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**Investigations of Deaths Associated with Police
Contact: Complying with the *Charter of Human
Rights and Responsibilities Act 2006***

Submission to the Office of Police Integrity

18 June 2010

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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1. Introduction

1. The HRLRC welcomes the inquiry by the Office of Police Integrity (**OPI**) into the adequacy and appropriateness of Victoria Police policies and procedures for investigating deaths associated with police contact.
2. Whether it is appropriate and effective for police to investigate the fatal conduct of members of their own police force has long been the subject of debate. Although not all investigations will be substantively tainted by the closeness of the investigating authority, there will always be a risk of perception of bias that is detrimental to the administration of justice. At worst, the system of police investigating their own can result in protection of police officers, collusion and fundamental failures of the investigative processes. The serious consequences of a system that is not properly independent was recently highlighted by the third Coronial investigation into the death of Mulrunji on Palm Island and the Crime and Misconduct Commission's report.
3. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Victorian Charter**) now places an obligation on the state to conduct independent, adequate, effective, public and accountable investigations into deaths associated with police contact.
4. The Terms of Reference for this inquiry set out ten focus areas for the OPI's report. This submission addresses each of the focus areas the OPI proposes to consider and the application of the relevant human rights principles.
5. First, given the HRLRC's expertise and experience in human rights law, this submission considers focus area 7 of the Terms of Reference, namely the requirement under the Victorian Charter for independent investigations to be carried out into deaths associated with police contact.
6. It then considers:
 - (a) the public perception associated with police investigating police (focus area 1);
 - (b) the type of body which should conduct investigations (focus area 4);
 - (c) defining 'deaths associated with police contact' (focus area 2);
 - (d) management of police officers involved in the incident (focus area 5);
 - (e) the role of external and internal oversight units (focus area 6);
 - (f) current Victorian policy and process (focus area 3);
 - (g) the relationship between Victoria Police and the State Coroner (focus area 8);
 - (h) other models for investigating police related deaths (focus area 9); and
 - (i) options for improving the current system in Victoria (focus area 10).

2. Executive Summary

7. In order to discharge its obligations under the Victorian Charter, the Government needs to establish a human rights-compliant framework for the investigation of deaths associated with police contact.
8. First, the Victorian Government needs to establish a body which is hierarchically, institutionally and practically independent of the organisation being investigated, both in theory and in practice (the **Independent Body**). Currently, OPI is the only body that could be considered independent in these terms (subject to consideration of the background of its staff at any given time) and the government may wish to nominate OPI as the Independent Body.
9. Second,, the Independent Body must be adequately empowered and resourced to, where necessary, conduct the primary investigation of the death, in place of the investigative role currently undertaken by the Homicide Squad.
10. Third, investigations must be placed in the hands of the Independent Body as soon as practicable, ideally within one hour of a death associated with police contact.
11. Fourth, investigations must be conducted with genuine independence. This should involve procedural safeguards, such as separating police officers until they are interviewed by the Independent Body. It is important that police officers (either witnesses or suspects) are interviewed as soon as practicable, preferably within 24 hours after the incident, unless there are exceptional and justifiable circumstances. Interviews must be recorded electronically.
12. Fifth, police officers involved in the relevant event should be required to cooperate with the investigation and provide all relevant accounts and documents regarding the event.
13. Sixth, independent review mechanisms must be established to permit public scrutiny of investigations and their results. Specifically, the victim and/or next-of-kin must have an enforceable right to be involved in the investigation to the extent necessary to safeguard their legitimate interests.

2.1 List of Recommendations

Recommendation 1:

The Independent Body responsible for investigating deaths associated with police contact must be hierarchically, institutionally and practically independent of the police.

Recommendation 2:

The Independent Body must be properly established and adequately empowered and resourced to effectively investigate breaches.

Investigations of deaths associated with police contact must be placed in the hands of the Independent Body at the earliest practicable point.

Recommendation 3:

The Independent Body must be adequately empowered and resourced to attend the scene of an incident as soon as practicable, gather evidence, interview witnesses, search premises and seize relevant materials and documents.

Recommendation 4:

Investigations of deaths associated with police contact should be conducted promptly and, if necessary, time limits should be set to minimise delay in investigations.

Recommendation 5:

Investigations into deaths associated with police contact must be conducted in a manner that is open to public scrutiny, such as through a full examination of the investigation in the coronial process.

Recommendation 6:

Investigations into deaths associated with police contact should involve next-of-kin to the extent necessary to safeguard their legitimate interests.

Recommendation 7:

The Victorian Government should either establish a new body or provide an existing body such as the OPI with appropriate resources and powers to operate as the Independent Body responsible for investigating deaths associated with police contact. The Independent Body must have all the features to ensure that investigations are independent, effective, adequate, prompt, subject to public scrutiny and involve the family of the deceased.

Recommendation 8:

The Independent Body should have an active role in undertaking the primary on-the-ground investigations of deaths associated with police contact. The Independent Body must be adequately empowered and resourced to attend the scene of an incident as soon as practicable, gather evidence, interview witnesses, search premises and seize relevant materials and documents.

Recommendation 9:

The Independent Body should employ some qualified and competent civilians to act as investigators.

Recommendation 10:

'Deaths associated with police contact' should be taken to mean:

- (a) deaths in police custody, such as deaths in police cells, police cars or during an arrest;
- (b) deaths as a result of police action, such as in police pursuits or shootings; and
- (c) deaths involving a failure by police to act to protect individuals, such as in situations where police fail to act to protect a person from known risk of imminent deadly harm from third parties.

Recommendation 11:

Police officers involved in deaths following police contact should be treated no differently to members of the public involved in criminal investigations subject to one exception. Police involved in a death may, in the absence of any other police in attendance, be required to attend to some policing of the scene, for example to secure the evidence. This should only occur where no other police are present, only for the purpose of preserving evidence, and only for the limited period of time necessary for other police officers or the Independent Body to arrive.

Recommendation 12:

Police statements must be video recorded and, where reasonably practicable, police suspects and witnesses should be required to provide evidence within 24 hours of notification of the complaint/incident. Precautionary measures should be taken immediately after a death associated with police contact, such as separating police officers involved as soon as the incident occurs and conducting separate interviews.

Recommendation 13:

The Independent Body should conduct the on-the-ground investigations into deaths associated with police contact on behalf of the Coroner (in place of the Homicide Squad) and prepare the brief to be used in Coronial proceedings.

3. Human Rights and Independent Investigations

Focus Area 7. Human rights and independence: What satisfies the obligations under the Victorian Charter? What constitutes an 'independent and effective' investigation into police related deaths? Does this mean a separate organisation should conduct the investigation or can independence and effectiveness be realised by other means?

3.1 The Victorian Charter

14. The Victorian Charter protects two fundamental rights that are relevant to deaths associated with police contact. First, it protects the right to life in the following terms (s 9):

Every person has the right to life and has the right not to be arbitrarily deprived of life.¹

15. Secondly, the Victorian Charter protects the right to freedom from torture and cruel, inhuman and degrading treatment (**ill-treatment**) (s 10):

A person must not be subjected to torture, treated or punished in a cruel, inhuman or degrading way or subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.²

16. The meaning of these rights, and the obligations that they impose on the state, should be understood by reference to international and comparative domestic jurisprudence.³

17. Both the right to life and the freedom from torture and ill-treatment under the Charter impose on the state a positive obligation to adopt measures to safeguard life; in particular, to establish independent and effective procedures for the investigation and monitoring of the use of force, including deadly force, by State authorities such as the police (the **duty to investigate**).⁴

¹ Section 9 of the Charter reflects article 6(1) of the International Covenant on Civil and Political Rights (**ICCPR**) which provides: 'Every human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

² Section 10 of the Charter reflects article 7 of the ICCPR which states that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

³ Section 32(2) of the Charter expressly states that international law and judgements of domestic, foreign and international courts and tribunals relevant to a human right may be considered for the purposes of interpreting a statutory provision.

⁴ *McCann v United Kingdom* (1996) 21 EHRR 97, [3], [188]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC, 653, [19]-[20]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115]. The duty to investigate has been enshrined in the following international instruments: the United Nations (**UN**) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions; the Code of Conduct for Law Enforcement Officials; and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (**Basic Principles**). In particular, the Basic Principles require governments and law enforcement agencies to establish effective reporting and review procedures for all incidents in which injury or death is caused by the use of force and firearms by law enforcement officials and

Given that OPI's inquiry is focused on deaths associated with police contact, this submission will primarily address the obligations arising under the right to life.

18. The Appendix to this submission is a table that sets out the obligations that the right to life imposes on government and public authorities.

3.2 Obligation to Conduct an Investigation

19. The duty to investigate is inseverable from the right to life and a failure to investigate amounts to a breach of that right by the Victorian Government.⁵
20. There is no specific *form* of investigation necessary for satisfaction of the State's obligation to investigate a death in custody.⁶ However, there are necessary *features* that must be reflected in the investigative system. In particular, the systems in place for investigations should be:
- (a) practically, hierarchically and institutionally independent;
 - (b) adequate and effective;
 - (c) prompt;
 - (d) open to public scrutiny; and
 - (e) inclusive of the next of kin.⁷

Each of these criteria is discussed in turn below.

3.3 Independence of Investigations

21. To avoid any perceived or real risk of collusion, corruption or bias, bodies and individuals investigating potential breaches of the right to life must be truly independent from the individuals they are investigating.
22. The rationale for this position is described by the Queensland Crime and Misconduct Commission in its report on the death of Mulrunji on Palm Island as the possibility for police officers to be 'handicapped in the performance of their professional duties by their over-

'access to an independent process' for persons affected by the use of force and firearms (see articles 22 and 23 of the Basic Principles).

⁵ *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008), 26; *R (Gentle) v Prime Minister* [2008] UKHL 20.

⁶ *Jordan v United Kingdom* (2001) 37 EHRR 52; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653.

⁷ See Concluding Observations of the Human Rights Committee, 9 November 1995, Hong Kong, para 11; Concluding Observations of the Human Rights Committee, 9 August 2005, Syrian Arab Republic, para 9; Concluding Observations of the Human Rights Committee, 1 December 2005, Brazil, para 13; the United Nations Basic Principles of the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles); and the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal Executions.

identification with fellow officers who were under examination'.⁸ The Royal Commission into Aboriginal Deaths in Custody stated:

The essential problem of the expertise of specialist, operational police investigators being employed in post-death investigations derives from the possibility of bias. In blunt terms, they may wish to protect other police from blame. They may wish to protect them from exacting scrutiny. More subtly, they may sympathetically project themselves into the position of the custodial officers and regard their explanations as having a credibility which they do not deserve.⁹

23. True independence is only achieved when an investigation is hierarchically, institutionally and practically independent of the organisation being investigated, that is:
- (a) the investigators are not from the same chain of command as those being investigated;
 - (b) the investigators are not from the same organisation as those being investigated; and
 - (c) the investigators do not uncritically rely on the version of events they have received from members of the body being investigated.¹⁰
24. This means, for example, that investigations of the excessive use of force by police will lack sufficient independence if they are carried out by other members of the same police force, even if the investigators work in a different department or an independent body oversees the investigation.¹¹
25. Further, a formally independent body may not be genuinely independent if it employs a significant number of former police officers who still identify culturally as police because there is a risk that, consciously or otherwise, police investigators will be sceptical of complainants and 'softer' on the police concerned.¹²

Recommendation 1:

The Independent Body responsible for investigating deaths associated with police contact must be hierarchically, institutionally and practically independent of the police.

⁸ Crime and Misconduct Commission, *CMC Review of the Queensland Police Service's Palm Island Review*, June 2010, xxvii.

⁹ E Johnston, *National report: Royal Commission into Aboriginal Deaths in Custody*, vol 1, Australian Government Publishing Service, Canberra, 1991, 121.

¹⁰ *Ramsahai v Netherlands* [2007] ECHR 393 (15 May 2007), 335, 338, 340–341; *Jordan v United Kingdom* [2001] ECHR 327 (4 May 2001) 120.

¹¹ *Ramsahai v Netherlands* [2007] ECHR 393 (15 May 2007), 335, 338, 340–341; *Jordan v United Kingdom* [2001] ECHR 327 (4 May 2001) 120.

¹² Tamar Hopkins, 'An Effective System for Investigating Complaints Against Police', a study conducted for the Victoria Law Foundation of human rights compliance in police complaint models in the US, Canada, UK, Northern Ireland and Australia (August 2009), 43-45, 48.

3.4 Adequacy and Effectiveness

26. The duty to investigate requires the Independent Body to be both empowered to, and capable of, gathering evidence to determine whether there has been a breach of the right to life. Additionally, the state must ensure that there are effective remedies available in relation to such breaches, including punishment of offenders and compensation of victims or their families.¹³
27. In order to be adequate, the investigation should be aimed at:
- (a) bringing the full facts to light;
 - (b) exposing culpable and discreditable conduct and bringing it to public notice;
 - (c) dispelling suspicion of deliberate wrong doing (if justified);
 - (d) rectifying dangerous practices and procedures; and
 - (e) ensuring that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from their death may save the lives of others.¹⁴
28. Effectiveness requires the investigation must also be capable of achieving these outcomes. That is, in order to be effective, the investigation must be capable of leading to a determination of whether the force used was justified and the identification and punishment of those responsible.¹⁵ This 'is not an obligation of result, but of means'.
29. The State may fail to meet its obligation to conduct an effective investigation where there is a deficiency in the primary investigation that undermines its ability to achieve its outcome.¹⁶ Where police officers are not required to give evidence, or are instructed to conceal information, legitimate doubts will be raised as to the overall integrity of the investigative process.¹⁷

¹³ The Rapporteur on police complaints to the European Commission of Human Rights, quoted in: Submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity's Inquiry into Law Enforcement Integrity Models, House of Representatives, Commonwealth of Australia, 2008 (Tamar Hopkins), 18.

¹⁴ *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [31]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [111]; *Edwards v United Kingdom* (2002) 35 EHRR 487, [69]; *Jordan v United Kingdom* (2001) 37 EHRR 52, [105]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *Leonidis v Greece*, application no. 43326/05, 8 January 2009, [67].

¹⁵ (2001) 37 EHRR 52.

¹⁶ *Menson v United Kingdom* [2003] 37 ERR CD 220. See also *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 [10]; *McKerr v United Kingdom* (2002) 34 EHRR 20 [113]; *Jordan v United Kingdom* (2001) 37 EHRR 52, [107]; *Leonidis v Greece* [2009] ECHR 5, [68].

¹⁷ *McKerr v United Kingdom* (2002) 34 EHRR 20, [127].

30. Adequacy and effectiveness require an investigation to be capable of promptly and expeditiously safeguarding the evidence to prevent loss or fabrication of evidence and collusion.¹⁸ In practice, this means that the investigative body must be empowered and resourced to attend the scene of an incident as soon as practicable, gather evidence, interview witnesses, search premises and seize relevant materials and documents.
31. This does not mean that police must play no role in the investigation. The European Court of Human Rights has acknowledged that, as a practical matter, it may be necessary to involve police in securing the scene, collecting evidence, and identifying potential witnesses in the event of death or injury involving police.¹⁹
32. However, while police are not forbidden from any necessary involvement in an investigation, the right to life requires that the investigation should be placed in the hands of the Independent Body at the earliest point it is practicable to do so.²⁰ (An example of how this has been implemented in practice is set out in section 11 below – Other Models for Investigating Police-Related Deaths.)

Recommendation 2:

The Independent Body must be properly established and adequately empowered and resourced to effectively investigate breaches.

Investigations of deaths associated with police contact must be placed in the hands of the Independent Body at the earliest practicable point.

Recommendation 3:

The Independent Body must be adequately empowered and resourced to attend the scene of an incident as soon as practicable, gather evidence, interview witnesses, search premises and seize relevant materials and documents.

¹⁸ Submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity's Inquiry into Law Enforcement Integrity Models, House of Representatives, Commonwealth of Australia, 2008 (Tamar Hopkins), 18-19; see *Ramsahai and Others v The Netherlands* [2007] ECHR 393 where the European Court held at 330 that, although there was no evidence of collusion, the fact that two officers were not kept separate after an incident involving police use of force and were only questioned three days later resulted in a 'significant shortcoming in the adequacy of the investigation'.

¹⁹ *Ramsahai v Netherlands* [2007] ECHR 393 (15 May 2007), 337-338, 340-341; *Jordan v United Kingdom* [2001] ECHR 327 (4 May 2001), 118-119.

²⁰ *Ramsahai v Netherlands* [2007] ECHR 393 (15 May 2007), 339.

3.5 Promptness

33. Having a timely and efficient investigation assists in dispelling fears of attempts to cover up any misconduct, which in turn instils confidence in the integrity of investigations.²¹ This, of course, means an investigative body must be adequately resourced to carry out such prompt and full investigations. It might also require legislative time limits for the conduct of an investigation.²²

Recommendation 4:

Investigations of deaths associated with police contact should be conducted promptly and, if necessary, time limits should be set to minimise delay in investigations.

3.6 Public Scrutiny of Investigations

34. The duty to investigate requires investigations of deaths associated with police contact to be sufficiently open and publicly accountable. There must be sufficient public scrutiny of investigations into deaths associated with police contact to 'secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts'.²³ In contrast, an investigation which is not open to public scrutiny and fails to give a convincing explanation of events may engender mistrust of investigating authorities.²⁴
35. The conduct of Coronial inquests in open court will generally satisfy this obligation of public scrutiny. However, in order for this to be the case, it will be necessary for the Coroner to conduct a full examination of the primary investigation during the coronial process. Where police officers are not required to give evidence, or are instructed to conceal information, it will raise legitimate doubts as to the overall integrity of the investigative process.²⁵

Recommendation 5:

Investigations into deaths associated with police contact must be conducted in a manner that is open to public scrutiny, such as through a full examination of the investigation in the coronial process.

²¹ Tamar Hopkins, above n 13.

²² Tamar Hopkins, above n 12 and 13.

²³ *Anguelova v Bulgaria* (2004) 38 EHRR 31, [140].

²⁴ Note: when such suspicious circumstances arise, the European Court has tended to find violations of the right to life, a notable example being *Anguelova v Bulgaria*, no.38631/97, 13 September 2002.

²⁵ *McKerr v United Kingdom* (2002) 34 EHRR 20, [127].

3.7 Involvement of the Next-of-Kin

36. The European Court has placed increasing emphasis on involving the next-of-kin in investigations.²⁶ It is noted that the requirement that the next of kin be involved does not necessarily mean that the next-of-kin must be granted access to all documents and files of police, if there are operational reasons for refusing that access.²⁷

Recommendation 6:

Investigations into deaths associated with police contact should involve next-of-kin to the extent necessary to safeguard their legitimate interests.

4. Public Perception: Police Investigating Police

Focus Area 1. Public perception: what are the concerns or issues associated with police investigating police that are involved in deaths associated with police contact?

37. Where deaths associated with police contact are investigated by the police, the integrity of the system as a whole is significantly undermined. This is not to say that every investigation conducted by police into other officers will be substantively tainted by impropriety. However, the mere fact that police investigate their own raises the perception of, and the possibility for, impartiality, collusion, corruption and bias in the investigation. This undermines the transparency and credibility of the process, fails to maintain standards of conduct of the members of the police and diminishes public confidence in the ability of the system to bring responsible persons to justice and to prevent similar incidents occurring in the future.
38. In its report on the Queensland Police Service's investigation of Mulrunji's death, the CMC states that the goal of the police should be for the public to have confidence that police will act in accordance with high standards, and that matters involving police officers can be investigated rigorously and impartially. It stated:

The CMC is strongly of the view that one of the most effective ways in which the QPS can engender public confidence, protect its reputation and maintain high standards and the self-esteem of its members is to be seen to take certain, timely, responsive and decisive action when there is a failure to meet these standards.²⁸

39. True independence of the investigating body is therefore crucial in dispelling suspicion of impropriety in the investigation of police.

²⁶ *Jordan v United Kingdom* (2001) 37 EHRR 52, [105], [133]; see also *Nachova v Bulgaria* (2006) 42 EHRR 43.

²⁷ *Ramsahai v Netherlands* [2007] ECHR 393, [348]-[349].

²⁸ CMC Report above n 8, xxviii.

40. Public confidence in investigations is also undermined where there is insufficient public scrutiny of investigations. Accordingly, the Victorian Government should ensure appropriate public access and scrutiny of investigations through Coronial hearings (see section 3.6, 'Public scrutiny of investigations').

5. Investigative Responsibility: Who Should Conduct Investigations?

Focus area 4. Investigative responsibility: who should conduct investigations into police related deaths?

41. There is not currently a body or institution in Victoria that is appropriately independent, empowered and resourced to conduct the functions required of the Independent under the right to life. Instead, the Government is required to establish a new body or to provide an existing body with appropriate resources and powers.
42. Currently, OPI would probably satisfy the independence requirement under the right to life, but it is unable to conduct adequate and effective investigations as it is neither expressly empowered to investigate deaths in custody nor resourced to undertake that role. OPI is empowered to investigate allegations of 'serious misconduct' and 'corruption'. Arguably 'serious misconduct' could include deaths associated with police contact. However in practice investigations into deaths associated with police contact are conducted by the Coroner, with the primary, on-the-ground investigation undertaken by the Homicide Squad with oversight by Ethical Standards Division (**ESD**).
43. OPI does not currently play a role in investigating deaths in custody, and it is not resourced to do so. However, if OPI were adequately empowered and resourced in accordance with the principles set out in part 4 above, then it may be an appropriate body to discharge the state responsibility to ensure independent investigations of deaths in custody. This would require a fundamental change in OPI's operations, requiring OPI among other things, to become the primary investigator of deaths in custody and to attend the scenes of incidents to collect and preserve evidence.
44. On 2 June 2010, Premier John Brumby announced the creation of the Victorian Integrity and Anti-Corruption Commission (**VIACC**).²⁹ Legislation to establish VIACC is not expected to pass until late 2011.³⁰ The Director, Police Integrity, will be one of the three independent officers comprising VIACC. It is intended that VIACC will oversee the workings of, among

²⁹ *Government adopts the Proust Integrity Model* (2 June 2010) The Premier of Victoria, available at <http://www.premier.vic.gov.au/component/content/article/10643.html>.

³⁰ Stephen McMahon with APP, 'Anti-corruption commission to be established in Victoria targeting judges, police and MPs', *Herald Sun*, 4 June 2010, available at <http://www.heraldsun.com.au/news/proust-review-into-states-anti-corruption-bodies-due-today/story-e6frf7jo-1225874510277>.

- other things, the OPI and will have the power to search homes and force witnesses to answer questions in closed hearings.³¹ New powers will also be given to the OPI to investigate unsworn officers working for Victoria Police were also announced.³²
45. On the basis of current information, it does not seem that VIACC will have the necessary powers and resources to conduct human rights-compliant investigations of deaths in custody. Further, there is no indication that human rights-compliant investigation of deaths associated with police contact is the intended role of VIACC.
46. However, as with OPI, if VIACC were adequately empowered and resourced, in accordance with the principles set out in part 4 above, then it may be an appropriate body to discharge the state responsibility to ensure independent investigations of deaths in custody.
47. Further, it is recommended any Independent Body is comprised of qualified and competent civilians. The inclusion of civilians in investigations will facilitate objective oversight and greater accountability in the process.

Recommendation 7:

The Victorian Government should either establish a new body or provide an existing body such as the OPI with appropriate resources and powers to operate as the Independent Body responsible for investigating deaths associated with police contact. The Independent Body must have all the features to ensure that investigations are independent, effective, adequate, prompt, subject to public scrutiny and involve the family of the deceased.

Recommendation 8:

The Independent Body should have an active role in undertaking the primary on-the-ground investigations of deaths associated with police contact. The independent investigative body must be adequately empowered and resourced to attend the scene of an incident as soon as practicable, gather evidence, interview witnesses, search premises and seize relevant materials and documents.

Recommendation 9:

The Independent Body should employ some qualified and competent civilians to act as investigators. **7**

³¹ Ibid.

³² Ibid.

6. Defining 'Deaths Associated with Police Contact'

Focus area 2. Definition of deaths associated with police contact: what type of deaths should be considered 'police-related' and investigated accordingly?

48. The obligation to conduct an independent human rights-compliant investigation arises in cases where police officers are directly responsible for the death of a person, such as a police shooting, and also where the police knew, or ought to have known, that there was a real and immediate risk to the life of an identified individual, either by way of criminal acts by third parties or through self harm.³³
49. Accordingly, the obligation to investigate extends beyond deaths in police custody to include the failure of the state to act in certain circumstances:
- while any deliberate killing by State agents is bound to arouse very grave disquiet, such an event is likely to be rare and the State's main task is to establish the facts and prosecute the culprits; a systematic failure to protect the lives of persons detained may well call for even more anxious consideration and raise even more intractable problems.³⁴
50. Examples of circumstances where it has been held that there is a need for the State to initiate an effective investigation include:
- (a) the death of a prisoner at the hands of his cell-mate,³⁵
 - (b) prison suicides,³⁶
 - (c) the death of a prisoner due to inadequate medical attention.³⁷
51. 'Deaths associated with police contact' should therefore be taken to mean:
- (a) deaths in police custody, such as deaths in police cells, cars or during an arrest;
 - (b) deaths as a result of police action, such as in police pursuits; and
 - (c) deaths involving a failure by police to act to protect individuals, such as in situations where police fail to act to protect a person from known risk of imminent deadly harm from third parties.

³³ *McCann v United Kingdom* (1996) 21 EHRR 97, [3]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC, 653, [20]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [20], [23]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [20]; *Osman v United Kingdom* (1998) 29 EHRR 245.

³⁴ *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [21].

³⁵ *Edwards v United Kingdom* (2002) 35 EHRR 487.

³⁶ *Keenan v United Kingdom* (2001) 33 EHRR 913; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.

³⁷ *R (Wright) v Secretary of State for Home Affairs* [2001] UKHRR 1399; *Edwards v United Kingdom* (2002) 35 EHRR 487; *Tariyeva v Russia* (2009) 48 EHRR 26.

Recommendation 10:

Deaths associated with police contact should be taken to mean:

- (a) deaths in police custody, such as deaths in police cells, police cars or during an arrest;
- (b) deaths as a result of police action, such as in police pursuits; and
- (c) deaths involving a failure by police to act to protect individuals, such as in situations where police fail to act to protect a person from known risk of imminent deadly harm from third parties.

7. Management of Police Officers Involved in the Incident

Focus Area 5. Management of police officers involved in the incident: how should police be managed in these cases – for example as witnesses or suspects? Should they be cautioned? How should police statements be recorded? Should police be treated the same as members of the public involved in a criminal investigation?

- 52. Police officers involved in deaths in custody should be treated no differently to members of the public involved in criminal investigations. If police are suspects in an investigation, they should be treated as such. If they are witnesses to an incident, then they should be treated as witnesses.
- 53. To treat police more favourably would call into question the impartiality and effectiveness of investigations into deaths in custody. Further, any preferential treatment of police witnesses or suspects would undermine public trust in the system of justice and increase perceptions of corruption and collusion.
- 54. The only exception might be where the police involved in a death are required, in the absence of any other police in attendance, to secure the evidence at the scene. This should only occur where no other police are present, only for the purpose of preserving evidence, and only for the limited period of time necessary for other police officers or the Independent Body to arrive. As mentioned above, the Independent Body should be able to attend the scene of deaths in custody and take carriage of the investigation within the first hour of the incident.
- 55. Police statements must be video recorded and, where reasonably practicable, police suspects and witnesses should be required to provide evidence within 24 hours of notification of the complaint/incident. Precautionary measures should be taken, such as separating police officers involved in deaths in custody as soon as the incident occurs and conducting separate interviews.

Recommendation 11:

Police officers involved in deaths associated with police contact should be treated no differently to members of the public involved in criminal investigations, subject to one exception. Police involved in a death associated with police contact may, in the absence of any other police in attendance, be required to attend to some policing of the scene, for example to secure the evidence. This should only occur where no other police are present, only for the purpose of preserving evidence, and only for the limited period of time necessary for other police officers or the Independent Body to arrive.

Recommendation 12:

Police statements must be video recorded and, where reasonably practicable, police suspects and witnesses should be required to provide evidence within 24 hours of notification of the complaint/incident. Precautionary measures should be taken immediately after a death associated with police contact, such as separating police officers involved in the deaths as soon as the incident occurs and conducting separate interviews.

8. Level of Internal and External Oversight

Focus Area 6. Level of internal and external oversight – what should the respective roles and responsibilities of internal and external oversight units be?

56. Neither internal nor external oversight can cure the deficiencies of an investigation of a death associated with police contact that is conducted by a department of the police or an associated body of the police. The investigative body itself must be independent (see section 3.3, 'Independence of investigations').

57. This proposition has been continually supported by European courts, which have established that it is not sufficient for an independent body to have oversight of an investigation, where the investigation itself is carried out by police officers connected organisationally with those under investigation:³⁸

Supervision [of the police investigation] by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation.³⁹

58. For this reason, the current oversight by ESD of the Homicide Squad's investigations into deaths associated with police contact does not make the current system of investigating deaths in custody human rights compliant.

³⁸ *Jordan v United Kingdom* (2001) 37 EHRR 52, [120]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [128]; *Kelly v United Kingdom* application no. 30054/96, 4 August 2001, [114].

³⁹ *Ramsahai v The Netherlands* [2007] ECHR 393, [337]; *Bati v Turkey* [2004] ECHR, [135].

9. Current Victoria Police Policy and Process

Focus Area 3. Current Victoria Police policy and process: what are the strengths and weaknesses of the current process used by Victoria Police? What is the reality of the policy in practice?

59. Deaths associated with police contact are currently conducted by the Homicide Squad, with oversight from ESD. This structure for investigating deaths associated with police contact is not sufficiently independent of the police to discharge the state's investigative obligation under the right to life (see parts 4 and 8 above).
60. The UN Human Rights Committee recently expressed concern at reports of excessive use of force by law enforcement officials in Australia and, in particular, regretted that 'investigations of allegations of police misconduct are carried out by the police itself'. The Committee recommended that Australia should, in particular, establish a mechanism to carry out independent investigations of complaints concerning excessive use of force.⁴⁰

10. The Relationship between Victoria Police and the State Coroner

Focus Area 8. Relationship between Victoria Police and the State Coroner: what is the reality of the relationship between the investigative unit and the State coroner in relation to police related deaths? Who is ultimately responsible for the investigation and what are the respective roles and authority of police and the State Coroner? What could/should OPI's role be?

61. Police related deaths in Victoria will be subject to investigation by the State Coroner. However, although the Coroner conducts the investigation and is hierarchically and institutionally independent of the police, it plays very little, if any, role in the primary investigation of deaths and generally relies on a police brief prepared by the Homicide Squad with the oversight of ESD.
62. In Australia, the Final Report of 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 of police investigators.⁴¹
63. The Royal Commission Report emphasised the general inability of Coroners to control the quality of preliminary police investigations which 'lay the foundation for the subsequent coronial inquest'.⁴²

⁴⁰ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5, Ninety-fifth session, Geneva, 16 Marcy-3 April 2009, para 21, available at <http://www2.ohchr.org/english/bodies/hrc/hracs95.htm>.

⁴¹ Royal Commission into Aboriginal Deaths in Custody 1991, National Report, Australian Government Publishing Service, Canberra, Vol. 1, 130, available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

64. If the Victorian Government were to create an Independent Body, or to properly empower and resource an existing body such as OPI to be the Independent Body to conduct primary investigations into deaths in police custody in accordance with part 3 above, then the Independent Body would conduct the on-the-ground investigations into deaths in custody on behalf of the Coroner (in place of the Homicide Squad) and prepare the brief to be used in Coronial proceedings.

Recommendation 13:

The Independent Body should conduct the on-the-ground investigations into deaths in custody on behalf of the Coroner (in place of the Homicide Squad) and prepare the brief to be used in Coronial proceedings.

11. Other Models for Investigating Police Related Deaths

Focus Area 9: Other models for investigating police related deaths: what type of models are used in other jurisdictions – interstate and overseas?

65. A prime example of an impartial and effective investigative body is the Police Ombudsman of Northern Ireland (**PONI**). The PONI arrive at a scene within an hour of any death or serious injury involving police and distinguish themselves from police officers by wearing orange jackets.
66. PONI investigators interview all police and civilian witnesses and, if there is an incident in which a civilian may be charged and police are investigating, the rule is the more serious allegation has primacy, which usually means the PONI investigation has primacy. Any information collected is then provided to the other team afterwards.⁴³
67. PONI uses independent scientists and medical experts, attends most post mortems that are conducted by the state pathologist and is in charge of collecting evidence for the Coroner.⁴⁴ Further, PONI dedicates an overwhelming majority of its staff to public human rights complaints and runs a 24 hour response service.⁴⁵

⁴² Quoted in Boronia Halsted, November 1995, Australian Deaths in Custody, No. 10 Coroners Recommendations and the Prevention of Deaths in Custody: A Victorian Case Study, available at <http://www.aic.gov>.

⁴³ Submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity's Inquiry into Law Enforcement Integrity Models, House of Representatives, Commonwealth of Australia, 2008 (Tamar Hopkins), 21.

⁴⁴ Ibid.

⁴⁵ cf. OPI which only dedicates about 5% (that is, 7 out of 130) of its staff to public complaints: Tamar Hopkins, 'An Effective System for Investigating Complaints Against Police', a study conducted for the Victoria Law

68. No Australian jurisdiction currently has a human rights-compliant system for investigating deaths in custody. Following three coronial inquests into the death of Mulrunji in police custody on Palm Island, and serious misgivings about the investigation by the Queensland Police Service of that case, on 18 May 2010, the Crime and Misconduct Commission (**CMC**) took over the role of investigating deaths in police custody from the Queensland Police Service.⁴⁶
69. The CMC is yet to finalise its processes for investigations of deaths in custody. Whilst the CMC is institutionally independent of the Queensland Police Service, on the basis of public statements to date, the CMC is probably not practically independent from the Queensland Police. There are Queensland Police officers seconded to the CMC and further, the Queensland Police will continue to assist the CMC with investigations into deaths in police custody, which will encourage the perception of bias.⁴⁷
70. While the recent broadening of CMC's powers is a useful example of steps which can be taken to overcome perceptions of police bias, it still falls short of the standard of independence required in Victoria. In order to comply with its obligations under the Victorian Charter, the Victorian Government needs to adopt a model for investigating deaths in custody which is independent in the sense discussed in this submission.

Foundation of human rights compliance in police complaint models in the US, Canada, UK, Northern Ireland and Australia (August 2009), 101.

⁴⁶ This decision was made following findings from the coronial inquest into the death in custody of Mulrunji Doomadgee on Palm Island: Cameron Atfield, 'CMC to investigate custody deaths', *brisbanetimes.com.au*, 18 May 2010, available at <http://www.brisbanetimes.com.au/queensland/cmc-to-investigate-custody-deaths-20100518-vaxq.html>.

⁴⁷ Cameron Atfield, 'CMC to investigate custody deaths', *brisbanetimes.com.au*, 18 May 2010, available at <http://www.brisbanetimes.com.au/queensland/cmc-to-investigate-custody-deaths-20100518-vaxq.html>; *Frequently asked questions – Is the CMC another police force?*, Crime and Misconduct Commission, available at <http://www.cmc.qld.gov.au/asp/index.asp?pgid=10698&cid=5266&id=121..>

12. Options for Improving the Current System in Victoria

71. The options for improving the current system are set out throughout this submission. See the Executive Summary for an overview of the human rights-compliant options for improving the current system.

APPENDIX – State duty to investigate under the right to life in international and comparative domestic jurisprudence

| | STATE OBLIGATIONS | SOURCE |
|-------------------------------|--|---|
| Procedural obligations | | |
| 1. | States must ensure that there is some form of effective and official investigation where individuals have been killed as a result of the use of force by State agents. | <i>McCann v United Kingdom</i> (1996) 21 EHRR 97, [3]; <i>R (Amin) v Secretary of State for the Home Department</i> [2004] 1 AC, 653, [20]. |
| 2. | At a minimum, it is required that there is a mechanism whereby the circumstances of a deprivation of life by the agents of a State may receive public and independent scrutiny. There must be sufficient public scrutiny of the investigation or its results to ensure accountability in practice and in theory. The need for public scrutiny relates to a State's obligation to secure to everyone within its jurisdiction the rights and freedoms protected by human rights law, and to ensure the existence of an effective political democracy and the rule of law. | <i>McCann v United Kingdom</i> (1996) 21 EHRR 97, [194]; <i>R (Amin) v Secretary of State for the Home Department</i> [2004] 1 AC, 653 [20], [23]; <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [115]. |
| 3. | Where a victim dies in circumstances which are unclear, the lack of any effective procedure to investigate the cause of the deprivation of life, could by itself, constitute a breach of the right to life. | <i>McCann v United Kingdom</i> (1996) 21 EHRR 97, [194]. |
| 4. | Where there is a credible case that the right to life may have been breached, a State must initiate the necessary proceedings - this obligation is often satisfied by an investigation such as an inquest. | <i>R (Amin) v Secretary of State for the Home Department</i> [2004] 1 AC 653 [20], [23]; <i>R (Middleton) v West Somerset Coroner</i> [2004] 2 AC 182, [20]. |

| | STATE OBLIGATIONS | SOURCE |
|-------------------------------|--|--|
| Procedural obligations | | |
| | | |
| 5. | <p>The purposes of an investigation are:</p> <ul style="list-style-type: none"> • to secure the effective implementation of domestic laws which protect the right to life; • to ensure as far as possible that the full facts are brought to light; • to ensure accountability for deaths occurring under the responsibility of State agents; • that culpable and discreditable conduct is exposed and brought to public notice; • that suspicion of deliberate wrong doing (if justified) is allayed; • that dangerous practices and procedures are rectified; and • that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from their death may save the lives of others. | <p><i>R (Amin) v Secretary of State for the Home Department</i> [2004] 1 AC 653, [31]; <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [111]; <i>Edwards v United Kingdom</i> (2002) 35 EHRR 487, [69]; <i>Jordan v United Kingdom</i> (2001) 37 EHRR 52, [105]; <i>R (Middleton) v West Somerset Coroner</i> [2004] 2 AC 182; <i>Leonidis v Greece</i>, application no. 43326/05, 8 January 2009, [67].</p> |
| 6. | <p>The authorities must take reasonable steps available to them to secure the evidence concerning the incident, including eye witness testimony, forensic evidence, an autopsy which provides a complete and accurate record of the injury and an objective analysis of clinical findings, including the cause of death.</p> | <p><i>R (Middleton) v West Somerset Coroner</i> [2004] 2 AC 182, [10]; <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [113]; <i>Jordan v United Kingdom</i> (2001) 37 EHRR 52, [107]; <i>Leonidis v Greece</i>, application no. 43326/05, 8 January 2009, [68].</p> |

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| | STATE OBLIGATIONS | SOURCE |
|-------------------------------|--|--|
| Procedural obligations | | |
| 7. | Any deficiency in the investigation which undermines its ability to establish the cause of death or identify those responsible will risk falling foul of the standard imposed by the right to life. | <i>R (Middleton) v West Somerset Coroner</i> [2004] 2 AC 182, [10]; <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [113]; <i>Jordan v United Kingdom</i> (2001) 37 EHRR 52, [107]; <i>R (Amin) v Secretary of State for the Home Department</i> [2004] 1 AC 653, [22]. |
| 8. | The investigation must be independent, effective, prompt and carried out with reasonable expedition. | <i>R (Amin) v Secretary of State for the Home Department</i> [2004] 1 AC 653 [22],[25]; <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [114]; <i>Leonidis v Greece</i> , application no. 43326/05, 8 January 2009, [68]. |
| 9. | It may be necessary to examine not only the means by which a person died and the actions of State agents, but also the broad surrounding circumstances, including such matters as the relevant legal or regulatory framework in place and the planning and control of the actions under examination. | <i>R (Middleton) v West Somerset Coroner</i> [2004] 2 AC 182 [35]-[36]; <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [109]; <i>Leonidis v Greece</i> , application no. 43326/05, 8 January 2009, [53]; <i>McCann v United Kingdom</i> (1996) 21 EHRR 97, [146]-[147]. |
| 10. | The next-of-kin must be involved in the investigation procedure to the extent necessary to safeguard his or her legitimate interests. The State has a distinct obligation to involve the next-of-kin, given the rights to respect family life. | <i>R (Amin) v Secretary of State for the Home Department</i> [2004] 1 AC 653 [22]; <i>Jordan v United Kingdom</i> (2001) 37 EHRR 52; <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [115]. |
| 11. | The investigation must be carried out by a person who is independent of those implicated by the events being investigated. This independence requires practical independence, as well as a lack of a hierarchical or institutional connection. | <i>Jordan v United Kingdom</i> (2001) 37 EHRR 52, [106]; <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [112]; <i>R (Amin) v Secretary of State for the Home Department</i> [2004] 1 AC 653, [20]. |

| | STATE OBLIGATIONS | SOURCE |
|-------------------------------|---|--|
| Procedural obligations | | |
| 12. | The requirement that the investigation be practically independent means that the investigation must, as well as involving a formally independent body, be carried out with genuine independence and not, for example, with uncritical reliance on the versions of events of police. | <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20; <i>Simsek v Turkey</i> , application no. 35072/87, [122]-[123], 26 July 2005; <i>Tahsin Acar v Turkey</i> , application no. 26307/95, [229]-[234], 8 April 2004. |
| 13. | An investigation is not hierarchically independent if the investigators inquire into the actions of those in the same chain of command. | <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20; <i>Simsek v Turkey</i> , application no. 35072/87, [122]-[123], 26 July 2005; <i>Tahsin Acar v Turkey</i> , application no. 26307/95, [229]-[234], 8 April 2004. |
| 14. | An investigation is not institutionally independent from those implicated in the relevant events if the persons under investigation are from the same body as those investigating. | <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20; <i>Simsek v Turkey</i> , application no. 35072/87, [122]-[123], 26 July 2005; <i>Tahsin Acar v Turkey</i> , application no. 26307/95, [229]-[234], 8 April 2004. |
| 15. | It is not sufficient for an independent body to have oversight of an investigation, where the investigation itself is carried out by police officers connected organisationally with those under investigation. | <i>Jordan v United Kingdom</i> (2001) 37 EHRR 52, [120]; <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [128]; <i>Kelly v United Kingdom</i> application no. 30054/96, [114], 4 August 2001. |
| 16. | Where police officers are not required to give evidence, or are instructed to conceal information, it will raise legitimate doubts as to the overall integrity of the investigative process. | <i>McKerr v United Kingdom</i> (2002) 34 EHRR 20, [127]. |