

ROYAL COMMISSION INTO THE MANAGEMENT OF POLICE INFORMANTS

SUBMISSIONS OF GRAHAM ASHTON

INTRODUCTION

- 1 These submissions address the submissions of Counsel Assisting in so far as they relate to Mr Graham Ashton. There may be aspects of Counsel Assisting's submissions which relate to Mr Ashton in his capacity as the Chief Commissioner of Victoria Police, for example with respect to the *AB v CD and EF* proceedings, which will be dealt with by Victoria Police in their submissions.
- 2 Prior to dealing with specific matters raised by Counsel Assisting in their submissions, some preliminary observations can be made.
- 3 It cannot be doubted that Mr Ashton has had an exemplary career of over 38 years working in and with law enforcement agencies in Australia and abroad.
- 4 At the outset, it is important to note that Mr Ashton joined Victoria Police in December 2009, in a civilian role.¹ Mr Ashton was appointed to a sworn position with Victoria Police in April 2011. On 1 July 2015 he commenced a 5 year term as the Chief Commissioner of Victoria Police.² Thus, many of the matters dealing with the involvement of Mr Ashton which feature in the submissions of Counsel Assisting deal with events which occurred when he was not a member of Victoria Police. As developed below, this is relevant to a consideration of the terms of reference of the Commission and proposed findings relating to Mr Ashton suggested by Counsel Assisting.
- 5 Mr Ashton's tenure as Chief Commissioner ended in July this year.

Mr Ashton's career prior to his appointment to Victoria Police

- 6 Mr Ashton enjoyed a long and distinguished career in the Australian Federal Police, between 1980 and 2004.³ His roles are summarised as follows:
 - (a) 1987 – 1988: AFP Drug Squad based in Melbourne, with a focus on high level drug traffickers.
 - (b) 1988 – 1990: Seconded to the National Crime Authority as an investigator, working as part of a joint operation between the AFP, the National Crime Authority and Victoria Police, based in Melbourne.
 - (c) 1990 – 1995: Promoted to the role of Detective Sergeant, AFP Drug Squad.

¹ Exhibit RC0856 Statement of Chief Commissioner Graham Ashton, 30 August 2019, GLA.0006.0001.0001, [37]

² Ibid [42]

³ Ibid [10] – [35]

- (d) 1995 – 1998: Promoted to the role of Acting Superintendent and appointed Senior Liaison Officer across the Indonesia Archipelago for the AFP, based in Jakarta, Indonesia.
- (e) 1998 – 1999: Transferred to Sydney to work as a Sergeant in the AFP Drug Squad, and was later promoted to the position of Director, Northern Operations based in Brisbane.
- (f) 1999 – 2000: Appointed the Director of Operations, Southern Region and returned to Melbourne in that capacity.
- (g) 2000 – 2002: Promoted to the role of Assistant Commissioner, Southern Region.
- (h) 2002: Appointed the AFP's Police Forward Commander for Operation Alliance and deployed to Bali following the Bali Bombings. Mr Ashton was made a member of the Order of Australia in 2003 as a result of his work in Operation Alliance.
- (i) 2003 – 2004: Assigned to Canberra to run the AFP's Counter Terrorism Command.

7 Mr Ashton then left the Federal Police and served as Assistant Director, Office of Police Integrity from December 2004 to December 2009.

Mr Ashton's career within Victoria Police

- 8 Mr Ashton joined Victoria Police in December 2009. He was appointed to an unsworn, civilian role as Director of Corporate Governance. He was shortly after also appointed to the position of Director of the Forensic Services Department.⁴
- 9 On 27 April 2011, Mr Ashton applied for and was appointed to the sworn position of Assistant Commissioner, Crime.⁵
- 10 In under a year, Mr Ashton was promoted to the position of Deputy Commissioner, Specialist Operations. He commenced that role on 1 February 2012.⁶
- 11 In January 2015, Mr Ashton returned briefly to the AFP as a Deputy Commissioner, and on 1 July 2015, he was appointed the Chief Commissioner of Victoria Police.⁷
- 12 It is against this background, that the matters raised in Counsel Assisting's Submissions are addressed below. It is clear from the evidence, that Mr Ashton conducted himself appropriately at all times and in accordance with the requirements and obligations of the various roles that he held.

⁴ Ibid [36] – [37]

⁵ Ibid [38] – [39]

⁶ Ibid [40]

⁷ Ibid [41] – [42]

PROCEDURAL FAIRNESS

13 Mr Ashton raised the issue of procedural fairness on a number of occasions during the Royal Commission.

14 Between March and November 2019, Mr Ashton made numerous requests for access to documents and witness statements produced to the Commission. A significant number of those requests were for documents produced by the Independent Broad Based Anti-Corruption Commission (IBAC). Mr Ashton made those requests in circumstances where the Commission was aware that Mr Ashton did not have access to documents relevant to the Commission's terms of reference, from the period during which he was employed by IBAC's predecessor, the OPI.⁸

15 On 5 December 2019, during the public hearing, Mr Ashton's counsel made an application before the Commissioner for access to certain witness statements.⁹ In response to that application, Counsel Assisting made the following submission:

This is a public inquiry and the Commission has determined to hold the evidence in public insofar as it can. To that extent witnesses who give evidence have the great benefit of hearing and seeing the evidence that's gone before, particularly if they have standing leave, and Mr Ashton's had that benefit. The Commission is entitled to choose the order in which it calls witnesses and is entitled to say to witnesses who have not given evidence that those statements will be provided after the witness has given evidence, if that witness is ahead of, for example, Mr Ashton. Mr Ashton has been provided with witness statements of people such as the current witness because he's got to cross-examine them. But it doesn't mean he's entitled to be given not just all of the statements of people who are coming before him, but those coming after him.

Commissioner, we do not propose to provide witnesses, and we haven't as far, as I understand it, been providing witnesses with the statements of witnesses who are coming after them. They'll have an opportunity in due course to cross-examine them, but at the moment we choose the order in which we call witnesses and that's the way in which we propose to do it. I don't see that procedural fairness requires Mr Ashton to have the benefit of seeing and hearing those who come before him but, in addition, seeing and hearing the evidence or anticipating the evidence that's going to come after him. This is a Royal Commission and we're entitled to choose to call the witnesses in the order in which we want.¹⁰

16 The Commissioner refused the application and stated that the Commission would be astute to ensure that everyone who appeared before the Commission would have the opportunity to be afforded procedural fairness.

⁸ Letter from Corrs Chambers Westgarth to Solicitors Assisting the Royal Commission dated 13 January 2020

⁹ Transcript, 5 December 2019, 10575:5 – 34

¹⁰ Transcript, 5 December 2019, 10577:14 – 43

- 17 As at the date of Mr Ashton's appearance before the Commission, he had not received a number of witness statements that he had requested access to. That access had nothing to do with the order of witnesses Counsel Assisting wished to call. Giving Mr Ashton and his legal representatives access to witness statements and documents which were, or may have been, relevant to matters on which he was to give evidence, or potentially be criticised, prior to him giving evidence could not in any rational way be seen to impact the order in which Counsel Assisting called witnesses.
- 18 The consequence of the failure to provide this material is that Mr Ashton was not afforded procedural fairness insofar as he was not provided with statements or documents highly relevant to his ability to recall and make sense of events long in the past. As a result, he was unable to:
- (a) prepare properly for his own appearance before the Commission;
 - (b) prepare for cross-examination of other witnesses that could potentially have given evidence against his interest; and / or
 - (c) cross-examine others to elicit the true state of the evidence.
- 19 Virtually every witness who gave evidence understandably struggled to recall events that happened many years before. The documentary trail was sometimes sketchy and inconclusive.
- 20 It became clear that witnesses, including Mr Ashton, were able to give more reliable testimony when their memories were refreshed by documents and the evidence of other witnesses who testified to similar or related events.
- 21 It was accordingly critical for Mr Ashton, who attracted much attention from Counsel Assisting, to be provided every relevant document and witness statement that might assist him in recalling events or which were to be deployed against him.
- 22 This is particularly so when Counsel Assisting put constructions of events and documents to witnesses, including Mr Ashton, and pressed them to agree with their various hypotheses. A common approach was to put a document to a witness, who might not even have been its author or recipient, and to suggest in a leading manner, that it was likely or probable that a particular meaning could be attributed to it. See for example, Counsel Assisting's cross-examination of Mr Overland in respect of a diary entry made by Mr Sandy White:
- Bearing that in mind, if we have a look at what occurs next. On 3 May 2007 Mr White has been given some instructions from Superintendent Biggin and if we have a look at his diary, VPL.0100.0096.0612. At 9am, at the bottom, "meeting with Superintendent", and that's Biggin, "3838 udpate. Agreed cannot yet deactivate but to wind down", over the page. "No tasking, no intel. Advised re Brouwer knowledge of Ms Gobbo's ID by DC Overland". Now, are you able to explain what that might mean? What is suggests is that the OPP, sorry the OPI has been advised by yourself that effectively, you know, Ms Gobbo's identity, conceivably that she's a human source? — Yes, it does.*

Do you believe you did speak to Mr Brouwer about Ms Gobbo's identity? --- I possibly did, yeah.

Mr Ashton's given evidence that he didn't know the identity of Ms Gobbo until a later time? --- Yes.

Do you think you might also – do you think you may have discussed it with Mr Ashton, putting aside what the evidence with respect to Khadi suggests or might not suggest, do you think you might have also spoken to Mr Ashton about it? --- Well I'd be surprised if I spoke to Mr Brouwer without Mr Ashton.

Yes? --- I would be surprised about that.

Well that's a note of Mr White. I mean it's second, third-hand conceivably hearsay but he's obviously got an impression that you had spoken to Brouwer. If you were going to speak to anyone at the OPI it would be more likely to be Ashton, wouldn't it, about this? --- Well yes, but I did meet with Mr Brouwer from time to time.

Yes. Do you think it would be more likely that if you were going to convey information like this or have a discussion about a human source of this sensitivity, you'd be speaking to a fellow police officer rather than the Director of the OPI or not? --- No, I – well I don't – I'm sorry, I'm genuinely trying to ---

Mr Coleman: He's not a fellow police officer.

Mr Winneke: He was previously. I understand the objection.

Mr Coleman: If that was meant to reference Mr Ashton, he of course was not a fellow police member, he was a member of the OPI.

Mr Winneke: A member of the OPI who had previously been a fellow police officer. I will withdraw that question and put it again? --- Look, again, I would be surprised if I'd mentioned it to Mr Brouwer without Mr Ashton being present.¹¹

23 This approach is manifestly unfair if that witness is denied the fullest opportunity to consider the documents and statements of those who were associated with it, in order to put it properly into context and give a properly considered answer, rather than one that fitted neatly within the pre-conceived narrative of Counsel Assisting.

24 Further, an important element of procedural fairness is that a finding should not be made against a person, unless the substantive content of the possible finding is squarely and unequivocally put to them.

25 As will appear below, Counsel Assisting have submitted that a number of adverse findings be made against Mr Ashton, without the relevant material or proposed finding being put to him when he was giving his evidence. He thus was denied the opportunity to give his version, or answer the criticisms now sought to be made of him by Counsel Assisting.

¹¹ Transcript, 19 December 2019, 11729:33 – 11730:40

26 It is no answer to the above propositions to say that s 36 of the *Inquires Act 2014* (Vic) is satisfied simply by a person having an opportunity to put on responsive submissions to proposed adverse findings. That is because if that person did not have the prior and proper opportunity to consider and challenge the evidence on which the proposed adverse findings are said to be supported and if necessary put on evidence in response, the opportunity pays nothing but lip service to the principles of natural justice.

OFFICE OF POLICE INTEGRITY, DECEMBER 2004 TO DECEMBER 2009

Terms of Reference do not include the conduct of the OPI

27 The OPI was established in November 2004. Mr Ashton was appointed Assistant Director to this fledgling organisation shortly afterwards in December 2004.¹²

28 In that role, Mr Ashton reported first to Mr John Taylor, the Deputy Ombudsman, and later, to Mr George Brouwer, the Victorian Ombudsman.¹³ In about 2008 Mr Ashton's title changed to Deputy Director of the OPI. He still reported in that role to Mr Brouwer who was then Director of the OPI.

29 The Royal Commission's Term of Reference 2 requires the Commission to assess and report on the:

*"conduct of current and former members of Victoria Police, in their disclosures about and recruitment, handling and management of EF as a human source"*¹⁴.

30 As Counsel Assisting submit at [30] of Volume 1 of their submissions when considering the principles applicable to the construction of Term of Reference 2:

*"The "conduct of current and former members of Victoria Police" refers to the acts and omissions **of those members** in their relevant interactions with Ms Gobbo arising from Victoria Police's use of Ms Gobbo as a human source. It is construed broadly to reflect the **duties and obligations of members of Victoria Police** at law, including the sworn duty **of every police officer** to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will."* (emphasis added)

31 Each of the highlighted sections of Counsel Assisting's submission above clearly demonstrate that the focus of the Term of Reference is the conduct of current and former members of Victoria Police in their capacity as members of Victoria Police.

32 The Terms of Reference thus do not extend to assessing the conduct of the OPI or any of its officers. So much seems to be accepted by Counsel Assisting when

¹² OPI Annual Report 2005, 3

¹³ Exhibit RC0856 Statement of Chief Commissioner Graham Ashton, 30 August 2019, GLA.0006.0001.0001, [34]

¹⁴ Royal Commission into the Management of Police Informants, Terms of Reference, accessible at: <https://content.rcmpi.vic.gov.au/sites/default/files/2019-10/Terms%20of%20reference.pdf>, Counsel Assisting's (CA) Submissions, [3]

in paragraph [2050] of their Submissions, they state that "*this Commission is not directly examining the conduct of the OPI*". It must also follow from that statement that the Commission is not directly examining the conduct of officers of the OPI.

- 33 The legal principles developed by Counsel Assisting also confirm this position. They reference to the sources and content of the duties and obligations of Victoria Police officers at common law and under statute including with respect to their duty of disclosure, breach of duty and misconduct. Reference is also made to the applicability of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to members of Victoria Police. Nowhere is there discussed or developed the obligations and duties of officers of the OPI. That is understandable having regard to the wording of the Terms of Reference.
- 34 Accordingly, the Terms of Reference do not permit the Commissioner to make any findings, and in particular any adverse findings, in respect of Mr Ashton's conduct while he was at the OPI and discharging the functions and responsibilities of an officer of the OPI. It is accepted that matters which came to the attention of Mr Ashton when he was an officer of the OPI may be considered, for example, as relevant to his state of knowledge as an officer of Victoria Police and if otherwise relevant to the terms of reference. However, in the same way as Counsel Assisting have not analysed or commented on the conduct of state and federal prosecuting authorities who plainly had relevant knowledge of Ms Gobbo's conduct at material times, no comment or finding should be made with respect to Mr Ashton's conduct whilst he was an officer of the OPI.
- 35 Despite the above, aspects of Mr Ashton's conduct while at the OPI have to be addressed in these submissions because of adverse commentary and proposed findings suggested by Counsel Assisting in relation to Mr Ashton's conduct when he was an officer of the OPI.

JOINT AGENCY AGREEMENTS (COUNSEL ASSISTING'S SUBMISSIONS [2083] to [2093])

- 36 Counsel Assisting have made submissions adverse to the practice of the OPI and Victoria Police entering into joint agency agreements. This practice occurred in the period following the formation of the OPI in 2004.
- 37 The thrust of Counsel Assisting's submissions in relation to joint agency agreements between the OPI and Victoria Police appears to be that they were wholly inappropriate because they compromised the independence of the OPI.¹⁵
- 38 The evidence before the Commission does not support this conclusion. The conclusion is simplistic and ignores the practical realities facing the OPI and Victoria Police at the time the OPI was created. In the briefest of terms, the OPI was a new organisation. It was established pursuant to the *Major Crime*

¹⁵ CA Submissions, [2083] – [2093]

Legislation (Office of Police Integrity) Bill, which amended the *Police Regulation Act 1958 (Vic)* to establish the OPI. The Bill was passed in October and formally came into effect on 16 November 2004.¹⁶

- 39 The OPI had to tackle very complex matters with limited resources and in a new statutory framework governing its powers and obligations. Its recorded successes are the best evidence that it was an effective organisation.
- 40 In support of their hypothesis, Counsel Assisting have relied on Sir Ken Jones and Commander John Nolan's criticisms of the concept of joint investigations between the OPI and Victoria Police. In summary, Ken Jones was of the view that the "*roles of regulator and regulated were hopelessly confused*" in joint investigations.¹⁷
- 41 Mr Nolan considered it would be difficult for the OPI to remain objective and independent in circumstances where it was party to a Victoria Police investigation.¹⁸ It should be pointed out, that notwithstanding his criticisms of the concept of joint investigations, Mr Nolan also acknowledged that the OPI's involvement in joint investigations at the same time as being the regulator of Victoria Police, was "*not an unresolvable*" issue.¹⁹ He said he understood that the imperative was to resolve the matters being investigated and the subject of the joint agency agreements.²⁰
- 42 Mr Ashton disagreed with those positions. Mr Ashton's view should be preferred for the reasons that follow below.
- 43 When Mr Ashton joined the OPI in December 2004, it was still in its formative stages. It was established as an organisation separate from Victoria Police, insofar as each organisation had "*entirely separate management, reporting and accountability arrangements*". The OPI reported directly to the Victorian Parliament.²¹
- 44 Notwithstanding that clear separation, the OPI needed to have "*substantial investigative capability*" to detect and address the highly sophisticated nature of police corruption and misconduct.²² It is clear from comments in the OPI Annual Reports that, in its formative years, the OPI did not have sufficient resources available to it to conduct investigations alone. Those Annual Reports demonstrate that in its first years of operation, the OPI engaged in at least 15 joint investigations with Victoria Police.

¹⁶ OPI Annual Report 2005, p. 7

¹⁷ CA Submissions, [2085]

¹⁸ CA Submissions, [2085] – [2089]

¹⁹ Transcript, 21 February 2020, 14706:35 – 37

²⁰ Exhibit RC1345 Statement of Commander John Nolan, 10 December 2019, VPL.0014.0116.0001, [26]

²¹ OPI Annual Report 2005, p. 7

²² *Ibid*

45 For example, in its 2005 Annual Report, the OPI noted that it and Victoria Police would need to use all powers, intelligence and technology available to them in order to combat police corruption, and that *"agreements and memoranda of understanding with other agencies have been progressed to enable OPI to have access to additional information sources"*.²³

46 In its Annual Report for 2007, the OPI referred to its progress from its *"developmental phase"* to become more fully operational, and noted that additional resources had been allocated to it.²⁴

47 The current independence of IBAC has been made possible because of changes in the legislative framework that gives it greater powers. It has also benefitted from having grown and developed over time into a more mature agency and benefited from the experience of and work done by those at the OPI which preceded it.

48 Mr Ashton's evidence to the Commission as to the necessity of conducting some investigations on a joint basis was that:

*"The context at the time when OPI started, it only had a small number of investigators and it had a large task to do, and there was, it was determined that we would have our own independent investigations and there many investigations conducted that had no involvement with Victoria Police. Some investigations it was seen that it would be more effective to do that in the collaborative context with the Ethical Standards Department and that would lead to us being able to get quicker access to information, better understanding of what was happening in Victoria Police. And we also at that time had Victoria Police investigators that were seconded across to the OPI so again they had existing relationships that we could potentially leverage off in terms of knowing what was happening within Victoria Police, who was where and that sort of thing. So there were occasions when it was thought it was appropriate to have joint investigations but that wasn't in the context of us not being in the position to criticise Victoria Police, we were critical of Victoria Police on many occasions in many of the reports that the OPI published."*²⁵

49 Mr Ashton disagreed with Counsel Assisting's assertion that *"there was not the degree of independent oversight that there should have been"* in joint investigations, stating:

*"... I think we managed that situation very well. I think that we were engaging in operations where we needed to. At the same time we were able to do our own independent investigations as we needed to as well and exercise that independence."*²⁶

²³ Ibid, pp. 10, 20

²⁴ OPI Annual Report 2007, 12

²⁵ Transcript, 9 December 2019, 10653:2 – 23

²⁶ Transcript, 9 December 2019, 10657:1 – 5

- 50 Mr Cornelius (who was Assistant Commissioner of the ESD at the relevant time), told Counsel Assisting that he was “*satisfied that the terms of the joint agency agreement covering the conduct of the operation*” appropriately addressed issues regarding the independent oversight of the OPI.²⁷
- 51 Mr Simon Overland gave evidence that the OPI and in particular, Mr Ashton remained independent even in the context of joint investigations. He stated:
- “My experience is it works best when there is a mutuality and where there is cooperation. The regulator standing apart and having nothing to do with the regulated body in my experience tends not to work terribly well. Within that there are lines that need to be respected and there are judgments that need to be made, but I understood very clearly that the OPI was separate from Victoria Police and were over sighting Victoria Police. Mr Ashton may have worked for me but at that time he wasn’t. I would never seek to improperly direct or influence him.”*²⁸
- 52 The OPI’s Legal Services team considered the issue and concluded that whether or not to engage in a joint operation was an operational decision and that there were “*practical advantages*” to engaging in a joint investigation with Victoria Police, pursuant to the terms of a joint agency agreement.²⁹
- 53 Mr Greg Carroll of the OPI Legal Services Team referred specifically to the fact that the joint agency agreement in respect of Taskforce Petra would allow the OPI to actively participate in the investigation “*without compromising our capacity to assess the investigation to date in a very independent and critical way*”.³⁰
- 54 Together, the OPI and Victoria Police advanced several investigations and prepared 10 briefs of evidence against police between 2005 and 2006, and between 2006 and 2007, they cooperated in a number of significant investigations to secure charges and convictions against corrupt police members.³¹ Without this co-operation the prospects of these successes would have been significantly undermined.
- 55 As to Mr Ashton, there is no evidence that he was the decision maker in causing any joint investigation to come about. The decision as to whether or not to enter into a joint investigation was ultimately, that of the Director of the OPI.³²
- 56 There is no evidence that joint investigations compromised the independence of Mr Ashton, nor the effectiveness of the OPI.

²⁷ Transcript, 12 December 2019, 11095:38 – 40

²⁸ Transcript, 18 December 2019, 11692:25 – 34

²⁹ Exhibit RC0867 Email from Mr Greg Carroll to Mr Graham Ashton and others, 22 June 2007, IBAC.0020.0001.0058

³⁰ OPI Annual Report 2006, p. 12, OPI Annual Report 2007, pp. 20 – 21

³¹ OPI Annual Report 2007, pp. 7 – 8

³² Transcript, 9 December 2019, 10725:34 – 38

Special Relationship between Mr Ashton and Mr Overland (Counsel Assisting's Submissions [2092])

57 During the hearing of evidence at the Royal Commission, Counsel assisting raised on several occasions that Mr Overland had provided Mr Ashton with a reference when he had applied to join Victoria Police.³³

58 The relevance of this persistent questioning was never overtly articulated, but the clear insinuation was that there was something irregular in the relationship between Mr Overland and Mr Ashton. The reference was never produced in evidence and the cross examination went nowhere.

59 The insinuation now finds expression in a different form, in paragraph [2092] of Counsel Assisting's Submissions, where Counsel Assisting say:

"It is submitted that there may have been additional, more personal factors that meant that the joint investigation in this case may have been less than effective. There had obviously been a previous professional relationship between Mr Ashton and Mr Overland. The two had previously worked for the AFP in the late 1990s where Mr Ashton reported to Mr Overland".

60 There is no basis whatsoever to assert that there were personal factors that made any joint investigations, or the particular joint investigation there referenced, less than effective. To state that there "*may have been*" such factors illustrates that the submission is without foundation and an insidious way of making an adverse comment about Mr Ashton, without committing to it openly, and without having any evidence whatsoever to support it. The insinuation impugns Mr Ashton's character and professional ethics. It should not have been made without a good basis, and should be withdrawn.

61 In the next paragraph of Counsel Assisting's Submissions, Counsel Assisting refer to Mr Overland telling Mr Ashton that the OPI had to improve its performance in various roles and to "*lift its weight more*".³⁴

62 If this paragraph is meant to criticise the OPI and/or Mr Ashton as one of its senior members, the comment is gratuitous because the conduct and effectiveness of the OPI are not within the terms of reference of the Royal Commission.

63 Also, the fact that Mr Overland was talking to Mr Ashton in the manner referred to, is directly contrary to any inference that there was a personal relationship between them, which affected the proper discharge of their respective duties.

Conclusions

64 The conclusions that the Commissioner should reach in respect to this issue are:

³³ Transcript, 9 December 2019, 10651:11 – 27

³⁴ CA Submissions, [2093]

- (a) While for a body such as IBAC there are understandable reasons why it has chosen to be completely independent from, and not enter into joint agency agreements with, Victoria Police, there were cogent reasons why that was not practically possible during the period in which Mr Ashton was the Assistant Director of the OPI.
- (b) There were substantial benefits, evident from the results referred to above, in appropriate cooperation with Victoria Police under the disciplined control of joint agency agreements.
- (c) There is no evidence that the OPI's operations were compromised in any way.
- (d) Mr Ashton was not the person who decided whether or not to enter into joint investigations or joint agency agreements; this was the provenance of the Director, Mr Brouwer.³⁵
- (e) Mr Ashton's conduct while at the OPI is outside the terms of the reference of the Commission.
- (f) There is no justification for finding that there was something unusual about the relationship between Mr Ashton and Mr Overland which in any way influenced the conduct of Mr Ashton in his dealings as the Deputy Director OPI, his dealings with Mr Overland or at all.

NOTE TAKING (COUNSEL ASSISTING'S SUBMISSIONS [2206])

Introduction

65 On and from February 2007, when he was at the OPI, Mr Ashton made a decision to stop keeping a diary. His reasons for this were explained in the following entry that he made in his diary on 2 July 2008:

*"In light of recognition of weaknesses in OPI subpoena provisions. I took a decision not to retain an official diary until the matter was clarified. That was done on 1 July '08. Now that OPI has adequate subpoena protection I will resume my official diary. For matters in the intervening period I refer to correspondence and my electronic diary".*³⁶

66 Mr Ashton explained his position in cross examination. Mr Ashton told the Commission that he *"decided to stop taking notes in terms of my diary because of conversations I'd been having with the legal department in OPI about our subpoena provisions being, the legislation being insufficient and their concerns about the fact that we needed legislative change to better protect information which the OPI gathered"*.³⁷ He went on to explain that *"The legislation in regards to the establishment of the OPI was deficient in a whole range of areas when it*

³⁵ It does not appear that Mr Brouwer was asked to comment on the efficacy of, or reasons for, OPI and Victoria Police entering into joint agency agreements or undertaking joint investigations. If he was, his statement (Exhibit RC1509b) is silent on these matters.

³⁶ Exhibit RC0861 Chief Commissioner Graham Ashton diary, 2 July 2008, 67, RCMP1.0097.0001.0001 at 0006

³⁷ Transcript, 9 December 2019, 10713:46 – 10714:5

was set up and it became apparent that the ability for the OPI to protect its information was seriously suspect and the OPI had to start working to get legal amendments to try and strengthen the provisions of the OPI to allow it to retain its information with more confidence, and I believe that ultimately happened.”³⁸

- 67 Counsel Assisting submit that it is open to the Commissioner to find that there was “*no reasonable justification*” for Mr Ashton to cease taking notes when he did.³⁹ They submit that whether or not subpoenas required production of OPI materials pursuant to the legislative changes or previous legislative provisions, any PII claims would be for a court to determine, and that continuing to take notes was necessary to contemporaneously and accurately record discussions and decisions for accountability purposes.
- 68 Counsel Assisting further assert that Mr Ashton’s conduct in not taking notes meant that there was potential for matters which may need to be disclosed, to never be revealed or for PII claims to be appropriately determined by a Court.
- 69 Counsel Assisting’s submissions are ill-founded and gratuitous for the reasons that follow.

The real facts

- 70 The whole premise of Counsel Assisting’s submissions is wrong. There is no evidence that Mr Ashton decided to stop taking “notes”. Therefore, it is said there was no record of what Mr Ashton had been doing. His evidence was precisely to the contrary.
- 71 Counsel Assisting has ignored Mr Ashton’s evidence that a proper record of events was maintained in writing, in meeting notes, correspondence, his electronic calendar and the like.⁴⁰
- 72 Mr Ashton’s evidence (referred to above) was that for a discrete period and for a proper purpose, he suspended his usual practice of keeping a diary. And for good reason.
- 73 To direct criticism against Mr Ashton for failing to keep “notes” is unfair when the documents that may be critical to show what records were kept of Mr Ashton’s activities have not been made available to the Royal Commission by IBAC⁴¹ (i.e. Mr Ashton’s electronic calendar, the Petra and Briars Steering Committee updates which Mr Ashton made handwritten notes on and stored in his safe at the OPI,⁴² or any other contemporaneous documents).
- 74 Further, Counsel Assisting’s conclusion that there was no reasonable basis for Mr Ashton not to keep notes ignores the substance of the amendments made to

³⁸ Transcript, 9 December 2019, 10716:9 – 17

³⁹ CA Submissions, [2206]

⁴⁰ Transcript, 9 December 2019, 10717:15 – 45

⁴¹ Transcript, 21 February 2020, 14729:39 – 14730:20

⁴² Transcript, 9 December 2019, 10720:22 – 38

the legislation. Whilst a PII claim could have been made under the general law prior to amendments to the *Police Integrity Act 2008* (Vic), the relevant amendments codified the protection of the OPI materials (including diaries) and gave Mr Ashton more confidence that what he considered highly confidential material could be kept confidential. Also, the very fact that the legislation was in fact amended to tighten up protection against disclosure of OPI materials, demonstrates the reasonable and rational basis for Mr Ashton to recognise the risks of disclosure that was addressed by the amendments. It cannot be said that Mr Ashton held the concerns he did about disclosure irrationally⁴³.

- 75 Mr Ashton's evidence as to why he ceased taking a diary until the legislation was amended is supported by the Second Reading Speech in respect of the amendments made to the *Police Integrity Act*, to the following effect:

The case of R v. Mokbel (decided by Justice Gillard of the Supreme Court on 4 November 2005) highlighted issues concerning how the OPI's public interest arguments about its documents are considered. In that case, the court considered it was difficult to balance the OPI's request to present its arguments against disclosure confidentially, against the defendant's right to a fair trial. However, in some circumstances, this presents a problem as, by hearing the arguments with the defendant present, a defendant may become aware of information that the OPI considers sensitive, such as information about its investigations and investigatory methods.

The bill overcomes these issues by providing for clear processes for the OPI to present arguments against disclosure through confidential affidavit or ex parte hearing. At the same time, appropriate safeguards are to be included to protect the defendant's right to a fair trial. For example, a court can appoint special counsel to appear at an ex parte hearing to advance arguments on behalf of a defendant. The facility to appoint special counsel to test the evidence is a measure that is not available under the current statute. The bill sets out considerations for the court in determining the appropriate manner of hearing any objection by the OPI to production of its sensitive documents. The bill also sets out considerations for the court in determining whether to grant access to the OPI's material.

The process provides clear statutory guidance to ensure consistent considerations are applied as to when OPI documents can be protected and how arguments against disclosure can be heard.⁴⁴

- 76 Counsel Assisting's conclusion that there was no reasonable basis for Mr Ashton not to keep notes (or a diary) also ignores Mr Ashton's evidence that prior to doing so, he discussed his decision with the legal department of the OPI and the

⁴³ The protections afforded under the amendments to the *Police Integrity Act* exist in other similar statutory regimes. For example, see *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 40 – 50. Indeed, the statutory framework governing this Royal Commission provides very similar protection from the production of sensitive materials : see *Inquiries Act 2014* (Vic) ss 26(1), 124(3), 125(1)

⁴⁴ *Police Integrity Bill 2008*, Second Reading Speech, 13 March 2008

Director. There is no basis to suggest that Mr Ashton acted other than in good faith in doing so, or that the OPI's legal department warned him against it.⁴⁵

77 To the extent that there is an inference that the decision not to keep a diary was motivated by improper considerations (which inference must be what Counsel Assisting seek to draw), the evidence leads to the contrary conclusion. That is because:

- (a) If Mr Ashton's decision to cease maintaining a handwritten diary was to hide from scrutiny the Petra and Briars operations (and Ms Gobbo's role in assisting those operations), such an outcome could more easily have been achieved by Mr Ashton continuing to keep a diary but not recording those matters, rather than ceasing to keep a diary altogether.
- (b) Prior to his decision to stop keeping a handwritten diary, and following the recommencement of his diary, Mr Ashton made numerous recordings in his diaries about Operations Petra and Briars. See for example, Mr Ashton's diary notes of 7 July 2008⁴⁶, 21 July 2008⁴⁷, 4 August 2008⁴⁸, and 18 August 2008.⁴⁹ Plainly, he would not have done so if his true intent was to not keep records of those operations.
- (c) Wrongful motivation is inconsistent with Mr Ashton's decision to stop keeping a diary only after he had discussed the matter with the legal department of the OPI and the Director. It is also inconsistent with the resumption of him keeping a diary (of all matters) immediately following the legislative amendments, and his recording in his diary of the reasons for not keeping a diary until the legislation was amended. The suggestion that this is an ex post facto justification⁵⁰ must be rejected.
- (d) Contrary to what is asserted by Counsel Assisting, Mr Ashton's decision was not in relation to (or motivated by) concerns about "an ongoing investigation that he bound to oversee". Mr Ashton's decision was motivated about disclosure generally, not about disclosure in relation to any particular investigation or investigations. Mr Nolan, although he continued to keep a diary, accepted that there were concerns within the OPI about the legislative provisions dealing with disclosure. Mr Nolan's evidence was as follows:

Were there concerns that you had during the period that you were at the OPI about the ability of persons who might want to obtain copies of your notes, were there concerns that you had that they might be able to do so?--I know there were a lot of concerns raised about the

⁴⁵ Transcript, 9 December 2019, 10713:20 – 10718:21

⁴⁶ IBAC.0015.0002.0007 at 0001

⁴⁷ IBAC.0015.0002.0008 at 0001

⁴⁸ IBAC.0015.0002.0010 at 0001 to IBAC.0015.0002.0011 at 0001

⁴⁹ IBAC.0015.0002.0012 at 0001

⁵⁰ Transcript, 9 December 2019, 10715:14

*strength of the legislation to resist broad subpoenas for information and that was a matter that was resolved subsequently through legislative change.*⁵¹

- (e) In the light of this evidence one should dismiss as mere speculation Mr Overland's agreement to a leading question in cross examination that a discussion about the sensitivity of the proposed Briars investigation *may* have included a suggestion that Mr Ashton not keep notes.⁵²
- (f) Counsel Assisting suggested to Mr Ashton that he ceased keeping a handwritten diary as a consequence of a meeting that he attended with Mr Overland and Mr Cornelius on 20 February 2007, in respect of Operation Briars. Mr Ashton categorically denied that he ceased keeping a handwritten diary as a result of any agreement to do so at the 20 February 2007 meeting. Rather, Mr Ashton referred to conversations he had been having with the Director of the OPI and the OPI's legal department about the deficiencies in legislation governing the use of OPI information.⁵³ Mr Ashton's evidence was that of his own recollection and not mere speculation.

78 Therefore, putting the assertion in the way Counsel Assisting does, is inaccurate and seeks to convey an unwarranted sinister overlay on the facts, when this is not called for.

79 In any case, Counsel Assisting's comments in relation to Mr Ashton's decision not to keep "notes" while at the OPI are gratuitous because, for the reasons identified above, insofar as they concern (as they must) Mr Ashton's conduct whilst an officer of the OPI, they fall outside the Terms of Reference of the Royal Commission.

Conclusion

80 For the above reasons, there is no basis for Counsel Assisting to say it is open to find that there was no reasonable justification for Mr Ashton to cease taking notes as contemporaneous records concerning an ongoing investigation that he was bound to oversee, and he should not have done so. No findings as proposed by Counsel Assisting in [2206] can properly be made.

MR ASHTON'S FIRST KNOWLEDGE THAT MS GOBBO WAS A HUMAN SOURCE

Introduction

81 During the course of the hearing of the Royal Commission there was a substantial amount of attention given to the earliest date at which Mr Ashton learned that Ms Gobbo was a human source.

⁵¹ Transcript, 21 February 2020, 14708:45 – 14709:5

⁵² CA Submissions, [2200]

⁵³ Transcript, 9 December 2020, 10713:36 – 10714:39, 10715:32 – 41

- 82 Mr Ashton's direct evidence was that he first acquired this knowledge in July 2007 at an OPI hearing to which Ms Gobbo was called to give evidence.
- 83 Counsel Assisting seek to establish that Mr Ashton first learnt Ms Gobbo was a human source earlier than this – namely in 2006, or in about May 2007.
- 84 Notwithstanding the amount of the Commission's time taken on seeking to undermine Mr Ashton's evidence (which evidence for the reasons identified below should be accepted), the precise timing is of little or no relevance to any material findings the Commission may make relevant to the Terms of Reference.
- 85 It appears that the reason for Counsel Assisting's attention to this subject is to submit that Mr Ashton ought to have investigated the role of Ms Gobbo immediately on learning that she was a human source and that such investigations may have had an impact on any threat to the administration of justice by reason of Ms Gobbo being an informer.
- 86 The trouble with this hypothesis, however, is the undisputed facts.
- 87 In July 2007, after being approached by Mr Ryan at the OPI hearing being conducted by Mr Fitzgerald and being told Ms Gobbo was a human source, Mr Ashton immediately disclosed to Mr Brouwer and Mr Fitzgerald that Ms Gobbo was a police informer.⁵⁴ Mr Ashton "reported up". He did not seek to hide or cover up what he had learned. There is no evidence that either Mr Brouwer or Mr Fitzgerald took the matter further or, indeed, did anything at all on learning that Ms Gobbo was a human source for Victoria Police.
- 88 If Mr Ashton had become aware in 2006 that Ms Gobbo was a human source he would have, as he did in 2007, gone to Mr Brouwer and reported this fact to him.⁵⁵ From his failure to take any action in 2007, one can confidently conclude that Mr Brouwer would not have then taken steps to investigate Ms Gobbo's role and potentially uncover the extent of her conduct.
- 89 Given the apparent significance that Counsel Assisting placed on this issue, it is extraordinary that neither Mr Brouwer, nor Mr Fitzgerald were called to give evidence. Their evidence was central to understanding the relevant events.
- 90 Failing to get the best evidence of these matters from all witnesses, and allowing Mr Ashton to cross examine them is a failure of procedural fairness if any adverse findings on this issue are considered against Mr Ashton.
- 91 We now turn to the evidence of Mr Ashton's knowledge of Ms Gobbo as a human source in more detail.

⁵⁴ For this argument, it does not matter whether Mr Ashton already knew about Ms Gobbo in July 2007. The critical element is the steps he took in bringing it to the attention of Messrs Brouwer and Fitzgerald.

⁵⁵ Transcript, 9 December 2019, 10707:29 – 34

First Knowledge in July 2006 (Counsel Assisting Submissions [2051] to [2096])

- 92 Counsel Assisting have submitted that it is open to the Commissioner to find that:
- (a) Mr Ashton was briefed as to Ms Gobbo's status as a human source on 27 July 2006, given the contemporaneous diary notes of Mr Sandy White and Mr Rod Wilson.⁵⁶
 - (b) In a meeting between Mr Ashton, Mr Overland and Mr Cornelius on 27 July 2006, Mr Ashton was "*prevailed upon to agree not to call Ms Gobbo to a coercive hearing at the OPI, because to do so would expose her as a human source*".⁵⁷
 - (c) This was a "*lost opportunity*" for the OPI and ESD to take steps to scrutinise Ms Gobbo's role as a human source in as early as 2006, and those involved in the decision not to call Ms Gobbo to an OPI hearing, contributed to that loss of opportunity.⁵⁸
 - (d) Removing Ms Gobbo as a potential witness in the investigation meant that the investigation was "*naturally hindered*".⁵⁹
- 93 The necessary fact to be found to support these submissions, is that Mr Ashton was informed that Ms Gobbo was a human source in 2006. However, for the reasons that follow below, the evidence does not support this conclusion.

27 July 2006 Meeting

- 94 Counsel Assisting rely upon some contemporaneous records, of persons other than Mr Ashton, to patch together a narrative they say establishes that Mr Ashton learned that Ms Gobbo was a human source on 27 July 2006.
- 95 Those records lead to, and follow, a meeting that Mr Ashton attended with Mr Overland and Mr Cornelius on 27 July 2006. Counsel Assisting assert that "*it is clear that the matter of Khadi was discussed*" at that meeting, and that Mr Ashton was informed Ms Gobbo was a human source and determined not to call her to an OPI hearing in respect of Operation Khadi, on that basis.⁶⁰
- 96 The records include:
- (a) A diary note made by Mr Sandy White on 24 July 2006, recording a suggestion to Mr Wilson, that Mr Overland approach Mr Ashton to brief him about Ms Gobbo's status as a human source and request that the

⁵⁶ CA Submissions, [2520]. As discussed below at [109], Counsel Assisting accept that these diary entries are "third hand hearsay".

⁵⁷ CA Submissions, [2079]

⁵⁸ CA Submissions, [2082], [2096]

⁵⁹ CA Submissions, [2096]

⁶⁰ CA Submissions, [2051]

OPI take no further action in respect of Operation Khadi.⁶¹ Mr White confirmed this in his evidence before the Commission.⁶²

- (b) Mr White's record on 25 July 2006 of a meeting between himself, Mr Biggin, Mr Wilson and Mr Peter Smith, stating: "*Luke Cornelius briefed. Agrees A/C Overland to speak to Graham Ashton (OPI) re issue. Advised not to proceed*".⁶³
- (c) Mr Wilson's diary note of 27 July 2006, recording a briefing from Mr Cornelius on that date, about the OPI wanting to coercively examine Ms Gobbo in respect of the unauthorised disclosure of IR44.⁶⁴
- (d) Mr Sandy White's diary note of 27 July 2006, recording the following:
- *"AC has met with Graham Ashton OPI.*
 - *OPI happy to drop off John Brown and Shields issue.*
 - *No requirement to examine 3838 re same.*
 - *Believe source and Paul Dale had relationship.*
 - *Want to examine source in future re leaked IR 44.*
 - *Belief that source may have been conduit between Mokbel and Williams and Dale re IR. Leading to killing of Hodsons.*
 - *Human source believes Dale involved in Oakleigh Burglary.*
 - *Belief that "Mokbel T", (for Tony) and "Williams K", (for Carl) "Ordered killing".*
 - *Fitzgerald to conduct inquiry.*
 - *Agreed:*
 - *Source can be told no OP hearing re John Brown etc.*
 - *At a time in the future source can be pre-warned re OPI hearing re Dale etc.*
 - *Source may speak to handlers re same.*
 - *Trust issue re informing source of hearing before it happens.*
 - *Peter Smith to be told only."*⁶⁵

97 The first point to make is that Mr Ashton was not involved in any of the meetings between SDU members and Victoria Police investigators through May to July

⁶¹ Exhibit RC0305 Mr Sandy White diary, 24 July 2006, VPL.0100.0096.0311 at 0321

⁶² Transcript, 2 September 2019, 5032

⁶³ Exhibit RC0305 Mr Sandy White diary, 25 July 2006, 14, VPL.0100.0096.0311 at 0324

⁶⁴ Exhibit RC0828 Mr Rodney Wilson diary, 27 July 2006, RCMP1.0118.0001.0001 at 0067

⁶⁵ Exhibit RC0407 Mr Sandy White diary, 27 July 2006, 17, VPL.0100.0096.0327 at 0327

2006 on which Counsel Assisting rely to conclude that Mr Ashton was told that Ms Gobbo was a human source and engaged in decision making on that basis.⁶⁶

98 The second point is that the fundamental difficulty with Counsel Assisting's construction of the records, is that the sole objective written record of the 27 July 2006 meeting itself between Mr Ashton, Mr Overland and Mr Cornelius, is Mr Ashton's diary note , which states:

*"1000 – Met with Simon Overland + Luke Cornelius re Op. Air. Discuss our public hearing. Agreed to go and see Paul Coghlan OPP re issues."*⁶⁷

99 The diary note does not indicate that Mr Ashton received any briefing at all about Ms Gobbo, nor made any decision in relation to calling her to a hearing in respect of Operation Khadi. It does not refer to any discussion of Operation Khadi. Mr Overland and Mr Cornelius made no notes of the meeting, and Mr Ashton's contemporaneous note refers to an entirely different subject matter.

100 Counsel Assisting ignore the actual content of Mr Ashton's diary note (as they must to justify their conclusions) and are forced to submit that Mr Ashton simply failed to record the discussion in his diary.⁶⁸ This is an example of Counsel Assisting trying to force their hypothesis onto the objective facts as recorded in contemporaneous material.

101 When cross examined on this issue, Mr Ashton said:

(a) He had no recollection of meeting with Mr Overland and Mr Cornelius to discuss Operation Khadi or the withdrawal of Ms Gobbo from that investigation. Had any such discussion taken place, he would have recorded it in his diary:

"Now, would you make a note yourself of any conversation that you had with Overland about these sorts of issues?---Well yes. I made a note of the day, of that particular day when he came and saw me and I went and I would expect I would have - - -

The only note we have is a note with respect to Operation Air?---Yes.

The meeting with Cornelius and Overland regarding Operation Air?---Correct.

*Can I suggest to you that there are other matters discussed and you simply don't make a note of it?---No, I would have made a note of it."*⁶⁹

(b) The evidence is clear that the meeting on 27 July 2006 that Mr Ashton attended was to discuss Operation Air. Operation Air was not related

⁶⁶ CA Submissions, [2002] – [2038]

⁶⁷ Exhibit RC0861 Chief Commissioner Graham Ashton diary, 27 July 2006, IBAC.0015.0001.0001

⁶⁸ CA Submissions, [2050]: *"It is clear enough that Mr Ashton did not record the discussion in his diary"*. Counsel Assisting also say that because IBAC has not provided any other contemporaneous record of the meeting, *"it is not possible to say"* whether or not there was any record of the meeting.

⁶⁹ Transcript, 9 December 2019, 10703:31 – 45

to Operation Khadi, or any other matters in which Ms Gobbo played a part:

"If we go to White's diary, if you'd like to see it, VPL.0100.0096.0325. Do you see that, that's Mr White's diary?---"Tomorrow am", was it? Yes, I see, thank you.

The intention is to speak tomorrow morning. And if we go to the following day. We have your diary entry which indicates that on 27 July 2006 you met with Simon Overland and Luke Cornelius on that day, albeit regarding Operation Air?---Yes, that's right.

What is clear though is that you meet with Overland and Cornelius?---Yes.

I think I can say this, that Operation Air is a matter which is associated or connected with improper associations of Paul Dale, is it not?---No.

You say no?---No, Operation Air from my memory was the investigation

Another matter, is it?---Into activities down the Crime Department.

All right, in any event. If you look at your diary entry it's clear that you met with Overland that morning, do you accept that?---Yes."⁷⁰

102 Entirely consistent with this is Mr Cornelius' evidence that he had no recollection of a discussion on 27 July 2006 about Operation Khadi. He categorically denied Counsel Assisting's assertion that Operation Khadi may have been discussed on 27 July 2006, but not recorded by Mr Ashton. Mr Cornelius gave evidence as follows:

"Do you accept that you may well have spoken about Operation Khadi at this meeting and that Mr Ashton just simply may not have noted it in his diary?---No.

You don't accept that?---No."⁷¹

103 It was not suggested to either Mr Ashton or Mr Cornelius that their evidence was false.

104 Counsel Assisting focussed on the events of 27 July 2006 because on or about that date they say a decision was made not to call Ms Gobbo to an OPI hearing in respect of Operation Khadi. Counsel Assisting has suggested that it was Mr Ashton who made that decision and hence he must have been told Ms Gobbo was a human source.⁷²

105 The trouble with this chain of conclusions is that Mr Ashton did not have authority to unilaterally determine whether or not to call Ms Gobbo to an OPI hearing, if such a hearing had been planned. He stated:

⁷⁰ Transcript, 9 December 2019, 10693:36 – 10694:14

⁷¹ Transcript, 12 December 2019, 11083:26 – 30

⁷² CA Submissions, [2045] – [2061]

*"That's not a decision I would just be taking on my own if that did occur. There would be conversations with the Director, the legal department, Kapetanovski. It's not just something I would say, "This isn't going ahead" and everyone would fall into line with that decision".*⁷³

- 106 As to Mr Ashton's lack of authority to make the decision, Mr Overland's evidence was consistent with Mr Ashton's. Mr Overland told the Commission that he would have expected Mr Ashton to consult with Mr Kapetanovski, the Manager of the investigation, and / or the Director of OPI.⁷⁴
- 107 When pressed on why the decision was made not to call Ms Gobbo, Mr Ashton, not having made the decision, could only surmise that the investigators were concerned about Ms Gobbo's safety and welfare. He asked Counsel Assisting why a "*sinister connotation*" was being placed on the decision.⁷⁵ Nothing was put to Mr Ashton in response to this query for him to respond to. It was a point well made by Mr Ashton. The conclusion reached by Counsel Assisting did seek, without any justification, to put a sinister connotation on what may equally have been a rational decision made for bona fide and genuine reasons (if such a decision was in fact made).
- 108 In summary, the evidence that Mr Ashton learned that Ms Gobbo was a human source in 2006 is speculative. Such a conclusion cannot be supported.

A more probable version of the 2006 events

- 109 As described in Volume 1 of the CA Submissions, the Commission had to deal in many instances with less than satisfactory evidence because of the passage of time and the incompleteness of critical records. Reference was made to the difficulties of arriving at conclusions based on third hand hearsay.⁷⁶
- 110 While the lack of objective written evidence makes the exercise of the Commission in making relevant findings difficult (assuming against Mr Ashton's submissions, it rejects his diary entry and oral evidence and Mr Cornelius's direct evidence), there is another probable narrative that fits the evidence in relation to the events of 2006. This narrative is given below.
- 111 Importantly, there is no corroborative evidence that there were OPI hearings actually scheduled for Operation Khadi in 2006. The objective documentary evidence only goes so far as to suggest that the OPI investigators wanted to arrange a hearing. There is no record that any hearing was actually arranged and it appears that no briefing papers were prepared for that hearing.
- 112 Mr Ashton's diary notes and other contemporaneous OPI records with respect to the arrangement of scheduled OPI hearings in 2007 indicate the extent of the

⁷³ Transcript, 9 December 2019, 10702:12 – 17

⁷⁴ Transcript, 18 December 2019, 11688:22 – 27

⁷⁵ Transcript, 9 December 2019, 10706:1 – 2

⁷⁶ CA Submissions, [2520]

planning and foresight involved before such a hearing took place.⁷⁷ There is no reason for the Commission to assume that hearings would have been arranged in 2006, without the same planning and the creation of similar records.

- 113 In circumstances where it cannot be safely concluded on the evidence that any OPI hearings in relation to Operation Khadi were scheduled in 2006, the more likely construction of events is that Mr Overland and Mr Cornelius raised with Mr Ashton the suggestions made by the OPI investigators that Ms Gobbo would be called to a hearing. In response, Mr Ashton confirmed that there were no hearings planned in relation to Operation Khadi and explained that the hearings being arranged by the OPI were in respect of the unauthorised disclosure of IR44.
- 114 On that basis, Mr Overland and Mr Cornelius did not disclose to Mr Ashton in July 2006, that Ms Gobbo was a human source, because there was no need to do so. Mr Ashton made no record in his diary of that conversation, because no "decision" was made not to call Ms Gobbo to an OPI hearing in respect to Khadi (as none were scheduled) and the conversation (likely in passing) was of no significance.
- 115 Mr Overland and Mr Cornelius then reported to their respective Victoria Police members that there were no plans to call Ms Gobbo to an OPI hearing in respect of Operation Khadi, but that the OPI was planning a hearing in relation to the unauthorised disclosure of IR44.
- 116 Any subsequent agreement about advising Ms Gobbo in advance of the IR44 hearing, as recorded in Mr White's diary at paragraph 96(d) above must therefore have been an agreement reached between Mr White, Mr Overland, rather than any agreement involving Mr Ashton.

2007

- 117 Given that the evidence does not support a finding that Mr Ashton first learned that Ms Gobbo was a human source in 2006, it is necessary to now turn to 2007. An analysis of relevant events in that year strongly support the conclusion that Mr Ashton first learned that Ms Gobbo was a human source when he was told of this fact by Mr Gavan Ryan at the OPI hearing in July or August 2007.
- 118 Contrary to Counsel Assisting's assertion that Mr Ashton learned of Ms Gobbo's role as a human source in 2006, Mr Ashton has consistently and unequivocally given evidence that he only became aware of Ms Gobbo's role as a human

⁷⁷ Exhibit RC0861 Chief Commissioner Graham Ashton diary, 28 May 2006, IBAC.0015.0001.0003 at 0004; Exhibit RC0857 Transcript of interview between Graham Ashton, Phillip Caine and Murray Gregor, 16 February 2005, IBAC.0010.0001.1078 at 0008 – 0018; Exhibit RC0862 Email from Graham Ashton to Peter Teather, 8 March 2005, IBAC.0010.0001.0916, see, e.g., a request for Ms Gobbo call charge records; Exhibit RC0858 Investigation Running Sheet: 2003 Leak of Victoria Police / MDID IRs, undated, 12, IBAC.0008.0001.0132 at 0012, 0015

source in July 2007, at an OPI hearing in respect of the unauthorised disclosure of IR44.⁷⁸

119 Mr Ashton gave the same answer when he gave evidence before Mr Kellam in 2014. Mr Ashton was there asked an open question as to when he understood that "3838" was Ms Gobbo. His answer was immediate, unequivocal and unqualified.⁷⁹

120 That answer can be relied on because the precise timing of when Mr Ashton came to this knowledge was not a critical issue in that inquiry and there was no reason for Mr Ashton to say it was later than it really was.

121 Mr Ashton repeated this evidence in his statement to the Commission⁸⁰ and in evidence before the Commission.⁸¹

122 Mr Ashton told the Commission (and Mr Kellam) that when he learned of Ms Gobbo's role as a human source, he immediately reported the matter to the Director of the OPI.⁸² Discussions with the Director, legal personnel and Mr Fitzgerald ensued thereafter.⁸³ This evidence is consistent with his evidence that he could not unilaterally have made a decision not to call Ms Gobbo to any OPI hearing (whether in 2006 or 2007).

123 Corroborative of Mr Ashton's recollection, there are in evidence a series of diary notes and entries in Informer Contact Reports (ICRs). These entries indicate that at the time of her scheduled appearances before the OPI in 2007, members of Victoria Police, including the SDU, were discussing whether or not to make Mr Ashton aware of Ms Gobbo's role as a human source. Those entries include:

(a) 16 August 2007: "2100 – call from DDI GR Purana. Recommended that OPI Graham ASHTON been made aware of HS potential to assist re Op BRIAR and PETRA and relevant consideration be given to damage to VICPOL relationship if source compelled to answer questions re sexual relationships with police if there is no forensic value. Decision to be made by ASHTON."⁸⁴

(b) 17 August 2007: "0900 – S/t Gavan Ryan re 3838.

- He has been briefing Mr Ashton and up re 3838 hearing today.
- Confirmed he will still be there during hearing today.

⁷⁸ Transcript, 9 December 2019 at 10694:30 – 41

⁷⁹ Exhibit RC0113 Kellam Report, 6 February 2015 at 111

⁸⁰ Exhibit RC0856 Statement of Chief Commissioner Graham Ashton, 30 August 2019, GLA.0006.0001.0001 at paras [99], [104] – [107]

⁸¹ Transcript, 9 December 2019 at 10662:6 – 7, 10694: 30 – 41, 10699:26 – 35, 10707:29 – 34; Transcript, 10 December 2019 at 10748:21 – 31

⁸² Transcript, 9 December 2019 at 10707:29 – 34

⁸³ Exhibit RC0113 Kellam Report, 6 February 2015 at 115 – 118

⁸⁴ Exhibit RC081, ICR dated 5 August 2007 - 17 August 2007, VPL.2000.0001.0987

- *She will have a hard day.*⁸⁵

(c) 17 August 2007: *“Call to DDI GR. Has spoken to Graham ASHTON. Informed of ramifications of hearing on 3838 and ongoing value to police. OPI still intend to cross-examine re possible lie about sexual relationships.*

...

*Call from GR re 3838 update. HS has been asked if she has spoken to anyone since her appearance at the hearings last month. HS has asked for stand down, obviously does not want to perjure self. Am going to meet Graham ASHTON to work out matter and then see HS.”*⁸⁶

(d) 7 August 2008: *“SO’C to consider how to approach same and call back. Advised SO’C that ASHTON and senior management at OPI were briefed by OVERLAND re identity of source prior to source giving evidence for the purpose of protecting the source from questions that would have compromised her but this was unsuccessful.”*⁸⁷

124 Accepting these diary entries as accurately reflecting the position as recorded (as Counsel Assisting are prepared to do in other situations) it is manifestly clear that if Mr Ashton had been told in July 2006 that Ms Gobbo was a human source, the persons who supposedly told him or knew that he had been told then (including Mr Overland, Mr Biggin and Mr White) would **not** have been discussing whether or not he should be told of her status in 2007.

3 May 2007

125 As set out at paragraphs 118 to 122 above, Mr Ashton has consistently given evidence, both at the Commission and in the Kellam inquiry, that he first learned Ms Gobbo was a human source during the course of the OPI hearings in respect of the unauthorised disclosure of IR44, in July 2007.

126 Mr Ashton’s direct evidence is that, on the date of Ms Gobbo’s appearance before the OPI in 2007, Detective Inspector Gavan Ryan attended the OPI to inform him that Ms Gobbo was a human source for Victoria Police. Mr Ryan told Mr Ashton that Victoria Police was concerned that if Ms Gobbo’s role was disclosed during the hearing, it would impact upon her ongoing cooperation with police.⁸⁸ Mr Ashton told the Commission that at that point, he connected Ms Gobbo with “3838”, because mention of “3838” had been made in Petra Steering Committee meetings.⁸⁹

⁸⁵ Exhibit RC0284, Source Management Log, 17 August 2007, VPL.2000.0001.2917

⁸⁶ Exhibit RC081, ICR dated 5 August 2007 - 17 August 2007 VPL.2000.0001.0987

⁸⁷ Exhibit RC0284 Source Management Log, 7 August 2008, VPL.2000.0001.9236

⁸⁸ Exhibit RC0856 Statement of Chief Commissioner Graham Ashton, 30 August 2019, GLA.0006.0001.0001 at [105]

⁸⁹ Transcript, 10 December 2019, 10758:40; Exhibit RC0856 Statement of Chief Commissioner Graham Ashton, 30 August 2019, GLA.0006.0001.0001, [106] - [107]

- 127 Counsel Assisting have sought to undermine Mr Ashton's direct evidence that he first connected Ms Gobbo and 3838 as a result of what Mr Ryan told him in July 2007 on two bases.
- 128 First, Counsel Assisting refer a diary note made by Mr Sandy White on 3 May 2007, which states:
"Advised re Brouer (sic) knowledge HS id by D/C Overland".⁹⁰
- 129 In cross examination Mr Overland said he would have been surprised if he had spoken to Mr Brouwer about Ms Gobbo's role as a human source, without Mr Ashton being present.⁹¹
- 130 From this Counsel Assisting argue that Mr Sandy White may have been
"...mistaken in his recording of Mr Brouwer being the person to whom Mr Biggin referred, or that Mr Biggin was mistaken in his recollection of the person from the OPI to whom he understood Mr Overland had spoken".⁹²
- 131 Not only is this another example of Counsel Assisting trying to force their narrative onto objective and contemporaneous facts that contradict it, but this submission ignores the evidence given by Mr Ashton and others in relation to the 3 May 2007 diary note.
- 132 Mr White told the Commission that he thought the diary note reflected a conversation during which Mr Biggin told Mr White that Mr Overland had said Mr Brouwer *"knew who the source was"*.⁹³ Mr Overland said, when pressed, that he would be surprised if he had discussed Gobbo's identity with Mr Brouwer without Mr Ashton being present. This was not direct evidence that he did so, but rather a speculative concession made under persistent cross-examination. What Mr Overland did say is that he did meet with Mr Brouwer without Mr Ashton from time to time, and that he possibly did tell Mr Brouwer that Ms Gobbo was a human source.⁹⁴ Certainly, Mr Overland did not agree that he had *not* told Mr Brouwer that Ms Gobbo was a human source.
- 133 Before moving to the second point, it should be observed that any dangers that Counsel Assisting highlighted that arise from relying on third-hand hearsay evidence (for example diary entries recording things that other people have said about what other people had been told), should have been heeded by them when formulating this speculative argument about Mr Ashton learning about Ms Gobbo in May 2007.⁹⁵

⁹⁰ Exhibit RC0898 Statement of Assistant Commissioner Luke Cornelius, 20 September 2019, [46], VPL.0014.0057.0001 at 0007

⁹¹ Transcript, 19 December 2019 at 11729:46 –11730:10

⁹² CA Submissions, [2308]; Exhibit RC0292 Mr Sandy White diary, 3 May 2007, VPL.0100.0096.0468 at .0613

⁹³ Transcript, 2 September 2019, 5333:38 – 42

⁹⁴ Transcript, 19 December 2019, 11730:14 – 19

⁹⁵ CA Submissions, [2520]

- 134 Second, Counsel Assisting say that the nature of a debriefing of Ms Gobbo by members of the SDU in May 2007 would have led Mr Ashton to the inevitable conclusion that the human source the subject of the debriefing was “3838” - if he had been briefed about this matter in the steering committee meetings.⁹⁶ This conclusion is, however, entirely speculative. There is simply no evidence that the debriefing, or relevant information from it, was provided to the Petra Steering Committee. On the contrary, Mr Ashton and Mr Cornelius, both members of the Petra Steering Committee, gave evidence that the debriefing was not relayed to them.⁹⁷ Counsel Assisting concede that there was no evidence of the debriefing ever being relayed to the Petra Steering Committee.⁹⁸
- 135 There is therefore no direct evidence to contradict Mr Ashton’s evidence about the timing of his knowledge of Ms Gobbo as a human source.
- 136 For these reasons the Commission should reject the submission that Mr Ashton first learned that Ms Gobbo was a human source in May 2007.

Conclusion as to Mr Ashton’s knowledge of Ms Gobbo’s use as a human source

- 137 The evidence does not support a finding, and it should not be found, that Mr Ashton learned that Ms Gobbo was a human source in July 2006.⁹⁹
- 138 Mr Ashton has expressly denied this. Rejecting Mr Ashton’s direct evidence on the basis of a patch work of other parties’ diary entries is unwarranted, unfair and fraught with the potential for error.
- 139 Counsel Assisting’s submissions in respect of 2006 highlight the dangers of selectively choosing to rely on some objective contemporaneous records but not others in order to support a particular hypothesis.
- 140 Mr Ashton’s credit and integrity have not been generally impugned and there is no reason to doubt his evidence on this issue. There is no benefit to Mr Ashton to try to fix his first knowledge about Ms Gobbo to July 2007 rather than a year earlier.

Lost Opportunity for the Regulators (Counsel Assisting’s Submissions [2082])

- 141 Finally, in Counsel Assisting’s Submissions at [2082] it is submitted that if the Commissioner accepts that Mr Ashton was briefed as to Ms Gobbo’s status as a human source on 27 July 2006, and the OPI Operation Khadi investigation ceased as a result of a request by Victoria Police to preserve the secrecy of Ms Gobbo’s role and not to compromise it, on the evidence, it is open to the

⁹⁶ CA Submissions, [2339]

⁹⁷ Transcript 9 December 2019, 10731:7 – 19

⁹⁸ CA Submissions, [2335]

⁹⁹ Once this is accepted, the foundation of Counsel Assisting comment at CA Submissions [3824] that Mr Ashton had reason to question the extent of Ms Gobbo’s assistance in mid 2006 falls away. Mere knowledge that Ms Gobbo was assisting police as asserted by Counsel Assisting, is not per se sufficient to have prompted Mr Ashton to have “asked questions”. It is also not possible to say what information would have emerged if Mr Ashton had “asked questions”.

Commissioner to find that this was a lost opportunity for the regulators (the OPI led by Mr Ashton, and the ESD) to take steps to cause Ms Gobbo's role as a human source to be scrutinised in 2006.

- 142 This submission should be rejected for a number of reasons.
- 143 First, as submitted above, the conduct of the OPI, and Mr Ashton as an officer of it, is not within the Terms of Reference of the Royal Commission.
- 144 Secondly, as noted above, there is no cogent evidence that the OPI had scheduled any hearings in relation to Operation Khadi, in which it intended to call Ms Gobbo in 2006 (or at all).
- 145 Thirdly, to the extent that the submission infers that Mr Ashton was responsible for the decision not to call Ms Gobbo, that inference is unfounded for reasons stated above at paragraphs 97 to 107 and 122.
- 146 The proposed finding at paragraph [2096], insofar as it may be said to apply to Mr Ashton, suffers from the same problems. A number of further observations can be made in relation to this paragraph.
- 147 The first is that the value laden phrase "*..those who took steps to prevent Ms Gobbo's thorough examination*" cannot apply to Mr Ashton. Mr Ashton did not have the power to prevent a witness being called. There is no evidence that he did so or acted opprobriously, if he had done so.
- 148 The second is an unstated speculation that a course of events would have followed if the examination had taken place leading to a thorough investigation of Ms Gobbo's role presumably instigated by Mr Brouwer. The facts point against this speculation. The evidence referred to below indicates that Mr Brouwer did know the facts that Counsel Assisting say would have spurred him into action, namely that Ms Gobbo was a human source. He did nothing when he had such knowledge. Further, his statement is silent as to these matters. Presumably these issues were canvassed with him by Counsel Assisting in preparing his statement but his responses did not support the theory. Alternatively, he was not asked about these matters when preparing his statement - and he should have been. Mr Ashton did not get the opportunity to test these matters as Mr Brouwer was not called to give evidence. Indeed, Mr Ashton did not receive a copy of Mr Brouwer's statement until after he had received Counsel Assisting's submissions and then only when a copy was requested.

KNOWLEDGE OF MR BROUWER AND MR FITZGERALD (COUNSEL ASSISTING'S SUBMISSIONS [2525], [2526])

Introduction

- 149 Counsel Assisting submit that there is conflicting evidence as to what persons involved in the OPI hearings in 2007 were told about Ms Gobbo's role as a human source, and that there is "*no reliable contemporaneous record of what*

information was conveyed to Mr Brouwer or Mr Fitzgerald".¹⁰⁰ They assert that, whilst Mr Brouwer and Mr Fitzgerald were given some information about Ms Gobbo's involvement with Victoria Police, they were not told the true nature and extent of that assistance.¹⁰¹ For the reasons that follow, these submissions should be rejected.

The evidence

150 First, once again, Counsel Assisting's submissions ignore the objective contemporaneous records that are available which do not support their conclusions. These records are:

- (a) Mr Sandy White's 3 May 2007 diary note refers to Mr Brouwer's knowledge. He notes having been told by Mr Biggin: "*Advised re Brouer (sic) knowledge HS id by D/C Overland.*"¹⁰²
- (b) An SML entry on 16 August 2007, stating "*Apparently Mr Brower (sic) knows but has not told Fitzgerald*".¹⁰³
- (c) An SML entry on 17 August 2007, stating "*FITZGERALD has now been told HS is a source*".¹⁰⁴
- (d) A further SML entry on 17 August 2007, stating "*1745 – Call to Super TB. Update re 3838 situation. Advised by Supt. that OPI prosecutor has also been told that HS is a police source.*

1800 – Update [redacted] re OPI prosecutor knowledge of HS role as well as chairman FITZGERALD."¹⁰⁵

151 Mr Ashton gave evidence that immediately after being informed that Ms Gobbo was a human source, he informed Mr Brouwer of this fact.¹⁰⁶ He was asked whether, having been told this information, Mr Brouwer expressed surprise. Mr Ashton said he did not. Mr Brouwer's apparent lack of surprise is consistent with him having learned of Ms Gobbo's role as a human source on 3 May 2007.

152 At paragraph [2526] of the CA Submissions it is said that Mr Brouwer and Mr Fitzgerald could not have been told about Ms Gobbo's role as a police informer because if they had been, the Commissioner can be confident that they would have taken appropriate action. This is said to follow because of their historical record of conducting enquiries into police corruption.

¹⁰⁰ CA Submissions, [2519] – [2520]

¹⁰¹ CA Submissions, [2524] – [2525]

¹⁰² CA Submissions, [2308]

¹⁰³ Exhibit RC0284 Source Management Log, 16 August 2007, VPL.2000.0001.2917

¹⁰⁴ Exhibit RC081 ICR dated 5 August 2007 - 17 August 2007, VPL.2000.0001.0987

¹⁰⁵ *Ibid*

¹⁰⁶ Transcript 11 December 2019, 10749:31 – 10751:46

- 153 This proposition simply does not follow as a matter of logic. For example, it may be that having learned that Ms Gobbo was a human source, they did not feel the need to undertake further investigations of a source they could safely assume was being managed by the Source Development Unit.
- 154 In any event, there is no evidence that once they knew, they did anything. If it is accepted (as it should be) that they were told Ms Gobbo was an informer, this was of course in the context that they knew she was a barrister. Yet still they did nothing. This puts to bed Counsel Assisting's theory that anyone who knew that Ms Gobbo was a barrister and a human source should have heeded the obvious alarm bells arising from those facts alone.
- 155 Also, Mr Ashton has undoubtedly a long and impeccable history in the law enforcement agencies, including in the OPI which dealt with the oversight of Victoria Police. Counsel Assisting have not allowed this history to stand in the way of scrutinizing his conduct. Nor should they with respect to Mr Brouwer and Fitzgerald if the terms of reference allow examination and criticism of conduct of officers of the OPI.

Conclusion

- 156 The weight of the evidence is accordingly that Mr Brouwer and Mr Fitzgerald were both made aware that Ms Gobbo was a human source, at least by August 2007.
- 157 This negates any adverse inferences the Commission seeks to draw about what steps Mr Ashton should have taken upon learning of Ms Gobbo's role as a human source. Mr Ashton reported what he knew (or had worked out) to the Director of the OPI and to Mr Fitzgerald, who was at that time, presiding over the OPI hearings. On the evidence, once they had the knowledge that Ms Gobbo was a human source, however and whenever they obtained that knowledge, they did not seek to take the matter any further.

SWOT ANALYSIS (COUNSEL ASSISTING'S SUBMISSIONS [3544], [4545])

The true facts

- 158 On 30 December 2008, members of the SDU prepared a document known as a SWOT Analysis (Strengths Weaknesses Opportunities Threats) with respect to the use (past and future) of Ms Gobbo as a human source and her transitioning to be a witness in respect of the prosecution of Mr Dale for the murder of Mr and Mrs Hodson.¹⁰⁷

¹⁰⁷ The decision to transition Ms Gobbo from a human source to a witness in the prosecution of Mr Dale for the murder of the Hodsons was one plainly open to be made by Mr Overland and one Mr Ashton supported. At that time, Mr Ashton reasonably believed the safety of Ms Gobbo could be ensured by her entry into the WITSEC program. The very consequence of that decision would have been the necessity for transparency and disclosure of Ms Gobbo's role to the defence as the prosecution proceeded. Of course, when Mr Williams was murdered and the prosecution was abandoned, that disclosure (at that time) became unnecessary.

159 Notwithstanding sustained cross examination of every possible witness who may have had relevant knowledge of the document and its movements, the Commission can be confident that Mr Ashton was not provided with and did not see the SWOT Analysis before, during or after the 5 January 2009 meeting of the Petra Task Force Steering Committee (**the 5 January meeting**). Mr Ashton's evidence was that the first time he had seen that document was in the course of preparing to give evidence before the Commission.¹⁰⁸

160 Counsel Assisting themselves submit at [3543] that the evidence clearly demonstrates that Mr Ashton was *not* given the SWOT Analysis. Counsel Assisting also (correctly) submit that this must have been a deliberate decision.

161 Further, the evidence before the Commission does not support a finding that Mr Ashton was informed of the specific contents of the SWOT Analysis at the 5 January meeting. The evidence of Mr Moloney confirms that it is likely that Mr Overland made the deliberate decision to keep the specifics of the SWOT Analysis, including the risks and concerns raised in, it from Mr Ashton at the 5 January meeting. Mr Moloney's evidence was as follows:

At 1461:43

Now, was the document tabled at the meeting?---I believe so.

And was the document read by Mr Ashton in the meeting?---I can't remember.

Was the document spoken to?---Yes.

Was it gone through?---No.

The various risks. In what way was it spoken to then?---From memory Simon read it.

To himself or out loud?---No, no, no, to himself, read the document. General conversation that basically said that everything here he knew about and had been considered and was being considered but it comes from the perspective, and he's right here, it comes from the perspective of only one part of the whole investigation, not the complete, not the complete investigation.

Sorry, what investigation are you talking about? The various investigations that Ms Gobbo was used within?---No, I presumed he was talking about the, where she was going to be a witness involved.

So by that do you mean to say, "These are the matters are irrelevant to our investigation because none of that's going to get disclosed to our investigation so there's no risk"?---No, he said all those issues had already been considered and noted and they would be, he was fully aware of it and it would be taken on board.

A number of the issues listed specifically had reference to the OPI and you've got Mr Ashton sitting there from the OPI?---Yes.

¹⁰⁸ Transcript, 10 December 2019, 10830:38 – 41

Were those issues raised with Mr Ashton?---**No. Not to my memory, no.**

They were left off Mr - Mr Overland didn't raise concerns of the SDU that there might be OPI reviews about Ms Gobbo's handling?---**We did not go through the list.**

I'm asking you in relation to concerns by the SDU that there might be an OPI review in relation to the handling of Ms Gobbo?---H'mm.

Was that raised with Mr Ashton?

Mr Coleman: He just answered that.

Ms Tittensor: No, I'm asking him to clarify.

Commissioner: The question can be put, thank you. The question will be put, yes. Just ask the question again please, Ms Tittensor.

Ms Tittensor: There are a number of references to the OPI?---Yes.

One of those references at least indicates concern about OPI review of the handling of Ms Gobbo?---Yes.

Was that raised with Mr Ashton or at that meeting?---**Not from my memory.**

That was left off?---Nothing was left off. He'd read the document.

Well I'm not talking about Mr Overland reading the document to himself, I'm trying to understand what was told to Mr Ashton at the meeting, what he would have learnt through the course of this meeting. He didn't see the document, what was said, what was the nature of the risk conveyed to him?---**I didn't convey that information to him from my memory.**

What did Mr Overland say?---**No, Mr Overland, Mr Overland took the document and said that, "It's all been considered, it will all be considered and thanks very much for bringing it to us".**

What specific risks from the document were conveyed at that meeting, or discussed?---The document itself was a whole risk assessment. **We didn't go through the items.**

...

At 14613:19

Did he offer Mr Ashton the document?---**Not in my presence. And there were no copies.**

Now, the purpose of yourself and Mr Ashton and Mr Overland being at that meeting was to discuss whether Ms Gobbo ought to be made a human source, sorry, a witness, is that right?---Generally, yes.

...

At 14614:13

Was there actually any consideration of those documents, aside from Mr Overland looking at it?---**No.**

And saying it was all okay. Was there any actual consideration by the steering committee of those documents?—No, there was only the three of us there and I've explained what happened to you.

(bold emphasis added)

162 This evidence clearly demonstrates that Mr Ashton was told nothing specific of the risks or threats discussed in the document. Mr Overland read the document to himself and simply noted he was aware of the issues raised and they were taken into account. Mr Moloney stated that Mr Overland did not go through the list of matters in the document. As such, it can be concluded that Mr Ashton learnt nothing new about Ms Gobbo's activities, or any concerns or risks arising from those activities, at the meeting. Nothing that occurred at the meeting would have raised any concerns with Mr Ashton as he was not told of the specific threats and concerns of the authors of the SWOT Analysis at the meeting.

163 A proper analysis of Mr Moloney's evidence leads to the conclusion that the specific contents in and concerns raised by the SWOT Analysis were not discussed at the meeting.

164 Mr Ashton's evidence confirms that none of the matters raised in the SWOT Analysis were specifically brought to his attention at the meeting. He said that if he had seen the document (or was aware of the concerns raised in it), that he would have:

- (a) been surprised¹⁰⁹ and concerned by the document;¹¹⁰
- (b) remembered seeing the document if he had been shown it;¹¹¹
- (c) asked questions as to why an OPI review would have been necessary;¹¹²
- (d) asked what was going on with the human source;¹¹³ and
- (e) elevated his concerns to the Director of the OPI.¹¹⁴

165 There is no reason to doubt this evidence.

Counsel Assisting's argument that Mr Ashton nonetheless ought to have reacted as if he had seen it

166 Having correctly accepted that Mr Ashton was not given and did not read the SWOT Analysis, Counsel Assisting submit, that notwithstanding this:

[3544] ... on the evidence it is open to the Commissioner to find that given his role at the relevant time was Assistant Director of the Office of Police Integrity,

¹⁰⁹ Transcript, 10 December 2019, 10780:43 – 44

¹¹⁰ Ibid, 10832:13 –15

¹¹¹ Ibid, 10830:46 – 10831:3

¹¹² Ibid, 10832:4 – 11

¹¹³ Ibid

¹¹⁴ Ibid, 10832:22 – 25

Mr Ashton failed to discharge the function of his role to provide independent oversight of police integrity by failing to inquire into and/or failing to cause an investigation into the relationship between Ms Gobbo and Victoria Police. That is so because Mr Ashton sat on the Petra Taskforce Management Committee, apparently wearing dual hats of police regulator, overseeing the integrity of the investigation and co-investigator.

[3545] Whilst he may not have been aware of the extent of Ms Gobbo's assistance to Victoria Police as a human source, he was aware that she was a criminal defence barrister and was a human source, which was, it is submitted, an extraordinary dual role for a barrister to undertake. He was aware that Ms Gobbo had been a human source, managed by the SDU, for a lengthy period of time. He was aware that those managing her were raising concerns regarding her. He was aware that human source management was the major risk faced by Victoria Police, and the focus of most OPI investigations.

[3485] On the evidence, it is open to the Commissioner to find that it would have been clear to anyone aware of the contents of this SWOT analysis, or who had knowledge of the concerns raised within it, that Ms Gobbo's role as a human source had not previously been disclosed in any court proceeding. That is so, because logically, if the courts had previously condoned her use, many of the weakness and threats would have already been dealt with:

- there would be no concern as to OPI, government or judicial review*
- there would be no concern about Ms Gobbo's exposure as a human source*
- there would be no concern about past convictions being overturned*
- there would be no concern about Tony Mokbel's case, or other cases, which were on foot or contemplated.*

167 The first observation to make is that, as submitted above, Mr Ashton's conduct whilst he was an officer at the OPI is outside of the Terms of Reference. His conduct whilst he was acting in that capacity cannot thus be the subject of adverse findings or conclusions.

168 The second observation is that any suggestion that because Mr Ashton already knew as at 5 January 2009 that Ms Gobbo was a human source and therefore, as a result of what happened at that meeting, should have been aware that no disclosure of that role had ever been made cannot be maintained. As observed above, he learned nothing new of her role at that meeting.

169 Further, whilst there is evidence that during the period 2007 to 2009, as a result of his attendance at various Petra and Briars Steering Committee meetings he knew of her assistance to police in those investigations and some other matters, Mr Ashton did not learn of the true nature and extent of Ms Gobbo's cooperation with police generally.

170 The third point is that, to the extent these observations are based on Counsel Assisting's thesis that Mr Ashton knew Ms Gobbo was a human source in 2006, it is a false premise. Even if he had this knowledge in 2006, Mr Ashton would

have reported up, as he did in 2007. To the extent that it is based on his knowledge in 2007, the evidence is that he did report up to Mr Brouwer and also to Mr Fitzgerald.

171 Leaving aside the fact that Mr Ashton raised the matter immediately with Mr Brouwer, the facts have to be put into proper context.

172 When Mr Ashton did connect 'Ms Gobbo' and 'human source 3838' in 2007 in his role at the OPI, he justifiably understood that senior members of Victoria Police who were highly trained in human source management, were managing the risk appropriately.¹¹⁵

173 When Mr Ashton joined Victoria Police in a sworn position in April 2011, he acted appropriately, as outlined below.

174 Finally, insofar as [3485] states that it would be open to the Commission to find that "... it would have been clear to anyone aware of the contents of this SWOT analysis, or who had knowledge of the concerns raised within it, that Ms Gobbo's role as a human source had not previously been disclosed in any court proceeding" for the reasons outlined in paragraphs 158 to 164 above, the evidence is that Mr Ashton was not aware of the contents of the SWOT Analysis and had no knowledge of the concerns raised within it. Therefore, it is not open to the Commissioner to make the findings suggested in relation to Mr Ashton.

2011

175 In April 2011, Mr Ashton became Assistant Commissioner Crime.

176 Counsel Assisting have sought to criticise Mr Ashton for failing to respond adequately to what they suggest should have been obvious alarm bells arising from Ms Gobbo's role as a human source.¹¹⁶ Counsel Assisting's approach is misdirected because it misconstrues the evidence and gives inappropriate weight to critical events.

177 Counsel Assisting's starting point for their analysis of this period is a good example of this. It focuses on the letter from Mr Sol Solomon to Mr Overland in late June 2011.¹¹⁷

178 Counsel Assisting has argued that:

[4219] On the evidence, it is open to the Commissioner to find that, whilst Mr Ashton may have only received positive confirmation of the extent of Ms Gobbo's involvement with Victoria Police as a human source later in the year, in late June 2011 Mr Ashton should have:

[4219.1] satisfied himself that the use of Ms Gobbo by Victoria Police had been lawful and appropriate, and

¹¹⁵ CA Submissions, [4219]

¹¹⁶ CA Submissions, [4219]

¹¹⁷ Exhibit RC088 Letter to Chief Commissioner Simon Overland from Sol Solomon (undated) with handwritten note from Findlay McRae, 28 June 2011, VPL.0005.0003.3042

[4219.2] ensured that disclosure obligations to that point had been lawfully met.

[4219.3] That is so, because of:

[4219.4] his awareness of Ms Gobbo's profession and the nature of her clientele

[4219.5] his awareness of her previous status as a human source who was handled by the SDU, and the length of time over which she had been a human source

[4219.6] his awareness that Ms Gobbo had assisted both the Petra and Briars Taskforces as a human source

[4219.7] the reference in Mr Solomon's letter to Ms Gobbo having potentially also assisted police in 'Major Organised Crime investigations'

[4219.8] the fact that she had assisted the Petra Taskforce in her status as a human source, and therefore that material would be held by Victoria Police relevant to those matters

[4219.9] the fact that such matters must not have been disclosed in the previous committal proceedings in respect of the Dale murder prosecution

[4219.10] the fact that there appeared to be a desire to shield such matters from disclosure

[4219.11] the oath that he swore and the responsibilities that he acquired when he became an Assistant Commissioner of Victoria Police.

179 The letter is identified by Counsel Assisting as a clear alarm bell that ought to have prompted an investigation by Mr Ashton into Ms Gobbo's true role and the consequences of her conduct.

180 However, putting the letter and Mr Ashton's knowledge of it into proper context, it is manifestly clear that the letter focuses on Ms Gobbo's physical and mental health and issues regarding ^{PII} [REDACTED]. As will be seen below, Mr Ashton recognised that the safety of human sources such as Ms Gobbo was paramount and the threat to Ms Gobbo's safety was what primarily motivated his actions in dealing with her from this point. At the same time, as is further detailed below, Mr Ashton took appropriate steps to set in train the necessary disclosures to his superiors and prosecuting authorities. He also initiated an independent review of the use of Ms Gobbo as a human source by Victoria Police. Having done those things, he then quite properly recused himself.

181 When Mr Ashton was cross-examined on Mr Solomon's letter, the thrust of his evidence was that in his capacity as the Assistant Commissioner, Crime, the letter was the commencement of the process of receiving information in relation to the full extent of Ms Gobbo's conduct and its significance. See for example Transcript, 11 December 2019 at 10869:

"Then she says this, "She alludes to her cooperation with other major organised crime investigations in the past but does not give me specifics. She pleads for flexibility and ^{PII} [REDACTED]". So what that letter suggests is that Ms

Gobbo's saying to Solomon, "Look, I've cooperated with police with respect to other major organised crime investigations in the past" and she wasn't giving Solomon specifics, but you were getting that information then and I take it that would have led you to wonder, if you didn't know already, what she was talking about?---Yes, I agree. There was a process certainly that went over a period of this few months leading up to that final decision to pull her as a witness in that matter where I would see things that would say, "What's that a reference to, this broader piece?" Yes, and they were concerns, I think, that Doug Fryer had as well in the same context.

I take it you would have asked questions of various other officers who had a more detailed knowledge than yours about what that was all about, what assistance she had provided in other major organised crime investigations in the past?---Yes, in the context with Doug Fryer, you know, it was conversations over a period of time that would be, that would allude to this issue, yes."

182 Counsel Assisting use Mr Solomon's letter, among other things, to make its comments in paragraph [4219] to the effect that in June 2011, Mr Ashton should have:

- (a) satisfied himself that the use of Ms Gobbo by VicPol had been lawful and appropriate; and
- (b) ensured that disclosure obligations to that point had been lawfully met.

183 The grounds relied upon by Counsel Assisting to come to these conclusions should not be accepted because at that time:

- (a) Although Mr Ashton was aware that Ms Gobbo was a human source who had provided assistance to Taskforces Petra and Briars, he also knew that Ms Gobbo had been managed by the SDU – a specialist branch trained in human source management, including risk management.
- (b) The mere fact that a human source is a barrister did not per se, require Mr Ashton to intervene. The use of a barrister, or other professional with obligations of confidence, as a human source was not prohibited by the Victoria Police policies and procedures on the use of human sources at the time.¹¹⁸ It is critical to consider Mr Ashton's conduct in proper context, and to avoid the overlay of current knowledge about the true extent of Ms Gobbo's conduct. Mr Ashton had only commenced his sworn role in VicPol in April and while there is evidence that Gobbo was associated with various crime figures, there was nothing to alert Mr Ashton that she was acting improperly.
- (c) There is no evidence that, at this time, Mr Ashton was specifically aware of discussions about a request for, or requirement to make, any disclosure in respect of Ms Gobbo's role. The prosecution of Mr Dale for the murder of the Hodsons, in which disclosure would have been

¹¹⁸ Victoria Police Manual Instruction 111-3 Human Sources, 7 May 2007, VPL.002.0001.1662

required, had fallen away the previous year following the murder of Carl Williams. The prosecution of Mr Dale for lying to the ACC had been initiated and the evidence indicates that issues with respect to disclosure in those proceedings arose from about August 2011, with Mr Ashton becoming specifically aware of them after that. Accordingly, there is no evidence to support the unfounded contention of Counsel Assisting that Mr Ashton knew or should have suspected a desire (which desire Mr Ashton denies) on the part of Victoria Police to "shield such matters" from the prosecuting authorities.

- (d) Counsel Assisting did not put to Mr Ashton that in June 2011, he should have taken steps to "ensure disclosure obligations" had been met. This should have been put to Mr Ashton so that he could have explained, in the context of his knowledge at the time, including Mr Solomon's letter, why he did not investigate what had or had not been disclosed to prosecuting authorities, of Ms Gobbo's role.

3 November 2011 meeting

- 184 Counsel Assisting next focused on the 3 November 2011 meeting between Mr Ashton, Mr Cartwright and Mr McRae, and made the following assertions:

[4328] On the evidence, it is open for the Commissioner to find that by the end of the meeting on 3 November 2011, there was sufficient information available to each of the participants to put them on notice that prosecutions of Mr Mokbel and those associated with the Tomato Tins importation may have been and may continue to be adversely impacted by the conduct of Ms Gobbo as a human source, and / or conduct of members of Victoria police in handling and managing her.

[4329] Further, each was aware that that information had probably not been brought to the attention of the legal representatives of those people or the relevant prosecuting authorities.

[4330] In the circumstances, it was necessary to take all reasonable steps to make sure that concerns discussed in the meeting were properly investigated and considered by appropriately qualified legal advisers, and / or immediately brought to the attention of the state and commonwealth offices of public prosecutions.

[4331] In the circumstances where prosecutions were ongoing, the appropriate immediate step would have been to communicate the concerns to the relevant office of public prosecutions.

- 185 There is no basis on the evidence to conclude that Mr Ashton failed to take reasonable steps to ensure that these matters were properly investigated and considered, and/or brought to the attention of the prosecuting authorities for the following reasons.

- 186 In respect of the CDPP, it is clear that appropriate disclosure had been made both by Ms Gobbo herself and by Victoria Police.

187 Ms Gobbo herself had made disclosure to Ms Breckweg on 28 August 2011, as appears from following extract taken from the transcript of a conversation between Ms Nicola Gobbo, Inspector Boris Buick, Mr Jason Lebusque and CDPP:

Ms Breckweg: If they do issue a subpoena ---

Ms Gobbo: I don't want to talk cryptically, but its maybe a conversation for another day. But it affects matters that are being prosecuted by your office at the moment.

Ms Breckweg: Okay

Ms Gobbo: Very significant matters.

Ms Breckweg: I think I know what you're talking about, just a rough guess – you're view is that its not just the threat from Dale – but the threat from other people.

Ms Gobbo: Yeah

*Ms Breckweg: Well, that's something we have to take very seriously.*¹¹⁹

188 Disclosure was then made by Victoria Police by granting access to Gerard Maguire and Ms Breckweg to review the Source Management Log.

189 Any suggestion that Mr Ashton was engaged in attempting to hide anything from the CDPP would accordingly be disingenuous.

190 In relation to disclosure to the Victorian OPP, Mr Ashton's evidence in his Statement was that at the 3 November meeting: *"It was agreed that Mr McRae would discuss the matter with the Director of the OPP, John Champion"*.¹²⁰ Before the Commission, Mr Ashton clarified this by saying that he may not specifically have named Mr Champion, but rather, asked Mr McRae to discuss the matter with the "OPP".¹²¹

191 Mr Cartwright's contemporaneous notes of the 3 November meeting is as follows:¹²²

GA concerns around INCA – a pending AFP matter for drug large scale importation, after a joint operations

F was the originating Human Source, AFP although aware of the importance of the HS, are not aware that it was F

Some concern that F was acting as a legal advisor to one of the accused at the time

¹¹⁹ CA Submissions, [4224]; Exhibit RC0679 Transcript of conversation between Ms Nicola Gobbo, Inspector Boris Buick, Mr Jason Lebusque and CDPP, 24 August 2011, 118, VPL.0100.0068.0644 at 0761

¹²⁰ GA Statement, [163]

¹²¹ Transcript, 9 December 2019, 1625:6 – 21

¹²² Exhibit RC1275 Handwritten notes of Tim Cartwright, VPL.0100.0013.0053 at 0099

Consequently a requirement to disclose or at the least, make the prosecution aware of F's involvement and the potential that she was a legal advisor.

Action: Fin to consider the requirements

- 192 The technicality of whether the final line of the file note was a "direction" from Mr Cartwright to Mr McRae or not is irrelevant because Mr Ashton could reasonably have expected, and did expect, that Mr McRae would have done so.¹²³
- 193 Mr Ashton said that Mr McRae reported back to him.¹²⁴ In cross examination he fairly conceded that there may have been crossed lines of communication between him and Mr McRae.¹²⁵ However, this does not mean that following the 3 November 2011 meeting, Mr Ashton did not genuinely and reasonably have the understanding that steps would be taken to inform the OPP of these issues.
- 194 It is common ground that as a result of the 3 November 2011 meeting between Mr Ashton, Mr Cartwright and Mr McRae, Mr Ashton took the proactive step of initiating an independent review in relation to Ms Gobbo. Mr Ashton did so by requesting that Mr Cartwright instruct Mr Pope to take all necessary steps to conduct the review. It is accepted that this was the catalyst for what became known as the Comrie Review.
- 195 Because of his involvement whilst at the OPI and on the Petra and Briars Steering Committees and the possibility of him having information relevant to any review, he quite properly recused himself from the process going forward. No one suggested to Mr Ashton that it was inappropriate that in the circumstances he recuse himself from the independent review, including framing the terms of reference of the Comrie review. He was entitled to believe the independent review would be undertaken in a thorough and timely fashion. Having regard to the focus by the Commission on issues of conflicts of interest, Mr Ashton's actions ought be commended rather than criticised.

Sheridan / O'Connor Document

- 196 As observed above, on 3 November 2011, the CDPP was provided with access to the Source Management Log by Victoria Police following which the CDPP requested that further information be provided in relation to Ms Gobbo. Contrary to any suggestion that Mr Ashton was reluctant to provide disclosure, he fully cooperated with the CDPP's requests. He took steps to ensure that a response to the CDPP's request for a list of disclosure items be prepared over the weekend.¹²⁶ This process culminated in the document prepared by Mr Sheridan and Mr O'Connor dated 7 November 2011 (the Sheridan / O'Connor document), from which Mr Ashton, for the first time, learned of the true extent of Ms Gobbo's activities as a human source.

¹²³ Transcript, 9 December 2019, 10628:4 – 7

¹²⁴ Ibid 10889:29 – 10890:31

¹²⁵ Transcript, 11 December 2019, 11008:11-28

¹²⁶ Transcript, 11 December 2019, 10896:38 – 44

197 At [4345] of Counsel Assisting's Submissions, Counsel Assisting say the following:

"On the evidence, it is open for the Commissioner to find that, having received the O'Connor document, and being shocked by the contents of it, Mr Ashton was aware:

- a. *That potentially many cases over and above those that he had discussed in the 3 November meeting with Mr McRae and Mr Cartwright may have been adversely impacted by the conduct of Ms Gobbo as a human source and / or conduct of members of Victoria Police in handling and managing Ms Gobbo*
- b. *That it was unlikely that this fact had been brought to the attention of the legal representatives of those people or the relevant prosecuting authorities*
- c. *That in those circumstances, it was necessary to take all reasonable steps to make sure that his concerns about the content of the document were properly investigated and considered by appropriately qualified legal advisors briefed with all necessary information."*

198 For the reasons set out above, including his understanding as to Mr Cartwright's direction to Mr McRae to consider the disclosure requirements for the OPP and the fact that the CDPD knew of Ms Gobbo's role having reviewed the entirety of the SML's, it ought be concluded that Mr Ashton acted entirely appropriately after receiving the Maguire advice and Sheridan/O'Connor document leading up to his initiation of the Comrie Review. Thereafter, he reasonably understood and expected that the investigation of Ms Gobbo and the consequences of her conduct were underway and subject to an independent review.¹²⁷ In those circumstances, the steps that he had taken were entirely appropriate and in accordance with his obligations.

199 When challenged on the adequacy of the steps that he took in relation to Mr Mokbel, Mr Ashton emphasised that the potential issues with respect to Ms Gobbo's role as a source were bigger than Mr Mokbel alone, and that a proper investigation of all of the impacts across *"the whole, every matter that she potentially could have had some involvement in, not just that matter"* was necessary. That is precisely what Mr Ashton initiated.¹²⁸

22 November 2011 diary entry

200 Counsel Assisting have made several references to a diary entry of Mr Ashton on 22 November 2011. That diary entry reads as follows:

"Mokbel – 23 warrants, 5 sworn correctly, all rest in question.

¹²⁷ Transcript, 9 December 2019, 10643:5 – 41

¹²⁸ Transcript 9 December 2019, 10642:44 – 46

- *Gerry I for form OPP. Peter Kidd (OPP) suggests we get represented, Coghlan.*
- *Director will call*¹²⁹

- 201 At [4365], Counsel Assisting assert that this diary entry records that Mr Ashton knew that the OPP had suggested that Victoria Police required representation for the Mokbel change of plea application and thus was aware that no disclosure had been made to prosecutors with respect to Mr Mokbel. Such a conclusion cannot be drawn from this diary entry. Significantly, this conclusion was not put to Mr Ashton in cross-examination.
- 202 The second reference to this diary entry is at [4379] where Counsel Assisting observe that Mr Ashton should have raised the Mokbel / Gobbo issues with Mr Coghlan QC *“when he had the opportunity to do so”* on 22 November 2011. This is a complete misreading of the diary entry. There is no suggestion in that diary entry that Mr Ashton actually spoke to Mr Coghlan on that day or at all. Further, the diary entry on its face does not support a conclusion that the suggestion that Victoria Police may require representation related to anything other than the irregularly sworn affidavits – an issue to which the diary entry plainly relates.
- 203 There is no evidential foundation whatsoever to support Counsel Assisting’s submission for the very serious finding in [4380] that Mr Ashton deliberately chose not to raise his concerns about Ms Gobbo with the DPP and did not do so. This was never put to Mr Ashton.
- 204 This submission ignores the evidence referred to above that Mr Ashton, at or about this time, had discussed the issue of Ms Gobbo’s role with his superior, Mr Cartwright, and reasonably understood that the Director Legal of Victoria Police, Mr McRae was to take steps to consider the requirements for disclosure of these matters to the DPP. The evidence as a whole is completely at odds with the finding now suggested by Counsel Assisting in [4380] of their submissions.
- 205 Even if it is (wrongly) thought that Mr Ashton could be criticised for not taking further steps to understand what Mr McRae had done with respect to consideration of the requirements of disclosure to the DPP, it simply cannot be said that Mr Ashton made a deliberate decision to withhold whatever concerns he had about Ms Gobbo’s role from either the DPP. If he truly had the intention to hide his concerns from prosecutorial authorities, he would not have taken the steps he did, for example to ensure the CDPP was aware of Ms Gobbo’s role in the context of the Dale ACC prosecution, nor initiated the commencement of the independent review of her role, which became the Comrie Review.
- 206 The fallacy of the suggested finding is reinforced by reference to contemporaneous objective evidence, being Mr Cartwright’s file note of the 3 November 2011 meeting with Mr Ashton and Mr McRae which is set out at paragraph 191 above.

¹²⁹ Exhibit RC0861 Chief Commissioner Graham Ashton diary, 22 November 2011, RCMP1.0097.0001.0093 at 0124

207 At paragraph [4325] of their submissions, Counsel Assisting note that the following was discussed at the 3 November meeting:

"Concerns raised by Mr Ashton in relation to the pending Tomato Tins prosecution, which was then at pre-trial stage. Ms Gobbo was the originating human source in relation to this prosecution, and there was a concern that Ms Gobbo was acting as a legal advisor to one of the accused persons at the time. It was stated that consequently, there was a requirement to disclose, or at least make the prosecution aware of, Ms Gobbo's role as a human source and the possibility that at the same time she was acting as legal advisor to an affected accused person."

208 Having made this observation, Counsel Assisting cannot fairly maintain the submission that Mr Ashton made the deliberate decision they suggest in [4380]. There is nothing in the evidence referring to matters after the 3 November 2011 meeting and prior to the 22 November 2011 diary note which would otherwise support Counsel Assisting's position.

209 It follows from the above that, insofar as Mr Ashton is concerned, he had taken all relevant, reasonable and necessary steps to deal with the matters raised in the Maguire advice.¹³⁰

PUBLIC STATEMENTS (COUNSEL ASSISTING'S SUBMISSIONS [4802])

210 Counsel Assisting submit that certain findings be made critical of Mr Ashton arising from media interviews he gave in relation to some of the matters before the Royal Commission. These proposed findings refer to, and are said to arise from, certain statements made by Mr Ashton in such media interviews.¹³¹ The insurmountable difficulty faced by Counsel Assisting in seeking that these findings be made is that none of the passages referred to and relied upon are in evidence before the Royal Commission. It should not need to be stated that findings can only be made on evidence that was before the Royal Commission. No evidence of the matters referred to means no such findings can be made. The Commission would fall into error if it did so. Indeed, as it is not based on any evidence, the section should not have been included in Counsel Assisting's submissions. That section should be removed from any version of the submissions published by the Commission.

211 In any event, Mr Ashton has made it clear in the past and repeats here, that he does not approve of noble cause corruption.

212 In his examination before Mr Kellam, Mr Ashton gave the following evidence:

Mr Kellam: (indistinct) hindsight I know, but that's the reality of it, isn't it?

Mr Ashton: I guess I'm trying to recreate in my mind the environment that existed around that time. Yeah, when that witness first come on-board you had all of the underworld killings going on, around that time.

¹³⁰ CA Submissions, [4381]

¹³¹ See for example [4793]-[4801].

Mr Hevey: Yes, they were.

Mr Ashton: Victoria Police Command would've been under considerable pressure, and there's this human source that comes on-board that could potentially solve a bunch of those murders or prevent others, and there (indistinct) this glittering prize but I think there'd be this sort of overall goal, we need to do this rather - that sometimes diverts you from the necessary sense of steps.

Mr Kirkham: Instead of glittering prize - -

Mr Ashton: Which in my eyes - -

Mr Kirkham: - - have you heard the term "noble cause" utilised?

Mr Ashton: Yeah, I don't think noble cause would apply here because noble cause implies that you are aware of the fact that you are doing something improper

Mr Kirkham: Chose to do it for the greater good

Mr Ashton: But have chosen to be ignorant of that or you've chosen to ignore.¹³²

213 Mr Ashton has also acknowledged the decision of the High Court, for example:
"I want to make it clear at the outset that I acknowledge the decision of the High Court, which has determined that the use of a lawyer as an informer between 2005 and 2009 was not appropriate. It is important to stress that Victoria Police has implemented substantial reforms since 2009 that have comprehensively changed the way that we manage informers."

Victoria Police understands the importance of cooperating fully and assisting the Commissioner with its inquiries in order to ensure that in the long term public confidence is not diminished.¹³³

214 The passages cited by Counsel Assisting were, in any event, all published after the inception of the Royal Commission and it cannot be found that statements made by Mr Ashton during this the Royal Commission were designed to or did have the effect of adversely influencing Victoria Police into straying from the path of proper conduct.

215 Because none of the material is in evidence it is unnecessary to go into detail, but it should be understood that the passages have been unfairly represented. For example, in regard to the 'pub test' quote, what Mr Ashton was truly saying was that when Ms Gobbo was not providing information that was subject to legal professional privilege, that did not offend the pub test.¹³⁴

216 In none of the quotes did Mr Ashton say that the ends justify the means. The objective evidence about Mr Ashton's view is to the contrary as can be seen in

¹³² Exhibit RC0113 Kellam Report, 6 February 2015, VPL.0007.0001.0001 at 134 – 135

¹³³ Graham Ashton Press Conference, 3 December 2018

¹³⁴ CA Submissions, [4800]

the evidence Mr Ashton provided to Mr Kellam in 2014.¹³⁵ What he was attempting to do was to give the public some context to the issues faced by and the times in which Victoria Police were operating which would be examined by the Royal Commission.¹³⁶ He was not seeking to condone or justify what had been done.¹³⁷

217 At the time of the statements, Mr Ashton was Chief Commissioner of Victoria Police and was expected to provide information to the public about the (past and present) operations of Victoria Police, including through regular media appearances. A proper analysis of the public statements made by Mr Ashton throughout the course of the Royal Commission shows that he was very careful to indicate that Victoria Police respected and was co-operating with the Royal Commission. Indeed, despite repeated questioning, Mr Ashton was careful not to answer questions which may have been the subject of matters on which he might be examined by the Commission, for example:

- (a) On 13 December 2018, 3AW radio host Neil Mitchell asked Mr Ashton why he had suggested an internal review in 2011. Mr Ashton responded that he was restricted in his response, as this would likely be a matter on which he may be asked to give evidence to the Royal Commission.¹³⁸
- (b) On 14 February 2019, in an interview with the ABC, Mr Ashton stated that Victoria Police would try to be as open and cooperative as possible with the Commissioner.¹³⁹
- (c) On 28 February 2019, Neil Mitchell asked Mr Ashton when he first discovered that Ms Gobbo was being used as a human source. Mr Ashton responded: "it's something that now the Royal Commission's afoot I really can't delve into until the matter is delved into by the Royal Commission."¹⁴⁰
- (d) In a further interview with Neil Mitchell on 27 June 2019, (which Counsel Assisting have used to assert that Mr Ashton was critical of the High Court's findings):
 - (i) Neil Mitchell asked Mr Ashton whether he was concerned that he would face criminal charges over the time taken for Victoria Police to produce documents to the Royal Commission. Mr Ashton responded that it was "*a matter for the Royal Commission*".

¹³⁵ Exhibit RC0113 Kellam Report, 6 February 2015 at 134 – 136

¹³⁶ Transcript, 9 December 2019 at 10663:33 – 40

¹³⁷ Ibid, 42 – 43

¹³⁸ 3AW Interview with Graham Ashton, 13 December 2018

¹³⁹ 3AW Interview with Graham Ashton, 14 February 2019

¹⁴⁰ 3AW Interview with Graham Ashton, 28 February 2019

- (ii) Mr Ashton was asked whether any person would be found accountable for what had occurred and responded that although he was unaware of any member of Victoria Police knowingly acted in bad faith, it was "*something that is going to be tested by the Commission*";
 - (iii) Mr Ashton was asked whether he felt any culpability. He responded that he did not feel culpable and that if he was requested to give evidence before the Royal Commission, he would do so to the best of his knowledge.
 - (iv) Mr Ashton concluded the interview by reassuring Mr Mitchell and his listeners that Victoria Police understood the importance of the Royal Commission and would continue to do everything that it could to assist.¹⁴¹
- (e) On 22 October 2019, Mr Ashton stated during his interview with Neil Mitchell, that he respected the processes of the Royal Commission. When asked when he first learned about "the Gobbo situation", Mr Ashton repeated his need to respect that this was evidence he would give to the Royal Commission.¹⁴²

218 Once Mr Ashton's public statements are properly analysed, it can be seen that the criticisms now sought to be levelled by Counsel Assisting, which cannot be used to support any findings for the reasons above, are completely unjustified. They should not have been made.

OVERALL CONCLUSION

- 219 A fair and careful analysis of the evidence does not point to any failures by Mr Ashton in his role with the Victoria Police nor breach of his police oath.
- 220 Any attempt to put a sinister overlay on Mr Ashton's conduct is the product of speculation and mischaracterising the true facts.
- 221 None of the findings that Counsel Assisting has identified as being open to be made against Mr Ashton should be accepted by the Commissioner.

Andrew Coleman SC

Banco Chambers

Peter Silver

Banco Chambers

¹⁴¹ 3AW Interview with Graham Ashton, 27 June 2019

¹⁴² 3AW Interview with Graham Ashton, 22 October 2019