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18 August 2017

Independent Broad-based Anti-corruption Commission Committee
Parliament House
EAST MELBOURNE VIC 3002

By email only to: IBACC@parliament.vic.gov.au

Dear Committee

Submission to Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria

We welcome the opportunity to make a submission to this important inquiry.

About St Kilda Legal Service

St Kilda Legal Service (**SKLS**) provides free and accessible legal services to members of the community within the Cities of Port Phillip, Bayside, Stonnington and parts of Glen Eira. The Legal Service is committed to redressing inequalities within the legal system through casework, legal education, community development and law reform activities.

We are a generalist community legal centre that provides legal advice and casework assistance on a broad range of legal issues, and often sees vulnerable clients with legal matters associated with poverty, drug addiction, mental illness and homelessness. SKLS provides a generalist night service three nights per week, and operates two specialist programs: the Drug Outreach Program and the Family Violence Duty Lawyer Program. We also undertake community legal education and law reform activities throughout our community.

Summary

Without external oversight, police are essentially left to police themselves. Victims are often reluctant even to report abuse directly to police, for fear of reprisals, or simply because they do not believe a serious investigation will result. ... Importantly, external oversight also plays a role in increasing community trust of the police service, and can

thereby increase public-police cooperation and improve the effectiveness of the police force's ability to address crime¹.

Our submission has been prepared on the basis of our community service and legal casework experience. Our experience has shown that where our clients, and particularly our most vulnerable clients, have a legitimate complaint about police misconduct, their complaints are most often either unsatisfactorily dealt with, or go unmade.

Our experience is that most, if not all, complaints lodged with Independent Broad-based Anti-corruption Commission (**IBAC**) are sent back to the police for investigation. Clients' experience is that where a complaint is dealt with by police the process is non-transparent, non-independent (and so is perceived as biased), under-resourced, and ultimately often results in an unsatisfactory outcome - unsubstantiated dismissal.

Yet perhaps the greatest indictment of the current system is that many legitimate complaints about police misconduct go unmade because people fear adverse consequences of that complaint. These fears include a fear of losing the protection of police, or, at worst, a fear of retribution. This suggests there is little public trust in the current police complaints system; and our experience suggests this is for good reason.

We have reviewed Flemington & Kensington Community Legal Centre's draft submission to this inquiry (to be submitted), and endorse its recommendations. In particular, we strongly support its submission that the Victorian Government establish a separate and specific oversight body exclusively dedicated to police oversight.

We further submit that in order to adhere to best practice principles, the Victorian Government must ensure that the established oversight body operates in line with the minimum requirements established by Amnesty International (Dutch Section) (**AID**) in its 2015 report on police oversight systems² and other relevant human rights instruments.

Specifically, we make the following recommendations:

- **Recommendation 1:** That the Victorian Government establish an external oversight body exclusively dedicated to police oversight.
- **Recommendation 2:** That the Victorian Government legislate for the oversight body's mandate to encompass all police complaints including:
 - Allegations of serious misconduct;
 - Allegations of misconduct or neglect of duty by any police employee; or

¹ Philip Alston, Study on Police Oversight Mechanisms, A/HRC/14/24/Add.8, par. 3 as quoted in Amnesty International Dutch Section, 'Police Oversight', Police and Human Rights Programme – short paper series No 2.

² Amnesty International Dutch Section, 'Police Oversight', Police and Human Rights Programme – short paper series No 2 (the **AID Report**). Available online:

https://www.amnesty.nl/content/uploads/2017/01/ainl_police_oversight.pdf?x79902

- Allegations in relation to any practice, policy, procedure of the police affecting the person or body of persons making the complaint in a personal capacity.
- **Recommendation 3:** That the Victorian Government establish a mechanism for members of the public to lodge complaints directly with the oversight body rather than having to first lodge an application for internal review.
- **Recommendation 4:** The Victorian Government implement legislation requiring police to participate in all investigations being conducted by the oversight body. This should include a requirement on police to notify the oversight body of any incidents which could reasonably fall within its mandate.
- **Recommendation 5:** The Victorian Government implement legislation providing the external oversight body with full power to conduct its own investigations and make appropriate findings. The power to conduct investigations should include the power to:
 - subpoena documents, obtain search warrants, summon witnesses and to compel police cooperation;
 - conduct investigations on receipt of a complaint as well as start investigations out of its own initiative; and
 - issue recommendations for prosecutions, disciplinary sanctions, reparations and policy reviews.
- **Recommendation 6:** That the Victorian Government appropriately resource the external police oversight body so that it may carry out its functions to a satisfactory standard.
- **Recommendation 7:** That the Victorian Government require that the external oversight body provide annual reports detailing their investigations.

Current complaints system creates disincentives to reporting by vulnerable clients

Our starting position is that all members of the community, particularly those who are most vulnerable, deserve to live in a society in which they can trust the police to perform their role effectively, professionally and free from prejudice. We acknowledge, of course, the crucial role that Victoria Police plays in securing the safety of our community, and that a large portion of Victorian police do perform their duties effectively, professionally and free from prejudice.

However, our casework and community development experience has caused us to have significant concerns in relation to how some police respond to the most vulnerable client groups in our catchment area. The groups are: the homeless; people with mental health issues; family violence survivors; the lesbian, gay, bisexual, transgender and intersex (LGBTI) community; sex workers, people with a disability; and people who experience of confluence of these vulnerabilities.

Unfortunately, the current police complaints system fails particularly our vulnerable clients, but also broader society, in numerous ways. Our experience is that where vulnerable clients face a legitimate problem with police response and wish to raise a complaint, there is a real risk that if they do so:

- (a) the complaint is investigated by the very station they are complaining against;
- (b) the process is re-traumatising, non-transparent and lengthy;
- (c) the complaint outcome is often unsatisfactory, in that it does not acknowledge our client's experience, it provides little to no basis for the decision and results in no positive outcome for our client and no change to police practice change; and
- (d) due to the non-independence of the process, the act of lodging the complaint contains an inherent risk of significant adverse consequences for our clients.

These include:

- Reduced police responsiveness in future call outs, or police (and particularly their local police station) being unwilling to investigate future allegations of criminal behaviour (including family violence).
- Targeting by way of subsequent criminal charges. In the case of family violence survivors, this may include being charged with breaches of an intervention order where there are cross-applications of orders.
- Threats of discrimination, or actual aggressive behaviour.
- Feelings of isolation in that our clients have nowhere to turn to when seeking protection against violence. See, for example, **Case Study 1: Anna's story** below.

In short, our experience echoes the findings of Flemington & Kensington Community Legal Centre³ (**FKCLC**) in its 2015 *Independent Investigations of Complaints against the Police, Policy Briefing Paper*, specifically that:

1. Police consistently fail to find that meritorious complaints are substantiated.
2. There are inherent problems with the current investigation process, including but not limited to:
 - a. bias in the investigation;
 - b. lack of trust and confidence in the complaint process; and

³ Police Accountability Project, *Independent Investigations of Complaints against the Police, Policy Briefing Paper* (2015)

- c. limitations of IBAC, which most often refer complaints back to Victoria Police.

CASE STUDY 1: Anna's story

The following was reported by one of the support services for women experiencing family violence that SKLS works with.

Anna was a young girl being sexually abused by her father. Anna's mother reported this to Child Protection. At the request of Child Protection, Victoria Police contacted Anna and her mother. Victoria Police suggested they interview Anna at school. Anna's mother requested that the interview be done by police in plain clothes to avoid any embarrassment for Anna given the public nature of her school.

On the day of the interview, the police had not notified Anna's mother that they would be conducting the interview on that day. Further to this, they showed up in full uniform. The interview was conducted without Anna's mother's knowledge and with an unfamiliar teacher present in the room.

As a result, Anna reported feeling embarrassed and terrified and refused to talk. Anna's mother tried to lodge a complaint with the police, but was told this is not something police would investigate.

As a result of this experience, Anna has refused to talk any further to people in positions of power regarding the family violence. This incident of family violence has therefore not been reported to police and no protective action has been taken.

The current system therefore results in our most vulnerable clients being left under-policed and under-protected. Worryingly, the system does not support the acknowledgement and correction of significant and legitimate problems in police conduct.

For example, see **Case Study 2: the particular position of sex workers**, below.

CASE STUDY 2: the particular position of sex workers

Our clients who work in the sex industry have reported that they are unable to seek support from police where they are the victims of assault or sexual assault due to a common reaction by police that a crime perpetrated against them is "*their fault*". By responding in this way, police are failing in their duty to properly investigate matters and clients are left feeling isolated.

This was reflected in the Royal Commission into Family Violence, which considered in its report the inadequate police response to women who are or have been involved in the sex industry and have experienced family violence. Specifically, the Commission commented on "the negative attitudes police held towards [sex workers], which in many cases affected

the justice outcome they received”⁴. The Royal Commission then went on to quote the following submission:

*When I was with [removed] I had told him I’d been a prostitute and when the police was called, he would tap them on the shoulder and say...she’s a prostitute and the police would say to me you need to pull your head in, and to him they’d say ‘just don’t hit her mate, just get rid of her’.*⁵

Again, crimes are left unreported and unprosecuted.

What could a best practice police oversight system look like?

In preparing this submission, we considered approaches to police oversight in the following local and international jurisdictions: New South Wales, South Australia, Ontario (Canada), New Zealand and England and Wales.

We further considered, and endorsed:

- the minimum requirements established by Amnesty International (Dutch Section) in its 2015 report on police oversight systems (**AID Report**);⁶
- FKCLC’s support of the finding of the United Nations Human Rights Committee (**UNHRC**) in the decision of Corinna Horvath.⁷ The Horvath decision “*obliges the Australian Government to ensure that victims of police assault have a right to compensation and requires that the State ensures that allegations of human rights abuses are investigated promptly, thoroughly and effectively through an independent and impartial body*”.⁸
- The Commonwealth Ombudsman *Better Practice Guide to Complaints Handling*⁹ which is built on the following elements of effective complaints handling:

“Culture. Agencies must value complaints as a means of strengthening their administration and improving their relations with the public.

⁴ Royal Commission into Family Violence: Report and Recommendations (March 2016) Volume V, Chapter 35, page 254.

⁵ As above.

⁶ Amnesty International Dutch Section, ‘Police Oversight’, Police and Human Rights Programme – short paper series No 2 (the **AID Report**). Available online:

https://www.amnesty.nl/content/uploads/2017/01/ainl_police_oversight.pdf?x79902

⁷ United Nations, Human Rights Committee, Horvath v Australia, 1885/2009, 24 April 2014.

⁸ <http://www.policeaccountability.org.au/independent-investigations/why-the-nsw-law-enforcement-conduct-commission-is-no-model-for-victoria/>

⁹ http://www.ombudsman.gov.au/_data/assets/pdf_file/0020/35615/Better-practice-guide-to-complaint-handling.pdf

Principles. An effective complaint handling system must be modelled on the principles of fairness, accessibility, responsiveness, efficiency and integration.

People. Complaint handling staff must be skilled and professional.

Process. The seven stages of complaint handling—acknowledgment, assessment, planning, investigation, response, review, and consideration of systemic issues— should be clearly outlined.

Analysis. Information about complaints should be examined as part of a continuous process of organisational review and improvement.”¹⁰

On the basis of the above review of other models and standards, and given our clients’ experience, we believe the first and most important step that Victoria must take toward an effective police accountability system is to establish an independent body exclusively dedicated to police oversight that meets the AID Report minimum requirements.

These include:

1. Mandate: an Independent oversight body with broad mandate
2. An accessible complaints procedure
3. Powers to investigate and to issue recommendations
4. Sufficient resources to do the job well
5. Transparency and reporting
6. The possibility to appeal
7. Civil society participation and public trust

We focus on the first five points in our below recommendations, but submit that all seven should be implemented.

We further endorse the following minimum requirements, as set out by FKCLC’s Police Accountability Project:¹¹

- a) *Independent of the police (that is, hierarchically, institutionally and practically);*
- b) *Capable of conducting an adequate investigation (that is, able to ascertain whether the actions of the police breach legal or disciplinary standards and whether police practices are in compliance with human rights);*

¹⁰ As above

¹¹ <http://www.policeaccountability.org.au/issues-and-cases/independent-investigations/>

- c) *Prompt;*
- d) *Open to public scrutiny;*
- e) *Victim-centred and enables the victim to fully participate in the investigation; and*
- f) *State-initiated.*

Independent oversight body with broad mandate

Firstly, it is imperative that an external oversight body be established that is dedicated to police oversight. Currently IBAC does not meet this requirement, because: (a) it continuously refers complaints back to police to investigate internally; and (b) its mandate includes monitoring the conduct of many other public sector agencies.

New Zealand, Ontario Canada and England and Wales all have independent bodies exclusively dedicated to monitoring police misconduct and police corruption that are functioning successfully. New South Wales new independent body commenced operations on 1 July 2017. One example of a broad mandate is that of the Independent Police Conduct Authority (**IPCA**) in New Zealand, the functions of which are:

- a) *to receive complaints –*
 - i) *alleging any misconduct or neglect of duty by any Police employee; or*
 - ii) *concerning any practice, policy, or procedure the Police affecting the person or body of persons making the complaint in a personal capacity:*
- b) *to investigate of its own motion, where it is satisfied that there are reasonable grounds to carry out an investigation in the public interest, any incident involving death or serious bodily harm notified to the Authority by the Commissioner under section 13:*
- c) *to take such action in respect of complaints, incidents, and other matters as is contemplated by this Act.*¹²

¹² Section 12, *Independent Police Conduct Authority Act 1988* (New Zealand)

In order to truly support those most vulnerable clients, it is important to recognise that police complaints do not just arise out of serious misconduct issues.

Recommendation 1: That the Victorian Government establish an external oversight body exclusively dedicated to police oversight.

Recommendation 2: That the Victorian Government legislate for the oversight body's mandate to encompass all police complaints including:

- Allegations of serious misconduct;
- Allegations of misconduct or neglect of duty by any police employee; or
- Allegations in relation to any practice, policy, procedure of the police affecting the person or body of persons making the complaint in a personal capacity.

Accessibility and an effective complaints procedure

In order to function effectively and truly be of service to members of the public, the oversight body needs to be accessible to all members of the community, particularly those that are at risk and most vulnerable. In South Australia, New South Wales and New Zealand there is no requirement to lodge a complaint with the police and receive a decision before approaching the external oversight body. This is not the case in Ontario Canada or England and Wales. Removing the need to first go through the internal review process would save time on investigations as well as aid public confidence that the system is effective and that matters are not being lost in the cracks while being investigated internally.

Recommendation 3: That the Victorian Government establish a mechanism for members of the public to lodge complaints directly with the oversight body rather than having to first lodge an application for internal review.

Powers to investigate and to issue recommendations

In order to ensure the oversight body achieves correct and effective outcomes, the power to investigate and issues recommendations is crucial. Police must be obliged to participate in the process in order to avoid the current failings whereby police are deeming certain complaints not important enough for investigation.

Furthermore, AID notes that the ability to commence investigations without a complaint being lodged allows the body "to investigate cases that would otherwise go unreported, by an uncooperative police station or victims who do not dare to make a complaint".¹³ This could include the unreported complaints of sex workers, as one example.

¹³ See page 18 of the AID Report.

It is evident that in order to be truly effective, the oversight body must be able to both conduct effective investigations, and issue recommendations that have the ability to effect practice change within the police force. This can only be done by giving that body the power to issue recommendations for prosecutions, disciplinary sanctions, reparations and policy reviews.

Recommendation 4: The Victorian Government implement legislation requiring police to participate in all investigations being conducted by the oversight body. This should include a requirement on police to notify the oversight body of any incidents which could reasonably fall within its mandate.

Recommendation 5: The Victorian Government implement legislation providing the external oversight body with full power to conduct its own investigations and make appropriate findings. The power to conduct investigations should include the power to:

- subpoena documents, obtain search warrants, summon witnesses and to compel police cooperation;
- conduct investigations on receipt of a complaint as well as start investigations out of its own initiative; and
- issue recommendations for prosecutions, disciplinary sanctions, reparations and policy reviews.

Resources

The oversight body must be provided with sufficient funds in order to carry out all of its functions, including the ability to investigate all complaints (both in relation to serious misconduct and day-to-day complaints) in a timely and effective manner. In accordance with the recommendations made by former NSW shadow attorney-general Andrew Tink in the *Review of Police Oversight* report (the **Tink Review**),¹⁴ we submit that an appropriate budget must be established with, among other things, the following in mind:

- the creation of a new oversight model is not designed to realise cost-savings;
- allowance should be made at the time of establishing the new oversight body for transitional costs;
- costs will need to be included to ensure there is sufficient capacity to monitor critical incident investigations; and
- resources should not limit the ability of the oversight body to investigate all complaints in appropriate detail.

¹⁴ <http://www.justice.nsw.gov.au/justicepolicy/Documents/review-police-oversight/review-police-oversight-final-report.pdf>

Recommendation 6: That the Victorian Government appropriately resource the external police oversight body so that it may carry out its functions to a satisfactory standard.

Transparency and reporting

In accordance with the standards listed in our introduction to this part, an appropriate oversight body must be open to public scrutiny, and should also support the victim to fully participate in the investigation where possible. This is not the case with the current system (see above, **Case Study 1: Anna's story**).

The jurisdictions we considered differ in their approach to this requirement. In NSW, the newly established Law Enforcement Conduct Commission (**LECC**) is required to prepare an annual report which canvases the types of matters referred to it as well as any recommendations for changes to state laws¹⁵. No reports have been prepared to date as the LECC has only recently been created. The Office of the Independent Police Review Director (**OIPRD**) in Ontario Canada is also required to publish annual reports, which are made available to the public via a website¹⁶.

This is in contrast to the Special Investigations Unit (**SIU**)¹⁷ of Ontario which provides a report on all investigations to the Attorney General¹⁸. These reports are not made public. New Zealand's IPCA publishes regular reports on investigations. The IPCA also provides annual reports to parliament setting out how they have performed against budget and performance measures¹⁹.

We submit that in order to satisfy the requirements of transparency and reporting, annual reports should be made public.

Recommendation 7: That the Victorian Government require that the external oversight body provide annual reports detailing their investigations.

We submit that the implementation of these recommendation provided would ensure that Victoria meets the minimum requirements outlined in the AID report, as well as satisfy international law and the State's own human rights charters.

Whilst these recommendations may lead to more complaints being lodged against police, they would also help establish a community which has greater trust in police and greater protections

¹⁵ Section 18, *Law Enforcement Conduct Commission Act 2016* (NSW)

¹⁶ Office of the Independent Police Review Director, *Annual Reports*
<http://www.oiprd.on.ca/EN/Education/Pages/Annual-Reports.aspx>

¹⁷ The SIU specialises in the investigations of serious injuries or deaths that may have resulted from criminal offences committed by police officers, whereas the OIPRD has a broader jurisdiction which handles both serious and general misconduct complaints made by members of the police against the public.

¹⁸ Section 113(8) of the *Police Services Act R.S.O. 1990, c. P.15*

¹⁹ <https://www.ipca.govt.nz/includes/download.ashx?ID=146449>.



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in place for its most vulnerable members. We submit that a community which has greater trust in police would thereby improve the effectiveness of the police force's ability to address crime.

If you have any queries, please contact Courtney Peters on 03 9534 0777 (reception) or by email to courtney@skls.org.au.

Yours faithfully

ST KILDA LEGAL SERVICE CO-OP LTD

Agata Wierzbowski
Principal Lawyer

Courtney Peters
Legal Education & Law Reform Lawyer