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**A Community Legal Centre**

1 September 2017

**IBAC Committee  
Lv 3 St Andrews Place  
East Melbourne  
VIC 3002**

- Hon Kim Wells MP
- Hon Marsha Thompson MP
- Mr Sam Hibbins MP
- Mr Danny O'Brien MP
- Mr Simon Ramsay MLC
- Mr Tim Richardson MP
- Ms Jaclyn Symes MLC

***Written submissions by email to: [IBACC@parliament.vic.gov.au](mailto:IBACC@parliament.vic.gov.au)***

***Accompanying documents provided in person***

Dear Committee members,

**Re: Inquiry into the external oversight of police corruption and misconduct in Victoria**

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Thank you for providing the opportunity to contribute to the Victorian Government's review into Victoria's police oversight system.

Fitzroy Legal Service (FLS) is one of the oldest community legal centers in Australia. FLS has substantial experience providing criminal law advice, representation and advocacy to vulnerable members of the community.

This work has included the lodging of police complaints, coronial inquest proceedings, contested hearings, and civil proceedings.

## **Systemic disincentives to complain about police conduct**

A significant proportion of our client base report concerns about their treatment by Victoria Police. In our experience, there are many barriers peripheral to the functioning police oversight system that act as a disincentive to complain about police misconduct. These include fear of reprisals in the form of more frequent police surveillance, as well as searches by police in public spaces, stigmatization, and humiliation in any complaints process. Furthermore, it is common that clients who report police violence will be simultaneously facing prosecution for assaulting those same officers. There is significant pressure to plead guilty to these charges at the Magistrate's Court, and a finding of guilt will obviously negatively impact on any complaint outcome or civil litigation.

This issue has been heightened in recent years by the changes in Victoria Legal Aid eligibility criteria so that only those facing actual imprisonment are eligible for a grant of legal assistance in summary crime matters, leaving many individuals unrepresented. However, even with legal representation, pressure from busy Magistrates may induce many individuals to accept the certainty of a seemingly favourable sentencing indication rather than proceed to a contested hearing.

## **Case studies**

The following case studies derive from the public interest practice of FLS. We comment strongly at the outset as follows.

The experience of the complainant/ person charged is likely to be one marked by intimidation and trauma (from the perspective of the events which gave rise to the complaint, the relative power of the complainant/ person charged and 'the police' as a key instrumentality of State power), and the approach taken to prosecuting matters where complaints have been issued against police.

As such, a plea to a charge or an acceptance of responsibility for offending pursuant to a diversion outcome does not present a full or even necessarily a partial indicator of the circumstances in which a complaint has been lodged.

Failures in independent investigation of police complaints represent lost opportunities to reflect on appropriate police practice/ policy, community accountability to the principles police members are accountable to, and to the rule of law in relation to which police play such a pivotal role. The prosecution of matters involving police complaints should be included in the oversight function of police complaints.

We acknowledge the extremely difficult circumstances with which police members contend on a daily basis, and the impacts of continued exposure to traumatic and violent contexts. We also acknowledge that police members work in conditions where split second decisions made are subsequently subject to scrutiny that may be perceived to be in a vacuum that does not acknowledge the stressors and immediacy of policing operations. It is our view that the retention of the doctrine of constabulary independence, and the absence of vicarious liability for conduct 'outside the course of duty' does not serve to promote police accountability.

Police accountability matters form a small part of our public interest practice. Even with significant support from FLS, clients have frequently decided to abandon complaints against Victoria Police, and have entered pleas of guilty to charges laid. We refer these decisions not to the 'truth' of what has happened, but to the stressors and realities identified and listed above. In particular, the vulnerability of some community members to intensive policing may be a significant factor.

We list below the casework examples on which our view is based. We note there are other examples where the weight or paucity of evidence has led us to the view that there is little merit in seeking to defend a charge or pursue a complaint. However, the examples outlined below present the clear failings of a system in providing independent oversight and engaging in continuous improvement around the objectives of community safety and wellbeing. These cases are ones in which an assessment has been made by legal practitioners that a complaint should be pursued and/ or evidence should be tested in relation to charges laid.

FLS has not to date had a complaint to the Ethical Standards Department substantiated. Given the extremely low statistical rates of substantiation, and our practical experience with the complaints process, FLS staff do not place any confidence or store in the investigation of complaints about Victoria Police by Victoria Police.

*CASE STUDY – THE ARREST OF XB – FEBRUARY 2016  
(Please see accompanying CCTV footage)*

XB was apprehended following a legitimate citizen's arrest inside a pharmacy on 13 February 2016. The police who attended the scene and in the process of arresting XB numerous assaulted him with punches and kicks to the face, neck and shoulder area, as well as hits to the head with a police baton and kicks and punches to his body. The acts by the police were not done on the grounds of self-defence, and they used excessive force in all circumstances.

XB initially requested an investigation of this assault. However, he retracted his complaint after receiving visit from police whilst in custody, where he advised that he would like to receive independent legal advice beforehand.

Notwithstanding XB request, Professional Standards Command (PSC) decided to proceed with an investigation this incident. The investigation was conducted by the same police officer who attended upon X in custody. Furthermore, the investigating officer was employed at a police station in close proximity to the station where the officers under investigation were employed.

On 25 October 2016 PSC provided XB with written confirmation of the outcome of the PSC investigation, stating (inter alia) as follows:

'As discussed with you, the actions and behaviour of the Police on this occasion was appropriate and in accordance with the law.

Divisional Management and a senior officer from the Professional Standards Command have reviewed the final outcome of this investigation.'

We encourage your team to review the footage and consider how this finding has been reached.

*CASE STUDY – CHARGES OF ASSAULT LAID AGAINST VICTIM OF POLICE ASSAULT – XA*

FLS acted on behalf of XA in a proceeding that involved multiple appearances at rural courts in a bid to have the matter listed for contested hearing. None of these proceedings would have been eligible for a grant of legal aid subsequent to reforms.

FLS attended ESD offices with XA to assist in the lodging of a complaint. The FLS solicitor in attendance was told by the investigating police member that ESD had a new policy to lay charges of perjury against complainants whose matters were found unsubstantiated, and the client should be briefed on that policy.

The client was offered a diversion on indictable assault of police officer (being the head charge of a negotiated four). The Diversion Coordinator indicated this could not be accepted as a matter appropriate for diversion. The Magistrate directed the parties to alter the summary and a diversion would be granted. The client decided not to accept the Diversion that had been offered - even though that would have ensured an absence of criminal record - and instead the matter went to contested trial.

The police member whose conduct had been the subject of an unsubstantiated complaint was, in the findings of fact made by the presiding Magistrate, found to have unlawfully imprisoned XA and committed unlawful assaults causing XA to sustain a broken jaw. XA was found guilty of using offensive language in a public place (the lowest charge of seven). The presiding Magistrate expressed particular offence at the charge laid by the prosecuting member of breaching the good order of the gaol and incurrance of cleaning costs as a result of our client's unsuccessful attempt to clean his blood from the floor of his cell.

We note it was made clear during the course of proceedings that direction as to how the matter was to proceed was subject to a hierarchy, and not in the hands alone of the Police Prosecutor acting in Court against our client.

The matter was referred to a private firm for civil proceedings and settled to our understanding on confidential terms.

We attach a copy of the Court transcript and encourage the team to read the manner in which the proceeding progressed, having reference to the views put forward by the Ethical Standards Department at the outset of the proceeding. Unlike our client, no charges of assault were laid against the relevant police member to our knowledge, and we have never been advised of any disciplinary action taken.

*CASE STUDY – WOMAN DRUNK IN A PUBLIC PLACE SUBJECT TO ARREST IN FRONT OF CHILD CAUSING BROKEN RIBS – PLEADS TO ASSAULT POLICE*

XY was with her child and another woman, at a public festival. XY was arrested for being drunk. Concern for the wellbeing of her child was a ground put forward by the arresting officer for the arrest, which eventuated as being highly escalated and violent. Multiple independent witnesses attended the local police station on their own conscience in contrast to police requests to merely make statements in relation to what they had seen. Witnesses stated XY was grabbed by the throat and pushed to the ground. XY was treated for injuries to her face, bruising to her body, and broken ribs.

It was not contested that XY was drunk, or that the arresting officers left her child in the custody of a third party without confirmation of identity or appropriateness. XY was not given permission to make a telephone call to verify the whereabouts and safety of her child for many hours following the incident.

XY made a complaint to ESD. It was found substantiated in one respect only, that inappropriate language had been used. (Footage of the same had been supplied by one of the witnesses). Later XY was advised that this finding had been reversed as the wrong police member had been identified in the footage.

Despite injuries and ongoing trauma experienced by XY's child subsequent to the incident, XY did not wish to pursue the matter further.

We encourage your team to consider that the Victoria Police Manual (VPM) policies and guidelines provides limited guidance regarding police responses to incidents involving children. Children have a right to feel safe in accessing and approaching police, and the failure to appropriately investigate the complaint XY was a failure to protect a child, and consider the rights and appropriate approach for children in similar circumstances.

An example of improvements that may have been generated by an independent approach to the complaint of XY – where the VPM is silent or deficient on how police members should manage arrests in situations where children are present (whether or not these involve family violence, allegations of child abuse, or circumstances where the child is the accused person) policies and guidelines could evolve to formally recognize the importance of the safety and security of children in law enforcement contexts.

We submit the failure to appropriately investigate the above complaint was an unacceptable failure to consider the rights of the child, and will result in the child concerned and other similar children viewing police with suspicion and fear, if not terror. For marginalized communities, this is dangerous and highly undesirable.

We now turn to the questions the subject of this inquiry. Please be advised we are happy to discuss the above cases and others handled by our service in greater detail should that be requested.

**Question 1: What changes (if any) would you suggest be made to improve the role of IBAC in investigating complaints about Victoria Police?**

FLS submits that complaints regarding police misconduct should be investigated by an independent body rather than through an internal investigation by Victoria Police. Whilst in theory the Independent Broad-Based Anti-Corruption Commission (IBAC) can investigate complaints against police, in practice, the majority of complaints by individuals are sent back to Victoria Police for investigation. As a result Victoria Police investigate themselves for allegations of criminal or unlawful conduct and other misconduct. This is an obvious and dangerous conflict of interest.

Flemington Kensington Community Legal Centre analysis suggests that the police complaints system consistently fails to find that meritorious complaints are substantiated. This is evidence by many instances where criminal courts have assessed upheld allegations of police mistreatment despite being dismissed by the police complaints system.<sup>i</sup> FLS submits that the current structure and functioning of IBAC offers a ‘complaint triage service’<sup>ii</sup> rather than a meaningful oversight mechanism.

**Victoria’s police oversight system**

FLS supports the establishment of a new independent body tasked only with investigating complaints of police misconduct or at a minimum a substantial reevaluation of the structure and resourcing of IBAC. This institution must be:

- practically, culturally and politically interdependent of Victoria police.<sup>iii</sup>
- resourced to conduct legitimate and thorough investigation of all individual complaints of police misconduct as well as investigate and report of systemic and cultural issues affecting Victoria Police
- inclusive of complainants, timely and transparent

Specific concerns about IBACs (and Victoria Police’s) current practices include:

## **Complaints handling process**

### ***a. Lack of inclusivity***

- Our clients report a lack of responsiveness, communication and information
- Often the only communication is the determination letter advising that the complaint has been decided in favour of the police officer
- The determination letter often lacks detailed reasons for the decision
- This fosters feelings of disempowerment, lack of opportunity to be heard and lack of due process.

### ***b. Timeliness***

- There is evidence that complaints made to IBAC cause significant delay in complaint investigation and resolution<sup>iv</sup>
- Timely resolution is necessary for community perception of due process
- Delay also impacts on any civil litigation proceedings as complainants have only three years from the date of an incident to initiate court proceedings.<sup>v</sup>

### ***c. Transparency***

- IBAC investigations are currently exempt from disclosure under Freedom of Information legislation. Furthermore, materials obtained in the course of an IBAC investigation are effectively 'quarantined' restricting victims from accessing these materials for use in civil proceedings. As a result, many victims of police violence choose to file police complaints with Professional Standards Command (PSC) rather than IBAC in order not to jeopardise their right to seek compensation for injuries resulting from police violence;<sup>vi</sup>
- The combination of the lack communication, detailed determination information and ability to access documents for review does not present as a transparent system.

**Question 2: What changes (if any) would you suggest be made to assure the community that there is sufficient probity in the investigation of police contact deaths in Victoria?**

As discussed above where Victoria police investigates its own members there is an obvious and dangerous conflict of interest. This situation is amplified where a consequence for Police members could involve serious criminal sanctions. As argued above an independent body would be much better positioned to attend and gather evidence in respect to police contact deaths.

**Question 3: What changes (if any) would you suggest be made in relation to: (a) Victoria Police's role in maintaining records about police complaints; and (b) IBAC's role in auditing Victoria Police records about complaints?**

This question is difficult to address considering the broader structural issues discussed above. However, when considering the current problematic system

- Thorough and accurate records are essential to ensuring a transparent accountability system.
- Any meaningful oversight by IBAC must involve regular audits of police records regarding complaints to ensure that all adequate information is recorded and to review the adequacy of investigations.
- Particular attention should be paid to failure of identify meritorious complaints, evidence of bias in investigation for example uncritical acceptance of police accounts, intimidation or discrimination.

**Question 4: Should IBAC have an express legislative function and/or power to investigate and report on systematic and cultural issues affecting Victoria Police?**

FLS supports an express legislative function or power for IBAC (or new independent body) to investigate and report of systemic and cultural issues affecting Victoria Police. However, this function would be more effectively exercised if informed by the same organization undertaking legitimate and thorough investigations of all individual complaints of police misconduct.

**Question 5: Should IBAC have an express legislative function and/or power to investigate and report on the adequacy of Victoria Police’s internal investigations of police conduct?**

This question is difficult to address considering the broader structural issues discussed above. However, when considering the current problematic system, FLS suggests IBAC should be:

- Investigating all police complaints
- Auditing the investigations performed by Victoria police
- Reporting publically on Victoria Police performance
- Making recommendations and enforcing recommendations on improvement of investigations performed by Victoria police
- Enforcing recommendations made by the Coroners Court.

**Question 6: What changes (if any) would you suggest be made to Victoria’s complaints system to ensure that IBAC appropriately considers the interests and welfare of complainants in its processes?**

There is evidence that individuals who report police misconduct to community workers or lawyers frequently do not make or continue with a complaint because of their lack of trust in Victoria Police handling the matter.<sup>vii</sup> However, the following general statements are relevant to the welfare of complainants under the current system:

- The complaints process should be inclusive and focused on: providing the victim with an opportunity to tell their story; the provision of frequent information on how their complaint is progressing and; an opportunity to respond to findings and provide further evidence.
- Determination letters should provide detailed information on what steps were taken in the course of an investigation, detailing the evidence considered, and the reasons for the determination.

- Where the complaint is upheld, IBAC should access the police member’s complaint history to ensure there are consequences for repeated misconduct.

**Question 7: What changes (if any) would you suggest to improve transparency of reporting about Victoria police oversight system?**

This question is difficult to address considering the broader structural issues discussed above. However, when considering the current problematic system. However further to the above comments an IBAC or a new police accountability mechanism could:

- Regularly produce public reports
- Regularly produce reports to Parliament about types and outcomes of complaints including whether police members have been disciplined.

Thank you for providing the opportunity to contribute to the Victorian Government’s review into Victoria’s police oversight system. Please feel free to contact me with any further enquiries on 9419 3744.

Yours faithfully  
Fitzroy Legal Service

Per

Matt Wilson  
Lawyer

Meghan Fitzgerald  
Lawyer

Jennifer Black  
Principal Solicitor

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<sup>i</sup> Flemington Kensington, ‘Independent Investigation of Complaints against the Police’ Policy Briefing Paper (2015) available at [http://www.policeaccountability.org.au/research\\_resources/](http://www.policeaccountability.org.au/research_resources/)

<sup>ii</sup> Flemington Kensington, ‘Independent Investigation of Complaints against the Police’ Policy Briefing Paper (2015) available at [http://www.policeaccountability.org.au/research\\_resources/](http://www.policeaccountability.org.au/research_resources/)

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<sup>iv</sup> Flemington Kensington, 'Independent Investigation of Complaints against the Police' Policy Briefing Paper (2015) available at [http://www.policeaccountability.org.au/research\\_resources/](http://www.policeaccountability.org.au/research_resources/)

<sup>v</sup> s 5(1AA) *Limitation of Actions Act* 1958 (Vic)

<sup>vi</sup> s 194 *IBAC Act*

<sup>vii</sup> Flemington Kensington, 'Independent Investigation of Complaints against the Police' Policy Briefing Paper (2015) available at [http://www.policeaccountability.org.au/research\\_resources/](http://www.policeaccountability.org.au/research_resources/)