

OFFICIAL

From the Office of the Commissioner

Our ref: CD/20/47491

15 September 2020

The Honourable Margaret McMurdo
Commissioner
Royal Commission into the Management of Police Informants
PO Box 10828
MELBOURNE VIC 3001

Via email: [kylie.kilgour](mailto:kylie.kilgour@ibac.vic.gov.au) [REDACTED]

Via email: [Alexandra.tighe](mailto:Alexandra.tighe@ibac.vic.gov.au) [REDACTED]

Dear Commissioner

Consideration of potential criminal conduct by Victoria Police members

I refer to the recent publication of Counsel Assisting's submissions to the Royal Commission into the Management of Police Informants (RCMPI). I understand you are currently considering these submissions, along with simultaneously published Responsive Submissions, and will make your findings and recommendations in the RCMPI's final report.

Counsel Assisting's submissions focus on the RCMPI's first two terms of reference, namely:

- Term of Reference 1 - the number of, and extent to which, cases may have been affected by the conduct of Nicola Gobbo as a human source.
- Term of Reference 2 - the conduct of current and former members of Victoria Police in their disclosures about and recruitment, handling and management of Nicola Gobbo as a human source.

In relation to the latter, the publication of Counsel Assisting's submissions has generated considerable public discussion about the conduct of a number of senior police, both current and former, and speculation as to whether these individuals might be the subject of a recommendation by the RCMPI for further criminal investigation, which would need to be conducted independently of Victoria Police. IBAC has been invited to indicate whether it would be able to investigate any such matters.

Background and previous inquiries

The Letters Patent establishing the Royal Commission directed your inquiry to seek to avoid unnecessary duplication of previous inquiries, specifically those conducted by former Chief Commissioner of Victoria Police Mr Neil Comrie, AO, APM in 2012, the Honourable Murray Kellam, QC in 2015 and the then Director of Public Prosecutions (DPP), Mr John Champion, SC in 2016.

As set out in the RCMPI's Progress Report published in July 2019, Mr Kellam was engaged by IBAC to examine the conduct of Victoria Police officers in their use of Ms Gobbo as a human source, and the application and adequacy of its policies, control measures and management practices. Mr Kellam found 'negligence of a high order', concluding that Victoria Police had failed to act in accordance with appropriate policies and procedures.

The Kellam Report endorsed the earlier findings of the Comrie review and recommended changes to governing policies and guidelines to more thoroughly assess, manage and review the risks of using information from human sources bound by professional obligations of confidentiality or privilege.

The Kellam Report also first identified a small number of potential case examples where the convictions of individuals and the administration of justice could have been undermined due to Victoria Police's use of Ms Gobbo as a human source. As this issue was considered beyond the scope of IBAC's jurisdiction, Mr Kellam recommended that the DPP should examine whether any prosecutions based on evidence involving confidential or privileged information obtained by Victoria Police from Ms Gobbo had resulted in miscarriages of justice.

Following the resulting review by Mr Champion, the DPP's proposed disclosure of post-conviction evidence to affected individuals was challenged in a number of court proceedings by Victoria Police and Ms Gobbo. These court proceedings ultimately led to the public exposure of the use of Ms Gobbo as a human source by Victoria Police and the establishment of the Royal Commission.

Current situation

It is evident from Counsel Assisting's submissions that armed with appropriate terms of reference, and dedicated funding, expertise and evidence gathering powers, the Royal Commission has now exposed the breadth and complexity of the issues raised by Victoria Police's use of Ms Gobbo as a human source over many years and how it potentially may have impacted upon a significant number of criminal prosecutions.

Following the Royal Commission's extensive inquiries - rightly previously described as a mammoth, Janus-like task - you may now consider whether to make recommendations that the conduct of any individuals warrants the consideration of criminal prosecution. As outlined in Part 5 of the Director of Public Prosecution's Responsive Submissions to the Royal Commission, the Director would require a brief of evidence in admissible form before any prosecution could be considered.

Independent criminal investigations would need to be undertaken, recognising that section 40 of the *Inquiries Act 2011* prohibits answers, information, documents and other things that have been given or produced to a Royal Commission from being used against the person in criminal proceedings. A large part of the evidence gathered by the Royal Commission would not be admissible in any criminal prosecution.

The public benefit of any further investigation into the conduct of any current or former Victoria Police officers by IBAC would only be in order to obtain admissible evidence that may support the laying of criminal charges.

Process of notifications and assessments under the IBAC Act

If the Royal Commission was to make a recommendation that any potential criminal conduct of certain Victoria Police members be referred to IBAC for investigation, I anticipate the following process would be followed. The State Government would consider the recommendation and, if accepted, then in accordance with IBAC's independent role and governing legislation the Government would make a formal notification to IBAC under Part 3 of the *Independent Broad-based Anti-corruption Commission Act 2011* (the IBAC Act). Once a notification was received, IBAC would then follow the assessment process established under Divisions 3 and 4 of Part 3 of the IBAC Act and would make a determination as to whether it should investigate. Division 4 contains a number of provisions which prohibit IBAC from instigating an investigation in certain circumstances including consideration of the public interest.

The detailed assessment required by these provisions, also entails a consideration of the provisions of the *Charter of Human Rights and Responsibilities Act 2006*. That must occur before IBAC makes its independent determination as to whether an investigation will be conducted. Importantly, in relation to conduct occurring prior to the introduction of the IBAC Act in 2011, and conduct that has already been investigated by another investigatory body, consideration must be given as to whether there is reliable, substantial and highly probative evidence that was not considered by the investigatory body, or that the previous investigation was materially affected by error.

Although IBAC is not dependent upon a notification and could commence a further investigation of its own motion, for the reasons that follow, it is unlikely that IBAC could undertake such a course in the absence of a Government request and support.

Challenges around investigating these matters

Assuming the necessary legislative requirements were satisfied to commence an investigation in this matter, the effluxion of time and the nature of the potential offences in question would make any investigation a highly challenging one.

The ability to obtain admissible evidence, replicating the evidence heard by the Royal Commission, and determining which evidence would support the laying of charges and successful prosecutions will present a challenge given the mental elements of the offence of misconduct in public office. A careful analysis and evaluation of the large body of oral evidence and documentary materials gathered by the Royal Commission would be necessary to understand the limited extent to which the Royal Commission's findings are based upon admissible evidence. Understandably, Counsel Assisting's submission as to the findings that you may make, do not identify the extent to which such findings are dependent upon evidence that is inadmissible in a criminal trial.

If IBAC were able to rely upon the partial exception contained within section 40(2) of the *Inquiries Act 2011*, it may be possible to overcome some of the shortcomings and challenges referred to above. Clearly, this would require careful legal consideration prior to any utilisation of such an exception to ensure that such a course was not subject to further litigation at the taxpayer's expense. This would require an assessment of the Royal Commission's transcripts and documentary evidence to identify what evidence might possibly have been obtained independently for the purposes of section 40(2), and in determining what if any further lines of investigative inquiry are open at this stage.

In this instance, one of IBAC's most significant powers – the ability to hold coercive examinations – is not likely to be of any assistance in the collection of admissible evidence, since information gathered during these examinations is subject to the same limitations as the evidence gathered by the Royal Commission. It cannot be used in criminal proceedings against the person being examined.

It is also important to emphasise that IBAC's coercive powers are designed to support IBAC's broad expository and preventative functions, not the pursuit of criminal prosecutions. I also note that many of the current and former members of Victoria Police that could be the subject of any investigation have already been extensively examined by IBAC during the Kellam inquiry and now by the Royal Commission.

IBAC's ability to effectively investigate the relevant conduct is also impacted by its limited powers. As I have publicly acknowledged in the past, IBAC lacks some of the necessary powers it should have to properly investigate complaints received against police officers, some of which affect its ability to gather admissible evidence. It is in fact the only commission throughout Australia whose investigators do not have the same powers as a police officer.

I draw your attention to the 2018 report of the Parliament of Victoria's IBAC Committee, entitled "*Inquiry into the external oversight of police corruption and misconduct in Victoria*". I note, in particular, the numerous recommendations made therein by the bipartisan Parliamentary Committee aimed at enhancing IBAC's investigative powers via legislative amendment. These recommendations, along with other legislative reforms that IBAC has raised with government, have not yet been fully considered or implemented. It is my understanding that these outstanding reforms will not be considered until the recommendations of the Royal Commission are handed down.

Each of the above considerations impact IBAC's capacity to effectively investigate the potential criminal conduct of those involved in the registration and use of Ms Gobbo as a human source. IBAC may be restricted in its ability to gather in admissible form, the same types of evidence as that amassed by the Royal Commission over the preceding 20 months. It is presently quite uncertain whether admissible evidence could be gathered that would meet the requisite standard required to pursue prosecutions in the public interest.

Resourcing

Finally, the success of any IBAC investigation into potential criminal conduct uncovered by the Royal Commission will necessarily depend upon budgetary and resource commitment by Government. I have publicly outlined the critical shortage of resources that IBAC is facing including the impending risk that it will have to significantly reduce its capacity to investigate serious corruption and police misconduct. The IBAC Committee's 2018 report proposed that IBAC be adequately empowered and resourced to increase its investigation of serious police misconduct.

Should the Royal Commission make the recommendation foreshadowed regarding possible referral of criminal investigations, IBAC would probably not be in a position to undertake an investigation of this likely scale and complexity without additional investigative and legal resources. Such an investigation would require the establishment of a dedicated, multi-disciplinary taskforce. There could be some efficiencies if IBAC were able to draw (where possible) on the legal team, investigators, intelligence analysts and others that have assisted the Royal Commission in its inquiries and who already have an in-depth knowledge of the matters to be investigated and an intimate familiarity with the material that the commission has gathered.

If other investigators must be recruited into such a task force, IBAC would need to draw them from interstate or federal law enforcement and integrity agencies to avoid obvious conflicts of interest in investigating Victorian police.

Future focussed recommendations

IBAC has also been asked to comment on various submissions that have now been made public on the Royal Commission's website.

I take the opportunity to draw attention to systemic reforms needed to prevent the sort of failures that Counsel Assisting's submissions have exposed. These failures align closely with work that IBAC is leading with Victoria Police to prevent 'noble cause' corruption, obscuring behaviours, nondisclosure and improper statement taking practices as captured in our recently published special report on Operation Gloucester.

Victoria Police's submissions to the RCMPPI set out the reforms that have been made to Victoria Police's Human Source Management Framework and changes that have been undertaken to enhance Victoria Police's compliance with disclosure obligations.

Until the Royal Commission's final report and recommendations are finalised, it would be premature to express anything more than a reservation that the improvements thus far proposed may not be sufficient to ensure that systemic failings identified by the Royal Commission do not reoccur.

Independent oversight is an essential requirement of any future focused recommendations to address systemic vulnerabilities. That must occur via a cohesive governance and oversight framework for the use of human sources by Victoria Police. Such a framework could utilise a risk-based model for external oversight of Victoria Police's use of human sources and possibly some form of external oversight in relation to disclosure obligations. Any reforms would need to be supported by legislation and clear powers to enable oversight and compliance, supported by sufficient investment by Government to both implement and maintain independent oversight.

Thank you for the opportunity to comment on these important matters at this stage.

I welcome further discussions in relation to the above matters, and I look forward to the publication of your Final Report.

Yours sincerely



The Honourable Robert Redlich AM, QC
Commissioner