

# TRANSCRIPT

## INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

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

Melbourne — 26 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

Ms Merys Williams, member, human rights subcommittee, Law Institute of Victoria.

**The CHAIR** — I declare open the public hearing for the Independent Broad-based Anti-corruption Commission Committee’s inquiry into external oversight and police corruption and misconduct in Victoria. All mobile telephones should be now turned to silent. Welcome, Ms Merys Williams. 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?

**Ms WILLIAMS** — I have.

**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 now invite you to proceed with a 15-minute opening statement to the committee, which will be followed by questions from the committee. We thank you for your time.

**Ms WILLIAMS** — Thank you. My name is Merys Williams. I am deputy chair of the human rights subcommittee of the Law Institute of Victoria, the LIV. The LIV is Victoria’s peak body for lawyers, representing nearly 20 000 lawyers and students in Victoria, Australia and around the world. We are grateful for the opportunity to address the committee today. Victoria’s inadequate response to complaints of misconduct by police has been a recurring issue in Victoria for decades and is damaging to not only community trust in police but also public confidence. It is clear that the current complaints system does not meet Australia’s human rights obligations. The Victorian government must show leadership in human rights by establishing a complaints system that is independent, transparent and holds police accountable for their misconduct. We recommend that Parliament establish a complaints system which complies with international human rights standards, being either a new branch of the Independent Broad-based Anti-corruption Commission — IBAC — or a new body.

Under the current system complaints of police misconduct can be made to either Victoria Police or to IBAC. However, we know that IBAC refers the majority of complaints back to Victoria Police for investigation. In 2014 Mr Simon Heath, then deputy commissioner of IBAC, stated that over 90 per cent of complaints by IBAC were referred to Victoria Police for investigation. It is the experience of our members that complaints of very serious misconduct, including assault and racial bias, can be referred from IBAC to Victoria Police for investigation.

Victoria has long been a leader in human rights issues in Australia. In 2007 Victoria became the first Australian state to have a charter of human rights. The charter applies to government authorities such as Victoria Police and functions to protect and promote human rights. The Victorian Charter of Human Rights and Responsibilities requires that a human right only be limited to the extent that it can be justified in a free and democratic society. Policing involves the detention of individuals, sometimes by the use of force, on behalf of the state. This limits an individual’s human rights including the right to liberty and security of person, the right to humane treatment when deprived of liberty, and the right to protection from torture and cruel, inhumane and degrading treatment. Where human rights are to be limited, it is vital that checks and balances are in place to ensure that limitation is justified.

The importance of an independent investigation of human rights breaches has been recognised by both the United Nations Committee Against Torture and the United Nations Human Rights Committee when considering international instruments which have been ratified by Australia. Further, Victoria is the only Australian state or territory to have its police complaints system reviewed by the United Nations. There can be no doubt, following the decision of *Horvath v. Australia*, that the current Victorian complaints system fails to meet human rights standards.

We have already heard a very brief summary of *Horvath v. Australia*, but for the purposes of this submission I will just touch on it again briefly. In 1996 Corinna lodged a complaint with Victoria Police members which was

not substantiated. She subsequently successfully sued the officers and the state of Victoria. However, due to the operation of the Police Regulation Act, since replaced by the Victoria Police Act, she did not receive the compensation she had been awarded by the court. After being refused leave by the High Court, Corinna Horvath made a submission to the United Nations Human Rights Committee, which led to Victoria Police's complaints system being examined in detail by the committee. The human rights committee found that Victoria Police's investigation of Corinna Horvath's complaint failed to meet the requirement for an effective remedy under the International Covenant on Civil and Political Rights. The committee made the following comments in coming to that finding:

... the disciplinary claims before the police department were dismissed for lack of evidence. In this respect, the committee notes the author's allegations, uncontested by the state party, that neither the author nor the other civilian witnesses were called to give evidence; that the author was refused access to the file; that there was no public hearing; and that once the civil proceeding finding was made, there was no opportunity to reopen or recommence disciplinary proceedings.

We know from a recent audit that many of the shortcomings identified by the United Nations Human Rights Committee continue to be present in our current police complaints system. The European Court of Human Rights has provided guidance as to the features of a human rights compliance system for the investigation of police misconduct complaints. By now you are no doubt familiar with these five principles, being independence, effectiveness, promptness, transparency and a victim-centred process. The LIV's written submissions have addressed each of these principles in detail, but for the purpose of today I will elaborate on the LIV's concerns regarding independence, adequacy and transparency of the current police complaint process.

Starting with the first principle, of independence, the majority of complaints of police misconduct in Victoria are investigated by Victoria Police officers. In 2016 IBAC published the results of an audit of the Victoria Police systems for the handling of complaints. The audit involved a review of 354 complaint files which had been investigated by Victoria Police. The audit found that in 17 per cent of complaint files the choice of Victoria Police investigator was inappropriate, including because the subject officer worked at the same station or the investigator had a complaint history relevant to the investigation. There is a real risk of a conflict of interest in these cases. It is the view of the LIV that instead all complaints of police misconduct should be investigated independently of Victoria Police to ensure integrity and compliance with international law. The investigating body must not only be institutionally independent but also practically, culturally and politically independent. If this committee is minded to recommend that IBAC retain the function to investigate police misconduct, the LIV suggests that Parliament review IBAC's funding and resources. IBAC has a similar number of staff as its predecessor, the Office of Police Integrity; however, IBAC has a much broader jurisdiction now, being to investigate all public sector corruption. Currently IBAC is funded by grants facilitated by the Department of Premier and Cabinet. IBAC should instead have a more independent funding model directly through Parliament.

Our members report that the current culture at IBAC is one of an anti-corruption body and not a complaints body. I note that the IBAC Act requires IBAC to prioritise the investigation of corrupt conduct and systemic corrupt conduct over other investigations. It is the view of the LIV that if IBAC is to continue as the independent body for investigating police misconduct complaints, then additional funding through an alternative model is required, together with cultural change.

Turning now to the second of the five principles from the European Court of Human Rights, being the adequacy of the investigations. A system of police oversight should allow for complaints to be effectively and thoroughly investigated. Crucially, an effective investigation must involve the collection and analysis of sufficient evidence such that an investigator is able to make fully informed findings. The LIV is concerned that in some investigations conducted by Victoria Police relevant evidence is not being collected. The IBAC report revealed that police investigators had failed to consider relevant evidence in 17 per cent of audited files. Evidence most commonly not considered was CCTV footage, medical records and police running sheets. Running sheets are internal police documents in which members make notes of each job attended. These notes include detailed summaries of any incidents which have occurred and can often be the most contemporaneous record of an incident.

The report also showed that the investigating member failed to contact witnesses in 34 per cent of investigations and that the complainant themselves was not contacted by the investigating officer in 16 per cent of investigations. You will recall that the United Nations Human Rights Committee criticised the investigating officers in *Horvath* for failing to contact civilian witnesses when Corinna Horvath's complaint was investigated

in 1996. The LIV is concerned that the findings of the IBAC report reflect an inadequate approach to the investigation of police misconduct complaints by Victoria Police members.

The LIV is also concerned about the low substantiation rate of complaints. At the end of an investigation of a police misconduct complaint the Victoria Police investigating officer will allocate a determination. Possible determinations include ‘substantiated’, ‘not substantiated’, ‘unfounded’, ‘unable to determine’ and ‘no complaint’. The IBAC audit found that in 14 per cent of investigations conducted by Victoria Police the recorded determination was inappropriate. In other words, had the investigation been conducted by IBAC, the outcome of the investigation would have been different. It was the view of IBAC that a number of files contained information that suggested a finding of ‘substantiated’ was appropriate but in those cases an alternate determination had been recorded.

The IBAC audit referred to throughout this submission relates to the complaint files closed in the 2014–15 financial year. In that audit IBAC found that only 9 per cent of files were determined by Victoria Police when substantiated, although we have heard from Flemington and Kensington Community Legal Centre that this substantiation rate may actually be lower. The current Victorian substantiation rate of 9 per cent is significantly lower than comparable jurisdictions — for example, the substantiation rates of 17 per cent in New South Wales, 22 per cent in Northern Ireland and 23 per cent in New York. When IBAC analysed complaints made by Victoria Police employees the substantiation rate increased significantly to 28 per cent. IBAC notes that this may reflect police members being more likely to report police misconduct where there is sufficient evidence of wrongdoing. However, the LIV is concerned that this may also reflect a possibility that investigators give greater weight to complaints made by police than by members of the public. We know that 5 per cent of Victoria Police members account for more than 20 per cent of complaints; however, in only 7 per cent of investigations was the officer’s complaint history considered during the triaging or investigation of the complaint. IBAC recommended that an officer’s complaint history be attached to all complaint files, and we understand that Victoria Police have now implemented that recommendation. The IBAC audit has evidenced an inadequate and ineffective system for the investigation of misconduct complaints by Victoria Police.

Moving now to the fourth principle, being transparency. A police oversight system must be transparent if it is to meet human rights standards. Transparency encourages accountability and fosters public confidence. The current police complaints system is not transparent for complainants or for the public generally. At the end of an investigation complainants are provided with very little information about what investigations were made and why an outcome was reached. The committee is aware of the barrier complainants face in obtaining their complaint file due to section 194 of the IBAC Act. Section 194 prevents documents relating to an investigation completed under the IBAC Act from being subject to a freedom of information request. Victoria Police have relied on section 194 to refuse complainants access to their complaint file if the initial complaint was made to IBAC, even where the subsequent investigation was conducted by Victoria Police. In practice this means that individuals who complain to IBAC and IBAC then refer the complaint to Victoria Police cannot access information they otherwise would have been entitled to had their initial complaint been made directly to Victoria Police, despite Victoria Police investigating in both of those circumstances.

The Victorian Parliament sought to remedy this issue with a bill introduced in 2016. The LIV is concerned that the amendments have not sufficiently addressed the problem. In a letter to the Attorney-General and the Special Minister of State the LIV proposed further amendments which we consider would rectify this discrepancy. I can make this letter available to the committee if it is of interest. The LIV was not given an opportunity to provide feedback on that previous bill prior to its introduction to Parliament and would welcome such an opportunity should Parliament be minded to make further amendments to section 194 of the IBAC Act.

Many of the submissions made to this committee have drawn heavily on the IBAC audit report in 2016, and this is because there is very little publicly available data regarding police complaints processes. The accurate recording and publication of complaints of police misconduct are important to maintaining the public confidence in the complaints system, and this data can also be used to identify trends and improve policing in Victoria.

In conclusion, the LIV calls on Parliament to implement a complaints structure which complies with our obligations under international law. We submit that all complaints against police should be investigated independently of Victoria Police. Alternatively, if IBAC is to retain this function, then a substantial increase in funding along with legislative, structural and cultural change is needed. In the alternative, we believe that the

establishment of a new body with a strong victim-centred focus may also be an effective way of ensuring that complaints of police misconduct are investigated independently, consistent with international law principles. We have also heard from Tamar Hopkins this morning that there are a number of international examples of human rights complaint bodies, which can be referred to by the committee.

As a signatory to the United Nations International Covenant on Civil and Political Rights, Australia and therefore Victoria has an obligation to ensure that any person whose rights or freedoms are violated has an effective remedy. Further, in the case of Horvath, the United Nations criticised Victoria's police complaints system in finding that Victoria's mechanisms for police accountability breached Corinna's human rights. Victoria's commitment to human rights, as demonstrated through the implementation of our human rights charter, sits in stark contrast to the decision in Horvath. We urge the government to work collaboratively with the LIV to ensure that Victoria's policies on police accountability reflect a commitment to fairness, quality and the rule of law. Thank you.

**The CHAIR** — Thank you. We will go to questions.

**Mr RAMSAY** — Thank you, Ms Williams. Your submission is very similar to others we have heard this morning. They all have a similar theme, and that is, there is not much confidence in the police standards command in relation to responding to police complaints, IBAC not having either the legislation or resources to provide that sort of investigative work for police complaints and a referral to Northern Ireland's police ombudsman as a preferred model. If I can perhaps make two comments and then ask the question. One is, I think Mr O'Brien indicated — and we have visited Northern Ireland and spoken with the police ombudsman — that it is a very different environment obviously in Ireland. There is a lack of confidence in the police there that necessitated the independence of the police ombudsman, so I am not sure if you can compare the environment that necessitated that model with Victoria's current status. You referred to the Charter of Human Rights and Responsibilities continuously, as have all the legal aid submissions here, as perhaps a catalyst for an independent body.

My question to you really is: police standards command will come here this afternoon and tell us that in fact it is a new structure in the Victorian police, distinct from the OPI, that it is actually dealing with most of the complaints in a satisfactory manner that meets the Charter of Human Rights and Responsibilities. You will have IBAC tell us that their principal responsibility is serious corruption or serious misconduct and they do not have the resources or capacity to deal with complaint matters. In your view, could you tell us the advantages and disadvantages of a PONI approach to an independent body? You have really given two options to us, either that or a relook at the legislation for IBAC to allow it to do greater responsibility work in police complaints. In relation to the PONI question but also in relation to IBAC's potential role in dealing with police complaints as an independent body, what would have to change, the funding from DPC to somewhere else, investigative reporters and the resourcing of all of that — investigators et cetera?

**Ms WILLIAMS** — There are quite a few parts to that question so I might take them in turn. The LIV's position is that a human rights compliant system is needed, so we refer to other jurisdictions where we have bodies which are more human rights compliant. For example, in Northern Ireland that system developed with a very different history to what we have in Victoria. But we are not looking at the history, saying this is why we need a body. What we are saying is we need a body which is human rights-compliant. So we say these are some examples of where they exist and this is where it is done well. But the catalyst is that it is human rights compliant, and that is Australia's obligation under international law. Yes, you have referred to the charter. But Australia has ratified covenants on this issue, saying we have made a commitment to provide people with an effective remedy where their human rights have been infringed.

In respect of the second part of your question, which is IBAC and the changes that are needed, it is very clear that IBAC does not meet those principles. Partially that is because IBAC is an anti-corruption body, so a lot of the features of IBAC, which are important for IBAC to investigate corruption, sit in very stark contrast to what is needed for a human rights-compliant police misconduct complaint body. For example, we have heard a bit today and last week about transparency, and transparency is key if a body is to have the confidence of the public and also of complainants. IBAC is set up in a very opaque manner so that it can investigate corruption. If you were to keep this function with IBAC, a lot of legislative reform is needed in order to make it compliant with human rights and international law.

**Mr RAMSAY** — The thing that perhaps concerns me is if you start significantly changing the current act for IBAC, which is as you said, primarily for corruption, you are actually distracting it from its core business. You are actually having to broaden out its powers and responsibilities to dealing with police complaints, then serious misconduct, then corruption and then serious corruption. I am just wondering is that a big ask, a big task, for a corruption body like IBAC to take on?

**Ms WILLIAMS** — If that is the view of the committee, perhaps it is appropriate to have a separate body dealing with these complaints.

**Mr RICHARDSON** — Thank you, Ms Williams, for coming in. I have got a couple of questions that I wanted to put to you. Do you think that since IBAC's inception in 2011 there has been improvement in the system and in confidence in Victoria Police?

**Ms WILLIAMS** — I suppose OPI was a little bit before my time as a practitioner, but in my experience as a practitioner there is little confidence I think in the current police complaints process. We know that IBAC have a lot fewer resources to investigate these types of issues than the OPI had, so I am not sure about public perception and I am not sure if it has been measured actually as to whether there is more confidence or less confidence now under IBAC than there was under the OPI. But it has been the experience of our members that practitioners are advising complainants not to make complaints to IBAC, partly because they do not have confidence in the system.

**Mr RICHARDSON** — I think you might be familiar with an article from 19 February this year that talked about a law firm telling clients not to bother complaining to Victoria Police and the watchdog, so there seem to be — certainly amongst legal practitioners — concerns with the current system. Is that something that you see throughout LIV, or what is your view in terms of the wider profession?

**Ms WILLIAMS** — I do not believe the LIV has a specific position on that, but our members have reported that they do advise clients against complaining to IBAC.

**Mr RICHARDSON** — Some of the evidence that we have heard previously as a committee and then in private hearings as well talks about the outcomes or the desire of individuals as to the outcomes of those complaints, and sometimes it is an acknowledgement that there was fault, and maybe an apology is a big thing. Obviously that depends on the scale. But one thing that we are interested in as well is conciliation. Under the IBAC Act, and I will go to the section, but there is the broader conciliation at section 64(2) and then under the Victoria Police act it is section 170. Do you think that power is used enough, and could that be broadened out to try to bring that confidence and that genuine engagement to trying to solve some of these issues and challenges

**Ms WILLIAMS** — The LIV is open to a conciliation process, but it is our position that if that is to occur, it has to occur with the permission and then the informed consent of the complainant.

**The CHAIR** — In your presentation you said that all police misconduct should be referred to or investigated by an independent body. Is there a threshold issue — that if all police misconduct or complaints were referred?

**Ms WILLIAMS** — The LIV's position is that all complaints should be handled by an independent body, and that really harks back to our obligations under international law — that police complaint and police misconduct be investigated independently.

**The CHAIR** — There have been some submissions put to us that customer service issues, such as a police officer being rude or a delay in returning goods, could be investigated by Victoria Police themselves. Is it LIV's view that those customer service issues should still be investigated by an independent body?

**Ms WILLIAMS** — I do not believe the LIV has a specific view on that question, and I can take it on notice and come back to the committee, but it has been the experience of our members that historically there has been some difficulty in the classification of what constitutes a serious complaint, and we have seen matters which we considered to be quite serious referred back to Victoria Police for investigation. So we would caution the committee about how that is framed, and we would welcome the opportunity to consult further on it.

**Mr D. O'BRIEN** — Just a clarification, Ms Williams, you talked about the figures here — 9 per cent substantiated, according to the IBAC report. Then you mentioned a 28 per cent figure. Did you say that is when it is police on police?

**Ms WILLIAMS** — Yes, that is right.

**Mr D. O'BRIEN** — Separately, when you talk about the need for a new body, do you think that new body, or if it were that IBAC stays in the role, should have powers of arrest and also powers such as searching a person and that sort of thing?

**Ms WILLIAMS** — I am not aware of the LIV's position with respect to those sorts of arrest and search powers, but again I can take that question on notice and come back to the committee.

**Mr D. O'BRIEN** — That would be appreciated Thank you.

**Mr RICHARDSON** — I just have one more. Obviously we are focusing on some of the things that are not working well, but has LIV gone through and assessed what is working well at IBAC and that dialogue between, I guess, some of the complaints and disclosures and other things that we have covered today? Are there things that are working well with IBAC that they could strengthen or improve, or as a broader thing is it a new framework that we are looking at and that is LIV's position?

**Ms WILLIAMS** — I do not believe the LIV has gone through and done a detailed analysis of what is working well. Partly that may be because there is not a lot of information publicly about what goes on with these complaints. We have seen Operation Ross, which I think is largely recognised as a success, but again I can come back to you if you would like a detailed analysis of what we say is working well with police complaints within IBAC.

**Mr RICHARDSON** — Thank you.

**The CHAIR** — In regard to an independent body, is it LIV's position that an independent body could or should be staffed by a type of investigator not necessarily ex-VicPol seconded from VicPol or police from other jurisdictions? Is there a view that LIV have in regard to who should do the investigation of police misconduct?

**Ms WILLIAMS** — It is the view of LIV that in order to comply with international law we need a culturally independent investigatory body. We do not have a specific view on how that can be achieved, just that that is the standard under international law.

**The CHAIR** — Does that that men ex-police officers or —

**Ms WILLIAMS** — I would have to, again, come back to you with our members' view on that specific question.

**The CHAIR** — Sure. Great. We thank you very much for your time, and we would appreciate those follow-up answers to some of those questions. That would be terrific.

**Ms WILLIAMS** — Absolutely. Yes, no worries.

**The CHAIR** — Thanks very much.

**Witness withdrew.**