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Submitted via email to ibacc@parliament.vic.gov.au

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

We welcome the opportunity to contribute to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria.

This submission brings together the views of two senior scholars from the School of Social Sciences at Monash University whose past and current research informs the concerns and issues raised in this submission. Short academic biographies for each of the authors are included at the end of this document.

Our submission focuses on police misconduct rather than corruption. The contribution by Professor Jude McCulloch concentrates mainly on the inquiry's first and second terms of reference concerning existing arrangements and best practice models for the oversight of police, with an emphasis on human rights standards. The contribution by Associate Professor Leanne Weber concentrates on one aspect of term of reference number three, specifically the views and experiences of marginalised Victorians, and offers some insights gleaned from academic policing research that are relevant to the final term of reference about strategies for change.

This submission has benefited from the input of South East Community Links youth workers at Youthlinks, Noble Park and Youth Support & Advocacy Services (YSAS) youth workers operating across Victoria. However, the authors take full responsibility for the recommendations made.

We would welcome the opportunity to discuss further with the Committee any matters arising from this submission or from our wider research on policing, human rights and social cohesion.

Kind regards,

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Our submission

Policing in Victoria has faced significant challenges in the past decade, including the introduction of the Charter of Human Rights and Responsibilities Act in 2006 and the adverse finding against Victoria Police in the Haile Michael race discrimination case. In this submission, we address both these issues, arguing that complaints-handling arrangements in Victoria fail to meet international human rights standards, and that reports of aggressive and discriminatory policing persist, despite claims of significant changes to policing approaches following the Haile Michael case.

The impact of lack of effective accountability includes decreased police legitimacy, the systematic over policing of marginalised populations as potential offenders, the under servicing of particular communities and groups as potential or repeat victims, and the use of excessive force with impunity by police. These impacts cost the police, the community and individuals. The lack of effective accountability leads to increased risk of:

- reduced police effectiveness
- police breaches of human rights
- intensified social marginalisation and social exclusion
- criminalisation and inadequate protection of marginalised groups
- police use of excessive force
- deaths in police custody
- financially costly civil litigation against police and the state
- international sanctions.

We believe all of these risks have been realised in Victoria because of inadequate police complaints mechanisms.

Effective police accountability, compliant with human rights standards, needs to be timely, impartial and independent. Currently the overwhelming majority of complaints by members of the public in Victoria are investigated by fellow police. This is unacceptable. The system of oversight of investigations now in place is no substitute for independent investigation. There are successful models for independent investigation of police complaints in other jurisdictions, such as the Police Ombudsman in Northern Ireland. Reform of police accountability in Victoria is long overdue.

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Recommendations

We recommend that improving the accountability of policing in Victoria requires action at three inter-related levels, as set out in recommendations 1 - 3:

Rec 1. Establish independent and responsive complaint and investigation structures that comply with human rights standards and follow global best practice, in order to deliver just outcomes for *individual complainants*. In turn, this will provide a benefit in terms of more positive views of police amongst complainant's families and wider social networks and, ultimately, more effective policing. We believe that policing is a unique activity, based on the exercise of coercive powers on behalf of the state, and reliant within democratic societies on the consent of populations. It therefore raises specific issues, not prevalent in other public bodies, which extend beyond the problem of corruption, necessitating a monitoring framework that is both independent and solely focused on police.

Rec 2. Acknowledge the need for *wider systemic reform*, and realise the potential of accountability structures to drive change beyond individual cases. In order to effect lasting change, the value of criminological scholarship on police occupational culture and the complex dynamics of organisational reform should be applied within policing organisations, and the adverse implications of certain risk-based policing styles in terms of police-community relations must be fully appreciated

Rec 3. Provide effective and responsive structures that facilitate *ongoing communication at local level* with relevant community groups so that place-specific problems in police-community relations linked to police practice can be dealt with informally with a view to prevention. In most circumstances, the issues dealt with at this level will fall short of serious police misconduct or even individual wrongdoing. However, such mechanisms should not preclude recourse to formal complaints processes where appropriate. Extensive research in police environments supports the view that police behaviour that does not meet the criteria for IBAC misconduct complaints, such as 'rudeness' (IBAC's term) and perceived harassment, can be extremely damaging to police-community relations, particularly when experienced repeatedly.

Rec 4: In addition to this three-pronged approach, the training of Protective Service Officers who are the subject of many of the concerns reported in the next section should be reconsidered in light of the vital role they play in the front line of police-community relations.

Comments on Terms of Reference

1. Examine the current system for the oversight of police corruption and misconduct in Victoria, in particular the role of IBAC and the Victorian Inspectorate.

In Victoria in the majority of cases, police investigate their colleagues. Internal investigation occurs after a death in police custody, when there is a complaint of torture, degradation, abuse, ill-treatment, assault, racial abuse, use of excessive force and when police fail to respond appropriately to intimate partner violence in the lead up to a homicide.

In 2014, the UN Human Rights Committee found that Australia breached an Australian citizen's human rights by failing to provide her (Ms Horvath) with an adequate remedy after members of Victoria Police assaulted her in an incident that took place in 1996. The complaint to the United Nations took place after a police investigation into Ms Horvath's contemporaneous complaint about the incident was not upheld and civil litigation was undertaken. The civil court found in favour of Ms Horvath. Australian research on civil litigation against police found that a number of civil actions against police were commenced after the failure of the police complaints system to find in favour of the complainant (McCulloch 2002; McCulloch and Palmer 2005). Plaintiff/complainants were successful in the civil courts in a number of these cases, despite failing to have their complaints upheld after lodging formal complaints. The lawyers undertaking the civil litigation interviewed in that study:

> were clear that they perceived the resort to civil litigation to be a reflection of the failure of the formal complaints system at the level of the ombudsman and police internal investigations and, in New South Wales, the Police Integrity Commission. The lawyers referred to these systems as being 'completely inadequate', 'useless', 'hopeless', and 'a waste of time' (McCulloch and Palmer 2005: 90).

Asked their opinion on why the courts would find in favour of a complainant/plaintiff while the police investigation of the same issues and events did not, the lawyers maintained that:

> the differences arose because the court processes were independent, unbiased and rigorous whereas the complaint mechanisms were strongly biased in favour of the police (McCulloch and Palmer 2005: 94).

Recently the family of a victim of intimate partner homicide, Kelly Thompson, commenced civil action against the police (Mickelburough 2017). The coronial inquest into her death documented a number of failures in the police response in the lead up to her killing in 2014. The police were under critical scrutiny during the inquest into Kelly Thompson's death because of their contact with her in the five weeks leading up to her killing. The Coroner considered the police investigation and oversight of the

investigation into her death. He found that the perception of lack of independence in that investigation exacerbated the family's 'suspicions concerning possible police involvement in the matter, even where there may have been none, and caused considerable additional grief to the family' (Gray 2016: 62). It is unconscionable that crime victim's families have their grief compounded by the perception of lack of independence in police investigations where police conduct is part of what is under investigation. The circumstances of the Thompson case, the nature of the investigation that followed, and the issues raised about the importance of the perception of independence in investigating police conduct speak to the principle that all investigations of police need to be both substantively independent and to be seen as independent.

Civil actions and international mechanisms such as the UN Human Rights Committee become the recourse of last resort where complaint/investigation mechanisms are not effective and/or are not seen as independent. It should not be incumbent on those who have suffered as a result of police actions (or lack of action), to pursue accountability and redress through such private and time-consuming actions.

2. Identify and assess best-practice models for the oversight of police.

The police are simultaneously agents of human rights and prime actors in the violation of human rights (McCulloch 2017). As gatekeepers of the criminal justice system charged with protecting and serving the community, police are critical in preventing human rights violations and providing recognition and justice for victims. As Crawshaw et al put it 'Police . . . are uniquely placed to prevent the barbarity of gross abuse of power; to protect the mental and physical integrity of vulnerable people; to alleviate the suffering of victims of human rights violations; and to bring to justice those responsible for such violations' (2007 et al: 3). The coercive power vested in police to protect and bring to justice, however, also provides the means by which police become violators of rights. In Anglo-American countries where the military has historically been confined to dealing with external enemies in times of war, police are the foremost agents of human rights violations domestically.

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) bans torture and cruel, inhuman or degrading treatment and Article 6 the arbitrary deprivation of life. Police may violate these articles where they use excessive force or engage in the unlawful or unnecessary use of lethal force, though police are also critical in protecting people from crimes of violence that may violate these rights. The ICCPR includes provisions relating to freedom of movement (Articles 12 and 13). Police may facilitate such freedom, for example, by minimizing the risk that people using or traversing public space will become the targets of random or prejudice motivated crimes. Police, however, may inhibit such freedom when they disproportionately stop, search and question minorities or use their powers to interfere with people's movement in an arbitrary or unrestrained way (Bowling and Weber 2012). Article 10 of the ICCPR enshrines the right 'to be treated with humanity and respect for the inherent

dignity of the human person'. The policing of those low on the social hierarchy may infringe upon this right where it involves harassment, provocation, brutality or the ready assumption that certain identities, particularly racialized identities, are innately suspect. Article 26 of the ICCPR prohibits discrimination and requires that all people are considered equal before the law. Policing impacts on this fundamental human right in myriad ways.

Article 2 of the United Nation's Code of Conduct for Law Enforcement Officials states that 'in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons'. Women and children, ethnic, sexual and religious minorities, racialized groups, political dissidents, the disabled, mentally ill, and the poor are particularly vulnerable to human rights violations perpetrated by community members. Effective protection of these groups relies to a significant extent upon law enforcement. However, police often perpetrate systematic human rights violations targeted at groups low on the social hierarchy with impunity. Vast numbers of human rights reports document the involvement of police in such violations. Police are vital in shaping people's experience of law. Police are the law on the street using their discretion in ways that uphold or undermine human rights. The criminal law is typically enshrined in legislation and interpreted through the courts. Policing is less transparent than formal law but just as significant in defining the activities and people that come to be seen as crime problems and the extent to which human rights are afforded or denied to individuals and groups.

The violation of human rights by police is sometimes rationalized as a 'noble cause' in the service of 'doing something about bad people', where ends are claimed to justify means. However, policing that does not accord with human rights is likely to undermine police effectiveness, given that police legitimacy and community support are critical to effective law enforcement. The police mission to serve and protect, investigate and prevent crimes and maintain the peace amount to a promise to enhance human rights. Policing that breaches human rights should be considered a failure of policing, whatever the short-term crime control achievements (Crawshaw et al 2007: xviii).

The discussion above points to the crucial importance of police behaviour being held to human rights standards, with breaches of human rights dealt with in a timely and impartial manner. The European Commission of Human Rights' Rapporteur on Police Complaints sets conditions for the effective investigation of alleged human rights violations by police, including that the investigation be independent, adequate, and capable of resulting in discipline and prosecution of perpetrators, prompt, transparent, and involves and protects the alleged victims (Smith 2010). Despite the existence of a Charter of Human Rights and Responsibilities in Victoria, which requires police to operate in a human rights compliant manner, these standards of investigation are not realized within the extant frameworks for investigating complaints against Victoria police (Hopkins 2010).

3. Identify and review the main challenges to the effective oversight and investigation of complaints and disclosures about police in Victoria. This will involve an examination of the legal framework for the oversight of police in Victoria. The review will encompass both the legal responsibilities of those overseeing police *as well as the perspectives and experiences of complainants, including marginalised Victorians.*

Associate Professor Leanne Weber is currently undertaking research on young people, policing and belonging, funded by an Australian Research Council Future Fellowship, which speaks to the question of the perspectives and experiences with police of marginalised Victorians. Her study does not explicitly target police misconduct, but is seeking to identify both positive and negative interactions between police and young people from diverse cultural backgrounds that affect their sense of belonging within Australian society. Preliminary discussions with youth workers in the southern suburbs of Melbourne have been dominated by reports of problematic encounters that are continuing to occur between young people, police and protective services officers (PSOs). This is despite the efforts by Victoria Police to improve accountability in street encounters following the Haile-Michael race discrimination case, and despite initiatives introduced locally in response to repeated complaints.

Concerns reported to the researcher to date include:

- Continued incidents of aggressive policing, racial vilification and excessive targeting of some migrant and marginalised youths for stops and infringement notices.
- Inappropriate use of handcuffs and inflammatory comments by PSOs who were said to lack the 'nuanced' training necessary for community policing.
- Stereotypical attitudes among police that young people can be divided into 'cleanskins' and 'criminals' and that the latter remain in that 'risk category' for life.
- The relocation of police officers in response to complaints, apparently without any action being taken against them.
- A belief that complaints are one of the few mechanisms available to generate police reform, alongside a sense that lodging formal complaints has been 'counterproductive'.
- Damaging effects, not only on young people who have experienced unfair or violent treatment from police, but also on their families and wider social networks.

All of this points to the ineffectiveness of the current system in responding to individual complaints and investigating systemic factors leading to recurrent conflicts. Youth workers recognise the problematic behaviours of some young people that can contribute to these conflicts, and direct much of their work towards changing the attitudes and responses of the young people concerned. However, they believe that most police officers are unable to imagine the challenging life circumstances and sense of hopelessness faced by many of the young people they encounter, and

that police responses generally exacerbate rather than resolve these problems. At a systemic level, the most problematic aspects of current policing approaches appear to be driven by cost-cutting/revenue raising motivations and an uncritical adoption of a particular mode of risk-based policing. Examples of the former include the deployment of undertrained PSOs to key front line roles, and the over-use of infringement notices that are totally inappropriate interventions for the young, often economically marginalised, people concerned. Examples of the latter include the intensive targeting of particular people and places (described by youth workers as 'smashing' a location) that ignore the consequent damage to community relations, and promote stereotypical attitudes about offenders that militate against desistance and rehabilitation. Local initiatives have been set up, outside the formal complaints system, which were intended to divert young people from punitive outcomes. Despite being undertaken with good will on all sides, they failed to make lasting and widespread change, possibly because they were not supported by a wider and cohesive framework that tackles police misconduct and poor policing practices at a range of levels.

4. Consider best-practice strategies to improve the oversight and investigation of police corruption and misconduct and how they may be implemented in Victoria.

There is a wealth of academic scholarship on police accountability and organisational change that could be brought to bear on the systemic problems recounted above. We cannot review all of this literature here, but would like to highlight some seminal findings in a few relevant areas. Extensive research in Britain and the USA has established the direct relationship between 'procedural justice' (i.e. being fairly treated by police, and perceiving that that is the case) and the maintenance of trust, cooperation and beliefs about police legitimacy amongst 'policed' populations - see, for example, Jackson et al 2013. The profound implications of unjust policing is well explained in the cover notes for that book:

> As elsewhere, the dominant vision of policing in Great Britain continues to stress instrumental effectiveness: the 'fight against crime' will be won by pro-active and even aggressive policing. In line with work from the United States and elsewhere, *Just Authority* casts significant doubt on such claims. When people find policing to be unfair, disrespectful and careless of human dignity, not only is trust lost, but legitimacy is also damaged, and cooperation is withdrawn as a result. Absent such public support, and the job of the police is made harder and the avowed objectives of less crime and disorder placed even further from reach.

Moreover, the 'asymmetry thesis' developed following extensive research using reported police encounters in the USA (Skogan 2006, 2009), has established that a bad personal experience with police has a disproportionate impact compared with a good experience. In fact, Skogan has quantified the impact of a bad experience (typically behaviour that falls far short of serious misconduct, such as individuals not being told why they were stopped, not being given much help

when police are called, and experiencing treatment perceived to be unfair, unhelpful or impolite) as being between three and 14 times as impactful on attitudes towards the police as a positive experience. Although the precise figures may be open to dispute, this striking finding highlights the importance of avoiding such negative encounters.

Closer to home, Weber's own research with Vietnamese communities in Melbourne identified that negative perceptions about the 'trustworthiness' of police persisted amongst some sections of those communities, contrary to prevailing beliefs within Victoria Police that these groups no longer posed a community relations challenge (McKernan and Weber 2016). Weber's research into immigration checks by NSW Police also revealed a lack of appreciation amongst many senior police of the likely damage to community relations of these activities and other 'proactive' policing practices, particularly considering that only around 10% of checks conducted by them identified an immigration breach (Weber 2013).

Policing scholarship has also produced many insights into the resistance of police organisations to systemic change. Foremost among this research in Australia is the seminal work conducted by Janet Chan in police organisational culture in the aftermath of the Wood Royal Commission in NSW (Chan 1997). Chan concluded that the success of attempts at police reform depended on the degree of alignment between authoritative messages from police leadership, day-to-day incentives and understandings about how to do police work, deeply entrenched cultural beliefs amongst rank-and-file members, and pressures from the wider social and political environment to either continue with current practice or make significant change. It is our belief that this body of scholarship has much to offer when considering ways to promote greater accountability, effectiveness and legitimacy in policing.

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Author biographies

Leanne Weber is Associate Professor of Criminology and Australian Research Council (ARC) Future Fellow in the Policing of Internal Borders at Monash University. She was previously employed as a teaching academic on the Bachelor of Policing degree at the University of Western Sydney, and prior to becoming an academic managed the Special Projects Section of the South Australia Police Department. She has an M.A. in the Theory and Practice of Human Rights from the Human Rights Centre at Essex University and an M.Phil and PhD in Criminology from the Institute of Criminology at Cambridge University. Associate Professor Weber has been a Chief Investigator (CI) on an ARC Linkage Project 'Exploring the experience of security in the Vietnamese Australian Community: practical implications for policing' in partnership with Victoria Police, and sole CI on an ARC Discovery Project 'Policing Migration in Australia: an analysis of onshore migration policing networks' which involved interviews and surveys with NSW Police. Her current research explores the relationship between the policing of public space and perceptions of belonging. She has published eight academic books including 'Stop and Search: Police power in global context (with Bowling, Routledge 2012), 'Policing Non-Citizens' (Routledge, 2013) and 'Crime, Justice and Human Rights' (with Fishwick and Marmo, Palgrave 2014). She is currently co-Director of the Border Crossing Observatory at Monash.

Jude McCulloch is a Professor of Criminology at Monash University, previously employed as an academic in Police Studies at Deakin University. Professor McCulloch has had a long engagement with policing and Victoria Police both as a community lawyer and as a scholar. Her book *Blue Army: Paramilitary Policing in Australia* (2001) provided new knowledge about police use of deadly force and the context and consequences of the growing militarisation of policing. Victoria Police have consulted with her about changes in standing orders or guidelines about police use of firearms, capsicum spray and strip searching. Fairfax media engaged her to give expert evidence on police accountability before the Victorian Administrative Appeals Tribunal. Professor McCulloch was a Chief Investigator on two Australian Research Council and Victoria Police funded projects – Counter-terrorism policing and culturally diverse communities and Targeted crime: Policing and Social Inclusion. In each of these projects Professor McCulloch worked closely with Victoria Police with regards to the development and implementation of policy responses to pressing social and policing issues. In addition to this Professor McCulloch has received funding from the Australian Institute of Criminology to research civil actions against police. Professor McCulloch is currently co-director of the Gender and Family Violence program of research at Monash.