Investigation summary

Operation Lynd

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Operation Lynd was an investigation by the Independent Broad-based Anti-corruption Commission (IBAC) into the conduct of Victoria Police officers at the Hares & Hyenas bookstore at 63 Johnston Street in Fitzroy on 11 May 2019, and the cause of the serious injury to a member of the public, Mr Nik Dimopoulos, arising out of that incident.

Further information on Operation Lynd may be found on IBAC's website.[1]

IBAC's decision to investigate

IBAC may investigate police personnel conduct in response to a complaint or a notification from Victoria Police, or on its 'own motion'.[2] On 13 May 2019, IBAC received a notification from Victoria Police under section 169 of the *Victoria Police Act 2013* that Victoria Police had received a complaint in relation to the incident at 63 Johnston Street. On 15 May 2019, following assessment of this complaint, IBAC decided to investigate pursuant to section 64(1)(b) of the *Independent Broad-based Anti-corruption Commission Act 2011* (IBAC Act).

What IBAC did

Operation Lynd investigated whether police conduct on the night was lawful. The investigation was limited to issues within IBAC's jurisdiction, specifically whether any criminal offences or breaches of discipline were committed.

Operation Lynd examined:

- the facts and circumstances leading to Victoria Police's attendance at 63 Johnston Street
- the circumstances, lawfulness and reasonableness of Victoria Police's entry to the premises at 63 Johnston Street
- the lawfulness and reasonableness of Victoria Police's conduct at 63 Johnston Street
- Victoria Police's use of force against Mr Dimopoulos
- Victoria Police's restraint and release of Mr Dimopoulos.

When considering whether any criminal offences had occurred, IBAC assessed the evidence against the criminal standard of proof – beyond a reasonable doubt. When considering whether any breaches of discipline had occurred, IBAC considered the evidence against the civil standard of proof – on the balance of probabilities.

IBAC's examination of the available evidence included:

- an extensive review of Victoria Police material related to the incident including footage from a Victoria Police helicopter, conducted energy device (TASER) recordings, and CCTV footage
- examining the premises at 63 Johnston Street
- taking twenty-one witness statements
- conducting private examinations according to Part 6 of the IBAC Act
- reviewing medical information and expert medical opinions in relation to Mr Dimopoulos's injuries.

What the investigation found

Victoria Police actions prior to officers' arrival at 63 Johnston Street

In the early hours of 11 May 2019, Victoria Police officers in a Victoria Police helicopter were conducting operations in the Dandenong area when they observed a speeding vehicle. Available information indicated the vehicle was being driven by an armed offender who was suspected of having committed serious indictable offences, including violent offences.

[1] IBAC, *Outcome of IBAC's investigation into the conduct of Victoria Police officers at the Hares & Hyenas bookstore in Fitzroy in May 2019*, April 2020; IBAC, Commissioner's foreword - *IBAC Insights*, July 2020.

[2] IBAC can initiate 'own motion' investigations into police personnel conduct under section 64 of the IBAC Act where IBAC determines a matter should be investigated even though a complaint or notification has not been received.

The vehicle was followed by the Victoria Police helicopter as it sped through multiple suburbs until it reached an unnamed laneway off Johnston Street, Fitzroy. There were three garages near where the vehicle was abandoned including the garage for 63 Johnston Street.

Victoria Police's entry onto the premises

The area was cordoned off, with the Critical Incident Response Team (CIRT) and Canine Unit among those units attending. Neighbouring yards were searched. A dog from the Canine Unit identified a human scent that tracked from the driver's side of vehicle to the end of the laneway, immediately adjacent to the garage door of 63 Johnston Street. Officers aboard the Victoria Police helicopter observed an open door at the rear of 63 Johnston Street and passed this information to the CIRT and Canine Unit.

CIRT officers entered 63 Johnston Street through an unlocked and open rear ground floor door, identified themselves as police and spoke to the owner/occupier of the premises, Mr Crusader Hillis. CIRT officers then gathered on an external rear staircase and entered the living area of the top floor where they observed a male person standing in the middle of the room (Mr Dimopoulos).

IBAC found the entry by Victoria Police officers to the premises was lawful.

Victoria Police officers are empowered under section 459A of the *Crimes Act 1958* to enter and search premises to arrest a person if the officers believe on reasonable grounds that the person to be arrested has committed a serious indictable offence.

IBAC found that the officers reasonably believed an armed offender who was suspected of having committed serious indictable offences, including violent offences, had escaped into the premises. IBAC found this belief to be reasonable, after receiving and accepting evidence about the information available to Victoria Police officers prior to entering the premises.

Victoria Police subsequently confirmed this belief was mistaken – that is, the person Victoria Police was seeking was not at 63 Johnston Street. Nevertheless, IBAC found the entry was lawful as the officers' held a reasonable belief based on the information available when officers decided to enter the premises.

Victoria Police officers' identification of themselves

Mr Dimopoulos's evidence was that CIRT officers did not announce themselves as police when they entered the living area of the top floor at 63 Johnston Street. The CIRT officers' evidence was they did identify themselves upon entering the top floor.

IBAC was not able to determine whether the Victoria Police officers identified themselves as police when they entered the top floor of the premises. There was conflicting evidence from Mr Dimopoulos and the CIRT officers and, as a result, IBAC was unable to make a finding on this issue.

Victoria Police's use of force

After the CIRT officers had entered the top floor of the premises, Mr Dimopoulos ran down internal stairs and out the front door onto Johnston Street. His evidence was that he believed he was being pursued by intruders who sought to harm or even kill him, possibly due to his sexuality. The officers' evidence was that they believed they were pursuing a person suspected of committing serious offences who was running into a public space in close proximity to licensed, occupied venues.

Mr Dimopoulos was pursued by CIRT officers who apprehended him on the footpath outside 63 Johnston Street following a forceful struggle. During the struggle, Mr Dimopoulos sustained abrasions to his head and serious injuries to his arm and shoulder. Mr Dimopoulos stated to IBAC that he was unaware of the extent of his injuries until placed into a seated position.

IBAC found the force used by the CIRT officers during the entry and arrest of Mr Dimopoulos did not breach any criminal laws or constitute a breach of discipline.

Victoria Police officers are authorised to use force to effect an arrest. The force used must not be disproportionate to the objective of effecting the arrest. The officers must reasonably believe that the force used is necessary to effect the arrest.

The evidence provided to IBAC, including the evidence from Victoria Police officers and Mr Dimopoulos, was that there was a forceful struggle outside of the premises as police sought to effect the arrest, and Mr Dimopoulos endeavoured to get away. The Victoria Police officers stated they thought they were pursuing a person suspected of committing serious offences and were concerned for public safety. Mr Dimopoulos stated he thought he was being pursued by intruders who sought to harm or even kill him, possibly due to his sexuality, hence his flight and the forceful struggle with police.

IBAC found that in the circumstances, the force used to subdue Mr Dimopoulos and give effect to the arrest was not disproportionate – the CIRT officers believed the force was necessary and there were reasonable grounds for that belief.

Victoria Police's arrest of Mr Dimopoulos

After being restrained by CIRT officers, custody of Mr Dimopoulos was passed to the local Crime Investigation Unit (CIU) officer. The CIU officer spoke to the owner/occupiers of 63 Johnston Street, Mr Hillis and Mr Rowland Thomson who advised that Mr Dimopoulos was a resident at the address. The CIU officer made the decision to release Mr Dimopoulos from custody pending further investigation into his possible links to the vehicle in the laneway.

IBAC found that Victoria Police had the power to arrest Mr Dimopoulos and the arrest was lawful.

Victoria Police officers are empowered under section 459 of the Crimes Act to arrest a person without a warrant if the officers believe on reasonable grounds that the person to be arrested has committed a serious indictable offence.

IBAC found the officers reasonably believed that an armed offender suspected of having committed serious offences had escaped into the premises. IBAC found this belief to be

reasonable, after receiving and accepting evidence about the information available to Victoria Police officers prior to entering the premises. Victoria Police subsequently confirmed that this belief was mistaken. Nonetheless, an arrest made on reasonable, but mistaken grounds, is not unlawful.[3]

In effecting a lawful arrest, the common law and the Crimes Act include that when a person is arrested they are to be advised of the reason for their arrest. However, the arrest does not necessarily become unlawful if reasons for arrest are not given at the precise moment when a detained person is arrested. This is particularly the case where there is a suspect who is fleeing or resisting arrest. The law allows for reasons for arrest to be given to a suspect at the first opportunity.[4] In Mr Dimopoulos's case, the arrest phase occurred in dynamic and fast moving circumstances, which meant that the first real opportunity the Police had to advise him of the reasons for his arrest was after it had been effected and he was handed over to CIU. However, before this could occur, Mr Dimopoulos was released from custody and transported to the hospital by ambulance.

Mr Dimopoulos's human rights

IBAC found Victoria Police officers did not fulfill their obligations under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

Under section 21(4) of the Charter, 'a person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention, and must be promptly informed about any proceedings to be brought against him or her'.

IBAC found that although the available evidence did not establish that the arrest was unlawful (based on the necessary high standard of criminal proof), IBAC did find Victoria Police officers did not properly fulfill their obligations under the Charter (or their own policies and guidelines). IBAC found the officers involved in the incident did not advise Mr Dimopoulos of the reason for his arrest, make him aware of his rights, or officially release him from custody.

IBAC has requested that the Chief Commissioner of Victoria Police ascertain why these officers failed to act consistently with their obligations under the Charter, and that Victoria Police take appropriate action with respect to the officers.

IBAC found that these failures by the officers involved did not make Mr Dimopoulos's arrest unlawful. The Charter does not state that a breach of human rights constitutes a criminal offence.[5] A person may seek a remedy for a breach of human rights as part of other legal proceedings seeking relief or remedies, such as judicial review or civil claims.

[3] Per section 461 of the *Crimes Act 1958*.

[4] *Christie v Leachinsky [1947] AC 573.*

[5] See section 39 of the Charter Act.

Subsequent activities

Mr Dimopoulos was taken to St Vincent's Hospital by Ambulance Victoria for medical treatment. He underwent surgery to his upper arm and shoulder and was released from hospital on 18 May 2019.

It was subsequently identified, following a review of footage from the Victoria Police helicopter and CCTV footage from neighbouring properties, that the driver of the pursued vehicle had left the laneway behind 63 Johnston Street after abandoning the vehicle in the minutes prior to police cordoning off the area.

On 24 June 2019, Victoria Police's investigations excluded Mr Dimopoulos from having any involvement with the stolen vehicle or criminal links to any connected offenders.

Other findings

IBAC found no evidence the incident was linked to the race or sexuality of the parties involved.

IBAC inquired into the Victoria Police officers' understanding of the appearance of the person they were pursuing and of the nature of the premises. IBAC found no evidence the officers were aware that the premises was an LGBTIQ+ bookshop.

Corruption vulnerabilities

Although Operation Lynd found the actions of the Victoria Police officers did not breach the criminal law, IBAC identified a number of misconduct vulnerabilities associated with Victoria Police's practices and procedures.

Poor understanding and application of CIRT policies and procedures

IBAC identified some CIRT officers had a poor understanding of CIRT policies and procedures and did not always appropriately apply them during this incident. In particular, IBAC found that policies in relation to CIRT deployment were not followed and that CIRT lacked a handover procedure for individuals in CIRT custody.

The CIRT's lack of a formal procedure governing the handover of people in custody may have contributed to Mr Dimopoulos not being advised that he was under arrest, or being properly advised of his rights.

Use of force not appropriately recorded

Under Victoria Police policies, a use of force form must be submitted in any situation where officers, in response to an actual or perceived threat, use force including using, drawing or threatening use of a firearm or a conducted energy device.

IBAC found that during Mr Dimopoulos's arrest, CIRT officers used a number of force options, including drawing (but not discharging) firearms. However, details of the force used by police in arresting Mr Dimopoulos were not fully and accurately recorded on the use of force form submitted in relation to the incident.

Victoria Police statements that may prejudge the outcome of an investigation

Following the incident, senior Victoria Police officers made comments that could be seen to prejudge the outcome of the investigation. A senior officer made public comments that it was 'very clear to us that police stuffed this one up'. IBAC also heard evidence that during an internal Victoria Police debrief process, senior officers made comments to CIRT officers that were supportive of the CIRT's actions, but which were not factually accurate.

Victoria Police leaders making public or internal statements that pass judgement on the probity of police actions prior to the completion of an independent investigation have the potential to contaminate or complicate that investigation. Victoria Police should consider the impact such comments may have on IBAC (or other) investigations, as it does when referring to matters that are the subject of court proceedings.

Broader concerns regarding potential systemic issues and misconduct vulnerabilities related to the CIRT

Arising from its oversight and review of incidents involving the CIRT, including this matter, IBAC holds broader concerns regarding potential systemic issues and misconduct vulnerabilities in relation to the CIRT.

Recurring themes identified by IBAC in CIRT-related matters include use of force, deficiencies in training and capability around key functions, and limitations with policies and procedures.

Conclusions and further actions

Based on the findings from this investigation, IBAC has suggested a number of improvements to Victoria Police's systems and processes.

IBAC requested the Chief Commissioner of Victoria Police identify why certain Victoria Police officers failed to act consistently with their obligations under the Charter, and that Victoria Police take appropriate action with respect to the officers.

IBAC also raised broader concerns about the CIRT with the Chief Commissioner of Victoria Police and asked the Chief Commissioner to report back to IBAC on a range of issues concerning the CIRT, including:

- details of complaints made about CIRT officers
- reporting about the use of force
- equipment management records
- status of body worn camera use
- CIRT policies and procedures.

IBAC intends to review this information to determine any further action.

IBAC's police oversight role

IBAC's independent oversight of Victoria Police helps ensure police act fairly, impartially and according to the law. This independent oversight is critical because of the significant powers exercised by police officers including the use of force and powers to detain, search and arrest.

IBAC's independent oversight of Victoria Police includes:

- receiving complaints/notifications about conduct of police personnel (including complaints received by Victoria Police, which are mandatorily reported to IBAC)
- assessing allegations about police to determine which are to be referred to Victoria Police for action, which are to be dismissed, and which are to be investigated by IBAC
- reviewing investigations of selected matters that IBAC has referred to Victoria Police to ensure those matters are handled appropriately and fairly
- conducting 'own motion' investigations into serious police misconduct
- oversighting deaths and serious injuries associated with police contact pursuant to a standing 'own motion' determination
- conducting private or public examinations as part of IBAC investigations into serious or systemic police misconduct
- ensuring police officers have regard to the Charter, including through IBAC's reviews of complaint investigations by Victoria Police
- undertaking research and other strategic initiatives, including auditing how Victoria Police handles complaints
- informing and educating the community and Victoria Police about police misconduct, encouraging the reporting of, and advising on ways that, corruption and police misconduct can be prevented.

For more information on IBAC's investigations, prevention work and how to make a complaint about corruption or police misconduct, visit **www.ibac.vic.gov.au**.

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IBAC is Victoria's anti-corruption agency responsible for preventing and exposing public sector corruption and police misconduct. We do this by:

- investigating serious corruption and police misconduct
- informing the public sector, police and the community about the risks and impacts of corruption and police misconduct, and ways in which it can be prevented.

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