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17 June 2015

Andrew Tink AM
Review of Police Oversight

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

Dear Mr Tink

RE: REVIEW OF POLICE OVERSIGHT

We write in relation to your appointment by letters patent to consider and report to the NSW Government on options for a single police oversight model for NSW.

The Jumbunna Indigenous House of Learning, Research Unit ("**Jumbunna Research Unit**") is a research Unit located within the University of Technology, Sydney that undertakes research and advocacy on Indigenous legal and policy issues of importance to Indigenous people, their families and their communities. Our current projects explore, inter alia, issues related to Indigenous people's contact with the criminal justice system and interactions with Police, and our staff include experienced researchers, academics and practicing solicitors with strong links to both the legal profession and Indigenous communities.

Jumbunna Research Unit welcomes the review of Police oversight mechanisms in NSW and believes it represents an opportunity to address, and perhaps improve, a lack of confidence in the NSW Police Force (and the oversight of that force by the NSW Government) expressed by many Aboriginal community members with whom we have worked. A commitment by the state to improve transparency, accountability and education for the NSW Police Force has the potential to lead to a significant improvement in the relationships between Aboriginal communities, the NSW Police Force and the NSW Government, as

demonstrated by the improved relationship that arose between NSW Homicide Detectives and the Bowraville Aboriginal community following a reformed second police investigation in relation to the three killings that occurred in that community between 1990 and 1991.[1]

Unfortunately, given the complexity of the issues involved, and the extremely short timeframe provided for submissions, we are not able to provide a comprehensive and substantive response to the Inquiry. We are concerned about the lack of time allocated for, and what appears generally to be lack of, consultation with Aboriginal community in relation to the Review, given the unique importance of this issue in the context of the historical and contemporary relationship between Aboriginal community and the Police Force, and the special issue of Deaths in Police Custody which continue to be a problem in Australia. Nonetheless, we provide our preliminary thoughts on the review herewith.

Consultation Process

We are not aware of the extent to which Aboriginal community organisations, and Aboriginal families with first hand experience of the Police complaints system, have been approached for comment in relation to the Inquiry. However, our view is that such consultation, done in a considered and sensitive way, is essential to obtaining the views of a community with a view formed by unique lived experiences as to the accountability provided by the current NSW Police oversight system.

As noted in the RCIADIC recommendations handed down in 1991;

> *1.4.14 The relations between Aboriginal and non-Aboriginal people were historically influenced by racism, often of the overt, outspoken and sanctimonious kind; but more often, particularly in*

[1] Standing Committee on Law and Justice, Legislative Council of New South Wales, *The family response to the murders in Bowraville* (2014) 29.

> *later times, of the quiet assumption that scarcely recognises itself. What Aboriginal people have largely experienced is policies nakedly racially-based and in their everyday lives the constant irritation of racist attitudes. Aboriginal people were never treated as equals and certainly relations between the two groups were conducted on the basis of inequality and control.*[2]

and later

> *1.4.16 Police officers naturally shared all the characteristics of the society from which they were recruited, including the idea of racial superiority in relation to Aboriginal people and the idea of white superiority in general; and being members of a highly disciplined centralist organisation their ideas may have been more fixed than most; but above and beyond that was the fact that police executed on the ground the policies of government and this brought them into continuous and hostile conflict with Aboriginal people. The policeman was the right hand man of the authorities, the enforcer of the policies of control and supervision, often the taker of the children, the rounder up of those accused of violating the rights of the settlers. Much police work was done on the fringes of non-Aboriginal settlement where the traditions of violence and rough practices were strongest.*[3]

We note that the definition of oversight contemplated by the Review includes not just corruption and misconduct, but providing accountability for the exercise of police powers. It is against the above outlined historical experience of Aboriginal people that Police oversight issues are perceived. Moreover, research shows that this relationship remains plagued with contemporary issues regarding the policing of Aboriginal people.

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[2] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National report* (1991) Vol 1, 10 [1.4.14].
[3] Ibid.

Accountability for the powers and discretion exercised by police (reference 5(d)).

Consistently studies have shown that Indigenous communities are more heavily policed than non-indigenous communities, and that Police discretion is more likely to be exercised against Indigenous Australians in relation to the exercise of stop and search powers, charging discretions, diversionary options and police bail determinations. Moreover, there is a long history of police violence exercised against Indigenous people.

For example:

A. Research has shown that young Indigenous offenders are more likely than non-indigenous offenders to be referred to Court, rather than receive a caution from Police;[4]

B. The types of offences for which Indigenous people appear before courts also differ significantly from non-Indigenous people. A study of Indigenous youth in New South Wales found that their rate of court appearances for public order offences was more than 10 times the rate for non-indigenous youth. Furthermore, the New South Wales Ombudsmen has noted that 'Aboriginal defendants are more likely to be dealt with by arrest, they are more likely to face a bail determination and the possibility of being unable to meet bail conditions, breaching bail conditions or being refused bail;[5]

C. With regard to the conditions police impose on police bail, the Office of the Chief Magistrate of New South Wales noted that;

> "Overly complex or onerous reporting requirements that go beyond those reasonably necessary to secure an accused person's attendance at court are commonly seen in conditions or police bail or are being sought in applications for bail before the court";[6] and

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[4] L Snowball, Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice no. 355, June 2008, '*Diversion of Indigenous juvenile offenders*', 2.
[5] Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives (Commonwealth), *Doing Time – Time for Doing* Report (2011) 217.
[6] Office of the Chief Magistrate of the Local Court, Submission No BA2 to NSW Law Reform Commission, *Bail*, 1 July 2011, 2.

D. There is also evidence that Police enforce extremely strict compliance with bail conditions, disregarding cultural nuances in those conditions and/or arresting individuals for 'technical' bail breaches.[7]

Similar discrimination was evident in the recent NSW Issues Paper on the use of consorting provisions powers by NSW Police. Notwithstanding that the powers were intended for use against Organised Crime organisations, 85% of the use of these powers were by general duties police officers. When they were used, whilst Aboriginal people comprise 2.5% of the total NSW population, 40% of all people subject to the use of the consorting provisions in the first year of use were Aboriginal. Additionally, the proportion of Aboriginal women and young people who have been subject to the law is especially high; two thirds of the 83 children and young people aged between 13 and 17 years are Aboriginal and just over half of the 109 women are Aboriginal.[8]

We are not aware of any substantive actions taken by existing Police Oversight bodies to properly address such discriminatory policing powers since the RCIADIC recommendations. Given this, we submit that the appropriate way to proceed to affect real change is the establishment of a genuinely independent oversight body, that is outside the NSW Police force, and therefore outside the strong cultural and historical prejudices that are present in the way in which Aboriginal communities are policed.

Guiding Principles of an Oversight Body (reference issues 4, 5(b) – (e) and 5(g)).

In our view any oversight structure aimed at promoting public confidence in policing, police oversight and the criminal justice system, must meet the following requirements, which we note, are widely considered general best practice and necessary to meet requirements at international law.

True Independence

[7] Youth Justice Coalition, Submission No BA20 to NSW Law Reform Commission, *Bail,* 25 July 2011, 6.
[8] NSW Ombudsman, *Consorting Issues Paper* (2013) 10.

In our view it is essential for accountability that any investigations of alleged misconduct, discriminatory exercises of power, human rights breaches, or criminal behavior (including a death or injury in custody) are conducted by organisations that are institutionally, practically culturally and politically independent of the Police Force. [9] This requirement is in keeping with International Law obligations.[10] The importance of such independence effects both the public perception of the extent to which Police officers are accountable to the law, but also the effectiveness of any investigation. Where officers feel a collegial obligation and duty to other officers, there is the risk of a conflict of interest leading to bias that in turns effects the adequacy of the investigation. In this regard, investigations of misconduct must take priority over any associated Police-instigated criminal investigation, as occurs in Ireland. This ensures that investigations into misconduct are not hampered by the role of Police in pursuing criminal investigations of the complainant, during which Police exercise a large power over the complainant in the form of the various discretions as to charge, bail etc. Moreover, it also reduces the temptation to pre-emptively charge a complainant with a criminal offence in an attempt to impugn their character and create a fictitious motive for the complaint, putting its veracity in issue before any investigation has commenced. Given the need for a genuinely independent organisation, we submit that a mere oversight body that is tasked with overseeing an internal investigation is insufficient to prevent conflicts of interest or the influence of a strong police culture of collegiality and loyalty, and address the opportunities that arise for collusion and the tainting of evidence at the time of an event. Consequently, such a body must have the following mechanisms conferred on an independent statutory basis:

[9] Tamar Hopkins, *An Effective System for Investigation Complaints Against Police* (Victoria Law Foundation), August 2009, Recommendation 1, 6.
[10] See for instance Brecknell v United Kingdom (2008) 46 EHRR 957.

(a) powers and training to investigate complaints in a rigorous, timely and effective matter, including the powers to conduct the investigation as a standard criminal investigation, including powers to interview Police officers. Police officers should be required to co-operate with such a body in such investigations, subject to standard common law rules against self-incrimination;

(b) the ability to refer matters to the DPP for prosecution where it thinks appropriate; and

(c) A statutory basis as an independent statutory body, being properly funded and resources.

Adequacy of Investigation

A series of high profile Aboriginal Deaths in Custody, in which the authors were professionally engaged, demonstrate the critical importance of adequate investigations that are timely, rigorous and effective. We endorse the concept of 'the golden hour' in this context, which identifies the importance in collecting evidence as soon as possible on the occurrence of an event. Importantly, this requires that witnesses be separated immediately, and be prevented from discussing the matter, so as to ensure that evidence is not tainted. The importance of ensuring a speedy and rigorous investigation is particularly clear given that there have been numerous cases in Australia where a failure to obtain evidence quickly, and to protect against collusion or the tainting of evidence, has meant that insufficient evidence is obtained. This then leads to a refusal by prosecutors to indict Police for crimes due to a lack of evidence. It is extremely concerning that when the ex-officio indictment of Snr Sgt Hurley was issued in

January 2007, over 262 Aboriginal deaths[11] had occurred in Police custody without a single criminal conviction recorded against an Australian Police Officer. In our view any adequate investigation requires at a minimum that:

(a) witnesses are separated and interviewed immediately or as soon as possible (and preferably within 24 hours);

(b) independent investigators must take control of and preserve scenes and evidence relating to the incident;

(c) non-police scientists and experts should be engaged; and

(d) enforceable timelines are used, and investigators have powers to access Police documents or evidence.

Examples in which Police oversight and accountability has failed Aboriginal communities.

Bowraville Aboriginal Community

It is clear that during an initial Police investigation into the killings of three Aboriginal children in Bowraville in 1990 – 1991, racial stereotypes and flawed investigation techniques resulted in a failure to properly collect evidence and contributing to the acquittal of the accused.[12] It has taken 20 years for the Bowraville Aboriginal community to receive an official, public acknowledgment that the initial police investigation was affected by, inter alia, racial prejudice and discrimination, that this had a significant impact upon the prospects of conviction of the suspected killer and that these impacts continue to this day.[13]

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[11] This figure is based on statistics from the ABS, however these were only collated from 1990 following the RCIADIC Report, so the number would be much higher.
[12] See generally Standing Committee on Law and Justice, Legislative Council of New South Wales, *The family response to the murders in Bowraville* (2014) 19 – 28 & 37-61.
[13] Id, 119.

Death of Mulrunji Doomadgee in Palm Island

This case demonstrates the collusion that can occur between witnesses when Police are tasked to investigate their own officers, and the consequent loss of evidence in a death in custody. The case also demonstrates powerfully the loss of confidence that occurs in a community who can see a failure to hold Police officers accountable through a rigorous, effective and transparent investigation. We note that a review by the Crime and Misconduct Commission of Queensland conducted in June 2010 of both the investigation into the killing (the **Police Investigation**) and the Internal Police Investigation that followed of that Investigation (the **IRT Investigation**) found that both investigations were deeply and critically flawed. Amongst the issues raised in regard to the Police Investigation were:

(a) possible collusion between police investigators and the suspect police officer;

(b) a failure to remove the suspect police officer from the area where witnesses were subsequently interviewed;

(c) the failure of investigating officers to include allegations of assault by the suspect police officer against the victim in the information provided to the medical examiner conducting the autopsy; and

(d) the appointment of an investigator who was friends with the suspect police officer and whom had previously failed to properly investigate an allegation that the suspect officer had driven over the foot of another community member and then sort to influence the evidence of a doctor at the hospital.

Moreover the CMC investigation found that the IRT investigation had failed to properly investigate these concerns.

Notwithstanding this CMC report, we are aware of no Police officers having ever been charged with or investigated for criminal offences arising from a possible cover-up relating to a death in police custody. In such cases accountability simply does not exist. Notwithstanding the subsequent criticisms, it remains that in this case a deeply flawed investigation tainted or failed to collect evidence properly, and that this almost certainly contributed to a DPP refusal to prosecute the suspect police officer. Even when later, a special prosecutor was appointed to prosecute an ex-officio indictment brought by the AG, it remained the case that the evidence available was limited and/or potentially tainted. It is impossible to know what evidence was never collected, and what impact it might have had at trial. As it was, the suspect police officer was acquitted.

The Death of Mr Ward in Western Australia

This case involved the brutal killing of an Aboriginal man, Mr Ward, who died from extreme heat whilst being transported by Western Australian corrective services in a prison van without air conditioning that reached temperatures of over 50C. Despite damning coronial recommendations, the Western Australian DPP again refused to prosecute, citing a lack of evidence. The company and individuals responsible were later charged under occupational health and safety legislation and fined for their role in the death. A failure to separate witnesses during the investigation was again an issue in this case.[14]

Whilst these cases represent particularly heinous examples of the lack of accountability and public confidence that occurs in Aboriginal cases, they

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[14] *The WA Coroner's Findings in the Relation to the Death of Mr. Ward*, Coroner's Court of Western Australia, 12 June 2009, 72.

demonstrate the importance of rigorous, effective, efficient and independent investigations into Police conduct, if the public are to believe that accountability in fact exists. Consequently, we believe they contain important lessons for consideration in a police oversight model.

These submissions have been prepared by Senior Researcher Craig Longman for Jumbunna Research Unit. Should we be able to provide any further assistance, we would be happy to do so.

Kind Regards,

Craig D. Longman
Snr Researcher

Prof. Larissa Behrendt
Director, Jumbunna IHL (Research)