

TRANSCRIPT

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

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

Melbourne — 19 February 2018

Members

Mr Kim Wells — Chair

Ms Marsha Thomson — Deputy Chair

Mr Sam Hibbins

Mr Danny O'Brien

Mr Simon Ramsay

Mr Tim Richardson

Ms Jaclyn Symes

Witness

Mr Jeremy King, Robinson Gill Lawyers.

The CHAIR — Good morning. I declare open the public hearings for the Independent Broad-based Anti-Corruption Commission Committee’s inquiry into the external oversight of police corruption and misconduct in Victoria. All mobile telephones should now be turned to silent. I welcome Mr Jeremy King from Robinson Gill Lawyers.

All evidence taken by this committee is protected by parliamentary privilege. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, including on social media, those comments may not be protected by this privilege. Have you received and read the guide for witnesses presenting evidence to parliamentary committees?

Mr KING — Yes.

The CHAIR — All evidence given today is being recorded by Hansard. You will be provided with a proof version of the transcript for you to check as soon as available. Verified transcripts, PowerPoint presentations and handouts will be placed on the committee’s website as soon as possible.

Members of the media are to observe the following guidelines: cameras must remain focused only on the persons speaking; operators must not pan the public gallery, the committee or witnesses; and filming and recording must cease immediately at the completion of the hearing. Broadcasting or recording of this hearing by anyone other than accredited media is not permitted.

I invite you to proceed with a 15-minute opening statement to the committee, which will be followed by questions from the committee.

Audio from commencement of Mr King’s statement to 10:25:15 not available.

Mr KING (continuing) — As I noted at the start, IBAC is set up as a corruption commission and not a complaints body, and this unfortunately creates barriers and disincentives for persons wishing to make a complaint. The legislation requires that IBAC prioritise its attention to the investigation and exposure of corrupt conduct, and it is therefore clear to us that corruption is IBAC’s intended focus.

However, some examples of this approach and what it creates are as follows. There has been a significant amount of discourse about the interaction between section 194 of the IBAC act and freedom of information legislation. The essential issue is this: our clients have faced issues in respect to attempting to access the complaint files, or materials on their complaint files, from both Victoria Police and IBAC. IBAC is expressly excluded from the freedom of information provisions under section 194 of the IBAC act. However, as noted in our written submission, our firm has many examples where IBAC has referred a complaint to Victoria Police, as they do in 90 per cent of cases, and Victoria Police have investigated this complaint on IBAC’s behalf.

Victoria Police have then taken the position that as the complaint is investigated on IBAC’s behalf, Victoria Police are also protected by section 194 and therefore are prevented or prohibited from providing a copy of the complaint file and/or investigation file conducted by Victoria Police, despite the fact that Victoria Police are obviously subject to the Freedom of Information Act.

Our clients have no knowledge of section 194. They complain to IBAC because they have lost faith in Victoria Police. It is extraordinarily disheartening and disempowering for them to learn that they will then be unable to obtain any of the documents concerning the investigation made by IBAC or Victoria Police, on behalf of IBAC, in respect to their complaint and in respect to the decision that was subsequently made regarding that complaint. This negative experience is often compounded by the fact that our clients do not understand why IBAC has referred their complaint to Victoria Police in the first place.

I apologise for the legalistic path I am going to have go through next, but I am a lawyer. The real issue with section 194 is the fact that it uses the words ‘relates to’ and also the words ‘an investigation’, and on the basis of the case law, particularly two cases, one called O’Grady and another called Luck, this has been interpreted broadly by the courts and certainly provides Victoria Police with an arguable case to say they are covered by section 194 despite Victoria Police being subject to the Freedom of Information Act.

Section 194 was recently the subject of legislative change in 2017. However, it is our position that the legislative change did not seek to remedy the true source of the issue, being the words ‘relates to’ and ‘an investigation’, which are still contained within the current legislation. Further, it has been the experience of our

firm that subsequent to a legislative change Victoria Police are continuing to rely upon section 194 of the IBAC act in situations where our clients have requested a copy of the police investigation file under the Freedom of Information Act and where there has been some sort of IBAC involvement. Our client [REDACTED] is currently facing this very issue in VCAT.

It is our submission that section 194 needs to be amended and that complainants of police misconduct should really be allowed full access to their file, save for exceptional circumstances of corruption. Further, section 194 should also be amended to ensure that Victoria Police are expressly not covered by it.

Section 194 is another example of the fact that IBAC is a corruption commission and not a complaints body, and it is our submission that any human rights-compliant complaints body should provide complainants with a copy of their complaint file in order to ensure transparency and confidence in the process.

Another issue that has arisen in respect to the interaction between IBAC, Victoria Police and complainants is the interaction of the police complaints process with the Protected Disclosure Act. This was not in our formal written submission; this is something that has really eventuated over the last few months. The Protected Disclosure Act is one of the most complicated pieces of legislation I have ever had the task of reading. It was conceived in order to protect whistleblowers in regard to corruption and misconduct. The problem with the current conception of IBAC and its interaction with the Protected Disclosure Act is that any police complaint to IBAC arguably falls within the parameters of the Protected Disclosure Act.

There have been many instances where police misconduct complaints have been classed as ‘assessable disclosures’ — those are the words used under the act — even where the complainant has not alleged corruption. This has meant that both the complainant and their legal representatives have not been able to obtain any documents that concern the complaint, including documents not generated by the IBAC investigation, such as CCTV footage. Where this occurs, and IBAC determines that a complaint is an assessable disclosure, the Protected Disclosure Act makes it a criminal offence to disclose the documents to any party, including the complainant. It has been the experience of legal practitioners that it is extraordinarily difficult for the disclosure status to be changed once it has been classified as accessible, even where the complainant wishes to withdraw their complaint. This has a very real impact on litigants seeking to pursue their civil rights and accountability due to the severe criminal penalty provisions provided under the Protected Disclosure Act.

In practice the problematic relationship between the Protected Disclosure Act and the police complaints process means that litigants are unable to provide documents to each other in subsequent civil proceedings concerning Victoria Police officers’ misconduct due to a concern of falling foul of the Protected Disclosure Act. There is as yet no guidance from the legislation or the courts on this issue, and in one case that I am aware of this issue has caused significant delay and potential prejudice to the plaintiff due to the fact that core processes such as discovery have yet to occur and have had to be placed on hold.

It is also worth noting that even where an individual complains directly to Victoria Police this issue could also arise, because Victoria Police is, quite rightly, still subject to the Protected Disclosure Act. The impact on civil litigation is, in our view, an unintended consequence of the construction of the IBAC and the Protected Disclosure Act. It means that often people are now having to choose between making a complaint or pursuing their civil rights, and it is yet another example of the fact that IBAC has been designed as a corruption commission and not as a user-friendly complaints body.

It is our recommendation that there should be a specific legislative provision allowing for a police complainant to waive an assessment made by IBAC in respect to their complaint being assessable disclosure or protected disclosure in order to make sure they can pursue their civil rights free from concern of criminal penalty.

The last legal issue faced by complainants who have made an IBAC complaint is the fact that within the legislation there are not a lot of definitions in respect to what is serious and corrupt conduct. The former IBAC deputy commissioner, Simon Heath, stated in 2004 that IBAC were referring approximately 90 per cent of complaints about police back to Victoria Police for investigation because they were not serious and largely involved customer service complaints. In the 2016 financial year IBAC had 13 open police misconduct investigations but received about 1300 police complaints that year — that is taken from the IBAC annual report — meaning that IBAC investigated 1 per cent, or thereabouts, of complaints in 2016.

It is my substantial submission that there should be an independent body set up to deal with all police complaints. However, if the committee were not minded to take this approach, then it is our view that in the alternative to an independent body for all police complaints there needs to be greater rigour surrounding when something is referred back to Victoria Police and when it is investigated by IBAC.

Historically, complaints which legal practitioners consider very serious have been referred back to Victoria Police for investigation because IBAC has not deemed them serious enough. If IBAC is going to continue to refer matters back to Victoria Police, it is our submission that these complaints should be limited to genuine customer service complaints and that this needs a full and comprehensive definition in the IBAC act. Of course this legislative change would also have to be accompanied by other changes noted in our written and in my submissions today — that is, that IBAC should have two investigatory silos, one dealing with corruption allegations that is in line with the current anti-disclosure and corruption legislative provisions and one dealing with police misconduct complaints that is human rights compliant.

In conclusion, our firm is currently in a situation where clients come to us following allegations of police misconduct, and it is very difficult for us to advise clients to make a complaint to either IBAC or Victoria Police. This is because of the protracted process, the fact that over 90 per cent of the time the complainants are making a complaint which is being investigated by the very organisation that they are complaining about and the very, very, very low substantiation rate of their complaint. It is very hard to recommend that someone go through the whole process when there is less than a 9 per cent chance of it actually being substantiated.

In addition to that, it is also very hard for us to recommend that somebody make a complaint to either IBAC or Victoria Police because of the unintended or significant legal ramifications, as I have just described, under the Protected Disclosure Act and also because of section 194 of the Freedom of Information Act. So, further, it is our submission that the current police complaints system is not functioning appropriately; that the structure and legislation of IBAC as an anti-corruption body is in fact a disincentive for victims of police misconduct to lodge a complaint; that an effective investigatory body must be, first and foremost, independent; and, without independence, public confidence will always be lacking and citizens will be left questioning whether their police force is subject to real accountability.

In my final submission to you today, if there is to be true police accountability, then the police misconduct complaint process must be independent, effective, prompt, transparent and above all must focus on the victim. Thank you.

The CHAIR — Thanks, Mr King. We will now ask a series of questions. Your first preference obviously is for an independent body to be handling police complaints. When you talk about genuine customer service complaints as part of your oral submission, where is the threshold? What should and should not be investigated by police themselves?

Mr KING — That is the secondary position, so I just want to reiterate that the first position is that there should be an independent body overseeing all police complaints.

The CHAIR — Sure.

Mr KING — If that were not to be the case, then a customer service complaint as described by the former deputy commissioner is really things like if someone said, ‘The police officer was rude to me’, or, ‘I had to wait for 4 hours in the lobby of the police station’. Those are really customer service complaints. But certainly allegations of assault, allegations of misconduct, allegations of inappropriate behaviour, allegations of any racist, derogatory or discriminatory remarks should definitely all fall within the remit of IBAC or an independent body.

Mr RAMSAY — Mr King, I am just wondering — the evidence we have received from Victoria Police, particularly from their professional standards branch, indicates there has been a change in the way that they deal with complaints, particularly internally but also externally. I take it from your evidence this morning that you do not have any confidence in the sort of change in structure in the professional standards branch in relation to complaints that are made to them, and you have already indicated that IBAC only deals with a very small proportion of police complaints. In fact nearly all of their complaints were referred back to professional standards. Is there any change from your point of view in relation to the changes in Victoria Police in dealing

with police complaints, or are you still of a mind that the only real opportunity for those that want to make complaints against Victoria Police should be through an independent body?

Mr KING — I should say that the overwhelming majority of my clients do not wish to make a complaint directly to Victoria Police. They want to make a complaint to IBAC. They want to make a complaint to an independent body. They did not want Victoria Police investigating misconduct that had occurred or is alleged to have occurred by a Victoria Police officer. So, if you asked my clients, they would say to you, ‘There aren’t any real changes you can make within Victoria Police that would affect how I view the investigation, unless it is done by an independent body, and only if it is done by an independent body will I have faith in the process and faith in the outcome’.

Mr RAMSAY — Can I just ask a quick secondary question, because I am trying to get an idea of numbers. How many clients are we talking about?

Mr KING — Since the early 1990s or in recent days?

Mr RAMSAY — Let us keep it reasonably current — in the last few years.

Mr KING — We have hundreds of clients, and I would say we get between two to three inquiries a day in respect of police misconduct.

Mr D. O’BRIEN — Thanks for your evidence. With respect to an independent body — a standalone body altogether — some of the evidence we have heard from around the world has been the difficulty of — how do I put this? I will put it the other way round. Investigators say it is difficult to have an independent body that does not involve police, because police know police and they are good at investigating, and they have the skills. If we had an independent body in Victoria, how would you propose that be staffed?

Mr KING — That is a very interesting question. In terms of the staffing of that organisation, it is my understanding that — it is always going to be a transitional process, and even amazing bodies like the one in Ontario, which is one of the international, separate independent complaints bodies, still contains former police officers within it. Obviously best practice would be to have as much removal as possible from the process to give the public confidence in the process, but I think the pragmatist within me realises that initially and over a period of years you are going to have to have former police officers involved because they do understand the process and because they have been trained in investigating matters. But certainly that would not be best practice in my view.

Mr D. O’BRIEN — Just a follow-up, again we have had evidence — and this could easily be contested — from some that have said, I think it was New Zealand where we were told that police are more likely to respond to another police officer investigating them because of the level of professional pride, I guess, that they are going to be concerned about their peers believing that they have done something wrong, so a policeman investigating a policeman is more effective. Can I ask you to comment on that, perhaps?

Mr KING — I suppose I would turn it back and say look at the current process where police are investigating themselves in over 90 per cent of cases and you have a 9 per cent substantiation rate, and I can tell you anecdotally from our clients: an experience of dissatisfaction. So currently you have that situation where police officers are investigating their own, but only 9 per cent of complaints are substantiated. So I have to say I do not really buy into the idea that police are somehow going to be more forthcoming because another police officer is investigating or they are going to cooperate more with the investigation, because the statistics and the experience right now just do not attest to that.

Mr D. O’BRIEN — I think in your submission you might actually have referred to that 9 per cent figure, but what is the evidence that that is wrong? Are you referring to civil cases which show a higher level of substantiation?

Mr KING — Sorry, 90 per cent of cases?

Mr D. O’BRIEN — You referred to only 9 per cent being substantiated. What is the evidence that suggests that that is not reflecting the actual situation? Is there a higher figure —

Mr KING — The evidence of our clients. I can tell you that our clients — and as I said to you at the start obviously it would be amazing if I could tell you all of the stories about all of our clients, but obviously for confidentiality reasons and for privacy reasons and legal privilege I cannot do that. But I can tell you that, absolutely, I do not think that I have ever met a client who has said they were happy with the complaints process.

Mr D. O'BRIEN — Very obviously someone who has made a complaint and had it ruled —

Mr KING — And who have had injuries, including physical injuries — broken hands, broken noses, orthopaedic injuries, psychiatric reactions — all sorts of issues which have been found to be unsubstantiated.

Mr D. O'BRIEN — What I mean is very obviously if someone makes a complaint against police and it is not substantiated, they are not going to go, 'Oh, well, fair enough; I was wrong'. What I was asking was I think you mentioned with respect to civil suits that there is a much higher substantiation —

Mr KING — Yes, that is right.

Mr D. O'BRIEN — Did you have a figure on that?

Mr KING — Unfortunately I could not give you statistics on that without, I feel, compromising the confidentiality behind it, but I can obviously tell you that it would be a significantly higher substantiation rate in terms of persons who receive compensation as opposed to making a complaint.

Mr D. O'BRIEN — And you believe there is a higher level in other jurisdictions as well — for substantiation?

Mr KING — Yes, I do, but again that is on anecdotal evidence.

Mr HIBBINS — I just wanted to get back to your submission for an independent police oversight body. Are you submitting that there would be no scope for that body to refer complaints back to police, even ones that are deemed to be customer service complaints?

Mr KING — As I say I think best practice and in a perfect world it would be a totally independent police body that would deal with all police complaints. That would be absolute best practice. That should be the model we are striving —

Mr HIBBINS — Including customer service?

Mr KING — Including everything — including customer service.

Ms SYMES — Including country Victoria? The geography concerns me.

Mr KING — Including country Victoria — especially including country Victoria. Country Victoria is one of the places that are in most need of independent oversight.

Ms SYMES — Can I cut in, Sam?

Mr HIBBINS — I think you just did.

Ms SYMES — Sorry, just because on that — and thank you for your evidence today. On the customer complaints stuff, the police would tell us that, with their changing models, they are getting great success in, say, the sergeant going out, knocking on the door and saying, 'Hey, I heard that you had a bad experience with Constable A. Do you want to tell me about it? I'm sorry about that'. And they would have a conversation, and it is dealt with — bang — on the spot, within a couple of hours, and that is something that people are responding to positively. My concern about your proposal would be a timely manner and particularly in country Victoria, if you have got to ring up a complaints body which obviously would have to be located probably centrally, and how you would see that being effectively dealt with quickly?

Mr KING — As I said before, best practice is still, in my view, that it should be independent, but if you wanted to take a pragmatic approach, as a reserve position it really should be that IBAC should be dealing with all of the significant police misconduct, even regional ones. I think it is really important in regional situations to

recognise that they have a very close community a lot of the time; they know their police officers. It is very, very difficult for people to make complaints about those police officers to begin with, and then to have that police complaint dealt with within the same station, which does occur, or within the same region, where all the police officers know each other, is very disheartening for people. So in my view having an independent body would actually be of great assistance to people in regional areas. I take your point about resources and about how it would all actually transpire, but for those who live in a close community, where the police are known to them and where they find it very, very difficult and confronting to complain about police I think having an independent body to complain to is very important.

Going back to your question, Sam, as I said, that is the reserve position. The reason why our firm came up with that reserve position was that in our view IBAC should really be investigating all police complaints save for those ones that can really be resolved very quickly and easily as customer service complaints. But it is very, very important, and I would really encourage the committee to take this on board, to really define as best you can what is a customer service complaint. What is Victoria Police actually going to deal with, because right now there is no guidance within the legislation as to what is dealt with by Victoria Police and what is dealt with by IBAC. So I would encourage the committee to really take that on board in terms of any further legislative revisions that might occur.

The CHAIR — Just on that, Sam, did you get your answer, and, Jaclyn, did you get your answer?

Ms SYMES — I did, thank you.

Mr HIBBINS — I did, but I need a follow-up.

The CHAIR — Follow up, Sam.

Mr HIBBINS — I just wanted to know whether you have given any thought to — let us say there is an independent oversight body and that function for investigating police complaints goes from the police to an independent body. How you would maintain and ensure that there is still internally within Victoria Police the capability and capacity to ensure police integrity within the organisation?

Mr KING — I suppose it depends on the framework for the independent body. Right now IBAC already has significant powers in order to prosecute police officers and lay charges against them in respect to extraordinary conduct. One of those is happening at the end of this month. You would hope that by giving an independent body appropriate power and ensuring a good relationship with Victoria Police that that would obviously send a message within Victoria Police that if there is serious misconduct it will be investigated and prosecuted by an independent body and there are real ramifications for that. You would hope that that, in addition to any internal disciplinary proceedings in Victoria Police, would be enough to ensure that there continues to be an appropriate culture within Victoria Police.

Ms THOMSON — I just want to tease out a little bit your attitude to having police or former police as part of the investigative body of, say, in this instance an IBAC, given the skills they bring and the ability to find people that would have those skills other than either former serving police officers or currently serving police officers. It would be incredibly difficult to staff an investigative branch of police unless you used those services. How do you see that playing out? Are you saying that you prefer no police, but in actual fact I do not think that you could have it work without either former police officers or police officers from another jurisdiction or currently serving police actually undertaking that role.

Mr KING — As I said to you before, there is a reality behind the situation in that obviously for the first period of any new body, if it was a new body, they would have to probably do what you are talking about in terms of relying on police officers. But you would hope in the long term that that does not have to be the case — that long term you could train up appropriate people to be able to investigate police complaints and that the skills in being able to investigate any complaint, particularly a police one, could certainly be transferred across to up-and-coming people who might never have worked in Victoria Police but who might be trained up by IBAC in respect to being able to investigate them. I think there is a myth that you have to have been police or former police in order to be able to investigate police. That is just not the case. Within our office, for example, we conduct civil litigation against police on a daily basis, and we have had to skill up all of our lawyers in respect to how do police work, what are police documents, what are we looking for in terms of CCTV evidence gathering.

I do not think it has to be police officers or former police officers; I think it can be intelligent, compassionate people who are brought into the organisation and who are then appropriately trained up in police procedures, in police powers, in police documents and in regard to criminal law generally. I think if you did that, then you could have a very powerful and effective independent body. I do not think it necessarily has to be staffed by police officers.

The CHAIR — Would that proposal have the credibility to be able to say to the public, ‘This is an effective way of investigating police misconduct’, if you do not have that police influence, either be it from overseas or from other states?

Mr KING — I think it depends on the structure and the scope of whatever body we are talking about. If that body is a toothless tiger and has no ability to prosecute, bring charges or properly investigate police misconduct, then, yes, that is not going to help with increasing public faith in the process. But in my view the public have already lost faith in the process, and people who complain to IBAC complain to IBAC because they want someone independent to investigate their complaint, and when that complaint is almost inevitably referred back to Victoria Police, they are just completely put on the back foot from the start. If you like, it is almost a fait accompli that the process is not going to transpire.

So the thing I would try to impart to the committee and the Chair is to say: some of the issues that you are talking about, what might happen or not happen, are happening. That is what is happening on a daily basis as we speak. It is a bit disappointing in some ways because IBAC does have some real power and IBAC does have some real teeth, and IBAC in recent times has also tried, I think, to change a little bit, like on their website, to make the complaints process a little bit easier and it is a good path to go down, but it really needs to continue to be reshaped and reformed to ensure that the public can very easily make a complaint and be kept in the loop throughout the whole complaint process, and that it really is done by IBAC if they complain to IBAC.

Mr RAMSAY — If I can ask through you, Chair, are there any other cases you can cite to us in respect of, under the current IBAC legislation, the act of 2011, where there has been serious police corruption or police misconduct — and you cited a personal case — where IBAC has not administered its responsibilities under the act to investigate and pursue potential prosecution? I got the feeling from IBAC themselves that they are short on resources and staffing to follow up a lot of the police misconduct cases except for police corruption and serious police misconduct. Are there other cases that you know of where IBAC may well have referred it back to Victoria Police rather than investigating it themselves?

Mr KING — That comes back to that very thorny question about what is serious. At this stage IBAC take a very, very, very narrow view of what is serious police misconduct and only investigate very limited numbers. As I said to you before, I think there were 13 open files in the 2016 audit. Obviously those files would contain very serious allegations of police misconduct. In my experience it has usually been accompanied by CCTV footage, which obviously makes IBAC’s role easier in terms of investigating it. But to answer your question, yes. The majority of my clients get referred back to Victoria Police, who do an investigation. There is never a situation where there is an injury or significant misconduct where IBAC wash their hands and say, ‘We’re not doing anything’; it is just that they refer it back to Victoria Police. Victoria Police then do, I would say, a subpar investigation. It then goes back to IBAC, who then simply sign off with a letter saying ‘Unsubstantiated — Victoria Police investigated’. I could think of many examples of where people have suffered injuries and made complaints, and that has resulted in it being unsubstantiated.

Mr RAMSAY — Can I just quickly ask for the record: why do you think IBAC are referring these quite serious police misconduct charges against the community back to Victoria Police when they can actually investigate it themselves under the act?

Mr KING — I think that there is undoubtedly an element of resourcing to it, but that is not really my place to say. I will leave that to greater minds than mine to talk to you about budgets and resourcing, but I also think there is just — as I said to you before — no definition within the act as to what is serious and what is a customer service complaint, what should and should not be referred back to it. So I think as a combination of IBAC and as a combination of a lack of clarity with respect to those definitions, just the overwhelming majority get referred back to Victoria Police.

Mr RAMSAY — So do you think a girl that has been handcuffed, had her face planted in the back of a divvy van and a broken nose is serious police misconduct?

Mr KING — Absolutely; well, a County Court judge thought so. They do not award aggravated damages very often.

Mr RAMSAY — And that case was referred back to Victoria Police?

Mr KING — Yes.

Mr RAMSAY — IBAC refused to investigate?

Mr KING — I do not think it is a matter of IBAC refusing to investigate. I think that would probably be a little strong. IBAC were saying that for whatever reason — they do not have the resources, they do not deem it to be serious — for all sorts of reasons they refer back to Victoria Police. But that is just a reality of the situation, that very, very, very few police complaints are investigated by IBAC.

The CHAIR — Mr King, we thank you for your presentation and your submission, which you lodged earlier to the committee. Thank you very much for your time.

Mr KING — Thank you, Chair. Thank you, committee.

Witness withdrew.