

# Victoria Police Response to Counsel Assisting reply submissions with respect to Terms of Reference 1 and 2

## 1 Introduction

- 1.1 This response addresses a number of matters, which are raised for the first time in Counsel Assisting's reply submissions with respect to Terms of Reference 1 and 2 (**Reply Submissions**).
- 1.2 In summary, Victoria Police makes the following points in response to the Reply Submissions:
- 1.3 *First*, there are instances in the Reply Submissions where Counsel Assisting have attributed the submissions made by current and former Victoria Police members to Victoria Police itself. There is a clear demarcation between the submissions of Victoria Police and the submissions of its current and former members. The Reply Submissions are confusing because they fail to distinguish between those submissions. This has also led Counsel Assisting to make a number of errors as to what Victoria Police has submitted and what flows from those submissions. These errors are identified below.
- 1.4 *Second*, Counsel Assisting have criticised the witness statements prepared by current and former members of Victoria Police in a way that is unfair to those individual members and fails to have proper regard to the circumstances in which they were made.
- 1.5 *Third*, Counsel Assisting have attempted to undermine Victoria Police's apology for the events that were the subject of inquiry by the Royal Commission in a way that is unhelpful and wrong.
- 1.6 *Fourth*, this response identifies three instances in the Reply Submissions where Counsel Assisting has sought to criticise Victoria Police based on submissions made by Ms Gobbo to the effect that Counsel Assisting was biased and approached the Royal Commission with a pre-conceived narrative. Victoria Police did not make these submissions. The way in which Counsel Assisting respond to Ms Gobbo's submissions is misleading and highlights the importance of and the need for precision which is regrettably lacking in the Reply Submissions.

## 2 The submissions of Victoria Police and its members

- 2.1 Victoria Police went to great care in its responsive submissions to clearly distinguish those submissions from the submissions made by numerous individual current and former members. Notwithstanding this clear demarcation, the Reply Submissions consistently and incorrectly attribute submissions made by individuals to Victoria Police as an organisation.<sup>1</sup>

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<sup>1</sup> For example, the Reply Submissions at [24], [39]-[40] and [163]-[166]; footnotes 3, 4 and 16 to the Reply Submissions.

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- 2.2 So that there is no confusion, the submissions filed by Victoria Police are organised as follows:
- (a) In tranche 1 (submissions dated 17 August 2020) (**Tranche 1 submissions**), submissions are made on behalf of seven current and former members of Victoria Police.<sup>2</sup>
  - (b) In tranche 2 (submissions dated 25 August 2020) (**Tranche 2 submissions**), submissions are made on behalf of Victoria Police. Annexed to the Tranche 2 submissions are submissions made on behalf of an additional 22 current and former members of Victoria Police.
- 2.3 Unless they have been expressly adopted by Victoria Police in the Tranche 2 submissions, the submissions in Tranche 1 and the Tranche 2 Annexure are the submissions of the relevant individuals alone.
- 2.4 The Reply Submissions also refer to the submissions of seven identified members of Victoria Police, but describe the Tranche 1 submissions as the “Responsive submissions of Victoria Police”.<sup>3</sup> This description is misleading because it suggests that those submissions were made on behalf of Victoria Police as an organisation when in fact it is clear that they were not.
- 2.5 Counsel Assisting have persistently failed to properly distinguish between the submissions of Victoria Police and the submissions of its current and former members. This failure has the potential to confuse the reader, who may also conflate the submissions of Victoria Police with the submissions of individual members. The failure to properly distinguish between the submissions of Victoria Police and the submissions of its current and former members has also led to instances where Counsel Assisting unfairly criticise Victoria Police by relying on submissions that it did not make. This is most obvious in Counsel Assisting’s Reply Submissions on the Kellam Report. Victoria Police’s response to that matter is set out in section 4, below.

### 3 The value of witness statements

- 3.1 Over 150 witness statements were prepared by individual current and former Victoria Police members for the Royal Commission. Each witness statement was produced voluntarily. The *Inquiries Act 2014* does not compel witnesses to prepare statements. Rather, these individuals did so to aid the Royal Commission and to allow hearings to be more efficient than would have been possible if all evidence had to be led orally.
- 3.2 Indeed, many witnesses were not called to give oral evidence, presumably because the statements that they prepared were sufficiently detailed to encapsulate all of the evidence that was required by the Royal Commission.
- 3.3 In the Reply Submissions, Counsel Assisting rightly say (at [208]) that they were assisted by the provision of statements. However, Counsel Assisting then criticise those statements on the basis that they did not deal comprehensively, or at all, with matters of significance, did not make concessions, even appropriate ones, and Counsel

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<sup>2</sup> Tranche 1 submissions at [1.1].

<sup>3</sup> For example, footnotes 45-47, 50-52, 54-57, 180-182, 186, 201, 203-215, 219-224, 230-232, 267-268, 270, 276, 282, 288-293, 295-301, 308, 310-318, 320-321, 325-327, 329, 337-338, 352, 362-363, 365-366, 395, 398-400, 407, 409-410, 413, 428, 451, 463, 467, 469, 476, 478, 485, 487, 489, 497-498, 503, 541-548, 554-555, 559, 567, 571-575, 577, 581-584, 588, 594, 604-606, 608, 625-626, 638-651, 653-658, 667-671, 673-675, 684-690, 692-695, 702-717, 719, 722-723, 729, 731-732, 734, 736-739, 750, 752, 756, 759-760, 762-766, 768-772, 777-778, 783-785, 787, 794-798, 803-807, 816-818, 825-826, 834, 836, 842, 844, 847, 850-851, 853-856, 863-867, 871, 874-876, 886, 917, 955, 958, 961, 970-974 and 976 to the Reply Submissions.

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Assisting were required to examine witnesses closely in order to acquit the terms of reference.<sup>4</sup>

3.4 This criticism is not accepted for the following reasons:

- (a) Each witness statement was prepared in response to questions specifically identified by the Royal Commission. Often, the Royal Commission asked questions without any regard to the witnesses' individual circumstances. For example, on 19 March 2019<sup>5</sup> and 23 May 2019,<sup>6</sup> the Royal Commission made a blanket request for witness statements from 77 current and former Victoria Police members. All 77 members were asked the same 14 questions, notwithstanding the obvious differences in their level of involvement in the matters that are the subject of the Royal Commission.
- (b) Many witnesses did identify and address in their statements the topics of significance to the Royal Commission that went beyond the specific questions asked. However, witnesses should not be criticised for failing to foresee the significance of certain topics in circumstances where they were not specifically asked to address them, particularly given that the events examined took place long ago. There are examples where witnesses prepared supplementary witness statements in response to matters of significance that they had not appreciated at the time they prepared their initial statement, but which became clear during the evidence, or because the Royal Commission requested the statement. If the Royal Commission had requested any further witness statement on a specific topic of interest, then it would have been provided.
- (c) Counsel Assisting's contention that witness statements were self-serving or did not make concessions is unfair to the individual members who prepared statements and is not accurate. Witness statements were often the only opportunity that current and former Victoria Police members had to address the facts known to them. Where the witness was called to give evidence, their statements essentially took the place of "evidence in chief" prior to cross examination. Plainly, many witnesses did make concessions in their statements.
- (d) The witness statements prepared by current and former Victoria Police members dramatically reduced the hearing time that would otherwise have been necessary to explore these issues. It simply would not have been possible for the Royal Commission to have received the significant body of evidence that it has received without the cooperation of these current and former Victoria Police members in producing those statements. The process was a massive undertaking and it was undertaken diligently and seriously. Counsel Assisting's criticism is unfounded.

## 4 Victoria Police takes responsibility for its failings in relation to the use of Ms Gobbo as a human source

4.1 In its submissions, Victoria Police accepted without reservation that the way in which Ms Gobbo was managed as a human source resulted in a profound interference with the relationship between a lawyer and client and that this was a major failing. Victoria

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<sup>4</sup> Reply Submissions at [208].

<sup>5</sup> See letters from the Royal Commission to current and former members dated 19 March 2019.

<sup>6</sup> See letter from the Royal Commission to Victoria Police dated 23 May 2019 requesting written statements from current and former members.

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Police apologised to the courts whose processes were impacted by what occurred and to the community for breaching its trust.<sup>7</sup>

- 4.2 In the Reply Submissions,<sup>8</sup> Counsel Assisting seek to undermine that apology. They do so by contending that in its submissions, Victoria Police understated the effect of the findings of the Kellam Report and was unwilling to accept that individual members were at the very least negligent and bore some responsibility for what occurred. These contentions are incorrect and misrepresent the submissions made by Victoria Police.
- 4.3 That Victoria Police would accept responsibility and apologise for what has occurred is hardly surprising and is entirely appropriate. The public position adopted by Victoria Police in its submissions is consistent with its publicly stated position after the Kellam Report was handed down and is consistent with its publicly stated position throughout the Royal Commission.
- 4.4 Victoria Police accepts responsibility and apologises for what has occurred because it is appropriate to do so and is the right thing to do. The apology reflects the genuinely held view of Victoria Police Command led by the new Chief Commissioner. To suggest that the apology was anything other than genuinely made is offensive and without foundation.
- 4.5 Contrary to the Reply Submissions, Victoria Police has not attempted and does not attempt to diminish the findings of the Kellam Report or the individual responsibility of certain current and former members of Victoria Police. The submissions of Victoria Police in relation to the Kellam Report could not be clearer.<sup>9</sup> They are repeated below:
- Victoria Police accepted – and still accepts – the findings of the Kellam Report. Those findings include that the conduct resulted from *“behaviour constituting negligence of a high order on the part of those responsible for their supervision, guidance, instruction and management in the particular prevailing circumstances of obvious attendant risk”*. Mr Kellam described the events as *“serious systemic failure”* by the organisation.
- 4.6 The Reply Submissions also incorrectly contend that Victoria Police is unwilling to accept that any individual was at the very least negligent.<sup>10</sup> Again, the submissions of Victoria Police in relation to this issue are very clear:<sup>11</sup>
- For the reasons explained in these submissions, the reasons why this occurred are primarily organisational and systemic. **That is not to say that individuals did not make significant mistakes, nor is it to fail to recognise and accept that individual accountability is important. Very many members and veteran members involved in the recruitment and handling of Ms Gobbo have accepted their own mistakes and the things that should have been done but were not.** However, the way to ensure that this will never happen again is through continued improvement to leadership practices, systems, governance, supervision and culture.
- 4.7 Counsel Assisting’s contention (at [218]) that Victoria Police has attempted to shield individuals from bearing responsibility for their actions is patently wrong. The Victoria Police position is simply that, on the evidence before the Royal Commission, it is not possible for the Commissioner to conclude that any one individual acted with knowing

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<sup>7</sup> Tranche 2 submissions at [2.8]-[2.9].

<sup>8</sup> Reply Submissions at [209]-[218].

<sup>9</sup> Tranche 2 submissions at [2.6].

<sup>10</sup> Reply Submissions at [217].

<sup>11</sup> Tranche 2 submissions at [2.10].

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impropriety. Counsel Assisting's commentary on the leadership of Victoria Police is wrong. Contrary to the submissions of Counsel Assisting, the ability of an organisation to reflect on its failings and accept its shortcomings is a measure of strong and effective leadership.

- 4.8 The fact that Victoria Police considers it accurate, fair and appropriate to acknowledge that it bears primary responsibility for what occurred does not undermine its apology, its acceptance of what occurred or that certain individuals bear responsibility for their mistakes.

## 5 There was no pre-conceived narrative

- 5.1 Throughout the Reply Submissions, there are examples where Counsel Assisting have failed to precisely identify the author of the submissions to which they are seeking to respond.
- 5.2 For example, in paragraph 256, Counsel Assisting submit that there is a sense of irony in some of the submissions accusing them of having a pre-conceived narrative and then accuse Victoria Police in having adopted a pre-conceived narrative of its own. The only person identified in the Reply Submissions as having made such an accusation is Ms Gobbo. No such submission was made by Victoria Police or any individual member of Victoria Police.
- 5.3 The use of a submission made by Ms Gobbo as a platform to criticise Victoria Police is, at best, confusing to the reader and, at worst, apt to mislead.
- 5.4 Fundamentally, however, the submission that Victoria Police approached the Royal Commission with a pre-conceived narrative is without basis. Victoria Police responds as follows:
- (a) The fact that Victoria Police does not accept some of the proposed findings of Counsel Assisting does not mean that it has not approached the Royal Commission with an open mind. Victoria Police has closely considered all of the evidence before the Royal Commission and the submissions of Counsel Assisting in preparing its submissions.
  - (b) The premise of the criticism on Victoria Police in paragraph 256 – that Victoria Police approached the Royal Commission with pre-determined narrative in spite of the findings of the Kellam Report – fails to take into account that Victoria Police accepted (and accepts) the findings of Kellam Report, including findings that there had been negligence of a high order.
  - (c) Having accepted the findings of the Kellam Report, there is no question that there was a potential for conflict between the position of Victoria Police and certain current and former members of Victoria Police. Where appropriate some members and former members have received independent legal representation.
  - (d) Since the inception of the Royal Commission, Victoria Police has been aware of the possibility for conflict between it and its current and former members. On many occasions, Victoria Police has determined that there was no conflict between Victoria Police and the individual member. On other occasions, Victoria Police has arranged alternative legal representation because of the possibility of conflict. Where members or former members themselves have perceived a conflict, alternative legal representation has been arranged.
  - (e) The possibility for conflict of interest and Victoria Police's approach to managing conflict was the subject of open and transparent correspondence between the
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solicitors assisting the Royal Commission and the solicitors acting for Victoria Police.<sup>12</sup>

- (f) The Royal Commissioner and Royal Commission staff were also consulted on information barriers that have been implemented by the solicitors for Victoria Police. Those information barriers have been adhered to.

- 5.5 Having regard to the significant body of evidence that has been received by the Royal Commission, it is not surprising for Victoria Police to have formed its own view about the events that have been the subject of the inquiry. It is to be expected that Counsel Assisting and Victoria Police would not agree on every matter and it is entirely appropriate for Victoria Police to take issue with submissions and proposed findings of Counsel Assisting.
- 5.6 The fact that Victoria Police accepts the findings of the Kellam Report but takes issue with some of the recommendations of Counsel Assisting does not support a conclusion that Victoria Police has pre-determined its position with regard to the inquiry.

## 6 Alleged apprehended bias

- 6.1 Another example of Counsel Assisting conflating submissions of various parties occurs in paragraph 1038 of the Reply Submissions where Counsel Assisting refer in a general way to submissions raising issues of alleged denials of procedural fairness and alleged apprehended bias.
- 6.2 Victoria Police has made detailed submissions about procedural fairness.<sup>13</sup> It was not controversial for it to have done so, given that the obligation to afford procedural fairness to potentially affected persons is accepted by Counsel Assisting in Volume 1 of their submissions and in the Reply Submissions.<sup>14</sup>
- 6.3 In contrast, Victoria Police has not made and does not make a submission of apprehended bias against Counsel Assisting. The only party identified in the Reply Submissions as having made an allegation of apprehended bias about Counsel Assisting is Ms Gobbo.
- 6.4 As Victoria Police has not made an allegation of apprehended bias against Counsel Assisting, there is patently no basis for Counsel Assisting to submit in a general way that such allegations are made to *“elide individual responsibility or to attempt to frame public opinion, or diminish the findings and recommendations of the Royal Commission”*.<sup>15</sup> This is the very opposite of what Victoria Police has done and therefore the submission by Counsel Assisting is unfounded.

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<sup>12</sup> See for example, letters from Holding Redlich to Corrs dated 19 February 2019 and 5 March 2019; letter from Corrs to Holding Redlich Dated 12 March 2019.

<sup>13</sup> Tranche 2 submissions at [14.1]-[14.19].

<sup>14</sup> Reply Submissions at [10].

<sup>15</sup> Reply Submissions at [1038].