Royal Commission
into the Management of Police Informants

Counsel Assisting Submissions with respect to Terms of Reference 1 and 2

Volume 1
Legal Principles

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INTRODUCTION

1. On 3 December 2018, the Premier of Victoria, the Honourable Daniel Andrews MP, announced that the Victorian Government would establish a Royal Commission into the Management of Police Informants ("the Commission"). That announcement followed the publication of the High Court of Australia's judgment in *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)*[1] ("*AB v CD*").

2. In that judgment, the High Court of Australia (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) held *per curiam*:[2]

> EF's [Ms Gobbo's] actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of 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.[3] As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.

3. The Letters Patent,[4] as amended,[5] require the Commission to inquire into and report on the following terms of reference:

    1. The number of, and extent to which, cases may have been affected by the conduct of EF as a human source.
    2. 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.
    3. The current adequacy and effectiveness of Victoria Police's processes for the recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, including:
        a. whether Victoria Police's practices continue to comply with the recommendations of the Kellam report; and
        b. whether the current practices of Victoria Police in relation to such sources are otherwise appropriate.
    4. The current use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege, subject to section 123 of the Inquiries Act 2014, including:
        a. the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of such human sources to prosecuting authorities; and

[1] (2018) 93 ALJR 59.
[2] At 62 [10].
[3] See *Victoria Police Act 2013* (Vic), Sch 2, and formerly *Police Regulation Act 1958* (Vic), Second Schedule.
[4] 13 December 2018.
[5] 7 February 2019.

b. whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the Office of Public Prosecutions prosecutes indictable matters on behalf of the Director of Public Prosecutions, when the investigation has involved human source material.

5. Recommended measures that may be taken to address:

a. the use of any other human sources who are, or have been, subject to legal obligations of confidentiality or privilege and who come to your attention during the course of your inquiry; and

b. any systemic or other failures in Victoria Police's processes for its disclosures about and recruitment, handling and management of human sources who are subject to legal obligations of confidentiality or privilege, and in the use of such human source information in the broader criminal justice system, including how those failures may be avoided in future.

6. Any other matters necessary to satisfactorily resolve the matters set out in paragraphs 1-5.

4. The submissions of Counsel Assisting address the Commission's first and second terms of reference.[6]

5. There are three Volumes to the submissions:

5.1. Volume 1 of the submissions ("the Legal Principles Submissions") takes the following structure:

5.1.1. first, there is this introduction (Chapter 1)

5.1.2. secondly, it will consider relevant guiding principles, including setting out the role of the Commission, the construction of its terms of reference, the treatment of evidence before the Commission, and the analysis methodology utilised (Chapter 2)

5.1.3. thirdly, it will consider the legal principles underpinning the first term of reference, including classifying the relevant conduct of Ms Gobbo (Chapter 3)

5.1.4. fourthly, it will consider types of criminal conduct and other misconduct of particular relevance to the first term of reference (Chapter 4)

5.1.5. fifthly, it will consider the legal principles underpinning the second term of reference, including considering the various sources and content of the duties and obligations of members of Victoria Police, and classifying the relevant conduct of members of Victoria Police (Chapter 5)

5.1.6. sixthly, it will consider types of criminal conduct and other misconduct of particular relevance to the second term of reference (Chapter 6).

[6] Counsel Assisting will not be making submissions on terms of reference three, four, five and six.

6. Volume 2 will set out submissions, based on the evidence and in narrative form, addressing the use of Ms Gobbo as a human source by Victoria Police ("the Narrative Submissions").

7. Volume 3 will set out submissions concerning specific cases which it will be submitted may have been affected by the use of Ms Gobbo as a human source by Victoria Police ("the Case Studies Submissions").[7]

8. The Commissioner has directed that those with standing leave provide any submissions in response by 7 August 2020.

[7] The specific case studies of two persons, Mr Cooper and Mr Thomas, are contained within the narrative section, due to the centrality of those matters in the inquiry under the first and second terms of reference.

RELEVANT GUIDING PRINCIPLES

The Role of the Commission

9. The Commission is established and conducted under the *Inquiries Act 2014* (Vic) ("the *Inquiries Act*").

10. The Commission has broad powers to compel production of documents and other things and to require the attendance of witnesses. It does not have the power to compel production of documents or attendance by certain Commonwealth bodies such as the Commonwealth Director of Public Prosecutions ("CDPP"), or other agencies, such as the Australian Federal Police ("AFP"), Australian Crime Commission ("ACC") or the Australian Border Force ("ABF").

11. Section 123(1) of the *Inquiries Act* means that the Commission cannot inquire into various persons or bodies, a number of which are relevant to the Commission's terms of reference.[8] However, a number of such persons or bodies have voluntarily provided information to the Commission.

12. The Commission's role is distinct from that of a court, significantly in that it "…can neither decide nor determine anything and nothing that it does can in any way affect the legal position of any person".[9]

13. In the context of this Commission, the Commissioner may make findings, for example, that a particular case *may* have been affected by Ms Gobbo's conduct as a human source. In her opening address, the Commissioner noted in relation to the first term of reference, that:[10]

> [t]his Commission has no judicial power. It is not empowered to quash convictions, change sentences or order retrials. If, as a result of the Commission's reporting on this term of reference, individuals decide to challenge their convictions or sentences, they must do so in the courts.

Construction of the Terms of Reference

14. Construction of the terms of reference is a matter for the Commissioner.[11]

15. There are a number of authorities relevant to the construction of the terms of reference which indicate that they must be construed:

    15.1. with care in order to avoid uncertainty or litigation about their interpretation[12]

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[8] For example, the Director of Public Prosecutions for Victoria, a Crown Prosecutor, or a judicial officer.
[9] *Lockwood v Commonwealth* (1954) 90 CLR 177, 181 (Fullagar J); see also *McGuinness v Attorney-General* (Vic) (1940) 63 CLR 73, 84 (Latham CJ).
[10] Royal Commission into the Management of Police Informants, Opening Statements, 15 February 2019, 12, TRN.2019.02.15.01.P.
[11] See *Easton v Griffiths* (1995) 69 ALJR 669, 672 [12] (Toohey J): "[i]t is for the Commissioner to determine the scope of [the] inquiry, subject to any decision on the matter by a court of competent jurisdiction".
[12] Such disputes are justiciable and commissions may be restrained from, or have adverse declarations made against them for, travelling beyond the scope of their terms of reference: See Peter M Hall, *Investigating Corruption and Misconduct in Public Office* (2nd Ed), 2019, at 535 [9.105], citing the Honourable Justice James Wood AO, "Royal Commissions — A Prelude to the Reform Process", 6 September 1998, at 8. See also Hall at 536 [9.110] and the references cited therein.

15.2. with regard to standards of fairness to the subjects of the inquiry, and to avoiding "fishing expeditions"[13]

15.3. with regard to budgetary considerations and completing the Commissioner's investigation and report on time.[14]

16. Construction of the terms of reference should utilise a purposive approach.[15]

17. There is a strong interplay between the first and second terms of reference, namely:

17.1. in relation to the first term of reference, the number of, and extent to which, cases may have been affected by Ms Gobbo's conduct as a human source cannot be properly analysed and understood without consideration of the relevant conduct of members of Victoria Police in relation to those cases

17.2. in relation to the second term of reference, the relevant conduct of members of Victoria Police in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source cannot be properly analysed and understood without consideration of Ms Gobbo's conduct as a human source, and consideration of the impact of the conduct of members of Victoria Police on particular cases.

The First Term of Reference

18. The first term of reference requires the Commission to inquire into and report on "[t]he number of, and extent to which, cases may have been affected by the conduct of [Ms Gobbo] as a human source".

19. The "conduct of Ms Gobbo" refers to Ms Gobbo's acts and omissions as a human source. Her conduct as a human source must be seen in the context of her representing or acting for accused persons, which includes the provision of legal advice. This necessarily invites an examination of her duties as a legal practitioner to the administration of justice, to the court and to her clients, and the potential consequences of breaching of those obligations, including whether such conduct may have affected cases. Ms Gobbo's conduct is identified as the focus of the first term of reference, however as described above at [17], the conduct of members of Victoria Police is also directly relevant to the analysis required under that term of reference. Notably, as will be considered below and set out in the tables at [249] and [465], Counsel Assisting have developed categories of conduct of Ms Gobbo and members of Victoria Police, which are applied when considering whether, and the extent to which, cases may have been affected.

20. "As a human source" is properly construed to concern conduct in connection with Ms Gobbo's provision of information to, and otherwise assisting (or attempting to assist), police. Assisting police is considered to include conduct that sought to assist in the prosecution, which is taken to include the police investigation, of her client, such as encouraging co-accused or other witnesses to provide evidence

[13] See P Weller (ed) *Royal Commissions and the Making of Public Policy* (MacMillan Education Centre Pty Ltd, 1994), Preface at p x, cited in Hall at 536 [9.105].
[14] See P Weller (ed) *Royal Commissions and the Making of Public Policy* (MacMillan Education Centre Pty Ltd, 1994), Preface at p x, cited in Hall at 536 [9.105].
[15] *Thiess v Collector of Customs* (2014) 250 CLR 664, 671, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ), cited with approval in *Independent Commission Against Corruption v Cunneen* (2015) 261 CLR 1, 20-1 [31] (French CJ, Hayne, Kiefel and Nettle JJ). See further term of reference six: The Royal Commission into the Management of Police Informants is appointed to inquire into and report on: …6. Any other matters necessary to satisfactorily resolve the matters set out in paragraphs 1-5".

against her client, or encouraging her client to plead guilty. Whilst the majority of Ms Gobbo's conduct which may have affected cases occurred during periods of registration as a human source, these submissions also analyse a number of cases which may have been affected by Ms Gobbo's conduct in periods when she was not a registered human source, but even so may have been providing information, or otherwise assisting (or attempting to assist) police in a manner consistent with being a human source. Accordingly, the terms "human source" and "informer" are taken to have the same meaning in these submissions.

21. The word "case" is construed to refer to a specific proceeding in which a conviction or finding of guilt has been obtained,[16] in order to give practical meaning to the word "affected". This means that there may be cases which may have been affected by Ms Gobbo's conduct as a human source, in such a way that, for example, the accused person did not receive a fair trial, but because they resulted in an acquittal or a discontinuance, they are not considered to be "cases" for the purposes of this inquiry. Further, the notion of "cases" is taken to refer to both summary proceedings and indictable proceedings. Both types of proceedings have been the subject of this inquiry and both are considered in these submissions. Where the submissions refer to "summary cases", that refers to proceedings (whether concerning summary offences or indictable offences triable summarily) that were determined in the summary jurisdiction of the Magistrates' Court of Victoria or the associated appellate jurisdiction of the County Court of Victoria, as represented in LEAP criminal history records or in copies of court orders. Where the submissions refer to "indictable cases", the reference is to proceedings that were determined on indictment or presentment in the County Court of Victoria or the Supreme Court of Victoria (or by way of associated appeal), as represented by those originating documents.

22. "Affected" is construed by reference to whether the impugned "conduct" may be relevant to the Court of Appeal in determining an appeal against conviction, or a second or subsequent appeal against conviction, or a referral from a petition for mercy, and when considering whether there has been a substantial miscarriage of justice, as discussed in detail below at [141]-[222].[17]

23. "Extent" is construed as the number of ways in which the case may have been affected, by reference to the types of conduct, which, if found, may be relevant to the Court of Appeal in determining an appeal against a conviction, or a second or subsequent appeal against conviction, or a referral from a petition for mercy, as discussed in detail below at [91]-[137].

24. The presence of the word "may" in the first term of reference sets a low threshold, and is interpreted to equate to the notion of "reasonable possibility". Any ultimate submission made to the effect that it is open to find that a case "may have been affected" is therefore different to conclusions of the kind with which criminal appellants and appellate courts are concerned. Such a submission does not make any suggestion as to the merits of any potential challenge to a conviction, or any determination that a case *was* affected.

[16] Participation in a diversion program (within the meaning of s 59 of the *Criminal Procedure Act 2009* (Vic) or any earlier provision for similar programs) has not been treated as a finding of guilt or conviction.
[17] It is acknowledged that some of the relevant cases are summary cases, where an appeal would lie to the County Court of Victoria, or to the Supreme Court of Victoria on a question of law, however it has been determined that, given the majority of cases are indictable cases, the most appropriate approach is to consider the approach taken by the Court of Appeal.

The Second Term of Reference

25. The second term of reference requires the Commission to inquire into and report on "[t]he conduct of current and former members of Victoria Police in their disclosures about and recruitment, handling and management of [Ms Gobbo] as a human source".

26. "Disclosures" refers to disclosures made by Victoria Police directly to an accused person and/or his or her legal representative(s), or prosecuting agencies such as the Victorian Director of Public Prosecutions ("DPP") and/or other bodies such as the Victorian Government Solicitor's Office ("VGSO").[18]

27. "Recruitment" refers to the circumstances in which Ms Gobbo was recruited, or came to act as a human source, during the period in relation to which the Commission has been inquiring.

28. "Handling" refers to how Ms Gobbo was handled as a human source.

29. "Management" refers to how Ms Gobbo was managed as a human source.

30. 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 or 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.

31. Again, "as a human source" is properly construed to concern conduct in connection with Ms Gobbo's provision of information to, and otherwise assisting (or attempting to assist), police.

Treatment of Evidence

32. Section 12 of the *Inquiries Act* provides the Commission with a broad procedural discretion as follows:

> A Royal Commission may conduct its inquiry in any manner that it considers appropriate, subject to—
>
> (a) the requirements of procedural fairness; and
>
> (b) the letters patent establishing the Royal Commission; and
>
> (c) this Act, the regulations and any other Act.

33. Further, s 14 of the *Inquiries Act*, provides that "[a] Royal Commission is not bound by the rules of evidence or any practices or procedures applicable to courts of record and may inform itself on any matter as it sees fit."

[18] It should be noted that in their Opening Statements, both the Commissioner and Senior Counsel Assisting expressed such a view, 15 February 2019, 12, 24, TRN.2019.02.15.01.P.

34. Whilst the Commission is not bound by the rules of evidence, it has not disregarded them in so far as they assist in providing "substantial justice" to the parties concerned.[19]

35. Given the subject matter of this Commission, it is important to note that s 18(2)(c) of the *Inquiries Act* confirms that public interest immunity ("PII") is a "reasonable excuse" to refuse to give information to the Commission.

36. Sections 32 and 33 of the *Inquiries Act* qualify the application of legal professional privilege and the privilege against self-incrimination respectively.

37. Subject to limited exceptions, evidence before the Commission is not admissible in other proceedings.[20]

38. As with other Royal Commissions, a broad, liberal approach has been taken to the question of relevance and admissibility, having regard to its investigatory nature and the sixth term of reference.[21]

39. It should be noted that these submissions draw together and rely on evidence from a number of sources, including witness statements, oral evidence, and contemporaneous records of communications between Ms Gobbo and her handlers consisting mainly of Informer Contact Reports ("ICRs"), diary entries and transcripts of face-to-face meetings.

40. The review of that material revealed what appeared to be potential instances and themes of misconduct, which were put to witnesses in hearings before the Commissioner. Witnesses examined included Ms Gobbo and current and former police members, who were generally legally represented, and subject on occasion to re-examination.

Standard of Proof

41. Due to the investigative, as opposed to adversarial, nature of the Commission's inquiry, there is no *onus* of proof upon any party.[22]

42. It is submitted that the standard of proof that applies to the Commission is the civil standard,[23] being reasonable satisfaction on the balance of probabilities.

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[19] *R v The War Pensions Entitlement Appeal Tribunal; Ex Parte Bott* (1933) 50 CLR 228, 256 (Evatt J):
Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, "bound by any rules of evidence." Neither it is. *But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party*. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice."…
(Emphasis added.)

[20] *Inquiries Act 2014* (Vic), s 40.

[21] "The Royal Commission into the Management of Police Informants is appointed to inquire into and report on: …6. Any other matters necessary to satisfactorily resolve the matters set out in paragraphs 1-5".

[22] See, e.g., *Bushell v Repatriation Commission* (1992) 175 CLR 408, 425 (Brennan J).

[23] See, e.g., the *Royal Commission into Trade Union Governance and Corruption, Final Report* (2015) Vol 1, 52-3; *Royal Commission into the Building and Construction Industry, Final Report* (2003) Vol 2, Ch 5, 48-49. See also *First Report of the Parliamentary Judges Commission of Inquiry* (Queensland) (1989), the report of McGregor J of the *Royal Commission into Matters in Relation to Electoral Redistribution in Queensland* (Commonwealth of Australia, 1977), and the report of the Hon W J Carter QC of the *Royal Commission into an Attempt to Bribe a Member of the House of Assembly* (Tasmania) (1991).

43. However, as explained by Dixon J (as his Honour then was) in *Briginshaw v Briginshaw*[24] ("*Briginshaw*"):[25]

> ... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But *reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal*. *In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

(Emphasis added and citations omitted.)

44. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,[26] Mason CJ, Brennan, Deane and Gaudron JJ cautioned that:[27]

> … authoritative statements … to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'…should not… be understood as directed to the standard of proof. Rather, *they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct*.
>
> There are, however, circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading…
>
> (Emphasis added and citations omitted.)

45. Regardless of the gravity of the findings, the standard of proof does not approach the criminal standard. As Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ stated in *Rejfek v McElroy*:[28]

> But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words; it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.

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[24] (1938) 60 CLR 336.
[25] at 361-3. See also s 140(2) of the *Evidence Act 2008* (Vic), which constitutes a statutory recognition of the principle: see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466, 480 [31] (Weinberg, Bennett and Rares JJ).
[26] (1992) 110 ALR 449.
[27] At 450.
[28] (1965) 112 CLR 517, 521.

46. The relevant principles establish that, when considering the weight of the evidence the decision-maker should bear in mind:

    46.1. the seriousness of any submissions made to the effect that it is open to find that there may have been criminal conduct or other misconduct;

    46.2. the inherent unlikelihood of the conduct alleged;

    46.3. the gravity of the consequences flowing from an adverse finding; and

    46.4. in relation to allegations that amount to criminal conduct, weight must be given to the presumption of innocence.

47. Findings in the present inquiry may give rise to significant adverse effects on the reputation of individuals, to potentially indirect effects on the liberty of individuals, and impact upon public confidence in the administration of justice. Accordingly, the *Briginshaw* standard should be applied in relation to both the first and second terms of reference.

48. However, it is important to note that, within the first term of reference, there are two discrete questions or propositions under consideration. The first is the *factual* question or proposition concerning what relevant conduct was engaged in by Ms Gobbo as a human source (together with the related conduct of members of Victoria Police) in relation to a particular case. The second is the *legal* question or proposition as to whether such conduct may have affected a case. In respect of the first question, the standard of proof to apply is the *Briginshaw* standard as explained above. In respect of the second question, however, no standard of proof applies as such, by virtue of its *legal* as opposed to *factual* nature. Rather, in relation to the second question, the threshold to apply is set by the qualifying word "may", which, as set out above at [25], is taken to set a threshold akin to "reasonable possibility". It is submitted that to set a higher threshold would risk usurping the proper function of the Court of Appeal when considering whether cases *have* been affected and whether or not there *has* been a substantial miscarriage of justice.

49. In contrast, when it is submitted that Ms Gobbo and/or members of Victoria Police *may* have engaged in specific instances of [redacted] misconduct, the standard is as explained by the Hon Mr Dyson Heydon AC QC:[29]

> …the word is used to convey the view that there is credible evidence before the Commission raising a probable presumption that a breach of law, regulation or professional standard has occurred.

50. The Hon Mr Heydon AC QC further explained:[30]

> …the phrase 'strong or probable presumption' has been employed in a number of previous inquiries.[31] According to the House of Lords in Armah v Government of Ghana,[32] it requires the decision maker to decide whether on the whole of the evidence it is probable that the offence was committed. Here 'probable' means not certain, nor nearly certain, but more than merely

[29] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1 Ch 1, 19 [62]. Further, Counsel Assisting respectfully adopt the reasons at 20-1 [64]-[67]. The approach was adopted in the Royal Commission into Trade Union Governance and Corruption, Final Report (2015), 55 [131]-[133].
[30] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1 Ch 1, 20-1 [66].
[31] See *Report of the Board of Inquiry into Allegations of Corruption in the Police Force in Connection with Illegal Abortion Practices in the State of Victoria*, 1971 at p 12; *Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force*, 1978 at pp 17–18.
[32] [1968] AC 192.

possible. On this formulation, a finding could only be made that a breach of law, regulation or professional standard may have occurred where on credible evidence before it, it is probable, and not merely possible, that a contravention occurred. This, of course, does not amount to a finding that the contravention has occurred. Rather, it reflects, the idea consistently with Briginshaw v Briginshaw, that a finding that a contravention of the law, regulation or professional standard may have occurred should not lightly be made. It is an appropriate way to balance the need to avoid tarnishing the innocent with the need to avoid unfairly prejudicing others.

51. It is acknowledged that, unlike other Royal Commissions,[33] there is no express reference in this Commission's terms of reference to breaches of laws, regulations or professional standards. However, it is submitted that it is appropriate within the first and second terms of reference to consider whether, in some circumstances, Ms Gobbo and members of Victoria Police may have committed specific instances of [redacted] misconduct. That is because such conduct is relevant when considering whether, and to what extent, cases may have been affected (for example whether an accused person may have had an argument at trial for a temporary or permanent stay of proceedings, or for the exclusion of improperly or illegally obtained evidence under s 138(1) of the *Evidence Act 2008* (Vic)). Such conduct is also relevant when giving consideration to the conduct of current and former members of Victoria Police in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source, which includes considering the duties and obligations of members of Victoria Police.

Structure of Volumes Two and Three

52. The submissions of Counsel Assisting in Volumes Two and Three set out the evidence received by the Commission relevant to the period from 1993 to the commencement of the Commission. The submissions contain a factual analysis of that period, relevant to the first and second terms of reference. Based on that factual analysis, Volumes Two and Three contain submissions as to findings which are open to the Commissioner, including findings that would be adverse to the interests of Ms Gobbo and certain current and former members of Victoria Police. As explained above, the conduct is identified as it is relevant to the terms of reference.

53. [redacted]

54. The two chapters are detailed "case studies" relevant to the cases of Messrs Thomas and Cooper. These cases have been given particular focus because of their significance and centrality to the relationship between Ms Gobbo and Victoria Police. They represent the two major streams of investigation of the Purana Taskforce (which was the unit that primarily utilised the information provided by Ms Gobbo), namely the investigations of gang murders (Mr Thomas's case) and the investigations of serious drug trafficking (Mr Cooper's case). The cases are of

[33] Such as the Royal Commission into Trade Union Governance and Corruption (2015), the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), the Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme (2006), and Royal Commission into HIH Insurance (2003).

importance because they illuminate the development of the relationship between Ms Gobbo and Victoria Police, and include circumstances and critical decision making which led to her third period of registration. Further, a significant number of cases that Counsel Assisting submit may have been affected by the conduct of Ms Gobbo and Victoria Police flow from or are related to the conduct in those two cases.

55. Whilst conduct of Ms Gobbo and current or former members of Victoria Police identified elsewhere in Volumes Two and Three may or may not amount to criminal conduct, Counsel Assisting do not invite the Commissioner to make such findings.

56. [redacted]

57. With regard to the Case Studies Submissions in Volume 3, it should be noted that Counsel Assisting submit that Ms Gobbo may have engaged in instances of misconduct. With regard to members of Victoria Police, submissions have been made that there have been failures to comply with duties and obligations, however submissions are not made in respect of individual members of police.

Procedural Fairness

58. As foreshadowed above, in parts of these submissions it is submitted that it is open to the Commissioner to find that the conduct of Ms Gobbo and that of current and former members of Victoria Police may have amounted to [redacted] misconduct.

59. Section 36(1) of the *Inquiries Act* establishes a procedure by which those against whom adverse findings are proposed to be made:

    59.1. are made aware of the matters on which the proposed finding is based; and

    59.2. have an opportunity to respond on those matters.

60. Section 36(2) provides that any such response must be considered by the Commission before making any adverse finding against that person. If an adverse finding is made, s 36(3) provides that the Commission must fairly set out the person's response.

61. Pursuant to s 12(a) of the *Inquiries Act*, the Commission is also bound by common law requirements of procedural fairness.

62. The main requirement of procedural fairness in relation to an inquiry, as it relates to the making of adverse findings, was set out by Mason CJ, Deane and McHugh JJ in *Annetts v McCann*[34] as follows:[35]

> …the [inquirer] cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding.

[34] (1990) 170 CLR 596.
[35] At 600-601.

63. Where Counsel Assisting submit that it is open to the Commissioner to make adverse findings against a person, that person should treat that submission as a "proposed finding", to which they may respond to by way of responsive submissions. Of necessity, this would mean that if the Commissioner proposed to make substantially different or other adverse findings, those would need to be the subject of a further procedure under s 36 of the *Inquiries Act*.

64. The common law obligation to afford procedural fairness is not, however, limited to the making of adverse findings. The obligation is context dependent but generally extends to any person whose rights, interests or legitimate expectations may be "affected" in a direct and immediate way.[36] The variety of "interests" which are protected by the requirements of procedural fairness are "almost infinite"[37] and include status, reputation, liberty, confidentiality, livelihood and financial or other benefit.[38] They are not limited to legal rights.[39] The overriding consideration in determining the scope and content of the obligation to afford procedural fairness is one of "fairness".[40]

65. Having regard to the scope and context of the Commission's inquiry in relation to the first term of reference, the relevance and potential significance of any finding by the Commissioner that a case may have been affected by the conduct of Ms Gobbo as a human source, and the fact that the Commission's inquiry in relation to the first term of reference pertains to matters concerning the deprivation of liberty of convicted persons, it is submitted that, as a matter of fairness, notice should be given to convicted persons where it is submitted by Counsel Assisting that their case(s) may have been affected by the conduct of Ms Gobbo and members of Victoria Police, and where those persons are the subject of a case study, so that those persons may be afforded an opportunity to make submissions to the Commissioner should they desire to do so.

66. For completeness, it should be noted that s 35(2) of the *Inquiries Act* provides that "[a] report may contain any recommendations the Royal Commission considers appropriate." It is submitted that while this represents a broad discretion, it is qualified by the parameters set by s 12 of that Act, including procedural fairness, and the requirements with regard to making potentially adverse findings under s 36 of that Act.

Analysis Methodology

Methodology Employed to Determine the Number of, and Extent to which, Cases may have been Affected

67. A detailed account of the methodology employed by Counsel Assisting in their analysis of cases under the first and second terms of reference is set out in Annexure A to the Legal Principles Submissions. In brief, the methodology may be summarised as follows.

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[36] *Kioa v West* (1985) 159 CLR 550, 584 (Mason J); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 577 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[37] *Kioa v West* (1985) 159 CLR 550, 617 (Brennan J).
[38] See the discussion in Aronson and Groves, Judicial Review of Administrative Action 5th Edition, Lawbook Co, 2013, [7.90].
[39] *Kioa v West* (1985) 159 CLR 550, 616-7 (Brennan J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658-9 [66] (Gummow, Hayne, Crennan and Bell JJ).
[40] *Lawrie v Lawler* (2016) 39 NTR 1, 69 [333], 73-4 [353] (Heenan AJ).

The Starting Point: Ascertaining Candidates for Review

68. The starting point for the study of cases undertaken by Counsel Assisting was to ascertain the persons who would be relevant candidates for review to determine whether their cases may have been affected by the conduct of Ms Gobbo as a human source. As at the finalisation of the submissions of Counsel Assisting, the list of candidates for review comprised 1,306 persons ("Candidates for Review**"**). Those persons came to the attention of the Commission from a range of sources, as set out in Annexure A.

69. Conceptually, the analysis of the 1,306 Candidates for Review may be represented in five stages, each of which is addressed below in turn. At stages two through to five, consideration was given as to whether the cases of relevant Candidates for Review may have been affected in ways described in the categories concerning the conduct of Ms Gobbo and Victoria Police, as addressed below at [249] and [465].

Stage 1 – Determining Candidates for Review with Convictions or Findings of Guilt

70. At the first stage ("Stage 1"), the object was to determine, as a first filter, which of the Candidates for Review did or did not have convictions or findings of guilt recorded against them in or following 1995[41] (being the year when Ms Gobbo was first registered as a human source). In light of the construction of "case", being limited to criminal proceedings which resulted in a conviction or finding of guilt (as addressed above at [21]), any of the 1,306 Candidates for Review without any record of such a disposition could be excluded from further review.

71. In order to conduct Stage 1, the Commission requested LEAP criminal history reports from Victoria Police in respect of each of the 1,306 Candidates for Review. The process for the examination of those records is set out in Annexure A. In short, on the material available, it was determined that the relevant pool of persons with a criminal conviction or finding of guilt in or since 1995 for analysis at each of the remaining four stages numbered 1,156 ("the Convicted Persons").

Stage 2: Analysis of Ms Gobbo's Role as a Lawyer for the Candidates for Review

72. At the second stage of review ("Stage 2"), the object was to determine how many of the 1,156 Convicted Persons received advice or legal representation from Ms Gobbo during her time as a legal practitioner. This was done by undertaking research in respect of each of the Convicted Persons by reference to various relevant sources, as set out in Annexure A.

73. Ultimately, it was established that Ms Gobbo may have acted for or advised 1,005 of the 1,156 Convicted Persons between 1997 and 2013. Further, for the reasons set out below at [233]-[241], it was considered that any Convicted Persons who Ms Gobbo represented between 14 May 1998 and 2013 should be the subject of a general submission to the effect that they or (where a sufficient nexus exists) their cases may have been affected by reference to Categories 1A and 3A.[42] To facilitate that submission, a further review of the data was conducted, and it was determined that 973 of the 1,156 Convicted Persons may have received legal services from Ms

[41] Whilst 1995 was taken as a first filter point in the early stages of the inquiry, it should be understood that Ms Gobbo did not commence Articles of Clerkship until 26 February 1996, and was admitted to practice as a barrister and solicitor in Victoria on 7 April 1997 (See Chapter 1 of Volume 2). Further, it is not suggested by Counsel Assisting that any case may have been affected by the conduct of Ms Gobbo as a human source prior to 14 May 1998.

[42] See below at [249] and [465].

Gobbo at some point during the period between 14 May 1998 and 2013. The submissions in relation to these persons is addressed at [233]-[241].

Stage 3: Further Review of Certain Indictable Cases

74. At the third stage of review ("Stage 3"), the object was to conduct a close analysis of relevant indictable cases of the 1,156 Convicted Persons, in order to determine whether, and if so, to what extent, such indictable cases may have been affected by Ms Gobbo's conduct as a human source. As an initial step, it was determined that 314 of the 1,156 Convicted Persons did not have any convictions or findings of guilt recorded against them for indictable cases. Therefore, the pool of relevant persons whose indictable cases were candidates for close analysis at Stage 3 comprised 842 persons ("Stage 3 Candidates").

75. As a preliminary process under Stage 3, Counsel Assisting undertook a series of *prima facie* considerations to determine which cases of the Stage 3 Candidates warranted further review. Based on those considerations, it was determined that 225 of the 842 Stage 3 Candidates warranted further review ("Further Review Candidates"). The considerations that led to that determination are explained in Annexure A.

76. The methodology in conducting further reviews of the 225 Further Review Candidates is addressed in detail in Annexure A. In summary, Counsel Assisting generally had regard to the circumstances and details of the case in question, as well as any relevant evidence concerning the conduct of Ms Gobbo (as a human source) and Victoria Police in relation to the case. An analysis was then conducted (within the framework, and by reference to the Categories set out below at [249] and [465]), as to whether, and if so, to what extent, the conduct of Ms Gobbo as a human source may have affected the case in question.

77. Ultimately, Counsel Assisting submit that the cases of 117 of the 225 Further Review Candidates may have been affected by the use of Ms Gobbo as a human source. The submissions in respect of the cases of each of those persons are set out in Volume 2 (Chapters 7 and 11 concerning Mr Thomas and Mr Cooper respectively) and Volume 3. As detailed in those parts of the submissions, it is submitted that the cases of the 117 persons may have been affected within the framework, and according to the categories, set out in the Legal Principles Submissions at [249] and [465].

Stage 4: Broad Review of the Summary Cases of the Further Review Candidates at Stage 3

78. At the fourth stage ("Stage 4"), the object was to conduct a broad review of any relevant summary cases of the 225 Further Review Candidates who were considered at Stage 3, in order to determine whether any such cases may have been affected by Ms Gobbo's conduct as a human source. As an initial step, it was determined that, of the 225 Further Review Candidates, 90 did not have any conviction or finding of guilt recorded against them for summary cases. Therefore, the pool of relevant persons at Stage 4 was 135 persons ("Stage 4 Candidates").

79. As set out in more detail in Annexure A, the Stage 4 Candidates were subjected to a broad analysis based on the application of limited criteria in order to determine whether any of the cases may have been affected. The aim of the broad analysis at Stage 4 was to identify instances where Ms Gobbo represented a person upon the disposition of their summary case, in circumstances where that person had

previously been (or on the date of disposition was) the subject of communications between Ms Gobbo (in her capacity as a human source) and members of Victoria Police. The rationale was that where such instances were identified, Counsel Assisting would be in a position to submit that the relevant case may have affected by the use of Ms Gobbo as a human source by Victoria Police, by reference to Categories 1A, 1B, 3A, and 3B (within the framework set out below at [249] and [465]).

80. Ultimately, of the 135 Stage 4 Candidates persons subjected to this review, positive results were obtained in respect of 4 persons. The case studies in relation to those persons are set out in Volume 3.

Stage 5: Broad Review of Cases (Summary and Indictable) of Convicted Persons Represented by Ms Gobbo who were not Further Review Candidates (and Therefore Not Considered or Captured at Stages 3 or 4)

81. In addition to the 225 Close Analysis Candidates, who received attention at Stages 3 and 4, it was determined that, for completeness, 106 persons who arose at Stage 2 also warranted a separate and further broad analysis in the same vein as that undertaken at Stage 4. The additional 106 persons were those who met all of the following conditions:

    81.1. first, they were Convicted Persons with a LEAP criminal history report, within the meaning of Stage 1

    81.2. secondly, they received legal services from Ms Gobbo during the relevant period, 14 May 1998 to 2013 (and were thereby captured by a general submission at Stage 2)

    81.3. thirdly, their names returned data hits in the searches undertaken of the Loricated Database, as described in Annexure A in relation to Stage 3, meaning that prima facie they may have been the subject of communications between Ms Gobbo (in her capacity as a human source) and Victoria Police)

    81.4. fourthly, they were, notwithstanding the three foregoing conditions, excluded from a further review at Stage 3 (and therefore review at Stage 4) by virtue of the various preliminary processes described in Annexure A in relation to Stage 3.

82. In addition, at a relatively late stage in the inquiry, the Commission received information from Victoria Police concerning 26 additional names of potential candidates for review who had not previously come to the attention of the Commission. Given the late stage at which that information was received and in light of the resultant practical constraints, it was determined that those 26 persons would *only* be subject to the Stages 1, 2, and 5 processes if they met the criteria detailed at [81.1]-[81.4].

83. Ultimately, a total of 106 persons were subjected to a review at Stage 5 (“Stage 5 Candidates”). The analysis at Stage 5, like that under Stage 4, was based on the application of a set of limited criteria, in order to determine whether any of the cases may have been affected. The aim and rationale of the broad analysis at Stage 5 was similar to that at Stage 4, except that the former was extended to include dispositions in indictable cases as well as summary cases. So, at Stage 5 the aim was to uncover instances where Ms Gobbo represented a person upon the disposition of any indictable case or summary case, in circumstances where that

person had previously been (or on the date of disposition was) the subject of communications between Ms Gobbo (in her capacity as a human source) and members of Victoria Police. At Stage 5, the rationale was that, similarly to that at Stage 4, where such instances were identified, Counsel Assisting would be in a position to submit that the relevant case or cases may have affected by the use of Ms Gobbo as a human source by Victoria Police, by reference to Categories 1A, 1B, 3A, and 3B (within the framework of and as set out below at [249] and [465]). Ultimately, of the 106 Stage 5 Candidates subjected to this review, positive results were obtained in respect of 6 persons. The case studies in relation to those persons are set out in Volume 3.

Exceptions in relation to Three Persons

84. Separately, it is noted that two summary cases (which are specified in Annexure A) were assessed as they arose in the course of assessment of other related indictable cases in Stage 3.

Qualifications to the Methodology

85. It is prudent to note a number of qualifications in relation to the methodology employed. The qualifications properly reflect the practical limitations and particular functions of the Commission, which are materially different to those pertaining to proceedings before the courts.

86. First, Counsel Assisting considered that the purpose of the first term of reference, to determine "the number of and extent to which cases may have been affected by the conduct of Ms Gobbo as a human source", is to give the Government, the public, and the relevant affected persons a general appreciation of the breadth and depth of the impact of the use of Ms Gobbo as a source on cases in the criminal justice system over the extended period that she practised as a lawyer. In the submission of Counsel Assisting, it is not the function of the Commission to *determine* in which cases and for what precise reasons substantial miscarriages of justice occurred; that is a matter which is properly the preserve solely of the courts. Indeed, the Commission can give no remedy; its report amounts to an opinion. It would also be inappropriate and impracticable for the Commission to engage in the depth or comprehensiveness of analysis of cases that would be required of an appellant in preparing an application for leave to appeal against conviction before the Court of Appeal.

87. Secondly, and relatedly, the level of examination undertaken at each of the stages described above amounts to a much broader, or less detailed, examination than would be involved in preparing a matter for, or in the hearing of, an application for leave and/or appeal before the Court of Appeal. That is so even at Stage 3, where the 'further reviews' were conducted. By way of example, the documents relied upon in undertaking the 'further reviews' were far more limited than those to which an appellant would have regard. In particular, the case documents were limited to certain key documents, as described above, and did not ordinarily include the full depositions or transcripts of proceedings. Also, it is noted that the data-based exercises described in some of the stages above were also inherently limited in that they relied on key word searches of data to identify express references to persons' names (or variants thereof), and therefore it is possible that implied references to persons may not have been captured. Further, it must be recognised that the Commission continued to receive information from Victoria Police concerning Ms Gobbo's informing throughout the life of the inquiry. Indeed, relevant material (including material concerning affidavits and warrants for surveillance or search

operations) continued to be provided as the submissions of Counsel Assisting were being completed. Such material may well have born upon numerous case studies but has not been able to be properly or fully addressed. In these circumstances, it is reasonably possible, if not to be expected, that evidence concerning Ms Gobbo's informing and its impact on cases many not have been fully uncovered in some cases.

88. Thirdly, for the above reasons, it is important to note that where Counsel Assisting submit that a case may have been affected in different ways, such a submission does not purport to provide an exhaustive or comprehensive account of the ways in which the case may have been affected. Likewise, where a case is not the subject of a positive submission of Counsel Assisting that it may have been affected, that should not be taken as a submission to the opposite effect. Rather, it should be taken to mean that, based on the material reviewed by Counsel Assisting, and according to the methodology described above, there was not a basis to submit that it may have been affected. In other words, in the submissions of Counsel Assisting, there is no submission made, at any time or in any way, to the effect that a case *is not* affected at all or in different ways.

Summary of Submissions as to Cases that May Have Been Affected

89. Ultimately, all 1,306 Candidates for Review received some form of analytical treatment at the five stages of review. The results, as at each stage, may be summarised as follows:

89.1. **Stage 1** – The total number of persons positively identified under this stage is 1,156 persons. These persons had a conviction or finding of guilt in or after 1995.

89.2. **Stage 2** – The total number of persons positively identified under this stage is 973 persons. These persons were represented by or received advice from Ms Gobbo between 14 May 1998 and 2013. These 973 persons are the subject of submissions at [233]-[241] below.

89.3. **Stage 3** – The total number of persons positively identified under this stage is 117 persons. The cases of these 117 persons are the subject of submissions as set out in Volume 2 (Chapters 7 and 11 concerning Mr Thomas and Mr Cooper respectively) and Volume 3. Of these 117 persons, 80 were also captured under Stage 2.

89.4. **Stage 4** – The total number of persons positively identified under this stage is 4 persons. The cases of these 4 persons are the subject of submissions set out in Volume 3. All 4 persons were also captured under Stages 2 and 3.

89.5. **Stage 5** – The total number of persons positively identified under this stage is 6 persons. These persons were assessed as having an indictable or summary case which was potentially affected, despite being excluded from Stage 3 (and by extension Stage 4). All 6 persons were also captured under Stage 2.

89.6. One exception, namely Mr Danny Moussa, was positively identified in the course of analysis of other persons under Stage 3. Mr Moussa's sole summary matter was not positively identified in Stages 2-5 but incorporated as an exception.

90. In total, taking into account the overlap of persons as between the various stages, in the submission of Counsel Assisting, 1,011 persons may have been affected by the conduct of Ms Gobbo as a human source in the criminal justice system. In making that submission, it is important to appreciate the qualifications made above. It is also important to recognise the restrained and general way in which the submissions are made, at [233]-[241] below, with respect to 887 of the 973 persons who arise under Stage 2.

LEGAL PRINCIPLES: FIRST TERM OF REFERENCE

91. As noted at [24] above, the first term of reference is directed to cases which "may have been affected". When examining whether a case may have been affected, it is instructive to consider the ways in which a person's case may be considered by the Court of Appeal. If a person has an available ground of appeal due to the conduct of Ms Gobbo (and in some cases also members of Victoria Police), then that person's case may have been affected by such conduct.

92. Should there be such an available ground of appeal, in the ordinary course[43] a person would make an application for leave against conviction[44] and/or sentence[45] to the Court of Appeal (together with any relevant application for an extension of time). In circumstances where a person has already pursued such a course, he or she may not generally do so again.[46] Instead, he or she may seek leave to make a second or subsequent appeal against conviction,[47] or make a petition for the exercise of the royal prerogative of mercy.[48] If a petition is successful, the Attorney-General will normally refer the whole case to the Court of Appeal to hear and determine as an appeal.[49]

93. For the purposes of the present inquiry under the first term of reference it is to be noted that the fact that the individual pleaded guilty at first instance is not a necessary barrier.[50]

94. Once the person has initiated the relevant proceeding (or after a petition for mercy is referred to the Court of Appeal), the Court will consider certain matters in determining whether the conviction and/or sentence should be set aside.

95. The submissions will consider, in turn:

    95.1. appeals against conviction

    95.2. second or subsequent appeals against conviction

    95.3. petitions for mercy

    95.4. appeals against sentence.

96. The submissions will then consider what is meant by a "substantial miscarriage of justice" as relevant to appeals against conviction, second or subsequent appeals

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[43] The following applies to persons convicted or who pleaded guilty at the County Court of Victoria.
[44] *Criminal Procedure Act 2009* (Vic), Part 6.3, Div 1. Note that a person may appeal against conviction notwithstanding any prior appeals against sentence.
[45] *Criminal Procedure Act 2009* (Vic), Part 6.3, Div 2.
[46] See *Burrell v The Queen* (2008) 238 CLR 218, in which the High Court affirmed the relevant principle in *Grierson v The King* (1938) 60 CLR 431. It is possible that minor exceptions exist: see *R v McNamara (No 2)* [1997] 1 VR 257, 268 (Winneke P, Charles JA, Southwell AJA).
[47] Part 6.4 of the *Criminal Procedure Act 2009* (Vic).
[48] See *Criminal Procedure Act 2009* (Vic), s 327.
[49] *Criminal Procedure Act 2009* (Vic), s 327(1)(a), (2). In rare circumstances, the Attorney-General may refer any point arising in the case to the judges of the Trial Division of the Supreme Court for their opinion: *Criminal Procedure Act 2009* (Vic), s 327(1)(b), (3).
[50] See *AB v CD & EF* [2017] VSCA 338, [135] (Ferguson CJ, Osborn and McLeish JJA), affirming *AB & EF v CD* [2017] VSC 350, [299] (Ginnane J) which cited *R v Reed* [2003] VSCA 95, [2] (Winneke P), *R v Mokbel ('Change of Pleas')* (2012) 35 VR 156, 176-7 [261]-[264] (Whelan J), and *R v KCH* (2001) 124 A Crim R 233.

against conviction, and for petitions for mercy that are referred to the Court of Appeal.

97. The submissions will then consider the general approach to the first term of reference, including by providing classifications of relevant conduct by Ms Gobbo which may have resulted in cases being affected.

98. The submissions will then consider categories of [redacted] misconduct that may be relevant to the first term of reference.

99. It is to be noted that the legal principles outlined below are by no means an exhaustive exposition of the relevant law or applicable elements of each offence outlined. This reflects the practical reality of the role of the Commission, as opposed to that of a court, and the types of findings and recommendations it is able to make. However, they serve as an outline which the Commissioner may use to guide the inquiry, report and findings or recommendations.

Appeals Against Conviction

100. A convicted person, who had not previously sought leave to appeal against conviction, would be entitled to seek an extension of time pursuant to s 313 of the *Criminal Procedure Act 2009* (Vic) ("the *Criminal Procedure Act*") to seek leave to appeal against conviction pursuant to s 274 of that Act.

101. Section 276 of the *Criminal Procedure Act* provides:

> **Determination of appeal against conviction**
>
> (1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—
>
> (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
>
> (c) for any other reason there has been a substantial miscarriage of justice.

102. Accordingly, on an appeal against conviction, the Court of Appeal must allow an appeal against conviction if it is satisfied that:

102.1. the jury verdict is unreasonable or cannot be supported having regard to the evidence ("the first limb");[51] or

102.2. there has been a substantial miscarriage of justice (whether as the result of an error or an irregularity in, or in relation to, the trial,[52] or for any other reason) ("the second limb").[53]

103. On a successful appeal, s 277 of the *Criminal Procedure Act* provides that the Court of Appeal can order a new trial, enter a judgment of acquittal, or substitute a conviction.

[51] *Criminal Procedure Act 2009* (Vic), s 276(a).
[52] *Criminal Procedure Act 2009* (Vic), s 276(b).
[53] *Criminal Procedure Act 2009* (Vic), s 276(c).

104. In relation to the first limb, the test to be applied is as set out by Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen*,[54] namely:[55]

> …the question which the court must ask itself is *whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty*, but in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.
>
> (Emphasis added and citations omitted.)

105. The italicised part of that paragraph was recently cited with approval by the High Court, *per curiam*, in *Pell v The Queen*.[56]

106. This limb is unlikely to be relevant to the Commission's inquiries.

107. On the facts before the Commission, the most likely ground of appeal for a convicted person affected by the conduct of Ms Gobbo and Victoria Police officers would concern the second limb and be to the effect that:

> The failure by the Crown to disclose material to the applicant relating to the conduct of Ms Gobbo and Victoria Police officers resulted in a substantial miscarriage of justice.

108. It is likely that such a ground of appeal would then list particulars with regard to how the case was purportedly affected.

109. Such an application and potential appeal would fall to be determined according to general principles.

110. As noted above at [93], a person who had pleaded guilty may still seek leave to appeal against conviction.[57] It should be noted that ordinarily to impugn the integrity of the plea, whether before or after conviction, the applicant must show an 'issuable question of guilt' and the existence of some circumstance which affects the integrity of the plea so that it would be a miscarriage of justice to hold the applicant to his or her plea,[58] although in some circumstances whether or not there might be a real question about the applicant's guilt is irrelevant.[59]

111. With regard to non-disclosure, as held in *Mallard v The Queen*[60] ("*Mallard*") by Gummow, Hayne, Callinan and Heydon JJ:[61]

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[54] (1994) 181 CLR 487.
[55] At 493.
[56] (2020) 94 ALJR 394, 403 [43].
[57] See *AB v CD & EF* [2017] VSCA 338, [135] (Ferguson CJ, Osborn and McLeish JJA), affirming *AB & EF v CD* [2017] VSC 350, [299] (Ginnane J) which cited *R v Reed* [2003] VSCA 95, [2] (Winneke P), *R v Mokbel ('Change of Pleas')* (2012) 35 VR 156, 176-7 [261]-[264] (Whelan J), and *R v KCH* (2001) 124 A Crim R 233.
[58] *Weston v R* (2015) 48 VR 413, 444 [109.5] (Redlich JA); *Kohari v R* [2017] VSCA 33, [122] (Weinberg and Kyrou JJ), *R v KCH* (2001) 124 A Crim R 233.
[59] *R v KCH* (2001) 124 A Crim R 233, 248 [106] (Ipp AJA, with whom Sperling J agreed).
[60] (2005) 224 CLR 125.
[61] At 133.

> At this point it is relevant to note that the recent case of Grey v The Queen[62] in this Court stands as authority for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty.

112. Notably, in respect of the seven particular convicted persons considered by Ginnane J in *AB & EF v CD*,[63] the Court of Appeal in *AB v CD & EF*,[64] and the High Court in *AB v CD*,[65] the effect of those judgments was that there was a breach by the Crown of the duty of disclosure in not disclosing evidentiary material concerning the conduct of Ms Gobbo as it related to their prosecution.

113. It does not matter whether the material that was failed to be disclosed by the Crown was only known to police, and not the Office of Public Prosecutions or the Prosecutor, see for example *R v Farquharson*[66] ("*Farquharson*"). This will be considered in further detail below at [362]-[374] in the context of the second term of reference.

114. In *Farquharson* it was accepted[67] that the correct test to apply with regard to the need for disclosure was as set out in *R v Spiteri*,[68] whereby:

> …the Crown has a duty to disclose material which can be seen on a sensible appraisal by the prosecution:
>
> (a) to be relevant or possibly relevant to an issue in the case;
>
> (b) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
>
> (c) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (a) or (b).

115. Those obligations are subject to limits:[69]

> The prosecution duty of disclosure does not extend to disclosing material:
>
> (a) relevant only to the credibility of defence (as distinct from prosecution) witnesses;
>
> (b) relevant only to the credibility of the accused person;
>
> (c) relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false;
>
> (d) for the purpose of preventing an accused from creating a trap for himself, if at the time the prosecution became aware of the material it was not a relevant issue at trial.

116. It would appear that the conduct of Ms Gobbo and Victoria Police officers, in very many cases, would be relevant or possibly relevant to an issue in the case, and/or

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[62] (2001) 75 ALJR 1708; 184 ALR 593.
[63] [2017] VSC 350.
[64] [2017] VSCA 338.
[65] (2018) 93 ALJR 59.
[66] (2009) 26 VR 410, 463-6 [206]-[218] (Warren CJ, Nettle and Redlich JJA).
[67] At 464 [213]-[214] (Warren CJ, Nettle and Redlich JJA).
[68] (2004) 61 NSWLR 369.
[69] (2009) 26 VR 410, 464 [214] (Warren CJ, Nettle and Redlich JJA).

raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use. That would include, fundamentally, the independence of the accused person's legal representation.

117. Notably, a ground of appeal concerning a failure of disclosure is not to be dealt with as a fresh evidence ground.[70] Rather, the question is whether the failure to disclose caused the trial to be unfair and therefore miscarry.[71]

118. However, there may be some circumstances where a convicted person may seek leave to appeal against conviction on the basis of fresh evidence, in which case the ground of appeal could be in the following form:

> Fresh evidence relating to the conduct of Ms Gobbo and Victoria Police officers demonstrates that the applicant has suffered a substantial miscarriage of justice.

119. Again, it is likely that such a ground of appeal would then list particulars with regard to how the case was purportedly affected.

120. With regard to "fresh evidence", the relevant test is whether the fresh evidence, when viewed in combination with the evidence given at the trial before the jury, shows that there is a "significant possibility that the jury, acting reasonably, would have acquitted the accused".[72] In some circumstances this test may sit uneasily with concerns about the conduct of Ms Gobbo and Victoria Police, which might never have been proposed to be adduced in evidence.

121. However, in *R v AHK,*[73] Winneke P stated:[74]

> The fundamental question for the Court, in each such case, is whether it perceives that a miscarriage of justice has occurred. In answering this question authorities binding on this Court have laid down three general considerations which should guide the Court in coming to its conclusion. The first of these, although it is not an inflexible rule, is that the conviction will not usually be set aside if the evidence relied on could, with reasonable diligence, have been produced by the accused at his trial. The second and third considerations, which are inter-related, are that the 'fresh evidence' is apparently credible or plausible or, at least, capable of belief and, in the view of the Court, is sufficiently relevant and cogent in the sense that, if considered in combination with the evidence already given at the trial, the Court considers that there is 'a significant possibility that the jury, acting reasonably, would have acquitted the applicant of the charge if the new evidence had been before it in the trial'. It is in respect of these last considerations that there has been, over the years, some difference of judicial opinion although it was the test adopted by this Court (albeit with a qualification) in *R v Nguyen & Tran*. *However, at the end of the day, it should not be forgotten that the expressions of judicial opinion to which I have referred are practical guidelines which do not detract from the force of the fundamental principle that an appellate court*

[70] *Grey v The Queen* (2001) 75 ALJR 1708, 1710-1 [8]-[9], 1713 [23] (Gleeson CJ, Gummow and Callinan JJ).
[71] *Grey v The Queen* (2001) 75 ALJR 1708, 1710-1 [8]-[9], 1713 [23], (Gleeson CJ, Gummow and Callinan JJ), 1718 [49]-[50] (Kirby J); *Mallard v R* (2005) 224 CLR 125, 133 [17] (Gummow, Hayne, Callinan and Heydon JJ), 148 [57], 156 [84] (Kirby J).
[72] *Rodi v Western Australia* (2018) 265 CLR 254, 262 [26], 263-4 [28]-[30] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
[73] [2001] VSCA 220. Recently cited with approval in *Hartley v The Queen* [2020] VSCA 62, [79] (Croucher AJA with whom Beach and Hargrave JJA agreed).
[74] At [8].

> *must allow an appeal if a miscarriage of justice is shown to have occurred. An appellate court will always receive 'fresh evidence' if it can be clearly shown that the failure to receive it might have the result that an unjust conviction is permitted to stand*.
>
> (Emphasis added.)

122. Accordingly, for both potential grounds of appeal considered above, the primary question is whether there has been a substantial miscarriage of justice. After considering the other potential avenues of appeal, that issue will be considered below at [141]-[222].

Second or Subsequent Appeals Against Conviction

123. A convicted person affected by the conduct of Ms Gobbo and Victoria Police officers, and who had previously sought to leave to appeal against conviction and had any such application or appeal determined under Division 1 of Part 6.3 of the *Criminal Procedure Act*, could seek leave to make a second or subsequent appeal pursuant to s 326A of that Act.

124. Pursuant to s 326B(1) of the *Criminal Procedure Act*, an application for leave to appeal under section 326A is commenced by filing a notice of application for leave to appeal in accordance with the rules of court.

125. Section 326C of *Criminal Procedure Act* provides:

> **Determination of application for leave to appeal under section 326A**
>
> (1) The Court of Appeal may grant leave to appeal under section 326A if it is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.
>
> (2) The Court of Appeal may grant leave to appeal under section 326A against a conviction for a related summary offence only if it grants leave to appeal under subsection (1) in relation to the indictable offence.
>
> (3) In this section, evidence relating to an offence of which a person is convicted is—
>
> (a) "fresh" if—
>
> (i) it was not adduced at the trial of the offence; and
>
> (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and
>
> (b) "compelling" if—
>
> (a) it is reliable; and
>
> (ii) it is substantial; and
>
> (iii) either—
>
> (A) it is highly probative in the context of the issues in dispute at the trial of the offence; or
>
> (B) it would have eliminated or substantially weakened the prosecution case if it had been presented at trial.

(4) Evidence that would be admissible on a second or subsequent appeal is not precluded from being fresh and compelling only because it would not have been admissible in the earlier trial of the offence that resulted in the conviction.

126. Section 326D of the *Criminal Procedure Act* provides:

Determination of second or subsequent appeal against conviction

(1) On an appeal under section 326A, the Court of Appeal must allow the appeal against conviction if it is satisfied that there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 326A.

127. On a successful appeal, s 326D of the *Criminal Procedure Act* provides that the Court of Appeal can order a new trial, enter a judgment of acquittal, or substitute a conviction.

128. In *Roberts v The Queen*,[75] the Court of Appeal (Osborn and T Forrest JJA, and Taylor AJA), considered the preconditions for granting leave to appeal pursuant to s 326C of the *Criminal Procedure Act*. The Court considered the judgment of the High Court of Australia in *Van Beelen v The Queen*,[76] and observed, *per curiam*:[77]

> First, the section manifests an intention that the finality of the criminal process yield in the face of fresh and compelling evidence which, taken with the evidence at trial, satisfies an appellate court that there has been a substantial miscarriage of justice.
>
> Second, the right to seek leave to appeal is additional to, and is to be contrasted with, the mechanism of executive referral in the case of a petition for mercy. The leave requirement is intended to prevent successive meritless applications.
>
> Third, the statutory preconditions to the grant of leave may be compared and contrasted with the terms of s 274 of the *Criminal Procedure Act 2009* governing the grant of leave to appeal in the ordinary case.
>
> Fourth, the notion of fresh evidence as against new evidence reflects an underlying concept commonly applied by intermediate appellate courts in this country. In *Mickelberg v The Queen*, Toohey and Gaudron JJ said:
>
> > The underlying rationale for a court of criminal appeal setting aside a conviction on the ground of fresh evidence is that the absence of that evidence from the trial was, in effect, a miscarriage of justice: see, e.g., *Gallagher v The Queen*. There is no miscarriage of justice in the failure to call evidence at trial if that evidence was then available, or, with reasonable diligence, could have been available: see *Ratten v The Queen*, per Barwick CJ, noting however, that there may be somewhat greater latitude in the case of criminal trials than in the case of civil trials. See also *Lawless v The Queen*.

[75] [2020] VSCA 58.
[76] (2017) 262 CLR 565.
[77] [2020] VSCA 58, [40]-[51] (Osborn and T Forrest JJA, and Taylor AJA).

Fifth, the Court must be satisfied that the fresh evidence has the qualities prescribed by s 326C(3). This follows from the plain terms of the section. It will not be sufficient for the purpose of leave under the Victorian statute to establish that it is reasonably arguable that the evidence has these qualities.

Sixth, the onus is upon the applicant to satisfy the Court that the preconditions to the grant of leave are met. The Court must be positively persuaded that the preconditions to the exercise of its power to grant leave have been satisfied.

Seventh, the words 'reliable', 'substantial', and 'highly probative' are to be given their ordinary meanings. In *Van Beelen*, the High Court observed (of the equivalent South Australian provision):

> Nothing in the scheme of the CLCA or the extrinsic material provides support for a construction of the words 'reliable', 'substantial' and 'highly probative' in other than their ordinary meaning. Understood in this way, each of the three limbs of sub-s (6)(b) has work to do, although commonly there will be overlap in the satisfaction of each. The criterion of reliability requires the evidence to be credible and provide a trustworthy basis for fact finding. The criterion of substantiality requires that the evidence is of real significance or importance with respect to the matter it is tendered to prove. Plainly enough, evidence may be reliable but it may not be relevantly 'substantial'. Evidence that meets the criteria of reliability and substantiality will often meet the third criterion of being highly probative in the context of the issues in dispute at the trial, but this will not always be so. The focus of the third criterion is on the conduct of the trial. What is encompassed by the expression 'the issues in dispute at the trial' will depend upon the circumstances of the case. Fresh evidence relating to identity is unlikely to meet the third criterion in a case in which the sole issue at the trial was whether the prosecution had excluded that the accused's act was done in self-defence. On the other hand, fresh evidence disclosing a line of defence that was not apparent at the time of trial may meet the third criterion because it bears on the ultimate issue in dispute, which is proof of guilt.

Eighth, when compared with the South Australian statute, the Victorian statute raises as a further alternative to the final component of 'compelling' evidence, that which would have eliminated or substantially weakened the prosecution case if it had been presented at trial.

Ninth, jurisdiction under s 326C(1) is further conditioned upon the appellate court's satisfaction that it is in the interests of justice that the fresh evidence be considered on appeal. In *Van Beelen*, the High Court observed (of the equivalent South Australian provision):

> Jurisdiction under s 353A(1) is further conditioned on the Full Court's satisfaction that it is in the interests of justice to consider the fresh and compelling evidence on appeal. Commonly, where fresh evidence is compelling, the interests of justice will favour considering it on appeal. Nonetheless, as the respondent submits, it is possible to envisage circumstances, such as where an applicant has made a public confession of guilt, where the interests of justice may not favour that course. Contrary to the analysis of the majority, the circumstance that a conviction is long-standing does not provide a reason why, in the

> interests of justice, fresh and compelling evidence should not be considered on a second or subsequent appeal.
>
> We note that the observations of the High Court recognise that evidence other than the fresh evidence relied on by the applicant and coming to light independently of the trial may bear on the question of the interests of justice.
>
> Tenth, whilst the judgment required as to the interests of justice is an intermediate one, it may be informed by the potentially broad scope of the notion of substantial miscarriage of justice. The issue if leave is granted is not limited to consideration of evidentiary questions going to the ultimate issue of the applicant's guilt but may embrace questions of irregularity in an applicant's trial.
>
> Eleventh, the question whether a proposed ground of appeal is reasonably arguable may demonstrate that it is in the interests of justice that leave be granted. Nonetheless, the concept of the interests of justice is not to be conflated with the ultimate issue of a substantial miscarriage of justice. The High Court's decision in *Van Beelen* demonstrates the application of this principle. In that case, fresh evidence undermined the basis of opinion evidence given at trial as to the probable time of death of a murder victim. Such evidence met the criteria for the grant of permission to appeal, as it is known in South Australia, because the time of death was in dispute at the trial. Nonetheless, the fresh evidence did not ultimately demonstrate a miscarriage of justice because it did not establish that, having regard to the evidence at trial, there was a significant possibility that a jury, acting reasonably, would have acquitted the accused if apprised of it.

129. On the facts before the Commission, it is reasonably possible that the conduct of Ms Gobbo and Victoria Police officers would, in some circumstances, be regarded as fresh and compelling evidence that should, in the interests of justice, be considered on a second or subsequent appeal. A question may arise as to whether the fresh evidence is highly probative in the context of the issues in dispute at the trial of the offence. However, should that and the other preconditions be satisfied, the relevant question is then whether the appellant had suffered a substantial miscarriage of justice.

Petitions for Mercy

130. A person who has been convicted or pleaded guilty could also make a petition for mercy, including possibly seeking a referral to the Court of Appeal pursuant to s 327 of the *Criminal Procedure Act.*

131. Pursuant to s 327(2) of the *Criminal Procedure Act*, "[i]f the Attorney-General refers the whole case to the Court of Appeal, the Court of Appeal must hear and determine the case as if it were an appeal by the person".

132. In considering a reference, the Court of Appeal, in considering the "whole case", will consider the entirety of the admissible evidence, whether that evidence is "new evidence", "fresh evidence" or previously adduced.[78]

[78] *Mallard v R* (2005) 224 CLR 125; *Re MJR* (2000) 1 VR 119, 120-1 [1]-[2] (Winneke P, Batt JA and Hampel AJA).

133. A guilty plea is not a barrier to such a referral.[79]

134. In *Orman v The Queen*[80] ("*Orman*") the appellant had alleged in the petition for mercy that he was denied a fair trial because of the conduct of Ms Gobbo and her role as a human source for Victoria Police.[81] He had previously exhausted his appeal rights. The Court of Appeal (Maxwell P, Niall and Emerton JJA) considered the conduct of Ms Gobbo as it related to the appellant, and noted that the Crown had conceded there was a substantial miscarriage of justice pursuant to s 276(1)(c) of the *Criminal Procedure Act*.[82]

135. The Court concluded:[83]

> The Director concedes that Ms Gobbo, while acting for Mr Orman, pursued the presentation of the principal evidence against him on the charge of murder. Self-evidently, that conduct was a fundamental breach of her duties to Mr Orman and to the Court. We refer, as did the Director, to the following statement of the High Court in *Tuckiar v The King*:
>
> > Our system of administering justice necessarily imposes upon those who practise advocacy duties which have no analogies, and the system cannot dispense with their strict observance.
>
> On the facts as conceded, Ms Gobbo's conduct subverted Mr Orman's right to a fair trial, and went to the very foundations of the system of criminal trial. There was, accordingly, a substantial miscarriage of justice. The appeal must therefore be allowed.

136. In light of a concession by the Director, the Court of Appeal declined to order a retrial, and after setting aside the conviction ordered a judgment of acquittal be entered.[84]

137. The Court also observed:[85]

> Plainly, these are matters of great significance to the Victorian community, and of deep concern to participants in the justice system. They affect the integrity of our system of criminal trial which is, of course, a cornerstone of our democracy.

Appeals Against Sentence

138. For the purposes of the present inquiry, it is submitted that the principles concerning appeals against sentence have very limited application.

139. In circumstances where the Commissioner finds that the conduct of Ms Gobbo may have affected a case of a convicted person, it is possible that any subsequent matter in which the original conviction was considered by a sentencing judge when sentencing that convicted person may have been affected. That is because the prior conviction may have been relevant in determining the appropriate sentence. It is

[79] *Re MJR* (2000) 1 VR 119, 121-2 [3] (Winneke P, Batt JA and Hampel AJA).
[80] (2019) 59 VR 511.
[81] At 512 [3].
[82] At 513 [9].
[83] At 513 [11]-[12].
[84] At 514 [16].
[85] At 514 [17].

possible, that in circumstances where the Court of Appeal allowed an appeal against conviction, a subsequent application for an extension to time to seek leave to appeal against sentence could be made, relying on the absence of the prior conviction and possible time served.[86]

140. For completeness, it is to be noted that on an appeal against sentence, the Court of Appeal must allow the appeal if it is satisfied that there is an error in the first sentence and a different sentence should be imposed.[87] Such error includes the sentencing judge acting upon a wrong principle, mistaking the facts, taking into account irrelevant matters, or failing to consider relevant matters.[88] However even if the precise error is not reality identifiable, in some circumstances the Court of Appeal may infer the relevant "error".[89]

Substantial Miscarriage of Justice

141. The above analysis demonstrates that, whichever appellate pathway is embarked upon regarding an accused person's conviction, a significant issue will be whether the conduct of Ms Gobbo and Victoria Police officers resulted in a "substantial miscarriage of justice".

142. Notably, in *Orman*,[90] as considered above at [134]-[137], the Court of Appeal found Ms Gobbo's conduct (pursuing the presentation of the principal evidence against Mr Orman on the charge of murder) subverted Mr Orman's right to a fair trial, and went to the very foundations of the system of criminal trial, and there was accordingly a substantial miscarriage of justice.[91]

143. However, there are a range of circumstances and different types of conduct whereby Ms Gobbo and Victoria Police officers may have affected a case, and where the Court of Appeal would have to consider whether there had been a substantial miscarriage of justice.

144. As observed by French CJ, Hayne, Crennan, Kiefel and Bell JJ in the leading judgment of *Baini v The Queen*[92] ("*Baini*"):[93]

> No single universally applicable description can be given for what is a "substantial miscarriage of justice" for the purposes of s 276(1)(b) and (c) [of the Criminal Procedure Act]. The possible kinds of miscarriage of justice with which s 276(1) deals are too numerous and too different to permit prescription of a singular test. The kinds of miscarriage include, but are not limited to, three kinds of case. First, there is the case to which s 276(1)(a) is directed: where the jury have arrived at a result that cannot be supported. Secondly, there is the case where there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial. Thirdly, there is the case where there has been a serious departure from the prescribed processes for trial. This is not an exhaustive list. Whether there

[86] *R v Renzella* (1997) 2 VR 88.
[87] *Criminal Procedure Act 2009* (Vic), 281(1).
[88] *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt, and McTiernan JJ).
[89] *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt, and McTiernan JJ). With regard to jurisprudence concerning "manifest excess", see *McPhee v The Queen* [2014] VSCA 156, [9]-[11] (Redlich and Priest JJA).
[90] (2019) 59 VR 511
[91] At 513 [12].
[92] (2012) 246 CLR 469.
[93] At 479 [26].

> has been a "substantial miscarriage of justice" ultimately requires a judgment to be made.
>
> (Citations omitted.)

145. The High Court further observed:[94]

> This understanding of s 276 accommodates fundamental tenets of the criminal justice system in Australia. It recognises that the prescribed mode of trial was trial by jury. It does so by encompassing, within the expression "substantial miscarriage of justice", not only an error which possibly affected the result of the trial but also some departures from trial processes (sufficiently described for present purposes as "serious" departures), whether or not the impact of the departure in issue can be determined.

146. As will be developed below, it is submitted that a substantial miscarriage of justice is:

146.1. concerned with outcome as well as process

146.2. related to the right not to be tried unfairly and the concept of abuse of process

146.3. concerned with public confidence in the administration of justice.

Outcome and Process

147. In *Nudd v The Queen*,[95] which predated the *Criminal Procedure Act*, Gleeson CJ observed that "…the concepts of justice, and miscarriage of justice, bear two aspects: outcome and process. They are different, but related."[96]

148. In *Baini*, the majority of the High Court noted that the structure of s 276 of the *Criminal Procedure Act* indicated that satisfaction by the Court of Appeal of an inevitable guilty verdict at trial, while relevant, would not preclude the existence of a substantial miscarriage of justice under ss 276(1)(b) and (c).[97]

149. *Baini* was applied in *Andelman v The Queen*[98] by Maxwell P, Weinberg and Priest JJA as follows:[99]

- Section 276 is not to be interpreted solely by reference to the interpretation given to the common form criminal appeal proviso in *Weiss v R*. Comparing "a statute with its legislative predecessor … is only a useful exercise if doing so illuminates the actual text of the new provision".

- There is no "single universally applicable" definition of a "substantial miscarriage of justice". That is because the possible kinds of miscarriage of justice dealt with by s 276(1) are "too numerous and too different to permit prescription of a singular test".

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[94] At 481 [33].
[95] (2006) 80 ALJR 614.
[96] At 617-8 [3]-[8].
[97] (2012) 246 CLR 469, at 479-481 [27]-[33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[98] (2013) 38 VR 659.
[99] At 677-8 [85]-[86].

- With respect to s 276(1)(b) and (c) (with which this appeal is concerned), the types of substantial miscarriage of justice include cases where "there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial".

- Those paragraphs also cover cases where "there has been a serious departure from the prescribed processes for trial".

- A "substantial miscarriage of justice" may occur where there has been a "departure from process" even if the "verdict was open or it is not possible to conclude whether the verdict was open".

- The question whether there has been a "substantial miscarriage of justice" "may be affected by the strength of the prosecution case". In such cases, however, the Court of Appeal must be aware of the "natural limitations that attend the appellate task".

- A finding that the conviction was "inevitable" is merely "relevant" to the court's determination of whether there has been a substantial miscarriage of justice. It does not conclude the issue.

- If it is submitted that the verdict was inevitable, the appellant need show "no more than that, had there been no error, the jury may have entertained a doubt".

- In assessing "inevitability", the Court of Appeal must "decide that question on the written record of the trial".

- In cases such as *Baini* where evidence has been wrongly admitted or excluded, the court cannot determine that there has been no substantial miscarriage of justice "unless it determines that it was not open to the jury to entertain a doubt as to guilt. Otherwise, there has been a substantial miscarriage of justice because the result of the trial may have been different (because the state of the evidence before the jury would have been different) had the error not been made".

- This reading of the majority's reasons in *Baini* demonstrates that s 276 is to be applied on a case-by-case basis, having regard to the particular nature of the error made in the trial. Further, whereas the strength of the Crown case may well be a relevant factor, it is not necessarily determinative.

(Citations omitted.)

150. Applying the *Baini* analysis, and having regard to the below principles, it is entirely possible that, in some circumstances, the conduct of Ms Gobbo and members of Victoria Police would be found to fall into a category whereby, given the nature of the serious departure from the prescribed processes for trial, the strength of the Crown case would be irrelevant to determining whether or not there had been a substantial miscarriage of justice.

151. As held by Brennan, Dawson, and Toohey JJ in *Wilde v The Queen*:[100]

> It is one thing to apply the proviso to prevent the administration of the criminal law from being "plunged into outworn technicality"… it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso.
>
> (Citations omitted.)

152. In *Baini*, Gageler J (albeit in dissent) pointed to extrinsic materials which demonstrate the legislative intention that "substantial miscarriage of justice" in s 276 of the *Criminal Procedure Act* is concerned with both trial process and outcome, and further with the right not to be tried unfairly and the concept of abuse of process.[101] Gageler J cited the second reading speech in which the Attorney-General relevantly stated in relation to the above that "[t]he appeal process will therefore operate to ensure that the accused receives a fair trial".[102]

153. The above demonstrates that a substantial miscarriage in relation to the justice "process" concerns the right not to be tried unfairly and abuse of process. Those two concerns are interrelated, as described below.

The Right Not to be Tried Unfairly and Abuse of Process

154. In *AB v CD & EF*,[103] the Court of Appeal (Ferguson CJ, Osborn and McLeish JJA) observed:[104]

> In the English case of *R v Patel*,[105] the Court of Appeal when considering the implications of the revelation of informer misconduct for numerous convictions adopted the following statement by Roch LJ in *R v Hickey*:
>
> > This court is not concerned with the guilt or innocence of the appellants, but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which

[100] (1998) 164 CLR 365, 373, considering s 6(1) of the *Criminal Appeal Act 1912* (NSW) which provided that the Court of Criminal Appeal might dismiss an appeal against conviction notwithstanding a wrong decision on a question of law in the course of a criminal trial if it considered that no substantial miscarriage of justice had actually occurred. See further *Kalbasi v Western Australia* (2018) 264 CLR 62, 119 [155] (Edelman J), and *OKS v Western Australia* (2019) 265 CLR 268, 281-2 [36] (Edelman J).
[101] *Baini v The Queen* (2012) 246 CLR 469, 494-495 [69]-[70] (Gageler J). At 494 [69] his Honour cited the explanatory memorandum to the Criminal Procedure Bill 2008 (Vic) which noted that:
[E]rrors or irregularities in the trial should result in appeals being allowed when the problem could have reasonably made a difference to the trial outcome; or if the error or irregularity was of a fundamental kind depriving the appellant of a fair trial or amounting to an abuse of process (regardless of whether it could have made a difference to the trial outcome).
[102] At 494-495 [70].
[103] [2017] VSCA 338.
[104] At [198].
[105] [2001] EWCA Crim 2505 [53] (citation omitted).

> have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distracted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.

155. The relevance of the right not to be tried unfairly to the notion of a miscarriage of justice is well established, and circumstances in which an accused person has been deprived of a fair trial may amount to a miscarriage of justice.[106]

156. That right is further related to the concept of abuse of process in that the inherent jurisdiction of courts contains the power to stay proceedings "to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair".[107]

157. The relevance of the concept of abuse of process to the assessment of substantial miscarriage of justice was applied by the Court of Appeal in *AB v CD & EF*[108] where Ferguson CJ, Osborn and McLeish JJ stated:[109]

> The second and third categories of miscarriage of justice identified in *Baini v The Queen* are informed by the fundamental policy considerations which the courts have identified as underlying the concept of abuse of process in criminal proceedings.

158. Both the notions of the right not to be tried unfairly and abuse of process are concerned with the repute, or public perception, of the administration of justice. In *AB v CD & EF*,[110] the Court of Appeal cited *Moti v The Queen*[111] in support of the proposition that:

> … *two fundamental policy considerations affect abuse of process in criminal proceedings. First, 'the public interest in the administration of justice* requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike'. Secondly, 'unless the court protects its ability so to function in that way, its failure will lead to an erosion of *public confidence* by reason of concern that the court's processes may lend themselves to oppression and injustice'. *Public confidence in this context refers to the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes*. The concept of *abuse of process extends to a use of the courts' processes in a way that is inconsistent with those fundamental requirements*.
>
> (Emphasis added and citations omitted.)

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[106] See, e.g., *Nudd v The Queen* (2006) 80 ALJR 614, 617 [6]-[7] (Gleeson CJ); *Wilde v The Queen* (1988) 164 CLR 365, 375 (Deane J); *Ratten v The Queen* (1974) 131 CLR 510, 516 (Barwick CJ). See also *Orman v The Queen* [2019] VSCA 163, [12] (Maxwell P, Niall and Emerton JJJA) citing *Wilde v The Queen* (1988) 164 CLR 365, 373 (Brennan, Dawson, Toohey JJ).
[107] *Dietrich v The Queen* (1992) 177 CLR 292, 300 (Mason CJ and McHugh J) quoting *Barton v The Queen* (1980) 147 CLR 75, 95-96 (Gibbs ACJ, Mason J); *Williams v Spautz* (1992) 66 ALJR 585.
[108] [2017] VSCA 338.
[109] At [63].
[110] [2017] VSCA 338, [63] (Ferguson CJ, Osborn and McLeish JJA).
[111] (2011) 245 CLR 456, 478 [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

159. More recently, in *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions*[112] ("*Strickland*"), Kiefel CJ, Bell and Nettle JJ, after citing the above passage from *Moti* with approval, stated:[113]

> … there is, too, a fundamental social concern to ensure that the *end* of a criminal prosecution does not justify the adoption of any and every *means* for securing a conviction and, therefore, a recognition that in rare and exceptional cases where a defect in process is so profound as to offend the integrity and functions of the court as such, it is necessary that proceedings be stayed in order to prevent the administration of justice falling into disrepute.
>
> (Emphasis in original.)

160. When viewed by reference to their shared underlying policy, any alleged distinctions between abuse of process and the right not to be tried unfairly dissolve and the use of such labels can become unhelpful. In that regard, in *Strickland* Edelman J noted that:[114]

> "Abuse of process" may not be the best language to describe the category where *the focus is upon the integrity of the court generally rather than its particular processes*. The rationale for this category has been described in various ways. The rationale has been described as being "a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law". It has been described as avoiding "an erosion of public confidence". It has also been described as arising where a trial would bring the administration of justice into disrepute. Each of these verbal formulations attempts to *capture a concern for the systemic protection of the integrity of the court within an integrated system of justice*. The possibility of an unfair trial, or a degree of unfairness in a trial, may be a factor contributing to that concern. But an unfair trial is not a prerequisite for a permanent stay in this category.
>
> (Emphasis added and citations omitted.)

161. Applying the above, it may be said that a "substantial miscarriage of justice", for the purposes of the Criminal Procedure Act, is often concerned with public confidence in the administration of justice. While there will invariably be subtleties which the Court of Appeal may consider in each case, it is submitted that for the purposes of the present inquiry, that concern should be of central guidance in assessing whether any cases may have been affected by Ms Gobbo's conduct and that of Victoria Police officers.

162. In that regard, it is to be noted that the High Court in *AB v CD* characterised Ms Gobbo's conduct (together with the conduct of Victoria Police) as responsible for affecting public confidence in the integrity of the criminal justice system,[115] and debasing fundamental premises of that system.[116] The High Court did not elaborate on the ways in which the criminal justice system was so affected; it is ultimately the

[112] (2018) 93 ALJR 1.
[113] At 25 [106].
[114] At 47 [249].
[115] (2018) 93 ALJR 59, 61 [4]-[5] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[116] At 62 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

task of the courts to make any relevant practical findings in each case. However, the task of this Commission is, in effect, to begin that inquiry.

Public Confidence in the Administration of Justice

163. In *R v Sussex Justices ex parte McCarthy*,[117] is the often-cited[118] passage of Lord Hewart CJ that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[119] That principle applies to the conduct of courts and legal representatives.

164. In relation to the latter, Sankey LJ said in *Hobbs v Tinling & Company Limited*:[120]

> The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which all of us desire – namely, that justice should not only be done, but should appear to have been done.

165. In *R v Szabo*,[121] after citing the above with approval, and before applying Lord Hewart CJ's "axiomatic stipulation",[122] De Jersey CJ added:[123]

> Litigants see members of the bar conducting themselves as officers of the Court, owing a special duty to the Court. Just as the Court expects fearlessly independent presentation by counsel, so the client expects that subject to counsel's supervening duty to the Court, counsel will with fearless independence promote the client's cause.

166. Further, in *Grimwade v Meagher*,[124] Mandie J referred to that principle in setting out a test for the engagement of the court's inherent jurisdiction to restrain lawyers from acting, as follows:[125]

> … it cannot be doubted that this court likewise has an inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process and as part of that jurisdiction, in an appropriate case, *to prevent a member of counsel appearing for a particular party in order that justice should not only be done but manifestly and undoubtedly be seen to be done.* The objective test to be applied in the context of this case is *whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required that counsel be so prevented from acting*, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause.
>
> (Emphasis added.)

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[117] [1924] 1 KB 256.
[118] This stipulation has been cited repeatedly in the judgments of Australian courts, including the High Court, in, eg, *Stollery v Greyhound Racing Control Board* (1973) 128 CLR 509, 518-519 (Barwick CJ); *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 351-352 (Mason J); *Webb & Hay v R* (1993-94) 181 CLR 41, 47 (Mason CJ, McHugh J).
[119] [1924] 1 KB 256, 259.
[120] [1929] 2 KB 1, 48.
[121] [2001] 2 Qd R 214.
[122] At 216 [10] (De Jersey CJ).
[123] At 215 [5].
[124] [1995] 1 VR 446.
[125] At 452.

167. Likewise, the principle applies to the conduct of agencies of the State, such as police. In *Williams v Spautz*,[126] Mason CJ, Dawson, Toohey and McHugh JJ stated:[127]

> …the public interest in the administration of justice requires that the court protect its ability to function as a court of law by *ensuring that its processes are used fairly by State and citizen alike*… unless the court protects its ability so to function in that way, its failure will lead to an eroding of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice.
>
> (Emphasis added.)

168. In *Strickland*, the continued prosecution of the appellants in circumstances where evidence was obtained by investigating authorities with reckless disregard for their statutory responsibilities was held to constitute an abuse of process,[128] particularly where that misconduct resulted in "an indeterminate element of incurable prejudice".[129] The plurality was at pains to caution that "decided cases should not be read as attempting to chart the boundaries of abuse of process"[130] before providing the following guidance:[131]

> No doubt, society and therefore the law ordinarily looks more askance on instances of deliberate or advertent reckless disregard of a duty or obligation than upon the accidents of incompetence. *As a rule, the former are conceived of as entailing greater moral culpability and for that reason their condonation is conceived of as more likely to bring the administration of justice into disrepute. But ultimately it is a question of degree which substantially depends upon the nature of the duty or obligation.* If a duty or obligation is of no more than peripheral significance, condonation of its breach, even of an intentional breach, may appear justified in the interests of relatively more pressing considerations of justice. The power to stay proceedings is not available to cure venial irregularities. But *if, as here, the duty or obligation is of a kind that goes to the very root of the administration of justice, condonation of its breach will bring the administration of justice into disrepute regardless of the culprit's mentality.* Ultimately, these appeals turn on that distinction.
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> (Emphasis added and citations omitted.)

It is submitted that the above is equally applicable to the assessment of the conduct of legal practitioners. Further, public confidence may be affected even in circumstances where there is no actual injustice.

Perceived Deprivation of Independent Counsel

169. In *R v Szabo*[132] ("*Szabo*"), the Queensland Court of Appeal allowed an appeal against conviction on the basis that the failure of defence counsel to disclose to his client that he had a prior intimate relationship with the prosecutor amounted to a

[126] (1992) 174 CLR 509.
[127] At 520.
[128] (2018) 93 ALJR 1, 19-20 [86] (Kiefel CJ, Bell and Nettle JJ).
[129] At 23 [98] (Kiefel CJ, Bell and Nettle JJ).
[130] At 23 [99] (Kiefel CJ, Bell and Nettle JJ), citing *Moti v R* (2011) 245 CLR 456, 479 [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); and *Truong v The Queen* (2004) 223 CLR 122, 171-172 [135]; cf 161 [96] (Gummow and Callinan JJ).
[131] At 23 [100] (Kiefel CJ, Bell and Nettle JJ).
[132] [2001] 2 Qd R 214.

perceived injustice against the appellant. This was so despite the Court of Appeal finding that "this was not a case of actual injustice"[133] and that the defence counsel's conduct was otherwise above reproach.[134]

170. Rather, the basis for the finding was concerned with a test analogous to that applicable to apprehended judicial or jury bias.[135] Each of the members of the Court described the test similarly, in the following terms:

170.1. "[whether the] circumstances of this case would engender reasonable suspicion or apprehension in a fair minded, informed observer as to whether defence counsel necessarily acted with … fearless independence [in promoting the client's case]";[136] or, very similarly,

170.2. "whether a fair-minded person, in the position of either the appellant or a member of the public, might reasonably apprehend that, because of defence counsel's relationship with the prosecutor or its consequences, the appellant was deprived of a fair trial";[137] or similarly again,

170.3. "whether, with knowledge of all relevant circumstances, an ordinary fair-minded citizen in the position of the appellant would entertain a reasonable suspicion that justice had miscarried."[138]

171. It is submitted that the tests are substantially identical in focus (at least for the purposes of the present inquiry). While the tests differ as to the position of the observer, it is to be noted that they have been subsequently applied in the alternative.[139]

172. Ultimately, De Jersey CJ found the mischief to exist in the reasonable observer's likely curiosity as to why defence counsel would fail to disclose "a matter which would concern an ordinary litigant in such a situation".[140] Davies JA found that a fair-minded person, having been informed of the relationship and the non-disclosure, might have entertained a reasonable apprehension that, had it not been for the relationship, counsel would have conducted his pre-trial conference differently,[141] and Thomas JA went further, finding the mischief to exist in the deprivation of the appellant, by the non-disclosure, of the opportunity to take alternative action, which relevantly "is capable of contributing to a miscarriage of justice."[142]

173. This was despite circumstances where:

173.1. the Crown case was said to have been strong[143]

173.2. the defence was robust and vigorously conducted[144]

173.3. the trial was "regularly conducted"[145]

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[133] At 215 [3] (De Jersey CJ), 225-6 [50] (Thomas JA).
[134] At 215 [3] and 215-6 [6] (De Jersey CJ), 229-230 [63] and 234 [80] (Thomas JA).
[135] At 215-6 [6] (De Jersey CJ), 227 [56] (Thomas JA), both citing *Webb v The Queen* (1994) 181 CLR 41.
[136] At 215-6 [6] (De Jersey CJ).
[137] At 217 [15] (Davies JA).
[138] At 228 [60] (Thomas JA).
[139] See, e.g., *Ismail-Zai v The State of Western Australia* (2007) 34 WAR 379, 394-5 [48] (Steytler P).
[140] *R v Szabo* [2001] 2 Qd R 214, 216 [9] (De Jersey CJ).
[141] At 218 [18] (Davies JA)
[142] At 233 [78] (Thomas JA)
[143] At 215 [3] (De Jersey CJ), 218 [21] and 234 [81] (Thomas JA).
[144] At 215 [3] and 215-6 [6] (De Jersey CJ).
[145] At 215 [3] (De Jersey CJ).

173.4. defence counsel acted competently[146]

173.5. there was no "real likelihood" that defence counsel did not properly defend the accused[147]

173.6. there was no reason to suspect any collusion, connivance or lack of dedication to his task by defence counsel[148]

173.7. there was no suggestion of any actual improper disclosure of material (or information) by defence counsel to the prosecutor.[149]

174. However, Thomas JA explained that if a reasonable suspicion arises that defence counsel has "run dead" or colluded with the Crown prosecutor contrary to the interests of the accused or for some extraneous purpose failed to play the proper role of defence counsel, that would reveal a seriously unfair contest, and would demonstrate a miscarriage of justice sufficient to require the conviction to be set aside.[150] Further, the test was satisfied because such a citizen would have at least a "lingering suspicion" that the appellant "did not have the benefit of fair play."[151] In other words, it may be perceived that the appellant had not had a fair trial according to the process by which criminal trials are conducted.[152]

175. Thomas JA considered[153] the English case of *R v Smith (Winston)*[154] ("*Smith*"), in which a pupil barrister who had met with the accused had subsequently sat behind the prosecutor in court. The English Court of Appeal held that despite a promise and assumption that the pupil would not be involved in the proceeding or divulge the information to the prosecution, it was "impossible to say that in the circumstances justice was seen to be done".

176. *Smith* was later considered in *Hurley v McDonald's Australia Ltd*,[155] where Dowsett J added that the fact that the pupil was a lawyer was the significant factor which created the miscarriage of justice. His Honour stated:[156]

> …It seems unlikely that the same result would have followed had a non-lawyer spoken to Smith concerning his case and then communicated relevant information to the prosecution. … it is likely that the decision was based upon the perception that justice would not be seen to be done if the accused had confided matters concerning his defence to a barrister who later became associated with the prosecution, and that such perception was sufficient to constitute a miscarriage of justice, enlivening the statutory jurisdiction to intervene.

177. Thomas JA concluded that, in allowing the appeal, there was no perception that an innocent man had been convicted.[157] However, to uphold the conviction would send the wrong message to professional persons entrusted with a vital role in the

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[146] At 229-230 [63] and 234 [80] (Thomas JA).
[147] At 215-6 [6] (De Jersey CJ).
[148] At 229 [63] (Thomas JA).
[149] At 215 [3] (De Jersey JA).
[150] At 228 [59] (Thomas JA).
[151] At 233-4 [79] (Thomas JA).
[152] At 234 [81] (Thomas JA).
[153] At 231-2 [71] (Thomas JA).
[154] (1975) 61 Cr App R 128.
[155] (2000) 101 FCR 570.
[156] At 585 [43].
[157] *R v Szabo* [2001] 2 Qd R 214, 234 [81] (Thomas JA).

administration of criminal justice, and would in the end lower public confidence in the integrity of the system.[158]

178. It should be noted that Thomas JA stated that he had hesitated in reaching his conclusion having particular regard to the appellant's seemingly competent representation, and accepted that different minds might differ concerning the application of the test to the facts of *Szabo*, with some minds reaching a contrary conclusion.[159]

179. Further, it could be contended that the tests formulated in *Szabo* set a very low threshold, with the consequence that it will be readily satisfied, giving no weight to the strength of the prosecution case and little, if any, weight to the fact that defence counsel has fought well and hard for the accused person, such matters being accepted by the court in *Szabo.*

180. Nevertheless, *Szabo* has been considered on this issue without apparent criticism (although it has been distinguished on the facts) by subsequent judgments of the Queensland Court of Appeal,[160] the Federal Court[161] the New South Wales Court of Criminal Appeal,[162] the South Australian Court of Criminal Appeal,[163] and the Western Australian Court of Appeal.[164]

181. Other than passing reference in *AB & EF v CD*[165] (to submissions made by the Director and *Amici*), and in *AB v CD & EF*[166] (to the types of arguments suggested by the Chief Commissioner that could be made by convicted individuals), *Szabo* has not been considered in Victoria.

182. However, the principle of comity with regard to the common law of Australia would apply, and as a judgment of an intermediate appellate court *Szabo* should be followed unless the Court of Appeal regards it as plainly wrong.[167]

183. Applying *Szabo* to the facts before the Commission, it should be noted that in many cases Ms Gobbo appeared at preliminary stages of proceedings (such as in mention hearings, bail applications and committals), and did not appear at trial. In some cases she was led at trial. In other cases she provided advice in relation to, but did not appear in, criminal proceedings. Cases will inevitably turn on their facts as to whether there was a sufficient connection between the conduct of Ms Gobbo and Victoria Police members and the conviction upon trial of the accused, or the accused's plea of guilty, to potentially result in a substantial miscarriage of justice.

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[158] At 234 [81] (Thomas JA).
[159] At 234 [80] (Thomas JA).
[160] *R v Pham* [2017] QCA 43, [61], [64] (Margaret McMurdo P); *R v Hamade* (2011) 220 A Crim R 151, 156 [13], 158 [22] (Margaret McMurdo P), *Phillips v The Queen* [2009] 2 Qd R 263, 267-9 [20]-[25] (Holmes JA). It was cited by the High Court with approval on a different point (in some circumstances counsel's failure to adequately advise the accused with respect to the exercise of the choice not to give evidence will occasion a miscarriage of justice) in *Craig v The Queen* (2018) 264 CLR 202, 212 [26] fn 24 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[161] *Hurley v McDonald's Australia Ltd* (2000) 101 FCR 570, 581 [29], 585-7 [44]-[49] (Dowsett J).
[162] *MG v The Queen* (2007) 69 NSWLR 20, 44 [74]-[77] (McClellan CJ at CL, Bell and Hoeben JJ).
[163] *R v Edwards* [2007] SASC 202, [73]-[79] (Sulan J).
[164] *Ismail-Zai v The State of Western Australia* (2007) 34 WAR 379, 394-5 [48] (Steytler P).
[165] [2017] VSC 350, [142]-[143].
[166] [2017] VSCA 338, [106].
[167] *Director of Public Prosecutions (Cth) v Thomas* (2016) 53 VR 546, 595 [130] (Redlich, Santamaria, and McLeish JJA), citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–52 [135] (Gleeson CJ, Gummow, Callinan, Heydon, Crennan JJ).

184. However, the *Szabo* analysis supports the proposition that Ms Gobbo was under an ethical duty to disclose to her clients that she was an active police informer who had, and was, covertly informing against some of her clients. Her non-disclosure of that fact deprived some of her clients of the opportunity of challenging the admissibility of some of the evidence sought to be led against them by the prosecution and also deprived her clients of the opportunity of making an application that their trials be stayed on the basis that their continuation constituted an abuse of process.

185. It is important to note that the deprivation of opportunity that arises from non-disclosure is not concerned with any "practical unfairness", but rather with the very nature of a trial and its requirements,[168] and the way in which justice is *seen* to be administered.

186. As is clear from the judgment of the High Court in *AB v CD* set out at the beginning to these submissions, together with the judgment of the Court of Appeal in *Orman*, it is reasonably possible that in some cases Ms Gobbo's conduct could be regarded as causing a substantial miscarriage of justice.

Public Confidence – Guiding Principles

187. In summary, the above demonstrates that public confidence in the administration of justice:

187.1. may concern the conduct of courts, the state and legal practitioners[169]

187.2. is not only concerned with matters at trial, but also with the conduct of investigations and the gathering of evidence prior to trial[170]

187.3. may be concerned with perceived or apparent injustice, whether or not there was any "actual injustice"[171] or "practical unfairness".[172]

188. In *AB & EF v CD*,[173] the Chief Commissioner,[174] the DPP[175] and the *amici curiae* advanced a number of bases upon which to contend that particular convictions might involve a substantial miscarriage of justice.[176] However, it is submitted that many of them (in so far as they concern the conduct of Ms Gobbo and are relevant to the first term of reference) essentially overlap, and those bases are all arguably subsumed into the principles emerging from the jurisprudence outlined above.

189. Indeed, the Court's conclusion in respect of those potential grounds was as follows:[177]

> The parties' and Amici's submissions which I have summarised demonstrate that the seven named persons may have a number of grounds on which to

[168] See for example *Lee v The Queen* (2014) 253 CLR 455, 470-471 [41]-[44] (French CJ, Crennan, Kiefel, Bell and Keane JJ), applied in *Strickland* (2018) 93 ALJR 1, 18 [79] (Kiefel CJ, Bell and Nettle JJ).
[169] See, e.g., *Williams v Spautz* (1992) 174 CLR 509, 520 (Mason CJ, Dawson, Toohey and McHugh JJ); *R v Szabo* [2001] 2 Qd R 214, 215-6 [6] (De Jersey CJ)
[170] See, e.g., *Strickland* (2018) 93 ALJR 1.
[171] *R v Szabo* [2001] 2 Qd R 214, 214 [3] (De Jersey CJ), 225-6 [50] (Thomas JA)
[172] *Lee v The Queen* (2014) 253 CLR 455, 470-471 [41]-[44] (French CJ, Crennan, Kiefel, Bell and Keane JJ).
[173] [2017] VSC 350.
[174] See *AB & EF v CD* [2017] VSC 350, [139]-[154] (Ginnane J).
[175] See *AB & EF v CD* [2017] VSC 350, [156] (Ginnane J).
[176] See *AB & EF v CD* [2017] VSC 350, [160] (Ginnane J); *AB v CD & EF* [2017] VSCA 338, [112] (Ferguson CJ, Osborn and McLeish JJA).
[177] See *AB & EF v CD* [2017] VSC 350, [160] (Ginnane J).

> contend that their convictions involved a substantial miscarriage of justice. *The possible grounds include that because of the conduct of Victoria Police and EF, they did not receive a trial as required by the criminal justice system and that the trials involved an abuse of process, because their legal counsel did not provide independent advice*. The requirements of a fair trial include that counsel will provide independent advice to a client and will not have separate obligations to the police who have brought the prosecution.
>
> (Emphasis added.)

190. In general, the above concerns perceived an actual conflict of interest. Another way in which the public confidence in the administration of justice may be undermined is through the tainting of evidence. This is explored in the next section below.

Tainted Evidence

191. It follows from the above, that in circumstances where a convicted person was not aware that evidence used by the prosecution may have been improperly or illegally obtained,[178] a question arises as to whether that person will have been deprived of a fair trial, and more generally, whether public confidence in the administration of justice might be adversely affected.

192. In light of the jurisprudence outlined above, the question concerns at least two aspects, namely:

192.1. the conduct of Ms Gobbo and members of Victoria Police in the obtaining of evidence which may constitute an abuse of process or otherwise undermine public confidence in the administration of justice

192.2. the non-disclosure of the illegality or impropriety amounting to a deprivation of an opportunity for the accused to object to the admission of such evidence, which is capable of contributing to a substantial miscarriage of justice, whether or not evidence might have been ruled to be admissible.

193. In relation to the former, a distinction has been drawn between circumstances in which law enforcement authorities create a "mere opportunity" for the offending to be committed, and where they engage in "entrapment". While entrapment is not a substantive defence in Australian law, it may be relevant to submissions regarding the potential exclusion of evidence.[179]

194. As Gaudron J noted in *Ridgeway v The Queen*:[180]

> … In cases of "mere opportunity", the accused person is fairly regarded as wholly responsible for his own actions. And that is so even if there is some illegality associated with the opportunity provided, as, for example, that involved in the purchase of contraband where it is clear that it is generally available to all who wish to purchase it. But in cases which go beyond the provision of mere opportunity, where the offence results from the illegal actions of those whose duty it is to uphold the law, it is they who, in a real sense, are responsible for its commission, not the accused. In such

[178] *Evidence Act 2008 (*Vic), s 138(1), or formerly the *Bunning v Cross* (1978) 141 CLR 54 discretion. See *Kadir v The Queen; Grech v The Queen* (2020) 94 ALJR 168, 173 [13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[179] *Ridgeway v The Queen* (1995) 184 CLR 19.
[180] (1995) 184 CLR 19, 77.

> circumstances the accused and society in general may well view prosecution as a serious injustice.
>
> *But what is more important is that the administration of justice is inevitably brought into question, and public confidence in the courts is necessarily diminished, where the illegal actions of law enforcement agents culminate in the prosecution of an offence which results from their own criminal acts.* Public confidence could not be maintained if, in those circumstances, the courts were to allow themselves to be used to effectuate the illegal stratagems of law enforcement agents or persons acting on their behalf.
>
> So far as public confidence in the administration of justice is concerned, the position is even worse if, as is usually the case, the law enforcement agents or those acting on their behalf are not brought to account for their criminal acts. In cases of that kind, the courts are brought into greater disrepute because they give the appearance of sanctioning illegality. And that appearance is given even if criticism is made of the police conduct involved. Indeed, criticism may well appear to be mere humbug and, itself, lead to a further erosion of confidence in the courts.
>
> (Emphasis added.)

195. As will be considered below, the required balancing exercise in relation to improperly or illegally obtained evidence[181] is built upon policy considerations of a nature similar to those relevant to a "substantial miscarriage of justice".

Improperly or Illegally Obtained Evidence

196. Section 138 of the *Evidence Act 2008* (Vic) ("the *Evidence Act*") provides:

> **Exclusion of improperly or illegally obtained evidence**
>
> (1) Evidence that was obtained—
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law—
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
>
> …
>
> (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—
>
> (a) the probative value of the evidence; and
>
> (b) the importance of the evidence in the proceeding; and
>
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

[181] *Evidence Act 2008* (Vic), s 138, or formerly the *Bunning v Cross* (1978) 141 CLR 54 discretion. See *Kadir v The Queen; Grech v The Queen* (2020) 94 ALJR 168, 173 [13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note

The International Covenant on Civil and Political Rights is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* of the Commonwealth.

197. Accordingly, in circumstances where evidence has been improperly or illegally obtained,[182] it is not to be admitted, unless the "the desirability of admitting the evidence outweighs the undesirability of admitting the evidence".[183] There is, therefore, a discretion[184] available to a judicial officer to admit or exclude such evidence.[185] That requires a balancing exercise, which is informed by the exercise at common law described in *Bunning v Cross*[186] and *Ridgeway v The Queen*,[187] but with modifications[188] including the requirement that the balancing exercise be carried out by reference to the non-exhaustive considerations under s 138(3) of the *Evidence Act*.[189]

198. As explained by the High Court in *Kadir v The Queen; Grech v The Queen* ("*Kadir*"):[190]

> In the event, s 138 enacts a "discretion" which is wider than the modified *Bunning v Cross* discretion discussed by the ALRC in the Interim Report. *Bunning v Cross* is an exclusionary discretion that applies in criminal proceedings and requires the court to balance the desirable goal of convicting wrongdoers against the undesirable effect of giving curial approval, or even encouragement, to the unlawful conduct of those whose task it is to enforce the law. Section 138 provides for the conditional exclusion of evidence obtained by, or in consequence of, impropriety or illegality in any proceeding

[182] Whether directly or indirectly, subject to a test of causation: see, e.g., *Slater (a Pseudonym) v The Queen* [2019] VSCA 213, [44]-[46] (McLeish and Weinberg JJA and Tinney AJA).
[183] *Kadir v The Queen; Grech v The Queen* (2020) 94 ALJR 168, 179 [40] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[184] See *Em v R* (2007) 232 CLR 67, 101 [95] (Gummow and Hayne JJ); *DPP v MD* (2010) 29 VR 434, 440-1 [27]-[30] (Maxwell P, Nettle and Harper JJA); *DPP v Marijancevic* (2011) 33 VR 440, 444 [13] (Warren CJ, Buchanan and Redlich JJA); *Slater (a Pseudonym) v The Queen* [2019] VSCA 213, [40] (McLeish and Weinberg JJA and Tinney AJA); *Murray v The Queen* [2017] VSCA 236, [47] (Priest, Beach and Kaye JJA).
[185] See, e.g., *Evidence Act 2008* (Vic), s 138
[186] (1978) 141 CLR 54.
[187] (1995) 184 CLR 19.
[188] E.g., a reverse onus of proof and the important qualifier that appropriate weight must be accorded to the effect of any impropriety or unlawfulness: *DPP v Marijancevic; DPP v Preece; DPP v Preece* (2011) 33 VR 440, 5–6 [17], citing *Parker v Comptroller-General of Customs* (2007) 243 ALR 574, [57]–[58] (Basten JA).
[189] See, e.g., *Evidence Act 2008* (Vic), s 138(3). See also *Gedeon v The Queen* (2013) A Crim R 326, 361 [174] (Bathurst CJ).
[190] (2020) 94 ALJR 168, 173 [12]-[13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

> to which the Act applies. Notably, the exclusion is not confined to evidence that is improperly or illegally obtained by police or other law enforcement agencies. The "discretion" conferred is to admit the evidence, should the court be persuaded that the balance of the competing public interests requires that outcome.
>
> As s 138 is not confined to criminal proceedings or to evidence obtained by, or in consequence of, the misconduct of those engaged in law enforcement, the public interests that the court is required to weigh are broader than those weighed in the exercise of the *Bunning v Cross discretion*. The desirability of admitting evidence recognises the public interest in all relevant evidence being before the fact-finding tribunal. The undesirability of admitting evidence recognises the public interest in not giving curial approval, or encouragement, to illegally or improperly obtaining evidence generally. In a criminal proceeding in which the prosecution seeks to adduce evidence that has been improperly or illegally obtained by the police (or another law enforcement agency), the more focused public interests identified in *Bunning v Cross* remain apt.
>
> (Citations omitted.)

199. For the purposes of the present inquiry, it is submitted that the applicable exercise prior to and since the enactment of the uniform evidence legislation remains substantially the same, as does the public policy of discouraging illegal or improper behaviour by law enforcement authorities.[191]

200. The operation and effect of s 138 of the *Evidence Act* raises a number of questions of importance to the Commission:

200.1. the definition and relevance of "improperly" obtained evidence

200.2. the definition and relevance of evidence obtained "in contravention of an Australian law"

200.3. the requisite causal connection between the impropriety or the illegality and the evidence sought to be adduced

200.4. the policy underpinning the Court's balancing exercise.

201. These issues will be considered in turn.

Defining Impropriety

202. The term "improperly" is not defined by the *Evidence Act.* In *Parker v Comptroller-General of Customs*,[192] French CJ observed that the meaning of "improper" in the *Oxford English Dictionary* includes "not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong".

[191] *Slater (a Pseudonym) v The Queen* [2019] VSCA 213, [55] (McLeish and Weinberg JJA and Tinney AJA). See *Kadir v The Queen; Grech v The Queen* (2020) 94 ALJR 168, 173 [13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[192] (2009) 83 ALJR 494, 501 [29].

203. What constitutes a relevant impropriety is a matter for the court to determine in each case.[193] It is clearly broader than a contravention of law, and "should not be narrowly construed".[194]

204. The following statement of Mason CJ, Deane and Dawson JJ in *Ridgeway v The Queen*[195] is instructive in the present inquiry:[196]

> …circumstances can conceivably exist in which a law enforcement officer intentionally brings about the opportunity for the commission of a criminal offence by conduct which is not criminal but which is quite *inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement*. Extreme cases of creating circumstances of temptation under which a vulnerable but otherwise law-abiding citizen commits an offence of a kind which (so far as the police are concerned) he or she otherwise might not have committed provide possible examples.
>
> …
>
> The effective investigation by the police of some types of criminal activity may necessarily involve subterfuge, deceit and the intentional creation of opportunities for the commission by a suspect of a criminal offence. When those tactics do not involve illegal conduct, their use will ordinarily be legitimate notwithstanding that they are conducive to the commission of a criminal offence by a person believed to be engaged in criminal activity. *It is neither practicable nor desirable to seek to define with precision the borderline between what is acceptable and what is improper in relation to such conduct. The most that can be said is that the stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree of harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances*, including, amongst other things, the nature and extent of any known or suspected existing or threatened criminal activity, the basis and justification of any suspicion, the difficulty of effective investigation or prevention and any imminent danger to the community. A finding that law enforcement officers have engaged in such clearly improper conduct will not, of course, suffice of itself to give rise to the discretion to exclude evidence of the alleged offences or of an element of it. As with the case of illegal conduct, the discretion will only arise if the conduct has procured the commission of the offence with which the accused is charged.
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> (Emphasis added.)

205. It follows from the above that there may be circumstances in which evidence obtained by non-illegal deceptive tactics will be admissible, for example where such tactics do not *clearly* fall short of the minimum standards of propriety expected by

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[193] Note that in relation to evidence of admissions, what may constitute impropriety in some circumstances is expressed by statute: see, e.g., *Evidence Act 2008* (Vic), ss 138(2) and 139.
[194] See *DPP v Carr* (2002) 127 A Crim R 151, 159 [34] (Smart AJ).
[195] (1995) 184 CLR 19.
[196] At 36. See Kadir (2020) 94 ALJR 168, 173-4 [14] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

society.[197] It has been said that "deceptive tactics, which do not involve illegal conduct, will ordinarily be legitimate".[198]

206. However, whatever deceptive tactics by police may be considered legitimate, they fall well short of having a legal representative purport to provide independent representation to an accused person whist acting as a human source in potential breach of fiduciary and ethical obligations, and indeed engaging in what may be criminal conduct. Ultimately, for the purposes of the present inquiry under the first and second terms of reference, it is submitted that the use of Ms Gobbo as a human source by Victoria Police, in circumstances where she was a legal practitioner and informing on her clients, was improper. So much was made clear by the High Court in *AB v CD*.[199] The impropriety attaches both to Ms Gobbo's conduct as a source and also to the conduct of members of Victoria Police in their use of Ms Gobbo as a source.

In Contravention of an Australian Law

207. Further to the above, in some cases evidence may have been obtained "in contravention of an Australian law" for the purposes of s 138(1) of the *Evidence Act* due to the conduct of Ms Gobbo and members of Victoria Police. "Australian law" is defined in the Dictionary to the Act as "a law of the Commonwealth, a State or a Territory", and "law" in turn is defined to include unwritten law, which would include the common law.[200]

208. [redacted] Further, it is submitted that in some cases members of Victoria Police may have committed "a breach of discipline" under s 125 of the *Victoria Police Act 2013* (Vic), and/or misconduct under s 166 of that Act.

209. Accordingly, in some cases information sourced from Ms Gobbo by members of Victoria Police, which led to the obtaining of evidence against accused persons, may have been in contravention of Australian law.

The Causal Connection

210. The chain of causation between the illegality or impropriety and the evidence sought to be adduced may be direct or indirect provided that the chain represents a

[197] See *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612 ,622 [36] (Basten JA).
[198] *Fleming v The Queen* (2009) 197 A Crim R 282, 288 [17] (McClellan CJ at CL), citing *Ridgeway v The Queen* (1984) 184 CLR 19. For example, in *Tofilau v The Queen* (2007) 231 CLR 396 , the High Court ruled that "scenario evidence" was admissible. As explained by Callinan, Heydon and Crennan JJ at 465 [219]: …scenario evidence is confessional evidence obtained in the following way. Undercover police officers pose as members of a gang. They solicit the cooperation of a person whom they think has committed a serious crime, although they do not believe that they are yet able to prove it. They encourage that person to take part in "scenarios" involving what the person wrongly thinks is criminal conduct. Provided that the person informs the head of the gang of anything which might attract the adverse attention of the police, they offer the person two advantages. One is the opportunity of material gain by joining the gang. The other is the certainty that the head of the gang can influence supposedly corrupt police officers to procure immunity from prosecution for the serious crime.
[199] (2018) 93 ALJR 59, 62 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[200] Dictionary to the *Evidence Act 2008* (Vic), Pt 1 and Pt 2 Cl 9.

course of rational, inferential reasoning.[201] The link need not be immediate. It may arise through various steps.[202]

211. The assessment of the requisite causal connection is a matter for the court and is guided by the policy underlying the balancing exercise considered below.

212. Where the causal link is "tenuous", this may affect the weighing of the public interest in not giving curial approval or encouragement to the unlawful conduct.[203]

213. In *Slater (a Pseudonym) v The Queen*,[204] McLeish and Weinberg JJA and Tinney AJA observed:[205]

> The degree of connection between evidence obtained 'in consequence of' an impropriety or contravention and that impropriety or contravention is plainly a matter capable of bearing on the balancing exercise. If the impropriety or contravention bears only a distant causal relationship to the evidence, the public interest in deterring impropriety or contravention of the law by obtaining evidence in the manner concerned might be thought more likely to be outweighed by the public interest in admitting probative evidence. Conversely, exclusion of evidence closely connected to the impropriety or contravention might more obviously serve the public interest in deterring the obtaining of evidence in that manner.
>
> … As the connection becomes more tenuous, and evidence is obtained through lawful means, in spite of that connection, the various factors weighing in the public interest will not necessarily remain constant.

The Balancing Exercise

214. The High Court has observed that "[n]one of the s 138(3) factors can be considered in isolation".[206]

215. The Court of Appeal has extracted the applicable balancing exercise as follows:[207]

> …the weighing against each other of two competing requirements of public policy, namely, the public interest in admitting reliable and probative evidence so as to secure the conviction of the guilty and the public interest in vindicating individual rights and deterring misconduct and *maintaining the legitimacy of the system of criminal justice***.**
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> (Emphasis added.)

216. Importantly, the above demonstrates that while the right to a fair trial and abuse of process may be relevant considerations, the "discretionary judgment called for

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[201] *R v Hill* (2012) 6 ACTLR 167, 185 [98]-[99] (Refshauge J); *R v Petroulias [No 8]* (2007) 175 A Crim R 417, 425 [25] (Johnson J).
[202] *Re Lee* (2009) 212 A Crim R 442, 449 [31] (Penfold J); *DPP v Kaba* (2014) 44 VR 526, 618 [337], 648 [472] (Bell J).
[203] *Kadir* (2020) 94 ALJR 168, 179 [41] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[204] [2019] VSCA 213.
[205] At [44]-[45].
[206] *Kadir* (2020) 94 ALJR 168, 179 [42] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[207] *DPP v Marijancevic; DPP v Preece; DPP v Preece* (2011) 33 VR 440, 445 [18] (Warren CJ, Buchanan and Redlich JJA), citing *Bunning v Cross* (1978) 141 CLR 54.

[under s 138] does not involve a simple question of ensuring fairness to an accused".[208]

217. Of relevance to the present inquiry, the High Court observed in *Bunning v Cross*:[209]

> The relevance of the competing policy considerations to which we have referred becomes of especial importance *in an age of sophisticated crime and crime detection when law enforcement increasingly depends upon electronic surveillance and eavesdropping, the unannounced search of premises or of the person and upon scientific methods, whether of identification, by fingerprints or voiceprints, or of ascertainment of bodily states, as by blood alcohol tests and the like*. In many such cases the question of fairness does not play any part. "Fair" or "unfair" is largely meaningless when considering fingerprint evidence obtained by force or a trick or even the evidence of possession of, say, explosives or weapons obtained by an unlawful search of body or baggage, aided by electronic scanners*. There is no initial presumption that the State by its law enforcement agencies, will in the use of such measures of crime detection observe some given code of good sportsmanship or of chivalry. It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.* A discretion exercisable according to the principles in Ireland's Case serves this end whereas one concerned with fairness may often have little relevance to the question.
>
> (Emphasis added.)

218. Given the underlying public policy, courts have considered that general police attitudes may affect the admissibility of the evidence.[210] In *Slater (a Pseudonym) v The Queen*[211] McLeish and Weinberg JJA and Tinney AJA cited the following from *Tasmania v Crane*[212] with approval:

> When evidence is improperly or illegally obtained by police officers, … the attitude of those officers to the rule of law*, as displayed during the relevant investigation and any associated prosecution, before, during and after the obtaining of the evidence*, must be relevant to the exercise of the discretion conferred by s 138.
>
> (Emphasis added.)

219. Consistently with the above, courts have considered the degree to which the conduct giving rise to the impropriety is widespread within the relevant law enforcement organisation to have a bearing on the seriousness of the impropriety for the purpose of the balancing exercise.[213]

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[208] *DPP v Marijancevic; DPP v Preece; DPP v Preece* (2011) 33 VR 440, 445 [18] (Warren CJ, Buchanan and Redlich JJA).
[209] (1978) 141 CLR 54, 75 (Stephen and Aickin JJ).
[210] See, e.g., *Tasmania v Crane* (2004) 148 A Crim R 346, 354 [21] (Blow J); *R v Hunt* (2014) 286 FLR 59, 85-6 [149] (Hiley J).
[211] [2019] VSCA 213, [57].
[212] (2004) 148 A Crim R 346, 354 [21] (Blow J).
[213] See *Director of Public Prosecutions v Marijancevic* (2011) 33 VR 440, 458 [67] (Warren CJ, Buchanan and Redlich JJA); *DPP (Cth) v Farmer (a Pseudonym) and Ors* (2017) 54 VR 420, 435 [56]-[57] and 436 [63] (Maxwell P and Beach JA).

220. Further, it should be noted that in *Kadir*,[214] the High Court held with regard to s 138(3)(h) (concerning the difficulty of obtaining the evidence without impropriety or contravention of an Australian law):[215]

> The significance of factor (h) to the balancing of the competing public interests under s 138(1) will vary depending upon the circumstances. In a case in which action is taken in circumstances of urgency in order to preserve evidence from loss or destruction, it is possible that factor (h) would weigh in favour of admission, notwithstanding that the action involved deliberate impropriety or illegality. Putting such a case to one side, where the impropriety or illegality involved in obtaining the evidence is deliberate or reckless (factor (e)), proof that it would have been difficult to obtain the evidence lawfully will ordinarily weigh against admission. By contrast, where the impropriety or illegality was neither deliberate nor reckless, the difficulty of obtaining the evidence lawfully is likely to be a neutral consideration. The assumption on which the parties and the Courts below proceeded, that proof that it would have been difficult to lawfully obtain the surveillance evidence was a factor which weighed in favour of admitting evidence obtained in deliberate defiance of the law, inverts the policy of the exclusion for which s 138 provides.
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> (Citations omitted.)

221. It is submitted that the discretionary nature and complexity of the above described balancing exercise make any findings that such evidence would have been admitted or excluded in a particular case unavailable to the Commissioner. However, for the purposes of the present inquiry, it is sufficient that an accused person might reasonably have submitted that such evidence should have been excluded.

222. The assessment of the requisite causal connection, as part of the broader considerations under s 138 of the *Evidence Act*,[216] is a matter for the courts. As noted above, while the chain of causation may be indirect or arise through various steps and still enliven s 138,[217] where the causal link is "tenuous", this may affect the balancing exercise under s 138(3) and the decision as to whether the evidence should be admitted or excluded.[218] However, it is submitted that where the relevant evidence is found to have been obtained (directly or indirectly) by what may have been improper or illegal conduct, and that conduct has not been disclosed to the accused, it is open to the Commissioner to find that the accused's case may have been affected. That is due to the deprivation of the accused's opportunity to object to the admissibility of the evidence, irrespective of how that objection might have ultimately been determined, for the reasons described above.

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[214] (2020) 94 ALJR 168.
[215] At 175 [20] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ). The Court further observed at 178 [37] that "[t]he gravity of the contravention (factor (d)) and the difficulty of obtaining evidence lawfully (factor (h)), along with whether the impropriety or contravention was deliberate or reckless (factor (e)), are overlapping factors".
[216] Or formerly the *Bunning v Cross* (1978) 141 CLR 54 discretion See *Kadir v The Queen; Grech v The Queen* (2020) 94 ALJR 168, 173 [13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[217] See above [210], citing *R v Hill* (2012) 6 ACTLR 167, 185 [98]-[99] (Refshauge J); *R v Petroulias [No 8]* (2007) 175 A Crim R 417, 425 [25] (Johnson J). *Re Lee* (2009) 212 A Crim R 442, 449 [31] (Penfold J); *DPP v Kaba* (2014) 44 VR 526, 618 [337], 648 [472] (Bell J).
[218] See above at [212]-[213], citing *Kadir* (2020) 94 ALJR 168, 179 [41] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) and *Slater (a Pseudonym) v The Queen* [2019] VSCA 213, [44]-[45] (McLeish and Weinberg JJA and Tinney AJA).

Challenging the Integrity of a Guilty Plea After Conviction

223. The Court of Appeal has explained:[219]

> The test for determining whether a conviction should be set aside following a plea of guilty is whether the applicant has established a substantial miscarriage of justice, in accordance with s 276(1) of the *Criminal Procedure Act 2009*. Although most cases in this area have been decided under earlier criminal appeal provisions, those cases remain a useful guide to the kinds of circumstances that will tend to satisfy the modern test.[220]

224. In order to challenge the integrity of a guilty plea after conviction, the appellant must show proof of an objective circumstance that allows a conclusion that the plea was attributable to that circumstance and not to a consciousness of guilt.[221]

225. In *Peters v The Queen (No 2)*[222] the Court of Appeal explained:[223]

> …identification of a mere issue as to the guilt or innocence of the person who has pleaded guilty, without more, will rarely if ever warrant setting aside a conviction after a plea of guilty. This itself respects the integrity of the plea and the high public interest attached to finality of criminal proceedings. It also recognises the fact that, in pleading guilty, an accused will have chosen to forego potential defences in the hope of deriving some compensating benefit. Dawson J explained in *Meissner v The Queen* that an accused may be motivated for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty.
>
> (Citations omitted.)

226. However, it is fundamental that an accused person must not be deprived of free choice with regard to his or her plea.[224]

227. One category of miscarriage of justice which emerges repeatedly is the situation in which the accused did not appreciate the nature of the charge, or did not intend to plead guilty.[225] Such a situation requires the presence of two factors: doubt as to the integrity of the plea in the sense that it was not really attributable to a genuine consciousness of guilt,[226] and a genuine issue as to the guilt of the accused.[227]

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[219] *Peters v The Queen (No 2)* [2019] VSCA 292, [37] (Maxwell P, Kaye and McLeish JJA).
[220] *Gurappaji v The Queen* [2018] VSCA 187 [5] (Priest, Beach and Weinberg JJA) ("*Gurappaji*").
[221] *Peters v The Queen (No 2)* [2019] VSCA 292, [39] (Maxwell P, Kaye and McLeish JJA); See *Weston (a Pseudonym) v The Queen* (2015) 48 VR 413, 444 [109(11)] (Redlich JA).
[222] [2019] VSCA 292, [38] (Maxwell P, Kaye and McLeish JJA).
[223] At [41] (Maxwell P, Kaye and McLeish JJA).
[224] *Meissner v The Queen* (1995) 184 CLR 132, 142 (Brennan, Toohey and McHugh JJ).
[225] *Peters v The Queen (No 2)* [2019] VSCA 292, [38] (Maxwell P, Kaye and McLeish JJA), citing *Gurappaji v The Queen* [2018] VSCA 187, [6]-[7] (Priest, Beach and Weinberg JJA) and *R v Murphy* [1965] VR 187, 190 (Sholl J).
[226] *Peters v The Queen (No 2)* [2019] VSCA 292, [39] (Maxwell P, Kaye and McLeish JJA), citing *R v Murphy* [1965] VR 187, 190 (Sholl J); *Weston (a Pseudonym) v The Queen* (2015) 48 VR 413, 445–6 [109(13)] (Redlich JA); *Kohari v The Queen* [2017] VSCA 33, [122] (Weinberg and Kyrou JJA).
[227] *Peters v The Queen (No 2)* [2019] VSCA 292, [39] (Maxwell P, Kaye and McLeish JJA), citing *R v Murphy* [1965] VR 187, 190 (Sholl J); *Jamieson v The Queen* [2017] VSCA 140, [79]–[81] (Ashley, Osborn and Santamaria JJA); *Rotner v The Queen* [2011] NSWCCA 207, [49] (Simpson J, with McClellan CJ at CL and Fullerton J agreeing); *Weston (a Pseudonym) v The Queen* (2015) 48 VR 413, 432 [77], 444 [109(5)] (Redlich JA).

228. In *Kohari v The Queen*,[228] the Court of Appeal held that it would be "an affront to justice"[229] if a conviction was allowed to stand, in circumstances where it was based on a guilty plea by an accused who had not been properly advised as to what the prosecution was required to prove. The Court considered it immaterial whether the accused would have otherwise entered a different plea, stating:[230]

> … it is true that we do not know whether the applicant would have elected to stand trial, rather than plead guilty, had he been properly advised (as he ought to have been) of what the Crown would be required to prove at a trial. The point is, however, that the applicant was denied the opportunity to make that choice, an opportunity that should have been afforded to him.

229. Other cases concern circumstances where improper pressure was applied upon an accused to plead guilty and whether the plea was entered into freely.[231] In such cases, the second factor noted at [227] above, has been considered to be irrelevant,[232] as has the notion that there may be more than one cause of an accused's decision to plead guilty.[233] Further, the conduct of the party imposing the improper pressure may not only result in a miscarriage of justice but constitute a perversion of the course of justice.

230. As Brennan, Toohey and McHugh JJ stated in *Meissner v The Queen*:[234]

> …[i]f a plea of guilty is entered by the person charged in purported exercise of a free choice to serve that person's own interests, but the plea is in fact procured by pressure and threats, there is a miscarriage of justice. In such a case, the court is falsely led to dispense with a trial on the faith of a defective plea. The course of justice is thus perverted.

231. Importantly for the purposes of the Commission, in *AB v CD & EF,*[235] the Court of Appeal (Ferguson CJ, Osborn and McLeish JJA) expressly endorsed[236] the conclusion of Ginnane J in *AB & EF v CD*[237] that:[238]

> There is an additional matter that concerns most of the seven persons. With the exception of Cvetanovski, all of them eventually pleaded guilty. EF submitted that a conviction following a plea of guilty can only be overturned in exceptional circumstances, for example where the accused did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; or upon the admitted facts, the applicant could not in law have been convicted of the offence charged.[239] While that is true, there is a duty on legal practitioners and others associated with prosecutions not to do anything that corrupts or

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[228] [2017] VSCA 33.
[229] At [142] (Weinberg and Kyrou JJA).
[230] At [142] (Weinberg and Kyrou JJA).
[231] See, e.g., *R v KCH* (2001) 124 A Crim R 233; *Guariglia v The Queen* (2010) 208 A Crim R 49.
[232] See, e.g., *R v KCH* (2001) 124 A Crim R 233, 248 [106] (Ipp AJA).
[233] See *R v KCH* (2001) 124 A Crim 233, 248 [105] (Ipp AJA); *Guariglia v The Queen* (2010) 208 A Crim R 49, 59-60 [35] (Nettle JA).
[234] (1995) 184 CLR 132, 142.
[235] [2017] VSCA 338.
[236] At [135].
[237] [2017] VSC 350.
[238] At [299].
[239] *R v Reed* [2003] VSCA 95 at [2], *R v Mokbel* ('Change of Pleas') [2012] VSC 86; (2012) 35 VR 156 [261]-[264].

subverts the administration of justice. Even a conviction following a guilty plea can be quashed by application of that principle.[240]

General Approach to the First Term of Reference

232. In applying the above principles to the present inquiry, and for the purposes determining whether cases have been "affected" and the construction of the word "extent" in the first term of reference, Counsel Assisting have developed categories relating to the impact of Ms Gobbo's conduct upon each particular case under consideration, which are outlined at [245]-[249] below,[241] and are informed by the following.

Legal Representation of an Accused Person by a Human Source

233. In the present inquiry, and applying the tests in *Szabo* above at [170], it is submitted that the fact that a legal representative of an accused person is a registered or ostensible human source for police would be of concern to the fair-minded informed observer (whether in the position of the accused or the public), and that the failure to disclose this would constitute a deprivation of independent legal representation.

234. An important distinction must be made between the circumstances in *Szabo* and the subject matter of the present inquiry. It is submitted that unlike parties to an intimate relationship (or indeed a former intimate relationship) and its inherent *risks*, the informer-police relationship has, as its central purpose, the provision of information to police against the interests of persons of interest. In *Szabo*, alternative action was open to be taken while maintaining representation through the disclosure of the relationship. However, with regard to Ms Gobbo's conduct, it is submitted that it is highly unlikely that an accused person would sensibly maintain such representation with the knowledge of a possible or actual open and active channel of communication between their legal representative and the police, regardless of the nature of the charge or stage of the proceeding. This is especially so in the criminal context in which these cases arise, where the liberty of the subject is at stake.

235. Accordingly, in circumstances where the legal representative for an accused person is a registered or ostensible human source for police, a perceived collusion (as described at [174]-[177] above) would occur, revealing a "seriously unfair contest", which invariably undermines public confidence in the administration of justice.

236. As the above authorities demonstrate, the above effect on public confidence in the administration of justice:

    236.1. arises whether or not Ms Gobbo in fact passed on any information about the client or the case or otherwise assisted (or attempted to assist) the prosecution; and

    236.2. could, depending on the circumstances, constitute a substantial miscarriage of justice sufficient to require any conviction to be set aside.

237. It is submitted that, for the purposes of the first term of reference, the above circumstances described at [233]-[236] are present in every instance that Ms Gobbo represented or acted for an accused person between 14 May 1998 and 2013 to a

[240] *KCH v R* [2001] NSWCCA 273; (2001) 124 A Crim R 233.
[241] Counsel Assisting have also developed categories with regard to the conduct of members of Victoria Police, see below at [465].

greater or lesser extent. During that time Ms Gobbo evinced a willingness to act as an informer against the interests of accused persons to whom she was purporting to provide independent legal representation.[242]

238. It should be observed that, in the earlier stages of her informing, Ms Gobbo did not provide information to police in the same manner as with regard to the third registration period (16 September 2005 – 14 January 2009) where her informing on accused persons was almost on an industrial scale. At earlier stages her informing concerned providing information on discrete topics to particular police officers. However, by later stages, Ms Gobbo's informing was prolific. The perceived depravation of independent counsel may vary significantly depending on whether Ms Gobbo had a relationship with any of the relevant investigators, and will be stronger in the third registration period.

239. Notably, there is no evidence that Ms Gobbo ever disclosed her role as an informer to her clients and/or their legal representatives.[243]

240. As such, on the basis of the information before the Commission, it is submitted that at least 973 persons (being those identified above at [73]) may have been affected by the conduct of Ms Gobbo as a human source. In the event that any of those 973 persons were convicted or found guilty in cases in which Ms Gobbo acted for them, it would be arguable that those cases may have been affected by the conduct of Ms Gobbo as a human source. Importantly, that submission must be made in qualified and somewhat hypothetical terms with respect to 887 of the 973 persons, being those persons who are not the subject of specific submissions in Chapters 7 and 11 of Volume 2 (namely Mr Thomas and Mr Cooper) and Volume 3. In relation to those 887 persons, it is not open to submit that their cases may have been affected, because, on the material currently before Counsel Assisting, it is has not been possible to draw a definite nexus between the cases in which the 887 persons were convicted or found guilty and Ms Gobbo's representation of them. Rather, all that can be said concerning those 887 persons, on the present material, is that those persons were convicted or found guilty at some stage in or since 1995, and they were represented by Ms Gobbo at some point between 14 May 1998 and 2013. The submission in respect of those 887 persons is therefore made with a focus on the relevant *persons*, rather than their *cases*, noting the potential that their *cases* may have been affected if the necessary nexus exists.

241. As will be explained below at [247] and in the table at [249], such persons may fall within Category 1A with regard to Ms Gobbo's conduct. Further, as will be explained below and set out in the table at [465], the non-disclosure of Ms Gobbo's status as a human source by members of Victoria Police, and a failure to take any steps to have potential issues of public interest immunity or matters of state considered by the DPP or the VGSO and then possibly a court, meets the corresponding Category 3A. A list containing the names of the 973 persons is retained by the Commission. Counsel Assisting recommend that the Commission furnish a copy of the names of the persons on that list, on a confidential basis, to Ms Gobbo, Victoria Police, the Director of Public Prosecutions in Victoria, and the Commonwealth Director of Public Prosecutions. As noted, 86 of the 973 persons are the subject of specific submissions in Chapters 7 and 11 of Volume 2 (namely Mr Thomas and Mr Cooper) and Volume 3.

[242] With regard to the events of 14 May 1998, see Narrative Submissions, Chapter 1, [63].
[243] See further Ms Gobbo's evidence at 13448, 13472, 7 February 2020, RC_PMI_07Feb20_provisional 13802, 11 February 2020, TRN.2020.02.11.01.P.

Additional Conflicts of Interest

242. There are circumstances where there may be an additional conflict of interest requiring disclosure, including where Ms Gobbo:

242.1. had previously provided information about the accused and/or otherwise assisted (or attempted to assist) the prosecution of the accused, or did so while representing them; and/or

242.2. was aware that evidence relied upon by the prosecution may have been improperly or illegally obtained, particularly in circumstances where she had:

242.2.1. been involved in obtaining the evidence herself; and/or

242.2.2. assisted investigative agencies in their efforts to do so; and/or

242.3. advised an accused to plead guilty whilst having the conflicts of interest described above.

243. The above conflicts of interest may themselves constitute misconduct. For example, Ms Gobbo informing on an accused person may have involved a breach of confidence or legal professional privilege, and her involvement in the tainting of evidence may create a further conflict of interest. In both circumstances an accused person may have been deprived of the opportunity to claim privilege or to object to the admissibility of the tainted evidence, whether or not such claims and objections might ultimately have been accepted. In addition, any advice to plead guilty may, depending on the circumstances, have deprived an accused person of their choice to plead freely.

244. [redacted] Such [redacted] misconduct would invariably create an actual (as opposed to merely perceived) conflict of interest between Ms Gobbo and her client, enlivening further breaches, including of equitable fiduciary obligations and ethical and professional rules.

Classification of Relevant Conduct

245. The above analysis demonstrates that the particular conduct of Ms Gobbo in relation to a particular case may have compounding effects. For the purposes of submissions under the first term of reference, the above may be distilled into two broad categories, namely:

245.1. conflict of interest (Category 1)

245.2. tainted evidence (Category 2).

246. In part, this reflects the observation of the Court of Appeal in *AB v CD & EF*:[244]

> In our view, looked at in the broad, [Ms Gobbo's] conduct raised questions first as to whether the Convicted Individuals received independent advice and representation as required by law, and secondly, whether the prosecution was unfairly advantaged and/or had access to evidence and information which was improperly obtained in ways which gave rise to a miscarriage of justice.

[244] [2017] VSCA 338, [112] (Ferguson CJ, Osborn and McLeish JJA).

247. Category 1 arises only in circumstances where Ms Gobbo represented or acted for an accused person in relation to the case in question. As noted above at [19], this is taken to include the provision of legal advice. The category primarily concerns a failure by Ms Gobbo to disclose relevant information to her client in a particular case, including that she was a human source. In circumstances where, before or during the period she acted for an accused person, Ms Gobbo provided information in relation to her client and/or otherwise assisted (or attempted to assist) in the prosecution of her client, that will constitute an additional "extent" to which the case may be affected. As noted above at [20], "assisting in the prosecution" is defined broadly to include assisting in the investigation by Victoria Police.

248. Category 2 may apply in cases regardless of whether Ms Gobbo represented the accused, and relates to the tainting of evidence. In circumstances where Ms Gobbo did act for the accused, her failure to disclose her knowledge of, or involvement in, the tainting of evidence will constitute an additional "extent" to which the case may be affected.

249. For ease of reference, the above may be represented in the following table:

Category 1 Conflict of interest	**Category 2 Tainted evidence**
1A. Ms Gobbo's non-disclosure of her status as a human source.	**2A.** Evidence relied upon by the prosecution may have been obtained in consequence of an impropriety or illegality in connection with the use of Ms Gobbo as a human source by Victoria Police.
1B. Category 1A + Ms Gobbo provided information in relation to the accused, and/or otherwise assisted (or attempted to assist) in the prosecution of the accused, before and/or during the period she acted for the accused, and there was non-disclosure of same.	**2B.** Category 2A + there was non-disclosure of same in circumstances where Ms Gobbo acted for the accused.

250. Conduct by Ms Gobbo under Categories 1A and 1B, together with conduct under Categories 2A and 2B, evinces a conflict of interest and may constitute breaches of her duty to the administration of justice, her duty to the court, her duty to her client, and her fiduciary duties (see below at [320]-[329] and [307]-[309]).

251. Further, Ms Gobbo's conduct may constitute a breach of legal professional privilege and/or confidence (see below at [310]-[319] and [301]-[306]).

252. As the High Court observed in *AB v CD*:[245]

> [Ms Gobbo's] actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of [Ms Gobbo's] obligations as counsel to her clients and of [Ms Gobbo's] duties to the court.

253. [redacted]

254. As noted above at [183], the Categories may apply even in circumstances where Ms Gobbo appeared at preliminary stages of proceedings (such as in mention hearings, bail applications and committals), and did not appear at trial. In some cases she was led at trial. In other cases she provided advice in relation to, but did not appear in, criminal proceedings. In some cases the information Ms Gobbo passed on to Victoria Police was relatively innocuous and/or based on the evidence reviewed by Counsel Assisting there is no suggestion that the information materially advanced the prosecution of her client. Cases will inevitably turn on their facts as to whether there was a sufficient connection between the conduct of Ms Gobbo and Victoria Police members and the conviction upon trial of the accused, or the accused's plea of guilty, to potentially result in a substantial miscarriage of justice.

[245] (2018) 93 ALJR 59, 62 [10].

TYPES OF MISCONDUCT OF PARTICULAR RELEVANCE TO THE FIRST TERM OF REFERENCE

255. [redacted] Broadly, they fall within the following four categories:

255.1. criminal conduct;

255.2. equitable misconduct;

255.3. procedural misconduct; and

255.4. ethical and professional misconduct.

256. It is to be noted that due to the nature of this inquiry and the role of the Commission, in contrast to that of a court, the following represent only a selection of the types of misconduct that might be relevant to the subject matter of this inquiry, and are only detailed at a relatively high level. It is conceivable that there are additional types of misconduct which have not been addressed. Nevertheless, it submitted that the below provides an outline against which the Commissioner may apply the standard of proof (see above at [41]-[51]) when arriving at her findings.

Criminal Conduct

Perverting (or Attempting to Pervert) the Course of Justice

257. In Victoria, perverting the course of justice and attempting to pervert the course of justice are common law offences.[246] Similar statutory offences exist under Division 4 of Part III of the *Crimes Act 1914* (Cth) in relation to the judicial power of the Commonwealth, which mirror the offence at common law.[247]

258. The common law offences of perverting the course of justice and attempting to pervert the course of justice both have a maximum penalty of level 2 imprisonment (25 years maximum).[248] The Commonwealth offences carry a maximum penalty of 10 years' imprisonment.[249]

259. As noted by the Judicial College of Victoria,[250] the offence of perverting the course of justice has the following elements:

(1) The accused engaged in conduct that did pervert the course of justice; and

(2) The accused intended for that conduct to pervert the course of justice.

260. The offence of *attempting* to pervert the course of justice has the following elements:

[246] *Crimes Act 1958* (Vic) s 320.
[247] *R v Murphy* (1985) 158 CLR 596, 609 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).
[248] Section 320 of the *Crimes Act 1958* (Vic).
[249] *Crimes Act* 1914 (Cth) ss 42 and 43.
[250] Judicial College of Victoria, Criminal Charge Book, <https://www.judicialcollege.vic.edu.au/eManuals/CCB/57163.htm>

(1) The accused engaged in conduct that had the tendency to pervert the course of justice; and

(2) The accused intended for that conduct to pervert the course of justice.

261. With regard to the definition of perverting the course of justice,[251] in *Meissner v R*[252] Deane J stated that "the most that can usefully be said is that the notion of "pervert[ing]" the course of justice involves no more than an adverse interference with the proper administration of justice".[253]

262. In *R v Rogerson*[254] ("*Rogerson*"), Brennan and Toohey JJ observed:[255]

> Justice, as the law understands it, consists in the enjoyment of rights and the suffering of liabilities by persons who are subject to the law to an extent and in a manner which accords with the law applicable to the actual circumstances of the case. *The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case. The course of justice is perverted (or obstructed) by impairing (or preventing the exercise of) the capacity of a court or competent judicial authority to do justice. The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, hindering of access to it, deflecting applications that would be made to it, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions*. An act which has a tendency to effect any such impairment is the actus reus of an attempt to pervert the course of justice. An act which effects any such impairment is the actus reus of a perversion of the course of justice. An agreement that an act be done which has such an effect and which is not otherwise justified in law is the actus reus of a conspiracy to pervert the course of justice. Each of these offences requires a specific intent. In the case of an attempt to pervert the course of justice, and in the case of perverting the course of justice, the intent which must accompany the relevant actus reus is that the course of justice should be perverted in one of the ways mentioned. To define the intent required in a case of a conspiracy to pervert the course of justice, the law of conspiracy must be examined.[256]
>
> (Emphasis added and citations omitted.)

263. The course of justice begins with the filing or issue of process invoking the jurisdiction of a court or judicial tribunal or the taking of a step that marks the commencement of criminal proceedings.[257]

264. In Victoria, pursuant to s 5 of the *Criminal Procedure Act*, a criminal proceeding is commenced by filing or signing a charge-sheet, filing a direct indictment, or making

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[251] See *R v Rogerson* (1992) 174 CLR 268, 280 (Brennan and Toohey JJ).
[252] (1994) 184 CLR 132.
[253] At 148.
[254] (1992) 174 CLR 268.
[255] At 280.
[256] Cited with approval in *Meissner v The Queen* (1994-95) 184 CLR 132, 142 (Brennan, Toohey and McHugh JJ).
[257] *Rogerson*, 276 (Mason CJ), 283 (Brennan and Toohey JJ), 303 (McHugh J).

a direction that a person be tried for perjury. Prior to this, under the common law it was held that the course of justice does not commence in criminal proceedings until the laying of an information against or the arrest of an accused person.[258] The "course of justice" ends "when the rights and liabilities of the parties are finally determined and declared".[259]

265. Accordingly, police investigations of an actual or suspected offence are not part of the course of justice because the police do not administer justice.[260] However, conduct during the course of an investigation is capable of constituting an *attempt* to pervert the course of justice. Where the conduct is engaged in before the commencement of judicial proceedings, the conduct may still tend to pervert "imminent, probable or even possible judicial proceedings", even if that possibility "has not been considered by the police or the relevant law enforcement agency".[261]

266. However, the requisite *mens rea* of perverting or attempting to pervert the course of justice necessitates that the accused must have contemplated the possibility that proceedings may be instituted, regardless of their consideration by law enforcement agencies.[262] Further, the inference must be available that the accused "…either knew that the relevant act would have a manifest tendency to pervert the course of justice in a relevant respect or intended that the act should have that effect. It is not sufficient for the Crown to prove merely an intention to deceive the police".[263]

Attempt

267. Section 321M of the *Crimes Act 1958* (Vic) was introduced by the *Crimes (Amendment) Act 1985* (Vic) and provides:

A person who attempts to commit an indictable offence is guilty of the indictable offence of attempting to commit that offence.

268. Section 321N of the *Crimes Act 1958* (Vic) provides:

Conduct constituting attempt

(1) A person is not guilty of attempting to commit an offence unless the conduct of the person is—

(a) more than merely preparatory to the commission of the offence; and

(b) immediately and not remotely connected with the commission of the offence.

(2) For a person to be guilty of attempting to commit an offence, the person must—

(c) intend that the offence the subject of the attempt be committed; and

(d) subject to subsection (2A) [which is irrelevant for the purposes of the Commission], intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time the offence is to take place…

[258] *Rogerson*, 303 (McHugh J).
[259] *Rogerson*, 304 (McHugh J).
[260] *Rogerson,* 276 (Mason CJ), 283 (Brennan and Toohey JJ).
[261] *Rogerson*, 277 (Mason CJ).
[262] See, e.g., *R v Rogerson* (1992) 174 CLR 268, 277, 281-2 (Mason CJ)
[263] *R v Rogerson* (1992) 174 CLR 268, 284 (Brennan and Toohey JJ); see also at 282 (Mason CJ).

> (3) A person may be guilty of attempting to commit an offence despite the existence of facts of which he or she is unaware which make the commission of the offence attempted impossible.

269. In *R v Beckett*,[264] the High Court observed:[265]

> *Murphy* was concerned with liability for the offence of attempting to pervert the course of justice under s 43 of the *Crimes Act 1914* (Cth). The statutory offence mirrors the offence of attempting to pervert the course of justice under the common law. Its gist was formulated by Pollock B in *R v Vreones* as "the doing of some act which has a tendency and is intended to pervert the administration of public justice". In common with cognate statutory provisions in Queensland, New Zealand and Canada, the offence can be committed at a time when no curial proceedings have been instituted.
>
> (Citations omitted.)

270. Conduct constituting an attempt to pervert the course of justice must objectively tend to pervert the course of justice. Such a tendency may be proved where there is a real possibility or risk that the accused's conduct had the capacity to interfere with the proper administration of justice.[266]

271. Attempted perversion of the course of justice has been considered in the context of, amongst other things, conduct calculated to mislead investigating police, or which has a tendency to deflect prosecution or from adducing evidence of true facts,[267] and the inducement of guilty pleas.[268] In relation to the latter, a line is necessarily drawn between legitimate inducements and improper conduct. In drawing that line, the "particular significance" of "the relationship between the parties and an overall perception of real criminality"[269] has been identified, in particular where pressure of inducement is motivated by the interests other than those of the accused.[270]

Conspiring to Pervert the Course of Justice or to Attempt to Pervert the Course of Justice

272. Section 321 of the *Crimes Act 1958* (Vic), which was introduced by the *Crimes (Conspiracy and Incitement) Act 1984* (Vic), provides:

> **Conspiracy to commit an offence**
>
> (1) Subject to this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will involve the commission of an offence by one or more of the parties to the agreement, he is guilty of the indictable offence of conspiracy to commit that offence.
>
> (2) For a person to be guilty under subsection (1) of conspiracy to commit a particular offence both he and at least one other party to the agreement—
>
> a. must intend that the offence the subject of the agreement be committed; and

[264] (2015) 256 CLR 305.
[265] At 316-7 [34] (French CJ, Kiefel, Bell and Keane JJ).
[266] *R v Murray* [1982] 1 WLR 475; *Healy v The Queen* (1995) 15 WAR 104, 107 (Malcolm CJ).
[267] *R v Rogerson* (1992) 174 CLR 268, 283-4 (Brennan and Toohey JJ)
[268] See *Meissner v The Queen* (1995) 184 CLR 132.
[269] *Meissner v The Queen* (1995) 184 CLR 132, 149 (Deane J).
[270] *Meissner v The Queen* (1995) 184 CLR 132, 143 (Brennan, Toohey and McHugh JJ), 149 (Deane J).

b. must intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time when the conduct constituting the offence is to take place.

(3) A person may be guilty under subsection (1) of conspiracy to commit an offence notwithstanding the existence of facts of which he is unaware which make commission of the offence by the agreed course of conduct impossible.

(4) An indictment charging an offence against this section must not be filed without the approval of the Director of Public Prosecutions or of a person authorized by the Director of Public Prosecutions to give approval for the purposes of this subsection.

273. As stated by the Judicial College of Victoria,[271] the offence of conspiracy to commit an offence has the following elements:

(1) The accused and at least one other person entered into an agreement to pursue a criminal offence (the "principal offence");

(2) The parties intended to form that agreement; and

(3) The parties intended that the principal offence would be committed.

274. In *Rogerson*, the High Court held:[272]

> What makes a conspiracy unlawful is the unlawfulness of its intended object or the unlawfulness of the means intended to effect its object, as Willes J., delivering the opinion of the judges in *Mulcahy v. The Queen*, said:
>
> > "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means."
>
> As the "very plot" is the actus reus of the offence, the offence is complete before any further unlawful act is done or any further lawful act is done to carry the unlawful object into effect. When Willes J. spoke of an "unlawful act", he was speaking of an act which has not occurred when the conspiracy is formed. He must have meant an act which, if done in circumstances contemplated by the conspirators, would be unlawful. Although acts done in pursuance of an apparent agreement often furnish the evidentiary foundation for inferring that a criminal conspiracy was formed, those acts are not themselves elements of the offence. In that sense, it is immaterial whether an act done in pursuance of a criminal conspiracy is, in the event, unlawful, provided the act was intended to be done in circumstances which, had they eventuated, would have made the act unlawful. *In the present case, we are concerned with an alleged conspiracy to do an unlawful act, namely, an act*

[271] Judicial College of Victoria, Criminal Charge Book, <https://www.judicialcollege.vic.edu.au/eManuals/CCB/4427.htm>. It should be noted that the Commonwealth offence of conspiracy provided for by s 11.5 of the *Criminal Code Act 1995* (Cth) requires the accused or at least one other party to the agreement to have committed an “overt act pursuant to the agreement” pursuant to s 11.5(2)(c). See further *R v LK; R v RK* (2010) 241 CLR 177.
[272] (1992) 174 CLR 268, 280-1 (Brennan and Toohey JJ).

> *that would have the effect of perverting the course of justice. The prosecution had to prove that the conspirators intended that, if the relevant act was done pursuant to the conspiracy and in the circumstances contemplated by the conspirators, it would have the effect of perverting the course of justice.*
>
> A conspiracy to pervert the course of justice may be entered into though no proceedings before a court or before any other competent judicial authority are then pending or are even contemplated by anyone other than the conspirators.
>
> (Emphasis added and citations omitted.)

275. [redacted]

276. [redacted]

277. [redacted]

Obtaining Property or Financial Advantage by Deception

278. Section 81(1) of the *Crimes Act 1958* (Vic) provides for the offence of obtaining property by deception. It relevantly provides:

> A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

279. The term "property" in that section is defined to include money,[273] and has been held to include cheques and other choses in action.[274] It is submitted that fees received from a client for legal services by a legal practitioner may also constitute the obtaining of property by that legal practitioner.

280. Section 82(1) of the *Crimes Act 1958* (Vic) provides:

> A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

281. The term "financial advantage" is construed in accordance with its plain meaning.[275] It has been held to occur "where a person is put in a favourable or superior economic, monetary or commercial position"[276] including through employment remuneration in the form of "salary, superannuation and other financial benefits".[277] It is submitted that fees received from a client for legal services by a legal practitioner may also constitute a "financial advantage".

282. The term "deception" in sections 81 and 82 have the same meaning,[278] being, relevantly:

> …any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.[279]

283. Relevant conduct may include a representation by implication,[280] and in that sense include a failure to disclose relevant information in some circumstances. For example, *R v Benli*[281] the defendant conducted himself as a driving licence instructor, in circumstances where he was unlicensed, and obtained cash payments for services as an instructor. Likewise, in *DPP v Ray*,[282] the defendant remained seated in a restaurant after deciding not to pay for the meal thereby deceiving the waiter. The House of Lords held that the conviction should stand on the basis that

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[273] *Crimes Act 1958* (Vic), s 71.
[274] See *Parsons v The Queen* (1999) 195 CLR 619.
[275] *Taylor v The Queen* [2019] VSCA 162, [97] (Priest and Beach JJA), citing *Matthews v Fountain* [1982] VR 1045, 1049 (Gray J). See also *R v Walsh* (1990) 52 A Crim R 80, 81 (O'Bryan J); *R v Oettinger* [2014] ACTSC 47, [72] (Murrell CJ) (and the authorities cited therein).
[276] *Taylor v The Queen* [2019] VSCA 162, [99] (Priest and Beach JJA), see also *Fisher v Bennett* (1987) 85 FLR 469, 472 (Miles CJ).
[277] *Taylor v The Queen* [2019] VSCA 162, [101] (Priest and Beach JJA)
[278] *Crimes Act 1958* (Vic), s 82(2).
[279] *Crimes Act 1958* (Vic), s 81(4)(a).
[280] See *Smith v The Queen* (1982) 7 A Crim R 437; *R v Vasic* (2005) 11 VR 380.
[281] [1998] 2 VR 157.
[282] [1974] AC 370.

the defendant's conduct (by remaining seated) constituted a continuing representation of his present intention to pay for his meal.

284. [redacted]

285. The term "dishonestly" has a special and technical meaning in this statutory context, being that the accused acted without a belief in a legal right to obtain the property or advantage,[283] regardless of the deception employed.[284] A moral belief in the right to obtain the property is not sufficient.[285]

286. In *R v Salvo*[286] Fullagar J stated:[287]

> If it is asked what is the test of rightfulness, it is in my opinion clear that the answer must be rightfulness in law. The belief which spells innocence is, to use legal language not necessarily to be employed before a jury, the belief that the actor has a legal right to or in respect of "the property" by reason of which (it is believed) the deprivation of the other does not constitute either a criminal or a civil wrong.

287. In *R v Benli*,[288] Brooking JA (with whom Callaway JA and Vincent AJA agreed) noted:[289]

> The deception practised by the applicant had not resulted in any loss to any of his pupils. They had all got what they had bargained for, subject to this, that the man providing the services had not possessed the licence required by law which they had been led to believe he did possess, and so was not entitled to be paid by them.

288. Indeed, there may be circumstances in which evidence of deceptive inducement can imply the necessary dishonesty.[290]

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[283] See *R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633; *R v Brow* [1981] VR 783; *R v Todo* (2004) 10 VR 244.
[284] *R v Salvo* [1980] VR 401.
[285] *R v Salvo* [1980] VR 401, 420 and 423 (Murphy J), 440 (Fullagar J).
[286] [1980] VR 401.
[287] At 433.
[288] [1998] 2 VR 157.
[289] At 162.
[290] See *R v Salvo* [1980] VR 401, 422 (Murphy J); In *R v Brow* [1981] VR 783, Young CJ, Crockett and Tadgell JJ said at 791:
In accepting … evidence of the representation and of its falsity and of the inducement (as they must be assumed to have done, the last being in effect not a live issue) the jury were in our opinion entitled to conclude that the [property] was obtained by the applicant dishonestly. It was not necessary that the Judge should have said more about dishonesty in the context of count 5 than we have indicated he did. The facts proved produced, we think, a typical case where, as Murphy, J. said in *R v Salvo*, [1980] VR 401, at p. 422, 'The very deception practised may, in all the circumstances, demonstrate the accused's dishonesty....'. *Once the jury had drawn their conclusions as to the fact of the representation and as to its falsity and the inducement there was in truth no basis for concluding*

289. [redacted]

290. [redacted]

291. [redacted]

Complicity

292. The *Crimes Act 1958* (Vic) contains statutory provisions concerning complicity,[294] and the abolition of related common law doctrines.[295] Both provisions apply to offences committed on or after 1 November 2014.[296] Since the material before the Commission about Ms Gobbo's conduct as a human source concerns events prior to that date, the earlier common law principles are relevant. They are described below.

293. At common law, there were three ways in which a person could be complicit in another's offending, namely:

293.1. accessorial liability

293.2. joint criminal enterprise

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that the [property] had not been obtained by the applicant dishonestly. The false representation which amounted to the deception was that the applicant intended reasonably promptly to discharge the hire-purchase obligation after obtaining the [property]. He cannot therefore now be heard to say that his receipt of it was not dishonest because he always intended to discharge the obligation by instalments or at a future undetermined time when the car was sold. The obtaining was made dishonest because it depended upon the false basis of the deception. (Emphasis added.)

[291] Transcript of Ms Nicola Gobbo, 7 February 2020, 13452, 13453, RC_MPI_07Feb20_provisional.

[292] Transcript of Ms Nicola Gobbo, 7 February 2020, 13453, RC_MPI_07Feb20_provisional.

[293] Transcript of Ms Nicola Gobbo, 7 February 2020, 13453, RC_MPI_07Feb20_provisional.

[294] *Crimes Act 1958* (Vic), s 324. It is noted that in relation to all the below forms of complicity, there are similar statutory provisions under the *Criminal Code Act 1995* (Cth) under Part 2.4, Division 11, which applied from 15 December 2001.

[295] *Crimes Act 1958* (Vic), s 324C.

[296] See Governor (Vic), 'Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) — Proclamation of Commencement' in Victoria, Victorian Government Gazette: Special, No S 350, 7 October 2014, 1.

293.3. extended common purpose.

294. *Accessorial liability* arises when a person is an "accessory" to the offending, whether present or not, by assisting, encouraging or procuring the offending.[297] It may take two principal forms, namely:

294.1. "an accessory before the fact", being a person who aided, abetted, counselled or procured the principal to commit an offence but were absent from the scene of the crime;[298]

294.2. "principals in the second degree", being those who provided such aid and were present when the crime was committed.

295. Liability by way of "aiding, abetting, counselling or procuring" is established where:[299]

295.1. the principal offence was committed

295.2. the accused knew the essential circumstances that establish (i.e. the facts that constitute[300]) the offence

295.3. with that knowledge,[301] the accused intentionally assisted or encouraged the principal offender to commit that offence.

296. *Joint criminal enterprise*, or *acting in concert*,[302] attributes the actions of all members of the enterprise to each other.[303] It is established where:[304]

296.1. the accused and another or others expressly or tacitly[305] agreed to commit a crime[306]

296.2. one or more of the parties to the agreement, in accordance with that agreement, performed all of the acts necessary for the commission of the crime[307]

296.3. the accused participated in the joint enterprise[308]

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[297] *Osland v The Queen* (1998) 197 CLR 316, 341–2 [71] (McHugh J).
[298] *R v Morgan* [1994] 1 VR 567; *R v Wong* [2005] VSC 96. See also *Arafan v R* (2010) 31 VR 82.
[299] *Giorgianni v The Queen* (1985) 156 CLR 473.
[300] *Johnson v Youden* [1950] 1 KB 544; *Giorgianni v The Queen* (1985) 156 CLR 473; *Likiardopoulos v R* (2010) 30 VR 654.
[301] See *R v Stokes & Difford* (1990) 51 A Crim R 25.
[302] Note that the distinction between the two is no longer recognised, since it is now accepted that there is no requirement to prove that an accused is present through the whole of the offending; *Likiardopoulos v The Queen* (2012) 247 CLR 265; *McAuliffe v The Queen* (1995) 183 CLR 108. See also *R v Morgan* [1994] 1 VR 567; *R v Franklin* (2001) 3 VR 9; *R v Lao & Nguyen* (2002) 5 VR 129; *R v Tangye* (1997) 92 A Crim R 545; *R v Cavkic* [2005] VSC 182; *Johns v The Queen* (1980) 143 CLR 108. Cf *Likiardopoulos v The Queen* (2010) 30 VR 654; *Smith, Garcia & Andreevski v The Queen* [2012] VSCA 5.
[303] *R v Clarke & Johnstone* [1986] VR 643; *Gillard v The Queen* (2003) 219 CLR 1.
[304] *R v Clarke & Johnstone* [1986] VR 643; *Gillard v The Queen* (2003) 219 CLR 1; *R v Cox & Ors* [2005] VSC 255.
[305] This can be inferred from this circumstances; *R v Tangye* (1997) 92 A Crim R 545; *R v Clarke and Wilton* [1959] VR 645; *R v Jensen and Ward* [1980] VR 196; *Guthridge v The Queen* (2010) 27 VR 452; an understanding is sufficient; *R v Tangye* (1997) 92 A Crim R 545; *R v Clarke and Wilton* [1959] VR 645; *R v Jensen and Ward* [1980] VR 196; *R v Lowery & King (No 2)* [1972] VR 560.
[306] *R v Taufahema* (2007) 228 CLR 232. Whether or not they knew the conduct to be criminal; *Osland v The Queen* (1998) 197 CLR 316; *R v Cox & Ors* [2005] VSC 255.
[307] *R v Clarke & Johnstone* [1986] VR 643; *Johns v R* (1980) 143 CLR 108; *McAuliffe v The Queen* (1995) 183 CLR 108; *R v Taufahema* (2007) 228 CLR 232.
[308] *R v Clarke & Johnstone* [1986] VR 643; *Arafan v The Queen* (2010) 31 VR 82.

296.4. at the time of entering the agreement, the accused had the requisite mental state for the relevant offence.[309]

297. *Extended common purpose* arises when parties reach an agreement to commit a crime, and in the course of doing so, one of the parties commits a different crime. The doctrine attributes liability to any party who foresaw the possibility[310] that the different crime would be committed in furtherance of the agreement.[311]

298. In the present inquiry, it is submitted that the above doctrines may be relevant to both the first and second terms of reference. For example, in relation to the first term of reference, there may be cases in which Ms Gobbo may have been complicit in [redacted] by members of Victoria Police, considered below at [476]-[501]. As David Lusty explains in "Revival of the common law offence of misconduct in public office":[312]

> In accordance with general principles of accessorial and conspiratorial liability,[313] a person who is incapable of committing the offence of misconduct in public office as a principal because he or she is not a public officer (or is not acting as such) may nevertheless be convicted of conspiring to commit, or being an accessory (aiding, abetting, counselling or procuring) to the commission of, the offence by a person who is a public officer.[314]

299. Any such [redacted] conduct by Ms Gobbo would constitute a conflict of interest with her client, which, if not disclosed, may affect the case for the reasons described at [244] above.

300. In relation to the second term of reference, where police engaged Ms Gobbo as a human source, and encouraged her informing in circumstances where they knew that she would necessarily deceive and receive payments from clients, they may be [redacted].

Equitable Misconduct

Breach of Confidence

301. Confidentiality and privilege overlap. For example, in order to attract privilege, the relevant communication must be confidential, as noted at [315] below. Further, once privileged communications have been disclosed, any action or remedies protecting

[309] *R v Heaney & Ors* [1992] 2 VR 531; *R v Clarke & Johnstone* [1986] VR 643; *Johns v The Queen* (1980) 143 CLR 108; *McAuliffe v The Queen* (1995) 183 CLR 108; *R v Taufahema* (2007) 228 CLR 232; *Likiardopoulos v The Queen* (2010) 30 VR 654; *Arafan v The Queen* (2010) 31 VR 82.
[310] *Hartwick, Clayton & Hartwick v The Queen* (2006) 81 ALJR 439.
[311] *Johns v R* (1980) 143 CLR 108; *McAuliffe v The Queen* (1995) 183 CLR 108; *Hartwick, Clayton & Hartwick v The Queen* (2006) 81 ALJR 439; *R v Hartwick, Clayton & Hartwick* (2005) 14 VR 125.
[312] (2014) 38 Crim LJ 337, 349.
[313] See *R v Whitchurch* (1890) 24 QBD 420; *R v Mackenzie* (1910) 6 Cr App R 64.
[314] See *R v Wright* [1964] SCR 192; *R v Llewellyn-Jones* (1967) 51 Cr App R 4; *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 426, 436-437, 442; *R v Rees* [2000] EWCA Crim 55; *Attorney-General's Reference (No 5 of 2002)* [2005] 1 AC 167 at [3]; *R v Miles* [2006] EWCA Crim 2675; *R v Ahmed* [2008] EWCA Crim 1384; *Belfast Crown Court v Griffiths* [2009] NICC 23; *Richardson, Re Attorney-General's Reference (No 5 of 2009)* [2009] NICA 41; *R v Bohannan* [2011] 1 Cr App R (S) 106, [7]; *R v Knox* [2011] 2 Cr App R 21, [3], [39]; *Jaturawong v The Queen* [2011] NSWCCA 168.

the use or further disclosure of those communications are to be found in the equitable doctrine of confidentiality.[315]

302. However, confidentiality is broader than privilege, for example it is not necessarily qualified by the (potential) adducing of evidence, the relevant client-lawyer relationship, or the relevant dominant purpose test, and is an actionable right.

303. A duty of confidence may arise expressly or impliedly under contract, and is usually implied as a matter of law in retainers between lawyer and client.[316] It may also arise in equity where information, having the necessary quality of confidence about it, is imparted in circumstances importing an obligation of confidence.[317] Thus the lawyer's professional or ethical duty of confidence, arises from an "amalgam of contract law and equity".[318]

304. However, any actionable right in contract or equity (and any derivative disciplinary professional duty) are qualified. For example, a contractual term of confidence may be void or unenforceable to the extent that it adversely interferes with the administration of justice.[319] Likewise at equity, relief may be denied to the plaintiff on the basis of "unclean hands", or the "iniquity" exception.[320]

305. As Warren CJ, Chernov and Nettle JJA stated in *Cowell v British American Tobacco Australia Services Ltd*:[321]

> …ordinary principles dictate that injunction ought not go at the suit of an applicant who comes to equity with unclean hands or where the subject-matter of the communication "is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed".
>
> (Citations omitted.)

306. It is submitted that in circumstances where Ms Gobbo received information in confidence which concerned a real likelihood of criminal conduct, such as information concerning an imminent importation of controlled substances, her dissemination of the information to law enforcement authorities would not constitute a wrongful breach of confidence. However, the dissemination of other information obtained in confidence, such as her client's instructions, defence tactics, contact details and financial information, may have constituted a breach of her duty of confidence and, as considered below at [310]-[319], legal professional privilege.

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[315] See,eg, *Glencore International AG v Commissioner of Taxation* (2019) 93 ALJR 967, 969 [6], 974 [34] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[316] *Prebble v Reeves* [1910] VLR 88, 108; *Parry-Jones v Law Society* [1969] 1 Ch 1.
[317] See, e.g., *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 222 [30] (Gleeson CJ), citing *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J).
[318] G D Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th ed, 2017) 344, [10.15]; cited by Ginnane J in *AB & EF v CD* [2017] VSC 350, [118].
[319] *A v Hayden* (1984) 156 CLR 532, 545-546 (Gibbs CJ); 557, 559-560 (Mason J), but cf 576-577 (Wilson and Dawson JJ). Such considerations may also apply to non-contractual confidentiality obligations: see *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448, 455 [26] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).
[320] See, e.g., *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434, 456 (Gummow J).
[321] [2007] VSCA 301, [34].

Breach of Fiduciary Duties

307. A client-lawyer relationship has been long recognised as a fiduciary relationship. Where a fiduciary relationship is found to exist, two proscriptive duties are imposed at equity upon the fiduciary, namely "not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict".[322] Conflict may arise between a fiduciary duty and a duty owed to another, or between a fiduciary duty and self-interest. In the event of a conflict of interest between client and lawyer, the client's fully informed consent in required.[323]

308. It is plain that in circumstances where a lawyer passes information about her client to police, especially where that dissemination occurs for the purpose of incriminating the client, the client and lawyer's interests will be in conflict.

309. However, the client's conduct may prevent him or her from any remedy for breach of fiduciary duties on the basis of the "clean hands" principle, where the client's conduct has "an immediate and necessary relation to the equity sued for;… [and involves] a depravity in a legal as well as in a moral sense".[324]

Procedural Misconduct

Legal Professional Privilege

310. Legal professional privilege is a common law immunity from the exercise of powers which would otherwise compel the disclosure of confidential legal communications.[325] The purpose of the privilege is to promote the public interest in assisting and enhancing the administration of justice, by facilitating legal representation in which clients may "make full and frank disclosure of all relevant circumstances to the lawyer".[326] In that light, the High Court recently noted that legal professional privilege has been described as fundamental to persons and to our legal system,[327] and "a practical guarantee of fundamental, constitutional or human rights".[328]

311. The immunity also exists under legislation,[329] where it is referred to as "Client Legal Privilege", arguably reflecting the fact that the immunity is held by the client, as it exists to protect the client's right, being "the right of a person to seek legal advice

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[322] *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ); see also *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197-8 [74] (McHugh, Gummow, Hayne and Callinan JJ), and *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 99 [32] (French CJ and Keane J).
[323] *Maguire v Makaronis* (1997) 188 CLR 449, 466.8 (Brennan CJ, Gaudron, McHugh and Gummow JJ), 495.9 (Kirby J).
[324] *Dering v Earl of Winchelsea* (1787) 1 Cox 318, 319-20; 29 ER 1184, 1185 (Lord Chief Baron Eyre).
[325] See *Glencore International AG v Commissioner of Taxation* (2019) 93 ALJR 967, 969-70 [9], [12] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, 553 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [44] (McHugh J); *DPP (Cth) v Galloway & Ors* (2014) 46 VR 809, 810 [1] (Maxwell P, Neave and Coghlan JJA).
[326] *Glencore International AG v Commissioner of Taxation* [2019] HCA 26, 973 [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) and the authorities cited therein. See also 974 [31] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[327] *Glencore International AG v Commissioner of Taxation* (2019) 93 ALJR 967, 972 [21] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) citing *Baker v Campbell* (1983) 153 CLR 52, 64 (Gibbs CJ), 106 (Brennan J), 113 (Deane J), 122 (Dawson J).
[328] *Glencore International AG v Commissioner of Taxation* (2019) 93 ALJR 967, 972 [21] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) citing *A M & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 941, referred to in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J).
[329] See, e.g., *Evidence Act 1995* (Cth), Pt 3...10 Div 1; *Evidence Act 2008* (Vic), Pt 3.10 Div 1.

knowing that what is disclosed in the course of receiving advice will always remain confidential as between client and legal adviser."[330] The protection extends further under legislation to the contents of confidential communications engaged in, and documents prepared, for the dominant purposes of providing legal advice[331] or litigation services.[332]

312. Without descending into a detailed analysis of each of the elements required to satisfy a claim of legal professional privilege, some select points which bear on the Commissioner's task in relation to the first term of reference are as follows.

313. First, the existence of the required relationship between the "lawyer" and "client" is a matter of substance, not form. It has been held that:[333]

> 'Client', in its ordinary signification, must … be regarded as referring to a person who, in respect of some legal matter within the scope of professional services normally provided by lawyers, has, with the consent of a lawyer, come to stand in a relationship of trust and confidence to the lawyer entailing duties of the lawyer to promote the person's interests, to protect the person's rights and to respect the person's confidences. The privilege exists so that a person may consult his legal adviser in the knowledge that confidentiality will prevail.

314. Whatever may be necessary to create the required "relationship of trust and confidence", it is clear that there need not be a valid contract of retainer.[334] Indeed, there may be circumstances in which it exists even though the "lawyer" does not hold a practising certificate,[335] or where the client (even erroneously) subjectively believes that the "lawyer" was entitled to give the legal advice.[336] It follows that the existence of a relevant lawyer and client relationship is to be determined by reference to the intentions of the parties objectively ascertained.

315. Secondly, in order to attract privilege, the communication must be confidential. In relation to communications from the client to the lawyer, which are of relevance to the present inquiry, the test has been stated as follows:

> If the communication is to the lawyer it will be privileged if it is confidential and provided to the lawyer in his professional capacity. A communication may be so characterised in a variety of circumstances, most usually if the person believes he is consulting a lawyer in that capacity and his manifest intention is to seek legal advice or legal services.[337]

316. Thirdly, the communications must be made predominantly for the relevant purpose. It is of relevance to the present inquiry to note that it appears that the

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[330] *DPP (Cth) v Galloway & Ors* (2014) 46 VR 809.
[331] See, e.g., *Evidence Act 2008* (Vic), s 118.
[332] See, e.g., *Evidence Act 2008* (Vic), s 119.
[333] See *Apple Computer Australia Pty Ltd v Wily* [2002] NSWSC 855, [11] (Barret J), applied in *Perazzoli v BankSA, a division of Westpac Banking Corporation Limited* [2017] FCAFC 204, [188] (Perram, Foster and Murphy JJ), see also [171]-[172], [181]-[182] (Perram, Foster and Murphy JJ).
[334] See *Hawksford v Hawksford* [2008] NSWSC 31, [17] and [19]-[20] (White J) and the authorities cited therein; *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 2)* (2009) 180 FCR 1, 7-8 [19] (Finkelstein J).
[335] See *Commonwealth v Vance* (2005) 158 ACTR 47, [23]-[35] (Gray, Connolly and Tamberlin JJ).
[336] See *Commissioner of Taxation v Donoghue* (2015) 237 FCR 316, 341 [100] (Kenny and Perram JJ, with whom Davies J agreed).
[337] *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 2*) (2009) 180 FCR 1, 8 [20] (Finkelstein J).

communication of a client's identity and contact details will not ordinarily attract privilege,[338] even where they are the subject of requested confidentiality.[339] However, such details may attract the protection of privilege in the rare circumstances in which where they were communicated for the requisite dominant purpose,[340] or are "so intertwined with the confidential communication that to disclose the identity would be to disclose the communication".[341]

317. Fourthly, there are limitations on the above privilege. Of particular relevance to the present inquiry is the rule that the privilege is not available in respect of a communication made "in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty",[342] or "a deliberate abuse of a power".[343]

318. Much of the judicial consideration of this exception concerns the seeking of advice or assistance of the lawyer in the furtherance of wrongdoing, and not the mere provision of information by a client to their lawyer which relates to the furtherance of wrongdoing (a scenario more relevant to the present inquiry).

319. However, potentially relevant and useful distillations of the principles that inform the application of the above exception have been expressed as follows:

    319.1. "The word 'furtherance' in the phrase 'in furtherance of the commission of a fraud or an offence or the commission of [a Penalty Act]' means 'the fact of being helped forward; the action of helping forward; advancement, aid, assistance'."[344]

    319.2. "Consistently, with its public policy origins, the reference to a communication being in "furtherance" of a fraud ought not be read too narrowly, or be too confined in a temporal sense."[345]

    319.3. "There is no absolute rule that conduct occurring after a fraud, an offence or a Penalty Act has been completed cannot be held to be 'in furtherance of the commission' of the fraud, offence or Penalty Act. Subsequent conduct may or may not be in furtherance, depending on the nature and purpose of the conduct."[346]

    319.4. "Although the person challenging the claim for privilege is not required to prove the alleged fraud or other improper purpose on the balance of probabilities, such a person must do more than simply allege that a fraud or other improper conduct has occurred, or was intended to occur at the time of the impugned communication or document. There must be

[338] Note that contact details may be more readily protected than identity: see *John Bridgeman Limited v Dreamscape Networks FZ-LLC* (2018) 360 ALR 768, [33] (Rangiah J); *Commissioner of Taxation v Coombes* (1999) 92 FCR 240, 252 [31] (Sundberg, Merkel and Kenny).
[339] *Commissioner of Taxation v Coombes* (1999) 92 FCR 240, 252 [31] (Sundberg, Merkel and Kenny).
[340] See *Z v New South Wales Crime Commission* (2007) 231 CLR 75, 81 [12] (Kirby and Callinan JJ), Cf at 87 [36], where Hayne and Crennan JJ appear to conceded that while "[i]n most cases the communication of those details is not for the purpose of seeking or giving legal advice", consideration of the purpose of the communication may yield an alternative conclusion. See also at 88-9 [40] (Hayne and Crennan JJ)
[341] *Commissioner of Taxation v Coombes* (1999) 92 FCR 240, 252 [31] (Sundberg, Merkel and Kenny), applied in *John Bridgeman Limited v Dreamscape Networks FZ-LLC* (2018) 360 ALR 768, [42] (Rangiah J).
[342] See, e.g., *Evidence Act 2008* (Vic), s 125(1)(a).
[343] See, e.g., *Evidence Act 2008* (Vic), s 125(1)(b).
[344] *Talacko v Talacko* [2014] VSC 328, [15] (Elliot J), citing *Amcor Ltd v Barnes* [2011] VSC 341, [32], [38]-[70] (Kyrou J). See also *P & V Industries Pty Ltd v Porto & Ors (No.3)* [2007] VSC 113, [22] and [26] (Hollingworth J).
[345] *Hodgson v Amcor; Amcor v Barnes (No.2)* [2011] VSC 204, [81] (Vickery J).
[346] *Talacko v Talacko* [2014] VSC 328, [15] (Elliot J), citing *Amcor Ltd v Barnes* [2011] VSC 341, [58]-[59] Kyrou J).

> "something to give colour to the charge" at a prima facie level that has foundation in fact.[347] What is sufficient to establish reasonable grounds to give "colour to the charge" will depend upon the circumstances of the case."[348]

Ethical and Professional Misconduct

320. A number of the legal doctrines outlined above, such as confidentiality, fiduciary duties and legal professional privilege form part of the rules that govern ethical and professional conduct.[349] Further, while ethical and professional rules may be rooted in "standards of common decency and common fairness",[350] the codification of those rules and the regulation of them reflects the important role of the legal profession in the proper administration of justice.

321. Indeed, the current Bar Rules provide that "barristers owe their paramount duty to the administration of justice",[351] which reflects long established principles.[352]

322. The current Bar Rules also provide:[353]

> A barrister must not engage in conduct which is:
>
> (a) dishonest or otherwise discreditable to a barrister,
>
> (b) prejudicial to the administration of justice, or
>
> (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

323. Further, the current Bar Rules provide:[354]

> A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice.

324. With regard to the duty to the client, the Rules provide:[355]

> A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.

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[347] *Talacko v Talacko* [2014] VSC 328, [16] (Elliot J), citing *Kang v Kwan* [2001] NSWSC 698, [37.6] (Santow J), referring to *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 556.9 (McHugh J). See also at 514.3 (Brennan CJ), 521.9 (Dawson J), 534.3 (Toohey J), 546.5 (Gaudron J), 575.4 (Gummow J), 592.1 (Kirby J).
[348] *Talacko v Talacko* [2014] VSC 328, [16] (Elliot J) citing *Kang v Kwan* [2001] NSWSC 698, [37.7] (Santow J).
[349] See, e.g., *AB & EF v CD* [2017] VSC 350, [109]-[114], [118] (Ginnane J).
[350] *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 199-200 (Dixon CJ, McTiernan, Fullager, Menzies and Windeyer JJ); *AB & EF v CD* [2017] VSC 350, [125]-[126] (Ginnane J).
[351] Legal Profession Uniform Conduct (Barristers) Rules 2015, r 4(a).
[352] See, e.g., *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 286 (Dixon CJ); 298 (Kitto J); *Tuckiar v The King* (1934) 52 CLR 335, 347 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ), cited in *Orman v The Queen* [2019] VSCA 163, [11] (Maxwell P, Niall and Emerton JJA).
[353] *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 8.
[354] *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 23.
[355] *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 35.

325. In addition, a barrister must return a brief where "the client's interest in the matter or otherwise is or would be in conflict with the barrister's own interest or the interest of an associate".[356]

326. Over the extended period in which Ms Gobbo was a human source, there were numerous changes to legislation concerning the regulatory framework for the legal profession in Victoria.[357] However, the above rules were also reflected, in substance, in the *Victorian Bar Practice Rules 1998*.[358]

327. Where Ms Gobbo may have engaged in the types of conduct particularised in Categories 1A, 1B, 2A and 2B, she may have fallen foul of the ethical and professional requirements outlined above. So much is plain from the judgment of the High Court in *AB v CD*.[359]

328. In particular, Ms Gobbo's conduct may have breached her duties to the administration of justice, to the court, and to her client. Such conduct may have been dishonest or otherwise discreditable, prejudicial to the administration of justice, and/or likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

329. To be clear, it is submitted that it is not any breach by Ms Gobbo of ethical and professional rules which relevantly may cause a case to be affected, but rather that such a breach, if found, would arguably indicate in the absence of disclosure, that her client was deprived of independent legal representation and/or denied the opportunity to object to potentially tainted evidence, which may potentially result in a substantial miscarriage of justice.

330. These submissions now turn to the legal principles underpinning the second term of reference.

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[356] *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 101(b).
[357] See, e.g., *Legal Profession Practice Act 1958* (Vic); Legal *Practice Act 1996* (Vic); *Legal Profession Act 2004* (Vic); now the Legal Profession Uniform Law, established by the *Legal Profession Uniform Law Application Act 2014* (Vic) Sch 1 (which commenced operation on 1 July 2015). In relation to the professional conduct of barristers, see, e.g., *Consolidated Rules of Practice and Conduct 1993*; *Victorian Bar Practice Rules 1998*; now the *Legal Profession Uniform Conduct (Barristers) Rules 2015*.
[358] Rules 4(a), 8, 23, 35, 101(b) in the *Legal Profession Uniform Conduct (Barristers) Rules 2015* are reflected in rules 4, 10-11, 16-20, 72 of the *Victorian Bar Practice Rules 1998.*
[359] (2018) 93 ALJR 59, 62 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

LEGAL PRINCIPLES: SECOND TERM OF REFERENCE

331. The second term of reference is concerned with the conduct of current and former members of Victoria Police in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source. There is significant overlap between the first and second terms of reference, as described at [17] above.

332. In light of the second term of reference, the conduct of current and former members of Victoria Police may be significant in its own right and/or due to its effect on a case.

333. This chapter of the submissions of Counsel Assisting the Commission will consider:

333.1. the sources and content of the duties and obligations of Victoria Police officers

333.2. the relevance of Victoria Police as a "public authority" under the Charter of Human Rights and Responsibilities Act 2006 (Vic) ("the Charter")

333.3. the relevance of the duties and obligations of Victoria Police officers to the facts before the Commission.

The Sources and Content of the Duties and Obligations of Victoria Police Officers

334. The duties and obligations of Victoria Police officers arise from various sources:

334.1. their oath or affirmation

334.2. legislation and prosecutorial guidelines

334.3. the common law.

335. As noted at the outset of these submissions, in *AB v CD* the High Court (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) held *per curiam*:[360]

> EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court. *Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of 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*.[361] As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.
>
> (Emphasis added.)

336. In that paragraph, the High Court made express reference to the Second Schedule of the *Victoria Police Act 2013* (Vic) ("the *Victoria Police Act*"), and the former

[360] (2018) 93 ALJR 59, 62 [10].
[361] See *Victoria Police Act 2013* (Vic), Sch 2, and formerly *Police Regulation Act 1958* (Vic), Second Schedule.

Second Schedule to the *Police Regulation Act 1958* (Vic) ("the *Police Regulation Act*").

337. Section 50(1) of the *Victoria Police Act* provides:[362]

> Before a police officer or protective services officer performs any duty or exercises any power as a police officer or protective services officer, he or she must take an oath of office or make an affirmation of office and subscribe that oath or affirmation.

338. Previously, that legislative requirement was provided for by s 13(1) of the *Police Regulation Act*.[363]

339. For police officers, s 50(2) of *Victoria Police Act* provides that the oath or affirmation must be in Form 1 of Schedule 2, which is in the following terms:

> I [*insert name*] [*swear by Almighty God/do solemnly and sincerely affirm*] that I will well and truly serve our Sovereign Lady the Queen as a police officer in Victoria in any capacity in which I may be appointed, promoted, or reduced to, without favour or affection, malice or ill-will for the period of [*insert period*] from this date, and until I am legally discharged, that I will see and cause Her Majesty's peace to be kept and preserved, and that I will prevent to the best of my power all offences, and that while I continue to be a police officer I will to the best of my skill and knowledge discharge all the duties legally imposed on me faithfully and according to law.

340. In substance, that mirrors the formulation of the oath as previously set out in the Second Schedule to the *Police Regulation Act.*

341. Notably, the oath or affirmation as set out in the *Victoria Police Act* and formerly the *Police Regulation Act* encompasses four aspects:

341.1. to well and truly serve without favour or affection, malice or ill-will

341.2. to keep and preserve the peace

341.3. to prevent, to the best of the officer's power, all offences

341.4. to the best of the officer's skill and knowledge, discharge all the duties legally imposed on the officer faithfully and according to law.

342. Further, s 51 of the *Victoria Police Act* provides:[364]

> **Duties and powers of police officers**
>
> A police officer who has taken and subscribed the oath or made and subscribed the affirmation under section 50 has—
>
> (a) the duties and powers of a constable at common law; and

[362] See s 192 for special constables. Section 193(3)(c) provides that Division 1 of Part 4 (Oath or affirmation of office) does not apply to special constables in incidents requiring urgent cross-border assistance, however pursuant to s 199(2) a special constable appointed during the period must take and subscribe an oath or make and subscribe an affirmation in accordance with s 192 as soon as practicable after his or her appointment. Pursuant to s 45, police reservists are taken to be a police officer for the purposes of, amongst other things, the oath or affirmation of office (s 50), and the duties and powers of police officers at common law (s 51(1)(a)).
[363] See s 102M(1) for special constables (as qualified by s 102T), s 105(1) for police reservists, s 118C(1) for protective services officers.
[364] See s 45 for police reservists, s 52 for protective services officers, and s 193 for special constables.

(b) any duties and powers imposed or conferred on a police officer by or under this or any other Act or by or under any subordinate instrument.

343. Previously s 11 the *Police Regulation Act* provided that police officers had the powers and duties as provided by legislation and under the common law.[365]

344. That raises the need to identify the content of the relevant duties of police officers at common law and under legislation,[366] including the Charter.

The Duties of Police Officers at Common Law

345. In *State of NSW v Tyszyk*[367] ("*Tyszyk*"), Campbell JA cited with approval[368] the statement of Angel J in *Thomson v C*[369] that "Courts have sensibly been loath to clothe the ambit of a police officer's duty in specifics. Rather, their duties have always been expressed in the most general of terms".[370]

346. Further, Campbell JA noted[371] that in *Innes v Weate*,[372] Cosgrove J observed that a police officer's duty "…cannot be stated in other than general terms – the range of circumstances in which the duty to act may arise is too wide, too various, and too difficult to anticipate for the compilation of an exhaustive list".[373]

347. However, in *Tyszyk*, Campbell JA did state that some indication of the common law duties can be given, and his Honour went on to identify two broad categories in light of authority:[374]

347.1. Duties concerning crime: A most important aspect of the duties of a constable concerns preventing and detecting crime. Constables' duties concerning crime extend to collecting evidence concerning crime and keeping it for as long as is necessary, enforcing the criminal law, and protecting property from criminal injury;[375] and

347.2. Keeping the peace: Another aspect of the duties of a constable concerns preventing or assisting in preventing disturbances or breaches of the peace. The notion of a "breach of the peace" is a multifaceted one, and includes a wide range of actions and threatened actions that interfere with the ordinary operation of civil society.[376]

348. With regard to the duty to enforce the criminal law, Campbell JA cited[377] the following passage of Finn J in *Rush v Commissioner of Police*:[378]

> It is widely accepted in common law jurisdictions that, at common law, police officers owe to the general public a duty to enforce the criminal law and, correspondingly, that latitude necessarily must be given to those responsible

[365] See s 102N for special constables, s 106 for police reservists, and s 118D for protective services officers.
[366] These duties include those provided for by Part 4, Division 3 of the *Victoria Police Act 2013* (Vic), which are not relevant to the first and second terms of reference.
[367] [2008] NSWCA 107.
[368] At [81].
[369] (1989) 95 FLR 116.
[370] At 117.
[371] [2008] NSWCA 107, [82].
[372] (1984) 12 A Crim R 45.
[373] At 51.
[374] [2008] NSWCA 107, [83].
[375] At [84] (citations omitted).
[376] At [85] (citations omitted).
[377] At [84].
[378] (2006) 150 FCR 165, 189 [91].

> for the conduct of police operations in the judgments required to be made to that end: see generally *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308 at [33]-[35]. As Lord Denning observed in *R v Chief Constable of Devon and Cornwall; Ex parte Central Electricity Generating Board* [1982] QB 458 at 472: "It is of the first importance that the police should decide on their own responsibility what action should be taken in any particular situation."

349. In *Hinchcliffe v Commissioner of Australian Federal Police*[379] ("*Hinchcliffe*"), Kenny J observed that "[i]t is customary for Parliament and the courts to describe police powers and duties in only the most general terms",[380] and that "Australian courts too have accepted that whilst a commissioner of police has a duty to enforce the law, he or she also has a broad discretion as to the manner in which he or she chooses to fulfil the responsibilities of office".[381]

350. With regard to the duty of disclosure, the judgments of the High Court in *Grey v The Queen*[382] ("*Grey*") and *Mallard*[383] made it plain that the Crown's duty of disclosure extended to information obtained by investigating police officers, even if that information was not known to prosecutors.

The Duty of Disclosure

351. In the recent judgment of *Roberts v The Queen*[384] ("*Roberts*"), the Court of Appeal (Osborn and T Forrest JJA, and Taylor AJA) held:[385]

> It is now accepted that it is fundamental that there must be full disclosure in criminal trials. It is a 'golden rule'. The duty is to disclose all relevant material of help to an accused. It is owed to the court, not the accused. It is ongoing. It includes, where appropriate, an obligation to make enquiries. *It is imposed upon the Crown in its broadest sense*. And a failure in its discharge can result in a miscarriage of justice.
>
> (Emphasis added and citations omitted.)

352. The Court concluded that "…the duty of disclosure is a significant element of a fair trial and a conspicuous aspect of the Crown's duty to ensure that the case against an accused is presented with fairness".[386]

353. The Court observed that the duty is mandated by a combination of statute, prosecutorial guidelines and judicial authority,[387] and went on to consider:[388]

353.1. the requirements of disclosure pursuant to ss 110 and 111 of the Criminal Procedure Act, regarding contents of a hand-up brief and the continuing duty of disclosure respectively[389]

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[379] (2001) 118 FCR 308.
[380] At 319-20 [33].
[381] At 320 [35].
[382] (2001) 75 ALJR 1708.
[383] (2005) 224 CLR 125.
[384] [2020] VSCA 58.
[385] At [56].
[386] At [64].
[387] At [57].
[388] At [59]-[60].
[389] At [58]. These duties are imposed on the informant. See further ss 41-4 regarding summary offences, and sub- s 416(1) which preserves the common law duty of disclosure on the prosecution.

353.2. the former requirements of disclosure under Schedule 5 of the Magistrates' Court Act 1989 (Vic)[390]

353.3. clause 15 of the Prosecution Policy of the Director of Public Prosecutions for Victoria (which the Court observed reflected the common law principles articulated in R v Keane,[391] and R v Brown (Winston)[392] ("Brown"), followed in R v Spiteri,[393] and approved by the Court of Appeal in Farquharson.[394]

354. The Court cited with approval[395] the following statement of principle by Lord Hope of Craighead in *Brown*:[396]

> *The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial.* If a defendant is to have a fair trial *he must have adequate notice of the case which is to be made against him* … the great principle is that of open justice. It would be contrary to that principle for the prosecution to withhold from the defendant material *which might undermine their case against him or which might assist his defence*.
>
> (Emphasis in judgment of the Court of Appeal.)

355. In *Roberts*, the Court observed[397] that in *Mallard* the plurality stated that the decision in *Grey* stood as authority for the proposition that the prosecution must at common law disclose all relevant evidence to an accused, and that a failure to do so may in some circumstances require the quashing of a verdict of guilty.[398]

356. Noting that the importance of the duty has been the subject of much judicial comment, the Court in *Roberts* cited with approval[399] the following observations of Kirby J in *Mallard*:[400]

> The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, particularly in countries observing the accusatorial form of criminal trial, of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused.

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[390] At [58]. Which included the required contents of the hand-up brief at Sch 5 cl 7, and an ongoing duty of disclosure on the informant, Sch 5, cl 7(4). It also preserved the duty of disclosure on the prosecution, Sch 5 cl 6(3).
[391] [1994] 1 WLR 746; [1994] 2 All ER 478.
[392] [1998] AC 367.
[393] (2004) 61 NSWLR 369.
[394] (2009) 26 VR 410.
[395] [2020] VSCA 58, [60].
[396] *R v Brown (Winston)* [1998] AC 367, 374.
[397] [2020] VSCA 58, [61].
[398] *Mallard v The Queen* (2005) 224 CLR 125, 133 [17] (Gummow, Hayne, Callinan and Heydon JJ).
[399] [2020] VSCA 58, [62].
[400] *Mallard v The Queen* (2005) 224 CLR 125, 155 [81].

357. The Court also cited with approval[401] the statement in *R v Ward*[402] ("*Ward*") of Lord Justice Glidewell, Lord Justice Nolan and Lord Justice Steyn:[403]

> Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.

358. As observed in *Regina v H (Appellant); Regina v C (Appellant)*[404] ("*R v H; R v C*") by the Appellate Committee (Lord Bingham of Cornhill, Lord Woolf, Lord Hope of Craighead, Lord Walker of Gestingthorpe and Lord Carswell), in *Ward* it was recognised in the United Kingdom that the previously limited approach to disclosure was inadequate.

359. In *Ward*, it was held by the Court:[405]

> An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but throughout the trial.

360. As noted by Martin Hinton in "Unused Material and the Prosecutor's Duty of Disclosure":[406]

> The combined decisions in Saunders [29 August 1989, Central Criminal Court, Henry J] and Ward changed the nature and ambit of the prosecutor's duty to make disclosure to the defence entirely. Everything with the exception of information to which public interest immunity attached was to be made accessible to the defence.

361. This duty of disclosure was entrenched in Australia in the judgments of the High Court in *Grey* and *Mallard*.

Material Held by Police

362. In *Mallard*, the High Court referred to a body of evidence that had been in the possession of investigating police before, during and after the trial, and which had not been disclosed to the appellant.[407] In allowing the appeal and quashing the appellant's conviction, the joint judgment expressly stated that "[w]hether any of it was in the possession of the Director of Public Prosecutions is a question that is unnecessary to investigate".[408]

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[401] [2020] VSCA 58, [63].
[402] [1993] 1 WLR 619.
[403] At 642.
[404] [2004] 2 AC 134, [16].
[405] [1993] 1 WLR 619, 674.
[406] (2001) 25 Crim LJ 121, 132. Cited in David Plater, "The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?" (2006) *University of Tasmania Law Review* 25(2), 111, 130.
[407] (2005) 224 CLR 125, 132 [16] (Gummow, Hayne, Callinan and Heydon JJ).
[408] At 132-3 [16] (Gummow, Hayne, Callinan and Heydon JJ). In contrast, Kirby J observed at 149 [62]: "[w]ithout exception, they were statements procured in the preparation of the police brief for ultimate tender to the

363. This followed *Grey*, which considered a failure by the Crown to disclose that a witness had procured for himself a very significant reduction in sentence because of his assistance to police in the investigation leading to the charges against the appellant. Further, a letter from the officer in charge of the investigation had been provided during the witness' sentencing hearing that set out the assistance the witness had given, which ensured that the witness did not receive a full-time custodial sentence. Notably, the Crown Prosecutor at trial was unaware of the letter and indicated that had he known of it then it would have been disclosed.[409] The Court held that the failure to disclose had resulted in a miscarriage of justice.[410]

364. Accordingly, the approach of the High Court in *Mallard* and *Grey* makes it plain that the duty of disclosure extends to material obtained by investigating police, even if that material is not known to the prosecutor.

365. This followed the approach taken in the United Kingdom. In *R v Taylor and Taylor*,[411] the Court of Appeal (Lord Justice McCowan, Mr Justice Douglas Brown and Mrs Justice Tuckey) observed with regard to a failure to disclose a prior inconsistent statement of a witness:[412]

> Mr Nutting, for the Crown, conceded that he cannot possibly argue that a failure to disclose a previous inconsistent description is not of real significance. He further conceded, therefore, that there was a material irregularity.
>
> It must be made plain, incidentally, that neither prosecution counsel at trial, nor the Crown Prosecution Service had any idea of the existence of this document.
>
> The Detective Superintendent in charge of the case did, however, know of the existence of the document and its significance, but decided that there was no need for him to disclose it to the prosecution legal team. He was, of course, as Mr Nutting agrees, completely wrong in so thinking. We can only conclude that he did not disclose it to the prosecution legal team because he knew that if he did, in accordance with the Bar's high traditions, they would in turn disclose it to the defence.

366. In the Court of Appeal judgment of *Farquharson,* a successful ground of appeal against conviction concerned the failure by the Crown to disclose that a prosecution witness had charges pending, which was compounded by the fact that the police were prepared to provide a letter of support upon his plea and sentence.[413]

367. Notably, again neither the prosecutor nor the judge knew of these matters.[414] It was expressly accepted by the DPP (then J Rapke QC) that there was no distinction for disclosure purposes to be drawn between the prosecution in the trial and the police informant.[415]

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prosecutor. At least some of them were certainly known to the prosecutor. All of them would have been available to the Director of Public Prosecutions".

[409] (2001) 75 ALJR 1708, 1709 [4] (Gleeson CJ, Gummow and Callinan JJ), 1716 [40] (Kirby J), 1724 [80] (Hayne J).

[410] At 1713 [23] (Gleeson CJ, Gummow and Callinan JJ), 1723 [78] (Kirby J), 1724 [84] (Hayne J).

[411] (1994) 98 Cr App R 361.

[412] At 366.

[413] (2009) 26 VR 410, 463 [206] (Warren CJ, Nettle and Redlich JJA).

[414] At 463 [206] (Warren CJ, Nettle and Redlich JJA).

[415] At 464 [212].

368. The Court of Appeal (Warren CJ, Nettle and Redlich JJA), cited *Cannon v Tahche*[416] ("*Cannon*") and *Mallard* and held that "[i]t is axiomatic that there must be full disclosure in criminal trials. The prosecution has a duty to disclose all relevant material. A failure of proper disclosure can result in a miscarriage of justice".[417]

369. In *Cannon*, the Court of Appeal (Winneke P, Charles and Chernov JJA) held:[418]

> The prosecutor's "duty of disclosure" has been the subject of much debate in appellate courts over the years. But, as it seems to us, authority suggests that, whatever the nature and extent of the "duty", it is a duty owed to the court and not a duty, enforceable at law at the instance of the accused.

370. As outlined above at [114]-[115], in *Farquharson*, it was accepted[419] that the correct test to apply with regard to the need for disclosure was set out in *R v Spiteri*,[420] whereby:

> …the Crown has a duty to disclose material which can be seen on a sensible appraisal by the prosecution:
>
> (a) to be relevant or possibly relevant to an issue in the case;
>
> (b) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
>
> (c) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (a) or (b).

371. Those obligations are subject to limits:[421]

> The prosecution duty of disclosure does not extend to disclosing material:
>
> (a) relevant only to the credibility of defence (as distinct from prosecution) witnesses;
>
> (b) relevant only to the credibility of the accused person;
>
> (c) relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false;
>
> (d) for the purpose of preventing an accused from creating a trap for himself, if at the time the prosecution became aware of the material it was not a relevant issue at trial.

372. In *Farquharson*, the Court of Appeal concluded "[i]n our view, the information was rationally probative and should have been disclosed. It behoved the informant *and the police* to do so" [emphasis added].[422]

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[416] (2002) 5 VR 317.
[417] (2009) 26 VR 410, 464 [210] (Warren CJ, Nettle and Redlich JJA) (citation omitted).
[418] (2002) 5 VR 317, 340 [57].
[419] (2009) 26 VR 410, 464 [213] (Warren CJ, Nettle and Redlich JJA).
[420] (2004) 61 NSWLR 369.
[421] (2009) 26 VR 410, 464 [214] (Warren CJ, Nettle and Redlich JJA).
[422] (2009) 26 VR 410, 465 [218] (Warren CJ, Nettle and Redlich JJA).

373. In their article "Is the 'Golden Rule' of Full Prosecution Disclosure a Modern 'Mission Impossible'?",[423] David Plater and Lucy De Vreeze write the following regarding the duty of disclosure:[424]

> The courts have insisted on a number of occasions in both Australia[425] and England[426] that the police are part of the prosecution for the purposes of disclosure. It is no answer for the prosecution to assert that they cannot disclose something of which the police have never made them aware.[427] 'In those circumstances, while the prosecuting authority as such may not have failed in their duty, the total apparatus of [the] prosecution has failed to carry out its duty to bring before the court all the material evidence.'[428] Furthermore, despite any previous practice to the contrary, the police cannot decide the relevance of items in the prosecution's possession or whether it is covered by public interest immunity.[429] Such an assessment must be made, in the first instance at least, by the DPP.[430]
>
> The logic of classifying the police as part of the 'total apparatus of the prosecution' is demonstrated by a number of cases in which the investigators withheld from the defence and even the prosecution lawyers vital material that undermined the Crown case.[431] Several leading cases support this and further have held that even an independent expert witness retained and instructed by the prosecution is part of the prosecution for the purposes of disclosure.[432] If the courts were prepared to overlook the nondisclosure of significant material by the prosecution on the basis that the police or prosecution expert witness had never made the prosecuting lawyer aware of such material, it would not encourage a climate of candour and transparency, and would undermine the modern insistence on frank disclosure of the prosecution case.[433]

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[423] (2012) 14 FLJ 133.
[424] At 141-2.
[425] See *R v Bradshaw* (Unreported, West Australian Court of Criminal Appeal, 13 May 1997, No 970228, Supreme Court Library, Transcript) 9-11; *R v Gray* (2001) 184 ALR 593, 599-600; *R v Button* [2002] 25 WAR, [58]; *R v Mallard* (2005) 224 CLR 125, 132-3; *R v Lipton (No 2)* [2011] NSWCCA 247.
[426] See *R v Birmingham Crown Court, ex parte Richetts* [1991] RTR 105, 108; *R v Taylor and Taylor* (1994) 98 Cr App R 361, 366.
[427] See, e.g., *R v Liverpool Crown Court, ex parte Roberts* [1986] Crim LR 622; *R v T (LA)* (1993) 84 CCC (3d) 90; *R v McCarthy*, The Times, 21 October 1993; *R v Oliver* (1995) 143 NSR (2d) 134, [36]; *R v McNeil* [2009] 1 SCR 66, [24]. Though it is unclear how far the prosecution's duty of disclosure extends to material in the prosecution's possession but relating to another case or investigation.
[428] *R v Boton Justices; ex parte Scally* [1991] 2 All ER 619, 633 (Glidewell LJ).
[429] See *R v Ward* [1993] 1 WLR 619, 632-3; *R v Solomon* (2005) 92 SASR 331, [115]; *R v West* [2005] EWCA Crim 517; *R v Lipton (No 2)* [2011] NSWCCA 247.
[430] See *R v Ward* [1993] 619, 632-3; *R v West* [2005] EWCA Crim 517; *R v Lipton (No 2)* [2011] NSWCCA 247. All three cases confirm that the ultimate decision as to whether an item is covered by public interest immunity is for the court alone. The previous practice, in New South Wales at least, that the DPP abstained from making claims of public interest immunity but rather left it to the police to 'instruct' the Crown Solicitor to appear on its behalf to argue such claims now appears doubtful in light of *R v Lipton (No 2)* [2011] NSWCCA 247.
[431] See, e.g., *R v Ward* [1993] 1 WLR 619; *R v Taylor and Taylor* (1994) 98 Cr App R 361; *R v Early and Others* [2003] 1 Cr App R 19; *R v Mallard* (2005) 224 CLR 125; *R v Maxwell* [2011] 1 WLR 1837.
[432] See, e.g., *R v Ward* [1993] 1 WLR 619, 674-5; *R v Maguire* [1992] 1 QB 936; *R v Clark* [2003] 2 FCR 447. Such classification should strictly be unnecessary as any expert witness should regard him or herself as a wholly independent player in the proceedings whose role is to provide objective and unbiased assistance to the court uninfluenced as to form or content by the exigencies of the litigation or the interests of the party instructing the witness: see *Whitehouse v Jordan* [1981] 1 WLR 246.
[433] But the courts may be prepared on occasion to overlook non-disclosure of relevant material through applying the test advanced by the House of Lords in *R v Pendleton* [2002] 1 WLR 72 that, despite the non-disclosure, the conviction remains 'safe'. See, e.g., *R v Kenedy (Hamidi)* [2008] EWCA Crim 2817, [23]; *R v Pomfrett* [2009] EWCA Crim 1939.

374. Notably, as Ginnane J observed in *AB & EF v CD*,[434] the obligation of disclosure is ongoing, and his Honour cited the following passage from *R (Nunn) v Chief Constable of Suffolk Police*:[435]

> There can be no doubt that if the *police or prosecution* come into possession, after the appellate process is exhausted, of something new which might afford arguable grounds for contending that the conviction was unsafe, it is their duty to disclose it to the convicted defendant.
>
> (Emphasis added.)

Public Interest Immunity

375. With regard to claims of public interest immunity , or "matters of state" under s 130 of the *Evidence Act*, in *R v H; R v C*, the Appellate Committee noted[436] that pursuant to the "ground-breaking" decision of *Ward*:

> The effect of the judgment was to require the prosecution, if it sought to claim PII for documents helpful to the defence, to give notice of the claim to the defence so that, if necessary, the court could be asked to rule on the legitimacy of the prosecution's asserted claim.

376. As observed by Ginnane J in *AB & EF v CD*,[437] "[s]ubsequently, the Court of Appeal modified the position in *R v Ward* to recognise an ability, in 'highly exceptional' cases, to deal with public interest immunity claims by way of an ex parte application without giving notice to the defence".

377. Further, Ginnane J noted that in *R v Ward*, the Court of Appeal observed that "[i]f, in a wholly exceptional case, the prosecution is not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned".[438]

378. In *AB v CD & EF*,[439] the Court of Appeal noted:[440]

> An accused will not receive a fair trial if he or she is denied access to information [including the identity of an informer] in circumstances where there is good reason to think that the disclosure of such information may be of substantial assistance in answering the prosecution case.

379. The Court of Appeal reformulated the test in the context of appeals by convicted persons as requiring it to be demonstrated that there is good reason to think that disclosure of the informer's identity may be of substantial assistance to the convicted person in seeking leave to appeal and appealing their convictions,[441] or in the case of those whose appeal rights are exhausted, whether disclosure may be of

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[434] [2017] VSC 350, [54].
[435] [2014] UKSC 37; [2015] AC 225, 246 [35] (Lord Hughes, with whom Lord Neuberger, Lord Clarke, Lord Reed and Lord Carnwath agreed).
[436] [2004] 2 AC 134, [20].
[437] [2017] VSC 350, [90].
[438] At [89].
[439] [2017] VSCA 338.
[440] At [47] (Ferguson CJ, Osborn and McLeish JJA). See further [53]-[54], [58]-[59] applying *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84, 89-90 (Brooking J, with whom Southwell and Teague JJ agreed) and *R v Roberts* (2004) 9 VR 295, 337 [103] (Batt JA, with whom Buchanan and Chernov JJA agreed).
[441] At [59] (Ferguson CJ, Osborn and McLeish JJA).

substantial assistance in seeking a reference under s 327 of the *Criminal Procedure Act*.[442]

380. As stated by Gibbs ACJ in *Sankey v Whitlam*[443] "[i]t is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld".

381. In *R v Solomon*,[444] Doyle CJ (with whom Duggan and Sulan JJ agreed) explained:[445]

> It is not appropriate for the investigating officers, or their superiors, to make a decision that potentially relevant and disclosable material will not be disclosed, because there are or may be grounds for resisting that disclosure. That is a decision that should be made by the Director. If the Director makes that decision, the Director can then consider whether anything, and if so what, should be done to inform the legal representatives of the accused that there is material that is being withheld. What happened in this case illustrates the dangers associated with a failure by the police to provide the Director with all the information which should be provided.

382. Accordingly, with regard to the Crown's duty of disclosure, it appears that there is an interwoven duty for investigating police, and their superiors, to take steps to ensure that decisions about PII claims, or claims about "matters of state" under the uniform Evidence Acts, are made by the DPP or the VGSO. It is not appropriate for police, or their superiors, to withhold potentially relevant and disclosable material because there may be grounds for resisting that disclosure.

383. It is further submitted that, consistently with their oath or affirmation to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will,[446] there is a duty on all members of Victoria Police:

383.1. with knowledge that a person has been charged and/or convicted

383.2. with knowledge of relevant information or material that may adversely impact, or may have adversely impacted, upon the fair trial of that person, including that the person's legal representative may not be, or may not have been, independent, and/or that evidence may have been improperly or illegally obtained

383.3. with reason to believe that the relevant information or material may not be, or was not, disclosed to the accused person and/or his or her legal representatives and/or to the relevant authorities such as the DPP or the VGSO

383.4. to take all steps necessary to ensure that there is disclosure to either the person and/or his or her legal representatives, or to the relevant authorities such as the DPP or the VGSO. That is consistent with their sworn oath or affirmation, and the duty of the Crown to disclose information or material that is relevant or possibly relevant to an issue in the case, or raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use, or to hold out a real (as

[442] *AB v CD* [2017] VSCA 338, [59] fn 81 (Ferguson CJ, Osborn and McLeish JJA).
[443] (1978) 142 CLR 1, 38.
[444] (2005) 92 SASR 331.
[445] At 359 [116]. See further *R v Lipton* (2011) 82 NSWLR 123, 152-3 [104]-[107] (McColl JA).
[446] *Victoria Police Act 2013* (Vic), Sch 2, and formerly *Police Regulation Act 1958* (Vic), Second Schedule.

opposed to fanciful) prospect of providing a lead on such evidence,[447] and with the ongoing duty of disclosure.[448]

Conclusions Regarding the Duty of Disclosure

384. Having regard to the above, it is submitted that:

384.1. the duty of disclosure extends to the police informant,[449] investigators,[450] superior officers,[451] and to any police officer in the circumstances as set out above[452]

384.2. the duty of disclosure is ongoing[453]

384.3. it is no answer that there are or may be grounds for resisting disclosure.[454] Such an answer creates additional duties of disclosure for the purpose of the determination of such claims.[455]

385. Accordingly, with regard to the evidence before the Commission, it is submitted that to the extent that any member of Victoria Police who meets the criteria at [384.1], claimed:

385.1. they did not have a duty of disclosure; or

385.2. that the duty was qualified; or

385.3. that they were otherwise exempt from the duty –

such evidence should be rejected in light of the above.

Breach of Discipline and Misconduct

386. Police officers have a duty and obligation to not engage in a breach of discipline or misconduct.

387. Part 7 Division 1 of the *Victoria Police Act* concerns breaches of discipline, which are defined by s 125 to include the following:

> **Breaches of discipline**
>
> (1) A police officer or protective services officer commits a breach of discipline if he or she—
>
> (a) contravenes a provision of this Act or the regulations [which includes committing misconduct contrary to s 166]; or …
>
> (h) engages in conduct that is likely to bring Victoria Police into disrepute or diminish public confidence in it; or …
>
> (j) is guilty of disgraceful or improper conduct (whether in his or her official capacity or otherwise); or

[447] *R v Spiteri* (2004) 61 NSWLR 369.
[448] See above at [351] and [374].
[449] See above at [353] and [367].
[450] See above at [362] and [381].
[451] See above at [381].
[452] See above at [383].
[453] See above at [351] and [374].
[454] See above at [380]-[382].
[455] See above at [380]-[382].

(k) is negligent or careless in the discharge of his or her duty; or …

(m) acts in a manner prejudicial to the good order or discipline of Victoria Police; or

(n) has been charged with an offence (whether under a Victorian law or under a law of another place) and the offence has been found proven.

(2) A police officer or protective services officer who aids, abets, counsels or procures, or who, by any act or omission, is directly or indirectly knowingly concerned in or a party to the commission of a breach of discipline, also commits a breach of discipline.

388. This replicates s 69 of the *Police Regulation Act*, which provided:

Breaches of Discipline

(1) A member of the force commits a breach of discipline if he or she—

(a) contravenes a provision of this Act or the regulations; or …

(c) engages in conduct that is likely to bring the force into disrepute or diminish public confidence in it; or …

(e) is guilty of disgraceful or improper conduct (whether in his or her official capacity or otherwise); or

(f) is negligent or careless in the discharge of his or her duty; or …

(h) acts in a manner prejudicial to the good order or discipline of the force; or

(i) has been charged with an offence (whether under a Victorian law or under a law of another place) and the offence has been found proven.

(2) A member of the force who aids, abets, counsels or procures, or who, by any act or omission, is directly or indirectly knowingly concerned in or a party to the commission of a breach of discipline, also commits a breach of discipline.

389. Part 9 of the *Victoria Police Act* concerns complaints and investigations. Section 166 provides that "misconduct" in relation to a police officer or protective services officer means:

(a) conduct which constitutes an offence punishable by imprisonment; or

(b) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or

(c) disgraceful or improper conduct (whether in the officer's official capacity or otherwise).

390. The statutory predecessor to s 166 of the *Victoria Police Act*, s 86A of the *Police Regulation Act*, defined "serious misconduct" in substantively the same terms:

(a) conduct which constitutes an offence punishable by imprisonment; or

(b) conduct which is likely to bring the force into disrepute or diminish public confidence in it; or

(c) disgraceful or improper conduct (whether in the member's official capacity or otherwise).

391. To the same effect, s 5 of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) provides that:

> "police personnel misconduct" means—
>
> (a) in relation to a public officer who is a police officer or protective services officer—
>
> (i) conduct which constitutes an offence punishable by imprisonment; or
>
> (ii) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or
>
> (iii) disgraceful or improper conduct (whether in the public officer's official capacity or otherwise);
>
> (b) in relation to a public officer who is a Victoria Police employee or police recruit, conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it.

392. With regard to transitional provisions, it should be noted that Schedule 6 to the *Victoria Police Act* provides, inter alia, at Part 7 Cl 32:

> **32 Disciplinary action under this Act**
>
> (1) Subject to subclause (2), Division 1 of Part 7 of this Act applies on and after the commencement day whether the conduct giving rise to the breach of discipline occurred before, on or after that day.
>
> (2) Division 1 of Part 7 of this Act does not apply in relation to conduct occurring before the commencement day that was or is the subject of an investigation under section 70 of the old Act held or commenced before that day.

393. With regard to complaints, Schedule 6, Part 9 Cl 35 provides:

> **Complaints made before the commencement day**
>
> (1) A complaint that was made under section 86L of the old Act before the commencement day is taken, on and after that day, to be a complaint made under section 167 of this Act and may be investigated, or continued to be investigated, under Part 9 of this Act accordingly.
>
> (2) Subclause (1) does not apply if an investigation of the complaint had been completed under the old Act before the commencement day.

394. It is submitted the failure by Victoria Police officers to take steps to disclose that Ms Gobbo was a police informer to accused persons and/or their legal representatives, effectively preventing them from obtaining independent legal representation, or to take steps to have potential issues of public interest immunity or matters of state considered by the DPP or the VGSO and then possibly a court, may constitute a breach of discipline and/or misconduct. As too may the obtaining of information from Ms Gobbo in consequence of a breach of legal professional privilege and/or a breach of confidence. Such conduct may be conduct which was likely to bring Victoria Police into disrepute or diminish public confidence in it, and/or disgraceful or improper conduct, and/or negligent or careless conduct. As will be considered

below at [476]-[509], such conduct may, in some cases, constitute an offence punishable by imprisonment (such as misconduct in public office and/or perverting or attempting to pervert the course of justice).

The Charter of Human Rights and Responsibilities Act 2006 (Vic)

395. Victoria Police is expressly defined as a "public authority" under the Charter.[456] Accordingly, it has been accepted that members of Victoria Police have to duties and obligations under the Charter.[457]

396. Section 38 of the Charter provides:

> **Conduct of public authorities**
>
> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision…

397. The duties and obligations on public authorities pursuant to s 38 of the Charter commenced on 1 January 2008.[458] Notably, the Charter does affect any proceedings commenced or concluded before 1 January 2007,[459] and does apply to any act or decision made by a public authority before 1 January 2008.[460]

398. Those duties and obligations encompass two aspects: first, it is unlawful for a public authority to *act incompatibly* with a human right; and second, it is unlawful for a public authority, when making a decision, to fail to give *proper consideration* to a human right.

399. In *Bare v Independent Broad-based Anti-Corruption Commission*,[461] Tate JA described s 38(1) of the Charter as containing both a substantive limb, which is concerned with whether an act of a public authority is incompatible with a human right, and a procedural limb, which is addressed to the decision-making process that was undertaken in respect of a particular decision.[462]

400. Section 3(1) of the Charter provides that "*act* includes a failure to act and a proposal to act". Accordingly, the obligations on public authorities pursuant to s 38 of the Charter can extend to a failure to act, where that failure is incompatible with a human right.

Limitations to Human Rights

401. Section 7(2) of the Charter provides:

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[456] Section 4(1)(d).
[457] *DPP v Kaba* (2014) 44 VR 526, 647 [466] (Bell J).
[458] Section 2(2) of the Charter.
[459] Sections 49(2) and 2(1) of the Charter; *R v Williams* (2006) 16 VR 168, 176 [48] (King J).
[460] Sections 49(3) and 2(2) of the Charter.
[461] (2015) 48 VR 129.
[462] *Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 498 [176] (John Dixon J).

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

402. Once a human right is identified as limited by the action of a public authority, the onus of "demonstrably justifying" the limitation in accordance with s 7 resides with the party seeking to uphold the limitation.[463]

403. In light of what must be justified, the standard of proof is high.[464]

The Road Map Approach to Section 38 of the Charter

404. In *Certain Children v Minister for Families and Children (No 2)*[465] John Dixon J identified a useful road map prepared by the Victorian Equal Opportunity and Human Rights Commission for assessing incompatibility under s 38 of the Charter.[466]

405. Under that roadmap, the Court is to consider a number of questions:

(a) is any human right relevant to the decision or action that a public authority has made, taken, proposed to take or failed to take? (the relevance or engagement question)

(b) if so, has the public authority done or failed to do anything that limits that right? (the limitation question)

(c) if so, is that limit under law reasonable and is it demonstrably justified having regard to the matters set out in s 7(2) of the Charter? (the proportionality or justification question)

(d) even if the limit is proportionate, if the public authority has made a decision, did it give proper consideration to the right? (the proper consideration question)

(e) was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted under s 32 of the Charter in a way that is consistent with the protected right (the inevitable infringement question).

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[463] *Re an application under the Major Crime (Investigative Powers) Act 2004*; *DAS v Victorian Human Rights & Equal Opportunity Commission* (2009) 24 VR 415, 448 [147] (Warren CJ). Approved by the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, 475 [144]; *Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 498 [175] (John Dixon J).
[464] Ibid.
[465] (2017) 52 VR 441.
[466] 497 [174], cited in *Minogue v Dougherty* [2017] VSC 724, [74] (John Dixon J).

Potentially Relevant Human Rights

406. With regard to human rights that are potentially relevant in the circumstances being considered by the Royal Commission, the Charter protects:

406.1. the right to a fair hearing (s 24 of the Charter)

406.2. rights in criminal proceedings (s 25 of the Charter).

407. Notably, pursuant to s 6(2)(b) of the Charter, ss 24 and 25 of the Charter apply directly to courts when exercising their functions.[467]

408. The content of these human rights will be considered in turn.

The Right to a Fair Hearing

409. Section 24(1) of the Charter provides:

> A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

410. Section 24 of the Charter is modelled on Article 14(1) of the *International Covenant on Civil and Political Rights* ("ICCPR").[468]

411. *In Re an application under the Major Crime (Investigative Powers) Act 2004*; *DAS v Victorian Human Rights & Equal Opportunity Commission*[469] ("*DAS*"), Warren CJ observed:[470]

> Consistent with the decision of the Victorian Court of Appeal in *R v Thomas*,[471] the right to a fair hearing in s 24(1) of the Charter reflects a fundamental principle of the common law.[472] In *Thomas* , the court held that the established principles of the criminal law are "principles which themselves embody important notions of individual rights".[473]

It was acknowledged by Bell J in *Tomasevic v Travaglini*[474] that the right of every person not to receive an unfair trial is deeply ingrained in the rule of law. His Honour cited the comments of Isaacs J in *R v McFarlane; Ex parte O'Flanagan*:[475]

> [That] the elementary right of every accused person to a fair and impartial trial … exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilisation. It is only a variant of the maxim that every man is entitled to his personal liberty except so far as that is abridged by a due administration of the law. Every

[467] *De Simone v Bevnol Constructions* (2009) 25 VR 237, 247 [51]–[52] (Neave JA and Williams AJA); *Victoria Police Toll Enforcement & Ors v Taha & Ors* (2013) 49 VR 1, 81 [247] (Tate JA); *AB v CD and EF* [2017] VSCA 338, [169]-[170] (Ferguson CJ, Osborn and McLeish JJA).
[468] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[469] (2009) 24 VR 415.
[470] At 424-5 [38]-[39].
[471] (2006) 14 VR 475 ("Thomas")
[472] *Dietrich v R* (1992) 177 CLR 292.
[473] (2006) 14 VR 475 at 510, [126] per Maxwell P, Buchanan and Vincent JJA.
[474] (2007) 17 VR 100.
[475] (1923) 32 CLR 518.

> conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle.

412. In *R v H; R v C*, the Appellate Committee (Lord Bingham of Cornhill, Lord Woolf, Lord Hope of Craighead, Lord Walker of Gestingthorpe and Lord Carswell) observed:[476]

> As the House declared in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 68, and recently repeated in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 WLR 1, para 13, it is "axiomatic" "that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all".

413. In *Kracke v Mental Health Review Board,*[477] Bell J observed that the right to a fair hearing is not "…a mere procedural right standing apart from the general scheme of human rights protection. It is a fundamental principle of the rule of law", which is a "bedrock value" of the Charter.

414. In *Knight v Wise*,[478] T Forrest J held:[479]

> The right to a fair hearing is concerned with the procedural fairness of a decision. What fairness requires will depend on all the circumstances of the case. Broadly, it ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to their opponent. This principle is commonly known as the principle of equality of arms.

415. T Forrest J found that the right to a fair hearing protected by s 24(1) of the Charter includes:[480]

> (1) The common law right of unimpeded access to courts;
>
> (2) An implied right to a reasonably expeditious hearing;
>
> (3) Duties to inquire;
>
> (4) Rights to legal advice and representation; and
>
> (5) The privilege against self-incrimination.

416. In *DPP v Mokbel*,[481] Whelan J considered the scope of the right to a fair hearing in the context of a criminal trial and observed:[482]

> (1) The High Court has considered the scope of the common law right to a fair trial in a number of decisions in different contexts, perhaps the most significant of which are Barton v The Queen, Jago, Glennon, Dietrich v The Queen, and Dupas v The Queen;

[476] [2004] 2 AC 134, [10].
[477] (2009) 29 VAR 1, 102 [460].
[478] [2014] VSC 76.
[479] At [36].
[480] At [38].
[481] [2010] VSC 331.
[482] At [161]-[163].

(2) At common law, the right to a fair trial is not a directly enforceable right but a negative right. It is the right not to be convicted otherwise than after a fair trial;

(3) The prevailing approach is that the right to a fair trial has an independent overarching existence which is of central importance to the criminal law;

(4) A somewhat divergent approach has been propounded by Brennan J (with whom Dawson J has agreed) to the effect that a "fair trial" is, in a sense, an "ideal", perhaps existing only as part of the law's "rhetoric". On this approach, the right is a right to a trial which is as fair as the courts can give by exercising powers over the matters which the courts can control;

(5) Consideration of the public interest is a part of the analysis when considering what is a fair trial in a particular case;

(6) The application of the Charter means that the Charter right to a fair hearing by an impartial court in s 24 is a positive right and not a negative one as is the position at common law;[483]

(7) The approach of Brennan J that the content of the right is no more than a right to a trial which is as fair as the courts can make it by reference to matters under the control of the courts, will not be the position when the Charter applies; and

(8) The public interest is a component of the analysis of what is a fair hearing under s 24 in the same way that it is part of the analysis of what is a fair trial at common law.

Rights in Criminal Proceedings

417. In *DAS,* Warren CJ observed that "[t]he majority of the elements that constitute the fair hearing right are expressly guaranteed in s 25(1) and (2) of the Charter".[484]

418. Section 25 of the Charter provides:

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and

(b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and

(c) to be tried without unreasonable delay; and

(d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through

[483] See further the judgment of Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 433 [76].
[484] At 425 [40]. See further *R v Williams* (2007) 16 VR 168, 177 [54] (King J).

legal aid provided by Victoria Legal Aid under the **Legal Aid Act 1978**; and

(e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and

(f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the **Legal Aid Act 1978**; and

(g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and

(h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and

(i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and

(j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and

(k) not to be compelled to testify against himself or herself or to confess guilt. …

419. Section 25 of the Charter is modelled on Article 14(3) of the ICCPR.

420. With regard to the conduct of members of Victoria Police being considered by the Royal Commission, the two most relevant "minimum guarantees" are:

420.1. the right of an accused person to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her as protected by s 25(2)(b) of the Charter

420.2. the right of an accused person not to be compelled to testify against himself or herself or to confess guilt (the privilege against self-incrimination or the right to silence) as protected by s 25(2)(k) of the Charter.

Adequate Time and Facilities to Prepare Defence and to Communicate with a Lawyer

421. In *Davies v The Queen*[485] ("*Davies*"), the Court of Appeal (Kaye, McLeish and T Forrest JJA) held that "…the rights in s 25(2)(b) and (h)… do not confer on an accused in a criminal trial rights having a content extending beyond the common law right to a fair trial. Rather, they are specific aspects, and explications, of that larger right".[486]

422. With regard to the rights as protected by s 25(2)(b) of the Charter, the United Nations Human Rights Committee, *General Comment No. 32,* states of the equivalent ICCPR right as protected by Article 14(3)(b):[487]

> "Adequate facilities" must include access to documents and other evidence; this access must include all materials[488] that the prosecution plans to offer in

[485] [2019] VSCA 66.
[486] At [428]. The operation and effect of the Charter was not the subject of argument, see [425].
[487] United Nations Human Rights Committee, *General Comment No. 32, 2007*, [33]-[34].
[488] See concluding observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13.

> court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary)…
>
> The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.[489] Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.

423. Section 32(2) of the Charter expressly provides that "International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision". That includes when interpreting the content of the human rights as protected by the Charter.

424. Accordingly, it can be seen that s 25(2)(b) of the Charter protects a right to disclosure, the confidentiality of legal communications, and the right to legal representation in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference. In the words of *Davies*, these are specific aspects, and explications, of the right to a fair trial.

The Privilege Against Self-Incrimination

425. With regard to the right to the privilege against self-incrimination as protected by s 25(2)(k) of the Charter, in *DAS* Warren CJ observed:[490]

> While there may be differences in the expression of similar rights in other jurisdictions, citizens in Victoria must have the right to a fair hearing pursuant to
> s 24(1) of the Charter, there being a fundamental component of that right in the form of a guarantee in s 25(2)(k) not to be compelled to testify against oneself or to confess guilt. As explained much earlier in time by Winneke CJ and Smith J:[491]
>
> "… before any person is convicted, it is imperative, if public confidence in the administration of justice is to be maintained, that the conditions essential to a fair trial according to law be strictly observed, one of which is that he may only be convicted on evidence legally admissible against him. If there be no such evidence, then there has been a failure of one of the conditions essential to fair trial according to law."
>
> The self-incrimination right is part of the "common law of human rights" as explained by Murphy J in *Hammond v Commonwealth*:[492]
>
> "The privilege against self-incrimination is part of our legal heritage where it became rooted as a response to the horrors of the Star Chamber (see *Quinn v United States* (1955) 349 US 155). In the United States it is entrenched as

[489] Communications No. 1117/2002, *Khomidova v. Tajikistan*, para. 6.4; No. 907/2000, *Siragev v. Uzbekistan*, para. 6.3; No. 770/1997, *Gridin v. Russian Federation*, para. 8.5.
[490] (2009) 24 VR 415, 425-6 [40]-[43].
[491] *Chappell v A Ross & Sons Pty Ltd; Maclennan v Hastings Transport Pty Ltd* [1969] VR 376 at 388.
[492] (1982) 152 CLR 188 at 199-200 per Gibbs CJ, Mason, Brennan and Deane JJ agreeing ("*Hammond*").

> part of the Federal Bill of Rights. In Australia it is a part of the common law of human rights. The privilege is so pervasive and applicable in so many areas that, like natural justice, it has generally been considered unnecessary to express the privilege in statutes which require persons to answer questions. On the contrary, the privilege is presumed to exist unless it is excluded by express words or necessary implication, that is, by unmistakable language."
>
> [Citations as in original.]

The privilege, as a deep-seated fundamental common law right, hardly needs emphasising. It defines the relationship between the individual and the state and protects people against aggressive behaviour of those in authority.[493] The fundamental rationale of the privilege is that those who allege the commission of a crime should prove it themselves and not be able to compel the accused to prove it for them. As explained by Mason, Wilson and Dawson JJ in *Sorby*[494] the privilege operates by protecting a witness from being compelled to answer questions, or produce documents, or things, if to do so might tend to incriminate that person. Their Honours held that the privilege:[495]

> "… protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure that might lead to incrimination, or to the discovery of real evidence of an incriminating character."

Despite the importance of the privilege at common law, it can be abrogated by statute and the right is not protected by the Constitution.[496] For the abrogation to have the appropriate effect, it must clearly represent the unmistakable intention of Parliament, either by express words, or necessary implication.[497] Once the privilege has been abrogated, all immunity is removed.[498] That said, the court should not impute to the legislature an intention to infringe upon a civil right unless the words of the legislature are expressed with irresistible clarity or necessary intendment.[499] As stated by Brennan J in *Re Bolton; Ex parte Beane*:[500]

> "[m]any of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much a part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force."

426. Warren CJ observed that the privilege "extends to both direct and derivative use",[501] citing the judgment of Deane J in *Reid v Howard*[502] that:

> [t]he protection which the privilege against self-incrimination confers extends not only to the risk of incrimination by direct evidence (ie evidence of the fact of disclosure and of the material disclosed) but also to incrimination by indirect

[493] *C v Chief Commissioner of Police* (2008) 20 VR 174 at 180, [9] per Smith J ("*C v Chief Commissioner* ").
[494] (1983) 152 CLR 281 at 310.
[495] At 310.
[496] At 298 per Gibbs CJ, 309 per Mason, Wilson and Dawson JJ; *Hammond* at 200 per Murphy J.
[497] See *Plaintiff S157/2000 v Commonwealth* (2004) 211 CLR 476 at 492, [30] per Gleeson CJ.
[498] *Hamilton* (1989) 166 CLR 486 at 496.
[499] *Coco v R* (1994) 179 CLR 427 at 437.
[500] (1987) 162 CLR 514 at 520-1.
[501] (2009) 24 VR 415, 426-7 [46].
[502] (1995) 184 CLR 1, 6.

> or "derivative" evidence (ie "evidence obtained by using" the disclosed material "as a basis of investigation")."

Limitation of Human Rights

427. It is clear that the rights as protected by ss 24(1), 25(2)(b) and 25(2)(k) of the Charter can be limited lawfully, provided such limitations are demonstrably justified pursuant to s 7(2) of the Charter.[503]

428. When one considers the actions, and indeed failures to act, of members of Victoria Police in relation to the conduct of Ms Gobbo with regard to the criminal proceedings of accused persons, it is at least arguable that members breached their duties and obligations as public authorities under the Charter by acting incompatibly with the human rights of accused persons:

    428.1. to a fair hearing, by knowingly permitting accused persons to be represented by a current and/or former police informer, and thereby preventing an accused person from having independent legal representation

    428.2. to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her, by failing to disclose material relevant to the defence, by failing to protect the confidentiality of those communications, and by restricting, influencing, pressuring or interfering with the accused's legal representation

    428.3. to the privilege against self-incrimination, by using information sourced from Ms Gobbo to further investigate an accused person (and obtain material either directly or derivatively), in circumstances where such information was conveyed in confidence by an accused person to his or her legal representative.

429. As noted above at [402]-[403], once a human right is identified as limited by the action (or indeed inaction) of a public authority, the onus of "demonstrably justifying" the limitation in accordance with s 7 resides with the party seeking to uphold the limitation, and in light of what must be justified, the standard of proof is high.[504]

430. It is certainly arguable that such limitations to the fundamental human rights of accused persons cannot be justified under s 7(2) of the Charter, given the need for any such limitations to be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and having regard to the factors in s 7(2).

Relief or Remedy

431. Section 39(1) of the Charter provides:

> If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that

[503] *AB v CD and EF* [2017] VSCA 338, [163]-[176] (Ferguson CJ, Osborn and McLeish JJA); *AB and EF v CD* [2017] VSC 350, [72]-[80] (Ginnane J).
[504] *DAS* (2009) 24 VR 415, 448 [147] (Warren CJ). Approved by the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, 475 [144]; *Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 498 [175] (John Dixon J).

> the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

432. As explained by Maxwell P in *Director of Housing v Sudi*,[505] s 39(1) of the Charter:[506]

> …has an operation which is both conditional and supplementary.[507] The condition to be satisfied is that a person be able to seek, independently of the Charter, "any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful". If — but only if — that condition is satisfied, then s 39(1) enables that person to seek "that relief or remedy" on a supplementary ground of unlawfulness, that is, unlawfulness arising because of the Charter

433. The boundaries of s 39(1) of the Charter are unclear.[508] However, it appears that there are three principal ways in which an accused person whose human rights may have been breached by the conduct of a Victoria Police officer as a public authority could seek relief or a remedy on a ground that the act or decision was unlawful, and thus also seek that relief or remedy on a ground of unlawfulness arising because of the Charter:

433.1. to seek a temporary or permanent stay of the criminal proceeding;

433.2. to seek exclusion of evidence pursuant to s 138(1) of the Evidence Act and/or the common law discretion;[509] or

433.3. to seek exclusion of evidence as a breach of a confidential communication pursuant to s 118 of the Evidence Act and/or the common law discretion.

A Temporary or Permanent Stay

434. In *Slaveski v Smith*,[510] the Court of Appeal (Warren CJ, Nettle and Redlich JJA) observed:[511]

> …a trial judge would not be powerless to prevent an infringement of the Charter right to a fair trial which results from a lack of legal representation.[512] As with a breach of the common law right to a fair trial which results from a lack of legal representation, the judge would have power to grant an adjournment or order a stay of proceedings.[513] But a stay is an extraordinary remedy. A proceeding should only be stayed on that basis if the judge is truly satisfied that, without legal representation, the accused will not receive a fair hearing.[514]

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[505] (2011) 33 VR 559.
[506] At 580 [96].
[507] See *PJB v Melbourne Health* (2011) 39 VR 373, 438-9 [296]-[297] (Bell J).
[508] Jeremy Gans, "The Charter's irremediable remedies provision", *Melbourne University Law Review*, Vol 33, No 1, 2009, 105-131; *Director of Housing v Sudi* (2011) 33 VR 559, 604-5 [267]-[269] (Weinberg JA).
[509] *Haddara v The Queen* (2014) 43 VR 53, 57-60 [12]-[16] (Redlich and Weinberg JJA).
[510] (2012) 34 VR 206.
[511] At 221 [54].
[512] We note that in *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237 the Court of Appeal held that "ss 24 and 25 [of the Charter] apply directly to courts and tribunals, when they exercise their functions": at 247, [52]; see also *De Simone v Bevnol Constructions & Developments Pty Ltd* (2010) 30 VR 200.
[513] Footnote not used.
[514] Footnote not used.

435. It is at least arguable that the conduct of members of Victoria Police in dealing with Ms Gobbo in many cases:

435.1. caused a significant forensic disadvantage to an accused person; and/or

435.2. brought the administration of justice into disrepute.

436. As noted above at [159], in *Strickland*[515] Kiefel CJ, Bell and Nettle JJ held with regard to permanent stays:[516]

> Certainly, as this Court has stated repeatedly[517], a permanent stay of a criminal prosecution is an extraordinary step which will very rarely be justified. There is a powerful social imperative for those who are charged with criminal offences to be brought to trial and, for that reason, it has been said that a permanent stay of prosecution should only ever be granted where there is such a fundamental defect in the process leading to trial that nothing by way of reconstitution of the prosecutorial team or trial directions or other such arrangements can sufficiently relieve against the consequences of the defect as to afford those charged with a fair trial. But, as this Court has also stated,[518] there is, too, a fundamental social concern to ensure that the *end* of a criminal prosecution does not justify the adoption of any and every *means* for securing a conviction and, therefore, a recognition that in rare and exceptional cases where a defect in process is so profound as to offend the integrity and functions of the court as such, it is necessary that proceedings be stayed in order to prevent the administration of justice falling into disrepute.

437. Kiefel CJ, Bell and Nettle JJ observed:[519]

> As the majority of this Court stated in *Moti v The Queen*,[520] decided cases should not be read as attempting to chart the boundaries of abuse of process. Nor should they be read as attempting to define exhaustively the circumstances that warrant exercise of the power to stay criminal proceedings or as providing some "exhaustive dictionary of words" by one or more of which executive action must be capable of description.

438. Kiefel CJ, Bell and Nettle JJ cited with approval[521] the observations of Kirby J in *Truong v The Queen*:[522]

> …relief is not confined to cases of deliberate and knowing misconduct, although that may be sufficient to enliven the jurisdiction. It extends to serious

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[515] (2018) 93 ALJR 1.
[516] At 25 [106].
[517] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34 per Mason CJ, 75 per Gaudron J; *R v Glennon* (1992) 173 CLR 592 at 605 per Mason CJ and Toohey J; *Truong v The Queen* (2004) 223 CLR 122 at 172 [136] per Kirby J; *Dupas v The Queen* (2010) 241 CLR 237 at 251 [37]; *Moti v The Queen* (2011) 245 CLR 456 at 478 [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. See also *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 556-557 per Kirby P, 564-565 per McHugh JA.
[518] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34; 63 ALJR 640 per Mason CJ; at 75 per Gaudron J; *R v Glennon* (1992) 173 CLR 592 at 605; 66 ALJR 344 per Mason CJ and Toohey J; *Truong v The Queen* (2004) 223 CLR 122 at [136]; 78 ALJR 473 per Kirby J; *Dupas v The Queen* (2010) 241 CLR 237 at [37]; 84 ALJR 488; *Moti v The Queen* (2011) 245 CLR 456 at [57]; 86 ALJR 117 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. See also *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 556-557 per Kirby P; at 564-565 per McHugh JA.
[519] (2018) 93 ALJR 1, 23 [99].
[520] *Moti v The Queen* (2011) 245 CLR 456 at [60]; 86 ALJR 117 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[521] (2018) 93 ALJR 1, 23 [99].
[522] (2004) 223 CLR 122, 171-2 [135].

> cases where, whatever the initial motivation or purpose of the offending party, and whether deliberate, reckless or seriously negligent, the result is one which the courts, exercising the judicial power, cannot tolerate or be part of.

439. Their Honours then observed:[523]

> The power to stay proceedings is not available to cure venial irregularities.[524] But if, as here, the duty or obligation is of a kind that goes to the very root of the administration of justice,[525] condonation of its breach will bring the administration of justice into disrepute regardless of the culprit's mentality.

440. Notably, the conduct of the then Australian Crime Commission and police in *Strickland* involved an encroachment of the accused's common law right to silence,[526] which:[527]

> … includes the substantive right of any person to refuse to answer any question except under legal compulsion and the privilege of any person to refuse to answer any question,[528] and which, subject to statute, applies at all stages of the process to all persons suspected of an offence whether charged or not yet charged as well as at trial.[529]

441. As observed above at [157], in *Moti v The Queen*[530] the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) held:[531]

> …two fundamental policy considerations affect abuse of process in criminal proceedings. First, "the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike".[532] Secondly, "unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice".[533] Public confidence in this context refers to the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes. The concept of abuse of process extends to a use of the courts' processes in a way that is inconsistent with those fundamental requirements.

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[523] (2018) 93 ALJR 1, 23 [100].
[524] See *R v Horseferry Road Magistrates Court; Ex parte Bennett* [1994] 1 AC 42 at 77 per Lord Lowry; *Truong v The Queen* (2004) 223 CLR 122 at [136]; 78 ALJR 473 per Kirby J.
[525] See and compare *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34; 63 ALJR 640 per Mason CJ; at 75 per Gaudron J; *Williams v Spautz* (1992) 174 CLR 509 at 518-520; 66 ALJR 585 per Mason CJ, Dawson, Toohey and McHugh JJ; *Lee v The Queen* (2014) 253 CLR 455 at [50]; 88 ALJR 656.
[526] *Strickland* (2018) 93 ALJR 1, 20 [88], 24 [101] (Kiefel CJ, Bell and Nettle JJ).
[527] At 22 [95] (Kiefel CJ, Bell and Nettle JJ).
[528] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [318]; 87 ALJR 1082 per Gageler and Keane JJ.
[529] See *Hammond v Commonwealth* (1982) 152 CLR 188 at 198-199; 56 ALJR 767 per Gibbs CJ (Mason J, Murphy J and Brennan J agreeing at 199-201, 202-203); at 206-207 per Deane J; Sorby v Commonwealth (1983) 152 CLR 281 at 294-295; 57 ALJR 248 per Gibbs CJ; *Petty v The Queen* (1991) 173 CLR 95 at 99-101; 65 ALJR 625 per Mason CJ, Deane, Toohey and McHugh JJ; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [39]-[47]; 87 ALJR 858 per French CJ and Crennan J (in dissent but not in point of principle); at [102]-[105] per Hayne and Bell JJ (Kiefel J agreeing at [157]); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [1]; 87 ALJR 1082 per French CJ; at [125] per Crennan J; at [182] per Kiefel J (Bell J agreeing at [255], [266]); cf at [318] per Gageler and Keane JJ.
[530] (2011) 245 CLR 456.
[531] At 478 [57].
[532] *Williams v Spautz* (1992) 174 CLR 509 at 520; 61 A Crim R 431 at 437.
[533] *Williams v Spautz* (1992) 174 CLR 509 at 520; 61 A Crim R 431 at 437.

442. Given the conduct of Ms Gobbo and members of Victoria Police, it is arguable that accused persons were not only permitted, with knowledge of Victoria Police officers, to continue to be represented by a member of counsel who was a human source, they were also denied the opportunity to obtain independent legal representation. It is strongly arguable that such conduct goes to the very root of the administration of justice. As a result of this conduct, accused persons have been convicted without the opportunity to seek a temporary stay to obtain independent legal representation, or a permanent stay because they had suffered an incurable forensic disadvantage and/or the administration of justice had been brought into disrepute.

Exclusion of Evidence

443. Accused persons may also have been denied the opportunity to make submissions for the exclusion of evidence obtained by Victoria Police officers that was derived directly or indirectly from the actions of Ms Gobbo, which may have breached the accused's right to a fair hearing, the right to have confidential communications with his or her legal representatives, and/or the right to the privilege against self-incrimination as protected by the Charter.

444. As explained above at [207], unlawfulness is relevant to the potential exclusion of evidence under s 138(1) of the *Evidence Act*. If impropriety or illegality is demonstrated, the evidence that was obtained "…is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained".[534]

445. With regard to the matters that the Court must take into account when considering the balancing exercise,[535] s 138(3)(f) of the *Evidence Act* expressly refers to "whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights". Notably, as referred to above, the relevant human rights as protected by Charter are modelled on the human rights as protected by the ICCPR.

446. As held by Bell J in *DPP v Kaba*:[536]

> Under s 38(1) of the Charter, it is "unlawful" for a public authority to act in a way that is incompatible with human rights or to fail to give proper consideration to human rights in making a decision. Section 39(1) contemplates relief or remedy being given in respect of such unlawfulness in the specified circumstances. As police are public authorities under the Charter,[537] it is a source of the standards expected of law enforcement officers in Victorian society. This is relevant to determining whether police actions are improper under s 138(1) of the *Evidence Act*. Further, acting or making decisions in contravention of an obligation imposed by s 38(1) of the Charter represents a contravention for the purposes of s 138(1) of the *Evidence Act*. In a case like the present, this too will likely be contrary to or inconsistent with

[534] Formerly known as the *Bunning v Cross* (1978) 141 CLR 54 discretion. See *Kadir v The Queen; Grech v The Queen* (2020) 94 ALJR 168, 173 [13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[535] See above at [214]-[222].
[536] (2014) 44 VR 526, 617 [334].
[537] Section 4(1)(d).

the individual's rights under the ICCPR, which will be a relevant discretionary consideration under s 138(3)(f).[538]

Confidential Communications

447. Section 118 of the *Evidence Act* provides:

> **Legal advice**
>
> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—
>
> (a) A confidential communication made between the client a lawyer; or
>
> (b) a confidential communication made between 2 or more lawyers acting for the client; or
>
> (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person—
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

448. Accordingly, it is unlawful to adduce evidence in contravention of s 118 of the *Evidence Act.* However, as observed by Ginnane J in *AB & EF v CD*,[539] and in light of s 125 of the *Evidence Act*, privilege never arises if the communication is used in furtherance of the commission of an iniquity.

449. However, where Ms Gobbo and/or members of Victoria Police failed to disclose that they used confidential communications to then obtain evidence that was adduced at trial, it is at least arguable that in some circumstances this denied accused persons the opportunity to contend that the admission of such evidence was unlawful pursuant to s 118 of the Act and the obligations on members of Victoria Police under the Charter.

450. The submissions now turn to consider the relevance of the above duties and obligations of members of Victoria Police to the facts before the Commission.

The Relevance of the Duties and Obligations of Victoria Police Officers to the Facts before the Commission

451. In light of the evidence before the Commission, it is submitted that the relevant conduct of members of Victoria Police with regard to Ms Gobbo includes:

451.1. knowingly encouraging Ms Gobbo to act as counsel for an accused person, or condoning the same, with knowledge that she was a human source and therefore not providing independent legal representation

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[538] Further, there remains a residual common law discretion to exclude admissible evidence. In *Haddara v The Queen* (2014) 43 VR 53, Redlich and Weinberg JJA held at 59-60 [16]:
…we consider it to be clear that there is a general discretion which inheres in a trial judge to exclude admissible evidence in order that the accused receive a fair trial. That general discretion is an indispensible tool if a trial judge is to have the capacity in all circumstances to discharge their overriding duty of ensuring that the accused receives a fair trial. An examination of authority strongly supports this conclusion. Many of the authorities are the subject of careful consideration in the comprehensive reasons of Fitzgerald P in *R v O'Neill* [1996] 2 Qd R 326.

[539] [2017] VSC 350, [106].

451.2. knowingly encouraging Ms Gobbo to act as counsel for an accused person, or condoning the same, whilst she covertly informed against them, or in circumstances where she had previously covertly informed against them

451.3. knowingly encouraging Ms Gobbo to act as counsel for an accused person, or condoning the same, when she had provided information which assisted police to obtain incriminating evidence against them

451.4. failing to disclose to an accused person, either directly or via the DPP or the VGSO, the existence of information or evidence which might have enabled an accused person to challenge the admissibility of evidence on the basis that it may have been improperly or illegally obtained

451.5. failing to take appropriate steps to ensure that any claim in relation to public interest immunity (or matters of state) concerning such evidence was determined by a court in accordance with law.

452. As is clear from the above analysis at [362]-[385], members of Victoria Police form part of the Crown with regard to the duty of disclosure. It is submitted that, in many cases, the fact of Ms Gobbo being a human source and her specific conduct were relevant matters that should have been disclosed by members of Victoria Police to the accused person and/or his or her legal representatives if the prosecution was to continue.[540]

453. If members of Victoria Police wished to suppress the identity of Ms Gobbo as a human source and her conduct, then that was a matter that called to be brought before the Court (potentially either by the DPP or the VGSO) for determination according to the principles of public interest immunity, and where applicable "matters of state" under s 130 of the *Evidence Act.* As part of any such determination, that would include the potential, pursuant to s 130(5)(f) of that Act, for the prosecution to be stayed.

454. Notably, over the relevant period there is no evidence that, in relation to any of the relevant cases,[541] members of Victoria Police ever took steps to have Ms Gobbo's status as a human source, or to have potential issues of public interest immunity or matters of state considered by the DPP or the VGSO and then possibly a court (prior to the institution of the *AB v CD* proceedings).

455. It is submitted that such conduct, which includes the failure to take steps to protect the rights of accused persons to a fair trial, was inconsistent with 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.[542]

456. There was an obligation upon all members of Victoria Police, in particular those with management and oversight responsibilities, who had knowledge of the recruitment, handling and management of Ms Gobbo as a human source, to take all steps necessary to ensure that:[543]

456.1. the same was lawful and not improper, and did not interfere with the right to a fair trial of any person charged with a criminal offence;

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[540] *AB v CD* (2018) 93 ALJR 59, 62 [9] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[541] See above at [21].
[542] *Victoria Police Act 2013* (Vic), Sch 2, and formerly *Police Regulation Act 1958* (Vic), Second Schedule.
[543] See above at [381]-[385].

456.2. in the event that the same had the potential to interfere with the right to a fair trial of any person, appropriate disclosure was made; or alternatively

456.3. if such disclosure was not to be made, to have matters of public interest immunity or matters of state considered by the DPP or the VGSO and then possibly a court.

457. Further, the duty of disclosure is ongoing, and the involvement of Ms Gobbo as a human source should have been disclosed to accused persons even after their conviction upon trial or guilty plea.[544]

Classification of Relevant Conduct

458. As with regard to the categorisation of Ms Gobbo's conduct above at [245]-[249], it is also possible to categorise the relevant conduct of Victoria Police officers in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source.

459. As with Ms Gobbo, the conduct of members of Victoria Police could have a compounding effect on a case. For example, they could knowingly encourage Ms Gobbo, as a legal practitioner, to be a human source. They could then obtain potentially privileged or confidential information from Ms Gobbo sourced from an accused person. That information could then be used to obtain evidence against the accused person, without those matters ever being disclosed.

460. For the purposes of submissions concerning the extent to which a case may have been affected by the conduct of members of Victoria Police under the second term of reference, this may also be distilled into the same two broad categories as with the first term of reference, namely:

460.1. conflict of interest (Category 3)

460.2. tainted evidence (Category 4).

461. The categories may apply to individual members of Victoria Police or to Victoria Police as a body.[545]

462. Category 3 applies where Ms Gobbo acted for an accused person. It primarily concerns a failure by a member of Victoria Police, or Victoria Police as an body, to take steps to disclose to an accused person and/or his or her legal representatives that Ms Gobbo was a human source, or to have issues of potential public interest immunity or matters of state considered by the DPP or the VGSO.

463. Category 4 may apply regardless of whether Ms Gobbo acted for the accused person and relates to the tainting of evidence.

464. Categories 3 and 4 have sub-categories to reflect the potentially compounding effects referred to above at [459].

465. For ease of refence, the above may be represented in the following table:

[544] See above at [351] and [374].
[545] *Victoria Police Act 2013* (Vic), ss 6-7.

Category 3 Conflict of interest	Category 4 Tainted evidence
3A. The non-disclosure of Ms Gobbo's status as a human source, and a failure to take any steps to have potential issues of public interest immunity or matters of state considered by the DPP or the VGSO and then possibly a court.	**4A.** Evidence relied upon by the prosecution may have been obtained in consequence of an impropriety or illegality in connection with the use of Ms Gobbo as a human source by Victoria Police.
3B. Category 3A + Ms Gobbo provided information in relation to the accused, and/or otherwise assisted (or attempted to assist) in the prosecution of the accused, before and/or during the period she acted for the accused, and there was non-disclosure of same, and a failure to take any steps to have potential issues of public interest immunity or matters of state considered by the DPP or the VGSO and then possibly a court.	**4B.** Category 4A + there was non-disclosure of same, and a failure to take any steps to have potential issues of public interest immunity or matters of state considered by the DPP or the VGSO and then possibly a court.

466. Conduct constituting the above Categories may well be considered involvement in what the High Court described as "reprehensible conduct in knowingly encouraging [Ms Gobbo] to do as she did and… in sanctioning atrocious breaches of 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".[546]

467. Further, such conduct may constitute a "breach of discipline" contrary to s 125 of that Act,[547] as conduct that was likely to bring Victoria Police into disrepute or diminish public confidence in it, disgraceful or improper conduct, or negligent or careless conduct. Further or in the alternative, it may be considered misconduct under s 166 of the *Victoria Police Act*,[548] as conduct which was likely to bring

[546] *AB v CD* (2018) 93 ALJR 59, 62 [10].
[547] Or s 69 of the former *Police Regulation Act*.
[548] Or serious misconduct under s 86A of the former *Police Regulation Act*.

Victoria Police into disrepute or diminish public confidence in it, or disgraceful or improper conduct.

468. Where the Charter applies to the conduct of public authorities (from 1 January 2008),[549] such conduct may constitute a breach of the obligations of members of Victoria Police pursuant to s 38(1) to act compatibly with the right to a fair hearing as protected by s 24(1) of the Charter, and the "minimum guarantees" as protected by ss 25(2)(b) and ss 25(2)(k) of the Charter, as considered above at [395]-[449].

469. In some cases such conduct may be criminal conduct (considered below at [474]-[509]).

470. As with the first term of reference considered above at [254], it should be noted that the Categories may apply even in circumstances where Ms Gobbo appeared at preliminary stages of proceedings (such as in mention hearings, bail applications and committals), and did not appear at trial. In some cases she was led at trial. In other cases she provided advice in relation to, but did not appear in, criminal proceedings. In some cases the information Ms Gobbo passed on to Victoria Police was relatively innocuous and/or based on the evidence reviewed by Counsel Assisting there is no suggestion that the information materially advanced the prosecution of her client. Cases will inevitably turn on their facts as to whether there was a sufficient connection between the conduct of Ms Gobbo and Victoria Police members and the conviction upon trial of the accused, or the accused's plea of guilty, to potentially result in a substantial miscarriage of justice.

471. These submissions now turn to consider types of misconduct of particular relevance to the second term of reference.

[549] As noted above at [397], the Charter does affect any proceedings commenced or concluded before 1 January 2007, and does apply to any act or decision made by a public authority before 1 January 2008.

TYPES OF MISCONDUCT OF PARTICULAR RELEVANCE TO THE SECOND TERM OF REFERENCE

472. The following principles are used to guide the identification of instances where members of Victoria Police may have engaged in [redacted] conduct or other misconduct. Broadly, they fall within the following two categories:

472.1. [redacted] conduct

472.2. regulatory misconduct.

473. As above at [256] with regard to the first term of reference, it is to be noted that due to the nature of this inquiry and the role of the Commission, in contrast to that of a court, the following represent only a selection of the types of misconduct that might be relevant to the subject matter of this inquiry, and are only detailed at a relatively high level. It is conceivable that there are additional types of misconduct which have not been addressed. Nevertheless, it submitted that the below provides an outline against which the Commissioner may apply the standard of proof (see above at [41]-[51]) when arriving at her findings.

Criminal Conduct

474. On the facts before the Commission, there are three principal categories of criminal offences that may have been committed by members of Victoria Police:

474.1. misconduct in public office

474.2. perverting the course of justice, attempting to pervert the course of justice, or conspiring to pervert the course of justice, or conspiring to attempt to pervert the course of justice

474.3. aiding, abetting, counselling or precuring Ms Gobbo, or conspiring with Ms Gobbo, to obtain property by deception, or to obtain a financial advantage by deception.

475. These offences will be considered in turn.

Misconduct in Public Office

476. The common law offence of misconduct in public office has a maximum penalty of level 5 imprisonment (10 years maximum).[550]

477. In *DPP v Marks*,[551] Nettle JA (as his Honour then was) held:[552]

> Unlike the narrower offences of bribery and extortion, the offence of misconduct in public office is not primarily concerned with abuse of position for pecuniary gain, but rather, as a common law offence, it gives expression to principles attributed to Lord Mansfield: that a man accepting an office of trust concerning the public is answerable criminally to the Crown for misbehaviour in the office; and that, whereas breach of trust, fraud and imposition in a

[550] Section 320 of the *Crimes Act 1958* (Vic).
[551] [2005] VSCA 277.
[552] At [35].

> matter concerning the public is as between individuals only actionable, between the Crown and the subject it is indictable. The object is to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office; does not abuse intentionally the trust reposed in him.

478. In *R v Quach*[553] ("*Quach*"), Redlich JA (with whom Ashley JA and Hansen AJA agreed) held that the elements of the offence are that:[554]

478.1. a public official

478.2. in the course of or connected to his public office

478.3. wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty

478.4. without reasonable excuse or justification

478.5. where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

479. Redlich JA cited with approval[555] the statement of P D Finn in "Public Officers: Some Personal Liabilities"[556] that "the kernel of the offence is that an officer, having been entrusted with powers and duties for the public benefit, has in some way abused them, or has abused his official position".

480. *Quach* was followed by the New South Wales Court of Criminal Appeal in *Obeid v The Queen*[557] and *Maitland v The Queen; Macdonald v The Queen*.[558]

481. The above elements will be considered in turn.

A Public Official

482. It has been accepted that a police officer is a public official.[559] The term "public office" is construed broadly[560] to include those on whom powers and duties are entrusted for the public benefit,[561] placing them in a position analogous to a private law trustee and fiduciary.[562] Consistently with the Australian position, the Hong Kong Court of Final Appeal in *HKSAR v Wong Lin-Kay*[563] expressly extended the concept of "public officer" to government employees. Millett NPJ stated that:[564]

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[553] (2010) 27 VR 310.
[554] At 323 [46].
[555] At 320-1 [37].
[556] (1977) 51 *ALJ* 313, 315.
[557] (2015) 91 NSWLR 226, 252-3 [133] (Bathurst CJ, Beazley P, and Leeming JA).
[558] (2019) 99 NSWLR 376, 391 [67] (Bathurst CJ, Beazley P, Ward CJ in Eq, Hamill and N Adams JJ).
[559] *Quach* (2010) 27 VR 310, 312 [5], citing *R v Dytham* [1979] QB 722. See also Cindy Davids and Marilyn McMahon, "Police Misconduct as a Breach of Public Trust: The Offence of Misconduct in Public Office", *Deakin Law Review*, Vol 19(1), 2014, 99.
[560] See, e.g., *Obeid v Lockley* (2018) 98 NSWLR 258, 283-4 [99] (Bathurst CJ, with whom Beasley P and Leeming JA agreed) and the authorities cited therein.
[561] See P D Finn, "Public Officers: Some Personal Liabilities: (1977) 51 ALJ 313, 315, cited in *Quach* (2010) 27 VR 310, 320-1 [37] (Redlich JA).
[562] *Maitland v R; Macdonald v R* (2019) 99 NSWLR 376, [80] 393 (Bathurst CJ, Beazley P, Ward CJ in Eq, Hamill J, N Adams J])
[563] [2012] HKCFA 33.
[564] At [44].

> The offence can be committed only by a public official. It cannot be committed by an ordinary member of the general public. But it does not discriminate against government employees. The reason it does not do so is that the core concept is abuse of official power. It can therefore be committed only by persons who are invested with powers, duties, responsibilities or discretions which they are obliged to exercise or discharge for the benefit of the general public. Such persons may or may not be employed by the government; they may or may not be paid. They may be high officers of state or lowly employees; the offence may be committed as well by a police or customs officer as by a government minister. The common element is that the accused must have abused some power, duty or responsibility entrusted to or invested in him or her and exercisable in the public interest.

483. While, as with the tort of misfeasance in a public office, "lowly employees" with minimal responsibilities might not reasonably be considered "public officers",[565] it is submitted that all members of police who are the subjects of these submissions would fall within the definition of "public officer", holding relevant powers and offices of trust by virtue of their appointment. Indeed, many of the cases involving this offence concern members of police. The circumstances in which misconduct in public office have been found in respect of police members include the unauthorised disclosure of confidential information,[566] and the exploitation of vulnerable persons.[567]

In the Course of or Connected to their Public Office

484. In *Quach*, Redlich JA observed "[t]he official's conduct will be linked to their office when in doing the impugned act, the official did something he or she was duty bound to refrain from doing, according to the responsibilities of the office".[568]

485. Redlich JA held:[569]

> … the relevant misconduct need not occur while the officer is in the course of performing a duty or function of the office. Certain responsibilities of the office will attach to the officer whether or not the officer is acting in the course of that office. Where the misconduct does not occur during the performance of a function or duty of the office, the offence may be made out where the misconduct is inconsistent with those responsibilities. It may be connected to a duty already performed or to one yet to be performed or it may relate to the responsibilities of the office in some other way. *The misconduct must be incompatible with the proper discharge of the responsibilities of the office so as to amount to a breach of the confidence which the public has placed in the office, thus giving it its public and criminal character*.[570] Accordingly, use of knowledge or information acquired by the office holder in the course of his or her duties for a private or other impermissible purpose may be inconsistent with the responsibilities of the office and calculated to injure the public interest. If the misuse of the information is of a serious nature and is likely to be viewed as breach of the trust reposed in the office so as to bring the office into disrepute, the conduct will fall within the ambit of the offence whether or

[565] See *Obeid v Lockley* (2018) NSWLR 258, 286 [113] (Bathurst CJ, with whom Beasley P and Leeming JA agreed) .
[566] See, e.g., *DPP v Marks* [2005] VSCA 277.
[567] See, e.g., *R v Quach* (2010) 27 VR 310.
[568] *Quach* (2010) 27 VR 310, 321 [38].
[569] At 321 [40].
[570] P D Finn, "Public Officers: Some Personal Liabilities" (1977) 51 *ALJ* 313 at 314.

> not it occurs in the course of public office. It will in such circumstance have the necessary connection to that office.
>
> I consider that the proper formulation of the offence requires the element to be expressed so that it encompasses the circumstance in which the offender's misconduct, though not occurring while the offender was discharging a function or duty, had a sufficient connection to their public office. Whether the misconduct was so connected will turn upon the facts of the case.
>
> (Emphasis added.)

486. There is little doubt that the current and former members of Victoria Police the subject of these submissions were acting in the course of, or connected to, that office when dealing with Ms Gobbo and when she was representing accused persons.

Wilful Misconduct

487. It should be noted that wilful misconduct may extend to both acts and omissions,[571] and would include the failure to perform a duty, such as a failure to perform the duty of disclosure and/or the failure to place material before the DPP or the VGSO so as to obtain advice concerning possible claims of public interest immunity or matters of state with regard to the identity of Ms Gobbo as a human source and her conduct.

488. In *R v Dytham*,[572] Shaw LJ, Widgery LCJ and McNeill J held:[573]

> [S]ome corrupt taint … [is] not a *necessary* incident of the offence. Misconduct in a public office is more vividly exhibited where dishonesty is revealed as part of the dereliction of duty. Indeed in some cases the conduct impugned cannot be shown to have been misconduct unless it was done with a corrupt or oblique motive.
>
> (Emphasis in original.)

489. The Court identified that the key test was whether "the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment".[574]

490. It is also clear than any improper purpose need not be the *sole* purpose. In *Maitland v The Queen; Macdonald v The Queen*[575] it was held:[576]

> Having regard to the rationale for the offence, it would be surprising if it was necessary for the improper purpose to be the sole purpose. If, for example, a Minister of the Crown embarked upon a transaction for the purpose of conferring a benefit on himself or his friends, it would not seem to matter that he also has a belief that the transaction would or might benefit some members of the public. In these circumstances, if the transaction in question would not have been undertaken but for the improper purpose, then subject to

[571] See Cindy Davids and Marilyn McMahon, "Police Misconduct as a Breach of Public Trust: The Offence of Misconduct in Public Office", *Deakin Law Review*, Vol 19(1), 2014, 102.
[572] (1979) 69 Cr App R 387.
[573] At 393.
[574] At 394.
[575] (2019) 99 NSWLR 376.
[576] At 392 [72] (Bathurst CJ, Beazley P, Ward CJ in Eq, Hamill and N Adams JJ).

> the other elements being made out, the offence, in our opinion, would have been committed.

491. Further, the Court of Criminal Appeal observed:[577]

> Having regard to these authorities, it seems to us that the direction as to the mental element of the offence should have been that [the accused] could only be found to have committed the crime (subject to the other elements being made out) if the power would not have been exercised, except for the illegitimate purpose...

492. However, it appears that the mental element of the offence can vary depending on the nature of the conduct falling within the ambit of the offence, for example whether the case involves an act (misfeasance, malfeasance or oppression) or an omission (nonfeasance).[578] In *R v W*,[579] the Court of Appeal of England and Wales held:

> The offence of misconduct in a public office may arise from acts or omissions by holders of that office, and depending on the acts and omissions alleged, the mental element of the offence will vary. … [T]he difficulty of attempting a definition of the offence is acknowledged but its principal applications are said to include: (a) frauds and deceits (fraud in office); (b) wilful neglect of duty (nonfeasance); (c) "malicious" exercises of official authority (misfeasance); (d) wilful excesses of official authority (malfeasance); and (e) the intentional infliction of bodily harm, imprisonment, or other injury upon a person (oppression). Accordingly the nature of the conduct falling within the ambit of the offence is very wide, and logically it would follow that any necessary element relating to the defendant's subjective state of mind cannot be identical for each and every one of its different manifestations

493. Cindy Davids and Marilyn McMahon, in “Police Misconduct as a Breach of Public Trust: The Offence of Misconduct in Public Office”,[580] state:

> The point here is that the relevant mental state may or may not be accompanied by dishonesty. If present, dishonesty may aggravate the offence…
>
> … in some cases, the case law suggests that it will be insufficient — in order to establish the offence of misconduct in public office — to simply demonstrate that the relevant conduct or omission occurred and that the defendant acted intentionally. Evidence may be required of dishonesty or deceit, or, at least, a subjective awareness or appreciation of the consequences that would likely flow from the act or omission.

494. It appears that, in some circumstances, the mental element can extend to reckless indifference. In *AG Reference No 3*,[581] the Court of Appeal of England and Wales held:[582]

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[577] At 394 [84] (Bathurst CJ, Beazley P, Ward CJ in Eq, Hamill and N Adams JJ).
[578] *R v W* [2010] EWCA Crim 372, [8]. See further David Lusty, “Revival of the common law offence of misconduct in public office” (2014) 38 Crim LJ 337, 348.
[579] [2010] EWCA Crim 372, [8].
[580] *Deakin Law Review*, Vol 19(1), 2014, 106.
[581] [2004] EWCA 868.
[582] At [30].

> There must be an awareness of the duty to act or a subjective recklessness as to the existence of the duty. The recklessness test will apply to the question whether, in particular circumstances, a duty arises at all as well as the conduct of the defendant if it does. The subjective test applies both to reckless indifference to the legality of the act or omission and in relation to the consequences of the act or omission.

495. Some members of Victoria Police may have acted with reckless indifference to the rights of accused persons in permitting them to be represented by Ms Gobbo, as an active informer. In some circumstances the failure to make such a disclosure, or at least to take alternative steps to have the matter considered by the DPP or the VGSO, may have been a wilful neglection or failure to perform a duty.

Without Reasonable Excuse or Justification

496. The offence has an element that the relevant act or omission alleged to constitute misconduct in public office was without reasonable excuse or justification.

497. While a reasonable excuse of justification might extend, for example, to a failure to make a direct disclosure about the identity of Ms Gobbo as an informer to an accused person and/or his or her legal representatives if it was thought such a disclosure could risk harm to Ms Gobbo, it would arguably not extend to a failure to take the appropriate steps to have such matters considered by the DPP or the VGSO concerning possible public interest immunity or matters of state claims. Nor would it arguably extend to permitting an accused person to continue to be represented by Ms Gobbo, and for the prosecution to continue, in circumstances where she was not independent.

498. In *AB & EF v CD*,[583] Justice Ginnane observed:[584]

> In *R v Robinson,* Pill LJ delivering the judgment of the Court of Appeal and after quoting the statement of Lord Bingham said:
>
> > Those rights [the right of access to a court, the right of access to legal advice, and the right to communicate confidentially with a legal advisor under the seal of legal professional privilege] are enjoyed equally by a person under investigation for or charged with a criminal offence. The right is severely curtailed if the solicitor, or solicitor's clerk from whom he seeks legal advice, is telling the police what passes between them. It is not only a serious breach of duty by the solicitor, or clerk, to the client but, on the face of it, and if encouraged by the police, an infringement by the police of those rights. The police would be inducing or encouraging breaches of the right to legal professional privilege.

499. Whether the relevant current and former members of Victoria Police had a reasonable excuse or justification depends on the particular conduct and the context in which it occurred. However, it is difficult to see how the failure to provide disclosure, or at least to take steps to have issues of public interest immunity or matters of state considered by the DPP or the VGSO could have a reasonable excuse or justification in circumstances where Ms Gobbo was continuing to act for accused persons and regularly informing upon them.

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[583] [2017] VSC 350.
[584] At [102].

Where Such Misconduct is Serious and Meriting Criminal Punishment

500. With regard to this element, in *Quach* Redlich JA explained:[585]

> Any charge must be tailored to the particular circumstances of the case. It will generally be desirable that the trial judge emphasise the notion that the conduct must be so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. As in the case of criminal negligence, and offences such as culpable driving and dangerous driving, it is recognised that it is necessary to distinguish the conduct sufficient to attract criminal sanction from less serious forms of conduct which may give rise to civil proceedings.[586] Accordingly it would also be desirable if the trial judge explained that in stating that the conduct must be sufficient to attract criminal punishment, a distinction is being drawn from less serious forms of conduct which may give rise to civil proceedings.

501. Ultimately the decision as to whether the conduct was sufficient to attract criminal punishment must be decided by the fact-finder, should criminal proceedings be instituted. However, by permitting an accused person to be represented by a known police informer, those engaged in such conduct may have fallen below acceptable standards as to amount to an abuse in the public's trust in the office holder. Conduct by police officers which may have or did adversely affect the administration of justice, including by interfering with the fair trial of an accused person, would be strongly arguable to be serious and meriting criminal punishment having regard to the responsibilities of their role in the proper investigation and prosecution of criminal conduct, the importance of the public objects which they serve, and the nature and extent of the departure from those objects.

Perverting (or Attempting to Pervert) the Course of Justice

502. These submissions adopt the above analysis under the first term of reference at [257]-[277], and for convenience repeats the concluding part of that analysis.

503. [redacted]

504. [redacted]

[585] (2010) 27 VR 310, 323 [47].
[586] *R v Boulanger* [2006] 2 SCR 49 at [54].

[redacted]

505. [redacted]

[redacted]

506. [redacted]

507. [redacted]

508. [redacted]

509. [redacted]

Regulatory Misconduct

Breach of Discipline and Misconduct

510. As noted above at [386]-[394], members of Victoria Police have a duty and obligation to not engage in a breach of discipline or misconduct.

511. As also submitted above at [394], the failure by Victoria Police officers to take steps to disclose that Ms Gobbo was a police informer to accused persons and/or their legal representatives, effectively preventing them from obtaining independent legal representation, or at least to take steps to have potential issues of public interest

immunity or matters of state considered by the DPP or the VGSO and then possibly a court, may constitute a breach of discipline and/or misconduct. As too may the obtaining of information from Ms Gobbo in consequence of a breach of legal professional privilege and/or a breach of confidence.

Police Officers with Knowledge of Potential Misconduct

512. As noted above at [347], members of Victoria Police have duty at common law to prevent and detect crime. If members of Victoria Police were aware of possible criminal conduct by other members and did not take steps to report or prevent such conduct, then they themselves may have engaged in breach of their common law duties and obligations. Further, this may constitute a breach of discipline or misconduct.

513. Section 167(3) of the *Victoria Police Act* provides:

> A police officer or protective services officer must make a complaint to a police officer or protective services officer of a more senior rank to that officer, or to the IBAC, about the conduct of another police officer or protective services officer if he or she has reason to believe that the other officer is guilty of misconduct.

514. During the period that Ms Gobbo was registered as a human source, s 86L(2A) of the *Police Regulation Act* provided:

> A member of the force must make a complaint to a member of the force of a more senior rank to that member, or to the Director, about the conduct of another member of the force if he or she has reason to believe that the other member is guilty of serious misconduct.

515. Notably, those provisions place an obligation on members of Victoria Police to report, not only criminal conduct, but misconduct (or what was defined as serious misconduct) more broadly.

516. As noted above at [387], Part 7 Division 1 of the *Victoria Police Act* concerns breaches of discipline, which are defined by s 125 to include the following:

> **Breaches of discipline**
>
> (1) A police officer or protective services officer commits a breach of discipline if he or she—
>
> (a) contravenes a provision of this Act or the regulations [which includes a breach of s 167(3)]; or …
>
> (h) engages in conduct that is likely to bring Victoria Police into disrepute or diminish public confidence in it; or …
>
> (j) is guilty of disgraceful or improper conduct (whether in his or her official capacity or otherwise); or
>
> (k) is negligent or careless in the discharge of his or her duty; or …
>
> (m) acts in a manner prejudicial to the good order or discipline of Victoria Police; or

(n) has been charged with an offence (whether under a Victorian law or under a law of another place) and the offence has been found proven.

(2) A police officer or protective services officer who aids, abets, counsels or procures, or who, by any act or omission, is directly or indirectly knowingly concerned in or a party to the commission of a breach of discipline, also commits a breach of discipline.

517. With regard to transitional provisions, it should be noted that Schedule 6 to the *Victoria Police Act* provides, inter alia, at Part 7 Cl 32:

32 Disciplinary action under this Act

(1) Subject to subclause (2), Division 1 of Part 7 of this Act applies on and after the commencement day whether the conduct giving rise to the breach of discipline occurred before, on or after that day.

(2) Division 1 of Part 7 of this Act does not apply in relation to conduct occurring before the commencement day that was or is the subject of an investigation under section 70 of the old Act held or commenced before that day.

518. Accordingly, if the relevant conduct of current or former members of Victoria Police occurred prior to the commencement of the *Victoria Police Act*, but was not investigated under the *Police Regulation Act*, it can be investigated and disciplined under Division 1 of Part 7 of the *Victoria Police Act*.

519. In those circumstances, members of Victoria Police who were aware of, and failed to report, the misconduct of other officers regarding their disclosures about and recruitment, handling and management of Ms Gobbo as a human source may have committed a breach of discipline.

520. These submissions now turn to the Narrative Submissions regarding the conduct of Ms Gobbo and members of Victoria Police

ANNEXURE A: METHODOLOGY OF ANALYSIS EMPLOYED IN CASE STUDIES UNDER THE FIRST AND SECOND TERMS OF REFERENCE

Introduction

1. The purpose of this annexure is to provide a detailed account of the methodology employed by Counsel Assisting in their analysis of cases under the first and second terms of reference. It should be read in light of other relevant aspects of the Legal Principles Submissions.

The Starting Point: Ascertaining Candidates for Review

2. The starting point for the study of cases undertaken by Counsel Assisting was to ascertain the persons who would be relevant candidates for review to determine whether their cases may have been affected by the conduct of Ms Gobbo as a human source. As at the finalisation of the submissions of Counsel Assisting, the list of candidates for review comprised 1,306 persons (Candidates for Review).

3. The 1,306 Candidates for Review came to the attention of the Commission from a range of sources, including:

    3.1. fee books of Ms Gobbo, containing details of fees rendered in the course of her practice as a barrister, produced by Ms Gobbo[1]

    3.2. financial records of Ms Gobbo's clerk, including statements of account and invoices, produced by Meldrum & Hyland List[2]

    3.3. records produced by the Magistrates' Court of Victoria, indicating Ms Gobbo's appearances in that court for the defence, in cases between 1 January 1995 and 31 December 2013[3]

[1] Exhibit RC1568 Ms Nicola Gobbo fee book 01, MIN.5000.7000.0001; Exhibit RC1568 Ms Nicola Gobbo fee book 02, MIN.5000.7000.0103.
[2] Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Statement of Account, GMH.0001.0001.0002; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 01, GMH.0001.0001.0003; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 02, GMH.0001.0001.0004; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 03, GMH.0001.0001.0005; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 04, GMH.0001.0001.0006; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 05, GMH.0001.0001.0007; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 06, GMH.0001.0001.0008; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 07, GMH.0001.0001.0009; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 08, GMH.0001.0001.0010; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 09, GMH.0001.0001.0011; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 10, GMH.0001.0001.0012; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 11, GMH.0001.0001.0013; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 12, GMH.0001.0001.0014; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 13, GMH.0001.0001.0015.
[3] Exhibit RC1841 Magistrates' Court of Victoria record of 'Persons represented by Ms Nicola Gobbo,' MCV.0001.0001.0001.

3.4. records produced by the Office of Public Prosecutions (PRISM records), indicating legal representation by Ms Gobbo for the defence, in cases prosecuted by the Director of Public Prosecutions between 1995 and 2009[4]

3.5. records produced by the Commonwealth Director of Public Prosecutions, indicating legal representation by Ms Gobbo for the defence, in cases prosecuted by the Commonwealth Director of Public Prosecutions between 1 January 1995 and 12 January 2009[5]

3.6. records produced by Victoria Legal Aid, indicating briefing of Ms Gobbo for the defence, in cases from 1 January 1995[6]

3.7. records contained within the Loricated Database, produced by Victoria Police, capturing communications between Ms Gobbo (in her capacity as a human source) and Victoria Police between 16 September 2005 and 14 January 2009[7]

3.8. statements made to the Commission by members of Victoria Police[8]

3.9. records produced by Corrections Victoria, indicating "professional" prison visitations by Ms Gobbo between 1 January 1995 to 13 March 2019[9]

3.10. submissions made to the Commission by members of the public

3.11. individuals identified as a result of investigations by Commission staff. These persons were either:

3.11.1. co-accused of someone previously identified in paragraphs [3.1] to [3.10]; or

3.11.2. targeted under the same police operation as someone previously identified in paragraphs [3.1] to [3.10].

4. Conceptually, the analysis of the 1,306 Candidates for Review may be represented in five stages, each of which is addressed below in turn. At stages two through to five, consideration was given as to whether the cases of relevant Candidates for Review may have been affected in ways described in the categories concerning the conduct of Ms Gobbo and Victoria Police in the Legal Principles Submissions at [249] and [465].

Stage 1 – Determining Candidates for Review with Convictions or Findings of Guilt

5. At the first stage (Stage 1), the object was to determine, as a first filter, which of the Candidates for Review did or did not have convictions or findings of guilt recorded against them in or following 1995[10] (being the year when Ms Gobbo was first

[4] Exhibit RC1898 Office of Public Prosecutions Victoria, PRISM database list of appearances by Ms Nicola Gobbo, OPP.0001.0004.0025; Exhibit RC1923 Office of Public Prosecutions Victoria list of Persons represented by Ms Nicola Gobbo from 2003 to 2009, OPP.0001.0001.0001; Exhibit RC1935 Office of Public Prosecutions Victoria list of Persons represented by Ms Nicola Gobbo from 1995 to 2002, OPP.0001.0004.0300.
[5] Exhibit RC1937 Commonwealth Director of Public Prosecutions record of Persons represented by Ms Nicola Gobbo, CDP.0032.0001.0004.

[6] Exhibit RC1936 Victoria Legal Aid record of briefing Ms Nicola Gobbo, VLA.0001.0001.0001.
[7] Exhibit RC0281 ICR3838, RCMPI.0050.0001.0001; Exhibit RC0281 ICR2958, RCMPI.0051.0001.0001.
[8] For example, Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, 23 [3.108], [3.109], 24 [3.109] VPL.0014.0005.0001 @.0023 and @.0024.
[9] Exhibit RC1359 Prisoners visited by Ms Nicola Gobbo archive report, CNS.0001.0003.0037.
[10] Whilst 1995 was taken as a first filter point in the early stages of the inquiry, it should be understood that Ms Gobbo did not commence Articles of Clerkship until 26 February 1996, and was admitted to practice as a

registered as a human source). In light of the construction of "case", being limited to criminal proceedings which resulted in a conviction or finding of guilt (as addressed in the Legal Principles Submissions), any of the 1,306 Candidates for Review without any record of such a disposition could be excluded from further review.

6. In order to conduct Stage 1, the Commission requested LEAP criminal history reports from Victoria Police in respect of each of the 1,306 Candidates for Review. As at the date of these submissions, the Commission received LEAP criminal history reports in relation to 1,275 of the of the 1,306 Candidates for Review. LEAP criminal history records were unavailable in respect of 31 of the 1,306 Candidates for Review due to a paucity of information and particulars.

7. Each of the LEAP criminal history reports of the 1,275 Candidates for Review were examined to determine whether they recorded a conviction or finding of guilt in or following 1995. In the result, it was determined that 1,155 of those 1,275 Candidates for Review did have at least one criminal conviction or finding of guilt recorded against them in or since 1995 in either indictable cases or summary cases.[11]

8. In relation to the 31 Candidates for Review in respect of whom LEAP criminal history records were unavailable, other inquiries revealed that one of those persons, namely Mr Danny Moussa, did have at least one conviction or finding of guilt in or since 1995. [12] As for the remaining 30 persons, there was no information reviewed which established a sufficient basis to conclude that they were convicted or found guilty in any specific matter in or since 1995. Based on the foregoing, the relevant pool of persons (combining the 1,155 referred to above, as well as Mr Moussa) with a criminal conviction or finding of guilt in or since 1995 for analysis at each of the remaining four stages numbered 1,156 (the Convicted Persons).

Stage 2: Analysis of Ms Gobbo's Role as a Lawyer for the Candidates for Review

9. At the second stage of review (Stage 2), the object was to determine how many of the 1,156 Convicted Persons received advice or legal representation from Ms Gobbo during her time as a legal practitioner. As noted in the Legal Principles Submissions at [19], Counsel Assisting have taken a broad approach to the interpretation of the provision of legal services by Ms Gobbo, so as to capture circumstances where Ms Gobbo advised or conferred with clients, represented them in proceedings, or engaged in any other form of legal service in connection with their proceedings.

10. To determine how many of the 1,156 Convicted Persons may have received legal services from Ms Gobbo, research was undertaken in respect of each of the Convicted Persons by reference to various relevant sources, including:

barrister and solicitor in Victoria on 7 April 1997 (See Chapter 1 of Volume 2). Further, it is not suggested by Counsel Assisting that any case may have been affected by the conduct of Ms Gobbo as a human source prior to 14 May 1998.

[11] See Legal Principles Submissions at [21].

[12] Un-tendered Commonwealth Director of Public Prosecutions, 'Moussa Plea Summary', *The Queen v Moussa* (citation unknown), undated, RCMPI.0033.0002.0094; Un-tendered Commonwealth Director Public Prosecutions, *Thirty-two of Australia's drug gang criminals successfully prosecuted,* (Media Release, 26 February 2010) <https://www.cdpp.gov.au/news/thirty-two-australia's-drug-gang-criminals-successfully-prosecuted>.

10.1. fee books of Ms Gobbo, containing details of fees rendered in the course of her practice as a barrister, produced by Ms Gobbo[13]

10.2. financial records of Ms Gobbo's clerk, including statements of account and invoices, produced by Meldrum & Hyland List[14]

10.3. records produced by the Magistrates' Court of Victoria, indicating Ms Gobbo's appearances for the defence, in cases in that court between 1 January 1995 to 31 December 2013 by Ms Gobbo[15]

10.4. records produced by the Office of Public Prosecutions (PRISM records), indicating legal representation by Ms Gobbo for the defence, in cases prosecuted by the Director of Public Prosecutions[16]

10.5. records produced by Victoria Legal Aid, indicating briefing of Ms Gobbo for the defence, in cases from 1 January 1995[17]

10.6. records from Corrections Victoria, detailing Ms Gobbo's "professional" visits to correctional facilities in Victoria 1 January 1995 to 13 March 2019.[18]

11. The result of the foregoing process established that Ms Gobbo may have acted for or advised 1,005 of the 1,156 Convicted Persons between April 1997 and 2013.

12. Further, for the reasons set out in the Legal Principles Submissions at [233]-[241], it was considered that any Convicted Persons who Ms Gobbo represented between 14 May 1998 and 2013 should be the subject of a general submission to the effect that they or (where a sufficient nexus exists) their cases may have been affected by reference to Categories 1A and 3A. To facilitate that submission, a further review of the data was conducted, and it was determined that 973 of the 1,156 Convicted Persons may have received legal services from Ms Gobbo at some point during the period between 14 May 1998 and 2013. The submission in relation to these persons is addressed in the Legal Principles Submissions at [233]-[241].

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[13] Exhibit RC1568 Ms Nicola Gobbo fee book 01, MIN.5000.7000.0001; Exhibit RC1568 Ms Nicola Gobbo fee book 02, MIN.5000.7000.0103.

[14] Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Statement of Account, GMH.0001.0001.0002; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 01, GMH.0001.0001.0003; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 02, GMH.0001.0001.0004; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 03, GMH.0001.0001.0005; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 04, GMH.0001.0001.0006; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 05, GMH.0001.0001.0007; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 06, GMH.0001.0001.0008; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 07, GMH.0001.0001.0009; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 08, GMH.0001.0001.0010; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 09, GMH.0001.0001.0011; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 10, GMH.0001.0001.0012; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 11, GMH.0001.0001.0013; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 12, GMH.0001.0001.0014; Exhibit RC1569 Meldrum & Hyland Barristers' Clerk Nicola Gobbo Tax Invoice Bundle 13, GMH.0001.0001.0015.

[15] Exhibit RC1841 Magistrates' Court of Victoria record of Persons represented by Ms Nicola Gobbo, MCV.0001.0001.0001.

[16] Exhibit RC1898 Office of Public Prosecutions Victoria, PRISM database list of appearances by Ms Nicola Gobbo, OPP.0001.0004.0025; Exhibit RC1923 Office of Public Prosecutions Victoria list of Persons represented by Ms Nicola Gobbo from 2003 to 2009, OPP.0001.0001.0001; Exhibit RC1935 Office of Public Prosecutions Victoria list of Persons represented by Ms Nicola Gobbo from 1995 to 2002, OPP.0001.0004.0300.

[17] Exhibit RC1936 Victoria Legal Aid record of briefing Ms Nicola Gobbo, VLA.0001.0001.0001.

[18] Exhibit RC1359 Prisoners visited by Ms Nicola Gobbo archive report", CNS.0001.0003.0037.

Stage 3: Further Review of Certain Indictable Cases

13. At the third stage of review (Stage 3), the object was to conduct a further analysis of relevant indictable cases[19] of the 1,156 Convicted Persons, in order to determine whether, and if so, to what extent, such indictable cases may have been affected by Ms Gobbo's conduct as a human source. As an initial step, it was determined that 314 of the 1,156 Convicted Persons did not have any convictions or findings of guilt recorded against them for indictable cases. Therefore, the pool of relevant persons whose indictable cases were candidates for further analysis at Stage 3 comprised 842 persons (Stage 3 Candidates).

Means of Determining Which of the Stage 3 Candidates Warranted a Further Review

14. As a preliminary process under Stage 3, Counsel Assisting undertook a series of *prima facie* considerations to determine which cases of the Stage 3 Candidates warranted further review. Based on those considerations, it was determined that 225 of the 842 Stage 3 Candidates warranted further review (Further Review Candidates). The considerations that led to that determination are set out below:

    14.1. First, a data search was conducted for instances (that is to say, data hits) of express references to the names (or relevant variants thereof)[20] of each of the 842 Stage 3 Candidates in the two primary bodies of contemporaneous records produced to the Commission by Victoria Police which disclose the communications between Ms Gobbo (in her capacity as a human source) and members of Victoria Police during the third registration period,[21] namely the ICRs and the transcripts of meetings between Ms Gobbo and her handlers. Depending on the results of that search, the Stage 3 Candidates were then treated in different ways. This may be summarised as follows:

        14.1.1. Searches in relation to 586 of the 842 Stage 3 Candidates returned zero data hits. On that basis, each of the 586 persons were then *prima facie* excluded from further analysis, and only considered further if in the event they came to the attention of Counsel Assisting by other means, including if they were captured by other considerations set out below.

        14.1.2. Searches in relation to 160 of the 842 Stage 3 Candidates returned 20 or fewer data hits (the Sub-20 Persons). The data hits in respect of each Sub-20 Person were then examined by Counsel Assisting to assess whether they disclosed *prima facie*, a suggestion that any case of the Sub-20 Person may have been affected by the conduct of Ms Gobbo as a human source. Where that *prima facie* assessment was positive (which was the result for 87 of the 160 Sub-20 Persons), the Sub-20 Person's case or cases received a further analysis in the manner set out below. Where, on the other hand, that prima facie assessment was negative (which was the result for 73 of the 160 Sub-20

[19] See Legal Principles Submissions at [21].
[20] This involved searching primarily for the surname of the Stage 3 Candidate, and with a 'fuzziness' of '2' on the document management system, which allowed for spelling mistakes of up to two letters in any one word.
[21] There was no similar body of evidence available to the Commission which concerned the other periods of registration, and therefore it was not possible to conduct this exercise in respect of those other periods.

Persons),[22] the Sub-20 Person were *prima facie* excluded from further analysis, and only considered further if they came to the attention of Counsel Assisting by other means, including if they were captured by other considerations set out below.

14.1.3. Searches in relation to 55 of the 842 Stage 3 Candidates returned 21 or more data hits. On the basis of their prevalence in the records, each such person was determined to warrant a further analysis in the manner set out below.

14.1.4. Notably, 41 Candidates were not subjected to any *prima facie* data hits review, because they were already the subject of a further analysis by reason of one or more of the other considerations below.

14.2. Secondly, 74 of the 842 Stage 3 Candidates made submissions to the Commission and/or were the subject of submissions made by other persons to the Commission, which were referred to Counsel Assisting by Commission staff for review as being potentially relevant for the consideration of cases that may have been affected (Submissions Candidates).[23] Each of the 74 Submissions Candidates received a further review in the manner set out below.

14.3. Thirdly, as it became clear in the course of the inquiry that the conduct of Ms Gobbo and members of Victoria Police in relation to certain persons, such as Mr Cooper, was such that it was potentially arguable that any subsequent case in which the evidence or assistance of those persons was relied upon may have been affected, information was sought and obtained from the OPP about any such subsequent cases. Information was provided by the OPP which detailed the cases in which persons had been convicted in matters where the prosecution relied upon persons such as Mr Cooper.[24] It was determined that the cases of those persons also warranted a further review in the manner set out below.[25]

14.4. Fourthly, as the inquiry progressed, other persons or cases came to the attention of Counsel Assisting by virtue of the ongoing receipt by the Commission, of evidence, information and material concerning the use of Ms Gobbo as a human source. Where relevant, such cases were subjected to a further review in the manner set out below.

15. It should be noted that there was considerable overlap between the foregoing four processes. That is, some persons emerged at two or more stages of the process. For example, some Sub-20 Persons were the subject of submissions made to the Commission, and some persons with zero hits were the subject of information from

[22] It is noted that due to the data-based nature of the exercise, some Sub-20 Persons returned false hits, in the sense that the data hits revealed that the instance of data was clearly not a reference to the person. In such instances, the relevant person would receive a negative assessment.
[23] There were an additional 18 persons who made submissions to the Commission or were the subject of submissions made by other persons to the Commission, which were referred to Counsel Assisting by Commission staff for review as being potentially relevant for the consideration of cases that may have been affected. However, ultimately it became apparent that these persons did not meet the definition of Stage 3 Candidates and therefore were not considered for a further review.
[24] Exhibit RC1844 Office of Public Prosecutions Victoria, Annexure A - Witnesses and Related Accused Matter Outcomes, 29 May 2020, OPP.0056.0001.0001.
[25] It should be noted that Counsel Assisting do *not* submit that every person or case referred to in the OPP document may have been affected by the conduct of Ms Gobbo as a human source. Rather, the information in that document was used as a source to conduct further inquiries to determine whether any such submissions were open.

the OPP in relation to the third process (see [14.3] above). As long as a person was the subject of a positive assessment in at least one of the preliminary processes, their cases were treated as warranting a further analysis. Ultimately, based on the foregoing processes, 225 of the 842 Stage 3 Candidates were determined to warrant further review.

Method in Undertaking Further Review

16. In conducting reviews of indictable cases of the 225 Further Review Candidates , the following method of analysis was generally[26] employed.

16.1. First, the details and circumstances of the case in question were examined and assessed by reference to the following (to the extent necessary and relevant):

16.1.1. Certain key documents that were obtained by the prosecutorial agencies and the courts, which where available, included:[27]

16.1.1.1. the indictments or presentments upon which the proceedings were conducted and determined

16.1.1.2. summaries of prosecution opening for trial or plea (or similar documents), as relevant, that were relied upon by the prosecution in the proceedings

16.1.1.3. defence responses for trial or outline of submissions on plea (or similar documents), as relevant, that were relied upon by the defence in the proceedings

16.1.1.4. transcripts of the following specific parts of the proceedings, as relevant –

16.1.1.4.1. prosecution opening (at trial)

16.1.1.4.2. defence response (at trial)

16.1.1.4.3. prosecution final address (at trial)

16.1.1.4.4. defence final address (at trial)

16.1.1.4.5. the trial judge's charge and directions to the jury (at trial)

16.1.1.4.6. the entirety of plea and sentencing hearings

16.1.1.5. reasons for sentence and relevant orders

16.1.1.6. any other rulings or judgments handed down by any court before which relevant proceedings took place (whether at trial, plea, sentence, or upon appeal)

16.1.2. any relevant information described above at [14.3] provided by the OPP

[26] See [16.4.1] below.
[27] The key documents obtained by the Commission in respect of each case differed according to need, relevance, and availability.

16.1.3. any submissions made to the Commission, as described above at [14.2], that concern the circumstances of the case.

16.2. Based on the foregoing types of documents, consideration was given (to the extent necessary and relevant) to a range of details and issues in relation to each indictable case, including:

16.2.1. the charges upon which the relevant person was convicted or found guilty

16.2.2. the procedural course of the case

16.2.3. the circumstances of the offending, as alleged by the prosecution and found proven by the court

16.2.4. the evidence and witnesses relied upon as part of the prosecution case

16.2.5. the factual issues in dispute, if any

16.2.6. the outcome of the proceedings.

16.3. Secondly, the conduct of Ms Gobbo as a human source was examined and considered (to the extent necessary and relevant) by reference to the relevant evidence and material received by the Commission. Significant aspects of such evidence included:

16.3.1. the ICRs, which constitute an expansive body of detailed contemporaneous notes of communications between Ms Gobbo (in her capacity as a human source) and members of Victoria Police between 16 September 2005 and 14 January 2009 [28]

16.3.2. transcripts of meetings between Ms Gobbo (in her capacity as a human source) and members of Victoria Police between 16 September 2005 and 14 January 2009 [29]

16.3.3. evidence of any specifically relevant legal services provided by Ms Gobbo (by reference to the records set out above)

16.3.4. evidence adduced in Commission hearings, including viva voce evidence, witness statements, and other material produced or tendered.

16.4. Thirdly, having ascertained (to the extent necessary and relevant) the details of the case on the one hand, and the relevant details of the use of Ms Gobbo as a human source by Victoria Police in relation to the case, on the other hand, an analysis was then conducted (within the framework, and by reference to the categories, set out in the Legal Principles Submissions at [249] and [465]) as to whether, and if so, to what extent, the latter may have affected the former.

16.4.1. Further, it should be noted that it was not always necessary to engage in all three steps set out above, as in many instances it became apparent that no further consideration of a person or case was required, or would be fruitful. For example, where the

[28] Exhibit RC0281 ICR3838, RCMPI.0050.0001.0001; Exhibit RC0281 ICR2958, RCMPI.0051.0001.0001.
[29] Exhibit RC0282.

following kinds of circumstances became apparent, no further review was undertaken:

16.4.1.1. where the conviction of the Further Analysis Candidate was obtained prior to Ms Gobbo's third period of registration by Victoria Police as a human source in September 2005,[30] and after careful examination of available records and evidence in hearings, there was otherwise no evidence or suggestion of any relevant informing that came to the attention of Counsel Assisting in relation to that person prior to September 2005

16.4.1.2. where there was no evidence or suggestion of Ms Gobbo having represented the Further Analysis Candidate (and they were not captured by any other relevant considerations described above)

16.4.1.3. where the representation by Ms Gobbo of the Further Analysis Candidate preceded any relevant informing or there was an absence of any relevant informing (and they were not captured by any other relevant considerations described above).

The Results of the Reviews

17. Ultimately, Counsel Assisting submit that the cases of 117 of the 225 Further Review Candidates may have been affected by the use of Ms Gobbo as a human source. The submissions in respect of the cases of each of those persons are set out in Volume 2 (Chapters 7 and 11 concerning Mr Thomas and Mr Cooper respectively) and Volume 3. As detailed in those parts of the submissions, it is submitted that the cases of the 117 persons may have been affected within the framework, and according to the categories, set out in the Legal Principles Submissions at [249] and [465].

18. Further, Counsel Assisting submit that 80 of these 117 persons were also captured under Stage 2.

Stage 4: Broad Review of the Summary Cases of the Further Review Candidates at Stage 3

19. At the fourth stage (Stage 4), the object was to conduct a broad review of any relevant summary cases of the 225 Further Review Candidates who were considered at Stage 3, in order to determine whether any such cases may have been affected by Ms Gobbo's conduct as a human source. As an initial step, it was determined that, of the 225 Further Review Candidates, 90 did not have any conviction or finding of guilt recorded against them for summary cases. Therefore, the pool of relevant persons at Stage 4 was 135 persons (Stage 4 Candidates).

[30] Whereas it was possible to closely examine the conduct of Ms Gobbo as a human source after her third registration in September 2005, prior to that registration, if there was specific suggestion or concern of potential informing behaviour, records were obtained and examined to the extent they are in existence and could be found. Otherwise further exhaustive searches for records would have been laborious, time consuming and for the most part fruitless.

20. The review of the summary[31] cases of the Stage 4 Candidates, as set out below, was conducted by way of a broader, less detailed, method of analysis than at Stage 3. There were a number of reasons for employing a broader approach at Stage 4, including the following:

    20.1. First, it was recognised that summary cases are, by definition and by nature, less serious than indictable cases. This is reflected in the following matters –

        20.1.1. summary cases are determined summarily in the Magistrates' Court

        20.1.2. the maximum sentences available upon the disposition of summary cases are lower than those available in indictable cases

        20.1.3. a person whose matter is determined in the summary jurisdiction of the Magistrates' Court has (or at least did have during the relevant periods under examination in these submissions) an option of de novo appeal to the County Court as of right

        20.1.4. offences that may be determined in summary jurisdictions are less grave than offences that must be determined in indictable jurisdictions.

    20.2. Secondly, the records available in relation to summary cases are generally far fewer and less detailed than those available in relation to indictable cases. For example, in summary cases, there is no hand-up brief or depositions, no requirements for prosecution openings, usually no transcripts of the proceedings, and ordinarily no written reasons are published or provided upon sentence. The absence of such records renders a detailed analysis less feasible.

    20.3. Thirdly, it became apparent to Counsel Assisting from an early stage that the use of Ms Gobbo as a human source by Victoria Police was primarily focused on advancing police investigations into serious indictable offences, rather than summary offences. Indeed, as the other parts of the submissions of Counsel Assisting make clear, when it came to the third registration period (2005–2009), the use of Ms Gobbo was predominantly directed towards advancing the investigatory ends of the Purana Taskforce.

    20.4. Based on the foregoing and having regard to the practical limitations and particular functions of the Commission, Counsel Assisting considered it appropriate to give summary cases less detailed attention than indictable cases.

Method of the Broad Review at Stage 4

21. The aim of the broad review at Stage 4 was to identify instances where Ms Gobbo represented a person upon the disposition of their summary case, in circumstances where that person had previously been (or on the date of disposition was) the subject of communications between Ms Gobbo (in her capacity as a human source) and members of Victoria Police. The rationale was that, where such instances were identified, Counsel Assisting would be in a position to submit that the relevant case may have affected by the use of Ms Gobbo as a human source by Victoria Police,

[31] See Legal Principles Submissions at [21].

by reference to Categories 1A, 1B, 3A, and 3B (within the framework of and as set out in the Legal Principles Submissions at [249] and [465]).

22. The method employed to identify such instances in respect of each of the Stage 4 Candidates was as follows:

22.1. first, a comparative analysis was undertaken between:

22.1.1. dates of disposition in summary cases (by reference primarily to LEAP criminal records produced by Victoria Police)

22.1.2. dates of Ms Gobbo's representation of the relevant person (by reference to the various records of legal representation as set out above)

to identify any coincidences between each; and

22.2. secondly, where such a coincidence was identified, a review was undertaken of certain records in the Loricated Database (namely the ICRs and the transcripts of meetings) to determine whether, prior to the relevant coincidence of disposition and representation, the person was the subject of communications between Ms Gobbo (in her capacity as a human source) and Victoria Police.

Results of the Broad Review at Stage 3

23. Where Stage 4 Candidates received a positive assessment at both of the foregoing steps, Counsel Assisting determined to submit that the relevant cases may have affected by the conduct of Ms Gobbo as a human source, by reference to Categories 1A, 1B, 3A, and 3B. Ultimately, of the 135 Stage 4 Candidates persons subjected to this review, positive results were obtained in respect of 4 persons. The case studies in relation to those persons are set out in Volume 3.

Stage 5: Broad Review of Cases (Summary and Indictable) of Convicted Persons Represented by Ms Gobbo who were not Further Review Candidates (and Therefore Not Considered or Captured at Stages 3 or 4)

24. In addition to the 225 Further Review Candidates, who received attention at Stages 3 and 4, it was determined that, for completeness, 106 persons who arose at Stage 2 also warranted a separate and further broad analysis in the same vein as that undertaken at Stage 4. The additional 106 persons were those who met all of the following conditions:

24.1. first, they were Convicted Persons with a LEAP criminal history report, within the meaning of Stage 1

24.2. secondly, they received legal services from Ms Gobbo during the relevant period, 14 May 1998 to 2013 (and were thereby captured by a general submission at Stage 2)

24.3. thirdly, their names returned data hits in the searches undertaken of the Loricated Database described above at Stage 3, meaning that prima facie they may have been the subject of communications between Ms Gobbo (in her capacity as a human source) and Victoria Police)

24.4. fourthly, they were, notwithstanding the three foregoing conditions, excluded from a further review at Stage 3 (and therefore review at Stage 4)

by virtue of the various preliminary processes described above in relation to Stage 3.

25. In addition, at a relatively late stage in the inquiry, the Commission received information from Victoria Police concerning 26 additional names of potential candidates for review who had not previously come to the attention of the Commission. Given the late stage at which that information was received and in light of the resultant practical constraints, it was determined that those 26 persons would *only* be subject to the Stages 1, 2, and 5 processes if they met the criteria detailed at [24.1]-[24.3].

26. Ultimately, a total of 106 persons were subjected to a review at Stage 5 (Stage 5 Candidates). The aim and rationale of the broad analysis at Stage 5 was similar to that at Stage 4, except that the former was extended to include dispositions in indictable as well as summary cases. So, at Stage 5 the aim was to uncover instances where Ms Gobbo represented a person upon the disposition of any indictable case or summary case, in circumstances where that person had previously been (or on the date of disposition was) the subject of communications between Ms Gobbo (in her capacity as a human source) and members of Victoria Police. At Stage 5, the rationale was that, similarly to that at Stage 4, where such instances were identified, Counsel Assisting would be in a position to submit that the relevant case or cases may have affected by the conduct of Ms Gobbo as a human source, by reference to Categories 1A, 1B, 3A, and 3B (within the framework of and as set out in the Legal Principles Submissions at [249] and [465]).

27. The method employed to identify such instances in respect of each Stage 5 Candidate was as follows:

    27.1. first, a comparative analysis was undertaken between –

        27.1.1. dates of disposition in indictable cases and summary cases (by reference to LEAP criminal records produced by Victoria Police)

        27.1.2. dates of Ms Gobbo's representation of the relevant person (by reference to the various records of representation as set out above)

    to identify any coincidences between each; and

    27.2. secondly, where such a coincidence was identified, a review was undertaken of certain records in the Loricated Database (namely the ICRs and the transcripts of meetings) to determine whether, prior to the relevant coincidence of disposition and representation, the person was the subject of communications between Ms Gobbo (in her capacity as a human source) and Victoria Police.

Results of the Broad Review at Stage 5

28. Where a Stage 5 Candidate received a positive assessment at both of the foregoing steps, Counsel Assisting determined to submit that the relevant cases may have affected by the use of Ms Gobbo as a human source by Victoria Police, by reference to Categories 1A, 1B, 3A, and 3B.[32] Of the 106 Stage 5 Candidates persons subjected to this review, positive results were obtained in respect of 6 persons. The case studies in relation to those persons are set out in Volume 3.

[32] See Legal Principles Submissions at [249] and [465].

Exceptions in Relation to Two Persons

29. Separately, it is noted that two summary cases (being those of Messrs Maddox (a pseudonym) and Danny Moussa) were assessed as they arose in the course of assessment of other related indictable cases in Stage 3.

Qualifications as to the Methodology

30. It is prudent to note a number of qualifications in relation to the methodology employed. The qualifications properly reflect the practical limitations and particular functions of the Commission, which are materially different to those pertaining to proceedings before the courts.

31. First, Counsel Assisting considered that the purpose of the first term of reference, to determine "the number of and extent to which cases may have been affected by the conduct of Ms Gobbo as a human source", is to give the Government, the public, and the relevant affected persons a general appreciation of the breadth and depth of the impact of the use of Ms Gobbo as a source on cases in the criminal justice system over the extended period that she practised as a lawyer. In the submission of Counsel Assisting, it is not the function of the Commission to *determine* in which cases and for what precise reasons substantial miscarriages of justice occurred; that is a matter which is properly the preserve solely of the courts. Indeed, the Commission can give no remedy; its report amounts to an opinion. It would also be inappropriate and impracticable for the Commission to engage in the depth or comprehensiveness of analysis of cases that would be required of an appellant in preparing an application for leave to appeal against conviction before the Court of Appeal.

32. Secondly, and relatedly, the level of examination undertaken at each of the stages described above amounts to a much broader, or less detailed, examination than would be involved in preparing a matter for, or in the hearing of, an application for leave and/or appeal before the Court of Appeal. That is so even at Stage 3, where the 'further reviews' were conducted. By way of example, the documents relied upon in undertaking the 'further reviews' were far more limited than those to which an appellant would have regard. In particular, the case documents were limited to certain key documents, as described above, and did not ordinarily include the full depositions or transcripts of proceedings. Also, it is noted that the data-based exercises described in some of the stages above were also inherently limited in that they relied on key word searches of data to identify express references to persons' names (or variants thereof), and therefore it is possible that implied references to persons may not have been captured. Further, it must be recognised that the Commission continued to receive information from Victoria Police concerning Ms Gobbo's informing throughout the life of the inquiry. Indeed, relevant material (including material concerning affidavits and warrants for surveillance or search operations) continued to be provided as the submissions of Counsel Assisting were being completed. Such material may well have born upon numerous case studies but has not been able to be properly or fully addressed. In these circumstances, it is reasonably possible, if not to be expected, that evidence concerning Ms Gobbo's informing and its impact on cases many not have been fully uncovered in some cases.

33. Thirdly, for the above reasons, it is important to note that where Counsel Assisting submit that a case may have been affected in different ways, such a submission does not purport to provide an exhaustive or comprehensive account of the ways in which the case may have been affected. Likewise, where a case is not the subject

of a positive submission of Counsel Assisting that it may have been affected, that should not be taken as a submission to the opposite effect. Rather, it should be taken to mean that, based on the material reviewed by Counsel Assisting, and according to the methodology described above, there was not a basis to submit that it may have been affected. In other words, in the submissions of Counsel Assisting, there is no submission made, at any time or in any way, to the effect that a case *is not* affected at all or in different ways.

Summary of Submissions as to Cases that May Have Been Affected

34. Ultimately, all 1,306 Candidates for Review received some form of analytical treatment at the five stages of review. The results, as at each stage, may be summarised as follows:

34.1. **Stage 1** – The total number of persons positively identified under this stage is 1,156 persons. These persons had a conviction or finding of guilt in or after 1995.

34.2. **Stage 2** – The total number of persons positively identified under this stage is 973 persons. These persons were represented by or received advice from Ms Gobbo between 14 May 1998 and 2013. These 973 persons are the subject of submissions at [233]-[241] of the Legal Principles Submissions.

34.3. **Stage 3** – The total number of persons positively identified under this stage is 117 persons. The cases of these 117 persons are the subject of submissions at set out in Volume 2 (Chapters 7 and 11 concerning Mr Thomas and Mr Cooper respectively) and Volume 3. Of these 117 persons, 80 were also captured under Stage 2.

34.4. **Stage 4** – The total number of persons positively identified under this stage is 4 persons. The cases of these 4 persons are the subject of submissions set out in Volume 3. All 4 persons were also captured under Stages 2 and 3.

34.5. **Stage 5** – The total number of persons positively identified under this stage is 6 persons. These persons were assessed as having an indictable or summary case which was potentially affected, despite being excluded from Stage 3 (and by extension Stage 4). All 6 persons were also captured under Stage 2.

34.6. One exception, namely Mr Danny Moussa, was positively identified in the course of analysis of other persons under Stage 3. Mr Moussa's sole summary matter was not positively identified in Stages 2-5 but incorporated as an exception.

35. In total, taking into account the overlap of persons as between the various stages, in the submission of Counsel Assisting, 1,011 persons may have been affected by the conduct of Ms Gobbo as a human source in the criminal justice system. In making that submission, it is important to appreciate the qualifications made above. It is also important to recognise the restrained and general way in which the submissions are made with respect to 887 of the 973 persons who arise under Stage 2 (see Legal Principles Submissions at [233]-[241]).