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

We welcome the opportunity to contribute to the IBAC Committee Inquiry into the external oversight of police corruption and misconduct in Victoria, and thank you for the extension of time to make this submission.

You will find our recommendations to the Committee in **Section 4** of this submission which considers best practice models and strategies in a Victorian context.

About Youthlaw and our client profile

Youthlaw is Victoria's state-wide community legal centre for young people under 25 years of age. Youthlaw both provides individual legal services and advocates for systemic responses to the legal issues facing young people.

Youthlaw is co-located with seven other youth services as part of Frontyard Youth Services at 19 King St, Melbourne. Young people accessing Frontyard Services are mostly aged between 18 and 25 and are either homeless, experiencing significant family breakdown or deemed to be at risk. We provide an outreach service via 9 Headspace centres and 3 local youth services throughout Victoria, a Family Violence program (with an interest in adolescents using violence) and outreach legal services to a youth residential detox unit in the Melbourne CBD.

By way of background to our comments, we assist over 1500 young Victorians under age 25, from all over Victoria. We target our services to those who are most in need & not eligible for other legal services. We don't assist for example assist young people in the child protection and the serious end of the juvenile justice system as they receive assistance from Victoria Legal Aid. Those who we assist are generally not visible to authorities and have started dropping out of school, are experiencing homelessness, are often developing substance abuse and mental health issues and are self harming. They have usually experienced neglect, abuse, substance abuse, mental illness and family violence in their childhood. They are also young people who live in disadvantaged communities & families. Most have low self esteem and their offending is generally low level crime and circumstantial (fines, debts, interactions with authorities) We also assist those existing the child protection system at 18 who no longer have legal assistance.

The reality for the young people we work with is that they have a higher likelihood of having more contact with police than other members of the community. For many their complaints arise in the context of police charges.

Many of the young people we assist are reluctant or don't realise they have a right to complain about treatment by police officers. They also regularly say they don't want to make a complaint because they did not think it will do anything, they are fearful of might happen to them if they do.

Our experience is that young people who are prepared to make a complaint usually do so out of an overriding sense of injustice and a desire to put a stop to the behaviour. This overrides their fear of the repercussions. A case we began in 2010 that ended up being a test case that went to the Court of Appeal (2015) and went back to IBAC to be reviewed in 2016, a good example of such a complainant. He was courageous enough to take this course but in most respects was quite typical of many young people we see with grounds to make complaints about police misconduct.

Youthlaw provided legal advice at an outreach service to a young man about his treatment by police. He described being physically assaulted - being pushed into the gutter that broke his teeth, handcuffed and capsicum sprayed, and racially abused by a number of Victoria Police officers. This happened in February 2009, when he was 17 years old.

When told of his options he was very clear he wanted his complaint to go to the Office of Public Integrity (OPI and predecessor to IBAC) and not to Victoria Police investigate. He was fearful that information about him or his complaint might be passed on to the officer involved risking reprisals from local police.

We were informed that OPI did not regard the complaint as appropriate for them to investigate and they would refer it to the Ethical Standards Department. We commenced an action through the courts to challenge this decision referral, on the grounds of not providing independent investigation of his complaint. This took another 5 years to proceed through the courts.

The case was finally heard in the Court of Appeal in 2015 and a decision in favour of our client. The court did not go as far as to find that his human rights required an independent investigation of his complaint, but they did find they were not satisfied with the OPI's handling of the case and directed that IBAC to reconsider investigation of the complaint.

Our client was interviewed by IBAC at length and he reiterated all that had occurred in 2009. We understand that a number of witnesses previously prepared to make a statement were not found. A first contact after the incident, a social worker at the community centre he went to, confirmed his attendance and complaint. Medical records were obtained. In 2016 we received a decision¹ by IBAC in May 2016 that the complaint could not be substantiated due to insufficient evidence.

1. Examine the current system for the oversight of police corruption and misconduct in Victoria, in particular the role of IBAC and the Victorian Inspectorate.

1.1 Police complaints to IBAC

¹ IBAC, Operation Derby Special Report, May 2016 IBAC report on their investigation . <http://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-operation-darby-may-2016.pdf?sfvrsn=9>

The experience of Youthlaw and other community legal centres in Victoria is that very few complaints against police, filed with IBAC, are investigated by IBAC and roughly 90% are referred to Victoria Police to investigate. In our experience and to our knowledge this is the case no matter how serious the police misconduct is such as physical assaults, threats, inflicting injury, engaging in harassment and serious verbal abuse.

To our knowledge there is a minimal number of police complaints filed with IBAC but referred to Victoria Police with a level of oversight. In the 2015 financial year for example IBAC reviewed only 114 internal Victoria Police investigations.²

IBAC holds itself out as a police complaints handling body, but in practice it appears to only investigate police misconduct when it is of a very serious nature and has an element of corruption. This is despite the fact Section 16 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) outlines that IBAC has power to investigate and expose serious corrupt conduct and police personnel misconduct.

IBAC has also conducted a number of public hearings in regard to police conduct such as Operation Ross. In our view these cases have been extremely important to address systemic police misconduct. However we and other legal practitioners are all too aware of many complaint incidents that have displayed features of systemic and serious misconduct and yet were referred back to Victoria Police for internal investigation.

The experience of legal services that assist complainants is that IBAC is not transparent about whether complaints they refer to Victoria police are referred because they are outside IBAC's remit or because they do not have the resources to investigate. At a recent Law Institute of Victoria Police Accountability roundtable on 25 July 2017, His Honour Michael Strong (previously head of the OPI) expressed the view that it was very much the latter. He said that IBAC inherited the functions of the OPI but also took on a much broader responsibility for investigating other public sector corruption and misconduct. Staffing did not increase with this expansion of responsibilities. Despite this, IBAC strongly suggests on their website, video and information on police misconduct, that it is the former. This does not provide clarity for practitioners or prospective complainants and it holds out the clear expectation that IBAC will investigate complaints that it clearly will not. The experience of practitioners in the field, including our own, is that they have regularly submitted complaints about police misconduct, that are clearly within IBAC's remit, such as incidents of assault, racist abuse and harassment. They have also submitted complaints about systemic practices (e.g. abusive and racist behaviour by a group of officers). All these cases have all been referred by IBAC to Victoria Police rather than investigated by IBAC.

We are not aware of any public and transparent account of the process used by IBAC in determining whether to keep a complaint with IBAC or refer it to Victoria Police. The Victorian Government IBAC Discussion paper (2016) for example states "*IBAC can refer matters to Victoria Police if IBAC considers Victoria Police is the more appropriate body to investigate the matter (e.g. the complaint is a general criminal matter)*".³ This lack of transparency about criteria used by IBAC's predecessor, the Office of Police Integrity (OPI) was raised in a Youthlaw Supreme Court test case *bare v Small*⁴ referred to above. The OPI stated in court that they used an 'internal 'priority matrix' not available to the complainant or public, to determine whether a complaint was referred to Victoria Police or stayed with the OPI.

1.2 Interpretations of police personnel misconduct

² IBAC, Special Report Concerning Police Oversight, August 2015, <http://www.ibac.vic.gov.au/publications-and-resources/article/special-report-concerning-police-oversight> p 5.

³ IBAC, 'Discussion Paper' March 2016, p 24

⁴ Judge Maxwell, *Case note on Bare v Small*. http://law.unimelb.edu.au/data/assets/pdf_file/0009/2099394/10-Maxwell.pdf

Police personnel misconduct is defined in section 5 of IBAC Act⁵ as conduct which constitutes an offence punishable by imprisonment; or conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it or disgraceful or improper conduct (whether in the public officer's official capacity or otherwise).

The IBAC website⁶ defines misconduct as Victoria Police personnel failing or refusing to perform their duties, behaving disgracefully or improperly (on or off duty) discrediting Victoria Police or its personnel.

The IBAC website also provides some examples of misconduct including: unauthorised or inappropriate use of the Law Enforcement Assistance Program (LEAP), drink driving or traffic offences using, selling or dealing drugs inappropriate or unauthorised use of social media theft accepting bribes, not declaring or managing Declarable Associations, unauthorised secondary employment, misuse of police resources, breaches of information security, unauthorised disclosure of police information, stalking, family violence, sexual offences, assault, circulating offensive material, racist behaviour, breaches of human rights, excessive use of force undeclared and mismanaged conflicts of interest misrepresentation on log books, time sheets or registers.

The *Special Report Concerning Police Oversight*⁷ published by IBAC provides some clarification on what constitutes police personnel misconduct. It found that Victorians consider the following behaviours as corruption or misconduct: accepting bribes, removing drugs from a crime scene to sell or for personal use, racist behaviour, being under the influence both on and off duty. The *Report* suggests that this conduct should be defined as Police personnel misconduct.

This *Report* also examined 'predatory behaviour' as a type of police personnel misconduct. Predatory behaviour includes the misuse of police authority and power to sexually exploit vulnerable people, who may include victims of domestic and family violence and other crimes, young people, sex workers, people with drug and/or alcohol dependency, and people with a disability.⁸ The *Report* recommended that this conduct should also be clearly defined as Police personnel misconduct.

It is the experience of legal practitioners representing complainants that whilst the definitions provided by IBAC cover a broad range of behaviours that we regularly receive complaints about, IBAC rarely investigates these types of behaviour unless it is connected with corruption or within the context of an enquiry (eg the recent Ballarat Police case). To our knowledge these types of misconduct are also rarely the subject of any effective level of oversight by IBAC.

1.3 Public confidence in the system and underreporting

Any examination of the role and effectiveness of IBAC and the broader police complaints system has to acknowledge that the current police complaints system does not have the confidence of the public and consequently that complaints are massively under reported to both IBAC and Victoria Police.

Legal practitioners in this field, including our lawyers at Youthlaw, hear of police misconduct on a regular basis. However clients are not prepared to make a complaint because they have no confidence it will be investigated with integrity, and they fear the repercussions of complaining.

Our experience is that the vulnerable young people do experience significant and repeated abuse by police and other authorities and yet overwhelmingly do not make a complaint.

⁵ Independent Broad-Based Anti-Corruption Commission Act 2011 (Vic)

⁶ See IBAC website at: <http://www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about/what-is-police-misconduct>

⁷ IBAC, 'Special Report Concerning Police Oversight' August 2015 p 13

⁸ IBAC, 'Special Report Concerning Police Oversight' August 2015 p 14

The abuse they experience is often significant and disturbing and yet when advised of the complaints process they are extremely reluctant to lodge a complaint. In general they have no confidence their complaint will be taken seriously and they understandably fear consequences of complaining about police officers that have so much power over their daily lives.

In our experience these young people rarely exaggerate the abuse or seek to complain for vexatious or flippant reasons. In fact most believe it is just a fact of life that they will be treated this way and there is little they can do about it. Overwhelmingly they are unaware they can make a complaint however once they receive this information they rarely want to make a complaint fearing criminal charges, retribution by police and not being confident that their complaint will be taken seriously.

1.4 Delays in investigations

The experience of our legal service and of other practitioners in the field is that delays in investigating complaints are unacceptably high. Our test case is perhaps an extreme example as it was a test case, however the result was not a surprise given their investigation took place seven years after the alleged incidents.

We refer to the submission from Flemington Kensington Community Legal Centre Police Accountability project in which they comment on delay, based on their extensive practice experience.

There are suggestions that internal investigation by police do result in police officers being motivated to deliberately slow down investigation to avoid scrutiny of their colleagues and to delay disciplinary actions until they retire.

2. Identify and assess best-practice models for the oversight of police.

2.1 Research and reviews on police oversight models

There is excellent research, reviews and critiques on police complaint system models throughout the world. We are confident that the Committee will be provided with sufficient coverage of these. We are familiar with these models through the research of Australian academics Tim Prenzler and Regina Graycar, and critiques by Deborah Glass (current Victoria Ombudsman, but previously Commissioner of the UK IPCC) , Flemington Kensington Community Legal Centre and the Law Institute of Victoria.

Research by Tim Prenzler

Academic Tim Prenzler has conducted extensive research on the range of police complaint models including oversight and direct investigation model.

He presented some conclusions drawn from this body of research to a Law Institute of Victoria Roundtable on the 25th July 2017. He described nine essential elements to ensure legitimacy & effectiveness in police integrity management and accountability.

1. An independent agency controls the complaints process and conducts all formal investigations.
2. The agency covers the entire public sector equally.
3. The agency is highly accessible (including regional offices).
4. The agency is fully empowered (inquisitorial powers, use public hearings where appropriate, own motion powers, covert operations powers).
5. Flexible complaints disposition system (eg. ADR and mediation, prosecutorial options and disciplinary process).

6. The agency evaluates a comprehensive battery of police in-house integrity management strategies (including a state of the art complaint and use of force reduction program).
7. The agency itself is subject to comprehensive accountability and transparency processes.
8. Strong whistle blower protection (including public interest protection).
9. The agency leadership skill set combines legal due process & behaviour management.

Ontario Canada – oversight models

We refer you an excellent report⁹ by Judge Michael Tulloch (of the Court of Appeal for Ontario) who recently reported on his review of the police complaints system in Ontario.

This report details Ontario’s tiered police complaints system that consists of 3 oversight bodies, their Special Investigations Unit (SIU) a civilian oversight agency that investigates police action that results in a death, serious injury, or allegations of sexual assault , the Office of the Independent Police Review Director (OIPRD), which oversees public complaints about the police in Ontario and the Ontario Civilian Police Commission (OCPC), which primarily adjudicates appeals of police disciplinary hearings, among a number of other functions.

He provides a very comprehensive examination of the 3 oversight bodies.

He generally finds the SIU is a highly effective body but it requires many improvements to achieve greater effectiveness. We summarise some of his recommendations below.

- The SIU should develop and deliver mandatory social and cultural competency programs for their staff. Those programs should be developed and delivered in partnership with the communities they serve and organizations supporting those communities.
- There should be ongoing recruitment and development of people from communities under-represented within the oversight bodies, including in senior and leadership positions.
- The SIU should create a public accountability office responsible for public communications and should be provided with adequate resources for this function.
- The SIU should enhance its services to affected persons and should be provided with adequate resources for this function.
- Affected persons support staff should make initial contact with affected persons who are not witnesses. They should maintain ongoing, proactive communication with all affected persons throughout an investigation.
- The SIU should enhance its community outreach and should be provided with adequate resources for this function. The program should target both the general public and community organizations that serve vulnerable people.
- The SIU should actively recruit civilian investigators with relevant experience who were not former police officers.
- The legislation should provide that the SIU reports to the public on every investigation.
- Resources should be designated and made available to community groups and organizations to assist complainants through the complaints process.

In regard to the OIPRD he is highly critical that it refers most complaints to the police force to internally investigate. He recommends these needs to change.

Below are his executive summary recommendations :

⁹ The Honourable Michael H. Tulloch, *The Report of Independent Police Oversight Review, Ontario 2017*
https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/

57. A commonly expressed view at my consultations was that “the police should not be investigating police.” Nonetheless, that is the current state of affairs. The OIPRD is largely a screening body and not an investigative one.

58. This, of course, is not the OIPRD’s fault. It was never designed to investigate all public complaints. It does not have the resources to do so.

59. In my view, that should change. All public conduct complaints should be investigated by the OIPRD. Independent investigation would help foster public trust in not only the complaints system, but policing more generally.

60. I recommend that within five years the OIPRD should be the sole body to investigate public conduct complaints (recommendation 7.20). To do so, I also recommend that it be resourced accordingly (see recommendation 7.21).

61. I further recommend that the OIPRD should have the power to lay disciplinary charges against police officers, rather than having to direct a chief of police to do so (see recommendation 7.25).

62. Fourth, I make recommendations to ensure that the OIPRD be able to investigate effectively. These are similar to my recommendations on the SIU. I say that there should be a duty for the police to cooperate with the OIPRD, and that the requirements of this duty should be set out in legislation (see recommendations 7.27, 7.28, and 7.29). I also recommend that there should be a sanction for failing to cooperate (see recommendation 7.30).

63. Fifth, I make recommendations aimed at enhancing the OIPRD’s transparency and accountability. These include recommendations to periodically report to involved parties about the status of the complaint, to develop performance metrics that are reportable to the public, and to collect and publish summary information on the outcomes of public complaints (see recommendations 7.33, 7.34, 7.35, and 7.36).

64. Finally, I address systemic reviews and monitoring. For systemic reviews, I recommend that the OIPRD publish the results and recommendations of its systemic reviews in the form of a written report (see recommendation 7.37). In addition, for greater accountability, I say that a chief of police should be required to respond in writing to the OIPRD’s recommendations, if designated to do so by the OIPRD (see recommendation 7.38).

65. For monitoring, I recommend that the OIPRD monitor complaints and publish the results of disciplinary charges, including the outcomes and penalties imposed (see recommendation 7.39).

United Kingdom research by Deborah Glass

Deborah Glass, currently the Victorian Ombudsman, was the Commissioner of the Independent Police Complaints Commission (IPCC) in the United Kingdom for ten years, and member of its predecessor the Police Complaints Authority for three years before that.

The IPCC is not dissimilar to IBAC. It conducts investigations into police related serious injury and death cases, but otherwise like IBAC refers most complaints about police to the UK police force to investigate.

Deborah Glass conducted academic research on her ten years at the IPCC. Her paper ‘*Towards greater public confidence: A personal review of the current police complaints system for England and Wales*’¹⁰ provides a

¹⁰ *Towards greater public confidence, A personal review of the current police complaints system for England and Wales*’ by Deborah Glass Commissioner, March 2014, p 2 <https://www.ipcc.gov.uk/sites/default/files/Documents/speeches/A-review-of-the-complaints-system-by-Deborah-Glass-March-2014.pdf>

detailed analysis of IPCC in its role as an oversight body, as well an examination of what is needed for an overall effective police complaints system. Her introductory remarks provide insight into the challenges to effective reform.

"I have no doubt that, while there have been improvements over the years and some real success stories, the system needs major reform. It has in fact needed it for decades, and has suffered from repeated piecemeal attempts at reform that tighten a bolt in the engine while loosening a few screws in the chassis. This paper seeks to analyse the strengths and weaknesses of the current system both in a historical context and in the context of other systems and countries, and make recommendations for change.

There is a historic lack of enthusiasm by Governments of any stripe to give too much power to independent bodies whose function is to oversee their own law enforcement arm.

Thus systems, and the bodies set up to implement them, are almost inevitably a product of their history, a response to some very significant event that damages public confidence in the police. Although the pattern of failure, scandal, inquiry, and reform is a well-known phenomenon both in other countries and other professions, policing reform rarely goes the distance."

Deborah Glass reflects on a number of inquiries and reviews including the UK Scarman report in 1981 and the clear appetite for substantial reform.

"The Scarman report described "a widespread and dangerous lack of public confidence in the existing police complaints system" and that "if public confidence in the complaints procedure is to be achieved any system falling short of independent investigation...is unlikely to be successful." Lord Scarman also attempted to "introduce simplicity, speed, flexibility and openness into the incredibly cumbersome, highly secretive police complaints procedure" but the legal framework ultimately adopted introduced little in the way of independence and nothing in the way of openness ".

Ms Glass provides a quote the Metropolitan Police Commissioner Lord Condon indicating police support for substantial reform.

"I believe that the most important provision in the Bill is the proposed creation of the independent police complaints commission. Many of us have campaigned for such a body for more than a decade. Police officers can intervene in people's lives in a way that alters those lives for ever—for good or for evil. It is vital that the investigation process against police officers enjoys maximum public support and confidence. Nothing short of a completely independent complaints commission will assuage public concern about the integrity and thoroughness of the complaints process"

Ms Glass concludes her introduction with an assessment of what was achieved:

"Once again, however, there was a mismatch between expectations and reality. Although it was said that the new body would investigate 1,000 complaints in its first year, when it came to writing out the cheque, the IPCC was funded to carry out 30.

While there has been real change over the decades, including a level of transparency that would have been unthinkable during the Police Complaints Board period of the 1970s, it is still of little surprise that many of those who come into contact with the system are dissatisfied. There are numerous reasons for this; first, the IPCC is simply unable to do what it says on the tin: it is not an independent body investigating police complaints. That is not what the Police Reform Act set up. Relatively few complaints meet the threshold for referral to the IPCC so the police themselves deal with the vast

majority of cases. Of the total number of referrals received by the IPCC (this includes complaints but also death and serious injury and conduct matters where no complaint has been made), currently about 94% are in fact referred back to be dealt with by the police themselves, sometimes with a degree of oversight by the IPCC”¹¹

2.2 Key features of a best practice model

The overall consensus from the extensive available research is that police force investigation of police complaints is generally highly flawed and cannot satisfy basic natural justice requirements and is not compliant with human rights benchmarks.

The research also indicates that most oversight bodies are highly flawed, usually because of insufficient capacity, insufficient control and for management to be effective. Even with sufficient powers to control and manage it is recognised that it is often not possible to cure deficiencies in an investigation by police once it has been carried out and evidence collected (or not).

The research strongly favours independent investigation external to the police force for all but customer service type complaints.

Any best practice model in our view must be properly resourced and empowered to ensure investigations are:

- *Independent of the police (institutionally, culturally, and politically);*
- *Capable of conducting an adequate investigation (i.e. an investigation leading to criminal and/or disciplinary outcomes);*
- *Prompt in its investigations;*
- *Open to public scrutiny;*
- *Victim centred; enabling the victim to fully participate in the investigation, including through access to information relevant to their complaint.*

In essence we are of the view that complaints must be independently received, assessed and where a complainant opts for it, independently investigated.

The model must ensure those who complain are treated fairly, promptly and do not suffer repercussions as a result of complaining.

Any model needs to recognise that police have enormous power over people’s lives and particularly those who are vulnerable. The use of coercive and invasive powers is a routine part of a police member’s job. Police are provided with weapons including guns, Tasers, OC (pepper) spray and batons. Police arrest, detain, stop, question and search people, their cars and homes, all of which impacts on fundamental human rights and freedoms.

The ideal model in our view is a separate, independent body to deal with all police complaints such as the Police Ombudsman of Northern Ireland. This body would be the entry point for all complaints, would have clear controls over police bias (eg. % of officers employed and in managerial roles) and be adequately resourced to investigate all complaints including serious injury and death.

¹¹ *Towards greater public confidence, A personal review of the current police complaints system for England and Wales’* by Deborah Glass Commissioner, March 2014, p 8 <https://www.ipcc.gov.uk/sites/default/files/Documents/speeches/A-review-of-the-complaints-system-by-Deborah-Glass-March-2014.pdf>

With complainant consent, there is a role for Victoria Police to investigate some complaints however we are very clear that this can only be for customer service type complaints, and in the case of the latter, this needs to be clearly defined.

Should government decide to allow referral to police of more serious matters, we are not at all confident & the public will not be confident that oversight will be sufficient to ensure integrity of the investigation. At the very minimal there would need to be in place a legislative framework that provides the oversight body with sufficient powers and capacity to control and direct the investigation, override findings and order outcomes such as disciplinary proceedings. We refer you to Deborah Glass's paper for more detailed examination of what such powers and legislative directives would need to include.

3. Identify and review the main challenges to the effective oversight and investigation of complaints and disclosures about police in Victoria

3.1 Assessment & classification of complaints

Tim Prenzler observes *"There are notably greater confidence levels in systems when the independent oversight body receives and assesses all complaints..."*

There is considerable concern amongst complainants and legal practitioners about the assessment and classification of complaints. This impacts on the body it is assigned to for investigation (e.g. IBAC or Victoria Police), where it is investigated within Victoria Police (eg by the Police Conduct Unit or regional station managers) and the oversight the complaint is given.

In commentary in regard to police complaints there is often reference to the bulk not being serious and are low level issues such as rudeness, lack of follow up etc. For example in the July 2017 Law Institute Journal General Counsel of IBAC, Dr John Lynch, responded to the Law Institute of Victoria (LIV) call for a new body to be established to investigate police misconduct complaints, saying:

"We do independently assess each [police] complaint, we do review investigations that police conduct but a lot of complaints involve performance issues and low level conduct [rudeness, poor customer service]..."¹²

In our experience complaints are rarely low level customer service in nature. The complaints we hear from young people are about abuse, physical assaults, degradation, prejudicial comments to degrade and control and excessive and intrusive policing. They are human rights abuses and would be unacceptable to any member of the community.

The experience of vulnerable young people is not dissimilar to the experience of other vulnerable and marginalised population cohorts in the community. By way of example, we refer you to the *Koori Complaints Project 2006-2008*, a project conducted jointly by staff from the then Victorian Police Ethical Standards Department (ESD) and the Victorian Department of Justice Indigenous Issues Unit.¹³

The project staff looked at files and spoke to indigenous complainants in regard to complaints made over a 15 year period. The complaints were overwhelmingly classified as being in the lowest (least serious) category of complaint. This is despite almost 40% complaints being allegations of assault.

¹² Carolyn Ford, *Safeguarding the public trust*, Law Institute Journal , 1 February 2017

<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/Jan-Feb-2017/Safeguarding-the-public-trust>

¹³ Victoria Police 'Koori Complaints Project' 2006-2008 <http://www.policeaccountability.org.au/wp-content/uploads/2014/03/Koori-Complaints-Project-Final-Repord.pdf>

The report notes “It was concerning that that the project team identified that since 2004, no assault complaint made by a Koori person has been classified correctly.¹⁴ Instead these complaints received a minor or management status. These are the most common complaints made by Kooris so the majority of these allegations were never investigated as a criminal matter”¹⁵

Complaints classified as minor were referred to local line managers (including the police station where the officer(s) complained about were stationed. During the research project ESD reviewed all assault complaints and most were reclassified ‘up ‘and criminally investigated.

The project team noted “reluctance within police to name these complaints as assaults and instead employing a range of euphemisms all of which mitigate the seriousness of the allegation:

*“excessive force, minor assault, pissy minor assault, manhandling, rough handling, misuse of police equipment, crash tackling, bringing to the ground, decentralising, overzealousness and “attitude adjustment”.*¹⁶

3.2 Determining the resolution pathway

Currently decisions are made as to the resolution pathway of a complaint:

1. IBAC to keep and investigate a complaint.
2. IBAC to refer without oversight to Victoria Police.
3. IBAC to refer with differing levels of oversight to Victoria Police.
4. Victoria Police Professional Standards Command to investigate or refer to operational management.

This area of the complaints system is in our opinion highly flawed due to a range of factors including police bias factors, lack of resources, lack of professional skill, lack of guidelines & criteria and subjective judgement about the complaint. Compounding this situation the complainant is usually given very little information to justify the determined resolution pathway, is usually not informed until a decision is made & has little redress apart from an appeal through the courts lasting years.

We strongly support a complainant determining the resolution pathway to investigate their complaint. While this would no doubt result in more referrals to investigation the literature on complaints models suggests that where effective alternative resolution is available such as mediation a significant number of complainants will opt for non investigation resolution.

We note Deborah Glass recommended this approach in regard to the UK IPCC. She explains her rationale as follows:

“The advantage is that it puts the complainant firmly at the heart of the process. ..Classifying their own complaint would greatly increase the likelihood of eventual satisfaction for the significant majority of complaints that neither involve serious misconduct nor are regarded by the complainant as doing so. While this will, inevitably, result in a number of complaints being referred for investigation that do not justify it, the IPCC would be in a position to assess all such complaints, and should have the power to close them without investigation or refer them back as appropriate.”¹⁷

We recommend

- Complainants to determine the body that will respond to their complaint (eg IBAC or Victoria Police)

¹⁴ Op cit, p34

¹⁵ Op cit, p34

¹⁶ Victoria Police ‘Koori Complaints Project’ 2006-2008, p34

¹⁷ Debra Glass, ‘Towards greater public confidence’ March 2014 p34 and p34

- All complaints should be received by an independent body and that assessment & classification is conducted by highly skilled complaints handling professionals.
- Establish a number of resolution options apart from investigation, to be offered to the complainant including mediation or alternative dispute

3.3 Complaint handling

The protection of complainant interests requires their involvement in the complaint process. This is basic to natural justice, good practice process and is evident in all other complaints handling systems. It requires that a police complaint body must consider the complainant. Currently the complaints system operates culturally and in practice like a prosecutorial body – the complainant is on trial. Investigators should treat complainants with the same care as all victims of alleged crime. This includes consideration in taking complaints that complainants may be reluctant, fearful and traumatised. They may find it hard to discuss and give coherent details. Particular care must be taken with interviewing young people.¹⁸

Unfortunately this is not the experience of our client’s experience. The feedback we have received is that their complaint is investigated assuming they are lying and need to be tested and caught out. Interviews and follow up contact felt like a criminal interrogation. One client described being visited unannounced early in the morning by an investigator demanding to talk to him.

There would need to be a significant change for IBAC to become an effective complaints handling body. The Victorian Police Complaints Authority provides an example of the importance of getting culture, resources, complainant friendly processes and enabling legislation in place right from the beginning. The Police Complaints Authority (“the PCA”) operated between 1986 and 1988. It operated a 24 hour complaint hot-line and outreach to complainants. It exercised its power to investigate “public interest” complaints and saw these as including complaints made by ordinary people about police abuses. It conducted thorough re-investigation of complaints where complainant’s raised concerns about the initial police investigation. Unfortunately the PCA was seriously under funded by the Government and hampered by badly drafted legislation. It was shut down by the Government within two years of its commencement following a powerful backlash from the Police Association¹⁹.

3.4 Transparency & accountability of complaints

Complaint handling and resolution is currently conducted on an essentially *ex parte* basis. The complainant rarely receives information about how the investigation is progressing and they are also rarely given the opportunity to comment or clarify as the investigation proceeds. This has a number of negative impacts. This includes compromising the complainant’s well-being and safety. It also impacts on the ability of the complainant to clarify aspects of the complaint, ensuring the investigation proceeds to collect appropriate and relevant evidence and interview witnesses.

Complainants usually also receive little in the way of explanation of the outcome of their complaint. Often all they receive is a letter indicating it was not substantiated or not. There are many models such as the one in the UK where the complainant receives a report.

¹⁸ An Effective System for Investigating Complaints Against Police (2009) Tamar Hopkins, p95

¹⁹ Freckelton, Ian 1991 “Shooting the Messenger” in *Complaints Against the Police, The Trend to External Review*, edited by Andrew Goldsmith.

Disciplinary action against officers is generally conducted in private and the complainant is not informed of the outcome. If complainants were made aware of actions it would go a long way to restoring confidence in the system.

3.4 Perception of bias if police continue to investigate – perception of police investigating themselves

There is very low public confidence in the current police complaints system due to strong disapproval of, and a perception of bias, in police investigating themselves.

The research of models world wide indicates that there is a positive a beneficial role for police to respond to some complaints. This is particularly where the complaint is about customer service type issues such as rudeness, inaction etc. As well resolution through police initiated mediation, as long as it is properly conducted, has become a highly regarded feature of successful models, particularly in the United States

Nonetheless it is clear that a line must be drawn where the integrity of police complaints investigation cannot be ensured. In our opinion this line is where the complaint is not a customer service issue, and where a complainant does not consent to police investigating the complaint.

In regard to investigation of alleged criminal behaviour by police there is also a reality that needs to be acknowledged. This is that alleged perpetrators are also police officers and their knowledge and institutional context poses difficulties for ensuring integrity of police complaints investigation by police or even oversight bodies.

The Parliament of New South Wales in late 2006 undertook a 10-year review of the Police Oversight system and highlighted the challenges:

“... investigation of police is potentially the most difficult area of criminal investigation, for many reasons, including the following:

- 1. police know the system and are likely to have early warning of any interest in their activities;*
- 2. they are skilled in investigation techniques and counter-surveillance;*
- 3. they are likely to have corrupt associates willing to cover for them;*
- 4. they are not easily fazed by interview, they are experienced in giving evidence, and they are capable of lying...*
- 5. they can exert considerable personal influence over internal informants, and internal investigators, particularly if they hold senior rank...*
- 6. in many cases there is not a conventional victim to act as a complainant”.*

We would also add that complainants have a very real fear that a complaint against a police officers will result in retaliatory action such as extra charges , stops and searches and harassment by the officer or his colleagues. Clients have told us of police officers referring to their complaint and then proceeding to racially and verbally abuse them.

3.5 Retaliatory charges & Legal Aid ineligibility

Our experience and that of other practitioners in this field is that a major disincentive to complain about police conduct, for disadvantaged and vulnerable complainants, is that there is likelihood that their complaint will trigger further charges by and interactions with police. For our clients (young people under 25 years) this is compounded by current Victoria Legal Aid guidelines that restrict legal aid grants for representation to those who are facing jail. The practical reality of this is that young people under 25 years often plead to charges rather than contest them.

4 Consider best-practice strategies to improve the oversight and investigation of police corruption and misconduct and how they may be implemented in Victoria

Drawing on research and analysis referred to above, and our client's experience we recommend a best practice model for Victoria consisting of the following:

- All complaints initially to be received by an independent body. This could be IBAC or possibly VEOHRC.
- Assessment and classification of all complaints is conducted by the independent complaints handling body
- IBAC be resourced to conduct complete independent investigation of all police misconduct complaints except obvious customer service complaints.
- Determination of the complaint resolution pathway and the body (investigation/ mediation etc.) to be determined by the complainant and where there is oversight there be an appeal right for a complainant.
- IBAC actively recruit civilian investigators with relevant experience who were not former police officers. There be rules that require a percentage of police versus civilians and civilians in managerial or otherwise crucial positions.
- IBAC develop and deliver social and cultural competency programs for their staff.
- The complaints process be made user friendly, prompt and informative, victim centred and complainant orientated; enabling the victim to participate in the investigation, including access to information.
- Introduction of mediation or other alternate dispute resolution options for complaint resolution.
- IBAC resourced in a public accountability role and providing public communications, including resources made available to community groups and organizations to assist complainants through the complaints process
- IBAC enhance its services to affected persons and maintain ongoing, proactive communication with all affected persons throughout an investigation.
- Where oversight of a police investigation occurs, clear powers for IBAC to control the investigation.
- IBAC have inquisitorial powers, public hearings and where appropriate own motion powers to investigate police practices of concern.
- Hearings are open to public scrutiny.

We believe these essential features could be resourced and performed utilising current integrity bodies in Victoria.

Accompanying legislative reforms

A best practice model would be supported by the following legislative reforms:

- Legislation to limit IBAC's ability to refer complaints that raise allegation of corrupt conduct, serious injury or human rights infringements involving Victoria Police.
- Legislation that directs that a complainant determines the body to investigate their complaint and where the complaint is referred to Victoria Police (with their consent) there is a right of appeal for the complainant, in regard to the outcome.
- Legislated criteria and powers that detail the levels and criteria for oversight and powers that can exercised by IBAC. The objective must be that any IBAC review function is effective and this will

require providing sufficient powers to IBAC to intervene, make binding directions and have the ability to take control where necessary to preserve integrity.

- During investigation to compel police witnesses to answer questions and in supervising a police investigation, to set terms of reference and direct lines of enquiry.
 - Following investigation to make findings about outcome, to re-open any investigation if new evidence comes to light and to present a case for gross misconduct.
 - To initiate an investigation into any matter involving the police if it is in the public interest to do so.
 - Annual public report recording numbers and patterns of complaints, which will promote learning and good practice arising from investigations
- Legislation that provides that IBAC reports to the public on every investigation.
 - We agree with the *Special Report Concerning Police Oversight* published by IBAC in 2015 that there needs to be a review on what behaviours constitute misconduct and a consideration of specifying and including behaviours such as racism and predatory behaviour towards vulnerable people.²⁰
 - We agree with the recommendation from the 2015 Review of the Victorian *Charter of Human Rights and Responsibilities Act 2006*²¹ that the Victorian Government ensures IBAC has capacity to investigate allegations of serious human rights abuses by police and protective services officers. (Recommendation 26)
 - Changes to the *Victoria Police Act 2013* (Vic) to tighten up police investigations and to include powers for IBAC to charge and prosecute misconduct.

Contact for submission:

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²⁰ IBAC, 'Special Report Concerning Police Oversight' August 2015 p 13.

²¹ Recommendation 26, From commitment to culture The 2015 Review of the Victorian *Charter of Human Rights and Responsibilities Act 2006* https://engage.vic.gov.au/application/files/7514/8609/7762/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf



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

We welcome the opportunity to contribute to the IBAC Committee Inquiry into the external oversight of police corruption and misconduct in Victoria.

Please find a summary of our recommendations below:

Recommendations

- All complaints about Victoria Police misconduct are initially received by an independent body. This could be IBAC or possibly VEOHRC or the Victorian Ombudsman's Office.
- Assessment and classification of all complaints is conducted by the independent complaints handling body
- IBAC be resourced to conduct complete independent investigation of all police misconduct complaints except obvious customer service complaints.
- Determination of the complaint resolution pathway and the body (investigation/ mediation etc.) to be determined by the complainant and where there is oversight there be an appeal right for a complainant.
- IBAC actively recruit civilian investigators with relevant experience who were not former police officers. There be rules that require a percentage of police versus civilians and civilians in managerial or otherwise crucial positions.
- The complaints process be made user friendly, prompt and informative, victim centred and complainant orientated; enabling the victim to participate in the investigation, including access to information.
- Introduction of mediation or other alternate dispute resolution options for complaint resolution.
- IBAC resourced in a public accountability role and providing public communications, including resources made available to community groups and organizations to assist complainants through the complaints process
- Where oversight of a police investigation occurs, clear powers for IBAC to control the investigation.
- IBAC have inquisitorial powers, public hearings and where appropriate own motion powers to investigate police practices of concern.
- Hearings are open to public scrutiny.
- IBAC enhance its services to affected persons and maintain ongoing, proactive communication with all affected persons throughout an investigation.
- IBAC develop and deliver social and cultural competency programs for their staff.

We believe these essential features could be performed by current integrity bodies in Victoria. The key is to adequately resource them and to establish the legal framework to ensure they have the powers they require and there is clarity about their function and accountability.

The cost of resourcing such a model is sometimes flagged as an obstacle to such reform however our opinion is that overall cost will be outweighed by the financial benefit of proactive and effective complaints handling, a reduction in later stage expensive proceedings & utilising the existing infrastructure of current integrity bodies.

Accompanying legislative reforms:

- Legislation to limit IBAC's ability to refer complaints that raise allegation of corrupt conduct, serious injury or human rights infringements involving Victoria Police.
- Legislation that directs that a complainant determines the body to investigate their complaint and where the complaint is referred to Victoria Police (with their consent) there is a right of appeal for the complainant, in regard to the outcome.
- Legislated criteria and powers that detail the levels and criteria for oversight and powers that can exercised by IBAC. The objective must be that any IBAC review function is effective and this will require providing sufficient powers to IBAC to intervene, make binding directions and have the ability to take control where necessary to preserve integrity of the investigation.
- Legislation that provides that IBAC reports to the public on every investigation.
- We agree with the *Special Report Concerning Police Oversight* published by IBAC in 2015 that behaviours such as racism and predatory behaviour towards vulnerable people should be included in the definition of misconduct.²²
- We agree with the recommendation from the 2015 Review of the Victorian *Charter of Human Rights and Responsibilities Act 2006*²³ that IBAC be ensured capacity to investigate allegations of serious human rights abuses by police and protective services officers. (Recommendation 26)
- Changes to the *Victoria Police Act 2013* (Vic) to tighten up police investigations and to include powers for IBAC to charge and prosecute misconduct.

²² IBAC, 'Special Report Concerning Police Oversight' August 2015 p 13.

²³ Recommendation 26, From commitment to culture The 2015 Review of the Victorian *Charter of Human Rights and Responsibilities Act 2006* https://engage.vic.gov.au/application/files/7514/8609/7762/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf