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Dear Sir

Oversight of Police Critical Incidents

I refer to the email from the Hon Robert McLelland on 25 September 2013 inviting a submission to the review into police oversight of critical incidents. The New South Wales Council for Civil Liberties (NSWCCL) welcomes the review, and is grateful for the opportunity to make a submission.

General Principles

The NSW CCL believes that the establishment of an independent body to oversee investigations into critical incidents involving police is paramount.

The European Court of Human Rights has enunciated five key principles of effective investigation: independence, adequacy, promptness, sufficient public scrutiny and next-of-kin involvement. The NSW CCL believes that this Review should recommend the adoption of these principles in the final model.

Dr Graham Smith, consultant to the European Commission for Human Rights summarised the independence¹ principle as such:

The investigators or investigative body should have no hierarchical or institutional connection to the police involved in a police-related death and the investigation must be independent in practice. The European Commissioner for Human Rights supports investigation by a civilian oversight or an independent police complaints body.

¹ <http://www.ibac.vic.gov.au/docs/default-source/opi-other-documents-and-papers/opi-issues-paper---review-of-the-investigation-of-deaths-associated-with-police-contact.pdf?sfvrsn=4>

The NSW CCL believes that the current system of the police investigating the police is not working, nor does it align with these principles. This was demonstrated by two recent cases - Adam Salter and Roberti Laudisio-Curti - where concerns were raised regarding the investigations of critical incidents.

These public tragedies cannot now be swept under the carpet. Structural change is needed.

The NSW CCL notes:

- The Police Integrity Commission's report on Operation Calyx and the Ombudsman monitoring of the police investigation into the death of Roberti Laudisio-Curti revealed the failure of the police force to conduct a thorough investigation.
- Several scandals related to the NSW Police Force were highly covered by the media. Corey Barker was assaulted by police officers at Ballina Police Station in September 2011. The involved police officers gave evidence under oath that they only tried to get Mr Barker under control after he assaulted them. CCTV footage proved the police officers lied.
- The allegations of police misbehaviour at the 2013 Mardi Gras demonstrates how quickly public confidence in the NSW Police Force can erode if complaints are not dealt with in an independent and transparent manner.
- In addition, the Ombudsman's report on "How are Taser weapons used by the NSW Police Force?" provided to the Parliament in October 2012 shows that Tasers can be misused by police officers and can cause serious body injury or death. Between 2008 and 2011, the report identified 80 incidents that involve a breach of the criteria of use.

The NSW CCL believes that police critical incidents must be investigated by an independent body of utmost integrity - with adequate resources to investigate misconduct or neglect in a prompt and efficient manner.

These are matters of the highest objective seriousness, and each has the potential to corrode public confidence in the NSW Police Force.

A broken system

Two recent cases have demonstrated problems involving the lack of oversight and independence regarding the current critical incident handling process. Those cases are demonstrative of a system that is not working.

The Adam Salter Case

The Police Integrity Commission furnished to the NSW Parliament a report on Operation Calyx. The Commission concluded that the investigation into the death of Adam Salter in 2009 was seriously flawed.

A critical issue emerged of whether police officer, in attempting to restrain Salter, had brought himself into physical contact with Salter. The police witness agreed he was in contact and therefore at a special risk of being injured, where the civilian reports said that he was in no physical danger. The Commission, however, found that the arresting officer's actions were inconsistent with the evidence.

The critical incident report of Detective Inspector Russell Oxford, the Senior Critical Incident Investigator found that Bissett, the officer who shot Adam Salter, had been reasonable in her belief that Abela had been at immediate risk of death or serious harm and that her decision to fire at Adam Salter was reasonable, necessary and justified.

The PIC stated: “Oxford did not conduct the critical incident investigation into the death of Adam Salter and did not prepare his report, with rigour and impartiality. His investigation did not fulfil the public interest expressed in the Guidelines that police investigating a critical incident should act and be seen to act with particular thoroughness and complete impartiality. His primary role was to ensure that the critical incident involving Adam Salter was “rigorously and thoroughly investigated”. The Commission considers that his investigation did not meet that standard. He was also responsible for reporting any management issues, including any complaint issues. The Commission considers that there were complaint issues which Oxford did not report.”

The Review Officer Tedder was obliged, under the Guidelines, “to ensure that a high quality comprehensive investigation is conducted and to ensure that the investigation process has integrity and can withstand independent scrutiny”. The Commission contends that Tedder did not comply with this central obligation. He did not detect report deficiencies and uncritically accepted the evidence of the police officers and disregarded the evidence of the civilian witnesses on the critical factual issue.

After the shooting the NSW brought into existence a number of documents about the shooting. These included three situation reports, a media statement by the Assistant Commissioner of Police and a media release. All of these documents were found to contain statements which were untrue and supplied senior police and the public with a version of the events that were untrue. The statements regarding the situation in which Salter was shot were, at the time of the Commission investigation, were not supported by evidence.

Further, the Commission found that the Duty Officer and Acting Local Area Commander did not make a situation report but was informed of the situation by others and failed to make a record of it. The Commission found he should have made a report and recorded who informed him of the details of the situation.

The Roberto Laudisio-Curti Case

The sudden and tragic death of Roberto Laudisio-Curti on 18 March 2012 raised issues of significant public interest both here in Australia and abroad after it was revealed that Mr Laudisio-Curti — an otherwise fit and healthy 21 year-old — died shortly after 11 officers used physical force, multiple Tasers, OC spray, handcuffs and a baton while attempting to arrest him for allegedly stealing two packets of biscuits from a convenience store.

The Ombudsman office received an internal police complaint raising issues of unreasonable use of force by unidentified officers involved in the critical incident. This complaint enabled the office to oversight the investigation. The report identified several issues in the monitoring of the critical incident investigation.

According to the *Critical Incident Guidelines*, “The Senior Critical Incident Investigator is to ensure that the investigation is recorded on e@gle.i which will be the primary storage facility

for all documents relating to the critical incident investigation”. The Ombudsman’s office was provided an unfettered access to e@gle.i to ensure that it could follow the investigation in real time. Important information was not placed on e@gle.i - or were but too late. This prevents the office from supervising the investigation. Generally, the investigators were not willing to cooperate with the office.

The Ombudsman also considers that the investigators did not identify a crucial witness early enough. A civil witness who saw the foot pursuit and final struggle spoke to an officer at the scene of the critical incident but was not asked to make a statement. He spoke to the newspapers and after that, the investigators contacted him to obtain a statement. The report criticises the fact that the investigators did not re-interview the officers involved after gathering additional information.

The report says that the investigators discovered that one of the Taser cartridges deployed at the scene of the critical incident was not signed out in the relevant Taser Register. The Ombudsman did not find any evidence that an action has been taken to address the fault of the officer.

The critical finding therefore laid bare that police investigators did not comply with established procedures for conducting critical incident investigations. They did not co-operate with the Ombudsman’s office, did not examine the lawfulness of the actions of the involved police officers and did not properly analyse each use of force by police.

The report concluded that there had been a “ failure of the NSW Police Force to appreciate and fulfil this responsibility (to conduct an appropriate and accountable investigation into any death that occurs during policing activities) when conducting the critical incident investigation into the death of Mr Laudisio-Curti”.

The Ombudsman made several recommendations in order to ensure that critical incident investigations are well conducted in the future. The main recommendations include:

The NSW Police Force amend the Critical Incident Guidelines to make it clear that the critical incident investigation team must consider all conduct and systemic issues and take or recommend appropriate action be taken in a timely manner to address any identified criminal conduct, misconduct or systemic issues before any coronial inquest. This should in all cases include a review of the complaint and use of force histories of the involved officers. (Rec iv.)

The NSW Parliament consider amending the Police Act 1990 to require the NSW Police Force to notify the NSW Ombudsman immediately following all critical incidents involving the death or serious injury of persons during policing activities. (Rec vi.)

The NSW Parliament consider amending the Police Act 1990 to provide the NSW Ombudsman with appropriate powers to effectively oversight critical incident investigations involving the death or serious injury of persons during policing activities.(Rec vii.)

An Independent Investigative Body

Arising from these recent cases, the NSW CCL believes that the case has been made out for the creation of an independent investigative body to ensure that police critical incidents are properly investigated.

The new independent investigative body can draw on the international experience of such bodies in New Zealand and the United Kingdom - with adequate resources to maintain public confidence and deal with claims expeditiously.

The body should have statutory independence and a charter based on the principles enunciated by the European Court of Human Rights.

The independence of the body from the police will ensure that police do not investigate police and that police officers whose behaviour causes death or serious injury will be dealt with appropriately.

The mandate of the body should be perfectly clear, as should a guarantee of adequate resources.

This should include a broader mandate to deal with police misconduct generally. The body's mission should not be limited to the investigation of cases involving the death or serious injury of a civilian or of a police officer arising from a police operation. It should have the power to conduct investigations on its own initiative if it is of the opinion that it is in the public interest to do so.

Further, the NSW CCL believes that protocols should be established to ensure that any police officer who has engaged in serious misconduct and/or is responsible for the death or serious injury of a civilian, is referred to the Director of Public Prosecutions.

When the investigation concludes on the criminal behaviour of a police officer, the brief should be turned over the Office of the Director of Public Prosecutions for prosecution.

The police force should be obliged to notify the independent investigative body of all incidents involving the death or serious injury of a person caused by a police operation. The notification should be made as soon as possible in order to ensure that the investigation can be conducted more efficiently.

The NSW CCL also believes that any member of the public, the coroner, the media, a medical professional or a lawyer should also be able to notify the independent investigative body of such an incident.

The police should be obliged to co-operate with the independent investigative body's investigation. All evidence and medical analysis should be submitted to the independent investigative body's investigators as soon as possible.

The independent investigative body's investigators should have the powers to conduct the investigation as any ordinary investigation and to interview police officers as they would interview any member of the public.

Police officers involved in the incident should be interviewed under caution to make sure that any evidence obtained during the interview can be used during the legal proceedings.

The independent investigative body should not be composed of NSW current police officers in order to avoid conflict of interest. This would not preclude former police officers. There should be a particular focus on recruiting officers from different states to ensure independence.

There should also be a focus on recruiting from overseas bodies with investigative experience of having worked in areas such as national security and intelligence, immigration, the legal profession, workplace health and safety, and professional regulation - including the Canadian Special Investigation Unit.

The independent investigative body should also establish a training scheme in order to ensure that all investigators have the investigative skills necessary to conduct an investigation into an incident involving the police.

The independent investigative body should include forensic investigators and other scientific specialists to ensure that the body does not rely on specialists from the police.

Recommendations

The NSWCCCL recommends:

1. The creation of an independent investigative body to ensure that police do not investigate themselves and that police critical incidents are properly investigated
2. This independent body should have:
 - 2.1. statutory independence and a charter based on the principles enunciated by the European Court of Human Rights.
 - 2.2. adequate resources to maintain public confidence and deal with claims expeditiously.
 - 2.3. a broad mandate to deal with police misconduct generally
3. Protocols should be established to ensure that any police officer who has engaged in serious misconduct and/or is responsible for the death or serious injury of a civilian, is referred to the Director of Public Prosecutions. When the investigation concludes on the criminal behaviour of a police officer, the brief should be turned over the Office of the Director of Public Prosecutions for prosecution.
4. The police force should be obliged to notify the independent investigative body of all incidents involving the death or serious injury of a person caused by a police operation. The notification should be made as soon as possible in order to ensure that the investigation can be conducted more efficiently
5. A member of the public, the coroner, the media, a medical professional or a lawyer should be able to notify the independent investigative body of such an incident.

6. The police should be obliged to co-operate with the independent investigative body's investigation. All evidence and medical analysis should be submitted to the independent investigative body's investigators as soon as possible.
7. The independent investigative body's investigators should have the powers to conduct the investigation as any ordinary investigation and to interview police officers as they would interview any member of the public.

Police officers involved in the incident should be interviewed under caution to make sure that any evidence obtained during the interview can be used during the legal proceedings.

8. The independent investigative body should not be composed of NSW current police officers to avoid conflict of interest. This would not preclude former police officers.

There should be a particular focus on recruiting officers from different states to ensure independence and from overseas bodies with investigative experience from areas such as national security and intelligence, immigration, the legal profession, workplace health and safety, and professional regulation - including the Canadian Special Investigation Unit.

9. The independent investigative body should also establish a training scheme in order to ensure that all investigators have the investigative skills necessary to conduct an investigation into an incident involving the police.
10. The independent investigative body should include forensic investigators and other scientific specialists to ensure that the body does not rely on specialists from the police.

This submission was prepared by members of the NSWCCCL committee. I hope it provides assistance to this very important review of police critical incidents. NSWCCCL would be most willing to meet with yourself and the review team to elaborate further on any matters arising from the submission.

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