

Submission to the *Inquiry into the external oversight of police corruption and misconduct in Victoria*

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My name is Allen Tong. I would like to share my personal experience with the police complaints system and my suggestions for its improvement.

On 16 December 2012, I was arrested at Melbourne CBD for being drunk in a public space. During the arrest, I was cooperative with the six Victoria Police officers who were present. One of them requested me to hand over my wallet. I asked him "why" twice before another officer pinned me down with brute force that caused heavy damage to my two front teeth. I was then sent to the Melbourne Custody Centre to sober off. Since the incident I had undergone 4 dental surgeries on my damaged teeth and will require further costly treatments. I have also suffered from trauma and depression due to this incident.

Below are the issues I have faced with the current police system along with recommendations for improvement. My main comment is that oversight by IBAC is not enough as we need a police complaint system that meets international human rights standards (Independent, Prompt, Effective, Transparent, Victim Centred).

Issue 1: Police investigating their own

I submitted a complaint regarding the officer's excessive use of force to the then-Office of Police Integrity on 19 December 2012. My complaint was referred to the Ethical Standards Department (ESD) of Victoria Police for investigation under Section 40(2) of the *Police Integrity Act 2008*.

The outcome of my complaint stated that that the officer's action in pinning me down after I questioned them was in line with police procedures. This is not in line with the United Nations (UN) standards stating that the use of force by officers that are beyond necessary to arrest someone for failing to comply with an order is an abuse of authority and unlawful [2].

IBAC has the power to investigate police but they do not meet international human rights standards that a police complaint system should have [3], seeing that it currently refers almost 90% of complaints against police back to the police for internal investigation [1].

This lack of independent investigation has been reported to produce biased outcomes, where less than 4% of total assaults complaints and less than 10% of total complaints against police were substantiated from 2000 to 2013 [3]. The courts have consistently found complaints against police to have substance despite being dismissed previously by the police complaint system [4].

Recommendation:

- A state-funded civilian-run police complaint system which meets international human rights standards (Independent, Prompt, Effective, Transparent, Victim Centred) should be put in place.
- This body has to be independent from the police, not only institutionally but also politically, culturally and practically [2]. This means that the use of former police officers should be minimal if at all. A good framework to follow would be the Police Ombudsman of Northern Ireland (PONI) where only 25% of their staff are former police officers and the culture within PONI is assertively civilian [2].

Issue 2: Prompt investigation

I was notified by the police investigator on 11 February 2013 that he was handling my complaint, which was lodged nearly 8 weeks before on 9 December 2012. The police investigator wanted to collect my statement first on 22 February 2013, and only finished collecting statements from all other officers involved on 15 March 2013.

Delay of investigation may provide an opportunity for the suspect officer to be fully briefed on the allegations against them, to have access to the full complaint by the victim, and have thoroughly discussed the complaint with their colleagues before they are interviewed by investigators [2].

A speedy response to complaints against police is crucial to dispel any fear or collusion in an attempt by police to conceal misconduct [2]. The code of silence practised by police make them more susceptible than other professions to attempts to cover up for themselves and their colleagues [9]. For example, [REDACTED] who was the police investigator for [REDACTED] case was caught teaching witnesses how to pen their statements with the aim of concealing the offending officer's misconduct [10].

Recommendations:

- The independent civilian-run investigation team must commence investigation as soon as they are notified of complaints that reveal an allegation that could lead to criminal or disciplinary outcomes [2].
- Police suspects and witnesses must be separated and interviewed no later than 24 hours after the notification of the complaint. Refusal to participate in an administrative interview must be grounds for dismissal for the suspects involved [2].
- To prevent the contamination of police statements, suspect police should be told of the allegations during the interview but should not be given prior written notice containing full details of those allegations [2].
- The complainant's statement must not be given to police unless disciplinary, civil or criminal proceedings have commenced against them [2].

Issue 3: Lack of complainant involvement

The European Rapporteur on Police Complaints states that “in order to safeguard his or her legitimate interests the victim is entitled to participate in the process” [2]. My involvement with the investigation ended when my statement was taken on 22 February 2013. There was no opportunity for me to participate in the investigation prior to the final complaint result.

After obtaining the ESD investigation file in parts which were released under Freedom of Information (FOI), I have learned that there were several incorrect facts which I could have corrected or provided feedback to the police investigator if I was involved.

- Use of Force forms did not indicate the injuries I have sustained to my teeth and mouth. It also states that I have grabbed the suspect officer’s hand and wouldn’t let go after requested by the officers, something I do not recall doing.
- Statement made by the arresting officer made no mention on how I was assaulted by the officer during the arrest.
- Final Investigation Report and Melbourne Custody Centre attendance form stated that I had no obvious signs of blood or injuries and I did not indicate to the staffs that I was injured. My mouth was bleeding as a result of the damage to my teeth and one of the officer asked me about my injury when I arrived at the custody centre.
- Final Investigation Report states that my belongings were placed in a bag before I was restrained. My belongings were forcefully removed from me after I was pinned down and arrested.
- Complaint result states that “CCTV footage supports the description of events provided by all members”. However, the footage quality wasn’t the best, and was partially obscured by a tram stop and street sculpture, making it difficult to confirm whether I have grabbed the officer’s hand.

Recommendation:

- Complainants should be given full access to preliminary findings and evidence in order to make submissions prior to the finalisation of a complaint [2].
- Complainants should be kept up to date throughout the period of the investigation and be permitted to make suggestions about additional lines of enquiry [2].
- There should be adjudicative hearings to determine complaints such as in a civil litigation where complainant could cross-examine police evidence. Examples of such hearings are under the Law Enforcement Review Agency in Manitoba Canada and the Office of Police Complaints in Washington DC, USA. Ideally this body would also make disciplinary decisions and award compensation [2].
- During these hearings complainants should be provided with a lawyer paid for by the State and at the rates equivalent to that paid to lawyers acting for the police [2].

Issue 4: Lack of Transparency

Investigative journalism has shown that transparency and public scrutiny are the only true forms of accountability that exist against government and police misconduct [4].

There is a huge lack of transparency on how my complaint result was deemed to be unsubstantiated by the police investigator. In his 2-page letter dated 5 April 2013 describing the final outcome on my complaint, the reason given for the officer's use of force was very brief, i.e. "refusal to hand over property when requested and your action in grabbing his hand", and that "This reaction by the officer is in line with police procedures". There was no avenue for me to seek a review on this complaint result.

I also faced difficulty in trying to obtain information pertaining to my incident and complaint. The timeline below illustrates my struggle in requesting for the CCTV footage of the incident.

Date	Status
4 Oct 2013	Submitted FOI request for the CCTV footage of my incident.
26 Nov 2013	Access to the footage denied due to Section 33 Documents affecting personal privacy as there were images of multiple third parties in the footage.
1 Apr 2015	Submitted a second FOI request with the assistance of FKCLC for the CCTV footage and full ESD investigation file.
29 May 2015	Vic Police was happy to release the CCTV footage as they now have access to editing software which were not available back in 2013.
15 Jun 2015	CCTV footage was released but there was a break in the footage, the moment I was pinned down by officers was missing. FKCLC immediately request access for the full CCTV footage.
25 Aug 2015	Victoria Police denied access to the full CCTV footage again.
2 Sep 2015	FKCLC has sent request for the full footage to Vic Government Solicitors Office and the FOI commissioner for review.
21 Oct 2015	Vic Government Solicitors denied access to the full CCTV footage.
17 Dec 2015	FOI Commissioner directed Vic Police to release the missing footage after cropping out the third party on the righthand side of the screen.
13 Jan 2016	Vic Police advised FKCLC that they have 60 days to appeal this decision.
4 Mar 2016	Vic Police advised they have an informal agreement with the previous FOI Commissioner to be given an extra 14 days to file a challenge to VCAT.
19 Apr 2016	Received new CCTV footage with 10 new seconds showing the moment I was pinned down by officers.

I have made an FOI request for the crucial documents relating to the investigation of my complaint. A partial investigation file was released to me, where the names, rank and registered numbers of the police officers in my complaint were unnecessarily censored throughout. The following requested documents remain denied in full till this day:

- Correspondence to investigated members
- Statements of investigated members
- Statements of other members
- CCTV Footage – Melbourne Custody Centre

CCTV footage has played a crucial role as evidence in bringing justice for police abuse victims such as in Tim Vivoda's case [5]. In Australia, police officers have been caught deleting video footage to conceal their misconducts [6][7]. In my case, it took Victoria Police 2 and a half years to release the important CCTV footage, by which time it was too late for me to take any civil action.

To make things worse, under Section 194 of the IBAC Act states that any complaint investigation made by Victoria Police following a referral by IBAC will be exempted from the Freedom of Information Act (FOI) 1982[3]. This rule removes a key opportunity for the complainant to understand how their complaint has been investigated.

Recommendation:

- At the conclusion of the investigation, a report explaining in full and thorough detail the reasons for the decision should be given to the complainant and advocates involved. The reasons must contain an analysis of the law and human rights principles applying to any force that used by police [2].
- The release of information should be subject only to the harm test, which concerns protection of the identity of vulnerable witnesses. The harm test should not concern the protection of the agency that makes the decision. Transparency in decision-making is the hallmark of accountable decision-making. No generalised Public Interest Immunity should be attached to complaint documents [2].
- IBAC should be subject to the FOI Act in the same way as other Victorian Government agencies. Section 194 of IBAC Act should be abolished.

Conclusion

The current police complaints system in Victoria has failed to bring justice to police abuse victims like myself and facilitate a culture where police are able to be above the law.

Complaints are an important avenue for police to ensure that their members adhered to the rule of law. Having an independent and reliable police complaint system is not only crucial for public confidence but also unity within the force (see article by The Age on internal police harassment, [9]).

I call on the Victorian Government to establish a body separate from police to independently investigate all complaints made against police. The body must be properly resourced and empowered to be:

- Independent of the police;
- Capable of conducting an adequate investigation;
- Prompt;
- Open to public scrutiny;
- Victim centred.

Yours sincerely,



Allen Tong



References

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- [2] Tamar Hopkins (2009, 13 April) 'An Effective System for Investigating Complaints Against Police: A study of human rights compliance in police complaint models in the US, Canada, UK, Northern Ireland and Australia', Victoria Law Foundation.
- [3] Police Accountability Project (2015) 'Independent investigation of complaints against the police: Policy Briefing Paper'. http://www.policeaccountability.org.au/wp-content/uploads/2015/11/CLCpaper_final.pdf
- [4] For an excellent example see the Guardian's coverage of the police involved death of Ian Tomlinson as a result of the policing of protests to the G20 meeting in April 2009 in London. <http://www.guardian.co.uk/commentisfree/2009/apr/11/police-surveillancemarina-hyde/print>
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- [6] Nedim, U. (2015, November 1) 'Police Tasered Man then Delete Footage'. *Sydney Criminal Lawyers*. <https://www.sydneycriminallawyers.com.au/blog/police-taser-man-then-delete-the-footage/>
- [7] Complaints against the police, Framework for a new system, December 2000, UK Home Office report, p 7. Information that is withheld includes for example the identity of vulnerable witnesses or confidential police informants.
- [8] See for example *The Age* 12 February 2009 – Stephen Linnell pleads guilty to attempting to assist colleagues escape detection at misconduct proceedings. <http://www.theage.com.au/national/linnell-spared-jail-over-lies-leaks-2009032599n7.html> See also a discussion of the code of silence in the Office of Police Integrity's 'Armed Offenders Squad report: http://www.opi.vic.gov.au/documents/The_Victorian_Armed_Offenders_Squad_a_case_study.pdf
- [9] Spooner, R, Mills, T, & Bucci, N (2015) 'Just 12 officers disciplined for sexual harassment in past five years', 9 December, *The Age*. <http://www.theage.com.au/victoria/victoria-police-commissioner-graham-ashton-pledges-compensation-for-victims-of-sexual-harassment-assault-within-the-force-20151208-gliwqb.html>
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