ISLAMIC COUNCIL OF VICTORIA

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SUBMISSION

SYSTEMIC REVIEW OF POLICE OVERSIGHT

DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY

66-68 Jeffcott Street
West Melbourne Vic 3003
Ph. (03) 9328 2067
E-mail: admin@icv.org.au
www.icv.org.au

The Islamic Council of Victoria (**ICV**) welcomes the opportunity to make a submission to the Department of Justice and Community Safety in the Systemic review of police oversight. As the peak representative body of Muslims in Victoria, the ICV's mission is to protect and advance the rights of its constituents throughout Victoria. It is from this perspective that we write this submission.

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Executive Summary

"I firmly believe in the rule of law as the foundation for all of our basic rights."

- Sonia Sotomayor, US Supreme Court Justice

The ICV is deeply concerned that the rule of law and due process is not being applied to certain cases involving alleged terrorism planning.

The ICV takes issue that people are being charged with serious offences when they have not actually committed a crime but have merely contemplated the crime; they are being punished for committing a 'thought crime'. What is deeply troubling is that police are encouraging and inducing individuals to contemplate these thought crimes that they would not otherwise have considered. This is entrapment. And it appears to occur regularly in counter-terrorism cases where a different understanding of the rule of law is applied to all other criminal cases.

The ICV firmly believes that the rule of law must be upheld and universally applied in our society. We define the rule of law as the basic principle that the law applies equally to everyone and all citizens have the right to procedural fairness, particularly during criminal investigations. All Australians that hold dear our fundamental rights as citizens of this democratic society would no doubt feel the same.

The ICV is recommending that there is robust independent oversight of the use of Undercover Operatives ('UCOs') during controlled operations to deter and prevent abuses of police powers involving the use of inducement and entrapment tactics. To that end, entrapment should be classified as 'serious police misconduct', and police should be held to account for such misconduct.

These changes would restore diminishing public confidence in the fairness of our legal system and would prevent injustices from being committed by law enforcement in the name of public safety.

Introduction

The ICV is gravely concerned about the improper use of inducement tactics by Victorian law enforcement officers during its investigations into terrorism offences outlined in the *Criminal Code Act 1995 (Cth) ('Criminal Code Act')*. The ICV identifies weaknesses in the oversight of the exercise of Victoria Police's coercive and intrusive powers, decisions and actions specifically during covert controlled operations. The ICV submits that in order to increase public safety, strengthen police accountability and maintain the rule of law, Victoria requires legislative reform to enhance police accountability, especially within controlled operations.

The ICV takes this opportunity to highlight two (2) key issues that it believes decrease public confidence in the Victorian police system. That is, the system of both internal oversight within various agencies belonging to Victoria and Federal Police, and the mechanisms currently in place for the oversight of controlled operations by the Victorian Inspectorate and Commonwealth Ombudsman respectively. The two key issues that we wish to highlight are as follows:

1. the absence of processes of review, and lack of accountability, for entrapping people into pursuing terrorism offences outlined in the *Criminal Code Act* and;

2. the ineffective methods of oversight in controlled operations in terrorism investigations.

Firstly, the ICV argues that the Victorian Government should introduce new laws to ensure more oversight into covert police tactics. These laws should recognise police inducement of crime as 'serious police misconduct' and legislate protections for individuals who have been entrapped during controlled operations. Secondly, the ICV recommends that outcome-focused monitoring ought to be conducted over applications for the commencement of controlled operations by law enforcement officers under the *Crimes Act 1914* (Cth) (*'Crimes Act'*) and *Crimes* (*Controlled) Operations Act 2004* (Vic) (**'***Controlled Operations Act*'). This may be achieved by the Independent Broad-based Anti-corruption Commission ('*IBAC*') or another independent body implementing a substantive review of applications made under the aforementioned acts, like those reviews made under the *Firearms Act 1996* (Vic). Alternatively, a system whereby the judiciary is required to approve Victoria Police's applications to engage UCOs in investigations by hearing from an independent special counsel to investigate the necessity and appropriateness of these applications.

As will be demonstrated in Part II of this submission, recent Australian case law shows that it is a common police tactic to facilitate and encourage individuals to take steps in committing terrorism offences within the scope of a controlled operation. Some seminal examples include *The Queen v Halis & Ors* [2021] VCC 1277 (*'Halis'*) where an undercover police operative implanted the idea to conduct a terror attack as well as facilitated the purchase of a firearm, as well as the *R v Taleb (No 5) (Sentence)* [2019] NSWSC 720 ('*Taleb')* where Victoria Police, in the words of the Honourable Justice Hamill, "encouraged and facilitated" Mr. Taleb's crime. The judiciary in both cases outlined that "the offence would not have been carried out 'if it were not for the encouragement of the UCO'".[1]

Legislation facilitating controlled operations in Australia establishes several indispensable conditions which limit how and under what circumstances controlled police conduct can occur. These conditions include that controlled operations are proportionate to the suspected criminal activity under investigation, and that police do not act to incite criminal activity which would not have otherwise occurred. The use of such tactics by undercover police operatives to induce, rather than de-escalate criminal activity raises serious concerns about the existing level of scrutiny over the use of this intrusive police power in Victoria. As a result, we submit that more rigorous independent oversight is required in this area.

Part I: Legislative Context

The governance of controlled operations under Australian law

At the federal level, Part IAB of the *Crimes Act* governs the process by which police departments can apply to conduct controlled operations or major controlled operations, for which authority can be granted by specified senior officers.[2] Applications can be made to a Tribunal to extend formal authority beyond three months under section 15GU. Similarly, in Victoria, Division 2 of Part 2 of the *Controlled Operations Act* establishes a process by which law enforcement officers may apply to the chief officer of their agency for authority to conduct either a cross-border or local major or minor controlled operation. Sections 15GI(2) of

[1] *The Queen v Halis & Ors* [2021] VCC 1277, para. 217, http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2021/1277.html?context=1;query=Hanifi%20Halis;mask_path#disp2; *R v Taleb (No 5) (Sentence)* [2019] NSWSC 720, para. 94, http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2019/720.html.

[2] *Crimes Act 1914* (Cth), s15GH(1)-(2).

the *Crimes Act* and 14 of the *Controlled Operations Act* respectively establish certain conditions which must be taken into account in deciding whether to authorise a controlled operation. The most relevant of these conditions include:

- that the nature and extent of the suspected criminal activity justify the conduct of the controlled operation;[3]
- that the operation will not be conducted in such a way that a person is likely to be induced to commit an offence that they would not otherwise have intended to commit;[4]
- that the unlawful conduct which will constitute part of the controlled operation is limited to the maximum extent necessary for the purpose of the investigation;[5]
- that the controlled unlawful conduct will be conducted in a way that is capable of being reported in line with the requirements of the respective Acts;[6]
- that the operation will not seriously endanger health or safety.[7]

Under the *Crimes Act,* sections 15HM and 15HN establish the reporting requirements with which the authorising officer must comply in line with section 15GI(2). On a six-monthly basis, the Chief Officer of all authorising agencies must report to the Commonwealth Ombudsman on procedural facts such as the number of applications for controlled operations that were approved, refused, extended or varied within that period. They must also provide details of the persons targeted by these operations, the nature of the suspected crime and the nature of the controlled conduct engaged in.

Under section 15HO, the Commonwealth Ombudsman will issue annual reports on the adequacy of the reports provided by the authorising agency. In consideration of the Ombudsman's Report on The Activities in Monitoring Controlled Operations published in 2018, the Ombudsman's criteria for assessing compliance can be summarised as follows:[8]

- assessing whether the agency obtained the proper authority for a controlled operation;
- assessing whether the activities undertaken were covered by an authority;
- assessing whether all records were kept as required by section IAB;
- assessing whether reports were properly made; and
- assessing the cooperation of the agency with the Ombudsman.

A similar system is established pursuant to sections 37 and 38 of the *Controlled Operations Act,* wherein the principal law enforcement officer for a controlled operation must report to the Chief Officer of their agency after the operation is declared complete. The report must detail the nature of the suspected offence and the

[3] Ibid, s15GI(2)(b).

[4] *Crimes Act 1914*, s15GI(2)(f); *Crimes (Controlled Operations) Act 2004*, s14(d).

[5] *Crimes Act 1914*, s15GI(2)(c); *Crimes (Controlled Operations) Act 2004*, s14(a).

[6] *Crimes Act 1914*, s15GI(2)(e); *Crimes (Controlled Operations) Act 2004* , s14(c).

[7] *Crimes Act 1914*, s15GI(2)(g); *Crimes (Controlled Operations) Act 2004*, s14(e).

[8] Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations* (Canberra, Commonwealth Ombudsman, 2018) 3, accessed Jan 25, 2022, https://www.ombudsman.gov.au/__data/assets/pdf_file/0017/110618/A-report-on-the-Commonwealth-Ombudsmans-activities-in-monitoring-controlled-operations.pdf.

related controlled conduct, details of any illicit goods involved, and of any loss of or damage to lawful property as a result of the operations.[9] The Chief Officer must then report to the Victorian Inspectorate on a six-monthly basis on facts such as the number of controlled operations authorised, refused or varied within that period, the nature of the suspected offences and details of the controlled conduct involved.[10] The Victorian Inspectorate then issues annual reports on the adequacy of the Chief Officer's reports.

However, the criteria identified by the Commonwealth Ombudsman plainly shows that oversight of the use of controlled operations by police agencies is largely restricted to the review of procedural compliance. While independent reviews of the reports put forward by Chief Officers are crucial, restricting the Ombudsman's powers to this focus results in insufficient oversight into actual police conduct. That is, these bodies are not empowered to review the actual compliance of police with the legislated principles governing controlled operations. Allowing an independent body to subtstanitvey review applications for controlled operations and police conduct throughout them would allow for greater scrutiny over the police's discretion and reasoning for using tactics such as inducment which blatantly violate these principles.

The conditions listed in the *Crimes Act* and *Controlled Operations Act* for conducting controlled operations govern how this intrusive power ought to be exercised justly and reasonably while remaining an effective tool for police investigations. Nonetheless, several case studies involving controlled operations by Victoria Police in investigating terrorism-related offences demonstrate that these considerations are often not upheld in such investigations. As the case studies discussed in Part II will demonstrate, the existing system of police oversight crucially lacks processes for effective monitoring and enforcement of the requirements for controlled operations.

The unique nature of terrorism offences under Australian law

The *Crimes (Controlled Operations) Act* 2004 was originally passed amidst an array of legislation concerning police investigative powers and organised crime throughout 2004.[11] In the second reading speech of the Act, Mr Tony Lupton MP noted that the High Court of Australia case of *Ridgeway v The Queen* [year?] 184 CLR 19 had "raised very serious doubts" about whether the evidence obtained by police in the process of committing an offence under controlled circumstances could be used in prosecuting criminal offenders.[12] In light of these doubts, the Act was praised for facilitating controlled operations which could play a "very important role in the investigation of organised crime such as drug trafficking," as well as terrorism offences.[13]

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[9] *Crimes (Controlled Operations) Act 2004*, s37(2).

[10] Ibid, s38(2).

[11] Adam Chernok. "Entrapment under controlled operations legislation: A Victorian Perspective," *Criminal Law Journal* 35:6 (2011): 361-375, 364.

[12] Victoria. Legislative Assembly. 2004. *Parliamentary Debates.* May 4, 2004. Tony Lupton MP.https://www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Autumn%202004/Assembly%20Extract%204%20May%202004%20from%20Book%204.pdf p. 858.

[13] Victoria. Legislative Assembly. 2004. *Parliamentary Debates*, quoted in Adam Chernok. "Entrapment under controlled operations legislation: A Victorian Perspective," 364.

However, terrorism offences under Australian law are unique from other offences. One example is drug-related offences particularly in terms of the stage at which the law considers a criminal act has in fact occurred. As stated by George Williams and Edwina Macdonald of the Gilbert and Tobin Centre of Public Law, preparatory terrorism offences under section 101 of the *Criminal Code Act "*go further than existing inchoate offences in that they criminalise the formative stages of an act," and "render individuals liable to very serious penalties even before there is clear criminal intent."[14]

Terrorism and related offences are largely covered by the *Criminal Code Act* which criminalises various terrorist acts as well as broad preparatory and conspiracy acts. Section 101.1 criminalises terrorist acts, including but not limited to actions causing death, serious injury, endangerment of life or property damage for the purpose of advancing an ideological cause or intimidating part of the government or public. Related to this is a wide range of preparatory offences including:

- receiving training that is connected to preparation for a terrorist act; [15]
- possessing any thing which is connected to preparation for a terrorist act;[16]
- collecting or making documents connected to preparation for a terrorist act;[17]
- any other act done in preparation or planning for a terrorist act.[18]

Further, section 119.1 prohibits Australian citizens, residents or visa holders from entering foreign countries with the intention of engaging in hostilities therein. Any action carried out in preparation for such an incursion is similarly criminalised under section 119.4 of the *Criminal Code Act*.

The offence of conspiracy under section 11.5 can also apply to any of the above offences. That is, the act of conspiring to commit any of these offences is also criminalised, and punishable as though the offence to which the conspiracy applies were actually committed.

Terrorism and related preparatory offences under the *Criminal Code Act* highlight that the law severely penalises acts committed well prior to the planning or execution of a terrorist act, that is, acts committed in what would otherwise be the pre-crime stage. Examples of such preparatory acts which constitute criminal offences can be seen in the cases of *Taleb, Halis* and *The Queen v Temssah* [2021] VCC 1353 (*'Temssah'*). In *Taleb,* acts including the "purchase of thermal tops, a solar-powered phone charger and a sleeping bag," attempting to borrow money from a relative, and partaking in "long-distance training exercises" were found to constitute preparatory acts in violation of section 119.4 of the *Criminal Code Act.*[19] This was despite there being "no realistic prospect that [the defendant] would have boarded a flight and left Australian soil, let alone joined [overseas hostilities]" according to His Honour Justice Hamill.[20] In *Temssah,* four preparatory acts formed the basis of the criminal charge under section 119.4(1) of the *Criminal Code Act*. Those acts were speaking to an online covert operative to make travel plans, researching and booking a flight, researching

[14] Edwina MacDonald and George Williams. "Combatting Terrorism," *Griffith Law Review* 16:1 (2007): 27-54, 34.

[15] *Criminal Code Act 1995* (Cth), s101.2.

[16] Ibid, s101.4

[17] Ibid, s101.5.

[18] Ibid, s101.6.

[19] *R v Taleb (No 5) (Sentence)* [2019], para. 20.

[20] Ibid, para. 4.

and booking a hotel in New Delhi, and exchanging money with the operative to fund travel.[21] Finally, in *Halis,* the defendants were charged with conspiring to commit acts in preparation for a terrorist act in violation of section 11.5 of the *Criminal Code Act,* on the basis that they made arrangements with an undercover operative to purchase a firearm which, if acquired, had been intended to be used to conduct training for a potential terrorist act.[22] The defendants, however, after arranging to purchase a firearm, had chosen to withdraw from the arrangement before actually acquiring one.[23]

Police inducement is particularly concerning when an accused is sentenced for one of these broad preparatory offences on the basis of acts committed at a stage when they showed no manifest intent to engage in acts of terrorism. In essence, the combination of these offences means the accused can be sentenced for merely thinking about planning for terror offence per Division 11 of the *Criminal Code Act.* Thereby, if a police operative implants the idea of a terror plot and the accused acts upon the UCOs suggestion, the accused can be prosecuted for terrorism under the Australian criminal justice system. Moreover, once the crime has been contemplated even to a minimal extent, conspiracy to commit a preparatory offence may be made out even if the accused evinces an intention to no longer participate in the so-called act of terror or take steps to withdraw from the act of terror. This was the case in *Halis*, which will be discussed below in Part II. Mr Halis was sentenced to 10 years imprisonment with a non-parole period of 7 years and 6 months. His crime was planning to prepare for a terrorist act pursuant to sections 11.5(1) and 101.6(1) of the *Criminal Code Act*. Such a lengthy sentence for a crime that was induced by a police officer has never been seen in the Victorian Courts.

The ICV takes particular issue with the very concept of conspiracy crimes under the *Criminal Code Act* when it is combined with anti-terrorism legislation. Conspiracy offences in combination with anti-terror laws are extraordinary exceptions to the traditional systems of criminal law that focus on crimes that have occurred. The *Halis* case exemplifies the idea that the totality of anti-terrorism legislation in Australian law criminalises "the formative stages of an act."[24] This, combined with the fact that it is acceptable, or even legal for police to induce and facilitate these early preparatory acts undermines the rule of law which forms the basis of Australia's legal and judicial system, allowing for the prosecution of intentions as perceived by Victoria Police prior to the planning of the contemplated criminal act.

Part II: Case Studies

Controlled operations and inducement of inchoate offences

Given the distinct nature of preparatory offences related to terrorism, and the severe penalties imposed for these offences, the use of controlled operations and inducive police tactics becomes especially problematic. In certain cases where controlled operations have been authorised under the *Crimes Act* or *Controlled Operations Act* to investigate terrorism-related offences in Victoria, these operations have been used to

[21] *The Queen v Temssah* [2021] VCC 1353, para. 33, http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2021/1353.html?context=1;query=%E2%80%A2Khaled%20Temssah;mask_path=#fn15 .

[22] *The Queen v Halis & Ors* [2021], paras. 2-3,

[23] Ibid, para. 93.

[24] Edwina MacDonald and George Williams. "Combatting Terrorism." 34.

induce or encourage the commission of preparatory offences. That is, police operatives have purposefully encouraged, rather than sought to prevent, acts constituting inchoate offences that may not have otherwise been committed. The cases of *Halis, Temssah and Taleb* provide clear examples of such inducement tactics.

I. *The Queen v Halis & Ors* [2021]

In *Halis,* the three defendants each pleaded guilty to one charge of conspiracy in violation of section 11.5(1) of the *Criminal Code Act,* for conspiring to commit acts in preparation or planning for terrorist activity under section 101.6(1).[25] The act which they had conspired to commit in violation of section 101.6(1) was negotiating and agreeing to the purchase of a firearm from a Victoria Police covert operative with whom they had been in contact at various stages between July and November 2018.[26]

Police had begun to surveil the three defendants as of mid-2017 and initially believed the group would plan to travel to Syria to partake in hostilities.[27] A Major Controlled Operation was authorised under the *Crimes Act,* and an undercover Victoria Police operative befriended the three defendants over the following months.[28] In January 2018, authorities cancelled the passports of all three defendants, frustrating the possibility that they might attempt to travel overseas.[29] In his sentencing, His Honour Judge O'Connell noted that at this stage, "investigators appeared to have formed the view" that the offenders "had not taken any practical steps towards committing an act of terrorism, and the investigation was to be scaled down."[30] However, in November 2018, in a discussion with the defendants about an unrelated terrorist incident in the Melbourne CBD, the operative began to discuss an acquaintance who would be able to acquire a firearm and offered to connect him with the group.[31] He further suggested they would need to acquire a firearm as soon as possible since it would be difficult to find, despite the defendants having not begun to plan an actual act of terrorism at this stage.[32] The group was introduced to another undercover operative to arrange the transaction, eventually agreeing to purchase a firearm and making a deposit on 17 November 2018.[33] On the night of 19 November 2018, the defendants requested their money be returned from the operative, stating that they no longer wanted to proceed with the purchase.[34] All three were arrested the following morning and charged with conspiracy.[35] Each was sentenced to 10 years imprisonment, and Judge

[25] *The Queen v Halis & Ors* [2021], para. 1.

[26] Ibid, paras. 2-5.

[27] Ibid, paras. 13, 16.

[28] Ibid, para 14.

[29] Ibid, para. 16.

[30] Ibid, para. 17.

[31] Ibid, para. 18.

[32] Ibid, para. 81.

[33] Ibid, para. 89.

[34] Ibid, para. 93.

[35] Ibid, para. 94.

O'Connell noted the possibility of a continued detention order being made after this period under section 105A.23 of the *Criminal Code Act.*[36]

Judge O'Connell stated in his sentencing that "there was a real likelihood that, but for the inducement, the offenders would not have committed this offence."[37] He further noted that before agreeing to attempt to acquire a gun, the offenders "had until that point shown no initiative to move towards a terrorist act" and the main factor which "appeared to bring about" this escalation in November 2018 was the intervention of the police operative.[38] Nonetheless, Judge O'Connell made no finding of improper conduct on behalf of the police.[39]

II. *The Queen v Temssah* [2021]

In *Temssah,* the defendant pleaded guilty to one charge of engaging in conduct in preparation for an incursion into a foreign country for the purpose of engaging in hostile activity under section 119.4(1) of the *Criminal Code Act 1995.*[40] The defendant had been contacted online by an undercover police operative who initiated discussions wherein they claimed to be able to assist the defendant in travelling to a conflict zone in Kashmir in order to engage in hostilities, and the two were in contact over a period of 17 days in 2019.[41] The preparatory acts committed by the defendant were identified as "speaking to an Online Covert Operative to make arrangements to travel to Kashmir," researching and booking flights and accommodation in New Delhi and meeting with an undercover operative to exchange cash for the purpose of funding the travel and the purchase of a weapon.[42]

In sentencing this case, His Honour Judge Hannebery acknowledged that the covert operative had "not initiated or encouraged any interest…in religious extremism" which the defendant had not already held prior to being contacted, and that the operative merely "provided an outlet" for the pursuit of this interest.[43] Nonetheless, he also found that the actions of the operative had influenced the nature of the preparatory acts which had been the subject of the charge. That is, he found that it was "reasonable to conclude that the suggestions by the online covert operative [had] directed [the defendant's] conduct," in that the suggestion of the preparatory acts committed were "first raised" by the operative.[44] He further stated that it was "unclear" whether the defendant would have undertaken those specific acts had he never been contacted by the undercover operative.[45]

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[36] Ibid, para. 323.

[37] Ibid, para. 328.

[38] Ibid, para. 177.

[39] Ibid, para. 178.

[40] Ibid, para. 144.

[41] *The Queen v Temssah* [2021], para. 1.

[42] Ibid, para. 33.

[43] Ibid, para. 57.

[44] Ibid, para. 55.

[45] Ibid.

III. *R v Taleb* [2019]

Although not conducted by Victoria Police, the controlled operation undertaken in the case of *Taleb* highlights an important example of the extremes to which police inducement tactics can go under Australian law. In his sentencing, Justice Hamill stated that the police operative's facilitation of the defendant's crime could be considered "entrapment," such that it ought to mitigate the defendant's sentence.[46] However, there was again no finding of improper conduct on the part of the police.[47]

In this case, the defendant was found guilty of one count of engaging in conduct in preparation for a foreign incursion offence in violation of section 119.4 of the *Criminal Code,* intending to travel to Syria to join Islamic State hostilities in 2017.[48] Justice Hamill identified seven preparatory acts, including consulting with an undercover operative who he believed could help him travel to Syria; attempting to pay $300 to facilitate travel; participating in long distance training exercises; purchasing outdoor equipment such as thermal clothing and a sleeping bag; purchasing "military-style" clothing, gloves and belt; attempting to borrow money from a relative; and travelling to Sydney Airport with the intention of boarding a flight to Syria.[49] At the time of his arrest at Sydney Airport, the defendant had no money or plane ticket in his possession, but was under the impression his travel would be facilitated by the undercover operative.[50] Justice Hamill highlighted in sentencing that there was "certainly no realistic prospect that he would have boarded a flight… let alone joined the insurgency in Syria."[51]

According to Justice Hamill, the acts forming the basis of this charge "would not have been carried out if it were not for the encouragement of the UCO."[52] He noted in sentencing that "most or all of the acts alleged in the indictment were encouraged or suggested by the UCO," and the operative had encouraged Mr Taleb to display "commitment to the cause" of ISIS.[53] He further stated that at the onset of the controlled operation, Mr Taleb had shown an inclination towards "extreme" beliefs, but it was not apparent that those beliefs "would ever have manifested themselves in acts of violence or terrorism."[54] The defendant also suffered from schizophrenia at the time of the offence, and his particular "psychological vulnerability" to extremist beliefs and the suggestions of the undercover operative was also highlighted by the sentencing judge.[55]

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[46] *R v Taleb (No 5) (Sentence)* [2019], paras. 92-93.

[47] Ibid, para. 94.

[48] Ibid, para. 22.

[49] Ibid, para. 20.

[50] Ibid, para. 2.

[51] Ibid, para. 4.

[52] Ibid, para. 94.

[53] Ibid, para. 93.

[54] Ibid, para. 14.

[55] Ibid, paras. 46, 58.

> Nonetheless, the defendant was contacted by an undercover operative throughout 2017 who encouraged and facilitated an intention to engage in hostilities overseas. It was highlighted in sentencing that the defendant had shown hesitation to commit an offence at various stages throughout his contact with the police operative. For example, "on several occasions" he expressed reluctance to leave his sick mother for whom he was the primary carer and informed the police operative of his religious obligation to care for her.[56] The operative, however, instead of seizing such opportunities to de-escalate the risk of an offence being committed, advised the defendant that he had sought religious advice and confirmed that he was religiously permitted to leave his mother for the sake of joining the ISIS cause.[57] Moreover, the operative also repeatedly questioned Mr Taleb about how he would proceed if authorities prohibited him from travelling, to which he responded that he would stay with his mother.[58] The operative continued to suggest new possibilities for terrorist activities, including that Mr Taleb should get "a different passport" or "do something" to advance the ISIS cause within Australia.[59] Finally, Justice Hamill also noted that Mr Taleb remained "perplexed" about pledging allegiance to a particular terrorist group throughout the duration of the operation and declined to do so despite encouragement from the operative.[60]

In such circumstances where the acts forming the basis of criminal charges were found to have been heavily influenced, facilitated and even initiated by a police operative, it cannot be said that these controlled operations fulfilled the principles enumerated in section 15GI(2) of the *Crimes Act.* In *Halis,* the group's agreement to purchase a firearm was done at the suggestion and encouragement of the undercover operative, at a stage in the investigation when the group showed "no initiative to move towards a terrorist act."[61] This inducement is particularly problematic in relation to the offence of conspiracy, in that once the offenders had agreed to the purchase, they were already criminally liable despite backing out of the criminal act of acquiring a firearm for preparation of a terrorist act. In *Temssah,* while the defendant may have had some form of pre-existing interest in "religious extremism",[62] this alone would not constitute a criminal act. What did so were the actions of discussing, researching and funding travel to Kashmir, actions which were committed at the suggestion and encouragement of the undercover operative. In *Taleb,* the police operative's role in inducing the offence was found to amount to entrapment, and the operative had persistently encouraged the criminal acts despite the defendant consistently showing reluctance to proceed. The aforementioned statements of Judges O'Connell and Hannebery and Justice Hamill demonstrate that absent the encouragement of the undercover operatives, there is no evidence that the acts constituting the criminal charges would have ever been committed in these cases. Such a high level of inducement evidently violates the principles governing the execution of controlled operations under the *Crimes Act.* Namely, that controlled operations ought to be conducted in such a way that individuals are not induced to commit criminal offences, and that controlled unlawful conduct committed by undercover operatives ought to be limited to the maximum extent required to conduct an effective operation.

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[56] Ibid, para. 36.

[57] Ibid, para. 37.

[58] Ibid, para. 40.

[59] Ibid.

[60] Ibid, para. 43.

[61] *The Queen v Temssah* [2021], para. 178.

[62] Ibid, para. 57.

Despite the role of the police operatives in inducing the specific acts of the accused, the Court did not make any finding that the police had engaged in improper conduct when executing these controlled operations. This is utterly unacceptable given their evident failure to comply with the established principles of how and under what circumstances controlled operations ought to be carried out. The *Crimes Act* and *Controlled Operations Act* facilitate immunity for illegal activity conducted by police within controlled operations, even where that activity transgresses the principles governing controlled operations, effectively sanctioning any illegal activity at the discretion of undercover operatives.

Lack of police accountability raises immediate concerns about the integrity of our justice system. This should be a matter of concern for all Victorians concerned about the impartial application of the rule of law in all circumstances. Relationships and trust are being broken in the community and the accused are being sentenced for acts that may not have been committed but for the inducement by police. The ICV questions the justification and perceived value for undercover police operatives to encourage the preparation of terrorist crimes. There needs to be transparency and evidence-based assessments to suggest, in each circumstance, that an undercover operative inducing terror crimes is fit for purpose. We call for there to be greater scrutiny and oversight on the police's discretion to induce terror crimes.

The ICV will now address the issues identified in the Consultation paper entitled "Systemic review of police oversight" published 25 November 2021.

Part III: Section 5

Definitions and complaint classifications Response

BACKGROUND

Given inducement by undercover operatives is becoming a common tactic used in people being under the investigation for terrorism, the ICV argues for greater individual protections to ensure law enforcement officers are proportionately exercising their powers.

The following issues threaten the procedural fairness of controlled operations in cases of accused terrorism. Firstly there is a lack of oversight into police misconduct during controlled operations. Whilst law enforcement officers are required to make an application for commencing controlled operations under the *Controlled Operations Act* or the *Crimes Act,* the actions of undercover operatives after the operation begins are held to little scrutiny. Despite the principal law enforcement officer being required to make a report to the Chief Officer of Victoria Police within two months after the completion of an authorised operation, they are only required to report on the procedural facts of the operation rather than to justify the proportionality of their actions.[63] Therefore, undercover operatives retain significant discretion during controlled operations with limited accountability. Secondly, UCOs receive unprecedented immunities even if they exceed the limitations of controlled operations powers granted in the *Controlled Operations Act* s 14(d) and the *Crimes*

[63] Victorian Inspectorate, *Inspection Report: Crimes (Controlled Operations) Act 2004 Wildlife Act 1975 Fisheries Act 1995* (Victoria, Victorian Inspectorate, 2020) 9, accessed Jan 25, 2022, https://content.vic.gov.au/sites/default/files/2021-12/Victorian_Inspectorate_Inspection%20Report_Controlled%20Operations_1_July_2019_to_30_June_2020.pdf.

Act s15GI(2)(f).[64] These sections clearly mandate that the operation should not be conducted in such a way that a person is likely to be induced to commit an offence that the person would not otherwise have intended to commit. However, in the two seminal cases of *Halis* and *Taleb,* both judges outline that "the offence would not have been carried out 'if it were not for the encouragement of the UCO [Undercover operative]'"[65] and there is no indication of the police operatives in these cases facing any consequences for their actions.

In an effort to address these concerns, the ICV recommends the following:

1. Conduct known as 'entrapment' should be included as 'serious police misconduct' in the IBAC Committee's proposed definition. Hence, the IBAC should be responsible for investigating such complaints or public interest disclosure. In the alternative, entrapment should at least be considered 'misconduct' per IBAC's proposed definition, however this waters down the seriousness of the misconduct. The definition of entrapment may vary across jurisdictions, but nonetheless, we attempt to outline a clear usable definition in the response to Section 5 questions for review.
2. Indicia for identifying entrapment should be written in legislation or regulations.
3. Protections for individuals who have been entrapped during controlled operations should be legislated.

Greater investigation into potential police misconduct during controlled operations in cases of accused terrorism will assist in maintaining public confidence that defendants are given a fair trial and law enforcement officers will be held accountable if they engaged in misconduct, notwithstanding that the operation is covert.

The submission will now directly address the Questions for review from section 5 of the Consultation Paper.

SECTION 5 QUESTIONS FOR REVIEW

Q3. Do you have any views on the IBAC Committee's proposed definitions?

Conduct known as 'entrapment' should be included as 'serious police misconduct' in the IBAC Committee's proposed definition. Hence, IBAC should be responsible for investigating such complaints or public interest disclosures, and it should be given the power to take action whereby it can hold Victoria Police accountable for engaging in entrapment tactics during controlled operations. Explicitly defining entrapment as serious police misconduct will communicate the clear boundaries police have in covert operations and it should act as a deterrent against unlawful police misconduct. In the alternative that entrapment does not make the threshold of 'serious police misconduct', we submit entrapment should at least be classified as 'misconduct' but again, we believe this would downplay the seriousness of such police misconduct.

[64] *Crimes Act 1914*, s15GI(2)(f); *Crimes (Controlled Operations) Act 2004*, s14(d).

[65] *R v Taleb (No 5) (Sentence)* [2019], para. 94; *The Queen v Halis & Ors* [2021], para. 217.

While entrapment is not a criminal defence in Australia, the term "entrapment" has been explicitly used by judges as a sentencing mitigating factor in multiple terrorism cases within Australia.[66] Other terms such as "inducement" have also carried similar definitions to entrapment in judgments passed by Victorian Courts.[67]

The ICV defines 'entrapment' based on Australian case law on terrorism as well as the language from section 14(d) of the *Controlled Operations Act* and s15GI(2)(f) of the *Crimes Act*. Entrapment occurs in cases where the "police operative improperly contributes to the commission of the offence prosecuted by going beyond mere facilitation of the offence".[68] Under this definition, not all deceitful conduct used in controlled operations would be considered entrapment. The criminal defence of 'entrapment' would only be satisfied, if:

1. the offender's conduct was facilitated by the police investigators; ***and***
2. the offender was induced to commit an offence against a law of any jurisdiction or the Commonwealth that the person would not otherwise have intended to commit.[69]

This definition is consistent with how the term 'entrapment' is used in *Temssah* and *Taleb.* To analyse if the UCO entrapped the offender, the judges in these cases looked to whether the UCO "initiated", "encouraged" or "facilitated" the terrorism offences.[70] We submit that if an operative were to initiate, encourage, facilitate or essentially induce an offence, the operative has effectively exceeded the limits of what they were authorised to do within s 14(d) of the *Controlled Operations Act and* s15GI(2)(f) of the *Crimes Act*, hence the operative's conduct would be unlawful. Inducement should not be an authorised tactic during controlled operations as s 14(d) of the *Controlled Operations Act and* s15GI(2)(f) of the *Crimes Act* mandate that the operation should not be conducted in such a way that a person is likely to be induced to commit an offence against a law of any jurisdiction of the Commonwealth that the person would not otherwise have intended to commit. If police adopt inducement tactics during controlled operations, they are effectively committing the offence of incitement per Division 11.4 of the *Criminal Code Act* as the operative 'propose[d]' or 'encourage[d]' the offender to commit particular crimes.[71] When operatives abuse their authorised limitations in covert operations, they should be held responsible for overstepping their mandate. Therefore, police inducement in controlled operations should amount to serious police misconduct.

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[66] See *R v Taleb (No 5) (Sentence)* [2019], paras. 92-94; See *The Queen v Temssah* [2021], para. 56.

[67] See *The Queen v Halis & Ors* [2021], paras. 136-213.

[68] Eric Colvin, "Controlled Operations, Controlled Activities and Entrapment," *Bond Law Review* 14, no. 2 (2002): 227-250, 231-232.

[69] Justice Hamill in *Taleb* separates the requirement for the offender to be an "unwary innocent" to the "but for" test. The offender's mind does not need to be free of any contemplation of committing the offence for entrapment to be made out. Instead, being "vulnerable to the suggestions and importuning of the UCO" can be enough to deduce the offenders "charge would not have been carried out if it were not for the encouragement of the UCO." In cases where the undercover operative knew or ought to have known about the offender's vulnerability, be it "fragile mental stability", it can be deduced that "unseemly pressure" placed on the offender can render a police investigator's conduct as improper or unlawful. Thereby, still satisfying the requirements for entrapment; *R v Taleb (No 5) (Sentence)* [2019], paras. 93-94.

[70] *R v Taleb (No 5) (Sentence)* [2019], para. 92; *The Queen v Temssah* [2021], para. 57.

[71] *Criminal Code Act 1995* (Cth), div 11.4, s2A.

We argue that there is utility in explicitly adding the term 'entrapment' to the non-exhaustive list of serious police misconduct. As a result of classifying entrapment as serious police misconduct, the public can be confident that actions undertaken in the name of law enforcement during controlled operations can be held to the same scrutiny as any other case of police misconduct. We strongly argue that such recognition would operate as an incentive to deter police personnel from exceeding their limits in covert operations, particularly in terms of preventing the inducement of crimes that would not have otherwise occurred.

Q2. How could legislative definitions best provide for a range of behaviour from 'low-level' conduct to serious misconduct and corruption?

If a definition is unclear, indicia for recognising certain misconduct should be written in legislation. Hence, the ICV recommends that if entrapment is included as serious police misconduct, there should be clear non-exhaustive examples in legislation or regulations to act as guiding principles to assist law enforcement officers, the IBAC and the general public to identify entrapment. Indicative factors for entrapment during controlled operations may include:

- the UCO encouraged or suggested the alleged acts of the offender;[72]
- the UCO encouraged the offender to display a commitment to pursuing an offence;[73]
- the offender was unlikely to proceed with the offence without the assurances of the UCO;[74]
- the UCO placed unseemly pressure on the offender;[75]
- the offender may have held grievances, however the UCO implanted and facilitated the execution of the alleged offence;[76]
- a reasonable person would have known the offender was vulnerable to the suggestions and importuning of the UCO;[77]
- the offender evinced a clear intention or hesitation to proceed with the offences suggested by the UCO;[78]

Indicative factors that entrapment is not applicable include:

- the UCO did not initiate or encourage extremist thoughts that the offender already had;[79]
- the UCO provided an outlet and direction for pre-existing and deeply held desires;[80]

[72] *R v Taleb (No 5) (Sentence)* [2019], paras. 93.

[73] Ibid.

[74] Ibid.

[75] Ibid, para. 94.

[76] Ibid, para. 93.

[77] Ibid.

[78] *The Queen v Halis & Ors* [2021], para. 219.

[79] *The Queen v Temssah* [2021] VCC 1353, para. 57.

[80] Ibid.

- the UCO provided the means to firearms but did not introduce the desire to possess or use one;[81]
- the offender was not exploited in order to foster intentions that the offender did not otherwise have;[82]
- the offender was not a vulnerable individual who was actively encouraged to pursue an offence they may not have otherwise contemplated.[83]

Q1. Which types of police wrongdoing do you think should generally be investigated by an independent oversight agency, rather than Victoria Police?

Entrapment should be considered police wrongdoing for the reasons outlined above and it should be investigated by an independent entity due to the covert nature of the conduct. Police operatives are granted significant discretion when acting under controlled operations and such powers often go unchecked. Due to the secrecy of controlled operations, an independent entity would be one of the only influential bodies able to investigate and hold police accountable for misconduct that occurs during covert operations. Every individual should have the right to a fair trial and to be treated fairly during the investigative processes. Hence, investigating police for engaging in entrapment would be a step towards safeguarding these rights.

Q4. Do you have any other comments that you would like to make about definitions and classification of complaints and notifications?

Additionally, IBAC could classify entrapment as serious police misconduct on the grounds of offending the fundamental right to a fair hearing. The right to a fair trial should extend into the pre-trial investigative phases and it should offer the accused protections from entrapment.

Whilst concepts of a fair trial are generally confined to the courtroom, Lord Scarman in *R v Sang* [1979] 2 All ER 1222 noted that "[t]he judge's control of criminal process begins and ends with the trial, though his influence may extend beyond its beginnings and conclusion".[84] This provides a powerful basis for protections against entrapment during the pre-trial investigative phase. Further, the *Victorian Charter of Human Rights and Responsibilities Act 2006* ('*Victorian Charter'*) may be consulted to affirm that entrapment should be considered serious police misconduct. The decision by the European Court of Human Rights in *Teixeira de Castro v Portugal* (1998) 28 EHRR 101 ('*Teixeira de Castro')* is reflective of this approach.[85] In this case, the court considered Article 6 of the *European Convention of Human Rights* (*'ECHR'*), which highlights the right to a fair trial. Article 6 of the *ECHR* mirrors both Articles 14 and 15 of the *International Covenant on Civil and*

[81] Ibid.

[82] Ibid.

[83] Ibid.

[84] *R v Sang* [1979] 2 All ER 1222, para. 1246.

[85] *Teixeira de Castro v Portugal* (1998) 28 EHRR 101.

Political Rights and is similar to sections 24 and 25 of the *Victorian Charter*.[86] The Judge in *Teixeira de Castro* found that Article 6 of the *ECHR* would be breached if the police investigators induced the commission of an offence and exceeded their instigative powers. In summary, the investigative techniques adopted were unfair in the administration of justice "because the police officers had acted on their own initiative without judicial supervision or good reasons to suspect that the accused was a drug trafficker."[87] On face value, this decision does not seem to affect the application of authorised controlled operations represented in the *Controlled Operations Act* in Victoria or the *Crimes Act* for the Commonwealth.[88] However, the significance lies within the identification of police impropriety based upon the accused being definitively deprived of a fair trial from the outset.[89] Therefore, the court's interpretation of entrapment as an affront to fairness should be enough of a principle to ensure controlled operations are carried out in line with the rights to a fair trial. Ultimately, IBAC should classify entrapment as serious police misconduct on the grounds of offending basic rights to a fair hearing.

Further, whilst legislating the defence of entrapment to be a complete criminal defence may be out of the scope of this inquiry, the ICV believes this would offer the greatest protection of rights to the accused where undercover operatives exceed their powers to investigate cases of terrorism. This approach is adopted in the United States and it is based on statutory construction principles of the United States Constitution by the Supreme Court.[90]

Ultimately, the ICV expresses its grave concern should entrapment not be recognised as serious police misconduct. At the moment, the accused under investigation has limited protections against police misconduct during a controlled operation. section 4(3) of the *Controlled Operation Act* makes it clear that the "fact that the evidence was obtained as a result of a person engaging in criminal activity is to be disregarded", and under section 28 police are indemnified from criminal responsibility and civil liability per section 29 as long as there is an absence of inducement.[91] The equivalent of each of these provisions in the Commonwealth jurisdiction is found in sections 15GA, 15KQ, 15HB of the *Crimes Act* respectively.[92] If police conduct was found to go beyond the scope of authorisation, then there is judicial discretion to exclude their evidence on the grounds of illegality as well as the forfeiting of the covert operatives immunities.[93] However, judges seldomly find that law enforcement operations were illegal at trial or appeal.[94] As seen in the cases of

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[86] Council of Europe. 1952. *The European convention on human rights*. Strasbourg: Directorate of Information, art. 6*;* United Nations (General Assembly). 1966. "International Covenant on Civil and Political Rights." *Treaty Series 999* (December): 171, art. 14-15; *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 24-25.

[87] Simon Bronitt. "Sang is Dead, Loosely Speaking: R v Looseley," *Singapore Journal of Legal Studies* 374 (2002): 377-387.

[88] Adam Chernok. "Entrapment under controlled operations legislation: A Victorian Perspective." 372.

[89] *Teixeira de Castro v Portugal* (1998), para. 39.

[90] Brendon Murphy and John Anderson. "'Mates, Mr Big and the Unwary': Ongoing Supply and its Relationship to Entrapment." *Current Issues in Criminal Justice* 19, no. 1 (2007): 5-33, 11.

[91] *Crimes (Controlled Operations) Act 2004*, ss 4(3), 28-29.

[92] *Crimes Act 1914,* ss 15GA, 15KQ, 15HB.

[93] Adam Chernok. "Entrapment under controlled operations legislation: A Victorian Perspective." 365.

[94] See especially Presser B. "Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence." *Melbourne University Law Review* 25, no. 3 (2001): 757-785, 777 at fn 45.

Halis and *Taleb*, despite findings of entrapment and inducement, the judge still found the police's actions to be lawful.[95] This suggests that the judiciary tends to favour law enforcement imperatives when weighing the public interest.[96] Even in the rare cases where police illegality has been identified, criminal charges rarely eventuate.[97] Hence, once again protections are skewed to favour law enforcement personnel, even where they violate the legislated principles governing controlled operations.

These developments give rise to significant tensions between the need to use investigative tools during covert operations on one hand and procedural fairness for individuals on the other.[98] Procedural fairness is a cornerstone of Australia's public policy. The case of *Bunning v Cross* (1978) 141 CLR 54 is considered to support this principle. The Honourable Justices Stephen and Aickin in this case state that:

> It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.[99]

This implies that the fundamental right to a fair trial underlines the conduct of criminal trials. However, as expressed above, this fundamental right appears to be consistently infringed upon particularly in cases involving police inducement in controlled operations. If this apparent flaw is allowed to pervade future trials, law enforcement personnel can essentially act with impunity even where evidence suggests improper conduct. Consequently, perceptions of unfair trials threaten to undermine public confidence in law enforcement officers and also the legitimacy of the work of the courts.[100]

Part IV: Section 9

Monitoring and reporting of police powers, decisions and actions

Many of the key limitations to the existing system of police oversight identified in the Final Report of the Commission into the Management of Police Informants are exemplified in the lack of effective oversight over the use of controlled operations, particularly in terrorism investigations. The Commission's report highlighted that the regime of police oversight in Victoria is "fragmented," "inconsistent," and "limited…with a somewhat technical and procedural focus on compliance."[101] The authorisation of controlled operations

[95] *R v Taleb (No 5) (Sentence)* [2019], para. 94; *The Queen v Halis & Ors* [2021], para. 141.

[96] Adam Chernok. "Entrapment under controlled operations legislation: A Victorian Perspective." 361

[97] Simon Bronitt and Declan Roche. "Between Rhetoric and Reality: Sociolegal and Republican Perspectives on Entrapment." *International Journal of Evidence & Proof* 4 (2000): 77-106, 80.

[98] Adam Chernok. "Entrapment under controlled operations legislation: A Victorian Perspective." 361

[99] *Bunning v Cross* (1978) 141 CLR 54, para. 75.

[100] Wheeler F. "Fair Trial and the Australian Constitution." *Legaldate* 17, no. 3 (2005): 7-8; see also Gleeson M. "Public Confidence in the Judiciary." ALJ 76 (2002): 558.

[101] The Honourable Margaret McMurdo, AC Commissioner, *Royal Commission*

under the *Crimes Act* and *Controlled Operations Act* is one area of police operations that currently requires only minimal and strictly procedural reporting to external oversight bodies. That is, substantive reporting on the facts, outcomes and necessity of controlled operations, and their compliance with the relevant legislation is largely done internally by chief officers of police agencies. The roles of the key bodies for independent oversight - the Commonwealth Ombudsman and the Victorian Inspectorate - are largely restricted to reviewing the adequacy of these reports from a purely procedural stance. In the absence of substantive oversight, controlled operations, particularly in relation to terrorism investigations, have evidently been used to induce further criminal activity rather than investigate or prevent actual criminal offences, and have been executed in ways that violate the principles governing them under the legislation. Therefore, applications to undertake controlled operations ought to be given more robust outcome-focused oversight by an independent organisation.

SECTION 9 QUESTIONS FOR REVIEW

Q2. What are your views on the types of decisions that may be suitable for outcome-focused monitoring?

We consider this question to be among the most crucial in addressing the issues surrounding the current use of intrusive police powers in terrorism investigations. We recommend that outcome-focused monitoring ought to be conducted over applications for the commencement of controlled operations made by law enforcement officers under the *Crimes Act* and *Controlled Operations Act.* That is, in order to best address the risks and harms involved with the exercise of this intrusive power, independent assessment and recommendations to police are required when formal applications are made to undertake controlled operations.

Ideally, we recommend that this oversight would be implemented by having an independent agency review the proposed conduct and the reasoning therefore with respect to section 15GI(2) of the *Crimes Act* or section 14 of the *Controlled Operations Act*, as well as the definitions of misconduct proposed in Part III. This would involve making recommendations to the relevant police agency regarding the necessity and proportionality of the proposed conduct and potential issues arising under the Acts. This would also include providing a justification for the use and purpose of tactics aimed at inducing criminal activity that would not have otherwise occurred. This procedure of oversight and recommendations may be comparable to the independent reviews conducted by IBAC of prohibition orders made by police under the *Firearms Act,* as outlined in the Department's Consultation Paper.[102]

One possible way to implement this more substantive oversight would be to extend the role of the existing oversight bodies –the Commonwealth Ombudsman and the Victorian Inspectorate– to allow more in-depth reviews of applications for controlled operations while they are under assessment, as opposed to after their conclusion. Potentially, this role could also be fulfilled by IBAC, as is the case with prohibition orders under the *Firearms Act.*

into the Management of Police Informants Final Report Summary and Recommendations (Melbourne, 2020) p. 234. https://content.rcmpi.vic.gov.au/sites/default/files/2020-12/0214_RC_Final%20Report_06_Full%20Report_0_0.pdf.

[102] Victorian Department of Justice and Community Safety, *Consultation Paper - Systematic Review of Police Oversight* (Melbourne, 2021), p. 18.

Another possible approach to ensure more robust, outcome focussed monitoring would be to pass legislation whereby a tribunal is required to review all applications for controlled operations, rather than just those extending beyond three months. We suggest that in order to ensure the most effective review of these applications, in a way that limits the harm to the process, special counsel independent of both the police and the suspect ought to be required in these hearings, since the confidential nature of hearings related to active investigations would not allow for the suspect or any affected parties to be represented. This would allow for an objective perspective before the Tribunal and a greater level of scrutiny into the submissions of the police agencies.

Q3. How can we ensure reporting requirements are an effective form of oversight?

The existing reporting requirements established under sections 15HM and 15HN of the *Crimes Act* and 37 and 38 of the *Controlled Operations Act* are evidently not entirely effective as an oversight mechanism. That is, they are limited to establishing procedural requirements for reporting and only allow the Commonwealth Ombudsman and Victorian Inspectorate to review police compliance with these procedures. The case studies discussed in Part II demonstrate that what is needed for effective oversight in relation to terrorism investigations is a more substantive review of how and in what circumstances the power to conduct controlled operations, particularly those involving inducement tactics, is utilised. Introducing such a process would necessitate stronger reporting requirements for law enforcement agencies in order to ensure not only compliance with the application processes under the two Acts, but with the outcomes of the substantive reviews that would be conducted by an external body. Similar to the procedure exercised in relation to prohibition orders made under the *Firearms Act,* this may require the agencies responsible for a particular controlled operation to issue written responses to recommendations or questions raised by the reviewing body.

Q1. Are there any issues or operational impacts that need to be considered if oversight agencies' monitoring functions include an assessment of the appropriateness of Victoria Police decisions and actions? Are there any barriers and how might these be overcome?

We acknowledge that the recommendation of substantive oversight into applications for authority to commence controlled operations raise some operational questions for both police investigations and the activities of the reviewing body. Namely, the issue of sensitivity with regard to ongoing investigations and the sharing of information with external agencies. In response to this issue, we submit that there are already systems in place which exercise oversight of police conduct in other areas without compromising classified information or active investigations, and that these systems are adaptable to applications for the commencement of controlled operations. Our recommendation to introduce a more substantive court review of applications for controlled operations is one process that could circumvent the issue of confidentiality. This process is already in use in some form under section 15GT of the *Crimes Act* for the purpose of extending controlled operations beyond three months, and could be used on a more regular basis to assess the necessity and proportionality of controlled operations and the conduct of police therein, while maintaining the confidentiality of a closed hearing. However, this system of Tribunal review is not without its own shortcomings. We recommend that within this system, the presence of independent special counsel is imperative in order to ensure comprehensive independent scrutiny of the applications. Similarly, IBAC's scrutiny of firearms prohibition orders in Victoria is another way in which external monitoring bodies have been able to substantively review the nature and necessity of police conduct with regard to active orders and

ongoing investigations. We argue that such approaches can be adapted to facilitate substantive independent oversight of authorising officers' assessment of controlled operation applications in a way that does not compromise or publicise sensitive information.

Conclusion

The existing system of oversight into the execution of controlled operations by internal police authorities, the Commonwealth Ombudsman and the Victorian inspectorate is significantly inadequate. Internal police oversight is evidently ineffective in limiting the risks and harms associated with the use of controlled operations in terrorism investigations, and existing external oversight bodies are limited to a procedural focus on compliance with reporting requirements. It is imperative that the legislated principles regarding the just and reasonable exercise of controlled operations are upheld by police, and that police operatives are held accountable for unlawful and improper conduct where these principles are transgressed.

The use of inducement tactics by police in investigating terrorism offences raise serious concerns for public safety, police accountability and the maintenance of the rule of law. These concerns are especially significant with regard to the investigation of terrorism-related offences, which already criminalise inchoate acts at an exceptionally, and uniquely, early stage.

The ICV calls for two (2) key reforms. Firstly, entrapment should be recognised as 'serious police misconduct' where entrapped individuals are protected by legislation. Secondly, the existing system of oversight should be comprehensively reformed to facilitate substantive, outcome-focused monitoring of active applications for controlled operations with respect to the governing Acts, rather than merely reviewing reporting compliance retrospectively once controlled operations have already been exercised in a harmful and unethical manner.