



IBACC Submission No. 44  
Received: 4 September 2017

4 September 2017

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Anti-Corruption Commission Committee  
Parliament House  
East Melbourne VIC 3002

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Dear Madam

## Submission to the inquiry into external oversight of police corruption and misconduct in Victoria

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We thank the Independent Broad-based Anti-corruption Commission Committee ('the Committee') for the invitation to make a submission to the inquiry into external oversight of police corruption and misconduct in Victoria. We also take this opportunity to commend the Committee for conducting this inquiry.

Robinson Gill Lawyers has represented and advocated for persons affected by police misconduct since the 1990s. We are experts in civil litigation against the State of Victoria for torts committed by its police members. Our clients have engaged in the police accountability system at various stages, including during the complaints process. The collective experience of our clients' engagement with that system has been one of uniform dissatisfaction.

### 1. OVERVIEW OF CURRENT SYSTEM

Complaints of police misconduct can be lodged with either Victoria Police or the Independent Broad-based Anti-Corruption Commission ('IBAC'). While IBAC has the jurisdiction and power to investigate police misconduct complaints, it refers over 90% back to Victoria Police for investigation.<sup>1</sup> It is our experience that significant complaints, including complaints of assault, are referred back to Victoria Police.

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<sup>1</sup> 'Policing the police' (2014) 11 Law Institute Journal 14.

Victoria Police therefore conducts the majority of investigations flowing from complaints regarding police officers. These complaints are triaged by the Police Conduct Unit ('PCU') of Victoria Police. The investigations are conducted by members of PCU, members at nearby stations or even members in the same station as the police member(s) against which the complaint was lodged.

IBAC investigate some police misconduct in Victoria. The most high profile investigation has been Operation Ross in which a public hearing occurred. In addition, IBAC exercise an oversight function by monitoring those investigations performed by Victoria Police.

## 2. LIMITATIONS OF CURRENT SYSTEM

### 2.1 Investigations conducted by Victoria Police

In our experience many complaints fail to be properly investigated by Victoria Police. The process is protracted and the complainant is largely ignored.<sup>2</sup> The investigation is determined without the opportunity for the complainant to respond to information gathered by the investigating officer or the account given by the subject member(s). Three of the substantial deficiencies are outlined below.

#### *Efficacy of investigations*

About 9% of complaints are substantiated; a lower substantiation rate than comparable jurisdictions.<sup>3</sup> Troublingly, the substantiation rate drops to less than 4% where the complainant has alleged they were assaulted by police members.<sup>4</sup>

IBAC conducted an audit of police misconduct complaints investigated by Victoria Police. That audit identified an alarming number of investigatory failings, including:

- 16% of complainants were not contacted by the investigating officer.<sup>5</sup>
- 34% of witnesses were not contacted by the investigating officer.<sup>6</sup>
- Relevant evidence, such as CCTV footage, was not considered in 17% of files.<sup>7</sup>
- In 14% of files the determination reached was inappropriate.<sup>8</sup>

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<sup>2</sup> IBAC, *Audit of Victoria Police complaints handling systems at regional level: summary report* (2016) 13.

<sup>3</sup> Ibid 15.

<sup>4</sup> Flemington Kensington Community Legal Centre, *Independent Investigation of Complaints against the Police: Policy Briefing Paper* (2017) 9.

<sup>5</sup> IBAC above n 2.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid, 15.

- In only 7% of files was the officer's complaint history considered during the triage or investigation stage.<sup>9</sup> IBAC recommends that complaint histories be attached to all complaint files.

The lack of communication with witnesses has been a longstanding deficiency of police misconduct investigations. In its 2014 Communication, the United Nations Human Rights Committee ('UNHRC') commented on the Victoria Police's investigation into assault allegations made against its own officers by Corinna Horvath in 1996. The UNHRC found that police had not interviewed the complainant or relevant civilian witnesses when investigating the complaint.<sup>10</sup>

Complainants dissatisfied with the complaints process often pursue civil litigation to obtain a sense of justice. In our experience a finding by Victoria Police that a complaint was not substantiated has little impact on the outcome of the litigation. Together with the inadequacy of Victoria Police's investigations, this suggests that the low rate of 'substantiated' complaints is unlikely to be reflective of the true number of genuine complaints.

### *Transparency*

Complainants often have little contact with the investigating officer and receive only limited updates throughout the process. At the end of the investigation the complainant will receive a brief letter stating each allegation and whether it was substantiated, unsubstantiated, unfounded etc. The decision letter provides neither the method of conduct, or the investigating officer's reasoning behind the decision. This deprives the complainant of any tangible understanding of how their complaint was handled.

Complainants can gain access to the investigation file through Freedom of Information processes if the initial complaint is lodged with Victoria Police. However, s 194 *Independent Broad-based Anti-Corruption Act* ('IBAC Act') applies if the initial complaint is lodged with IBAC and then referred to Victoria Police for investigation. The complainant will therefore be precluded from accessing the same file to which they would otherwise have been entitled had the complaint been lodged with Victoria Police initially. Whilst Parliament passed the *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill* 2016 in May this year with the intention of overcoming this discrepancy, it is our view that the amendments are not sufficient to achieve this aim.

### *Conflict of interest*

There is a clear risk for a conflict of interest where Victoria Police investigates its own officers. Even a perception of a conflict of interest is sufficient to undermine public confidence in the investigatory

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<sup>9</sup> Ibid, 9.

<sup>10</sup> Human Rights Committee, *Views: Communication No 1885/2009*, 110th sess, UN Doc CCPR/C/110/D/1885/2009 (27 March 2014) [8.3] ('*Horvath v Australia*').

process. Commentary regarding the internal investigation of the Inflation Nightclub shooting is but one recent illustration of the public's lack of confidence in police to fairly investigate its own officers.

This perception of bias exists regardless of which officer is allocated the investigation, however that perception is significantly escalated where the complaint is referred for investigation to the station at which the officer who is the subject of the complaint works.

The IBAC audit identified that an inappropriate investigator was appointed in 17% of files.<sup>11</sup> The investigator was deemed inappropriate for either not being of a higher rank than the subject officer, working at the same station as the subject officer, or having a complaint history relevant to the investigation.

11% of files were wrongly classified, including instances where serious complaints were classified as minor customer service issues.<sup>12</sup> It is often these types of complaints which are referred to the member's station for investigation.

Individuals aggrieved by police members often lose faith in the police force and become cautious. The lack of transparency surrounding the investigatory process together with the perceived (and sometimes actual) conflict of interest means investigations performed by police often carry little weight with complainants.

## **Role of IBAC**

IBAC investigates a very small portion of police misconduct complaints. The IBAC investigatory process is plagued with many of the difficulties encountered where the complaint is investigated by police, including limited involvement of complainants and lack of transparency. Three of the substantial difficulties with IBAC are outlined below.

### *Resourcing*

In the 2016 financial year, about 1,300 police misconduct complaints were received by IBAC.<sup>13</sup> At 30 June 2016, IBAC had 13 open police misconduct investigations.<sup>14</sup> Extrapolating the above figures, IBAC seemingly investigates around 1% of the police misconduct complaints it receives.

The complaints received by IBAC are only a portion of the total complaints about police members as complaints are also lodged directly with Victoria Police. Practitioners in this area advise clients against lodging complaints with IBAC, and instead encourage complaints to be lodged directly with Victoria

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<sup>11</sup> IBAC, above n 2, 11.

<sup>12</sup> Ibid 8.

<sup>13</sup> IBAC, *Annual Report 2015/2016*, 16-17.

<sup>14</sup> Ibid 19-20.

Police, for two main reasons, as previously discussed. Firstly, it is almost inevitable that the complaint will be referred to Victoria Police for investigation. Secondly, the complainant is provided with limited information about how the investigator reached their final decision and prevented from accessing their file through Freedom of Information due to s 194 *IBAC Act* (see above).

When it commenced operation February 2013, IBAC subsumed the roles of multiple integrity bodies including the Office of Police Integrity ('OPI'). It is understood that the OPI had a similar number of investigators as IBAC, yet IBAC now has a significantly broader areas of responsibility. In the 2012 financial year, the OPI received 697 complaints,<sup>15</sup> approximately half the number of police misconduct complaints received by IBAC in the 2016 financial year. Further, police numbers have increased by nearly 10% since IBAC commenced operation.<sup>16</sup>

IBAC is not sufficiently resourced to conduct the bulk of investigations into police misconduct.

### *Corruption-focused*

IBAC is focused on corruption. Section 15(1A) *IBAC Act* requires IBAC to "... *prioritise its attention to the investigation and exposure of corrupt conduct which the IBAC considers may constitute serious corrupt conduct or systemic corrupt conduct*". The body has been named an 'anti-corruption commission'. It is apparent from the website that IBAC prioritises corruption claims. The navigation tabs on its website for example, are "Reporting corruption", "Investigating corruption", "Preventing corruption", "Publications" and "More".

In many circumstances, the conduct subject of a police misconduct complaint is a discrete event which would not satisfy the definition of 'corruption' but could be nevertheless a significant infringement on a person's rights. It is therefore not easily apparent to a potential complainant that they can lodge a complaint with IBAC.

### *Structure*

Difficulties arise from the fact that IBAC has a number of investigatory functions, some of which have conflicting interests. For example, confidentiality and secrecy is essential for an effective anti-corruption body. However, transparency is vital for a robust police oversight system. The current legislation favours the anti-corruption investigatory functions of IBAC.<sup>17</sup> This would be difficult to overcome with legislative amendments without separating IBAC into two bodies with separate governing legislative provisions.

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<sup>15</sup> Office of Police Integrity, *Annual Report 2011 – 2012*, 28.

<sup>16</sup> See Victoria Police, *Annual Report 2011-2012*, 55 and cf Victoria Police, *Annual Report 2015-2016*, 68.

<sup>17</sup> For example, see s 15(1A) *Independent Broad-Based Anti-Corruption Act 2011* (Vic).

### 3. BEST-PRACTICE COMPLAINT BODY

#### *Human Rights Standards*

The European Court of Human Rights has described five principles for the investigation of police misconduct:

1. Independence
2. Adequacy of investigation
3. Promptness
4. Public scrutiny
5. Victim involvement.<sup>18</sup>

The Victorian system fails to meet any of these principles. Reform in this area should be guided by these principles.

#### *Call for a new complaint body*

A police accountability system is not capable of complying with these principles where investigations are conducted by Victoria Police. We call for Parliament to establish a new body for the investigation of police misconduct complaints which is independent of Victoria Police and complies the principles developed by the European Court of Human Rights.

It is our submission that IBAC should not retain an investigatory function in respect to police misconduct complaints. IBAC's priority of being a corruption-focused body creates an inherent and problematic tension with the fourth principle; public scrutiny. In most circumstances, it will not be appropriate for a corruption body to be transparent as this would hinder investigation. However, transparency is at the heart of an effective police misconduct complaints body.

Alternatively, if IBAC is to retain this function, significant legislative and internal IBAC policy/procedural reform is required. IBAC would likely need to be split into two separate internal silos with separate governing provisions, particularly in respect to disclosure of information. Consideration should also be given as to whether IBAC should be renamed to reflect its power to investigate police misconduct.

Any reform should move towards a police oversight system that reflects the principles developed in the European Court of Human Rights.

#### *Features of a best-practice complaints body*

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<sup>18</sup> Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against Police*, CommDH(2009)4, 3.

Any new complaints body should embrace international human rights standards.

Notable models for investigation of police misconduct complaints include The Police Ombudsman for Northern Ireland, Law Enforcement Review Agency (Manitoba, Canada), and, Office of Police Complaints (Washington DC, USA). Academics and those experienced in policy have highlighted the strengths and limitations of those bodies and Parliament is respectfully referred to their commentary.

We support the position outlined by the Flemington Kensington Community Legal Centre's Policy Briefing Paper<sup>19</sup> and urge Parliament not to replicate the New South Wales Law Enforcement Conduct Commission in Victoria.

#### **4. CONCLUSION**

Victoria has the opportunity to continue to lead Australia in respect to human rights. This opportunity should be embraced through the creation of a new independent human rights compliant body for the investigation of police misconduct complaints.

**Jeremy King & Merys Williams**

**ROBINSON GILL LAWYERS**

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<sup>19</sup> Flemington Kensington Community Legal Centre, above n 4, 35.