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Rob Hulls MP
Deputy Premier
Attorney-General
Level 3, 1 Treasury Place
East Melbourne VIC 3002

Bob Cameron
Minister for Police and Emergency Services
Level 26, 121 Exhibition Street
Melbourne VIC 3000

Dear Attorney-General Hulls and Minister Cameron,

RE: Independent Investigation of Deaths and Near-Deaths in Victoria Police Custody

Enduring concerns about Victoria Police investigations of deaths in Victoria Police custody have been raised on numerous occasions by families and advocates of people who lose their lives during police operations in Victoria. It is a critical concern for Shani Cassidy, the mother of Tyler Cassidy, a child who died during a Victoria Police shooting on 11 December 2008. It was a critical concern for the family of Paul Carter who died in Mildura after being taken and left on a highway by two Victoria Police officers on the night on 6 August 2006. The Victoria Police investigations of the police shootings of four young men was a serious concern for families connected to the Flemington & Kensington Community Legal Centre during the late 1980's and early 1990's.

Human rights standards¹ require that death-in-custody investigations are at first instance conducted by a body that is:

- Independent of the police; (that is hierarchically, institutionally and practically)
- Capable of conducting an effective and adequate investigation, that is- ascertaining whether the actions of the police breach legal or disciplinary standards and whether police practices are in compliance with human rights;
- prompt;
- open to public scrutiny;
- victim/family centred, enabling the victim or the family of the victim to fully participate in the investigation,
- state initiated;

These standards and obligations are now mandated in Victoria, through the *Charter of Human*

¹ See for example Graham Smith, (2008) "European Commissioner for Human Rights Police Complainants Initiative" 172 JPN 399, pp1,2.

Rights and Responsibilities Act 2006 (the "Charter"). The right to life – (section 9) and the right to freedom from ill-treatment and torture, (sections 10 and 22) impose positive obligations on the State to ensure investigations meeting these standards occur when allegations these rights have been breached are prima facie in question.

An independent body willing and capable of effectively investigating Victoria Police involved deaths in custody and near deaths is critically absent in Victoria.

Why is the *investigation of allegations* so critical?

The capacity of the State of Victoria and its public authorities to discharge its obligations pursuant to sections 9 and 10 of the Charter is dependent and informed by the independence and effectiveness of the fact gathering process. The lack of independence of a Victoria Police investigation, cannot be cured by it being directed by an independent person, such as the coroner or by the appointment of independent counsel to acts as counsel assisting:

"Supervision [of the police investigation] by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation²"

Gary Abdallah was fatally shot in his flat by bullets to the back of his head and back by Victoria Police in Carlton on 9 April 1989. In submissions to the Inquest Counsel for the Family noted:

"It is an alarming thought that considering the magnitude and significance of the [Internal Investigations Department ("IID")] investigation, Inspector Basham showed his report to Detective Avon [one of the two police present at the shooting] for approval. It is even more alarming that he edited it to accord with what Avon said on 14 April 1989. This reinforces our submissions that IID's function was not to investigate but to justify."⁴⁰³

While independent counsel assisting may raise concerns about an investigation where concerns are known to the counsel, evidence that is lost as a result of internal investigation failures - be they deliberate or otherwise, can not be remedied.

On numerous occasions the European Court of Human Rights has been unable to determine whether a violation occurred because of serious flaws in the investigation process. In the case of *Anguelova v Bulgaria* [2002] ECHR 489 at paragraphs 142- 144, the European Court found that the failure of the police investigators to sufficiently document the injuries of a boy allegedly mistreated by police in custody undermined its capacity to determine the causes of those injuries.

Inquires have found on repeated occasions that it is the body that *carries out* the investigation that is critical to the investigation's capacity to effectively investigate a death in custody. For example, the Royal Commission into Aboriginal Deaths in Custody noted:

The breadth and quality of the coronial inquest often "reflected the inadequacies of perfunctory police investigations and did little more than formalise the conclusions control the quality of preliminary police investigations which lay the foundation for the subsequent coronial inquest" (RCIADIC 1991, Vol. 1, p. 130)³.

² *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 337. *Bati v Turkey* [2004] ECHR (3.6.2004) para 135

³ Quoted from Boronia Halsted, November 1995, Australian Deaths in Custody, No. 10 Coroners' Recommendations and the Prevention of Deaths in Custody: A Victorian Case Study. <http://www.aic.gov.au/publications/dic/dic10.html>

In the investigation into the police involved death of Indigenous man Frank Paul in Vancouver, a police detective failed to collect all relevant evidence in his initial investigation. This had a profound effect on the outcome⁴.

On 12 February 2009 the Davis Commission Interim Report into the Death of Frank Paul found that:

Having concluded that the current practice of a home police department conducting criminal investigations of police-related deaths is fundamentally flawed due to conflict of interest, it follows that no amount of tinkering with the current practice can eliminate that underlying conflict of interest. *The challenge lies in developing a new system for the investigation of police-related deaths.*⁵

It follows from these conclusions that deficiencies in the independence of investigation in a coronal inquest into a death in custody cannot be cured by a Coroner or independent counsel assisting. What is of critical importance is the availability of a body capable of undertaking and providing an independent investigation to the Coroner and independent counsel assisting the Coroner as well as the Family and other parties to the Inquest.

What does Independent Investigation mean?

In Ramshai v The Netherlands [2007] ECHR 393, 15 May 2007) para 325, the European Court of Human Rights concluded that independence means a lack of hierarchical and institutional connection and also requires a practical independence from the police. The Homicide Squad and the Ethical Standards Department are not independent of the Victoria Police and thus investigations of deaths in Victoria Police custody by these bodies do not meet the requisite standard of independence.

Furthermore, deaths in Victoria Police custody will routinely implicate issues of direct and systemic responsibility of the entirety of force command in terms of policy, training, resourcing, preparedness and prevention of deaths. These issues are incapable of independent and effective investigation of any part of Victoria Police.

Can civilians investigate allegations of Police human rights abuses?

Some police and former police argue that only other police are capable of investigating police. Examples of civilians investigating police reveal otherwise. The Washington DC Office of Police Complaints currently employs no former police officers and yet is capable of conducting investigations⁶. Only 25% of the investigating staff in the Northern Ireland Police Ombudsman's Office are former police officers and none of these officers previously worked in Northern Ireland⁷.

Police Ombudsman of Northern Ireland

The Police Ombudsman of Northern Ireland ("PONI") is an excellent example of a body

⁴ <http://www.frankpaulinquiry.ca/> See other examples, *Semsi Onen v Turkey* - 22876/93 [2002] ECHR 445 (14 May 2002). Also see the Royal Commission into Aboriginal Deaths in *Custody*, Australia Vol 1 4.2.2, 4.2.3

⁵ <http://www.frankpaulinquiry.ca/> At page 218.

⁶ Kesha Taylor, Chief Investigator Washington DC Office of Police Complaints, 27 October 2008

⁷ Jim Coupland, Senior Director of Investigations Northern Ireland Police Ombudsman 28 November 2008.

capable of rapidly and independently investigating deaths in police custody. PONI investigators pride themselves at being able to get to a scene within the hour of police involved death or serious injury occurring. They will interview all police and civilian witnesses. If the police are also investigating in cases where a civilian may be charged, the rule is that the investigation with the more serious allegation has primacy and that relevant forensic information must be provided to other investigation afterwards. Usually this means the Police Ombudsman investigation has primacy. The Police Ombudsman operate a 24-hour service. There is a team of eight investigators. For small investigations, they send two people out. They wear orange jackets to distinguish them from the police. According to Police Ombudsman investigators, they are highly visible and get their fast. They believe this takes the tension out of the incident for people. They say they are friendly and approachable and that the public perceives them to be independent and competent. These views are reflected in their complainant satisfaction survey of 2007. PONI use independent scientists and medical experts. They attend post mortems that are conducted by the state pathologist. They produce the file and are in charge of collecting the evidence for the coroner.⁸

England and Wales

In England and Wales the Independent Police Complaints Commission ("IPCC") has the responsibility to conduct and/or manage independent investigation into deaths in custody.

In *Reynolds v Independent Police Complaints Commissioner* [2008] EWCA Civ 1160, the Court of Appeal quoting from the IPCC website in relation to its obligation to investigate stated:

"Where the alleged conduct of a person serving with the police has resulted in death or serious injury Articles 2 and 3 of the European Convention on Human Rights may be engaged. If they are engaged, the IPCC, as a public authority under the Human Rights Act 1998, has an obligation to determine a form of investigation that is an effective independent investigation that does not have any hierarchical or institutional connection with those implicated in the events."

Who should carry out independent investigations in Victoria?

The Office of Police Integrity could investigate police involved killings and serious injuries. In 2008 the OPI received \$18.9 million in funding from the State Government in 2008. The Victoria Police received \$1,660 million in income in the same year. Thus, the OPI annual budget is a slightly more than 1% of the police budget.⁹

Anecdotal evidence from staff at the Northern Ireland Police Ombudsman (PONI) is that it receives a budget of about 1% of the police budget.

Resourcing independent investigations may require funding re-allocations. For example, a 2008 report of the Comptroller and Auditor General in London, said the following of the IPCC's workload:

The IPCC's workload has increased significantly since 2004-05. The IPCC opened 100 independent investigations in 2007-08 compared to 31 in 2004-05 and handled over 4,100 appeals in 2007-08 compared to just over 1,000 in 2004-05. The number of independent investigations has increased in part because of the impact of Human

⁸ Interview with an investigator, Northern Ireland Police Ombudsman 28 November 2008.

⁹ These figures are from the Annual Reports of Victoria Police and the Office of Police Integrity

Rights case law, which has expanded the range of investigations where the IPCC is legally obliged to conduct an independent investigation.

The balance of the IPCC's investigation activities has also since its inception shifted from managed investigations to independent investigations. As a result of the increase in the number of independent investigations the IPCC considers that it is now working above full capacity, since in 2007-08 the IPCC began 100 independent investigations as compared to a planned figure of 50 independent investigations. To help address its increasing workload the IPCC approved a Business Change Programme in 2008, building on a project initiated in 2007. The Business Change Programme is designed to increase the IPCC's productivity and flexibility and realise efficiency savings. The Programme includes a review of IPCC's estates, including the need for a central London base, and local complaints handling systems.¹⁰

The OPI has an arguably strong and effective investigative capacity and its legislation gives it the capacity to investigate deaths in custody and serious injuries through its power to investigate matters in the public interest¹¹.

The OPI's focus however is on its "corruption busting" role, rather than the investigation of human rights abuses - including deaths in custody.

To fill the gap and comply with the Victorian Government's obligations under section 9 and 10 of the Charter it is necessary for the Victorian Government to establish an Independent Police Investigation Commission. We submit that Northern Ireland's Police Ombudsman provides a good model.

Specific recommendations concerning the imperative for independence of the Independent Investigation Commission are as follows:

Independence:

1. Investigations of allegations of misconduct, criminality and human rights abuses must be conducted by an agency that is not only institutionally independent of police but also practically culturally and politically independent. This means that the use of former police officers should be minimal if at all. If they are used they must come from forces outside the one under investigation. Unless carefully selected for the absence of police cultural biases, and removed from positions of influence in the organisation, the risk of using former police in this central task is considerable. On the other hand, civilians can and do perform investigations in civilian bodies in Northern Ireland, the UK, Canada and the US. They can be trained to be highly effective. Civilians must dominate the organisation both in number and culture. Former police should be less than 25% and should not have previously been employed in the agency under scrutiny.
2. The agency must be complainant centred and complainant oriented.
3. Civilian investigators must by their attitude and attire be distinguishable from police.
4. The agency must be protected from the risks of agency capture through minimising collegiate working relationships with the police agency. No seconded police officers from the agency under examination or other law enforcement agencies should be used.

¹⁰ Report of the Comptroller and Auditor General, National Audit Office, London 12 November 2008, p5.
http://www.nao.org.uk/publications/0708/police_complaints_commission.aspx

¹¹ *Police Integrity Act 2008* section 40 (4)(i)

5. The agency must be protected from political and police union interference through separate enabling legislation and regulations as well as independent reporting to parliament. Its key positions must be long-term appointments. A parliamentary committee must be established to assist with improving its functions and to provide oversight to the agency.
6. The agency must be properly and securely funded so that it does not need to rely on seconded police for any of its functions.
7. The agency must be adequately empowered to perform its tasks in the face of police resistance so that it does not need to rely on maintaining good will with police to do its task.
8. The agency must be staffed by people who reflect the community; it must contain young people, working class people, people from ethnic, religious, Indigenous, disabled and gay lesbian queer identified and trans-gendered communities and maintain a gender balance.

We look forward to your earliest response to this issue.

Yours sincerely,



Tamar Hopkins
Principal Solicitor
for the Community Legal Centre