

National Police Accountability Network

Of the National Association of Community Legal Centres (NACLC)¹

9 August 2011

The Hon Robert McClelland, MP
Attorney-General
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

The Hon Jenny Macklin
Minister for Indigenous Affairs
149 Burgundy Street
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Copied to:

- 1) Senator the Hon George Brandis, SC, Shadow Attorney-General
- 2) Senator the Hon Nigel Scullion, Shadow Minister for Indigenous Affairs
- 3) The Hon. Peter Ryan, MP, Minister for Police and Emergency Services (Vic)
- 4) The Hon Michael Gallacher MLA, Minister for Police and Emergency Services (NSW)
- 5) The Hon Paul Raymond Henderson MLA, Chief Minister and Minister for Police, Fire and Emergency Services (NT)
- 6) The Hon Rob Johnson JP MLA, Minister for Police, Emergency Services and Road Safety (WA)
- 7) The Hon David O’Byrne, Minister for Police and Emergency Management (Tasmania)
- 8) The Hon James Merlino, MP, Shadow Minister for Police (Vic)
- 9) The Hon Nathan Rees, Shadow Minister for Police (NSW)
- 10) The Hon Terry Kennedy, Shadow Minister for Police, Fire and Emergency Services (NT)
- 11) The Hon Margaret Quirk, Shadow Minister for Police; Emergency Services; Road Safety (WA)
- 12) The Hon Elise Archer MP, Shadow Minister for Police and Emergency Services (Tasmania)
- 13) The Office Of Police Integrity (Victoria) the Northern Territory Police Ombudsman, the NSW Ombudsman (NSW), Corruption and Crime Commission of Western Australia
- 14) The Australian, The Age, The Sydney Morning Herald, Tracker

Dear Ministers,

Re: 20th anniversary of the Royal Commission into Aboriginal Deaths in Custody

As the 20th anniversary of the report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) passes, we write to urge your governments to take action in relation to police accountability mechanisms in each state and territory.

We note with despair that since the RCIADC Report, incarceration rates for Aboriginal and Torres Strait Islander peoples have increased. Overall in Australia, an Aboriginal person is 14

¹ The National Police Accountability Network (NPAN) is a network of community and legal organizations convened and supported by the National Association of Community Legal Centres (NACLC).

times more likely to be in custody than a non-Aboriginal person (and an Aboriginal young person is 28 times more likely to be in jail than a non-Aboriginal young person). The level of incarceration of Aboriginal and Torres Strait Islander peoples is a national disgrace.

It is also disheartening that 20 years on from the RCIADC, very few of the 339 recommendations of the Royal Commission have been implemented.

While much of the focus of the 20th anniversary of the RCIADC has been on the continuing over-representation of Aboriginal and Torres Strait Islander peoples in our courts and prisons, and conditions within the correctional system, we wish to raise the issue of police accountability.

Given the level of interaction between many Aboriginal and Torres Strait Islander peoples and the police, we note that Recommendation 226 of the Report of the RCIADC remains relevant and in need of urgent attention today in each and every State and Territory in Australia. This recommendation calls for urgent review of the processes for dealing with complaints against police. Our current observations, which coincide with the observations of the Royal Commission 20 years ago, are that Aboriginal and Torres Strait Islander peoples do not have confidence in the existing police complaints mechanisms, and tend not to lodge complaints even where they have been treated unfairly, unreasonably, unlawfully, or even maliciously, by police.

Furthermore, Recommendation 226(g) of RCIADC that “Aboriginal Legal Services be funded to ensure that legal assistance, if required, is available to any Aboriginal complainant” wishing to lodge a police complaint, has not been implemented. We note that the Aboriginal and Torres Strait Islander Legal Services (ATSILS) are underfunded in regards to Civil Law, so are not able to provide legal assistance for every complaint.

From the point of view of a disempowered member of the public, Aboriginal or otherwise, in each state the existing process for making a complaint is inaccessible, fraught with the risk of retaliation, lacking in transparency, and lacking in independence.

In NSW, for example, most complaints, including serious complaints, are managed by senior police officers in the same police station or local area command as the officer who is the subject of the complaint: they will often know each other through their work and/or socially. Complaints about police officers lodged with the NSW Ombudsman are generally transferred to the NSW Police to manage or investigate themselves.

In Victoria, while complaints can be made to the Office of Police Integrity (OPI), over 97% of them are referred to the Ethical Standards Department of Victoria Police. Of the complaints referred to the Ethical Standards Department, the vast majority will be either referred to police investigators in the regions from where the complaints come, or not investigated at all, but rather “managed” under the Management Investigation Model. The emphasis of complaint handling in Victoria is on “restorative” justice. In a context where criminal acts by police such as assaults are consistently treated with a high level of impunity, such an approach undermines the critical necessity that police who engage in criminal assaults are removed from policing. This is not an ordinary workforce - police can use lethal force and interfere with peoples’ rights to liberty, freedom and privacy.

Complainants have only minimal contact with the complaint process. After speaking to an investigator after submitting their written complaint, they generally hear no further information about the investigation until they receive a finalisation letter. The finalisation letter sent to a complainant after a complaint has been investigated or managed is generally

a one to two page pro forma letter stating whether their complaint has been substantiated, or otherwise, with little or no reasoning provided.

In a recent Victorian case, after documents were requested and received through Freedom of Information processes, it was obvious that the complaint investigator had not interviewed some of the police witnesses, instead allowing them to adopt each others notes. This breach of investigation policy was not corrected despite an OPI review of the investigation.

In the Northern Territory (NT), solicitors report that when clients know that it is other police who will investigate the complaint about an officer, they may be reluctant to make a complaint and are skeptical of the impartiality and likely outcomes.

For example a recent case in the NT involved police allegedly pointing a firearm at a man in circumstances when it appeared entirely unnecessary. Before the lawyers made a complaint, the Assistant Commissioner requested a report from the relevant Commander. It was his view that potentially, there had been “an aggravated assault by a police officer on a member of the public.” Police “investigated” the incident, which involved speaking to the relevant officer, who advised he thought it was necessary in his opinion. The commander agreed and no further action was recommended. Police had not spoken to the person who had the firearm pointed at him, or the witnesses who were with him at the time. The legal service subsequently made a complaint, with a version of events which differs materially from the account apparently given by the officer. However, police stated that the issue had been dealt with and that they did not wish to re-investigate.

A further concern raised by lawyers in the NT is the lack of transparency in the complaint process. For example, NT lawyers recently had a complaint where 8 members of the police force were disciplined after keeping a young man in custody for 12 hours with multiple fractures to his pelvis. He repeatedly requested medical assistance which was refused. While the lawyers and young man know the members were disciplined in some way, no details were provided. Accordingly, the lawyers and young man do not know whether the disciplinary action taken was appropriate.

The lack of mechanisms for the truly impartial investigation of police in Australia is particularly concerning given their continued role in conducting the primary investigation (including the collection and management of evidence) of any death of an Aboriginal and Torres Strait Islander person in police custody.

The concerns detailed above are typical of concerns faced by complainants and their lawyers across Australia.

To improve confidence in police accountability mechanisms, we draw your attention to some of the principles suggested in Recommendation 226 of the RCIADC:

- Receipt of complaints, their investigation and adjudication should be performed by an independent body;
- It should be a serious offence of a police officer to retaliate against a person because they have made a complaint;
- Formal hearings of complaints should be public and transparent; and
- Aboriginal and Torres Strait Islander peoples should be involved in complaint handling determination (particularly where the complainant is Aboriginal).

Point 29.5.24 of the RCIADC reads as follows:

At least so far as they involve complaints by Aboriginal people, investigations of alleged police misconduct should be carried out as much as possible by persons other than police officers. It may be that a civilian investigator might be a team leader of a group including police officers, as there are some investigatory skills and processes, such as physical evidence collection and analysis, which are best done by police, but it is vital that there be a 'hands on' investigation leader who is not currently or formerly a police officer. There needs to be an involvement in the process of an Aboriginal person so that the complainant is kept informed of progress by someone who has their trust, and, finally, details of the investigation and the findings must be made public so that the wider Aboriginal community might have some confidence in the process.

Significant changes to current police accountability mechanisms are required to enable the confidence of people who come into contact with police. Changes are also necessary for Australia to comply with international human rights standards, which require effective investigation of any actions of the police that lead to violation of an individual's human rights.

The European Commission of Human Rights Rapporteur on Police Complaints identifies effective investigation as an investigation instigated by the State that is:

- a) Independent
- b) Adequate and capable of resulting in discipline and prosecution of perpetrators
- c) Prompt
- d) Transparent and open to public scrutiny
- e) Involves and protects the victim of the alleged abuse.

These standards arise from case law emanating from the European Court of Human Rights and have been endorsed by Amnesty International.

Two United Nations committees have agreed that Australia fails to meet human rights standards in the investigation of police complaints. The United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, requires its signatories to ensure effective measures are taken to “prevent, investigate, prosecute and punish” perpetrators of ill-treatment.²

The Committee that oversees the Convention's implementation noted in its concluding observations concerning Australia in 2008, at paragraph 27:

The Committee is concerned over allegations against law enforcement personnel in respect of acts of torture or cruel, inhuman or degrading treatment or punishment and notes a lack of investigations and prosecutions. The State Party should ensure that all allegations of actions of torture or cruel, inhuman or degrading treatment or punishment committed by law enforcement officials, and in particular any deaths in detention, are investigated promptly, independently and impartially and – if necessary – prosecuted and sanctioned.

² See for example UNCAT General Comment No 2. 23 November 2007.

Furthermore, the State party should also ensure the right of victims of police misconduct to obtain redress and fair and adequate compensation.³

Similarly, Article 2 of the United Nations *International Covenant on Civil and Political Rights* (the "ICCPR"), to which Australia is also a Party, requires states to ensure that victims of rights violations achieve an effective and enforceable remedy for that abuse.

The United Nations Human Rights Committee's Concluding Observations on Australia in April 2009 stated that Australian states and territories should

- a) establish a mechanism to carry out independent investigations of complaints concerning excessive use of force by law enforcement officials;
- b) initiate proceedings against alleged perpetrators.....[and] provide adequate reparation to the victims.⁴

The signatories to this letter are interested in working with you to improve police accountability mechanisms across Australia, to provide complainants and police officers with fair, independent, and transparent mechanisms for complaint resolution.

Yours sincerely,



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³ Concluding observations of the Committee Against Torture 15 May 2008 Australia

⁴ Concluding observations of the Human Rights Committee 3 April 2009 on Australia at paragraph 21.

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