OFFICE OF THE
SPECIAL INVESTIGATOR
VICTORIA

Level 9/451
Little Bourke Street
Melbourne VIC 3000

SPECIAL REPORT TO PARLIAMENT

(*Special Investigator Act 2021*, s 99)

To the Clerk of the Legislative Council

And to the Clerk of the Legislative Assembly:

1. Section 99 of the *Special Investigator Act 2021* (SI Act) provides in substance that the Office of the Special Investigator (OSI) may at any time give to the clerk of each House of Parliament a report on any matter relating to the performance of OSI's duties and functions.

2. Pursuant to section 99 of the SI Act, I have the duty to report on the matters hereinafter set out.

3. In brief summary, OSI was established by section 12 of the SI Act consequent on recommendations of the Royal Commission into the Management of Police Informants (Royal Commission) to establish a Special Investigator with the necessary powers and resources to investigate whether there is sufficient evidence to prove the commission of offences by Nicola Maree Gobbo (Gobbo) or by current or former members of Victoria Police (VicPol) in connection with VicPol's use of Gobbo as a human source (relevant offences).

4. Section 6 of the SI Act thus provides in substance that the principal functions of OSI are:

    - Investigating and determining whether there is within the records of the Royal Commission (Royal Commission records) or otherwise sufficient evidence to establish the commission of relevant offences; and
    - On that basis, providing to the Director of Public Prosecutions briefs of evidence for the Director to determine whether charges should be filed.

5. Unlike the *Independent Broad-based Anti-corruption Commission* (IBAC), which has power under sections 189 and 190 of the *Independent Broad-based Anti-corruption Commission Act 2011* to bring criminal proceedings for any matter arising out of an IBAC investigation, OSI's ability to bring criminal proceedings for a relevant offence is subject to constraint. Section 40 of the SI Act prohibits OSI from filing a charge of relevant offence unless the Director of Public Prosecutions first agrees to the charge being filed.

6. In light of the Director's past refusal of permission for OSI to file charges of relevant offences, and the Director's recent identification of considerations likely to result in her refusing to permit OSI to file any other charges of relevant offences, I consider that there is no longer any point in OSI persisting with investigating and determining whether there is sufficient evidence to establish the commission of relevant offences.

The Perjury brief of evidence

7. During October and early November 2021, three OSI legal officers who had been engaged in anticipation of the formation of OSI and I prepared a brief of evidence alleging a charge of perjury against one suspected offender. The brief was submitted to the Director in draft form on 19 November 2021.

8. On 29 November 2021, the Director wrote to OSI that she had determined that a charge sheet should not be filed "at that stage" and that further evidence would be required before she could be satisfied to the necessary extent of the prospects of conviction.

9. Later that day, I emailed to the Director urging her to accept that the documents provided on the brief left little doubt that the alleged offending had been committed and that all that would remain to be done once OSI was granted access to unredacted Royal Commission records (as opposed to redacted Royal Commission records to which OSI was restricted at that time) was to assemble formal proofs of evidence.

10. On 1 December 2021, OSI resubmitted the brief to the Director and on the same day I conferred with the Director regarding difficulties OSI was having in obtaining access to unredacted Royal Commission records and how OSI proposed to surmount the problems. The Director stated in substance that, even if OSI could surmount those problems, there were also public interest considerations that would weigh against a decision to approve the charge. They were, she said, that the alleged offence was relatively old (it was alleged to have been committed in 2017); although a relevant offence, it was not committed in connexion with a criminal proceeding (it was alleged to have been committed in the course of civil proceedings relating to the possible commission of relevant offences); and, because of the personal circumstances of the alleged offender, it was not unlikely that, if the alleged offender were convicted, a non-custodial sentence would be imposed. The Director questioned whether, having regard to those considerations, it was worth spending money prosecuting the case and possibly thereby putting the alleged offender (and perhaps other persons associated with the alleged offender) at personal risk.

11. Later on 1 December 2021, I received a letter from the Director stating that she had not yet made a determination whether to grant permission to charge and in which she listed additional documentary and other evidence that she said, if provided, might alleviate some of her concerns regarding the prospects of conviction. But the Director added that:

"These matters need to be balanced against the seriousness of the proposed charge in circumstance where the likely sentencing outcome in the event of a conviction would be a non-custodial disposition".

12. Days later, the suspected offender departed the jurisdiction making it pointless to proceed with the brief.

The Spey brief of evidence

13. Faced with those developments, during January 2022 OSI identified eight other matters involving possible relevant offences that OSI considered were worthy of investigation. Each of those eight matters concerned multiple suspected offenders in relation to a range of facts traversing a period of more than nine years.

14. After several further months of investigation, OSI concluded that one of the eight matters (designated as Operation Spey) stood out from the others as the strongest case of relevant offending, which, as such, would provide the best chances of securing convictions. From that point on, the bulk of OSI's investigative resources (which by then included a team of investigators recruited by OSI) were focussed on Spey with the aim of completing the investigation and preparation of the Spey brief of evidence in the shortest possible time.

15. To begin with and for the following nine months, OSI's progress with Spey was hampered by difficulties in obtaining access to unredacted Royal Commission records and in overcoming claims of public interest immunity and the application of statutory secrecy provisions. The details of those problems were reported in OSI's first and second Implementation Monitor Reports pursuant to section 97 of the SI Act.

16. After overcoming some of those difficulties, on 8 December 2022 Operation Spey culminated in the delivery of the Spey brief of evidence to the Director of Public Prosecutions, and by memorandum accompanying the brief OSI sought a determination by the Director pursuant to section 41 of the SI Act that OSI be permitted to file charges of attempting to pervert the course of justice against five identified persons.

17. The Spey brief of evidence consisted of more than five thousand pages of admissible documentary evidence, many hours of audio recordings, and multiple witness statements. OSI considered that the brief established a powerful case of offending and therefore expected that the Director would approve the charges. Contrary to OSI's expectation, however, on 16 March 2023 the Director notified OSI that she had determined that a charge sheet should not be filed against any of the alleged Spey offenders. The Director stated that she did not consider that there was a reasonable prospect of conviction against any of those five persons. A redacted copy of the Director's letter of 16 March 2023 is attached.

18. On 20 March 2023, I wrote to the Director submitting that her decision to reject the Spey brief was wrong, and setting out in brief substance why I considered that her reasons for rejecting

the brief were untenable. A redacted copy of my letter to the Director of 20 March 2023 is attached.

19. On the same day, I wrote to the Attorney-General enclosing copies of the Director's letter of 16 March 2023 and my letter to the Director of 20 March 2023. A redacted copy of my letter of 20 March 2023 to the Attorney-General is attached.

20. The Director did not reply to my letter of 20 March 2023 and thus Operation Spey ended without prosecution.

Operations Leith, Wick and Forth

21. Meanwhile, having delivered the Spey brief of evidence to the Director on 8 December 2022, OSI had refocussed attention on the remainder of the eight matters identified at the outset of operations and had selected three (Operation Leith, Operation Wick and Operation Forth) as the next strongest cases after Spey. The plan was to complete and deliver a brief of evidence in at least one of Leith, Wick and Forth by the end of calendar 2023 with the other two briefs to follow during calendar 2024.

Operation Charlie[1]

22. That approach later changed as the result of work carried out in Leith, Wick and Forth during December 2022 and January 2023. With the insight that work provided, OSI concluded that, although none of Leith, Wick and Forth was individually as strong as Spey, a combination of elements of the three (in the form of Operation Charlie) would sustain a charge against at least one senior police officer of misconduct in public office committed by knowingly failing to report, investigate and prosecute offences of attempt to pervert the course of justice.

23. The efficacy of the Charlie approach was later confirmed to the extent that some of the considerations which the Director subsequently identified in her letter of 16 March 2023 as having informed her rejection of Spey did not apply to Charlie or at least did not appear to apply in the same way and to the same extent.

24. In particular, in the Director's letter of 16 March 2023 the Director stated in substance that she regarded it as inimical to the success of the Spey brief of evidence that the immediate "victim" of the alleged offences was not prepared to make a voluntary witness statement for inclusion in the brief. The Director wrote that she was not prepared to proceed on the basis of evidence which (consistently with evidence the alleged victim had given before the Royal Commission) OSI considered the alleged victim would almost certainly give if compelled to give evidence pursuant to section 103 of the *Criminal Procedure Act 2009* (or under subpoena issued under section 336 of the Criminal Procedure Act). The Director also recorded that another reason not to approve prosecution was that four of the persons proposed to be charged were at relevant

[1] A pseudonym.

times relatively junior police officers who the Director considered could conceivably raise a defence that they did not know how to prevent what occurred.

25. By contrast in Charlie, although there were multiple alleged immediate victims of the alleged offence, who, like the alleged immediate victim in Spey, might not agree to make witness statements for inclusion in the brief, the most important consequence of the alleged offending in Charlie was the damage thereby done to the fundamental integrity of the criminal justice system, and the suspect (or conceivably suspects) in Charlie was at relevant times a senior police officer with apparent ability to prevent what had occurred.

26. Consequently, despite the Director's rejection of Spey, after 16 March 2023 OSI continued to focus all of its investigative resources on Charlie with the object of concluding the investigation and delivering the Charlie brief of evidence to the Director on or before 30 December 2023 or at latest 30 June 2024.

The Attorney-General's letter of 22 May 2023

27. On 22 May 2023, I received a letter from the Attorney-General referring "to your recent update" (which I interpreted as a reference back to my letter of 20 March 2023) requesting information as to the status of "remaining OSI investigations"; the probability of any of them resulting in the provision of a brief of evidence to the Director; and my opinion as to the chances of the Director granting permission to file charges. A redacted copy of the Attorney-General's letter of 22 May 2023 is attached.

OSI's letter to the Attorney-General of 23 May 2023

28. On 23 May 2023 I wrote to the Attorney-General replying that the short answer to her enquiry was that, subject to the maintenance of OSI's present staffing levels and operational budget, I was confident that the Charlie investigation would result in the provision of a major, comprehensive brief of evidence to the Director by early 2024 and that there was good reason to think that the Director may be satisfied that the charges proposed should be filed. I then set out my reasons in support of those conclusions. I added, however that, if the Director rejected the Charlie brief, it would then be appropriate to reconsider whether any further investigations should be pursued. A redacted copy of my letter of 23 May 2023 to the Attorney-General is attached.

The Director's letter of 26 May 2023

29. I did not receive an immediate response from the Attorney-General. Three days later, however, on 26 May 2023 I received a letter from the Director referring to a conference that OSI Chief Counsel and I had had with the Director and the Chief Crown Prosecutor on 8 May 2023. The purpose of that conference had been to raise with the Director whether, if former VicPol officers who had authored VicPol records refused to provide witness statements verifying those

records, the Director might be disposed to consider the strength of the Charlie brief on the basis of the sworn evidence of verification of those records which the former officers had given before the Royal Commission; there being no reason to suppose that they would not repeat that evidence if compelled to give evidence by order pursuant to section 103 of the Criminal Procedure Act. At the conference, the Director stated in substance that she might be prepared to consider OSI's proposal after she had seen the brief but that she could not and would not give any guarantees.

30. By contrast in her letter of 26 May 2023, the Director stated that after further reflection she was not prepared to consider the possibility because to do so would run counter to her policy of assessing the strength of a brief of evidence "on the basis of the evidence currently available to the prosecution, not on the basis of what further evidence *might*[2] be obtained"; and because she considered that to invoke section 103 of the Criminal Procedure Act in the manner proposed "may be an abuse of process".

31. The Director also included in her letter of 26 May 2023 an analysis of what she considered to be the law relating to the offence of misconduct in public office, which was followed by an observation that the proposed Charlie accused might well successfully argue in opposition to the proposed charge of misconduct in public office that "Victoria Police's institutional position over the years regarding public interest immunity validated their own subjective perception that their actions did not amount to misconduct", and thus that "it will be difficult to prove 'wilful misconduct' beyond reasonable doubt". In turn, that was followed by a reiteration of what the Director had said in her letter of 16 March 2023 about there being a number of "deficiencies" in the Spey brief of evidence.

32. Finally, the Director added that she took the opportunity also to make "observations about the passage of time and the impact it has on the decisions ahead for our respective offices in relation to any further briefs of evidence", leading the Director to conclude that:

> "As it stands, the passage of time will undoubtedly have a significant bearing on the prospects of conviction …[which] is also a matter I would have to take into account in determining whether it is the public interest to proceed with a prosecution … particularly if there is a reasonable prospect that, at the conclusion of the protracted criminal proceeding, some years into the future, the ultimate disposition on a finding of guilt is not custodial".

A redacted copy of the Director's letter of 26 May 2023 is attached.

33. My initial reaction to the letter was that it was calculated to inform me of as many reasons as the Director could conceive why she would be disposed to reject the Charlie brief of evidence

[2] The Director's emphasis.

once submitted and thereby to convey to me that the Director would reject the Charlie brief, and any other brief that might be submitted, for any or all of those reasons. After reflecting on the matter over the weekend of 27 and 28 May 2023, I remained of that view. It appeared to me that the effect of the Director's letter of 26 May 2023 was to reduce the chances of approval of any charge of relevant offence effectively to nil.

OSI's letter to the Director of 29 May 2023

34. Accordingly, on 29 May 2023 I wrote to the Director informing her in substance that, although I remained of opinion that her reasons for rejecting the Spey brief of evidence were wrong, and that I considered that her analysis of the law relating to misconduct in public office was misdirected, it appeared to me from her letter of 26 May 2023 that the chances of her approving any charges that OSI might submit to her were now effectively nil, which made it a waste of time and resources for OSI to persist. A redacted copy of my letter to the Director of 29 May 2023 is attached. I did not receive a response.

OSI's letter to the Attorney-General of 29 May 2023

35. On the same day, I wrote to the Attorney-General enclosing copies of the Director's letter to me of 26 May 2023 and my letter to the Director of 29 May 2023, and advising the Attorney-General that the Director's letter of 26 May 2023 had altered my view as to the likelihood of the Charlie brief being approved. I explained that, in face of the contents of the Director's letter of 26 May 2023, I had concluded that the chances of Director approving Charlie or any other charges that OSI might submit were now effectively nil, which made it a waste of time and money for OSI to persist. I requested the opportunity to speak to the Attorney-General urgently about the course to be adopted. A redacted copy of my letter to the Attorney-General of 29 May 2023 is attached.

Conferral with the Attorney-General

36. On 1 June 2023, the OSI Chief Executive Officer and I conferred with the Attorney-General. I reiterated the contents of my letter of 29 May 2023 and repeated that, in light of the Director's letter of 26 May 2023, I considered that the chances of the Director approving any brief of evidence that OSI might submit were effectively nil. I advised the Attorney-General that, in those circumstances, any further investigation of relevant offences by OSI appeared to me to be a waste of time and resources and that I believed that the appropriate course was to recommend to Parliament that OSI be wound up. I suggested that OSI cease further investigation and the assessment of evidence, and that the Government propose to Parliament the legislative amendment necessary for OSI to be wound up. I advised that if the Government decided to adopt that course, I would remain as Special Investigator for the time it would take to give effect to that decision; alternatively, if the Government decided that OSI should continue, I would resign as Special Investigator to make way for someone whose views as to the weight of evidence required to warrant prosecution for relevant offences more closely accorded to the Director's position. I stressed the urgency of the need for the Government to

make a decision one way or the other, not least because OSI had no allocated budgetary funding beyond 30 June 2023. At the conclusion of the meeting, I was assured that government would move with as much speed as was practicable.

Further communication with the Attorney-General

37. Consistently with that assurance, since 1 June 2023 the Attorney-General has kept me apprised of developments and of the processes involved and, consequently, time likely to be taken in the Government making a considered decision. I have had the benefit of conferring with the Attorney-General's staff and, through OSI officers, with pertinent sections of the Department of Justice and Community Safety. I am also looking forward to conferring with the Attorney-General again on 21 June 2023. I believe that the Government may be in position to make a decision in principle one way or the other by early next week, although of course the implementation of the Government's decision and any necessary legislative amendments are bound to take considerably longer.

Inutility of further investigation

38. As is recorded above, Operation Spey represented what OSI considered to be the strongest and clearest case of relevant offending which provided the best chances of securing convictions. More specifically, Spey was unique among the eight cases of relevant offences identified for investigation in that a significant part of the evidence consisted of many hours of audio recordings of conversations before and after the alleged offending was committed. Those recordings were admissible real-time direct evidence of the acts and state of mind of some of the alleged offenders and powerful inferential evidence of the acts and states of mind of others. Taken with the more than five thousand pages of VicPol records of communications that were included on the brief, they attested powerfully to the deliberateness, planning and implementation of the alleged offences and the effect of them on the alleged victim. That is why Spey was the first major brief of evidence that OSI submitted to the Director.

39. By comparison, Leith Wick and Forth (and thus ultimately Charlie) were largely comprised of documentary evidence (albeit to be confirmed by oral testimony) but Charlie had the advantage over Spey of being unaffected by some of the factors that the Director had determined weighed against Spey. That is why Charlie was pursued as the next best matter after Spey and why, until receipt of the Director's letter of 26 May 2023, I considered that Charlie stood a realistic chance of receiving the Director's approval.

40. That is no longer the case. In light of:
    - the Director's response to the Perjury brief;
    - the Director's rejection of Spey;
    - the reasons expressed in the Director's letter of 16 March 2023 for rejecting Spey;
    - the reiteration in the Director's letter of 26 May 2023 of what the Director considered to be "defects" in Spey;

- the Director's analysis in her letter of 26 May 2023 of what she considered to be the law relating to misconduct in public office in relation to Charlie;
- the identification in the Director's letter of 26 May 2023 of defences which she conjectured the Charlie accused might call in aid; and
- the views expressed in the Director's letter of 26 May 2023 regarding public interest considerations that would dispose her not to approve a charge of relevant offence against any present or former VicPol officer,

I no longer think it is realistic to suppose that the Director could be persuaded to approve any charge of relevant offence.

41. The foregoing is not, and is not intended to be, an adverse finding about the Director or anyone else within the meaning of section 99(2) of the SI Act, nor the expression of an opinion or comment adverse to the Director or anyone else within the meaning of 99(3) of the SI Act. It is a statement of the facts that have occurred. I remain of the views expressed in my letters to the Director of 20 March 2023 and 29 May 2023. I consider that the Spey brief established a powerful case of relevant offending and offered substantial prospects of securing convictions. Prior to receipt of the Director's letter of 26 May 2023, I was also of the view that, despite the Director's rejection of Spey, there was a realistic chance that the Director would approve the Charlie brief of evidence when submitted, and that, if approved, Charlie would afford a substantial prospect of securing a conviction. I remain of the view that it would have. But as it appears to me from the Director's letters of 20 March 2023 and 26 May 2023, the Director is of a contrary view, and I accept as I am bound to do that the Director's decisions are determinative. As was noted at the outset, the effect of section 40 of the SI Act is that OSI must obtain the Director's permission to file any charge of relevant offence regardless of OSI's assessment of the strength of the evidence.

42. Since it now appears to me that the Director will not grant OSI permission to file any charge of relevant offence, I consider it to be pointless for OSI to continue. In my view, the appropriate course is for OSI to be wound up.

Conclusion

43. It is of course for the Government and Parliament to determine whether to wind up OSI, and I do not presume to anticipate their decisions. Nevertheless, it has become clear that my assessment of the strength of the evidence necessary to establish the commission of relevant offences and the Director's approach to the matter stand considerably apart and are unlikely to coalesce. If, therefore, the Government or Parliament decides that OSI should continue to investigate and analyse evidence of relevant offences, it will cease to be appropriate for me to remain as Special Investigator. In that event, I shall resign so that someone whose views more closely accord to the Director's position may be appointed in my place.

44. It has been an honour to serve thus far as Special Investigator and a privilege to work with the lawyers, investigators, analysts and other staff of OSI who have laboured with me over the last

18 months in establishing OSI and endeavouring to discharge its statutory responsibilities. I regret only that I have been unable to achieve the results that presumably were expected at the time of my appointment.

Geoffrey Nettle
Special Investigator
20 June 2023

Kerri Judd KC
Director of Public Prosecutions
Victoria

Director's Chambers
565 Lonsdale Street
Melbourne VIC 3000
DX 210290

T: 03 9603 7508
E: director@opp.vic.gov.au

16 March 2023

The Hon. Geoffrey Nettle AC KC
Special Investigator
Office of the Special Investigator

BY EMAIL: *Geoffrey.Nettle@osi.vic.gov.au*

Dear Special Investigator,

Re: Determination pursuant to s41(1) *Special Investigator Act* 2021

1. I refer to your request for a determination as to whether a charge sheet should be filed against:
   a. [redacted]; and
   b. each of the following Victoria Police ("VicPol") officers:
      i. Former [redacted]
      ii. [redacted];
      iii. Former [redacted]
      and
      iv. Former [redacted]
   for the offence of attempting to pervert the course of justice.

2. The proposed charge essentially encapsulates two conversations between [redacted] and [redacted] client [redacted] Fleet (a pseudonym) (FLEET) on 22 April 2006.

3. I have determined that a charge sheet should not be filed against any of the five proposed accused. The determination was made as a special decision within the meaning of the *Public Prosecutions Act* 1994. My determination is provided with this correspondence.

4. The reason for not authorising the proposed charge sheet is that I am of the view that there is no reasonable prospect of conviction against any of the proposed accused on the charge of attempting to pervert the course of justice.

5. The primary reason for determining that there are no reasonable prospects of conviction is that there is no witness statement from FLEET. This is important for a number of reasons, but it is particularly important in the context that there is insufficient admissible evidence on the brief to prove what conduct [redacted] *in fact* engaged in when [redacted] was alone with FLEET following [redacted] arrest on 22 April 2006.

6. The OSI was unable to persuade FLEET to make a witness statement and I was informed in conference with the OSI that those attempts have been exhausted.

7. There is no other evidence of what went on between FLEET and [redacted] on the two critical occasions.

8. A compulsory examination of FLEET has been suggested as a possibility by the Special Investigator. I have a number of concerns about this as a proposed course. However, I need not reach a final conclusion about a future compulsory examination because an assessment of the reasonable prospects of conviction must be undertaken on the evidence currently available to the prosecution, not on the basis of what further evidence *might* be obtained. Given FLEET's evidence is essential to a successful prosecution, I am not prepared to authorise the charge in the hope that FLEET's evidence might be obtained through this mechanism.

9. Reliance on the evidence that FLEET gave to the Royal Commission has also been suggested as a possibility by the Special Investigator. I am not convinced that this is a viable legal option. In any event, I am of the view that to proceed in such a fashion would lead to an unfair trial as, without FLEET, each accused would be deprived of the ability to test the prosecution case in any meaningful way.

10. I also note that:
    a. FLEET's evidence at the Royal Commission is in the form of substantially leading questions which would not be admissible in a criminal prosecution;
    b. he was not cross examined about the matters the subject of this proposed charge by any of the proposed police accused; and
    c. only two of the proposed police accused were *arguably* represented.

11. Calling [redacted] as a prosecution witness has also been raised as a possibility by the OSI. I am not persuaded that calling [redacted] gets this prosecution over the line. For a number of reasons [redacted] does not satisfy the Director's policy in relation to undertakings or indemnities. I would not be prepared to pursue the police accused in place of [redacted] in circumstances where [redacted] breached [redacted] and [redacted] client. In many respects, the conduct of [redacted] is far worse than the individual police officers the subject of this brief of evidence.

12. I am also not satisfied that the content of the two can-say statements fills the evidentiary gaps in the prosecution or establishes that there was a joint criminal enterprise in place.

13. I am also not persuaded that [redacted] could be put forward as a witness of truth:
    a. [redacted] has a history of exaggerating [redacted] actions and achievements and overstating the importance of [redacted] role in various matters, a fact which [redacted] admitted to the Royal Commission;
    b. [redacted] has a demonstrated antipathy towards Victoria Police;
    c. [redacted] would fall into the category of a criminally concerned witness necessitating the giving of an unreliability warning pursuant to s.32 *Jury Directions Act*;
    d. [redacted] has given vastly different accounts of the evidence relevant to this proposed prosecution.

14. In relation to the audio recordings, there are some admissions made by [redacted] against [redacted] interest, but overall they are insufficient to mount a prosecution case and they are insufficient to negate a likely defence by the police that they tried to discourage [redacted] from being available to advise FLEET upon [redacted] arrest, that [redacted] was not instrumental in rolling FLEET and that they did not want [redacted] there but did not know how to avoid the situation. In any event, [redacted] admissions against interest are not admissible against the other four proposed accused.

15. Given my determination is based on there being no reasonable prospect of conviction, I have not been required to balance the competing public interest issues.

16. Accordingly, my determination is that a charge sheet should not be filed against any of the five proposed accused. The determination is based on there being no reasonable prospect of conviction.

Yours faithfully,

Kerri Judd KC
Director of Public Prosecutions

Determination pursuant to s41(1) *Special Investigator Act* 2021

1. On 8 December 2022, the Special Investigator sought a determination of whether a charge sheet may be filed.

2. The proposed charge alleged that between 20 April 2006 and 22 April 2006 –

   a. the [redacted]); and
   b. each of the following Victoria Police ("VicPol") officers:
      i. Former [redacted];
      ii. [redacted];
      iii. Former [redacted]; and
      iv. Former [redacted],

   committed a series of acts that had the tendency to pervert the course of justice comprised of [redacted] with the knowledge and concurrence of each [redacted] pretending to [redacted] client Mr Fleet (a pseudonym) (FLEET) that she was acting as FLEET's [redacted] **bona fide** and independently in FLEET's best interests while [redacted] was in truth acting as a covert agent of VicPol with the aim and intent of persuading FLEET to admit offences with which it was planned he be charged and to act against, and to inform and give evidence against other suspected offenders.

3. I determine that the proposed charge sheet should not be filed.

4. The determination is based on an assessment that there is no reasonable prospect of conviction against any of the proposed accused on the charge of attempting to pervert the course of justice.

5. This determination was made as a special decision within the meaning of the *Public Prosecutions Act* 1994.

Kerri Judd KC
Director of Public Prosecutions

16 March 2023

OFFICE OF THE
SPECIAL INVESTIGATOR
VICTORIA

Level 9/451
Little Bourke Street
Melbourne VIC 3000

Ms Kerri Judd KC
Director of Public Prosecutions
Director's Chambers
565 Lonsdale Street
Melbourne, VIC. 3000

20 March 2023

By email

Dear Madam,

Determination pursuant to section 41(1) of the Special Investigator Act

I refer to your letter of 16 March 2023 and the enclosed Determination pursuant to section 41(1) of the *Special Investigator Act 2021* (SI Act) that the proposed charge sheet delivered to you on 7 December 2022 should not be filed.

Until I received your letter, I had hoped that if you had any reservations about the proposed charges, you would put your concerns in writing and allow the Office of the Special Investigator (OSI) the opportunity of responding before you made a final determination. Leastways, given the extensive work of the Royal Commission into the Management of Police Informants (RCMPI) and the consequent wide-spread public concern over the use by Victoria Police of Nicola Maree Gobbo (GOBBO) as a human source, I assumed that you might think that your consideration of the proposed charges required as much. Evidently, however, you are of a different view, and of course your view is determinative.

But in case the adequacy of OSI's efforts to make the case sought to be advanced is hereafter made the subject of inquiry, it is appropriate that I record in brief substance the way in which OSI would have responded to your concerns if given the opportunity.

Adequacy of evidence on the brief to sustain a conviction

In paragraph 5 of your letter, it is stated that the primary reason for your determination is that there are no reasonable prospects of conviction because "there is insufficient evidence on the brief to prove what [redacted] *in fact*[1] engaged in when [redacted] was alone with FLEET[2] following [redacted] arrest on 22 April 2006". Then, in apparent explication of that proposition, it is stated in paragraph 7 of your letter that, apart from the evidence which FLEET might have given, there "is no other evidence of what went on between FLEET and [redacted] on the two critical occasions". Thus, it is concluded, in paragraph 8 of your letter, that "FLEET's evidence is essential to a successful prosecution".

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1 Your emphasis.
2 A pseudonym.

With great respect, as was emphasised in the Memorandum accompanying the brief FLEET's evidence is not essential to a successful prosecution. Quite apart from any evidence which FLEET might have given, there is on the brief an abundance of circumstantial evidence of what occurred between [redacted], FLEET and [redacted] on the second and critical meeting between [redacted] and [redacted] on the night of 22 April 2006, and direct evidence of what occurred on that occasion. In totality, it leaves no room for reasonable doubt that, whatever exactly was said, [redacted] while acting as a covert agent of police, encouraged FLEET to "roll" and thus accept the offer that [redacted] had made to FLEET in the hour preceding that meeting.

Presumably, you or your officers have read all of the circumstantial evidence on the brief and closely considered its relevance and probative value. If so, you will be aware that there are more than five thousand pages of it and thus that it is impracticable to summarise all of it within a communication of this kind. Given, however, that your reasons for determination make very little mention of its substance or effect, I note the following few significant highlights as worthy to be kept in mind.

The circumstantial evidence of the origins and development of the investigative plan to roll FLEET

As was noted in the memorandum accompanying the brief, the case is substantially documentary, and, as the documentary evidence shows, the idea that [redacted] should use [redacted] influence over FLEET to cause [redacted] to "roll" and provide information to assist police first emerged on 26 September 2005 (just over a week after [redacted] 16 September 2005) when [redacted] with [redacted] present) asked [redacted] if [redacted] thought [redacted] was persuasive enough to convince FLEET to assist[5]. [redacted] observed that FLEET's life would be a lot easier if MOKBEL were not around and suggested that [redacted] sit down with FLEET and see what [redacted] knew and what opportunities there were to do something with [redacted] that might help police lock MOKBEL up.

On 27 September 2005, that idea was discussed at a meeting of [redacted][6]. [redacted] recorded: "...[redacted] could convince [FLEET] [to] talk to [redacted] – either [FLEET] or [BICKLEY[7]] roll Tony Mokbel will do life..."

Likewise, [redacted] recorded: "[redacted][8] tasked to ST [FLEET]" ... Talk [FLEET] to coming on board ... [redacted] to progress [FLEET] matter".

On the same day, [redacted] briefed [redacted] and they discussed the development of the investigation strategy and the need to ensure that [redacted] was not compromised. As a result of the briefing, [redacted] recorded[9]: "...[FLEET] might roll over ... Discussed handling of info from [redacted] ...highly sensitive..."

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3 A pseudonym.
4 A pseudonym.
5 Para [47] of the Statement of Material Facts refers.
6 Para [49] of the Statement of Material Facts refers.
7 A pseudonym.
8 [redacted]
9 Para [52] of the Statement of Material Facts refers.

Two days later, [redacted] recorded[10]: "Purana re [redacted] advised actions + possibility of challenge. AOS. High risk. Brief on background and strategies to address".

On 30 September 2005, [redacted] spoke to [redacted] and [redacted] about [redacted] in relation to investigation strategies. As a result, [redacted] recorded[11]: "1430 Meet with [redacted] – Op Quills [redacted] … [FLEET] may role [sic]." Likewise, [redacted] wrote in his diary"[12]: "[FLEET] may roll – investigate".

On 5 October 2005 [redacted] and [redacted] agreed that [redacted] and [redacted] should attend a pub with [redacted] in a covert ploy designed to determine if FLEET would agree to assist police[13].

On 28 October 2005, [redacted] expressly recognised the extraordinary conflict of interest involved in [redacted] acting covertly against [redacted] and knew that [redacted] was not disposed to cease [redacted][14].

The enormity of the [redacted] and the possible, consequent ramifications of continuing to employ [redacted] as a covert agent of police in those circumstances were then further expressly recognised in the OP POSSE risk assessment. It was noted that by virtue of [redacted]'s:

> "occupation and particular position, if compromised, the handling of this Source would come under extreme scrutiny. This could cause embarrassment and criticism of the Force. This must be considered and balanced against the proposition of not utilizing the Source, and the potential resultant harm to the public that may occur through lack of intelligence against very large scale drug traffickers."

[redacted] completed the assessment as the "Handler" on 15 November 2005[15].

Following discussion between [redacted] and [redacted] on 12 January 2006[16], on 16 January 2006 [redacted], [redacted] and [redacted] resolved to narrow the investigation onto the opportunity of rolling FLEET[17].

Between those dates and 9 March 2006, [redacted] provided police with a stream of information regarding FLEET directed to catching [redacted] red-handed and thereby inducing [redacted] to roll[18].

On 9 March 2006, [redacted] discussed with Officer [redacted] [redacted] and [redacted] the inevitability of [redacted] having to attend on FLEET when FLEET was arrested[20].

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10 Para [55 of the Statement of Material Facts refers.
11 Para [57] of the Statement of Material Facts refers.
12 Para [60] of the Statement of Material Facts refers.
13 Para [68] of the Statement of Material Facts refers.
14 Para [78] of the Statement of Material Facts refers.
15 Para [83] of the Statement of Material Facts refers.
16 Paras [100] and [101] of the Statement of Material Facts refer.
17 Paras [103] and [104] of the Statement of Material Facts refer.
18 Paragraphs [105] to [126] of the Statement of Material Facts refer.
19 A pseudonym.
20 Paragraphs [127]-129] of the Statement of Material Facts refer.

On 5 April 2006, [redacted] discussed with [redacted] handlers the need to obtain an adjournment of FLEET'S Matchless and Landslip Presentment pleas so that [redacted] would continue to cook and thus could be caught red-handed in accordance with the plan[21].

At a meeting between [redacted] and [redacted] on 18 April 2006, it was reiterated that the objective of the operation was to arrest FLEET in possession of incriminating evidence, "roll [redacted] over", and use [redacted] against others[22].

At 5.45 pm on 18 April 2006, [redacted] told [redacted] that [redacted] considered that the way to get FLEET to roll was to make FLEET believe that the MOKBELs had been arrested, that [redacted] should be the officer involved in the exercise of rolling FLEET because FLEET had respect for [redacted], and that FLEET would listen to [redacted] s advice [to roll] when FLEET was arrested[23].

[redacted] immediately called [redacted] and informed [redacted] of what [redacted] had said[24]. The very next day, 19 April 2006, [redacted] and [redacted] met and discussed the way to approach FLEET following [redacted] arrest[25].

And on the same day, [redacted] and [redacted] attended at the offices of the Director of the Public Prosecutions on [redacted] and [redacted] to discuss the terms of the plea deal to be offered to FLEET on [redacted] arrest, and request the DPP to procure an adjournment of FLEET's plea in Matchless and Landslip, on the basis that there is ["a much bigger picture at play"][26].

At 6.00 pm on 19 April 2006, [redacted] and [redacted] further discussed the fact that [redacted] would attend on FLEET when [redacted] was arrested and would purport to [redacted] FLEET as [redacted] [redacted][27].

On the evening of 20 April 2006, [redacted] and [redacted] again discussed the ethics of [redacted] purporting to [redacted] FLEET post his arrest. [redacted] once again made clear that it was what [redacted] proposed to do. Neither [redacted] nor [redacted] said or did anything to prevent it[28]. To the contrary, at 9.23 am on 22 April 2006 [redacted] telephoned [redacted], asked [redacted] to notify [redacted] handlers if [redacted] received any contact from FLEET, and directed [redacted] that [redacted] may see [redacted] handlers at the St Kilda Road Police Complex after FLEET was taken there following his arrest, and that, if so, [redacted] was to ignore them[29].

Thereafter, [redacted] did attend at the St Kilda Road Police Complex purporting to [redacted] FLEET [redacted] [redacted]; [redacted], knowing that it was [redacted]'s purpose to roll FLEET explained the terms which had been offered to FLEET to roll; and [redacted] in accordance with the understanding that [redacted]

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21 Paragraphs [153] of the Statement of Material Facts refers.
22 Paragraph [193] of the Statement of Material Facts refers.
23 Paragraph [196] of the Statement of Material Facts refers.
24 Paragraph [196] of the Statement of Material Facts refers.
25 Paragraph [198] of the Statement of Material Facts refers.
26 Paragraphs [181], [193], [195] and [199] of the Statement of Material Facts refer.
27 Paragraph [200] of the Statement of Material Facts refers.
28 Paragraph [208] of the Statement of Material Facts refers.
29 Paragraph [216] of the Statement of Material Facts refers.

would attend and persuade FLEET to roll, was left alone with [redacted] and FLEET for more than an hour to persuade FLEET to accept [redacted]'s terms[30].

Then, at the end of that hour of persuasion, FLEET agreed to accept [redacted]'s terms, evidently persuaded by whatever had been said during the course of their hour-long discussion.

The direct evidence

After leaving the police complex and retiring with [redacted] and [redacted] to a nearby hotel, [redacted] confirmed that [redacted] had "push[ed] [redacted] [FLEET] over the line tonight"[31].

As was explained in the Memorandum accompanying the brief of evidence, that evidence of what [redacted] said to [redacted] and [redacted] in the hour following [redacted]'s meeting with [redacted] and FLEET is not just admissible against [redacted] as an admission against interest pursuant to section 81 of the *Evidence Act 2008*, but is also admissible against [redacted], and thus against the other participants to the joint criminal enterprise, as direct evidence of the fact of what [redacted] said to [redacted] and [redacted] reaction to it.

Furthermore, as was confirmed by [redacted]'s statement to [redacted] at 11.32 am on the morning of 23 April 2006, [redacted] and [redacted] were never in any doubt that FLEET had been deceived that [redacted] was not in any way involved in FLEET's arrest[32]. And that evidence is admissible against not only [redacted] as an admission against interest but also admissible as against the other accused as evidence of the truth of [redacted]'s statement, pursuant to section 65(2) of the Evidence Act.

Calling [redacted] as a witness for the Crown

In paragraph 11 of your letter, it is stated that you are not persuaded that the evidence that [redacted] can give "gets this prosecution over the line".

But as was noticed in the Memorandum accompanying the brief of evidence, it is not essential that [redacted] be called as a witness for the Crown. The case is capable of yielding a verdict of guilty beyond reasonable doubt on the basis of the circumstantial and direct evidence which is partially summarised above. It is just that [redacted] would add to the weight of the case if [redacted] were called.

Your letter states that [redacted] could not be called because [redacted] does not satisfy your policy in relation to undertakings or indemnities, and the reason given in paragraph 11 of your letter for that is said to be that you "would not be prepared to pursue police in place of [redacted] in circumstances where [redacted] breached [redacted] ethical obligations [redacted]" and "[i]n many respects, the conduct of [redacted] is far worse than the individual police officers the subject of this brief of evidence". With respect, that reasoning entails a number of misconceptions.

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30 Paragraph [242] of the Statement of Material Facts refers.
31 Paragraph [248] of the Statement of Material Facts refers.
32 Paragraph [257] of the Statement of Material Facts refers.

Indemnity or Undertaking

It is not suggested, and it has never been suggested, that [redacted] should not be charged or convicted of attempting to pervert the course of justice by acting as [redacted] did towards FLEET on the night of 22 April 2006. As was stated in the Memorandum accompanying the brief of evidence, [redacted] accepts [redacted] criminal responsibility for what occurred and is prepared to be charged and plead guilty on condition only that the Crown will acknowledge at the hearing of [redacted]'s plea in mitigation of penalty that a non-custodial sentence would not be beyond the range of the sound exercise of sentencing discretion. Nor can it sensibly be supposed that a non-custodial disposition would be beyond the range: given [redacted]'s age, [redacted], and social circumstances, [redacted] physiological and psychological condition, and the deprivations to which [redacted] has been subjected over the last 14 years by reason of having acted as a covert police agent in a manner that was known to and either actively or tacitly encouraged by the police officers, among others, who are proposed to be charged. Your assessment of whether [redacted]'s conduct was "far worse than the individual police officers" is, with due respect, beside the point. Each of [redacted] and the other four putative accused are criminally liable and all should be charged. Relative criminality is a matter for the sentencing judge to determine in his or her assessment of nature and gravity of [redacted] offending.

With respect, it is true, as is stated in substance in paragraph 13 of your letter, that [redacted]'s reputation for credibility and reliability is questionable. But that said, the important point is that, whatever criticisms might be levelled against [redacted] either out of court or in cross-examination, the documentary evidence (only some of which is summarised above) consists almost entirely of VicPol records that wholly accord with [redacted]'s [redacted] statements, and the audio recording evidence (to only some of which reference is made above) is irrefutable evidence of what [redacted] and relevant police officers said to each other which substantially corroborates the whole of [redacted]'s testimony.

For those reasons, the considerations adumbrated in paragraphs (a) to (d) of paragraph 13 of your letter are also essentially beside the point. More particularly:

(a) Allowing that [redacted] has a history of exaggerating [redacted] role, the objective evidence is clear that [redacted] and [redacted] conferred with FLEET alone for more than an hour on the night of 22 April 2006 without disclosing that [redacted] was a covert agent of police; and, by reason of whatever [redacted] and [redacted] may have said to FLEET in the course of the hour, they persuaded [redacted] to roll over and accept [redacted]'S offer. In substance, [redacted]'s evidence of what occurred in the course of that hour asserts no more than that.

(b) [redacted] may not like VicPol but that is hardly a factor that disqualifies [redacted] from giving objectively corroborated evidence against current and former VicPol officers. Any number of Crown witnesses who dislike accused daily give evidence which juries accept and which results in convictions. If a Crown witness's dislike of an accused were a disqualifying factor, there would never have been any Purana convictions.

(c) Granted, [redacted] does fall into the category of a criminally concerned witness, and that might result in the defence seeking a direction that [redacted]'s evidence may be unreliable. But given that [redacted]'s evidence would be objectively corroborated in almost every material respect, such a direction would be unlikely to deter a jury from accepting [redacted]

testimony. It is far more likely that a jury would be persuaded by the very close correlation between the objective evidence and [redacted]'s testimony and the complete absence of evidence to rebut it. There is none, and none which could be given by any of the other putative accused without contradicting [redacted] evidence before the RCMPI.

(d) It is not apparent from paragraph (d) of paragraph 13 of your letter which "vastly different accounts" you have in mind. Suffice it to say, therefore, that whatever differences there may have been, they would be impotent to cast doubt on the irrefutable correlation between the objective evidence and [redacted]'s can say statements.

Audio recordings

In paragraph 14 of your letter, it is stated in effect that, although the audio recordings contain some admissions against [redacted] they are overall insufficient to mount a prosecution case and they are insufficient to negate a likely defence by the police that they tried to discourage [redacted] form being available to FLEET upon [redacted] arrest; that [redacted] was not instrumental in rolling FLEET; that the police did not want [redacted] there but did not know how to avoid the situation; and in any event they are only admissions against [redacted]'s interest and are inadmissible against the other proposed accused.

There are several matters which bear upon that analysis and they should be considered separately.

First, the principal significance of the audio recordings is that they establish beyond peradventure exactly what was said between [redacted] and other handlers in the period which began [redacted] in September 2005 and continued on until 26 April 2006. As such, as was explained in the Memorandum which accompanied the brief, they are admissible against all accused, whether as admissions pursuant to section 81 of the Evidence Act or as against other participants in the conversation as evidence of what they were told and how they reacted to it.

Secondly, what emerges from the audio recordings, even those few to which your officers listened when they attended this office during the morning of 27 February 2023 (but more so from the totality), is that [redacted] and [redacted] knew that [redacted] was intent on attending on FLEET following [redacted] arrest and there persuading [redacted] to roll, while at the same time keeping secret from [redacted] that [redacted] who had assisted police in the conception, and was assisting police in the execution, of the plan to concentrate on FLEET as the "weak link" and roll [redacted].

Thirdly, it is true that within the recordings there are a couple of perfunctory suggestions by [redacted] to [redacted] that it might be better for all concerned if [redacted] did not attend on FLEET following [redacted] arrest. But as the recordings also attest, [redacted] on each occasion immediately repudiated the suggestion as impractical and left [redacted] and [redacted] in no doubt that [redacted] would attend, pretendedly as [redacted] but with the true intent of endeavouring to persuade FLEET to roll.

Finally, what the recordings also demonstrate is that neither [redacted] nor [redacted] nor indeed any other involved police officer did anything at all to stop [redacted] doing what [redacted] stated [redacted] intended to do - nor even warn FLEET of [redacted]'s true status and purpose - no doubt because those police officers conceived that to do so might get in the way of achieving the object of rolling FLEET. Perhaps, one or other of the putative accused might seek to defend the charge against [redacted] by contending that there was nothing that VicPol could do to stop [redacted] attending or to warn FLEET of what [redacted] was about. But with all respect, the idea that a rational jury rightly directed might accept such a contention is risible.

Yours faithfully,

Geoffrey Nettle
Special Investigator

cc The Attorney-General

OFFICE OF THE
SPECIAL INVESTIGATOR
VICTORIA

Level 9/451
Little Bourke Street
Melbourne VIC 3000

20 March 2023

The Hon Jaclyn Symes MLC
Attorney-General
Level 26, 121 Exhibition Street
Melbourne VIC 3000
(*By email: ken.mcpherson@minstaff.vic.gov.au*)

Dear Attorney-General,

Rejection of Spey brief of evidence

As recently reported to the Implementation Monitor, on 7 December 2022 the Office of the Special Investigator (OSI) submitted a second brief of evidence (the Spey brief) to the Director of Public Prosecutions (DPP) pursuant to section 40 of the *Special Investigator Act 2021*.

The Spey brief was the culmination of an eleven-month investigation into the use of [redacted]. Up to 11 investigators were allocated to the investigation, supported by up to five legal staff and up to three intelligence staff. The investigation gathered available evidence by reviewing Royal Commission Records and records obtained by way of voluntary production as well as records obtained under search warrants (of which nine were executed on multiple agencies). As part of the investigation, 40 witnesses were identified, with 22 co-operating providing 23 statements and 18 being unwilling to co-operate. Based on the brief of evidence, OSI recommended to the DPP that five persons be charged with offences of attempting to pervert the course of justice.

On 16 March 2022, the OSI received advice from the DPP that the DPP had determined that the proposed charge sheet should not be filed, together with a letter of 16 March 2023 from the DPP outlining her reasons for determination. I enclose a copy of the DPP's determination and the DPP's letter of reasons. They are confidential and are provided to you only so that you are fully informed of a very significant development in the course of the OSI's investigations. Neither document should be publicly distributed lest its distribution prejudice any future prosecution.

I have today written to the DPP outlining the OSI's response to the DPP's reasons. I enclose a copy of my letter to the DPP, which I trust is self-explanatory. Like the DPP's determination and reasons, my letter is confidential and provided to you only so that you are fully informed of the situation.

Yours sincerely,

Geoffrey Nettle
Special Investigator
cc The Director of Public Prosecutions

Office of Jaclyn Symes MP

Attorney-General
Minister for Emergency Services

121 Exhibition Street
Melbourne Victoria 3000
Telephone: +61 3 8684 1111

Our ref: 23050467

Mr Geoffrey Nettle AC KC
Special Investigator
Level 29
121 Exhibition Street
Melbourne VIC 3000

By email: Geoffrey.Nettle@osi.vic.gov.au

Dear Mr Nettle,

Thank you for your recent update on the important investigations that the Office of the Special Investigator (OSI) is progressing in line with its functions under the *Special Investigator Act 2021* and the recommendations of the Royal Commission into the Management of Police Informants (Commission).

I appreciate your frank advice regarding the outcome of the OSI's initial briefs of evidence to the Director of Public Prosecutions (DPP), including the decision of the DPP not to prosecute those matters. I understand from your advice that these initial investigations presented the strongest likelihood of successful prosecution, and involved conduct most closely linked to the matters that gave rise to the Commission. I understand you have also raised these matters with the Implementation Monitor, Sir David Carruthers.

In light of your update, and advice from the Implementation Monitor, I am writing to seek further information on the status of the remaining OSI investigations, in particular your views in relation to the likelihood of remaining investigations resulting in successful prosecutions given the recent decision of the DPP.

Noting the sensitivities involved in providing such advice in the context of ongoing investigations by the OSI, the request for that advice from the OSI is limited to two key issues, namely:

1. Advice in relation to the nature of the OSI's remaining investigations, in particular the proximity of the conduct the subject of those investigations to the events and individuals at the heart of Victoria Police's uses of Ms Gobbo as a human source
2. As far as possible, your view of the likelihood that the outstanding investigations will result in the provision of a brief to the DPP or commencement of a disciplinary proceeding, and the likelihood based on outcomes from initial briefs that these matters will proceed to prosecution.

My department will continue to work closely with you to understand the resourcing and operational needs of the OSI in the current fiscally constrained environment once the

outcomes of OSI's request for additional funding are known, following release of the 2023-24 Budget on 23 May 2023.

If your office would like to discuss any of these issues further, please contact [redacted].

Yours sincerely

Jaclyn Symes MP
Attorney-General
Minister for Emergency Services

22/05/2023

OSI

OFFICE OF THE
SPECIAL INVESTIGATOR
VICTORIA

Level 9/451
Little Bourke Street
Melbourne VIC 3000

23 May 2023

The Hon Jaclyn Symes MLC
Attorney-General
Level 26, 121 Exhibition Street
Melbourne VIC 3000
(*By email: ken.mcpherson@minstaff.vic.gov.au*)

Dear Attorney-General,

Office of the Special Investigator (OSI) – remaining investigations

1. I refer to your letter of 22 May 2023 requesting information as to the status of remaining OSI investigations; the probability of any of them resulting in the provision of a brief of evidence to the Director of Public Prosecutions (DPP); and my opinion as to the chances of the Director granting her approval to file charges.

2. The short answer to your enquiry is that, subject to the maintenance of OSI's present staffing levels and operational budget, I am confident that the investigation in which OSI is now engaged will result in the provision of a major, comprehensive brief of evidence to the Director by early 2024, and that there is good reason to think that the Director may be satisfied that the charges proposed in this new brief of evidence should be filed. If, however, the Director rejects the new brief of evidence, it will be appropriate then to reconsider whether further investigations should be pursued.

3. To explain why that is so necessitates some recitation of OSI's work to date.

The course of investigations to date

4. As you are aware, OSI was established on 1 December 2021 pursuant to section 6 of the *Special Investigator Act 2021* (SI Act) with the principal purposes, in substance, of:

   - investigating and determining whether there is within the records of the Royal Commission into the Management of Police Informants (Royal Commission records) or otherwise sufficient evidence to establish the commission of offences arising out of the deployment of Nicola Maree Gobbo as a police informant (relevant offences); and

   - on that basis, providing to the Director of Public Prosecutions briefs of evidence for the Director to determine whether charges should be filed against persons in relation to relevant offences.

5. On commencing operations in January 2022, OSI identified eight matters involving possible relevant offences which OSI determined were worthy of investigation. Each entailed multiple suspected offences committed in the context of a range of divergent facts traversing a period of more than nine years.

6. After several months of investigation, OSI concluded that one of the eight matters (Spey) stood out from the others as by far the strongest case of relevant offending, which as such provided the best chances of securing convictions. Accordingly, the bulk of OSI's investigative resources were thereafter focussed on Spey with the aim of completing the investigation and the preparation of the Spey brief of evidence in the shortest practicable time.

7. That aim was achieved. Although, as you know, OSI faced very significant difficulties in gaining access to unredacted Royal Commission records and in attempting to overcome myriad police claims of public interest immunity and statutory secrecy[1], on 8 December 2022 Operation Spey culminated in the delivery of the Spey brief of evidence to the Director of Public Prosecutions, and, by memorandum accompanying the brief, OSI sought a determination by the Director pursuant to section 41 of the SI Act that OSI be permitted to file charges of attempting to pervert the course of justice against five identified persons.

The Spey brief of evidence

8. The Spey brief of evidence consisted of more than five thousand pages of admissible documentary evidence, many hours of audio recordings, and multiple witness statements. Consequently, as OSI anticipated, it took the Director several months to respond to OSI's request for determination. During that period, OSI refocussed its investigative resources on the three further cases of apparent relevant offending (Operation Leith, Operation Wick and Operation Forth) that OSI determined would provide the next best chances of securing convictions. The aim was to complete Leith, Wick and Forth and submit a brief of evidence in at least one of those matters by the end of calendar 2023.

9. Contrary to OSI's expectations, on 16 March 2023 the Director notified OSI that she had determined that a charge sheet should not be filed against any of the alleged Spey offenders, because she did not consider there was a reasonable prospect of conviction against any of those persons[2]. Operation Spey thus ended without prosecution.

Operation [Charlie]

10. Meanwhile, as a result of work carried out in Leith, Wick and Forth throughout December 2022 and January 2023, by the end of January 2023 OSI had concluded that, although none of Leith, Wick and Forth was individually as strong as Spey, further investigation was likely to yield sufficient admissible evidence to sustain a successful prosecution based on a much larger combined operation incorporating the major elements of Leith, Wick and Forth (Operation Charlie) directed to establishing beyond reasonable doubt that at least one former, [redacted] commissioned police officer (and potentially a limited number of other former [redacted] commissioned police officers) committed offences of misconduct in public office

1 Which are detailed in OSI's second report to the Implementation Monitor.

2 A restricted and highly confidential copy of the Director's letter of 16 March 2023 and of OSI's reply of 20 March 2023 were provided to you on 20 March 2023.

by failing to disclose, investigate and arrest persons suspected of attempting to pervert the course of justice by their deployment of Ms Gobbo as a covert agent of police.

11. As also later emerged from the Director's letter of 16 March 2023, Charlie has an apparent advantage over Spey in that some of the concerns the Director stated informed her rejection of Spey would not apply to Charlie, or at least would not apply in the same way and to the same extent.

12. In particular, in Spey the Director recorded that she regarded it as inimical to the success of the brief that the immediate "victim" of the alleged offences was not prepared to make a voluntary statement for inclusion in the brief. The Director was not prepared to proceed on the basis of evidence which (in view of the sworn evidence the immediate victim had given before the Royal Commission) OSI considered the immediate victim would almost certainly give if compelled to give evidence pursuant to section 103 of the *Criminal Procedure Act 2009* or under subpoena issued under section 336 of the Criminal Procedure Act. The Director further stated that another reason not to approve prosecution was that four of the persons proposed to be charged were at relevant times relatively junior police officers who, the Director said, she considered could conceivably raise a defence that they had been incapable of preventing what occurred.

13. By contrast in Charlie, although there were multiple immediate "victims" of the alleged offences who, like the immediate "victim" in Spey, may not agree to give evidence, the most important consequence of the Charlie alleged offences was the damage thereby done to the fundamental integrity of the criminal justice system; and the suspects the subject of Charlie were at relevant [redacted] senior police officers with apparent [redacted] responsibility for the conduct comprising the underlying offending (and thus plenary ability to have prevented what occurred).

14. So, therefore, despite the Director's rejection of Spey, since 16 March 2023 OSI has continued to focus all of its investigative resources on Charlie with the object of concluding the investigation and delivering the Charlie brief of evidence to the Director on or before 30 June 2024. Based on progress to date, I believe that OSI will meet the objective well within that time.

Further investigations after Charlie

15. Operation Charlie is a very large investigation which in effect combines the major parts of Leith, Wick and Forth into one operation and so requires the attention of OSI's entire investigation and analysis staff. Charlie is also heavily concentrated on [redacted] review and analysis of a massive volume of [redacted] files and documents in [redacted] only recently obtained under warrant from Victoria Police and further huge volumes of [redacted] files and other documents still to be seized. The scope and direction of Charlie may thus change over time (potentially extending the range of suspects to a further a limited number of former [redacted] commissioned officers) as more documents are reviewed and analysed. It is also envisaged that a number of prospective witnesses will come to understand that they have reason to assist.

16. Such developments will help determine whether and which of the remaining eight matters is to be further investigated once Charlie has been completed and also whether it is then appropriate to pursue any disciplinary offence investigations. For that reason, I am not yet in a position to provide you with an informed assessment of what will be done after Charlie, and I shall probably not be in a position to do so until, on present estimates, about April 2024.

17. What I can say for the time being, however, is that, if the Director approves the Charlie brief and permits the Charlie charges to be filed, there may be scope for further investigation and possibly charges against other former police officers, albeit less senior and less centrally involved than the subjects of Charlie. By contrast, if the evidence that I envisage will be assembled in support of Charlie fails to satisfy the Director that charges should be filed, it is unlikely that further investigation would lead to her approving charges in any other matter.

Future operations and resourcing requirements

18. OSI's ability to complete Charlie within the time envisaged and then manage further investigations is dependent on OSI maintaining its present staffing levels and operational budget. Apart from anything else, OSI's unfortunate experience to date is that an uncertain funding landscape leads rapidly leads to highly valued staff departing from OSI to take up more certain and durable employment opportunities. Having built up a superbly qualified workforce over the last 18 months with the skills and knowledge of the evidence essential to complete the tasks assigned to OSI, OSI cannot afford to lose even a few of them at this stage of operations. As matters stand, OSI aims to deliver the Charlie brief of evidence to the Director of Public Prosecutions by early calendar 2024 and, in that event, I estimate that the Director would be likely to make her determination in response to the brief by about April 2024. But any significant uncertainty as to staffing levels and operational budget before then will inevitably delay completion considerably. As OSI's current budget is due to expire on 30 June 2023, the Expenditure Review Committee's expedited approval of OSI's proposed budget is thus of critical importance.

19. I was grateful to be briefed by [redacted] yesterday afternoon and I should greatly value the opportunity of discussing the matter with you at your early convenience

Yours sincerely,

Geoffrey Nettle
Special Investigator

Kerri Judd KC
Director of Public Prosecutions
Victoria

Director's Chambers
565 Lonsdale Street
Melbourne VIC 3000
DX 210290

T: 03 9603 7508
E: director@opp.vic.gov.au

26 May 2023

The Hon. Geoffrey Nettle AC KC
Special Investigator
Office of the Special Investigator

BY EMAIL: geoffrey.nettle@osi.vic.gov.au

Dear Special Investigator,

Meeting regarding current OSI investigation

I refer to our meeting on 8 May 2023.

The Chief Crown Prosecutor and I have reflected further on the matters discussed with you and Mr Hevey at that meeting, and wish to raise the following issues for your consideration.

Assessing a brief based on contingencies

At that meeting, you asked whether there would be any circumstances in which a prosecution could be commenced based on a brief which relied on further admissible evidence being obtained at a later date.

As I understand your inquiry, the strength of such a brief might be contingent on:

- the making of an order or orders for compulsory examination under s 104 of the *Criminal Procedure Act 2009*; or
- additional statements being obtained from compellable witnesses after the filing of a charge or charges.

As you know, pursuant to s 41 of the *Special Investigator Act 2021*, the determination that a charge-sheet should be filed against a person in relation to a relevant offence can only be made by me. I cannot institute a prosecution unless first satisfied that, based on the available, admissible evidence, there are reasonable prospects of conviction.[1]

[1] *Policy of the Director of Public Prosecutions for Victoria*, 24 January 2022, 3 [1].

If, on assessment of a brief provided to me for consideration, I consider that:

- there are no reasonable prospects of conviction; but
- there may be reasonable prospects after a curial process has been invoked and further evidence obtained;

I will not authorise the commencement of that prosecution.

This view was conveyed to you in our correspondence of 16 March 2023 in relation to the earlier brief concerning [redacted] and the four police officers.

In the case of an application for an order under s 104 of the *Criminal Procedure Act 2009*, I am concerned that instituting a proceeding:

- for the purpose of invoking the coercive powers of the Magistrates' Court to obtain further evidence; and
- in circumstances where I do not believe there to be reasonable prospects of conviction based on the evidence available at the time of commencing the proceeding;

may be an abuse of process.

Observations regarding mens rea and misconduct in public office

In assessing whether or not there are reasonable prospects of conviction, I must consider any possible defence available to the accused.[2] I use the word 'defence' here to denote not just a substantive legal defence, but also a plausible defence case theory which might make it difficult or impossible for the Crown to prove an element of the offence beyond reasonable doubt.

As outlined in my 16 March 2023 letter regarding the earlier brief, the availability of certain defences (in the latter sense) to police officers was one of the reasons I determined not to authorise the filing of a charge-sheet against those police officers.

When reviewing any future briefs, I will again consider any possible defences available to the putative accused. With this in mind, I make the following observations.

I understand that your current investigation focuses on the liability of some senior members of Victoria Police for the common law offence of misconduct in public office. I do not know the identities of those police officers, the particulars of the alleged offence, or the extent of the evidence you have gathered to date.

However, in my experience, and the experience of the Office of Public Prosecutions, misconduct in public office is a difficult offence to prove beyond reasonable doubt.

A particular difficulty is the need to prove that the accused wilfully misconducted themselves.

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[2] Ibid 3 [2].

The requirement that the misconduct be 'wilful' signifies knowledge or advertence to the consequences.[3] Proof of recklessness can suffice.[4] But, either way, the mens rea is subjective.

The key question is not whether 'on a full investigation of the circumstances, the decision was strictly right, but from what motive it had proceeded'.[5] Was the motive dishonest, oppressive or corrupt; or was the conduct the product of mistake or error?[6]

In light of what we know from evidence given at the Royal Commission into the Management of Police Informants, in any prosecution of current or former members of Victoria Police, a likely defence case theory is clear. The accused will in all likelihood say that if, with the benefit of hindsight, any wrong or improper decisions were made, they were made in good faith in an effort to solve and prevent serious criminality.

They may also characterise the litigation the Chief Commissioner of Police commenced to protect Ms Gobbo's anonymity as a registered human source as an indication that their employer considered their acts to be not so patently wrong as to doom a public interest immunity claim. With the benefit of hindsight, that consideration was misguided. But the accused may well argue that Victoria Police's institutional position over the years regarding public immunity validated their own subjective perception that their actions did not amount to misconduct.

I will reserve my final determination of these matters until I have received any further brief of evidence. However, it seems to me that, in the face of that 'good faith' defence — and notwithstanding the cogent findings of the Royal Commission in relation to the impropriety of choices made by senior members of Victoria Police — it will be difficult to prove 'wilful misconduct' beyond reasonable doubt.

Impact of the passage of time

I also take this opportunity to make some observations about the passage of time, and the impact this has on the decisions ahead for our respective offices in relation to any further briefs you may refer to me.

Nicola Gobbo was first registered as a human source in 1995. However, the most relevant period of registration was between 1999 and 2009.

The Royal Commission's final report was published in 2020, and the Office of the Special Investigator was established in late 2021.

Since that time, we have received a brief from your office in December 2022. As indicated in my correspondence to you of 16 March 2023, there were a number of deficiencies in that brief. It was suggested that evidence a key witness gave to the Royal Commission could be relied on; this was not a viable option. It was suggested

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[3] *Shum Kwok Sher v Hong Kong Special Administrative Region* (2002) 5 HKCFAR 381 [85] (Mason ACJ); *Obeid v The Queen* (2017) 96 NSWLR 155, 193 (Bathurst CJ).
[4] *Obeid v The Queen* (2017) 96 NSWLR 155, 197-9 [178]-[183] (Bathurst CJ, Hamill J and N Adams J agreeing).
[5] *Maitland v The Queen* (2019) 99 NSWLR 376, 391 [69] (Bathurst CJ, Beazley P, Ward CJ, Hamill and N Adams JJ), quoting *R v Borron* (1823) 3 B & Ald 432, 434 (Abbott CJ).
[6] Ibid.

that the same witness could be compulsorily examined in circumstances where, without that witness's evidence, there would be insufficient evidence to justify a prosecution; this was also not a viable option. It was suggested that admissions against interest made by [redacted] would be admissible against the four co-accused; this was not a viable option. It was suggested that [redacted] could be put forward as a witness of truth; this was, in my view, not a viable option.

I raise these deficiencies at this time, because they demonstrate the evidentiary and legal complexity that these briefs present. I appreciate they take your office time to prepare. But they also take me and those advising me considerable time to review and assess.

It is not presently clear to me whether I will receive a further brief of evidence or, if so, when. But assuming that you provided me with a further brief of evidence imminently, it is unlikely I could make a decision on whether to authorise a prosecution in less than three months. Accordingly, the very earliest any prosecution would commence would be into the final quarter of 2023.

That hypothetical prosecution would then need to proceed through a committal process. Given the likely volume of documentary evidence involved, and the inherent complexity of a misconduct in public office prosecution, I consider it unlikely that a committal proceeding would conclude before the latter part of 2024. Any subsequent trial would be highly unlikely to proceed before late 2025 at the very earliest.

Accordingly, that hypothetical trial would likely proceed some 15-25 years after the events it concerns.

As it stands, the passage of time will undoubtedly have a significant bearing on the prospects of conviction. Witnesses' memories have likely faded over time, and will continue to do so, with consequences both in terms of the quality of the evidence available to the Crown, and to the ability of any accused person to meet the case against them.

It is also a matter I would have to take into account in determining whether it is in the public interest to proceed with a prosecution — particularly if there is a reasonable prospect that, at the conclusion of a protracted criminal proceeding, some years into the future, the ultimate disposition on a finding of guilt is non-custodial.

For these reasons, I would be grateful to receive a further brief of evidence, if one is to be prepared, as soon as possible.

Yours faithfully,

Kerri Judd KC
Director of Public Prosecutions

OSI

OFFICE OF THE
SPECIAL INVESTIGATOR
VICTORIA

Level 9/451
Little Bourke Street
Melbourne VIC 3000

Ms Kerri Judd KC
Director of Public Prosecutions
Director's Chambers
565 Lonsdale Street
Melbourne, VIC. 3000

29 May 2023

By email

Dear Madam,

Meeting regarding current OSI investigation

I refer to your letter of 26 May 2023. I regret that it has taken me until now to comprehend its full significance. To put the matter in appropriate context, however, I should deal first with some points of clarification.

To begin with, the references in your letter of 23 May 2023 to your letter of 16 March 2023 suggest you might think that I had forgotten its contents. I had not. In it you set out your reasons for rejecting the OSI's last submitted brief of evidence (the Spey brief). You stated that your primary reason for rejecting the Spey brief was that OSI had been unable to persuade the immediate victim of the alleged offending to make a witness statement for inclusion in the brief. You rejected OSI's submission that one could be confident that, if the victim were compelled to give evidence pursuant to section 103 of the *Criminal Procedure Act 2009*, the evidence [redacted] would give would be relevantly the same as the sworn evidence [redacted] had given before the Royal Commission into the Management of Police Informants (Royal Commission). You stated that you considered yourself bound to assess the strength of the brief "on the basis of the evidence currently available to the prosecution, not on the basis of what further evidence *might*[1] be obtained".

Indeed it was because I was mindful of your letter of 16 March 2023 that I emailed to you on 3 April 2023 regarding the next brief of evidence that the Office of the Special Investigator (OSI) proposed to submit to you pursuant to section 40 of the *Special Investigator Act 2021* (SI Act) (the Nairn brief). I explained that OSI Chief Counsel, Gary Hevey, and I had "hit a problem regarding proof of documents which would likely turn on such decision as you might make as to the application of section 103 of the *Criminal Procedure Act 2009* to the proof of documents, and I requested the opportunity to discuss

1 Your emphasis.

the problem with you and the Chief Prosecutor "on a preliminary, tentative and non-binding basis". That led you to agreeing to see us on 8 May 2023.

As I endeavoured to convey at the meeting of 8 May 2023, like the Spey brief much of the evidence comprising the Nairn brief was likely to consist of Victoria Police (VicPol) Informer Contact Report (ICR's), Source Management Logs (SML's) and official diaries. In contrast to the Spey brief of evidence, however, it was not proposed to charge the makers of those records, meaning that they would not be unavailable to give evidence, and, therefore, that section 65(2) *Evidence Act 2008* would not be engaged. That necessitated proof of the records aliunde. As you know, the records were verified in evidence before the Royal Commission by the former VicPol officers who made them. But as I explained on 8 May 2023, the problem we were facing was that those former VicPol officers might not be disposed to make witness statements for inclusion in the Nairn brief. OSI's assessment was that one could be confident that the evidence of verification which those former officers would give if compelled to give evidence pursuant to section 103 of the Criminal Procedure Act would be the same as the evidence of verification that they gave before the Royal Commission. On that basis, I asked you whether, if they refused to provide statements verifying the records for inclusion in the Nairn brief, you might be disposed to consider the strength of the brief on the basis of the verification evidence they had given before the Royal Commission, and thus would give if compelled to do so pursuant to section 103.

As I understood your response in the meeting, it was that you might be prepared to consider the question once you had seen the brief, but that you could not and would not give any guarantees. By contrast, as I understand your letter of 26 May 2023, you are no longer prepared to entertain even the possibility of proceeding on the basis proposed.

Secondly, as appears from your letter of 26 May 2023, your reason for refusing even to entertain the possibility is in part that you consider that it would contravene your policy: Policy of the Director of Public Prosecutions of Victoria 24 January 2022 3[1]. Since I expect that anything I might advance in opposition to that proposition would be powerless to persuade you, I say nothing about it. More concerningly, however, you also state that you consider that to approach the assessment of the brief on the basis proposed "may be an abuse of process". I reject that suggestion as both wrong and offensive. Section 103 of the Criminal Procedure Act was enacted for the very purpose of enabling evidence which is known to exist, and it appears on good grounds can be obtained only with the aid of compulsory process, to be obtained after a charge has been filed by order pursuant to section 103. Whether or not it accords to your policy, it is the law as decreed by Parliament and that is the antithesis of an abuse of process.

Thirdly, in my letter of 20 March 2023 I set out in brief substance why I considered that your reasons for rejecting the Spey brief of evidence were wrong. Despite the repetition of your reasons in your letter of 26 May 2023, I remain of the view they are wrong. As with most other arguments, the strength of yours do not improve with repetition.

When I was appointed to the position of Special Investigator, I believed that I knew sufficient of the law properly to discharge the task. The analysis of the law relating to misconduct in public office included in your letter of 26 May 2023 – which is to say before submission of the Nairn brief – implies that you take leave to doubt it. That is as disappointing as it is displeasing, although of course you are entitled to your opinion. Nevertheless, for the sake of the OSI officers who have thus far laboured long and hard on Nairn, be aware that the premise of the brief is not as your analysis imagines. It is rather that the subject, knowing or believing that past Purana convictions may have been secured by attempts to pervert the course of justice, and that evidence in support of pending prosecutions had likewise been obtained, intentionally refrained from investigating, detecting, and prosecuting the persons who had committed those offences, for the sole or dominant purpose of avoiding risk that disclosure would result in past convictions being set aside as miscarriages of justice and make convictions in pending prosecutions more difficult to obtain. VicPol "culture", as you describe it, notwithstanding, there is no room for a "good faith" defence to that.

Finally, your letter of 26 May 2023 mentions the time and resources you fear might be required to be applied to your consideration of the Nairn brief of evidence once submitted and refers to the public interest considerations you think might lead you to refuse permission to charge in any event. Neither is a matter that the SI Act permits me to take into account. I am required to determine whether there is evidence of the commission of relevant offences sufficient to sustain convictions and to submit briefs of evidence to you for determination of whether charges should be filed. That requires me to proceed in accordance with my perception of the law, and the quality of the evidence as I determine it to be, regardless of the reasons you might conjure to reject it.

That said, however, as Special Investigator and thus with the responsibilities of a permanent head, I consider that it would be irresponsible for me not to notice that what your letter of 26 May 2023 relevantly reveals for the first time is that your views as to the availability of "good faith" defences and what you conceive to be applicable public interest considerations are such that the likelihood of you ever approving any charges that OSI may submit is effectively nil.

After a great deal of reflection, I have concluded that, given that is so, there is no point in OSI persisting. It is a waste of people's time and scarce economic resources.

I shall advise the Attorney-General accordingly.

Yours faithfully,

Geoffrey Nettle

Geoffrey Nettle
Special Investigator

OFFICE OF THE
SPECIAL INVESTIGATOR
VICTORIA

Level 9/451
Little Bourke Street
Melbourne VIC 3000

29 May 2023

The Hon Jaclyn Symes MLC
Attorney-General
Level 26, 121 Exhibition Street
Melbourne VIC 3000
(*By email: ken.mcpherson@minstaff.vic.gov.au*)

Dear Attorney-General,

Office of the Special Investigator (OSI) – remaining investigations

1. You will recall that I wrote to you on 23 May 2023 that I considered there was good reason to suppose the Director of Public Prosecutions might approve the charges to be proposed in the Nairn brief of evidence. I write to you now because my perception of the likelihood of the Director approving the charges has fundamentally altered.

2. On 26 May 2023 I received a letter of that date from the Director of which a copy is attached. After considering the matter over the weekend, this morning I replied to it. A copy of my letter of reply is also attached. In face of the Director's consistent rejection of proposed charges and her newly revealed views as to public interest considerations, the likelihood of the Director ever approving any charges that OSI might submit to her is now effectively nil.

3. In the circumstances, I am forced to conclude that there is no point in OSI persisting, To do so would be a waste of time and money.

4. Given the consequences, I request the opportunity to speak to you urgently about the course that is to be adopted.

Yours sincerely,

Geoffrey Nettle
Special Investigator