

IBAC Committee: Hon Kim Wells MP, Hon Marsha Thompson MP, Mr Sam Hibbins MP, Mr Danny O'Brien MP, Mr Simon Ramsay MLC, Mr Tim Richardson MP, Ms Jaclyn Symes MLC.

3 August 2017

By email: ibacc@parliament.vic.gov.au

Dear IBAC Committee Members,

Re: Inquiry into the external oversight of police corruption and misconduct in Victoria

We the undersigned organisations, welcome the IBAC Parliamentary Committee's inquiry into the external oversight of police corruption and misconduct in Victoria.

We urge the Committee to consider the following critical reforms to ensure Victoria has a leading and robust system of police accountability that serves both the community and police.

1. The need to move from 'independent oversight' to 'independent investigation'

We consider that one of the critical challenges undermining effective oversight of police is the lack of independent investigation of police complaints and disclosures. Victoria has a system in which the majority of complaints against police (whether they are made internally by police, or by members of the public) are *investigated by police*. The Independent Broad Based Anti-Corruption Commission (IBAC), an independent body operating since 2013, has legislative power to investigate police misconduct, however, it carries out very few investigations into police misconduct.¹ Instead, IBAC refers most complaints it receives regarding police misconduct to Victoria Police for investigation. IBAC's public position is that "*the majority of complaints assessed by IBAC are considered appropriate for direct action by Victoria Police.*"² While IBAC can provide 'oversight' of police investigations, this oversight is only partial.³

This system of independent partial oversight and extremely limited independent investigation, needs to change. It is a conflict of interest to have police lead and resolve investigations into allegations of police misconduct and deaths caused by

¹ In 2015/16, IBAC had 34 active investigations into *both* serious public sector corruption and police misconduct (IBAC Annual Report, 2015-2016, p 18). It is impossible to determine how many of those 34 investigations related to police misconduct, because IBAC do not segregate this data in its reporting. But even if all 34 investigations related to police misconduct, this accounts for only a small percentage of the 2041 complaints it received in 2015/16 (of which 65% of allegations related to Victoria Police sworn offices, p17).

² See, for example, *Special Report Concerning Police Oversight* (IBAC, 2015) p 9, and *Exposing Corruption: Annual Report* (IBAC, 2016), p 33.

³ According to IBAC's *Special Report Concerning Police Oversight* (2015), in 2014-15 IBAC reviewed only 114 Police Investigations and identified concerns in more than half of these reviews. However it received over 1600 complaints regarding Victoria Police

police, including allegations of criminal conduct and/or human rights breaches that involve torture, degradation, assault, racial abuse and excessive force by police. This conflict of interest has long undermined public confidence in the outcomes of police investigations into police misconduct. It inhibits disclosure by police of unlawful and unprofessional conduct by colleagues; and it prevents members of the public from making complaints. This weakens accountability and trust and confidence in police, police accountability, and the administration of justice.

‘Oversight’, even by an independent body, cannot compensate for a lack of effective and independent investigation. Evidence needs to be obtained in the critical window in which it is available and must be obtained and held by an independent expert body, not by the institution under scrutiny. Oversight cannot cure deficiencies in investigations and cannot restore community confidence in an investigative process that is overshadowed by a conflict of interest and/or defective investigation.

Police investigations, even when supervised by an independent body, have been held to be insufficient for the purposes of safeguarding investigative independence of deaths caused by police.⁴

2. Instilling human rights benchmarks in our legislative frameworks and institutional cultures

Victoria is the only State in Australia that has a Charter of human rights. We urge the Committee to examine the current police accountability frameworks in Victoria against established international human rights benchmarks for police accountability.

These human rights benchmarks require that investigations into police complaints are:

1. independent (institutionally, hierarchically and practically);
2. Prompt;
3. Effective (capable of determining whether police conduct is unlawful and leading to disciplinary/criminal outcomes);
4. Transparent (open to public scrutiny); and
5. Victim centred (involve the victim in a way that safeguards their legitimate interests).⁵

The current system does not meet these benchmarks.

In addition to legislative, institutional independence, practical independence must also be embedded in any Victoria institution that is given jurisdiction to investigate police complaints.⁶ This requires the cultivation of a culture of accountability and

⁴ Investigations of Deaths Associated with Police Contact: calling for an independent and effective investigation body (FCLC, HRLC, FKCLC, DCLC, 2010), para 19, discussing *Ramsahai v The Netherlands* [2007]

⁵ See, General Comment No.31, *The Nature of the General Legal Obligation imposed on State Parties to the International Covenant on Civil and Political Rights*, Paragraph 15; *Horvath v Australia*, UN Human Rights Committee Communication No. 1885/2009.

⁶ See this idea discussed further in: Savage, Stephen, ‘Independent Minded: The Role and Status of

independence through careful recruitment, appropriate training, the development of cultural and procedural policies and proper financing and resourcing of the institution. For practical independence to be realised, the overriding culture and decision making of an institutionally independent body's staff (including expert, non-police investigators) cannot be dominated by deference to police.

3. Recognising that independent investigations by non-police, expert investigation teams have a proven track record

Models around the world demonstrate that independent, expert bodies of non-police investigators are effective in investigating police complaints and these bodies hold the trust and confidence of both police and the broader community. One example is the Police Ombudsman of Northern Ireland, where staff are trained through practical, external, independent courses to investigate even the most serious of police misconduct, including deaths caused by police that may involve criminality.

4. Recalling that police accountability includes non-repetition: The need for compliance with the [‘Horvath test’](#):

The Horvath test requires consideration of any reforms to the police accountability system through the lens of the ‘Horvath test’: That is: If the assault that Corinna Horvath experienced in the hands of police in 1996 occurred again, would that complaint be investigated, adjudicated and redressed in a just, timely, efficient and transparent manner or would a person in a similar predicament have to go through years of arduous, costly and protracted court processes to receive justice, as Corinna Horvath did? In *Horvath v Australia (2014)*, the UN Human Rights Committee found that Australia (and by necessity Victoria), was required to ensure that police perpetrators of human rights violations are disciplined through an independent, effective and impartial complaints body. It also stated that when the State is found to have committed human rights violations, the state is obligated to implement non-repetition measures, to prevent similar violations from occurring in the future.⁷

We know that today, 5% of police officers account for more than 20% of all police complaints.⁸ This suggests that the current system is not adequately holding police who are subject to repeated complaints to account.

A key problem with the current legal framework for the oversight of police in Victoria, is that there is still no state liability for tortious conduct of its police officers found to be serious and wilful. There is also *no mechanism* to ensure police perpetrators of human rights who are found to have engaged in serious and wilful tortious conduct are disciplined. This means perpetrators of this type of misconduct can remain undisciplined and serving within the police force, even when a court of law has found they have acted unlawfully. One way to change this is to amend the

“Independence” In the Investigation of Police Complaints,’ in *Civilian Oversight of Police* (Den Heyer; Prenzler 2016).

⁷ *Horvath v Australia – United Nations Human Rights Committee Communication No. 1885/2009*

⁸ Special Report Concerning Police Oversight (IBAC, 2015), p 5.

Victoria Police Act 2013, one of many police accountability reforms (alongside those listed above), which the “Horvath test” requires.

It is our hope, that Victoria uses this opportunity to take a leading role in a robust system of police accountability that provides more than just partial ‘oversight’.

Yours sincerely,

Anthony Kelly

Chief Executive Officer
Flemington Kensington Community Legal
Centre
22 Bellair St, Kensington VIC 3031



Anoushka Wootton

Coordinator of Youth Services and
Communities
100 Drummond Street, Carlton, VIC 3053



Tom Ballantyne

President, Victorian State Committee
C/- Australian Lawyers Alliance
7/189-197 Kent St, Sydney NSW 2000



Clare Sauro

Legal Practice Manager
Loddon Campaspe Community Legal
Centre
54 Mitchell Street Bendigo



Eddie Micallef

Chairperson
Ethnic Communities Council of Victoria
Suite 101, 398 Sydney Road, Coburg 3058



Melanie Poole

Director of Engagement
Federation of Community Legal Centres
L3, 225 Bourke Street, Melbourne 3000



Wayne Muir

Chief Executive Officer
Victorian Aboriginal Legal Service
273 High Street, Preston, 3072



Clyde S. Sharady
Chief Executive Officer
Africa Media Australia



Dr Mark Zirnsak
Director, Justice & International Mission
Synod of Victoria and Tasmania
Uniting Church in Australia
130 Little Collins St Melbourne 3000



Jenni Smith
Chief Executive Officer
Northern Community Legal Centre
8 – 34 Gladstone Park Drive, Gladstone
Park VIC 3043



Nail Aykan
Executive Director
Islamic Council of Victoria
66-68 Jeffcott St Melbourne West 3003



Kristen Wallwork
Executive Director
Springvale Monash Legal Service
5 Osborne Ave, Springvale, 3171



Karen Field
Chief Executive Officer
Drummond Street Services
100 Drummond Street, Carlton, VIC 3053



Belinda Lo
Director- Legal Services/Principal Lawyer
Eastern Community Legal Centre (ECLC)
27 Bank Street, Box Hill VIC 3128



Kaz Gurney
Managing Lawyer
Goulburn Valley Community Legal Centre
98 Nixon St, Shepparton

