department may also be involved. Advice was also sought from the Legal Services Department and external lawyers in the development of the updated policy. Victoria Police is also considering feedback provided by members through focus groups conducted by the Royal Commission. Victoria Police has in the past and will continue to seek input from external bodies.¹¹ Accordingly, Victoria Police considers that the breadth of its current consultation in relation to the VPM Human Sources Policy is appropriate.

- 3.5 In this context, it is noted that the Royal Commission has observed that Victoria Police's implementation of the Kellam Report recommendations could have been accompanied by a more effective consultation and change management process.¹² Recommendation 16 of the Kellam Report provides that the Kellam Report "should be accorded the highest level of confidentiality by all persons to whom it is disseminated", and that "[f]ailure to accord such confidentiality would be highly likely to increase the already significant danger to the life of the [s]ource".¹³ The live security concerns, and the recommendations of the Kellam Report relating to document security, limited the extent to which Victoria Police could actually conduct broad consultation across all members regarding the changes to policy. However, following the introduction of the changes, the HSMU informed human source handlers and controllers of the changes to policy.
- 3.6 The Royal Commission has noted that Victoria Police updated the VPM Human Sources Policy in May 2020, during the course of the Royal Commission's inquiry. While the Royal Commission agrees that the updated version of the VPM Human Sources Policy "better reflected the intent of the Kellam Report recommendations and usefully clarified aspects of the policy", the Royal Commission has characterised the updates as "piecemeal" amendments which "should have been implemented earlier and more comprehensively".¹⁴ Victoria Police does not agree with this characterisation of the May 2020 updates to the VPM Human Sources Policy. When asked about this matter by Counsel Assisting, DC Steendam noted that while the Royal Commission had "highlighted some areas" to be addressed, the process of updating the Policy was also informed by subject matter experts, a review of international best practice and issues or gaps that had been identified internally concerning the operation of the previous version of the Policy.¹⁵
- 3.7 Accordingly, while Victoria Police acknowledges that some of the amendments incorporated into the VPM Human Sources Policy in May 2020 related to the Kellam Report recommendations and some matters identified in the Commission's inquiries, the updates were not limited to those areas. In fact, the May 2020 updates covered the broader subject of human source management generally, with key updates including:¹⁶
- (a) rationalisation of the categories of human sources and the introduction of a new process to register those providing one-off information;
 - (b) restrictions on the registration of persons with serious medical or mental health conditions;
 - (c) introduction of a new mental health functioning screening tool;

¹¹ Exhibit RC1529 - Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, [13] (VPL.0014.0113.0019 at .0021).

¹² Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [202].

¹³ Exhibit RC0113 - Kellam Review, recommendation 16 (VPL.0007.0001.0001 at .0094).

¹⁴ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [197]–[198].

¹⁵ T14860.40 – T14681.9 (DC Steendam).

¹⁶ Deputy Commissioner, Specialist Operations Briefing: Updated VPM Human Sources (27 April 2020), 2 (VPL.0098.0129.0001 at .0002).

- (d) expansion of matters to be considered by the HSEC;
- (e) qualification requirements;
- (f) introduction of two levels of approval for management of human sources (relating to tasking of sources and tasking with special conditions); and
- (g) management of sources as potential witnesses.

4 Victoria Police's implementation of the Kellam Report recommendations

- 4.1 Victoria Police agrees with the Royal Commission's view that most of the Kellam Report recommendations were implemented within one year of the completion of the Report.¹⁷ However, the Royal Commission has formed a view that Victoria Police had not fully implemented aspects of the Kellam Report recommendation relating to:
- (a) safeguards for the use of potentially privileged and confidential information obtained from all human sources, not only those in one of the 'Kellam Occupations' (recommendation 1(a));¹⁸
 - (b) an understanding of the term 'positive obligation', as envisaged by the Comrie Review and Kellam Report (recommendation 3(d));¹⁹
 - (c) human rights considerations;²⁰ and
 - (d) reviewing risk assessments (recommendation 3(a), (d), (e) and (f)).
- 4.2 Victoria Police's policy and processes in relation to each of these recommendations have improved markedly since completion of the Kellam Report. These enhancements reflect the overall improvements to Victoria Police's human source management framework. While aspects of these recommendations had not been fully implemented within a year following completion of the Kellam Report, Victoria Police had made, and continues to make, substantive amendments to its policies and practices to reflect these issues. The recommendations are fully implemented under the current human source management framework.

Use of potentially privileged or confidential information from sources other than those in one of the 'Kellam Occupations' (recommendation 1(a))

- 4.3 Recommendation 1(a) of the Kellam Report recommends:

That all VicPol human source policies, associated instructions and practice guidelines be revised to clearly reflect: . . . That special consideration applies to the obtaining, usage and management of information that may be subject to legal professional privilege and/or the subject of confidential information

- 4.4 Victoria Police's implementation of recommendation 1(a) of the Kellam Report focussed on implementing safeguards in relation to obtaining information from individuals in a 'Kellam Occupation'. The 'Kellam Occupations' — lawyers, doctors, parliamentarians, court officials, journalists and priests — are so-named because they are provided by way of example in the Kellam Report, as individuals "who may have conflicting professional duties".²¹

¹⁷ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [190].

¹⁸ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [175].

¹⁹ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [181]–[183].

²⁰ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [184]–[186].

²¹ Exhibit RC0113 - Kellam Report recommendation 1(b) (VPL.0007.0001.0001 at .0089).

- 4.5 Given that individuals in these professions are, on the face of it, the most likely to potentially provide information that may be subject to legal obligations of confidentiality and privilege, Victoria Police's human source policies have focussed on implementing safeguards in relation to individuals in these occupations. This is also consistent with recommendation 1(b) of the Kellam Report.
- 4.6 As a result, section 4.6 of the VPM Human Sources Policy (2014) contained instructions to members to "be mindful that some sources as a result of their occupations may have professional obligations regarding confidentiality eg lawyers, doctors and clergy".²² Later versions of the VPM Human Sources Policy referred to the full set of the Kellam Occupations.²³ The VPM Human Sources Policy referred to the Kellam Occupations as non-exhaustive examples, consistent with how they appear in the Kellam Report.²⁴
- 4.7 The Commission has identified some of the safeguards and oversight mechanisms that apply to registration of an individual in a Kellam Occupation as a human source.²⁵ These mechanisms have proven effective in practice and have been strengthened over time.
- 4.8 In May 2020, the VPM Human Sources Policy was updated to also capture human sources who have a 'connection' to a Kellam Occupation. This amendment to the VPM Human Sources Policy effectively imposes additional safeguards to minimise the risk of obtaining or using information that may be subject to legal obligations of privilege or confidentiality.
- 4.9 A person has a connection to a Kellam Occupation if they:²⁶
- (a) previously worked in a Kellam Occupation;
 - (b) are likely to receive confidential or privileged information from someone in a Kellam Occupation; or
 - (c) work in a similar occupation where they are likely to receive confidential or privileged information.
- 4.10 The VPM Human Sources Policy (2020) provides examples of circumstances in which a person has a 'connection' to a Kellam Occupation.²⁷ The registration and oversight requirements for a person with a 'connection' to a Kellam Occupation are the same as for an individual currently engaged in a Kellam Occupation.
- 4.11 Notably, these provisions of the VPM Human Sources Policy (2020) cast a broader net than other jurisdictions examined by the Royal Commission.²⁸ As acknowledged by the United Kingdom-based expert called by the Royal Commission, Sir Jonathan Murphy, while there is a specialised regime in the UK for approval of a human source in circumstances where it is anticipated that use of the source will involve obtaining, providing access to, or disclosing matters subject to legal professional privilege,²⁹ this regime would not necessarily capture registration of a person who has a connection to a Kellam Occupation.³⁰ Tellingly, it is also possible under the UK regime for a lawyer to be registered as a human source without engaging the specialised approval regime at all.³¹

²² Victoria Police Manual — Policy Rules — Human Sources (29 September 2014), s 4.6 (VPL.0002.0001.1719 at .1733–.1734).

²³ Victoria Police Manual — Human Sources (15 March 2016), s 4.5 (VPL.0002.0001.1750 at .1762–.1763); Exhibit RC1530 - Victoria Police Manual — Human Sources (8 May 2018) s 4.6 (VPL.0002.0001.1776 at .1791–.1792).

²⁴ Exhibit RC1530 - Victoria Police Manual — Human Sources (8 May 2018) s 1.20 (VPL.0002.0001.1776 at .1784–.1785).

²⁵ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [174].

²⁶ Exhibit RC1531 - Victoria Police Manual — Human Sources (May 2020), s 8.5 (VPL.0005.0285.0001 at .0030).

²⁷ Exhibit RC1531 - Victoria Police Manual — Human Sources (May 2020), s 8.5 (VPL.0005.0285.0001 at .0030).

²⁸ T14997.38 – T14998.3 (Sir Jonathan Murphy).

²⁹ See *Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010* (UK), r 3.

³⁰ T14997.38 – T14998.3 (Sir Jonathan Murphy).

³¹ T14997.3 – T14997.24; T14999.9 – T14999.18 (Sir Jonathan Murphy).

- 4.12 Victoria Police acknowledges that initially following completion of the Kellam Report, the amendments to the VPM Human Sources Policy did not effectively capture the full set of circumstances in which Victoria Police might receive information that may be subject to legal obligations of privilege or confidentiality. Victoria Police's policy amendments were designed to capture what it considered to be the most likely circumstances in which it could receive such information, which was consistent with other recommendations in the Kellam Report. In order to broaden oversight and registration requirements to capture other circumstances in which Victoria Police may potentially receive information subject to legal obligations of privilege or confidentiality, Victoria Police has updated the VPM Human Sources Policy in a manner which goes beyond requirements in other jurisdictions.

Positive obligations

- 4.13 The term 'positive obligation' appears in recommendation 3(d) of the Kellam Report, which recommends:

That all VicPol human source policies, associated instructions and practice guidelines be revised to clearly reflect: That any risk assessment reliant on positive obligations to utilise a source must be subjected to the utmost scrutiny to reflect upon the issues of proportionality and necessity. Positive obligation reliance must be for specific purpose only and approval must lapse upon fulfilment of this purpose. Where positive obligations are to be relied upon consultation must first occur with the VicPol Director Legal Services

- 4.14 The Royal Commission has formed a view that, while the concept of 'positive obligation' was implemented into the VPM Human Sources Policy (2018),³² it was "incorrectly conflated with legal obligations of confidentiality or privilege and defined by reference to circumstances where information is provided by a source who is bound by legislation or rules of their profession".³³
- 4.15 'Positive obligation' appeared in a section of the Comrie Review referring to the Australasian Human Source Risk Assessment Manual (**AHSRA Manual**).³⁴ Mr Comrie noted that the term appeared to be "poorly and incompletely expressed" in the AHSRA Manual.³⁵ The AHSRA Manual, while part of Victoria Police's human source management policy framework, was originally developed by the Australasian Human Source Working Group (of which Victoria Police is a member).
- 4.16 While here is evidence that the use of the term 'positive obligation' as it appeared in the VPM Human Sources Policy (2018) was intended to capture the considerations of proportionality and necessity in relation to the ethical and legal risks of using a human source,³⁶ Victoria Police acknowledges that the wording of the VPM Human Sources Policy (2018) did not convey this meaning effectively. During the course of the Royal Commission, Victoria Police acknowledged that the term 'positive obligation' was not well understood by members.³⁷ This appears to be consistent with the feedback provided by members in focus groups conducted by the Royal Commission.³⁸

³² Exhibit RC1530 - Victoria Police Manual — Human Sources (8 May 2018) s 1.20 (VPL.0002.0001.1776 at .1784–.1785).

³³ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [182], quoting Exhibit RC1530 - Victoria Police Manual — Human Sources (8 May 2018) s 1.20 (VPL.0002.0001.1776 at .1784–.1785).

³⁴ Comrie Review, 139 (VPL.0012.0002.1672 at .1697); Australasian Human Source Risk Assessment Manual (VPL.0005.0016.0034 at .0042).

³⁵ Comrie Review, 139 (VPL.0012.0002.1672 at .1697).

³⁶ Untendered statement of Assistant Commissioner Neil Paterson dated 5 March 2020, [19] (VPL.0014.0005.0072 at .0074).

³⁷ Untendered statement of Assistant Commissioner Neil Paterson dated 5 March 2020, [35] (VPL.0014.0005.0072 at .0076).

³⁸ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [95].

- 4.17 In order to reduce ongoing confusion in relation to the term ‘positive obligation’, the VPM Human Sources Policy (2020) does not use those words. As the Royal Commission has identified, Victoria Police has implemented oversight requirements for human sources that Victoria Police would not ordinarily register, but who the member believes may be able to provide information of extraordinarily high value.³⁹ The VPM Human Sources Policy (2020) provides a list and examples of the types of people that Victoria Police would not ordinarily register as human sources. Importantly, registration of a human source in these circumstances requires approval from the HSEC, which will consider principles of proportionality and necessity in its assessment of the impact on the human rights of any individuals or the community if the information is utilised or not utilised.⁴⁰

Human rights considerations

- 4.18 The Commission has noted that, until recently, the VPM Human Sources Policy “did not set out the requirement for officers to consider human rights or to assess proportionality and necessity”.⁴¹
- 4.19 As noted in paragraph 3.3 above, the VPM Human Sources Policy is to be read within the broader context of the Victoria Police Manual.⁴² The Victoria Police Manual contains a chapter dedicated to human rights: The Victoria Police Manual — Policy Rules — Human Rights, Equity and Diversity Standards (**VPM Human Rights, Equity and Diversity Standards**).⁴³ While past versions of the VPM Human Sources Policy did not expressly refer to the requirements of the VPM Human Rights, Equity and Diversity Standards, members were still aware of and required to act in accordance with those standards. The requirement to consider and act in accordance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) is reinforced in current human source management training.⁴⁴
- 4.20 Importantly, the interaction between human rights and policy is a mandated component of policy development within Victoria Police. Amendments to any part of the Victoria Police Manual, including the VPM Human Sources Policy, requires completion and review of a Human Rights Risk Assessment (**HRRRA**). In the HRRRA, members are required to identify potential human rights that may be impacted by amendments to the Victoria Police Manual, and appropriate risk mitigation strategies. Specifically, the HRRRA requires members to consider:⁴⁵
- (a) The human rights impacted;
 - (b) Is this right being limited? If so, how?
 - (c) Where this right is impacted, what is the suggested risk mitigation strategy?
- 4.21 As each chapter of the VPM is developed in consideration of potential human rights implications, it was not necessary for each iteration of the VPM Human Sources Policy to have referred to human rights.

³⁹ Draft Final Report, *Victoria Police’s Implementation of the Kellam Report recommendations*, [84]; Exhibit RC1531 - Victoria Police Manual — Human Sources (May 2020), s 8.9 (VPL.0005.0285.0001 at .0033–.0034).

⁴⁰ Exhibit RC1534 - Human Source Ethics Committee Terms of Reference (12 April 2020), s 12 (VPL.0005.0285.0045 at .0049–.0050).

⁴¹ Draft Final Report, *Victoria Police’s Implementation of the Kellam Report recommendations*, [186].

⁴² See Exhibit RC1529 - Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, [196] (VPL.0014.0113.0019 at .0059).

⁴³ Untendered Victoria Police Manual — Policy Rules — Human rights, equity and diversity standards (31 August 2015) (VPL.0005.0280.0267).

⁴⁴ Exhibit RC1529 - Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, [262]–[264] (VPL.0014.0113.0019 at .0059–.0075).

⁴⁵ Untendered Deputy Commissioner, Specialist Operations Briefing: Updated VPM Human Sources (27 April 2020) (VPL.0098.0129.0001 at .0054–.0059).

- 4.22 Further, while all members involved in human source management make decisions in fulfilling their duties that may affect human rights, the most impactful decisions are reserved to senior experienced members and are subject to review by the HSEC and Deputy Commissioner, Specialist Operations. In particular, the HSEC is comprised of four very experienced members at the rank of Assistant Commissioner, and the Executive Director, Legal Services Department.⁴⁶ These members all have significant policing experience and experience in matters of governance, accountability and risk management.⁴⁷ All members of the HSEC have received specialised training concerning Victoria police's obligations under the Charter,⁴⁸ and the HSEC Terms of Reference require due consideration of the human rights of any individuals or the community in making decisions relating to approaching, registering or managing human sources.⁴⁹

Reviewing risk assessments

- 4.23 Recommendation 3 of the Kellam Report provided that Victoria Police should “develop a more comprehensive and robust human source risk assessment process”. Recommendation 3(a), 3(e) and 3(f) reiterated the importance of regular reviews of risk assessment documentation.
- 4.24 The Royal Commission has formed a view that while the Kellam Report recommendations that required regular review and endorsement of risk assessments were adequately reflected in the VPM Human Sources Policy (2014), in practice there has been a “lack of consistent and robust oversight and scrutiny of risk assessments”.⁵⁰
- 4.25 The Royal Commission's position appears to be based on feedback from members provided in focus groups conducted by the Commission — in particular, feedback that some members “perceived that the LSRs' ability to undertake a thorough review of risk assessments was diminished by competing operation priorities and responsibilities”.⁵¹
- 4.26 Victoria Police acknowledges the significant challenge posed by competing demands faced by members in effectively fulfilling their duties — this is present for all areas of policing not just human source management. The Commission has noted that Victoria Police has already taken remedial action to assist members in conducting regular and thorough reviews of risk assessments:⁵²

The Commission's audit confirmed that the HSMU reviewed human source files to determine compliance with policy requirements. The time taken by LSRs to review source files was among the issues identified by the HSMU. This led to remedial action, including the suspension of files until the compliance issues were addressed.

- 4.27 The Commission has noted the pivotal role of the HSMU in reviewing and scrutinising risk assessments. Other ways in which Victoria Police has streamlined the risk assessment review process have included:
- (a) implementing the Human Source Dynamic Risk Assessment;⁵³ and

⁴⁶ Exhibit RC1534 – HSEC Terms of Reference (12 April 2020), s 3 (VPL.0005.0285.0045 at .0048).

⁴⁷ T14882.1 – T14882.23 (DC Steendam).

⁴⁸ Exhibit RC1529 - Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, [249] (VPL.0014.0113.0019 at .0072).

⁴⁹ Exhibit RC1529 - Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, [199] (VPL.0014.0113.0019 at .0060).

⁵⁰ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [188].

⁵¹ Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [95].

⁵² Draft Final Report, *Victoria Police's Implementation of the Kellam Report recommendations*, [95].

⁵³ Exhibit RC1529: Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, [158] (VPL.0014.0113.0019 at .0052–.0053); Untendered Human Source Dynamic Risk Assessment (VPL.0005.0280.0279).

(b) upgrading the Interpose human source module;⁵⁴

5 Conclusion

5.1 Victoria Police's human source policy framework has improved significantly since Ms Gobbo's deregistration in 2009.⁵⁵ Two of the key drivers of the changes to Victoria Police's human source policy framework have been the Comrie Review and Kellam Report. Victoria Police has also amended the policy framework during the course of the Royal Commission, in part to address potential shortcomings highlighted throughout hearings of the Royal Commission. Importantly, while Victoria Police has used these opportunities to make these changes to its human source policy framework, the Royal Commission's inquiries have confirmed that there are no other examples of any engagement with any other potential or actual human source of the nature of Nicola Gobbo.

5.2 Victoria Police will continue to develop its human source policy framework in consideration of any recommendations made by the Royal Commission, and to reflect international best practice in human source management.

⁵⁴ Exhibit RC1529: Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020, [219] (VPL.0014.0113.0019 at .0065).

⁵⁵ See Tranche 2 of the Closing Submissions on Behalf of Victoria Police and Individual Members, 42–50.

Part B: Victoria Police's use of other human sources with legal obligations of confidentiality or privilege

1 Overview

- 1.1 The Commission's draft chapter sets out details of its review of:
- (a) the use of twelve human sources associated with the legal profession who became known as the IBAC 12 and one other human source associated with the legal profession identified by Victoria Police;
 - (b) the use of human sources in other occupations with legal obligations of confidentiality or privilege by reference to the Commission's audit of human source files; and
 - (c) inquiries made into allegations made by members of the public concerning 45 persons.
- 1.2 The draft chapter also sets out some concerns that the Commission has in relation to the identification, disclosure of and access provided to human source files by Victoria Police.
- 1.3 Victoria Police agrees with many of the factual observations made by the Royal Commission in its review of the above matters. However, the review would be more accurate – and would better reflect a complete picture in relation to Victoria Police's handling of human sources with legal obligations of confidence and privilege other than Ms Gobbo – by noting the following matters:
- (a) there is no record of any engagement with any other potential or actual human source of the nature of Ms Gobbo;
 - (b) since 1990, there have been only two other cases of the consideration of the use of a person associated with the legal profession as a human source where there was a prospect that information subject to a legal obligation of confidence or privilege may have been involved. In neither case was the person registered as a human source;
 - (c) in all other cases, the information that was or could have been disclosed was of a personal nature in which no legal obligation of confidence or privilege could have arisen. In these cases, Victoria Police's position is that under its policies at the time there was no need for it to consider whether or not to obtain legal advice in circumstances where it was clear that a legal obligation of confidence or privilege was not involved or the source would not be registered for other reasons;
 - (d) in respect of the human source audit, there is no analysis of whether many of the occupations referred to have a legal obligation of confidence or privilege, and many do not;
 - (e) the review of the 45 persons the subject of allegations made by members of the public fails to note that these persons were all defence lawyers, the allegations were all made by their clients in respect of criminal proceedings, there are no records of any of the persons being registered as human sources and Victoria Police has made inquiries with the informants in most of those proceedings which indicate that there has been no communication of any information to Victoria Police which would have involved a legal obligation of confidence or privilege; and

- (f) Victoria Police had a legitimate, proper and lawful basis not to provide the Royal Commission with access to the ^{PII} human source files under the *Inquiries Act 2014* (Vic) which was explained to the Royal Commission. However, to assist the Royal Commission, Victoria Police provided a briefing to the Royal Commission and access to legal advice concerning the files. Had the Royal Commission wished to challenge that basis then the *Inquiries Act* provides the power for it to refer the matter to the Supreme Court, which was not done.

2 The use of other human sources associated with the legal profession

- 2.1 Victoria Police generally agrees with the observations made by the Royal Commission in respect of its review of each of the 10 human source files from the IBAC 12 files which involved individuals who through their occupations were subject to legal occupations of confidentiality or privilege, or had access to confidential or privileged information, during the time they provided information to Victoria Police.⁵⁶ The observations also generally accord with the advice from counsel in respect of the files produced by Victoria Police.⁵⁷
- 2.2 However, the review fails to note the following in relation to the 10 human source files:
- (a) only two of the human source files⁵⁸ involved circumstances in which the potential source may have been in a position to communicate information subject to a legal obligation of confidence or privilege;
 - (b) in both cases, Victoria Police members considered issues relating to the use of those individuals given their legal obligation of confidence or privilege. In the first case, the potential source was not registered, no information was provided in relation to the source's clients and no information was generated, disseminated or used in the prosecution of a crime.⁵⁹ In the second case, the potential source was not registered;⁶⁰ and
 - (c) in respect of the eight other human source files where the individual may have had a legal obligation of confidence or privilege it was clear that the information to be provided was of a personal nature, such as relating to a friend or relative's involvement in criminal behaviour, or was otherwise not privileged or confidential. In these circumstances, there was no need for Victoria Police to seek legal advice in relation to their legal obligation of confidence or privilege.
- 2.3 The Commission has observed at [39] that Victoria Police generated and disseminated IRs from information provided by two individuals who had not been registered as human sources and were subject to legal obligations of confidentiality and privilege being a court officer and a lawyer. However, the court officer provided information of an obviously personal nature. The lawyer is the subject of a separate confidential submission.
- 2.4 The Commission notes at [40] and [41] that:
- (a) only two of the 12 human source files demonstrated any evidence that Victoria Police officers had turned their minds to issues relating to the use of individuals with legal obligations of confidentiality or privilege.⁶¹ Neither of these persons was registered as a human source;

⁵⁶ Sources 1 and 4 from the IBAC 12 were not subject to legal obligations of confidentiality or privilege.

⁵⁷ Untendered advice about 12 human source files (11 June 2019) (VPL.0005.0294.0023).

⁵⁸ Sources 6 and 10.

⁵⁹ Source 6.

⁶⁰ Source 10.

⁶¹ Sources 6 and 10

- (b) none of the 12 human source files indicated that Victoria Police had obtained legal advice about the use, or prospective use, of any of the individuals as human sources notwithstanding the fact that 9 of the files related to the period after the receipt of the Maguire advice in October 2011; and
- (c) three of the human source files relate to the period after September 2014, when the requirement to obtain legal advice was introduced into the VPM – Policy Rules: Human Sources 29 September 2014.

2.5 The Commission has not noted that:

- (a) under the VPM Human Sources Policy (2014) there was only a requirement for the HSMU to seek legal advice regarding the quarantine or use of information or intelligence obtained which may breach a professional obligation;⁶² and
- (b) Under the VPM Human Sources Policy (2016) there was only a requirement to seek legal advice if a human source who is in a position to which confidentiality obligations or privilege applies voluntarily offers information that is or appears to be in breach of that privilege.⁶³

2.6 There was at that time no requirement to obtain legal advice simply because a potential human source had an occupation that may have been subject to a legal obligation of confidence or privilege but where the source was not registered for other reasons or the information to be provided was clearly based on personal associations. There is now a mandatory requirement to obtain legal advice in these circumstances.

3 Further disclosure of a human source in 2020

3.1 In May 2020, Victoria Police provided the Royal Commission with information concerning the operation of then existing governance protocols in circumstances involving the consideration of the registration of a lawyer as a human source.⁶⁴ The proposed registration was considered by the HSEC and legal advice was obtained. The HSEC approved the dissemination of IRs that had already been created as the information was of a personal nature and not relating to the lawyer's occupation. The registration was not approved on an ongoing basis. Victoria Police rejects the Royal Commission's criticism of the circumstances concerning its disclosure of the use of this human source to the Commission and its processes in dealing with the matter. Victoria Police considers this is an excellent example of its governance processes operating effectively.

4 The use of human sources in other occupations and the legal obligations of confidentiality or privilege

4.1 On 13 March 2019, Victoria Police informed the Royal Commission that it had commenced a process to identify human sources (other than those connected with the legal profession) who may be subject to legal obligations of confidentiality in response to items 26 to 28 of NP-002. As had been previously noted in correspondence, these items (which requested details of persons who are or were human sources other than Ms Gobbo who were or are subject to legal obligations of confidence or privilege) were capable of a broad interpretation. Victoria Police provided the Royal Commission with a spreadsheet which set out details of the Interpose searches undertaken and noted that searching had been difficult because of the number of entries which did not include an

⁶² Victoria Police Manual — Policy Rules — Human Sources (29 September 2014), s 4.6 (VPL.0002.0001.1719 at .1733–.1734).

⁶³ Victoria Police Manual — Human Sources (15 March 2016), s 4.6 (VPL.0002.0001.1750 at .1763–.1764).

⁶⁴ Letter from Corrs Chambers Westgarth to the Solicitors Assisting the Royal Commission dated 1 May 2020 VPL.0005.0299.0001

occupation of where the occupation was non-specific.⁶⁵ The completion of the occupation entry is now mandatory.

- 4.2 Victoria Police informed the Royal Commission that it had identified 285 relevant human sources with a breakdown of 129 under “medical”, 1 under “Parliament”, 63 under “Government”, 5 under “Religious”, 10 under “Journalist”, 36 under “Teachers” and 41 under “Financial” for the period 21 October 2008 (earliest Interpose file) and February 2019. Victoria Police noted that reconstructing human source files is an extremely time-consuming task and sought guidance from the Royal Commission on:
- (a) the occupations it was particularly interested in; and
 - (b) the occupations and professions that it considered were subject to legal obligations of confidentiality or privilege.
- 4.3 Consistent with its commitment to full transparency and cooperation with the Royal Commission, Victoria Police adopted a very broad approach to identifying these categories. For example, rather than simply identifying “doctors” or “lawyers” (ie the Kellam Occupations), Victoria Police identified and included in its spreadsheet provided to the Royal Commission numerous examples of other occupations with a connection to these categories, such as “nurses” and “legal secretaries”, whether or not a clear legal obligation of confidence or privilege could be identified.
- 4.4 The Royal Commission subsequently sought revised data for human source files between March 2016 and September 2019. Based on its broad search categories, Victoria Police identified 91 human source files of which ^{PII} were ^{PII} relating to ^{PII}. From the remaining ^{PII} files, the Royal Commission selected 31 files for audit.
- 4.5 Victoria Police provided the Royal Commission with access to hard copy redacted versions of Interpose records for the 31 files for the audit. The redactions were made to protect the identity of the sources only
- 4.6 The outcomes of the audit demonstrate that:
- (a) for 23 of the files, individuals had provided information in a personal capacity which did not involve legal obligations of confidence or privilege;
 - (b) for 8 of the files, individuals had provided information that had been obtained in the course of their employment and:
 - (i) for 7 of these files, Victoria Police members identified issues relating to legal obligations of confidentiality and privilege; and
 - (ii) for one of these files relating to a nurse, Victoria Police members did not identify issues relating to legal obligations of confidentiality and privilege.
- 4.7 For the one file of concern relating to a nurse identified by the Royal Commission the conclusion is that “it is arguable that Victoria Police ought to have considered the potential obligations of confidentiality owed by the nurse to their patient in the context of the nurse providing information about the patient’s drug use”. Victoria Police agrees that this position is only best described as “arguable” as it is hard to discern or identify any legal obligation of confidentiality in the circumstances.
- 4.8 The Royal Commission has identified that on occasion IRs were disseminated before the registration of human source was approved or where there was ultimately no approval. This should not have occurred and is not permitted under the VPM Human Sources

⁶⁵ Letter from Corrs Chambers Westgarth to the Solicitors Assisting the Royal Commission dated 13 March 2019.

Policy (2020). However, there is no evidence of any adverse outcomes through this dissemination.

Human source files subject to a claim of public interest immunity

- 4.9 At paragraphs [76] to [78] and [113] to [114], the Royal Commission has expressed its concerns about not being provided with access to the PII human source files that related to [REDACTED]. These files are PII and are the subject of a legitimate PII claim.
- 4.10 Victoria Police took the following steps to brief the Royal Commission in relation to these files:
- (a) the files and the security and PII concerns were identified to the Royal Commission at the outset of the human source audit;
 - (b) the PII claims over the files was reviewed by independent senior counsel;
 - (c) then Assistant Commissioner Neil Paterson, Acting Deputy Commissioner Fontana and the senior counsel met with the CEO of the Royal Commission to brief her in relation to PII of the files and the security concerns (a further file was identified after the briefing);
 - (d) the CEO of the Royal Commission wrote to Victoria Police with specific queries concerning the files;
 - (e) Victoria Police responded to the queries in a detailed confidential affidavit and produced advice from the senior counsel; and
 - (f) through this process, the Royal Commission was advised of the nature of the files, the potentially relevant legal obligation of confidentiality or privilege and the relevant PII claims.
- 4.11 It was open for the Royal Commission to press for production of the files. Victoria Police's position is that it had a reasonable excuse not to produce the files on the basis of a PII claim. As noted above, the Royal Commission had available to it a mechanism under the *Inquiries Act* to dispute Victoria Police's PII claims in this regard by referral to the Supreme Court but it did not do so. It is unreasonable to criticise Victoria Police for upholding its legal responsibilities to the community by maintaining these PII claims. This is particularly the case in circumstances in which the Royal Commission participated in a collaborative process with Victoria Police and chose not to challenge the claims in the Supreme Court. Notwithstanding the time and budgetary constraints of the Royal Commission, it is misleading and prejudicial to now question the legitimacy of these claims not having challenged those claims through the appropriate process.

5 Inquiries into allegations made by members of the public

- 5.1 In December 2019, the Royal Commission served a notice to produce on Victoria Police with a list of the names of 41 persons and a request that Victoria Police produce all documents relating to the use or registration of any of those persons as human sources. 39 of the persons were criminal defence lawyers. In May 2020, the Commission added four persons to this list.
- 5.2 The Royal Commission subsequently informed Victoria Police that the list of 45 persons was compiled from submissions received by the Royal Commission from the public many of which alleged that the lawyers had provided information to Victoria Police in possible breach of their legal obligations of confidentiality or privilege.

- 5.3 Victoria Police confirms that none of the 45 persons has ever been registered as a human source or considered for registration as a human source. Victoria Police informed the Royal Commission that it did not maintain a database recording all communications made by defence lawyers to Police members and sought further details in relation to the allegations. The Royal Commission subsequently provided some further information in relation to the prosecutions the subject of the allegations. Victoria Police then took steps to contact the informants in each of the prosecutions the subject of the allegations.
- 5.4 On 2 July 2020, Victoria Police provided the Royal Commission with a table setting out the responses from each of the informants to the allegations concerning the defence lawyers. In each case, the informants who had been contacted stated that, as far as they were aware, the specified lawyer did not provide any information to Victoria Police in possible breach of their legal obligations of confidentiality or privilege. Victoria Police noted that it was not able to identify the informant in two of the matters as there was insufficient information provided and identified one of the matters as being an Australian Federal Police matter.⁶⁶
- 5.5 On 17 August 2020, Victoria Police sent the Royal Commission a letter in which Victoria Police confirmed that:
- (a) it does not hold any information to indicate that the 45 individuals were used, considered for use or registered as human sources by Victoria Police; and
 - (b) given that none of the 45 individuals were used as human sources (or considered for use as human sources), it is extremely unlikely that any of these individuals ever provided information to Victoria Police in breach of their legal obligations of privilege or confidentiality as a human source.
- 5.6 Victoria Police understands that the Royal Commission has not contacted any of the 45 individuals in relation to the allegations. It is difficult to see what else the Royal Commission expects that Victoria Police could have done to assist in relation to this issue.

6 Policy and procedural issues

- 6.1 Victoria Police acknowledges the policy and procedure issues noted in paragraphs [104] to [108]. However, as set out above, Victoria Police emphasises that the Royal Commission's review has not identified any issues similar in nature or consequences as the handling of Ms Gobbo. The review indicates that:
- (a) Victoria Police members at times had difficulty identifying and addressing issues relating to legal obligations of confidentiality and privilege at a time when policies were not well developed;
 - (b) most of the files concerned human sources providing information of a personal nature and/or a decision being made not to register a human source before there was a need to consider seeking legal advice; and
 - (c) outside a legal or medical relationship there were no examples of any of the occupations considered in the review giving rise to a relevant legal obligation of confidentiality or privilege.

⁶⁶ Letter from Corrs Chambers Westgarth to Solicitors Assisting the Royal Commission dated 2 July 2020.

7 Victoria Police's identification and disclosure of human source files

- 7.1 Victoria Police submits that it provided the Royal Commission with appropriate access to the relevant human source files as soon as practicable (apart from the ^{PII} human source files with ^{PII} concerns addressed above) given the following:
- (a) the security and PII concerns in respect of these ^{PII} files;
 - (b) the Interpose records were difficult to convert into hard copy files; and
 - (c) redactions were required to protect the identity of the human sources. These redactions did not prevent the Royal Commission from knowing the occupation of, information provided by, and the manner of handling of each source.
- 7.2 It is appropriate, again, to record that Victoria Police has always approached the issue of provision of information which may identify a human source with extreme care. The risk of not doing so is that someone will be seriously harmed or killed and Victoria Police has obligations – both legal and moral – to take all reasonable steps to ensure that does not happen.

Part C: The use and disclosure of information from human sources in the criminal justice system

1 Overview

- 1.1 Victoria Police has constructively engaged with the Royal Commission's inquiries into the use and disclosure of information from human sources in the criminal justice system. Victoria Police's contribution to the Royal Commission's inquiries has included:
- (a) submitting two responses to the Royal Commission's Consultation Paper concerning the current use of specified human source information in the criminal justice system;⁶⁷
 - (b) the statement and oral evidence of Deputy Commissioner Wendy Steendam in relation to the Royal Commission's terms of reference 3 and 4;⁶⁸
 - (c) participating in two hearings of the Royal Commission dedicated to the Royal Commission's terms of reference 3 and 4; and
 - (d) producing to the Royal Commission submissions on behalf of Victoria Police and members and former members of Victoria Police, in relation to the Royal Commission's terms of reference 1 and 2.⁶⁹
- 1.2 A large number of other statements prepared by members and former members of Victoria Police, and documents produced by Victoria Police, have also related to the use and disclosure of information from human sources in the criminal justice system.
- 1.3 Victoria Police understands that these materials will inform the chapters of the Royal Commission's final report relating to the use and disclosure of information from human sources in the criminal justice system. Victoria Police considers that, subject to the two points of clarification outlined in paragraph 1.4 below, these materials sufficiently set out its position on disclosure.
- 1.4 In its review of the Royal Commission's draft chapter, Victoria Police considers that it is necessary to address the following matters:
- (a) The Royal Commission has received submissions from other parties which have expressed views questioning Victoria Police's "culture of compliance with disclosure obligations"⁷⁰ and the "weight police give to their disclosure obligations".⁷¹ Deputy Commissioner Steendam's evidence addressed Victoria Police's focus on creating a "culture of confident humility", which she outlined as comprising an "ethical culture and a culture that's committed to good service delivery".⁷² Victoria Police has acknowledged the many and diverse challenges that exist in effectively acquitting disclosure obligations — insofar as the Royal Commission considers that the challenges relate to aspects of police culture, Victoria Police has and will continue to take measures to address this issue. These measures are being complemented by the other reforms to disclosure being progressed by Victoria Police.

⁶⁷ Victoria Police response to Royal Commission Consultation Paper (20 January 2020): SUB.0144.0001.0001; Victoria Police further response to Royal Commission Consultation Paper (16 April 2020): SUB.0144.0001.0002.

⁶⁸ Statement of Deputy Commissioner Wendy Steendam dated 16 April 2020: VPL.0014.0113.0019.

⁶⁹ See, eg, Tranche 2 of the Closing Submissions on Behalf of Victoria Police and Individual Members, 51–64.

⁷⁰ Draft Final Report, *The use and disclosure of information from human sources in the criminal justice system*, [226].

⁷¹ Draft Final Report, *The use and disclosure of information from human sources in the criminal justice system*, [134].

⁷² T14924.6 – T14924.43 (DC Steendam).

- (b) The Royal Commission has observed that there are findings from other reviews that “better use of technology is critical in improving disclosure”.⁷³ Victoria Police has submitted, and the Royal Commission has acknowledged, the structural challenges and complexities of disclosure given the current state of Victoria Police’s information systems. Victoria Police reiterates that any significant reform to the Victorian disclosure framework should fundamentally take into account the current limitations of Victoria Police’s information systems, and the investment required to alleviate the current issues.
- 1.5 Victoria Police is grateful to have had the opportunity to assist the Royal Commission’s inquiries into the use and disclosure of information from human sources. Victoria Police is committed to collaborating with other stakeholders, and enhancing its own processes, to improve disclosure in the Victorian criminal justice system.
- 1.6 To reiterate, Victoria Police is absolutely committed to ensuring that it meets its disclosure obligations in a comprehensive, transparent and efficient manner, in accordance with its statutory and common law obligations.

⁷³ Draft Final Report, *The use and disclosure of information from human sources in the criminal justice system*, [249].

Part D: Issues arising from the conduct of the Commission's inquiry

1 Overview

- 1.1 Victoria Police acknowledges that issues related to document production and claims of PII created challenges for the Royal Commission in light of the Commission's terms of reference, the sensitivities of the issues being examined and the timeframes involved. However, for the reasons set out below Victoria Police rejects any suggestion that it deliberately hindered or delayed the inquiry.⁷⁴
- 1.2 The Royal Commission has conducted an inquiry into a highly sensitive part of Victoria Police's covert capability. As part of its inquiry, the Royal Commission sought and was provided with thousands of highly sensitive documents, the contents of which – if disclosed – have the potential to cause serious harm to numerous people. The Letters Patent establishing the Royal Commission expressly refers to the need for the Royal Commission to have regard to the safety of Ms Gobbo and other persons affected by the matters raised in this inquiry.
- 1.3 Victoria Police has already made detailed submissions as to the significance and scale of Victoria Police's response to the Royal Commission, the manner in which it engaged with the Royal Commission and the assistance that it provided.⁷⁵ Those submissions need not be repeated. However, Victoria Police relies on them as they support the conclusion that Victoria Police has fully cooperated with the Royal Commission and has taken all reasonable steps to ensure that the Royal Commission proceeded as efficiently as possible.
- 1.4 The contention that Victoria Police has deliberately hindered and delayed the inquiry through its handling of document production and public interest immunity claims fails to give due regard to:
- (a) the scale of the document production undertaken by Victoria Police;
 - (b) the statutory framework pursuant to which the Royal Commission conducted its inquiry;
 - (c) the importance of PII, both in terms of community safety and the safety of individuals; and
 - (d) the contemporaneous communications between Victoria Police and the Royal Commission in relation to document production and other priorities.
- 1.5 Victoria Police has worked very hard to support the Royal Commission. It has done so transparently and proactively and has dedicated extraordinary resources to the task. Victoria Police did not have unlimited resources with which to respond to the Royal Commission. All resources applied to the Royal Commission were diverted from other areas of Victoria Police. Many Victoria Police members have worked tirelessly to produce documents to the Royal Commission as expeditiously as possible and in a manner that is consistent with established public interest immunity principles. The assistance provided by Victoria Police has gone well beyond its legal obligations to assist in an inquiry of this nature and includes the preparation of statements, formal and informal briefings to Royal Commission staff, reconstruction of files, transcription of audio recordings and organising

⁷⁴ Draft Final Report, *Issues arising from the conduct of the Commission's inquiry* [121].

⁷⁵ Tranche 2 of the Closing Submissions on Behalf of Victoria Police and Individual Members, Chapter 23.

and facilitating focus groups. This assistance has been critical to the Royal Commission being able to perform its role in a timely and efficient manner.

2 The scale of Victoria Police's document production

- 2.1 Throughout the course of the Royal Commission, over 250 Notices to Produce (**NTPs**) have been served on Victoria Police and its current and former members. Those NTPs varied greatly in terms of the work required for Victoria Police to properly comply with the requirements of the particular notice. Some required only a short investigation of Victoria Police databases or required the production of a statement that had been prepared. Others required detailed analysis, and time-consuming, labour intensive searches.
- 2.2 The process of responding to those NTPs has been a significant undertaking. Through Taskforce Landow, Victoria Police has conducted searches of more than 50 million records dating back to the early 1990s. Of these records, approximately:
- (a) 600,000 documents were individually inspected;
 - (b) 75,000 documents, consisting of 650,000 pages were produced;
 - (c) 980 diary extracts, consisting of 22,000 pages were produced; and
 - (d) 3,500 audio files, consisting of 230 hours of recording were produced and much of this material was transcribed to assist the Royal Commission.
- 2.3 To put this work into context, in the period from January to December 2019, Victoria Police responded to an average of 5 NTPs and produced around 1,500 documents per week.
- 2.4 The Taskforce Landow Operations Team – which holds primary responsibility for locating material relevant to the Royal Commission – has been proactively searching for materials relevant to the Royal Commission since its inception. This task has required the Taskforce Landow Operations Team to proactively search for material across many work areas and physical locations and to engage with many current and former members of Victoria Police. It has been a challenging task, not least of all because there is no central repository of material. For earlier material – including those records relating to Ms Gobbo's earlier registrations – there is no central electronic document management system. On occasion, it has been necessary to trawl through entire contents of unmarked archive boxes or entire unsorted computer drives to locate relevant materials.⁷⁶
- 2.5 Victoria Police has made detailed submissions about the efforts made – both proactively and in response to NTPs – to locate material and to produce it to the Royal Commission.⁷⁷ The difficulties encountered by Victoria Police with regard to locating and producing relevant documents are hardly unique. Having regard to the passage of time, it is likely that any large organisation would encounter similar difficulties in producing historic records of the magnitude that has been necessary for this inquiry.
- 2.6 In its submissions, Victoria Police likened the document production task to the discovery process in a very large and complex piece of civil litigation. However, there is a notable difference between the two. In the context of civil litigation, a litigant could expect to be given at least many months prior to the start of any hearing to complete a review of the size undertaken by Victoria Police for the purpose of this inquiry. In contrast, Victoria Police was afforded the minimum seven days to comply with almost every NTP issued by

⁷⁶ Exhibit RC1525 – Statement of Paul Millett dated 6 May 2020, [14–[16] (VPL.0014.0126.0036 at .0038).

⁷⁷ Tranche 2 of Victoria Police submissions at [152.1]–[152.14].

the Royal Commission and the vast majority of the process was done while hearings were already underway.

3 The statutory framework

- 3.1 In assessing the manner in which Victoria Police handled document production and PII claims, the Royal Commission should have regard to the statutory framework that governs NTPs and claims for PII. The *Inquiries Act* provides two critical principles to which the Royal Commission should have regard.
- 3.2 *First*, section 19(1) of the *Inquiries Act* provides that a NTP must be served a reasonable time, being not less than seven days, before the person is required to comply with the notice.
- 3.3 In setting a reasonable time it is necessary for the Royal Commission to allow time sufficient to enable performance of the specific requirement, having regard to all of the surrounding circumstances.⁷⁸ In assessing a reasonable time for compliance with a NTP, the objective surrounding circumstances to which the Royal Commission should have regard include the following:
- (a) the breadth of the particular notice;
 - (b) the need for the recipient to construe the terms of the notice;
 - (c) the classes of documents required to be produced;
 - (d) the ability of the recipient to collate and thereafter produce the documents; and
 - (e) the time of year at which the notice is served and intervening disruption by reason of public or religious holidays.⁷⁹
- 3.4 *Second*, public interest immunity is a reasonable excuse for not complying with a notice in relation to a Royal Commission and a person claiming PII may refuse to provide such information.⁸⁰ If the Royal Commission does not accept a PII claim, then the claim must be resolved by referring it to the Supreme Court.

4 The Notices to Produce often did not allow for a reasonable time for Victoria Police to respond

- 4.1 One of the ways in which the Royal Commission contends that Victoria Police has hindered and delayed the Royal Commission is through persistent delays in the production of documents and what the Royal Commission considered to be extensive non-compliance with NTPs.
- 4.2 Victoria Police does not accept this criticism because it suggests that Victoria Police acted in a way that was unreasonable or dilatory. This is simply not true, having regard to the vast amount of material produced by Victoria Police.
- 4.3 Victoria Police went to extraordinary efforts to produce documents to the Royal Commission in a timely way. The reason why production took as long as it did is a function of the volume and sensitivity of the material that needed to be located and reviewed, as opposed to the attitude and commitment of Victoria Police to the task.

⁷⁸ *McVey v Commissioner of Pay-roll Tax (Vic)* (1985) 85 ATC 4,131 at 4,137 (Kaye J) (in the context of a notice issued under section 16 of the *Pay-roll Tax Act 1971 (Vic)*).

⁷⁹ *A.B. Pty Ltd v Australian Crime Commission* (2009) 175 FCR 296 at [61] (Flick J) (in the context of a notice issued under section 29 of the *Australian Crime Commission Act (2002)* (Cth)).

⁸⁰ *Inquiries Act 2014 (Vic)*, s18.

- 4.4 The Royal Commission contends that Victoria Police was delayed in the production of documents because it did not comply with the standard seven day deadlines that were set by the Royal Commission, as provided for in the various NTPs issued by the Royal Commission.
- 4.5 As has been noted above, Victoria Police was served with over 250 NTPs over the course of the inquiry. Each of those notices afforded Victoria Police the statutory minimum period of seven days to respond, save for when the Royal Commission allowed for an additional day to account for a public holiday falling in the seven-day period. Victoria Police complied with many NTPs within the seven-day time period specified in the notice. However, for some notices it was simply not possible for Victoria Police to produce the documents in the time period allowed.

Examples – NTP 002 and NTP 004

- 4.6 This issue is most obvious when regard is had to NTP 002 and NTP 004.
- 4.7 On 23 January 2019, the Royal Commission served NTP 002 on Victoria Police. It required the production of the documents specified in the Schedule to the notice by 4.00pm on 31 January 2019.
- 4.8 NTP 002 required production of 28 separate categories of documents, some of which were extremely broad. It required production of, amongst other things:
- (a) **(category 4)** all internal correspondence between Victoria Police personnel in respect to Operation Loricated;
 - (b) **(category 7)** all documents and correspondence from 1 January 2003 to date with, or concerning, 3838 that were not uploaded to the web based program titled "Operation Loricated Web-Based Solution"; and
 - (c) **(category 11)** all documents and correspondence from 1 January 2003 in relation to all persons referred to in the Operation Loricated database, including but not limited to [31 named individuals].
- 4.9 Victoria Police has produced around 43,000 documents to the Royal Commission under NTP 002. This represents more than half of the total documents produced by Victoria Police.
- 4.10 On 31 January 2019, the Royal Commission served NTP 004 on Victoria Police. It required the production of the documents specified in the Schedule to the notice by 4.00pm on 7 February 2019.
- 4.11 NTP 004 required production of a further 17 categories of documents. NTP 004 was similarly broad and required the production of documents dating back to 1995.
- 4.12 Compliance with NTP 002 and NTP 004 has not been formally closed because Victoria Police has treated its obligations under those notices as ongoing, given the breadth of the document requests in these notices. It is appropriate for Victoria Police to do so because it ensures that the Royal Commission continues to be provided with all responsive materials as Victoria Police becomes aware of them.
- 4.13 In his witness statement, Acting Commander Millett said:⁸¹

NP-002 and NP-004 are extremely broad. As has been the case with almost every Notice to Produce, Victoria Police was given seven days – the minimum amount of time allowable under the Inquiries Act – to comply with the Notices. In almost all

⁸¹ Exhibit RC1525 – Statement of Paul Millett dated 6 May 2020, [32] (VPL.0014.0126.0036 at .0043).

instances, save for very straightforward requests or notices issued at the request of Victoria Police where the documents had already been located, it was not possible to comply with these time limits. As far as I am aware, Victoria Police was not asked how long it would take to obtain relevant information before a Notice to Produce was issued. The solicitors assisting the Royal Commission have issued numerous letters following up outstanding Notices to Produce and there have been many discussions with solicitors assisting the Royal Commission about progress in response to outstanding requests.

- 4.14 Compliance with NTP 002 and NTP 004 was the subject of much correspondence and discussion between Victoria Police and those assisting the Royal Commission. Victoria Police and the Royal Commission worked collaboratively to set priorities so that, as much as possible, Victoria Police prioritised the searches to locate and produce materials in accordance with the Royal Commission's immediate requirements. For example, shortly before hearings commenced, the Royal Commission requested that Victoria Police prioritise the production of those records that related to the 1993 to 1998 period as this was to be the first period examined by the Royal Commission in public hearings. The prioritisation of tasks was reset at numerous meetings between the Royal Commission and Victoria Police, which are referred to in detail, below.
- 4.15 Respectfully, it is clear that it was simply not possible for Victoria Police to have responded to NTP 002 and NTP 004 in the time period allowed.

Victoria Police was open and transparent in its dealings with the Royal Commission

- 4.16 Victoria Police acknowledges that the Royal Commission was heavily reliant on Victoria Police's cooperation to conduct its inquiry. However, the fact that Victoria Police did not meet deadlines set by the Royal Commission does not mean that Victoria Police's conduct hindered or delayed the inquiry.
- 4.17 Victoria Police accepts that the Royal Commission had good reasons for wanting all relevant documents produced to it as expeditiously as possible. It makes sense for the Royal Commission to gather all relevant materials prior to the commencement of public hearings. However, deadlines must be realistic.
- 4.18 It is also important for the Royal Commission to acknowledge that Victoria Police was open and transparent about the approach to document production. The steps taken by Victoria Police and the challenges that it faced in compliance with the NTPs – particularly NTP 002 and NTP 004 – are set out in detailed correspondence between the solicitors for Victoria Police and the Solicitors Assisting the Royal Commission. Equally, meetings were regularly held between Solicitors Assisting the Royal Commission and Victoria Police at which priorities for document production, preparation of statements and other inquiries and tasks were raised, discussed and tracked.

5 Public Interest Immunity

- 5.1 While the Royal Commission has acknowledged that much of the material that it was required to examine is highly sensitive, the draft report conveys the impression that the management of PII claims was inconvenient and was designed to limit the disclosure of information presented before and published by the Royal Commission.⁸²
- 5.2 In the context of this Royal Commission, it is not surprising that the careful management and consideration of PII claims and the sensitive management of material subject to legislated secrecy provisions fell almost entirely to Victoria Police. Victoria Police

⁸² Draft Final Report, *Issues arising from the conduct of the Commission's inquiry*, [33].

acknowledges that the majority of this material originated within Victoria Police, however, it must be emphasised that the responsibility for the management of the public interest resides equally with the Royal Commission, or with any other person in possession of that sensitive information.

- 5.3 It must also be emphasised that in the context of this inquiry, the PII claims made by Victoria Police fall into two major areas:
- (a) informer privilege claims (for human sources other than Ms Gobbo); and
 - (b) police methodology claims.
- 5.4 Informer privilege and police methodology are both well-established categories of PII. Victoria Police did not make these claims to protect its own interests. It has made these claims in order to protect the safety of the Victorian community and so as to ensure that current and future police investigations are not compromised.
- 5.5 The improper disclosure of sensitive information has the potential to cause harm in the community. The risks to community safety, including risk of serious injury and death to certain individuals will continue long after the Royal Commission publishes its final report. Victoria Police is not the only party to have concerns about the way in which the Royal Commission has used confidential and sensitive information.⁸³
- 5.6 Victoria Police understands that the PII process was difficult for the Royal Commission. There were numerous instances where information that was subject to a valid PII claim was:
- (a) inadvertently discussed by Counsel Assisting the Royal Commission in open hearing;
 - (b) inadvertently disclosed by Solicitors Assisting the Royal Commission in email communications; and
 - (c) inadvertently published by the Royal Commission on its website.
- 5.7 These examples highlight the need for a careful and cautious approach to be taken with the management of this highly sensitive information. It is important to acknowledge that inadvertent disclosure of some of the material gives rise to serious risks to life and safety of the individuals involved. Victoria Police stands by the careful and considered approach it takes to PII claims.

Victoria Police adopted a facilitative approach to public interest immunity

- 5.8 The starting point in assessing the way in which PII claims were managed by the Royal Commission is the *Inquiries Act* itself.
- 5.9 As the Royal Commission has acknowledged, the *Inquiries Act* expressly sets out that that a PII claim is a reasonable excuse for not complying with a notice in relation to a Royal Commission.⁸⁴ The position adopted under the Act is clear. If the Royal Commission does not accept that a PII claim is made out, then the Royal Commission can refer the question to the Supreme Court for determination.⁸⁵
- 5.10 Under the *Inquiries Act*, Victoria Police could have simply exercised its right to refuse to produce material that was the subject of a PII claim, which would have necessitated those claims being referred to Court if they were not accepted by the Royal Commission.

⁸³ Submissions on behalf of the Australian Criminal Intelligence Commissions in response to Counsel Assisting's submissions dated 7 August 2020.

⁸⁴ Draft Final Report, *Issues arising from the conduct of the Commission's inquiry*, [43].

⁸⁵ *Inquiries Act 2014* (Vic), s 41.

Victoria Police did not do so, however, because adopting that approach would have been contrary to its desire to fully cooperate with the inquiry and to ensure that it was conducted as efficiently as possible.

- 5.11 In general, the approach adopted by Victoria Police has involved:
- (a) Victoria Police producing unredacted documents to the Royal Commission on a confidential basis and subject to a general PII claim; and
 - (b) the resolution of specific claims to PII being resolved once the Royal Commission had determined that it wished to disclose materials that are the subject of the general claim.
- 5.12 The approach adopted to PII claims has evolved over time. Those assisting the Royal Commission are well aware of these changes because they have been participants in that process. In other words, Victoria Police's approach to PII claims has been developed in consultation with the Royal Commission.
- 5.13 The Royal Commission has contended that there were many occasions where Victoria Police refused to provide unredacted originals of documents.⁸⁶ Leaving to one side the fact that Victoria Police was entitled to do so (either because the material – in the case of diary entries – was not relevant, or was subject to a claim of PII), the fact is that there are comparatively very few documents that fall into this category, having regard to the fact that Victoria Police has produced over 75,000 documents to the Royal Commission most in advance of PII review.

The earlier agreement on production of material subject to PII claims

- 5.14 The earliest example of the collaborative approach to PII claims is evident from correspondence between the solicitors for Victoria Police and the Solicitors Assisting the Royal Commission in the period from January 2019 to March 2019.
- 5.15 On 31 January 2019, the solicitors for Victoria Police wrote to the Solicitors Assisting the Royal Commission. In relation to PII and the document management protocol, the letter stated:

Public Interest Immunity (PII)

As noted in our meeting with you on 24 January 2019, Victoria Police has voluminous materials in its possession which may be responsive to NP-002. Given the nature of this Royal Commission, much of this material will contain information that is subject to claims of PII. We are instructed that undertaking a legal review of all potentially responsive material to identify information subject to PII and making redactions in accordance with the Document Management Protocol will result in significant delay to the production of responsive material.

In these circumstances, Victoria Police considers that the most expedient approach to the production of some responsive material may be to do so on the basis that the Royal Commission will:

- *at first instance receive the material confidentially and subject to a general claim of PII; and*
- *provide Victoria Police with an opportunity to assert specific PII claims in respect of any document (in whole or in part) which the Royal Commission wishes to disclose.*

⁸⁶ Draft Final Report, *Issues arising from the conduct of the Commission's inquiry*, [59].

5.16 After this letter was sent, Victoria Police and the Royal Commission continued to discuss the manner in which PII claims were to be managed and the Victoria Police proposal was refined.

5.17 On 14 February 2019, the solicitors for Victoria Police wrote to the Solicitors Assisting the Royal Commission, stating:

As previously noted, and reiterated at the meeting [on 13 February 2019] by Deputy Commissioner Steendam, Victoria Police is committed to being fully cooperative with the Royal Commission and wishes to expediently provide responsive material that will assist the Royal Commission with its inquiry.

However, as has previously been ventilated, this material is voluminous and will include highly sensitive information that it is plainly in the public interest to keep confidential. The risks associated with the inadvertent disclosure of this information to a third party are genuine and of the highest order. These risks include death or serious injury to police members, former police members and human sources.

Approach to PII

In these unique circumstances, a standard approach to notifying PII claims, which would involve undertaking a comprehensive operational and legal review of all responsive material to redact information that is subject to PII prior to production, is simply not workable within the present timeframes.

From our discussion yesterday evening, we understand that Victoria Police and the Royal Commission have now agreed to adopt the following approach:

- 1 *Victoria Police will produce all relevant material, subject to the discussed security arrangements being in place at the Royal Commission (which are set out below). Victoria Police will redact some, but not all responsive material on the basis of asserted PII claims prior to production;*
- 2 *The Royal Commission will receive all material on the basis that it will not be further disseminated until it has been determined whether or not a PII claim will be made;*
- 3 *Victoria Police will continue to conduct a detailed operational and legal review of all material to be provided to the Royal Commission as quickly as possible and notify the Royal Commission of specific instances in which PII is asserted. The Royal Commission will assist by identifying particular categories or tranches of information that should be prioritised; and*
- 4 *where any document that has not been notified as free of a PII claim as a result of the above process is to be disclosed beyond the Royal Commission (e.g. to witnesses, potential witnesses or in a public hearing) the Royal Commission will provide Victoria Police in advance with an opportunity to assess whether the said document is the subject of a PII claim.*

Please confirm whether our understanding of the agreed approach to PII claims is accurate.

5.18 On 19 February 2019, the solicitors assisting the Royal Commission wrote to the solicitors for Victoria Police confirming that the Royal Commission was prepared to adopt the approach outlined in items 1 to 4, above, save for a query about whether Victoria Police would in fact initially produce all documents to the Royal Commission in an

unredacted form. On 21 February 2019, the solicitors for Victoria Police provided the clarification sought by the Solicitors Assisting the Royal Commission, stating that:

[W]e confirm that all documents produced by our client will be initially produced to the Royal Commission in an un-redacted form in respect of PII except where we consider that all or part of the document must be redacted by reason of matters arising under legislation such as the Witness Protection Act 1991 (Vic). If our client makes redactions on this basis, we will clearly outline the relevant legislation that we assert gives rise to the redaction.

- 5.19 Following this correspondence, Victoria Police produced documents to the Royal Commission on the basis agreed with redactions generally only in respect of material that might identify human sources other than Ms Gobbo or persons subject to legislative protection.

The public interest immunity protocol

- 5.20 The draft chapter creates the wrong impression that a PII protocol was in place from the start of the hearings and that the protocol was not used because Victoria Police did not comply with it.⁸⁷ In fact, the protocol referred to by the Royal Commission was not adopted until 17 June 2019,⁸⁸ more than six months after the Royal Commission was established.
- 5.21 The protocol was implemented to build on the agreed PII approach set out in paragraph 5.17, above and provide a mechanism for the notification and resolution of disputes concerning PII claims. Under the protocol, where possible the Royal Commission was required to give Victoria Police advance notice of its intention to use documents that had been produced in hearings. If the Royal Commission had complied with this measure – as it had agreed to do – then PII claims could have been resolved in advance of the hearings. This rarely occurred and accordingly, it was often necessary for Victoria Police to make PII claims during the hearings.
- 5.22 It is true that the protocol was never properly used. However, the reasons given in the draft chapter for why this was the case are incomplete and therefore create a false impression. First, notwithstanding the criticism directed towards Victoria Police for the production of redacted material to the Commission, the protocol itself provides for the production of material to be unredacted, “*except for information which might identify human sources, persons subject to the Witness Protection Act, and for relevance*”.
- 5.23 Second, while Victoria Police acknowledges the difficulties it had with complying with many of the deadlines set by the Royal Commission, those assisting the Royal Commission very rarely (if ever) complied with the time frames provided in the protocol for notifying Victoria Police weeks in advance of the witnesses to be called and the documents to be referred to in hearing.
- 5.24 Third, the protocol required Counsel Assisting to attempt to resolve any PII issues concerning the document or evidence in question before the relevant hearing. Counsel Assisting did not take steps to attempt to resolve claims prior to the hearing commencing, with the consequence that it was impractical to resolve PII claims in accordance with the protocol.

⁸⁷ Draft Final Report, *Issues arising from the conduct of the Commission's inquiry*, [44]–[45].

⁸⁸ T2319.

- 5.25 In essence the departure from the protocol was driven primarily by the Royal Commission, not Victoria Police. The decision to not follow the protocol contributed to the issue whereby PII claims were never properly resolved.

The Royal Commission has failed to acknowledge improvements to the PII process

- 5.26 As time went on, Victoria Police made significant refinements to its approach to making PII claims. All of these changes were made in consultation with the Royal Commission and were made with the view to assisting the Royal Commission and protecting legitimate PII claims while also facilitating the Royal Commission in the conduct of its inquiry.
- 5.27 By around March 2019, the approach taken by Victoria Police to PII claims was as follows:
- (a) as soon as it became aware of the existence of documents responsive to a NTP, Victoria Police produced those documents. In most cases, the documents were produced in full, on a confidential basis and subject to a general PII claim;
 - (b) following PII review, Victoria Police produced the vast majority of documents in shaded and redacted form to enable the Royal Commission to easily review the PII claims;
 - (c) Victoria Police provided the basis for each redaction (in the form of tables accompanying the PII claims); and
 - (d) Victoria Police reviewed materials for PII claims in consultation with the Royal Commission and prioritised documents identified by the Royal Commission as critical.
- 5.28 Most significantly, the improvements made to Victoria Police's PII processes meant that there was no delay in providing material to the Royal Commission. To the extent that the PII process caused any delay, it was almost always only in relation to the publication of that material.
- 5.29 Victoria Police's approach to PII claims has remained the same since around March 2019. In that time, Victoria Police estimates that it has provided more than 1,000 pages of materials in support of PII claims. The Royal Commission has responded to around one third of the total claims made by Victoria Police.

The Victoria Police approach to Public Interest Immunity

- 5.30 Victoria Police rejects the inference (in [48]–[49] and [52]–[54]) that its approach to PII claims was too broad. The approach that Victoria Police has adopted to PII claims is based on accepted legal principle and to ensure community safety.
- 5.31 With regard to some of the specific matters referred to by the Royal Commission, Victoria Police responds as follows:
- 5.32 *First*, the draft chapter fails to acknowledge the constructive approach adopted by Counsel and Solicitors Assisting the Royal Commission, and counsel and solicitors retained by Victoria Police to resolving PII issues as they arose. As set out above, these issues were the subject of correspondence in the lead up to hearings and were the subject of dozens of conversations which occurred on a daily basis during hearings. Many PII issues were resolved in this way.
- 5.33 *Second*, Victoria Police specifically rejects that there was anything improper about its PII claims with respect to biodata. Viewed in isolation, individual claims over biodata may appear innocuous. However, even relatively innocuous information can be pieced together to identify someone. Claims of this nature over biodata are not theoretical. In

evidence in this inquiry it became clear that criminals and associates would seek to puzzle together information from various briefs of evidence to identify a human source.

- 5.34 *Third*, while Victoria Police acknowledges that the use of confidential affidavits was a cause of frustration to those assisting the Commission,⁸⁹ Victoria Police maintains that it was appropriate for it to have done so on the limited occasions where it was considered necessary. In this context, it is important for the Royal Commission to acknowledge that all of the information that was the subject of a confidential affidavit is information that Victoria Police could have refused to provide by exercising its right under the *Inquiries Act*.
- 5.35 *Fourth*, the approach adopted by the Royal Commission of accepting all Victoria Police PII claims on an interim basis⁹⁰ meant that there were relatively few PII rulings made during the hearings. As a consequence, no precedent was set as to what the Commissioner considered to be a permissible claim to PII and conversely, there was no opportunity for Victoria Police to appeal any controversial PII rulings to the Supreme Court. As a consequence, ambiguity surrounding the Royal Commission's approach to PII continues to persist, even as the Royal Commission's final report is close to being finalised.
- 5.36 *Fifth*, paragraph 54 of the draft chapter demonstrates a fundamental misunderstanding of the process by which a PII claim is to be made. A PII claim made under section 18 of the *Inquiries Act* gives rise to a reasonable excuse for a person failing to comply with a notice by refusing to give information to a Royal Commission. Section 26 of the *Inquiries Act* provides for the circumstances where a Commissioner may make an order prohibiting or restricting the publication of:
- (a) any information that may enable the identity of a person who has given, or is to give, information or evidence to the Royal Commission for the purposes of an inquiry to be ascertained; or
 - (b) any information or evidence given to the Royal Commission for the purposes of an inquiry.
- 5.37 The discretion afforded to the Commissioner under section 26 of the *Inquiries Act* is not a relevant consideration for determining a PII claim because any information subject to a valid PII claim would not be available for publication. The Commissioner does not have a discretion as to whether to accept or reject a PII claim under section 18 of the *Inquiries Act*. It is a question of law, which the Commissioner may refer to the Supreme Court.⁹¹
- 5.38 *Sixth*, one of the great challenges for both Victoria Police and the Royal Commission was that PII claims were not resolved prior to hearings. As the draft chapter notes,⁹² matters that were properly the subject of a PII claim were often referred to in open hearing, which meant that Victoria Police had to make a retrospective claim over that material. Victoria Police also accepts that there were instances where it made inconsistent claims and claims that were later withdrawn following further consideration. This was predominantly a function of the need for such claims to be made 'on the spot'.
- 5.39 *Seventh*, having regard to the reasons why Victoria Police made PII claims in the first place – to prevent serious injury or death to those who have assisted police, or community safety more generally – it is entirely appropriate for Victoria Police to reconsider past claims and to make new claims prior to material being published by the

⁸⁹ Draft Final Report, *Issues arising from the conduct of the Commission's inquiry*, [51].

⁹⁰ Draft Final Report, *Issues arising from the conduct of the Commission's inquiry*, [45].

⁹¹ *Inquiries Act 2014*, s 41.

⁹² Draft Final Report, *Issues arising from the conduct of the Commission's inquiry*, [53].

Royal Commission. Failing to do so would be irresponsible, having regard to the legitimate safety concerns that those claims are directed at addressing

- 5.40 *Eighth*, Victoria Police rejects the contention (at [55]) that those responsible for preparing PII claims require further training. Victoria Police has already made detailed submissions about the process of PII review and the specialised knowledge of those Victoria Police members responsible for that task. Throughout the Royal Commission, Victoria Police's approach to making PII claims evolved, just as there was an evolution in the way that the Royal Commission assessed them. Victoria Police has engaged with its external lawyers and counsel throughout the Royal Commission to ensure that only appropriate and consistent PII claims are maintained. Further, Victoria Police's external lawyers have provided the Royal Commissions with detailed tables of the PII claims made in respect of exhibits, transcripts, submissions and documents relating to terms of reference 3 and 4.
- 5.41 *Ninth*, the fact that the Royal Commission may not agree with PII claims made by Victoria Police does not mean that Victoria Police's PII claims are wrong. The contention (at [56]) by the Royal Commission that making PII claims demonstrates that Victoria Police did not sufficiently value the processes of the Royal Commission, the importance of conducting as much of the inquiry as possible in public and the need to give procedural fairness to potentially affected persons, is patently false.
- 5.42 Given the subject matter of this inquiry, issues regarding PII were always going to pose challenges to the Royal Commission. Those challenges were unavoidable because some of the information that was the subject of the inquiry – if publicly known – would have the potential to lead to serious injury or death. Rather than hindering the inquiry, the approach adopted by Victoria Police assisted the Royal Commission by ensuring that it had full access to relevant materials that Victoria Police was otherwise entitled to withhold under the Inquiries Act.

Public interest immunity claims have not hindered the Royal Commission's inquiry

- 5.43 The Royal Commission has not identified any way in which the resolution of PII claims has hindered the Royal Commission's inquiry. It is difficult to see how Victoria Police's approach to PII claims could possibly have hindered the inquiry, having regard to the fact that:
- (a) Victoria Police produced a large amount of documents that were responsive to NTPs in full (on a confidential basis);
 - (b) the Royal Commission was free to examine witnesses on those documents (acknowledging the need to conduct some hearings in private); and
 - (c) Victoria Police was under no obligation to produce to the Royal Commission materials that is the subject of a PII claim at all.
- 5.44 At its highest, PII claims caused the Royal Commission inconvenience and prevented it from publishing documents at the time that they were tendered. While Victoria Police acknowledges the importance of making exhibits available to the public, the public interest clearly favours taking those steps as are necessary to ensure community safety in circumstances where some of the material that was the subject of this inquiry, if disclosed, may have led to serious injury or death.

6 Suppression orders and the Witness Protection Act

- 6.1 With regard to suppression orders, Victoria Police notes that:

- (a) The historic suppression orders that impacted on the Royal Commission did not operate for the benefit of Victoria Police. Rather, they were made to protect the safety of certain persons based on risks that existed at the time the relevant orders were made.
 - (b) Victoria Police was almost never a party to the original proceedings in which the suppression orders were made.
 - (c) The Royal Commission did not ask Victoria Police to apply to revoke or vary the historic suppression orders and it would not have been appropriate to do so. However, Victoria Police did provide the Royal Commission with significant assistance in relation to its application to vary the suppression orders.
 - (d) When the Royal Commission applied to the Court of Appeal to vary the suppression orders, Victoria Police did not oppose the variations sought.⁹³
- 6.2 Victoria Police maintains that the approach that it took to information subject to the *Witness Protection Act 1991 (Vic)* was appropriate. The central objective of witness protection is, as far as reasonably possible, to protect those exposed to a risk of injury or death by reason of their participation in, or cooperation with, the criminal justice system, whilst endeavouring to give practical effect to the rule of law and the advancement of the public interest in the efficacy and integrity of the criminal justice system.⁹⁴
- 6.3 Victoria Police accepts that the provisions of the *Witness Protection Act* may have impacted on the Royal Commission, however the need to hold hearings in private and the use of pseudonyms was a function of the *Witness Protection Act* itself, not Victoria Police. Victoria Police considers those protections to be essential to ensuring the safety of persons afforded protection under the *Witness Protection Act*.

7 Other assistance provided by Victoria Police

- 7.1 The assistance that Victoria Police has provided to the Royal Commission goes well beyond the production of documents under NTPs. Over the course of the inquiry, the Royal Commission has made hundreds of requests for information, witness statements and other assistance, in addition to the documentation sought under the formal NTP process. By way of example:
- (a) Victoria Police produced witness statements for current and former members in spite of there being no obligation on it to do so. In total, more than 150 witness statements were produced. The production of these witness statements allowed the Royal Commission to be informed of the evidence and selective in the witnesses that it called. There is no doubt that the production of witness statements allowed the inquiry to be conducted more efficiently. These witness statements, were detailed and lengthy and sought to provide as much relevant information as possible to assist the Commission. It would have been open for members to refuse to provide witness statements at all, or to provide very limited responses directly to the standard questions asked.
 - (b) Victoria Police transcribed hundreds of hours of audio recording to assist the Royal Commission in its review of that material including obtaining technical support to access encrypted audio files.

⁹³ *Chairperson of the Royal Commission into the Management of Police Informants v DPP* [2020] VSCA 184.

⁹⁴ *Re an Application under section 10 of the Witness Protection Act 1991* [2018] VSC 810 (at [17]).

- (c) Victoria Police reconstructed 1995 and 1999 registrations through an investigative and analytical process which required the location of historical records and liaising with current and former members. Victoria Police provided a briefing to the Royal Commission on these registration on 6 March 2019. Victoria Police also provided briefings on the 'IBAC 6' (as it then was) and its approach for the first term of reference.
 - (d) Victoria Police assisted in facilitating the focus groups. The draft chapter acknowledges that these focus groups were of great benefit to the inquiry.⁹⁵
 - (e) Victoria Police provided contact information for persons of interest to the inquiry.
- 7.2 Wherever possible, Victoria Police provided the assistance sought by the Royal Commission, even if there was no requirement for it to do so. Victoria Police collaborated with those assisting the Royal Commission to ensure that the Royal Commission's priorities were well understood and that tasks were completed in order of priority, as set by the Royal Commission.
- 7.3 Victoria Police attended many priorities meetings with the Royal Commission to ensure that the Royal Commission's priorities were well understood and were actioned. In his witness statement, Acting Commander Millett said:⁹⁶

The priorities [which were set out in a table], were the subject of discussion at the first meeting and this document was then updated for subsequent meetings, which occurred on average on a weekly basis from April to June 2019. If Taskforce Landow anticipated that it would have difficulty in meeting the Royal Commission's expectations with regard to a given item, then this was raised at the priorities meeting. From time to time, priorities would change during these meetings. And after each meeting, Taskforce Landow would allocate resources in accordance with the priorities set at the meeting.

8 Conclusion

- 8.1 Viewed objectively, Victoria Police has devoted extraordinary resources to facilitating the Royal Commission. The challenges identified by the Royal Commission are largely the result of the enormous volume of materials that Victoria Police has reviewed and produced, the difficulties in identifying and locating those documents, the very real safety risks arising due to the highly sensitive nature of some of the material and the limited time allowed for the document process to be undertaken.

Dated: 20 September 2020

⁹⁵ Draft Final Report, *Issues Arising from the conduct of the Commission's inquiry*, [137].

⁹⁶ Exhibit RC1525 – Statement of Paul Millett dated 6 May 2020 at [52] (VPL.0014.0126.0036 at .0047).