

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

Mr Tim Marsh, chief counsel, Victoria Legal Aid Chambers, Victoria Legal Aid.

The CHAIR — I declare open this public hearing 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 be turned to silent. I welcome Tim Marsh.

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 MARSH — Yes, 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.

I invite you to proceed with a 10-minute opening statement to the committee, which we will follow up with questions. We thank you for your time.

Mr MARSH — Thank you, committee. Just very briefly by way of introduction, I am chief counsel at VLA Chambers. I have been practising in criminal law since about the year 2001 and during that time have worked both for the Office of Public Prosecutions, for Victoria Legal Aid and approximately eight years at the Victorian Bar, during which time I had a mixed prosecutorial and defence practice, interestingly including representing police members at OPI hearings during that period of time.

In terms of what I would like to say, just very briefly, to frame the responses to the questions, VLA obviously represents many people within the community who come from marginalised groups or people who have particular vulnerabilities or complex needs. That cohort of clients, in our view, is a group that has particular vulnerabilities when it comes to their interactions with the police system. Our response, which you received by way of the written response, sets out our preference for an independent complaints system which is independent from Victoria Police for reasons that I will go into in more detail in a moment.

Whilst it is clear that the current system in Victoria has certain capacities when it comes to investigating large-scale corruption, in our view simply focusing on large-scale corruption — the sort of big-ticket items — elides the fact that there are many other forms of police overreach or misuse of police powers which might well be regarded in a broader sense as being minor but which nevertheless have a profound effect on those same marginalised groups whom we represent. The reason why we say that is so is that public confidence in the police and in their ability to manage complaints, whatever level they occur at, is crucial to people actually having the courage to complain. When you consider the act of complaining as a form of agency or courage on the part of a complainant, any further barriers that might stand between a complainant and the decision to complain about police conduct has the capacity to effectively disenfranchise those people from feeling as though they have an accountable police system.

And there is a very particular nuance to this that we have experienced, which is that when client groups — and they might be defined by region, they might be defined by age, by ethnicity, by cultural and linguistic diversity — when they feel as though they do not have confidence in the police, then in effect those people become an island that is somewhat insulated from the rule of law. They are not only less likely to make complaints about the conduct of the police, they are less likely to turn to the police to solve legal problems that they may be experiencing, and in doing so we believe that that creates an island of unfairness and inequity where people who are the most needy of the protection of the rule of law then become simultaneously outside it and also cease to receive its full protection.

VLA receives approximately one phone call per day — we have over 400 telephone calls a year — where complaints about police conduct is a significant part of that contact. That does not include the many contacts that people have through the duty lawyer service or complaints that might arise in the course of another matter, such as criminal representation. So quite clearly there is a significant overlap between our client group and people who have complaints about police conduct. For the reasons that I said earlier, we believe that community confidence is essential to the rule of law and essential to the equal protection of law for all people within Victoria.

One of the matters that I would like to highlight is that the last probably 10 to 15 years have seen a significant shift in public policy and public attitudes towards increasing police power and in some cases decreased judicial discretion where there are certain consequences, for example, that flow automatically from being charged or prosecuted for a particular sort of offence. This means that police discretion, and in particular prosecutorial discretion, becomes an increasingly important part of how people experience the impact of the law on their lives.

We do not say that the current system whereby approximately 90 per cent of complaints about police conduct are investigated by the police is necessarily deficient because of lack of application or lack of willingness on the part of police to investigate. Rather we say that this is a system of investigation which is not optimised for producing transparent results in a way that can be communicated to the people who need to understand that police are accountable to them and to the public.

That was really what I wanted to say by way of brief introduction. If I can move into our response to the questions specifically, the first question that was posed to us directly is: why is public confidence in Victoria's system of handling complaints about police important? As I said a moment ago, there has been a strong sort of tilt, if you like, towards law and order. That has become an increasingly significant political and social agenda. Because of that we think that trust and confidence in police institutions and the administration of justice is an increasingly important bulwark to protect the liberty of citizens. I am not commenting about whether or not a tilt towards law and order is appropriate — that is a matter for politics to decide. But what I do say is that where there is an increase in police power we say there ought to be an increase in police responsibility. Public confidence in how those matters are dealt with and overseen is vital. As I indicated earlier, we say that in circumstances where a person loses trust and confidence in the police it sets in motion in effect a ripple effect that undermines the authority of public institutions. At a simple and practical level, when a person who has a complaint about police needs to make that complaint, we believe that they should be supported with an effective and meaningful response, one that takes into account the personal circumstances of the complainant, cultural and linguistic diversity and other barriers to why they might make a complaint.

In the second question we are effectively asked to explain that our position of the current system, which hands the investigation process back to the police, is inappropriate for independent investigation of serious complaints. To elaborate on that, common sense tells us that for a complaint to be considered properly it needs to be assessed by an independent body or person. A colleague or a workmate is not sufficiently independent. In our view an effective structure for handling complaints will be institutionally independent. It needs to avoid being captured by the same regulatory system as the body being investigated. It needs to be practically, culturally and politically independent. In our view the current system, whereby 90 per cent of complaints are investigated by the police, falls short of that mark.

The CHAIR — Is that because they go to IBAC and then are referred back to Victoria Police to investigate?

Mr MARSH — In our view there are a number of issues with that referral process, and I will elaborate on those in response to some of the other questions, but part of the issue with that is there is lack of clarity from the point of view of the complainant about what the choices are between complaining directly to VicPol or to IBAC. There are delays and inefficiencies that are built into that system. As I said in the opening statement, in our view to make a distinction between serious or particularly egregious examples of police corruption and lesser examples is not a particularly client-centred or complainant-centred way to view police malfeasance or misfeasance. In our view to draw those distinctions is to draw an artificial line between how some things might impact on people and how other things might impact.

In our view a loss of confidence comes with not having a full and independent police investigatorial system. We are not talking about the failure of the police through massive corruption. If I can just hark back to some of the significant scandals that rocked Victoria Police back in the mid-2000s with investigations into the drug squad, investigations into the armed offender squad, those were egregious examples of police misbehaviour, and that is the sort of misbehaviour that indeed could undermine the entire credibility of policing in the state.

What we are talking about is not a failure through catastrophe but a failure through rust, a failure through the gradual erosion of public confidence by the people who are the most vulnerable and the most needy of police protection. In our view to have this distinction between some matters go to IBAC, some matters go back to VicPol creates a situation where complainants may feel with some real degree of certainty that their subjective circumstances are not being taken as seriously. So for that reason we say that a fully independent system is the

appropriate solution. Our argument would be that that is also consistent with a broader interpretation of the human rights charter here in Victoria, and it also aligns much more strongly with some of the European experience, particularly in countries such as the Netherlands.

The CHAIR — Just to clarify on that point, sorry, do you support IBAC as an independent body investigating the serious misconduct and corruption in Victoria Police? Is the other 90 per cent being referred back where your issue is?

Mr MARSH — Perhaps to clarify, VLA does not have an opinion about whether or not IBAC should investigate every single form of complaint about the police. It may well be that they are not appropriately structured to do that, they are not appropriately resourced to do that. Our preference is for a body which is capable of handling from root to tip all issues of police overreach, corruption, malfeasance and so on. If that means that there is another model of something that is not IBAC but is similar to it or if that means that IBAC needs to be expanded to fit that role, then those are clearly matters that are within the purview of the committee.

I think our position on this might gain some more substance when I talk a little bit about the Police Ombudsman for Northern Ireland's approach and the reasons why we believe there are many things that favour that sort of approach, but at this stage we would argue that there is a real lack of clarity about the complaints pathway.

To pose this problem from a client-centred perspective, if you simply do online searches for 'I want to make a complaint about police in Victoria', you will see very readily that there are multiple pathways to making that complaint. There is one web page that is clearly hosted by Victorian police and one by IBAC. It is entirely unclear on the basis of those two entry points into the system what the benefits or detriments might be to a complainant about initially lodging a complaint with one body or another. Indeed Victoria Police have significant support on their web page for cultural and linguistic diversity with downloadable PDFs in multiple languages. The IBAC page does not have a similar level of support. It is entirely opaque to a complainant why they might decide to pursue one entry point over another. If a person had a particularly strongly held view about the nature of the police conduct as being corruption, it may well be that they would automatically ideate towards making a complaint through IBAC because, unsurprisingly, it has corruption in its name. We do not believe that the likelihood of that complaint being referred to VicPol for investigation would be consonant with that person's expectations of having lodged that complaint initially to IBAC.

In our view there are some real issues when it comes to the lack of clarity about how the current system is accessed by people. Additionally, the process of referring complaints back to Victoria Police, in our view, can impart delay into the process. And it can mean that if there is evidence that is particularly time critical or ephemeral in nature — that could include, for example, photographs of injuries — by the time police are looking to investigate this matter that evidence might have either disappeared or be compromised. Anecdotally we have heard of the Victorian Institute of Forensic Medicine being asked to analyse blurry photos from a mobile phone because that was the only evidence that documented in a contemporaneous sense the injuries that a person said they received during an arrest that they have made a complaint about.

So in our view there are some real issues about the timeliness, and that is really baked into this process. Again, as I said at the outset, we are not suggesting any lack of application or integrity on the part of the police conducting the investigations, far from it. What we are saying is that this is a process that is not set up in such a way as to promote independent, transparent and communicative accountability.

The final point I would want to make about this is that, in our view, it is not a process that is fair to police either because police are being put in a situation where they are investigating their own, and that may well pose conflicts for people on both the personal and professional level. Those conflicts might be magnified in rural areas, for example, where there are simply fewer police and there is more operational contact between them.

If I can move on to the next question, and please forgive me, many of these answers becomes subsumed into each other but —

The CHAIR — We might go to the committee for questions, Tim, if you do not mind, and then we can come back.

Mr MARSH — Sure.

Mr HIBBINS — I guess I just wanted to ask you about potential under-reporting from marginalised groups and whether you had any statistics or evidence around people involved with legal aid wanting to make a complaint but then not going through the process.

Mr MARSH — We cannot give you examples of, ‘In the last financial year there were X number’. You would appreciate that in these circumstances it is a little difficult to get an accurate number on it, but certainly there are circumstances that VLA has become aware of, of people who potentially have a reason to make a complaint about police but have not done so.

I can bring to mind two examples. There was an incident outside a supermarket in Lakes Entrance where a number of young Indigenous women were having a verbal altercation with each other. Police attended. Two uniformed police members were attempting to diffuse that situation when an un-uniformed, off-duty police prosecutor emerged from the supermarket dressed in shorts and a singlet, proceeded to get involved in this argument and retrieved capsicum spray from the duty belt of one of the uniformed officers and deployed that capsicum spray on one of the young women involved. She declined to make a complaint about that conduct.

We have another example of another Aboriginal client who had a motor vehicle that was registered in his name. He lent that motor vehicle to a friend of his who subsequently disappeared with the car. He went to report that to police and was told that it was a civil matter and that they would not take a complaint about it. He declined to make a complaint towards police.

In many cases the people who we see who might have cause to make a complaint about police also have had many interactions with the police where they themselves have been either arrested or interviewed in relation to offending, and they have chosen not to.

Another example which occurs on a daily basis — and I am sure you will hear more of this when you speak to the Flemington and Kensington Community Legal Centre later this morning — are complaints in relation to stop and search powers. From the perspective of a person who is being stopped and searched by police, they are often put in a situation where they have to make a choice about the extent to which they want to stand on their rights. They can either consent to a minor interference in their daily business — submit to a search — and move on with their life, or they can choose to dig their heels in and resist that police power. In circumstances where that is the choice that a person is making it is unrealistic to think that they would then voluntarily choose to involve themselves in a complaints process that would take up more of their life, more of their time and bring them into more contact with police.

This is really at the heart of what I was saying earlier about the erosion in police confidence through rust rather than catastrophe. This is where people, through their daily interactions with policing, lose confidence that it is a system that is designed to protect their rights, rather it is designed to protect other people’s. Those are examples where we can say with some real certainty that our client groups are having to make decisions like that on a regular basis.

Another significant client cohort are people who suffer from intellectual disabilities or mental illnesses, who may well have reason to believe that their complaints will not be taken seriously by virtue of their impairments. They may have mistrust of police for reasons that are related to mental illness, for example, and choose not to make complaints for that reason. So, again, our experience is that these are people who are really sort of falling between the stools when it comes to being able to access effective complaints mechanisms.

Mr RAMSAY — Thank you, Mr Marsh, for your time this morning. This is a question I was going to pose to the previous witnesses, who were researchers from Monash University that deal mainly with south-east youth services. Given their submission, I was still unclear whether they would have confidence in a system that changes both the IBAC Act and the current Victoria Police Act to give greater confidence to those that want to complain about police misconduct to do so through either of those two agencies. The view I am getting from you in relation to your verbal submission this morning is that you do not have confidence regardless of any significant change or even slight change in legislation to the IBAC Act or the police standards command — which is responsible for police complaints — that some of your clientele would have confidence to report complaints against police.

The view from you and others we have heard from is that we need an independent body like the Northern Ireland police ombudsman to deal with complaints independent of those two agencies. I guess that is what we

are getting at, isn't it? From the grassroots level, for people wanting to make a complaint against police, they do not want to do it through Victoria Police, they do not want to do it through IBAC except for maybe corruption. But for just basically complaints and low-level misconduct, the only place they would get any degree of confidence from would be through an independent body, perhaps like the police ombudsman in Northern Ireland. Is that where you are sitting?

Mr MARSH — Yes, in essence. As I indicated earlier, our position is not to say that there is something necessarily deficient about IBAC as a body, but it may well be that they are not currently resourced or structured in such a way as to be able to pursue more minor levels of police overreach. Our most fundamental point is that the current system, that bifurcates complaints against police into very serious examples that are dealt with through IBAC, the vast majority of which are devolved back to the police, is an inherently flawed approach for the reasons that I have already rehearsed.

You have raised the Police Ombudsman for Northern Ireland, so quite clearly that is an independent body. It has own-motion investigatory powers. It has independent investigators with the power to investigate, arrest and charge. So those are all significant factors when it comes to providing public confidence in there being an independent investigatory body.

What I would like to focus on with the Police Ombudsman for Northern Ireland is perhaps a less obvious aspect of that system, and that is that it is also highly communicative about the nature of complaints and the outcome of allegations. It is a very simple matter to see through their website a log of resolved matters in the previous financial year that indicate in brief summary the nature of the complaint and the outcome. It should be said that, certainly on my viewing, the majority of those complaints were resolved without a finding against police or a caution or anything of the sort issued. But what it did quite clearly communicate was what the expectations were about what good or bad police conduct looked like. So as a potential complainant to be able to see a log of completed complaints and understand that certain sorts of behaviour are clearly not tolerated sends a very clear message both to the police and to the public about what they ought to expect from policing.

One of the concerns that we have about the current system is that there is not really a transparent and communicative process that keeps either the complainants themselves updated about the progress of the investigation, but there is certainly nothing that communicates those issues more broadly to the community. In our view that is a very powerful way of building public confidence in policing and a very powerful way of communicating what realistic expectations are for how police conduct themselves and how private citizens might conduct themselves in their interactions with police. Those are two areas that we say currently are really not met by the current system.

It is interesting to note that I think it was the 2015 or 2016 IBAC review of the internal police complaints process indicated that in something over 50 per cent of matters there were deficiencies in the investigation or that there was no deficiency but there was feedback provided to the investigators. That suggests, in our view, that there are things about the current process with police investigating complaints internally that fall short of being an independent and rigorous investigatory procedure.

When you combine things like the 50 per cent of deficiencies or feedback provided with the lack of transparent, publicly accountable communication, in our view these are powerful factors motivating towards an ombudsman-style body that has the capacity to take all issues of police misconduct, however grave or however minor, from inception through to finalisation and communication of the results, both to the complainant and to the public more broadly. As I said at the outset, we do not have an opinion about whether IBAC should or could be that body. Perhaps it could. But from what little I do know of the current IBAC legislation, it is not envisaged to be that body as it currently stands.

The CHAIR — Just to clarify a point, isn't part of the issue that if we were to maintain IBAC it is at what level you refer back to Victoria Police? So part of your argument is that too much is being referred back. Where should the threshold be? Is it the police officer who is rude to somebody or is taking too long to report back to a house break-in? Where should that high jump or that threshold bar be? I know it is a difficult question, but maybe some —

Mr MARSH — No, certainly. In a perfect world where there was boundless appetite and limitless resourcing for these sorts of things we would say that all issues, all complaints in relation to police — overreach, misconduct, malfeasance, however you want to characterise it — should be investigated by an

independent body. In a practical world that may well be unrealistic. It may well not be feasible, for example, to have an independent body investigate whether or not a desk sergeant was rude to somebody. So there may well be some basic nuts and bolts operational-level issues where investigation at the station level, where internal discipline and feedback is sufficient to provide public confidence and provide redress.

You will no doubt note that I am separating out public confidence and redress in my responses to you. In our view it is critical that a system addresses both of these things. To simply provide redress in a private setting, as between the complainant and the police officer involved, in our view does little to promote an accountable police force and one where there is transparency about what the public's expectations ought to be of police conduct. So whatever the system is, whether it is one where there is entirely 100 per cent external investigation, whether it is one where minor levels of operational policing are referred back to the police force for investigation, in our view it is still important that all of those hallmarks are addressed.

As to exactly where the settings should be, it is very difficult to say, and one person's interpretation of what an operational issue might be versus another's might be difficult to pin down. One of the clear pieces of feedback that we have received is that a complainant's individual sense of how a particular police action has impacted on them is often a very heartfelt and personally felt matter. People may not necessarily have a sense of perspective about where this particular act fits into a much broader hierarchy of potential aspects of police behaviour. If there is to be a situation where investigation is devolved back to the police, our own preference would be that that is very much biased towards independent investigation rather than the current setting, which is clearly 90 per cent internal.

The CHAIR — If we could get the answers to your questions tabled for the committee as part of your submission, that would be terrific.

Mr MARSH — Certainly. At the moment they are in very rudimentary point form, but I am happy to write those up and provide them in a fuller and more comprehensive form for the committee if that is appropriate.

The CHAIR — That would be fantastic. If you could submit that to Sandy Cook, our executive officer, that would be great. We thank you very much for your time.

Mr MARSH — Thank you for your time.

Witness withdrew.