

Mr Michael Strong

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Copy to:
Judge Jennifer Coate
State Coroners Office

12 May 2009

Independent Investigation into the Victoria Police Fatal Shooting of Tyler Cassidy

Dear Mr Strong,

The Federation of Community Legal Centres (Vic) and Youthlaw: Young People's Legal Centre are writing in relation to the independent investigation of Victoria Police fatal police shootings and in particular the investigation into the death of Tyler Cassidy.

We have had the opportunity to review the submissions made by Shani Cassidy, Tyler's mother, in her letter to the State Coroner, Her Honour Judge Jennifer Coate, dated 23 April 2009. We support those submissions and also support Youthlaw's letter dated 27 April 2009 regarding the coronial investigation into Tyler's death. We understand that the issues raised in that correspondence have been referred to the Office of Police Integrity ('OPI') for your response.

We submit that the OPI is properly empowered¹, is sufficiently hierarchically and institutionally independent and has the practical capacity to undertake and complete the investigation of Tyler's death for the purposes of the coronial investigation and inquest.

We submit that the OPI, where directed by the Coroner or of its own motion, has a clear and binding legal obligation to undertake the investigation as a consequence of the *Charter of Human Rights and Responsibilities Act 2006* ("the Charter").

Specifically the OPI is a public authority under ss. 4, 6 and 38 of the Charter, and accordingly s.38 (1) applies. This section provides that:

'...it is unlawful for a public authority to act in away that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.'

There is significant and compelling international jurisprudence interpreting similar provisions to s.9 of the Charter regarding the right to life. The decisions provide that

1 See also the Coroners investigatory powers pursuant to s.26 (1) of the *Coroners Act 1985*

this encompasses the right to an independent and effective investigation of deaths in custody. In our view, this is not only what Victoria should require but is also what s.9 of the Charter does require in the circumstances of Tyler's fatal shooting by Victoria Police officers.

Furthermore, ss.6 and 8 of the *Police Integrity Act 2008 Act (Vic)* provide the necessary jurisdictional basis to undertake an independent investigation at the direction and on behalf of the Coroner. The circumstances of Tyler's fatal police shooting fall within the definition of 'conduct' and potentially 'serious misconduct' pursuant to s.3 of the Act. This further supports our belief that the OPI has the necessary jurisdictional basis to investigate at the direction and on behalf of the Coroner.

The status of the Victoria Police investigation into their fatal shooting of Tyler

As you are aware the Homicide Squad is currently undertaking the investigation and compiling a brief of evidence into Tyler's fatal police shooting. We understand that the brief was to be submitted to the State Coroner's Office by this time but it remains outstanding.

For all the reasons set out in the submissions made to the State Coroner by Shani Cassidy and Youthlaw, Victoria Police's investigation does not meet the necessary hierarchical and institutional independence required under s.9 of the Charter.

If Victoria Police investigates Tyler's death on behalf of the Coroner, it will breach s.9 of the Charter and involve Victoria Police acting incompatibly with its public authority obligations pursuant to s.38 of the Charter.

Purported oversight and direction of the Victoria Police investigation of their fatal shooting of Tyler fails to discharge the right to life

International and domestic human rights jurisprudence on the right to life is compellingly clear on the necessity for hierarchical and institutional independence of the investigators and the investigation in order to discharge the right to life as a whole.

Oversight by the Ethical Standards Division, the OPI, any Counsel appointed by the Coroner and even oversight and direction provided by a Coroner cannot remedy or cure a fundamental and structural lack of independence within the primary investigators of Tyler's fatal police shooting: Victoria Police.

Nor can such oversight or direction constitute a reasonable limitation on the right to an independent and effective investigation as a mandatory component of the right to life. The establishment of the OPI with its independent statutory framework, provides an organizational avenue of independent and effective investigation to the State Coroner. Pursuant to the Charter, the OPI as a public authority, is an appropriate body through which the right to life can and must be discharged and through which the independence and effectiveness of the investigation can be more adequately safeguarded.

Relevant policy and practice in comparable jurisdictions - the implications of the right to life on questions of independent investigations and who undertakes police investigations

The right to life under Article 2 of the *European Convention of Human Rights* and the *Human Rights Act 1998* (UK) has had profound and constructive implications for the independent investigation of fatal police shootings in England and Wales and Northern Ireland.

In Northern Ireland all fatal police shootings are independently investigated by the Police Ombudsman of Northern Ireland ('PONI') which states on its website:

"By law the Police Ombudsman is required to investigate all discharges of firearms by police officers, all fatal road traffic collisions involving the police and all deaths which may have resulted from the actions of police officers²."

Section 55 (2) & (3) of the *Police (Northern Ireland) Act 1998* provide the legislative mandate for the Police Ombudsman to investigate police involved deaths³. The draft policy on the investigation of State related deaths by the Office of the Police Ombudsman Northern Ireland states at (6):⁴

"The investigation of serious matters, but in particular, the death of any member of the public while in the custody of the PSNI (Police Service of Northern Ireland) or as a consequence of actions or operations taken to maintain the rule of law or to prevent a crime must be independent of the PSNI or other associated parties."

In England & Wales the Independent Police Complaints Commission ('IPCC') has the responsibility to conduct and/or manage independent investigations into fatal police shootings including on behalf of Coroners.

In *Reynolds v Independent Police Complaints Commissioner* [2008] EWCA Civ 1160, the Court of Appeal quoting from the IPCC website in relation to its obligation to investigate stated:

"Where the alleged conduct of a person serving with the police has resulted in death or serious injury Articles 2 and 3 of the European Convention on Human Rights may be engaged. If they are engaged, the IPCC, as a public authority under the Human Rights Act 1998, has an obligation to determine a form of investigation that is an effective independent investigation that does not have any hierarchical or institutional connection with those implicated in the events. It would only not have to do that where there has been an inquest that satisfied Article 2. An independent investigation into a death conducted by the IPCC itself would satisfy the requirement of independence under Article 2. An IPCC managed investigation into a death involving the police would satisfy the requirement of independence under Article 2 of the Convention provided that it was conducted by an external police force."

A recent and extensively publicised example of the role played by the IPCC in relation to a coronial inquest is its investigation into the fatal police shooting of Jean

² <http://www.policeombudsman.org/modules/pages/investigations.cfm>

³ http://www.opsi.gov.uk/acts/acts1998/ukpga_19980032_en_6#pt7-l1g51

⁴ <http://www.policeombudsman.org/publicationsuploads/Article2policy.pdf>

Charles de Menezes. In this case, the IPCC prepared an investigation report⁵ that was provided to the Coroner and appeared at the inquest⁶.

Human rights jurisprudence in the United Kingdom have placed precise and non-derogable mandates on statutorily independent bodies equivalent to the OPI to undertake investigations into fatal police shootings that have “organizational and functional independence; that is by non-police investigators according to established principles of independence and impartiality.”⁷ “This means not only a lack of hierarchical or institutional connection but also a practical independence⁸”, i.e. investigations that are “independent in law and practise.”⁹

Legal and practical implications on the OPI – conduct and completion of the investigation into the fatal police shooting of Tyler

The OPI is to our knowledge currently the only appropriately constituted body in Victoria, that in combination with the State Coroner’s public authority obligations, can fulfil the requirements of the Section 9 of the Charter and perform an independent investigation of Tyler’s death.

The independence and effectiveness of the investigation is critical to the capacity of the Coroner to undertake an independent and effective inquest into Tyler’s death. The circumstances of Tyler’s shooting and death are not so complex and unknown as to pose a serious question of capacity to the OPI as to whether it can review and complete the existing investigation. The identity of all four officers is established; the number of shots fired and the number of shots that struck Tyler’s body are also established. The OPI has recourse to both in-house and external human, specialist and technical resources and expertise to conduct rigorous evidence gathering and related investigations sufficient to comprehensively and independently compile the necessary Inquest Brief on behalf of the State Coroner.

Through its November 2005 *Review of Fatal Shootings by Victoria Police*, the OPI has demonstrated capacity to independently and rigorously analyse and report on the systemic factors that have contributed to fatal police shootings and their future prevention.

As you are aware the issue of ‘police investigating police’ especially in relation to fatal police shootings in Victoria and Aboriginal deaths in custody nationally have and remain matters of intense controversy and cause for significant public concern for the legitimacy, independence, integrity and effectiveness of investigatory and accountability systems.

This is no less an issue in relation to Tyler’s fatal police shooting at the hands of Victoria Police. The fact that Tyler was legally a child and the youngest person to be

⁵ http://www.ipcc.gov.uk/index/resources/evidence_reports/investigation_reports/the_stockwell_investigation/reports_stockwell.htm

⁶ http://www.ipcc.gov.uk/index/resources/evidence_reports/investigation_reports/the_stockwell_investigation/the_ipcc_and_the_inquest.htm

⁷ Graham Smith, (2008) “European Commissioner for Human Rights Police Complaints Initiative” – 172 JPN 399, pp 1,2

⁸ *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 325.

⁹ *Nachova and Others v Bulgaria* [GC] ECHR 2005 at para 112.

shot dead by any Australian police force intensifies the human rights obligations reposed in the Coroner and the OPI. This fact also magnifies the family's rights, our own and broader public concern and the need to ensure public confidence in a fully independent, effective and transparent investigation into his death.

We strongly urge you to consider undertaking and completing an independent investigation into Tyler's death on behalf and at the direction of the State Coroner for the reasons outlined.

If you would like to discuss this further or require further information please do not hesitate to contact our offices.

Sincerely

Hugh de Kretser
Executive Officer
Federation of Community Legal Centres

Anna Radonic
Principal Solicitor
Youthlaw