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Minister responsible for the establishment of an anti-corruption commission

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Dear Ministers

Police Shootings on 1 May 2011 and 2 May 2011

We are writing in relation to two police shootings, one death and one near-death, that have occurred in Melbourne this week. The first was the fatal police shooting of Craig Douglas on 1 May 2011 in Grey Street St Kilda. The second shooting occurred in High Street, Windsor on 2 May 2011.

From the statements published on the Victoria Police online news service, both shootings appear to be being investigated by members of the Victoria Police, with the oversight of Ethical Standards.

In our view it is both inappropriate and a breach of the state's legally binding human rights obligations for the investigation of deaths in police custody to be carried out by the same police force. The state must immediately create an independent body that is capable of conducting these investigations and should take steps to place the responsibility and resources for investigating deaths in custody with the new Independent Broadbased Anti-Corruption Commission (IBAC).

The Police are Clearly the Inappropriate Investigative Body in these Cases

First, it is inappropriate that the Victoria Police continue the investigation. Public comments made by the Chief Commissioner Simon Overland and Assistant Commissioner Luke Cornelius were that police officers involved in the Grey Street shooting acted appropriately and that they had no choice but to shoot. Media comments such as these have the potential to interfere with the public confidence in the Coroner's ability to conduct an independent investigation. These comments raise serious concerns regarding pre-determination of the issues, a perceived lack of impartiality and an apprehension of bias

at the highest echelons of the Victoria Police, which at the same time is meant to be conducting an impartial and independent investigation.

Secondly, the Baillieu government has consistently stated its commitment to transparency and accountability in government. The system whereby police investigate other police who have been involved in fatal or near fatal shootings is a serious flaw in Victoria's system of accountability. The conflict is clear – the organisation that is conducting the investigation of a serious public matter is also the organisation that wishes to protect its officers. Only institutional change can overcome this flaw.

Victoria is Legally Obligated to Establish an Independent Investigations Body

The right to life is protected in section 9 of the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) (Victorian Charter), and is clearly engaged in circumstances where a death has occurred while a person is in the custody, care or control of the state. (Attached to this letter is a summary of the state's obligations under section 9 of the Victorian Charter.)

The right to life requires that any investigation of possible breaches of that right must be:

- (a) hierarchically, institutionally and practically independent from the persons implicated in the events giving rise to the investigation;
- (b) effective, in that it is capable of identifying the facts and leading to the punishment of any individuals who may be responsible for the death of a person; and
- (c) sufficiently open so as to allow public scrutiny, so that accountability is secured in practice as well as in theory.

This independent model is already being used in Queensland, parts of Canada, New Zealand and the United Kingdom. In Queensland, the Coroner has taken on the primary investigation of deaths in custody following the problems with investigations by police into the death of Doomadgee on Palm Island.

The current investigations in Victoria are not institutionally independent from the persons implicated in the relevant events. It is well established that investigations of deaths of persons in the custody or care of police lack sufficient independence if carried out by other officers from the same police force.¹

We acknowledge that the police must play a role in the investigations; however the role should not be that of primary investigators. European case law on the right to life establishes that the investigation should be placed in the hands of an independent authority at the earliest point it is practicable to do so.² Further, the oversight by Ethical Standards, a division of Victoria Police, does not cure an investigative process that otherwise lacks independence. This is particularly so where the investigation has been conducted, for all practical purposes, by police officers connected organisationally with those under investigation.³

An Independent Body Must Be Established Immediately and IBAC Should Be Used

We urgently request that the state ensure that an effective, independent, accountable body be immediately and properly resourced to conduct the investigations into these two shootings. Currently, the Office of Police Integrity is an existing independent investigative body that could conduct the investigations adequately, although it would require significant resourcing to do so. Another option is

¹ *Ramsahai v Netherlands* no. 52391/99 § 335, 338, 340–341 (15 May 2007); *Jordan v United Kingdom* § 120.

² *Ramsahai v Netherlands* § 339.

³ *Jordan v United Kingdom* § 120.

for the Coroner to assume an investigative role, in much the same way as has happened in Queensland.

Further, in the establishment of the IBAC, particular consideration should be given to resourcing that body to conduct independent investigations of deaths and near deaths in custody.

We would be pleased to discuss this letter and would appreciate a response as soon as possible.

Yours sincerely



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1. The State's obligation to properly investigate deaths under the Victorian Charter

The obligation to properly investigate deaths in police custody arises under the right to life, which is protected in the Victorian Charter.

The right to life has fundamental importance in international and domestic human rights law. Article 6(1) of the *International Covenant on Civil and Political Rights (ICCPR)* states that:

'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'.

Section 9 of the Charter reflects Article 6(1) of the ICCPR, providing that 'Every person has the right to life and has the right not to be arbitrarily deprived of life'.

Although the primary obligation on State authorities is not to take life arbitrarily, there is also a recognised obligation on the State to investigate deaths at the hands of officials, such as the police, with the aim of bringing to justice anyone who may be responsible for the death of a person, and preventing similar incidents in future.⁴ The purpose of the obligation to investigate deaths at the hands of State authorities is to ensure that the right to life is rendered practical and effective.⁵

In addition to the ICCPR, the obligation to conduct independent investigations is recognised in other international instruments, including:

- the United Nations 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 (the *Basic Principles*).

Section 32(1) of the Charter requires that all legislation be interpreted consistently with human rights, so far as is possible consistent with the purpose of the legislation. In the recent decision in *Kracke v Mental Health Review Board*, Justice Bell referred to this provision as 'mandatory', 'very strong and far reaching'.

Section 32(2) of the Charter expressly states that international law and judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered for the purpose of interpreting a statutory provision. In *Kracke v Mental Health Review Board*, Justice Bell emphasised the broad, permissive scope of section 32(2), stating:

The scope of s 32(2) should be appreciated. For the interpretation of all Victorian primary and subordinate legislation (including the Charter) touching on human rights (in the Charter), it operates as a statutory permission to consider international law and judgments in all cases whatsoever. ...

⁴ See, for example, *Herrera Rubio v Colombia*, Human Rights Committee, Communication No: 161/1983 UN Doc: CCPR/C/OP/2 at 192 (1990), paragraphs 10.3 and 11 in which the United Nations Human Rights Committee commented upon the State's obligation to establish effective procedures to investigate circumstances which might involve a violation of the right to life through an appropriate impartial body. See also *Osman v United Kingdom* (1998) 29 EHRR 245 and *McCann v United Kingdom* (1995) 21 EHRR 97.

⁵ *McCann v United Kingdom* (1995) 21 EHRR 97.

2. Scope of the obligation to investigate deaths

The purpose of an investigation into a death at the hands of State authorities is to "secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility".⁹

An investigation of possible breaches of the right to life must be:

- (a) hierarchically, institutionally and practically independent from those implicated in the events giving rise to the investigation;
- (b) effective, in that it is capable of identifying the facts and leading to the punishment of any individuals who may be responsible for the death of a person; and
- (c) sufficiently open so as to allow public scrutiny, so that accountability is secured in practice as well as in theory.

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. In particular, investigations of deaths at the hands of police lack sufficient independence if carried out by other officers from the same organisation.¹⁰ This is reflected in the UN Human Rights Committee's recent criticism of Australia, referred to above.

The requirement that the investigating body is independent does not mean that police must play no role in the investigation. The European Court of Human Rights, in interpreting the right to life set out in Article 2 of the ECHR, acknowledges that as a practical matter, it will be necessary to involve police in securing the scene of a death, collecting evidence, and identifying potential witnesses.¹¹

It will usually be necessary for police to be involved in the initial investigation because:

- (a) it would hinder the proper investigation of deaths pursuant to section 9 of the Charter if evidence was not quickly secured at the scene of the death; and
- (b) in a case where police have some involvement in the death of a person, police will almost inevitably be the first at the scene.

Although the police are not forbidden from any necessary involvement in an investigation, European case law establishes that the investigation should be placed in the hands of an independent authority at the earliest point it is practicable to do so.¹² In particular, it is not sufficient that an independent body have oversight of the investigation, where the investigation has been conducted, for all practical purposes, by police officers connected organisationally with those under investigation.¹³

⁹ *Jordan v United Kingdom* no. 24746/94 § 105 (4 May 2001). See also *R (On the Application of JL) v Secretary of State for Justice* [2008] UKHL (26 November 2008), paragraph 26.

¹⁰ *Ramsahai v Netherlands* no. 52391/99 § 335, 338, 340–341 (15 May 2007); *Jordan v United Kingdom* § 120.

¹¹ *Ramsahai v Netherlands* § 337–338; *Jordan v United Kingdom* § 118–119.

¹² *Ramsahai v Netherlands* § 339.

¹³ *Jordan v United Kingdom* § 120.

...The rationale of s 32(2) is not parliamentary intention to enact legislations in conformity with international law, but the utility of referring to international law and judgments in understanding the relevant human right and how it may be reflected in or influence the interpretation of the statutory provision.⁶

Accordingly, for the purposes of understanding the proper scope of the right to life contained in section 9 of the Charter, HRLC submits that the Victoria Police should have regard to the relevant international instruments and related jurisprudence.

The Basic Principles require that governments and law enforcement agencies establish effective reporting and review procedures for all incidents where injury or death is caused by the use of force and firearms by law enforcement officials, and that "independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances." (Article 22). The Basic Principles further provide that persons affected by the use of force and firearms have "access to an independent process, including a judicial process" (Article 23).

The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions prohibit, among other things, the use of excessive or illegal use of force by a public official. The Principles require that there be a "thorough, prompt and impartial investigation" of all suspected cases where such force may have been used. In cases where the established investigative procedures are inadequate because of, among other things, a lack of impartiality the Principles state that the investigation should be conducted through an independent commission of inquiry or similar procedure (Paragraphs 9 and 11).

Invoking these international principles does not presuppose that individuals are to blame for the events leading to a person's death, or seek to anticipate the results of any investigation. Rather, the principles reflect the need to ensure public confidence in the use of force by the State.

In European jurisdictions where the *European Convention on Human Rights (ECHR)* applies, the obligation to investigate deaths is sometimes referred to as the 'procedural' obligation (the 'substantive' obligation being not to take life arbitrarily).⁷ Describing the obligation as 'procedural' does not mean that an investigation is a mechanical exercise however. The importance of the right to life requires that any investigation must be real and effective.

Australia's failure to appropriately investigate reports of excessive use of force by law enforcement officials has been the subject of recent criticism by the UN Human Rights Committee. In its Concluding Observations on Australia, made earlier this year, the Committee 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 and bring its legislative provisions and policies for the use of force into line with the Basic Principles.⁸

⁶ *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646, paragraphs 201-202 (footnotes omitted).

⁷ See *Ertak v Turkey* no. 20764/92 § 134, 151 (9 May 2000).

⁸ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5, Ninety-fifth session, Geneva, 16 March- 3 April 2009, para 21. (<http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>).