



29 June 2015

Mr Andrew Tink AM
The Secretariat
Review of Police Oversight
Department of Justice

By email: policeoversightreview@justice.nsw.gov.au

Dear Mr Tink,

RE: REVIEW OF POLICE OVERSIGHT IN NEW SOUTH WALES

The Inner City Legal Centre (ICLC), NSW Gay and Lesbian Rights Lobby and ACON welcome the opportunity to provide a submission to the review of police oversight in NSW. Our focus in this submission is on the reported policing experiences of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) individuals and communities in NSW.

The ICLC is a community legal centre in Kings Cross that provides legal assistance to disadvantaged clients in the Inner City of Sydney. The ICLC also provides a specialist state-wide legal service to people who identify as lesbian, gay, bisexual, transgender and intersex. Our service includes legal advice and assistance to members of the LGBTIQ communities, including in relation to police complaints and misconduct.

Established in 1988, the Gay & Lesbian Rights Lobby (GLRL) is the peak representative organisation for lesbian and gay rights in New South Wales (NSW). The mission of the GLRL is to achieve legal equality and social justice for lesbians and gay men. The GLRL has a strong history in legislative reform in areas including relationship recognition, age of consent, anti-discrimination and the ending of the “homosexual advance” defence in this State.

ACON is New South Wales’ leading health promotion organisation specialising in HIV and lesbian, gay, bisexual, transgender and intersex (LGBTI) health. Incorporated in 1985 as the AIDS Council of NSW, ACON has been widely recognised as an innovative, successful organisation which has adapted to changes in the HIV epidemic and responded early to emerging health issues among our communities.

Policing and LGBTIQ people

The policing of LGBTIQ people has historically been a priority area of concern in New South Wales and other Australian jurisdictions. Acts of commission, including alleged police involvement in assaults on LGBTIQ people, and omission, which include the failure to fully investigate murder cases involving gay men, for instance, have historically impacted detrimentally on LGBTIQ communities, as well as their

relationship with the NSW Police Force. In the past decade police activity at LGBTIQ-specific events has intensified, particularly in relation to (but not only) drug operations.

On 24 June 1978, following the morning protest that commemorated the Stonewall Riots of 1969, a large group of people converged on Oxford Street to rally for the end of discrimination, police harassment and anti-gay laws. Later that night a party was organised. Despite the organisers securing permission to hold the party, the police violently broke up the party and arrested 53 people. Many of those arrested spent 8 hours in custody without charge and most charges eventually were dropped but not before police released the names and occupations of many of those arrested to the press. This was the beginning of Mardi Gras and much has changed since that time.

The policing operations during the 2013 Mardi Gras season resulted in an unprecedented number of complaints being reported to Mardi Gras, the NSW Police Force ACON, and other community organisations from local and visiting guests. Allegations of violence, excessive physical force, threats and intimidation and in some cases strip searches that might contravene legal guidelines were made. Police were also reported to have displayed homophobic conduct during these operations. In total, 58 separate complaints were received by Mardi Gras and ACON.¹

It is due to this history that constant efforts are required to ensure that LGBTIQ individuals and communities can have confidence in the NSW Police Force. Efforts must improve responsiveness an operational level, reforms to policies and legal frameworks, training and, critically, oversight of policing.

Any gaps in the current police oversight system

Currently complaints concerning police conduct can be lodged with the NSW Police Force, the Police Integrity Commission (PIC) or with the NSW Ombudsman. However, given that independent oversight is not mandated, this often results in a situation whereby the NSW Police in effective investigate their own conduct.

There is a significant body of literature nationally and internationally describing the shortcomings of models where police investigate police. Such arrangements often fail to facilitate community confidence in policing and justice.² The process may also traumatise victims of violence by forcing them to appeal to the source of that violence for redress. This is particularly the case for vulnerable groups of people who may be more likely to have contact with police, such as young people, Aboriginal people, people of disability and LGBTIQ people.

Currently there is confusion and uncertainty for people who lodge police complaints, particularly in relation to ascertaining the process for lodging a complaint and establishing the status or progress of specific complaints. Furthermore, complainants have no legal right to be informed about the progress of any investigation or its findings. Complainants generally receive very little information following the

¹ Gay & Lesbian Rights Lobby et al, *Policing at NSW Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Events and Venues* (2013) 4-5.

² Commission for Public Complaints Against the Royal Canadian Mounted Police, *Police Investigating Police: A Critical Analysis of the Literature* (2012).

investigation – they may just receive response stating their complaint has been investigated, and often that the complaint was not substantiated without being given reasons.

Complaints to any of the current police oversight bodies tend to be referred to the Local Area Command in the first instance. For these reasons, complainants to Mardi Gras and ACON following the events of the 2013 Mardi Gras season were reluctant to make formal complaints.

Best practice models from around the world

There are currently a range of models of police oversight in various Australian and overseas jurisdictions. We outline two models, from New Zealand and Northern Ireland respectively, which we argue may be considered examples of best practice in this area.

New Zealand

The Independent Police Conduct Authority (IPCA) investigates claims of police misconduct in New Zealand. According to section 12 of the *Independent Police Conduct Authority Act* (1988), the functions of the IPCA are:

- (a) to receive complaints—
 - (i) alleging any misconduct or neglect of duty by any Police employee; or
 - (ii) concerning any practice, policy, or procedure of the Police affecting the person or body of persons making the complaint in a personal capacity;
- (b) to investigate of its own motion, where it is satisfied that there are reasonable grounds to carry out an investigation in the public interest, any incident involving death or serious bodily harm.

The Gay & Lesbian Rights Lobby (GLRL) outlines the structure and functions of the IPCA as follows:

Complaints may be referred to the Police for investigation, with IPCA oversight, or investigated independently by the IPCA itself. Although the IPCA has the same powers as a commission of inquiry to summon witnesses, seek information and make recommendations, the authority itself cannot lay charges or initiate disciplinary action. However, if, following the notification of their findings and recommendations to Police, the IPCA are not satisfied with the response, they are obliged to notify the Minister of Police and Attorney General who, in turn, must inform Parliament.

The IPCA is designated as an Independent Crown Entity (ICE), which means that although it is funded through a 'Vote', it reports to Parliament and not, strictly speaking, a department or other government body directed by the government of the day.³

³ Gay & Lesbian Rights Lobby. Submission to Hon. Robert McClelland, *Review of Police Critical Incident Guidelines in New South Wales* (2015).

Northern Ireland

In Northern Ireland, police oversight is exercised by the Police Ombudsman for Northern Ireland under the *Police (Northern Ireland) Act 1998*. The Police Ombudsman is required to investigate all serious complaints; and it also investigates police critical incidents. Roth summarises the structure and processes of the Police Ombudsman as follows:

After an investigation, the Police Ombudsman officer or police officer appointed to conduct the investigation is to submit a report to the Police Ombudsman. The Police Ombudsman is to consider the report and determine whether it indicates that a criminal offence may have been committed by a member of the police force. If so, the Police Ombudsman must send a copy of the report to the Director of Public Prosecutions together with such recommendations as appear to be appropriate. If not, and the Police Ombudsman considers that the complaint is not a serious one, the Police Ombudsman may determine that the complaint is suitable for mediation. If the complainant and police officer agree to mediation, the Police Ombudsman is to act as the mediator.

If (a) criminal proceedings are not instituted, or have been concluded; or (b) a complaint is not suitable for mediation or attempts to resolve it in that way have been unsuccessful – the Police Ombudsman is to consider the question of disciplinary proceedings. The Police Ombudsman is to send the appropriate disciplinary authority (generally the Chief Constable) a memorandum containing a recommendation as to whether or not such proceedings should be brought. If the Police Ombudsman recommends that such proceedings should be brought, and the Chief Constable is unwilling to bring such proceedings, the Police Ombudsman may, after consultation with the Chief Constable, direct him or her to bring disciplinary proceedings; and this direction must be complied with.⁴

A recommended model for police oversight including guidance on its design, structure, cost and establishment

We recommend that a transparent, civilian-led police complaints and investigatory body be established that is institutionally, culturally and politically independent from the NSW Police Force. The independent body should be provided with the adequate funding and resources and should incorporate appropriate safeguards to protect complainants from retaliation.

Functional, cultural and political independence

A 2009 Council of Europe Commissioner for Human Rights Report stated that ‘an independent and effective police complaints system is of fundamental importance for the operation of a democratic and

⁴ Lenny Roth, ‘External oversight of police conduct’ (Briefing paper No. 6, NSW Parliamentary Research Service, 2015) 40-41.

accountable police service⁵. As such we argue that complaints regarding NSW Police misconduct must be investigated by an independent, civilian-led organisation.

Single integrated complaints system

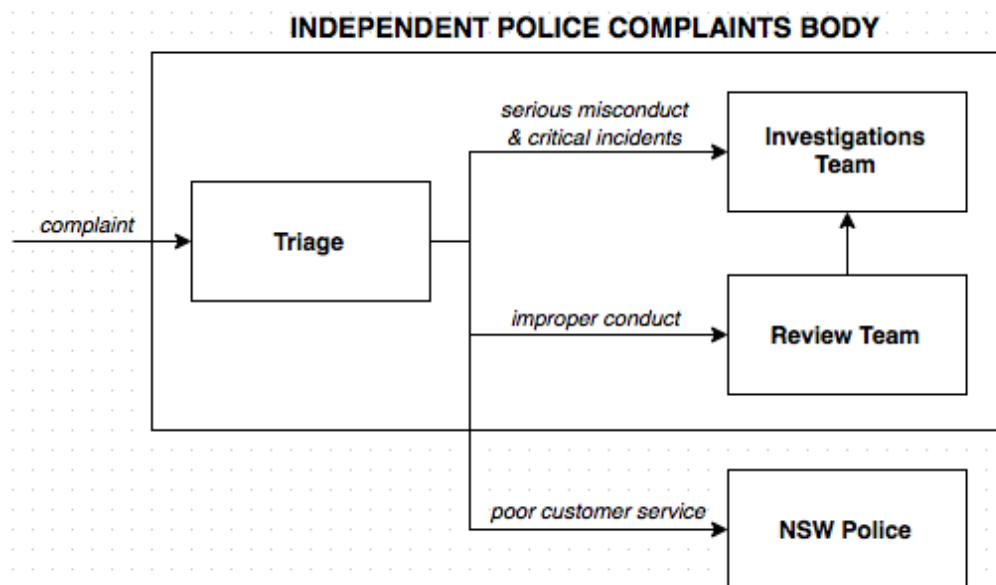
Incorporating aspects of the New Zealand model, we argue that the independent body should be empowered to inquire into:

1. Misconduct or neglect of duty by any member of Police; and
2. Incidents in which a member of Police causes or appears to have caused death or serious bodily harm (i.e. what is currently considered a 'critical incident' in NSW).

This would incorporate the functions of the current NSW Ombudsman, in relation to reviewing complaints, and the Police Integrity Commission NSW (PIC), in relation to investigating serious misconduct and critical incidents, into one organisation. Two teams would therefore operate within the independent body but with an ability to escalate 'reviews' to 'investigations' where necessary.

Given the potential volume of complaints we recommend implementing a triage system where complaints that do not meet a particular statutory threshold would be referred to NSW Police for internal investigation. The statutory threshold should take into account the nature and seriousness of the allegations, the need for impartiality in managing the complaint, and the safety and vulnerability of the complainant. We recommend that where complaints are deemed appropriate for internal investigation they be referred to another Local Area Command in order to increase the actual and perceived impartiality of the investigation.

The complaints received during the 2013 Mardi Gras season were not "critical incidents". Nevertheless it is important that an avenue for the independent assessment of such complaints be instituted in order to boost public confidence and therefore ensure that incidents are reported.



⁵ Council of Europe Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* (2009).

Independent, competent, diverse personnel

It is necessary that the independent body be staffed by experts with the required capabilities and professional knowledge to conduct investigations into police conduct. This might include a combination of police officers from other states and territories and people experienced in the handling of administrative complaints. The independent body should have a gender balance, an adequate representation of people of cultural and lingual diversity, and people of disability. This diversity should be supported through policy and training that are inclusive and supportive of diversity.

Empowered to make binding decisions and recommendations

The independent body should have the power to make findings and decisions that may be referred to the Director of Public Prosecutions for the consideration of criminal charges, and to report to Parliament where a recommendation of disciplinary proceedings has been made and no proceedings have been commenced, say within six months.

Furthermore, the independent body should have the ability to report directly to the NSW Parliament; to submit proposals and observations concerning existing or draft legislation. The NSW Parliament should be required to publish the annual reports of the independent body to ensure transparency.

Increased transparency in relation to process and results

The independent body should provide adequate information, in writing, to the complainant at the conclusion of the investigation, including:

1. The steps taken to investigate the complaint;
2. The findings of the investigation;
3. Any actions taken or planned to be taken as a result of the investigation; and
4. Details of how to request a review of the decision.

The powers of the independent body to decline or discontinue an investigation should be prescribed. We recommend an administrative finding after due investigation, that a particular complaint may lack substance, be misconceived, to be too remote in time (a critical date should be discussed further with stakeholders). Where the independent body decides not to investigate or to discontinue an investigation reasons should be provided for that decision.

Improved accessibility for prospective complainants

To ensure the safety of the communities the NSW Police serve, it is paramount that the community understand the process and the support resources available to them. We recommend that information should be publically available in relation to the review and investigation process, as well as which types of complaints are actually managed (as opposed to overseen) by the various bodies involved in the complaint process. This information should be prominently available on the websites of both the NSW Police and the independent body and provided in major community languages.