



# Independent Investigation of Complaints against the Police

Policy Briefing Paper

## Introduction

Police are granted powers by the state and it is the state's responsibility to ensure that these powers are not abused. Police must be fully accountable for their every action when interacting with citizens.

Police who abuse the trust of Victorians must be held accountable. Existing accountability mechanisms in Victoria have consistently failed to maintain accountability, uphold human rights, change police behaviour or improve practices.

The use of force, or the use of coercive and invasive powers, are 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 abuse of force or power has a profound and detrimental impact on all those who experience it, their families and entire communities. It undermines safety, self-worth and belonging and it erodes faith in the institutions of democracy and the rule of law. *Even minor excesses by Police can have a significant impact on the community.*

The abuse of police power impacts most upon the already vulnerable such as the young, the mentally ill, those from refugee and migrant backgrounds and Indigenous Australians.

This paper addresses this persistent and reoccurring problem. It draws upon the direct experience of victims, solicitors from community legal centres and law firms and upon decades of international research and developing best practice approaches.

People who, in good faith, lodge a formal complaint about something that they suffered often do so with a sense of injustice. They are often motivated by an impulse that says that *"if I don't complain, what happened to me could happen to someone else."*

Most people who spend the time and effort it takes to make a formal complaint provide a benefit to the community. Complaints from the public allow the detection, investigation, disciplining and prosecuting of police members who have engaged in misconduct. When a person takes the time and effort to lodge a formal complaint, they create an opportunity for the reform of systemic failures in police practices.

The onus is on the Victorian Government to make this system work, and not to punish, dismiss complainants, nor to hide or dismiss human rights abuses against Victorian citizens or to waste these opportunities for positive reform.

This briefing paper is intended for Ministers, Members of Parliament, policy makers, police command and community advocates. It covers five primary issues:

1. How complaints against police are currently investigated in Victoria.
2. What's wrong with the current system?
3. Getting the model right
4. Overcoming the barriers to independent investigation
5. Key policy recommendations

## 1. How complaints are currently investigated in Victoria

There are three ways you can submit a complaint against police in Victoria: at a police station, to the Police Conduct Unit, or the Independent Broad-based Anti-corruption Commission, (“IBAC”).

While, in theory, IBAC can investigate complaints against police, in practice, the overwhelming majority of complaints by the public are sent back to the police for investigation or “management”.

What this means for Victoria is that Police investigate themselves when:

- there is a death in police custody; or
- there is a complaint of torture, degradation, abuse, ill-treatment, assault, racial abuse or excessive force in police custody.

Consequentially police investigate themselves for allegations of unlawful and/or criminal conduct, disciplinary breaches, human rights abuses and other misconduct.

For the overwhelming number of cases, at most IBAC offers is a complaint triage service - and extremely limited oversight.

## 2. What's wrong with the current system?

In Australia police are rarely prosecuted or disciplined for the death, assault or ill-treatment of a member of the public<sup>1</sup>. This is not for lack of meritorious complaints. It is because the current system of accountability is not working.

### 2.1 Police consistently fail to find that meritorious complaints are substantiated

An analysis of police complaint substantiation rates indicates that there is something seriously wrong with our current system of handling complaints. Less than 10% of all complaints to police are substantiated. Tellingly however, less than 4% of all assault complaints are substantiated.

	2000-2011 <sup>2</sup>	2012 <sup>3</sup>	2013 <sup>4</sup>
Assault allegations substantiated	3.6%	2.3%	3.8%
Total complaints substantiated	6.4%	7.2%	9.8%

This is not for a lack of meritorious complaints. When courts are given the chance to assess allegations of police mistreatment, they consistently find those allegations have substance, despite being dismissed by the police complaint system. This means that our criminal courts are currently more effective institutions in holding the police to account than police complaint investigations. The extraordinary and consistent differences in the results of criminal proceedings in criminal courts and police complaint investigations highlights the failure of the current complaint investigation system and the urgent need for reform.

Since 2006, clients of the Flemington Kensington Community Legal Centre have made over 70 complaints<sup>5</sup> to the Office of Police Integrity, IBAC or

Victoria Police about their experiences. All but three complaints made to independent bodies were referred to Victoria Police for investigation. Two of the three matters investigated independently of the police resulted in disciplinary recommendations and/or the initiation of criminal proceedings against police.

In all 67 complaints investigated by the Victoria Police, Police investigators found in favour of the police, rather than the complainants' version of events<sup>6</sup>

We think it is more likely that this indicates a failure in the investigative process than every one of the complaints investigated by Victoria Police being without substance.<sup>7</sup>

In thirteen<sup>8</sup> criminal cases the Flemington Kensington Community Legal Centre has been involved in, judicial decision-makers contradicted the assessment made by the Victoria Police investigators. These judgments support the view that the present internal complaint system is not achieving justice.

These thirteen cases came before the criminal courts<sup>9</sup> because the FKCLC's clients had been charged by the police for conduct arising out of the same incident that our client complained about. Charges included assault, resist and hinder police in the execution of their duty or offensive language. The FKCLC's clients defended the charges. In two other cases, charges were dropped on the day of the hearing. It can be inferred from the decision to withdraw the charges that Prosecutor believed it was likely that the court would dismiss the charges.

1 See for example McCulloch & Palmer 2005 – Report to the Criminology Research Council, "Civil Litigation by citizens Against Australian Police between 1994 and 2002", Human Rights Watch 1998 "Shielded from Justice, Police Brutality and Accountability in the United States." British Columbia Civil Liberties Association Press Release dated 30/09/08 Deaths in Custody Investigation needs reform, "Torture in Chicago" 2008 Report by Peoples Law Office et al. Conversations with Imran Khan and Raju Bhatt in the UK 2008.

2 Herald Sun {NEEDS A REFERENCE}

3 See FOI results released to the FKCLC by Victoria Police on 10 October 2014 4 See FOI results released to the FKCLC by Victoria Police on 10 October 2014

5 Some complaints contain numerous allegations of misconduct, some complaints were made by a groups of individuals.

6 In one case the decision was partly reversed and substantiated after a court decision.

7 The inherent structural flaws in Victoria's complaint system was explored in Tamar Hopkins, 'When Police Complaints Mechanisms Fail, The use of civil litigation', (2011) *Alternative Law Journal* 36,101.

8 In two of the cases, the client defended the charge and made the complaint prior to the Legal Centre's involvement. The Legal Centre is now acting in subsequent legal action. There are three other cases where the client declined to make a complaint due to fears that the investigation would adversely interfere with the criminal case but nevertheless successfully defended the charges.

9 These courts include Magistrates, Children's, District, County and Supreme Courts

### Case study

A Somali youth made a complaint that a police officer had assaulted him by hitting him with a torch in the face causing his teeth to be damaged<sup>10</sup>. Three months after he had lodged his complaint about the police conduct, he was charged with hindering police in the execution of duty. His complaint against the police was found to be “unsubstantiated” by the police investigators. However, the Magistrate, listening to the all evidence, found that he had not hindered the police and that the police had acted unlawfully in touching him. Because the Magistrate was not hearing a charge against the police, the Magistrate did not conclude that the police officer had “assaulted” the youth.

However, the obvious conclusion to draw from the Magistrate’s finding was that the police officer had assaulted the youth. Any unlawful touching, including the striking of person in the face with a torch, is an assault. This conclusion of unlawfulness flatly contradicted the “unsubstantiated” assault finding by the police investigators. The youth went on to sue the police involved in assault, battery and false imprisonment. The claim settled confidentially before trial.

### Case study

An Eritrean taxi driver alleged that police had assaulted him. The taxi driver had photos of injuries to his neck as a result of his allegation that the officer had tried to choke him. An image of the police officer’s hand on the taxi driver’s neck had been caught by the taxi’s automatic camera system. Police investigators accepted a police member’s version of events that his hand had slipped to the neck of the driver who was seated in the driver’s seat the taxi. In contrast, a Magistrate hearing the case took the view that the police officer had no right to be touching the taxi driver, let alone holding him around the neck. The logical implication is that the police assaulted the driver, although because the case was not against the police officer, the Magistrate did not directly say so. The decision of the police investigators failed to find any unlawfulness on the part of the officer.

### Case study

A Magistrate found that an African youth could not be arrested for failing to give his name and address to a police officer because he was not under a legal obligation to provide his name and address to the police officer. The youth had alleged in his complaint that he had been unlawfully arrested and assaulted in the arrest.

The logical conclusion of the Magistrates decision was that he had been unlawfully arrested. In contrast, the police investigating the complaint found the complaint to be unsubstantiated. The Court’s conclusion directly contracts the unsubstantiated finding.

### Case study

A Magistrate found that the police trespassed when they searched a Sudanese boy’s house in breach of their search warrant. The boy was charged with hindering police after running off to his room and locking the door after the room had been searched. The police broke down the door to his room and detained him. Amongst other things, he complained of assault, trespass and unlawful arrest.

In contrast to the logical conclusion of the Magistrate, Police investigators found these aspects of his complaint unsubstantiated. Interestingly, the OPI, in monitoring the outcome of this court case, asked the police investigators to re-investigate the claim. As a result, these aspects of the complaint were subsequently substantiated.

10 Elizabeth Porter, ‘Somali youth to sue police over unprovoked attack’ The Age, Melbourne, 21 October 2007.

In the nine other cases where both complaints against police were made and police charges such as hinder, assault, obstruct or resist police followed the complaint, judicial officers reached conclusions that concurred with the complainant's view they had been assaulted and differed to findings of the police investigators into a complaint. Indeed, at this stage all contested hearings involving clients who made an official complaint have resulted in judgments that contradict the police complaint investigation.

### Case Study

In 1993, Corinna Horvath was brutally assaulted by police who unlawfully broke down her door and trespassed into her property. While her police complaint resulted in no action being taken against police, a Magistrate dismissed the charges the police falsely laid against her and a County Court Judge found that she had been unlawfully assaulted in a civil claim. These independent fact finders determined the facts in ways that completely contradicted the police disciplinary process – leading the United Nations to conclude in 2014 that internal process of police investigating themselves was flawed. Today, the same internal mechanisms apply in the overwhelming majority of investigations and disciplinary processes<sup>11</sup>.

The fact that independent magistrates and judges are finding that police acted unlawfully in situations where the complaint investigation does not, raises questions about the effectiveness of the investigation and determination of complaints about police by police. It also underscores the importance of criminal courts as the primary means of redress against police misconduct, a role that is consistently undermined by the pressure on complainants to plead guilty due to cuts to legal aid and court funding which means the vast majority of people facing criminal charges involving allegations of police misconduct are ineligible for legal assistance to defend charges unless they face a term of imprisonment upon conviction.

The experience of the FKCLC in achieving these results is similar to other lawyers and CLCs who defend clients charged when they have or are intending to make a complaint about the police; such as Fitzroy Legal Service, Youthlaw and Robert Stary & Associates.

The success of the criminal courts in holding police to account for misconduct suggests ways in which police complaint systems may be improved. For example, it is clearly beneficial for evidence to be tested in open court and for decision makers to be independent.<sup>12</sup> In Washington DC, USA<sup>13</sup>, complaints are determined by an independent (non-police) decision-maker often following a hearing and testing of evidence. Decisions are recorded in writing and are appealable. Interestingly, complaints in this system are frequently substantiated.

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11 United Nations, Human Rights Committee, *Horvath v Australia*, 1885/2009, 24 April 2014.

12 Above n 1, 99.

13 Office of Police Complaints, <<http://policecomplaints.dc.gov/node/164852>>

## 2.2 Problems with the investigation process

Why do police investigations consistently fail to identify meritorious complaints? We believe it is because of a number of reasons to do with the internal nature of the investigative process.

### Bias in the investigation

In internal police investigations evidence collection is subject to the biases, motivations and interests of the investigator.

For example, police investigators consistently:

Lack motivation to collect evidence from all witnesses or to gather available CCTV or other evidence in a timely manner;

*In 2014, a legal centre client alleged he was assaulted by the police for failing to give his name and address. He had two independent witnesses to the assault. The police investigator failed to interview his two witnesses.*

View the complainant as criminal and motivated to lie;

*In 2015, a complaint investigator told a lawyer at FKCLC that "After 25 years in the force, I am cynical about complainants."*

Seem entrenched in a culture that tolerates or accepts police abuses so tend to downplay or minimise unlawful conduct;

*In 2014, a client alleged that the police slammed him face first on the ground breaking his front teeth causing bleeding and requiring dental surgery. Photos of him after the arrest show the broken teeth and swollen mouth. At least five police were present during the incident. Not one of the police statements about the incident describe that our client was forced to the ground or that he suffered serious injury.*

Interpret their job as picking holes in a complainant's story rather than picking holes in the police version of evidence;

*In 2006, a police investigator, investigating a serious assault allegation, interrogated the three civilian witnesses while interviewing them and minimised the language they used (ie 'dragged' became 'escorted') and tried to get them to admit to criminal conduct. The same investigator accepted the notes made by the police in relation*

*to the incident and statements made for the purposes of prosecuting the complainants without interviewing them.*

Tend to be uncritical of police accounts;

Actively assist the police to frame a defence to the complaint;<sup>14</sup>

*In 2008 when interviewing a police officer who was alleged to have assaulted a complainant, the police investigator asked, "it looks like your hand slipped, is that right?"*

Use information obtained in complaint gathering to assist a prosecution of complainants;

*In 2007 a complaint investigator provided a statement made by a witness to a complaint to a prosecutor who was prosecuting the complainant.*

Consistently fail to interview police, instead just accept a statement or notes from the officer;

Fail to question the police under criminal caution or for disciplinary purposes;

*In 2011, a police officer stated in Court that he was not even aware a complaint had been made against him alleging serious assault. Through the civil claim, discovery of the police investigation revealed that none of the police officers had been questioned at all by police investigators.*

Fail to understand the law/Charter/Victoria Police Manual requirements and instead apply police logic or police "common sense" and understandings about "the way things are done" to police conduct.

*In 2015, a police investigator declined to investigate a complaint alleging that three mobile phones were taken in a police raid of a complainant's house when only one phone was listed on a warrant saying that no unlawfulness was apparent on the face of the complaint.*

Intimidate or urge complainants to drop their complaint;

*In 2008, a police investigator approached a client on three occasions to get him to sign a "statement of no complaint" in relation to a complaint he made about being seriously assaulted during an arrest.*

<sup>14</sup> See for example the investigation into the death of Adam Salter discussed in the Operation Calyx report, Police Integrity Commission, June

### Complainants are locked out of the process

Complaints also fail because complainants are rarely given any opportunity to give feedback to an investigation before it is finalised.

Nor are complainants routinely given access to the investigation reports into their claim. Indeed, it is currently the case that copies of investigation reports where a complaint was initially made to IBAC are now being regularly denied to complainants when they make FOI requests for them.

If complainants *were* to be provided with access to the report before finalisation, they could correct false assumptions, provide further information, witnesses or ideas. (Indeed as these reports frequently make negative comment about complainants, natural justice suggests they ought to have the opportunity to comment.)

### Lack of trust and confidence in the complaint process

We believe, based on numerous client interviews, that the numbers of formal complaints against police represents a very low proportion of actual incidents.

People who report police misconduct to community workers or solicitors frequently don't make or don't continue with a complaint because of their lack of trust in a police handling the matter.

Many lawyers themselves also distrust police investigating and commonly advise their *clients not to make complaints* to police investigators.

Even police members don't trust internal investigation and are less likely to whistle-blow, knowing that their complaint will be investigated by other police. Unfortunately much of this lack of trust has foundation.

This lack of trust in internal investigation is a major impediment to holding police to account for their wrong-doing<sup>15</sup>.

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<sup>15</sup> For further detail, Hopkins T, "Effective System for Investigating Police Complaints" 2009 [www.policaccountability.org.au](http://www.policaccountability.org.au), Chapter 6.

## 2.3 Limitations of IBAC

We believe limitations of IBAC also contribute to the low substantiation rate of complaints in Victoria.

### Regulatory capture

IBAC, (much like its predecessor, the Office of Police Integrity) is of the opinion that the vast majority of police misconduct complaints can be resolved at the station level. This opinion may well have been forced on these bodies by a lack of resources, but it also underpins an attitude—that a person accused of serious professional misconduct can be investigated by their own colleagues—that is completely at odds with public opinion, international human rights standards and is indicative of regulatory capture.

Regulatory capture is the process by which the regulator fails in its role of holding the regulated body to legal standards because of inappropriate relationships:

Regulatory capture occurs ‘when officials inappropriately identify with the interests of a client or industry’. For example, a liquor licensing inspector could, after years of contact with people in the industry, begin to favour the wishes of the industry rather than public interest. Alternatively, the inspector

may be biased toward a single firm or company, motivated by a ‘white knight’ kind of sympathy. In such cases the regulator may fail to enforce because they believe the firm is struggling and the management team are ‘nice folk’ who ought to be protected.<sup>16</sup>

A study by Tim Prenzler into the Queensland Criminal Justice Commission set up following the 1989 Fitzgerald Inquiry into police and public sector corruption in Queensland, found evidence that the CJC was exposed to regulatory capture through its “role in facilitating police management, joint operations [with police] against organised crime and reliance on seconded police investigators.”<sup>17</sup> He also found that the CJC had adopted an appeasement strategy towards the police and politicians. It is our contention that IBAC’s acceptance that police should investigate themselves is an appeasement strategy rather than one that reflects public interests or international human rights standards<sup>18</sup>.

The reality is that complaints alleging excessive force by police are routinely investigated by line managers within Victoria Police. If we are to ensure that police use force appropriately, excessive force complaints must be investigated independently of Victoria Police.

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16 Gary Adams, Sharon Hayes, Stuart Weierter and John Boyd, Regulatory Capture: Managing the Risk Australian Public Sector Anti-Corruption Conference 24 October 2007 – Sydney, 1.

17 Prenzler T “Civilian Oversight of Police, A Test of Capture Theory,” in *British Journal of Criminology* (2000) 40 at 659.

18 Hopkins T, The effective investigation of complaints against police, 2009 <[http://www.communitylaw.org.au/flemingtonkensington/cb\\_pages/files/VLF%20REPORT%20-Effective%20Investigation.pdf](http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/VLF%20REPORT%20-Effective%20Investigation.pdf)>

## IBAC does not have an established process for resolving complaints and do not adhere to natural justice

In early 2015, IBAC admitted they have no real criteria for investigation of police complaints. The IBAC Act permits IBAC to investigate police in a wide range of circumstances including in situations where the alleged conduct could “bring the force into disrepute or where the officer could be dismissed.” It is our contention that every time a police officer abuses his or her power, this brings the force into disrepute. Police carry and use lethal weapons. Any abuse of power raises serious doubt into a person’s ongoing capacity to continue carry such weapons.

A further critical concern about IBAC is its attitude to complainants. IBAC consider that they are:

- Not at complaint resolution scheme;
- Are not required to be transparent to complainants;
- Are not required to explain the reasons for their decisions to complainants;
- Are not required to adhere to natural justice in their decision-making.

The Police Complaints Clinics run by the Flemington & Kensington Community Legal Centre and the Melbourne University Law School now have such little faith in the IBAC process that staff at those clinics no longer recommend that members of the public make complaints to IBAC, but instead make their complaints to the Police Conduct Unit. They do not make this recommendation because they think complaints are better investigated by the police. The reasons for the Clinic’s recommendations are as follows:

1. Complaints made to IBAC will inevitably be referred to the police – even very serious assaults.
2. Complaints made to IBAC will cause significant delay in complaint investigation and resolution.
3. Complaints made to IBAC result in denial to complainants about any information about the investigation of their complaint, even if that investigation ends up being conducted by Victoria Police.

## Processes are not transparent to the public or complainants

The implication of section 194 of the IBAC Act is that any complaint investigation made by Victoria Police following a referral from IBAC is not subject to the *Freedom of Information Act 1982* (the FOI Act). Section 194 allows that the FOI Act ‘does not apply to any document that is in the possession of any person or body’ if that document relates to (among other things), complaints, investigations, reports, or recommendations conducted under the IBAC Act.

This is, as IBAC itself states, a broad exclusion.<sup>19</sup> We believe it unreasonably removes a key avenue by which complainants can understand how their complaint was investigated.

We believe that IBAC should be subject to the FOI Act in the same way as other Victorian Government agencies. Part IV of the FOI Act already allows agencies to refuse freedom of information requests where to do so would be contrary to the broader good, including where releasing a document would prejudice law enforcement activities.<sup>20</sup> There is no need for a blanket exemption of the kind set out in section 194 of the IBAC Act.

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<sup>19</sup> IBAC, ‘Statement 3 – Freedom of Information Arrangements’ <http://www.ibac.vic.gov.au/general/contact-us/freedom-of-information-requests/freedom-of-information-part-ii-statements/statement-3---freedom-of-information-arrangements>

<sup>20</sup> Section 31, FOI Act.

### 3. Getting the model right

Human rights standards and indeed, community expectations, demand that the investigation of human rights abuses and unlawful police behaviour is conducted by a body that meets the following five benchmarks:

#### 1. Independent of the police

The investigating body must be not only institutionally independent of police but also practically, culturally and politically independent. This means that the use of former police officers should be minimal if at all<sup>21</sup>. The agency must be protected from the risks of agency capture through minimising collegiate working relationships with the police agency. It should be properly and securely funded, and protected from political and police union interference through separate enabling legislation and regulations as well as independent reporting to parliament. Its key positions must be long-term appointments.

On 2 April 2009 the United Nations Human Rights Committee observed that Australian police must be independently investigated where allegations of abuses are made and prosecuted and sanctioned when criminal conduct, disciplinary offences or human rights abuses are exposed. In the 2014 decision in *Horvath* (1885/2009), a case involving the abuse of a Victorian woman by police, the UN stated at paragraph 8.4

In the present case, the disciplinary claims before the Police Department were dismissed for lack of evidence. In this respect, the Committee notes the author's allegations, uncontested by the State party, that neither author nor the other civilian witnesses were called to give evidence; that the author was refused access to the file; that there was no public hearing; and that once the civil proceeding finding was made, there was no opportunity to reopen or recommence disciplinary proceedings. In view of these shortcomings and *given the nature of the deciding body*, the Committee considers that the State party failed to show that the proceedings met the requirements of an effective remedy under article 2, paragraph 3 of the Covenant [emphasis added].

The history of the reform of police complaint systems in England and Wales provides an instructive example of what results from police accountability organisations that are not truly independent. After each agency is created, a boom in complaints occurs as complainants' and their solicitors' hopes are raised that the new body will be effective. The hope is quickly dashed and complaints drop down to normal levels a short while later. Interesting, substantiation rates also dropped after each body was created and these rates did not improve over time. A cause of complainant dissatisfaction was that each creation remained focussed on police concerns disregarding the interests of complainants.<sup>22</sup>

In 2008, The Guardian newspaper conducted an investigation into complaints lodged with the Independent Police Complaint Commission in the UK and found:

- A pattern of favouritism towards the police with some complaints being rejected in spite of apparently powerful evidence in their support;
- Cases of indifference and rudeness towards complainants;
- Extreme delays, with some complaints remaining unresolved after years of inaction and confusion<sup>23</sup>

Consequently it is incumbent on legislators to understand that the creation of "independent" investigation cannot be in name only. It must be functionally and practically independent. For instances the following are not solutions:

- a. Employing current Victoria Police investigators in the new "independent" body<sup>24</sup>;
- b. Using seconded police in the independent agency;
- c. Failing to address issues of cultural independence (ie an agency that while nominally independent is biased against complaints).<sup>25</sup>

21 The Washington DC Office of Police Complaints currently employs no former police officers and yet is capable of conducting investigations. Only 25% of the investigating staff in the Northern Ireland Police Ombudsman's Office are former police officers and none of these officers previously worked in Northern Ireland.

22 Smith Graham 2005, A Most Enduring Problem; Police Complaints Reform in England and Wales, Jnl Soc. Pol. 35, 1, 121-141.

23 Crisis at police watchdog as lawyers resign | Politics | The Guardian <http://www.guardian.co.uk/politics/2008/feb/25/police.law1>

24 This was Chicago's "solution" when it created the Independent Police Review Authority. Its substantiation figures went down after the re-labelling effort.

25 Hopkins, The Effective Investigation of complaints against police, 2009, Chapter 3. <<http://www.policeaccountability.org.au/wp-content/uploads/2014/03/VLF-REPORT-Effective-Investigation.pdf>>

## 2. Capable of conducting an adequate investigation

The investigating body must be capable of ascertaining whether the actions of the police breach legal or disciplinary standards and whether police practices are in compliance with human rights. The decision following investigation should be open to administrative review and subsequent to this judicial review.

## 3. Prompt;

Police suspects and witnesses must be separated and interviewed immediately for both criminal and administrative purposes. Enforceable timelines for investigations are critical. Provision of documents by police agencies must be prioritised and investigators should use warrants to collect documents themselves where any delay occurs.

## 4. Open to public scrutiny

Data on complaints against police, as well as disciplinary action, civil litigation and prosecutions against police should be regularly and publicly reported. Investigation bodies should be subject to freedom of information law. Adjudication of complaints and disciplinary proceedings<sup>26</sup> should occur in public.

## 5. Victim-centred and enables the victim to fully participate in the investigation.

Complainants need to be protected from victimisation after making a complaint and should be entitled to full and frank reasons for the decision on their complaint and be provided with the capacity to seek review of that decision. The investigating body should be accessible to all Victorians, with information provided in multiple languages. Outreach and support should be provided to ensure accessibility for vulnerable groups. Complainants must be permitted to provide evidence through an advocate.

These standards are mandated under International law.

In 2005, Graham Smith analysed police complaint and substantiation rate data in the UK over a 40-year period<sup>27</sup>. During this time four statutory reforms to complaint handling processes occurred. Each reform was precipitated in part by an inquiry or serious scandal in policing but also a build-up in dissatisfaction<sup>28</sup>. Noting the continued dissatisfaction of complainants and solicitors despite these reforms, Smith concludes that:

*“the search for effective complaints systems is severely damaged by under representation of complainant’s interests in the reform process and by those responsible for procedures.”*

In order to devise a complaint system that will succeed where all others have failed, true reforms must take into account complainant concerns (which is in itself a human rights requirement) and *must* meet internationally defined human rights standards.

## Police Ombudsman of Northern Ireland

The **Police Ombudsman for Northern Ireland** demonstrates that it is possible to design a police complaints body that meets the five principles listed above. Features of the Northern Ireland model include that:

- The Ombudsman is appointed by the Queen on a seven year fixed term and is accountable to parliament through the Minister for Justice;<sup>29</sup>
- It is staffed with specialist investigators who have power to secure incident scenes and seize documents and property. Police are obliged by law to provide information required in connection with an Ombudsman’s investigation;<sup>30</sup>

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26 QCAT decides police disciplinary processes in public in Queensland.

<<http://www.qcat.qld.gov.au/matter-types/occupational-regulation-matters/prescribed-persons>>

27 Graham Smith 2005, A Most Enduring Problem: Police Complaints Reform in England and Wales, Jnl Soc. Pol. 35, 1, 121-141.

28 Ibid at 136.

29 <https://www.policeombudsman.org/About-Us/Corporate-Governance>

30 Office of the Police Ombudsman for Northern Ireland, The Police Complaints System in Northern Ireland, page 9.

Accessed from: <https://www.policeombudsman.org/getmedia/02508825-5b89-4148-9b3c-58b939261d65/The-Police-Complaints-System-in-Northern-Ireland.PDF>

- Following an investigation, the Ombudsman can recommend to the public prosecutor that an officer be prosecuted, or to the Chief Constable that an officer be disciplined.<sup>31</sup>
- The Ombudsman may refer a complaint to the police to handle, but only if it is 'less serious', and the complainant consents. Even then, the ombudsman's office will check how the police have handled the complaint<sup>32</sup>
- The body is subject to Freedom of Information law<sup>33</sup> and has publicly committed to disclosure of information about the office's work.<sup>34</sup>

### Office of Police Complaints - Washington DC

The Office of Police Complaints in Washington DC is another example of a complaint body that is independent and considers the needs of complainants:

- Complaints are made to the civilian Office of Police Complaints (OPC). The office conducts an investigation into the complaint.
- A legally trained complaint examiner will determine whether there is a factual dispute about what occurred and if there is, will hold a hearing into the complaint.
- The complainant is entitled to legal representation at the hearing.
- The examiner will make a written decision substantiating allegation or exonerating the officer. This decision is publically available on the OPC website (with names removed). The examiner will make recommendations to the Chief Commissioner about disciplinary action against the police. If the Chief Commissioner refuses to discipline the officers as recommended, a panel of three examiners will review the decision. The Chief Commissioner of Police is mandated to accept this further decision.<sup>35</sup>

### Law Enforcement Review Agency – Manitoba, Canada

The Law Enforcement Review Agency (LERA) is required under legislation to:

- 'promote a high standard of professional conduct among police officers in Manitoba.
- guarantee each citizen in Manitoba the opportunity for an independent investigation and review of their complaints against on duty municipal police officers.
- provide a mechanism for the resolution of complaints in a manner that is fair both to the complainant and the respondent police officer(s).
- ensure that the conduct of police officers is consistent with the rule of law and the ideas of a democratic and open society.<sup>36</sup>

LERA refers complaints for adjudication to a judge of the Queen's Bench for public hearing. The complainant is entitled to representation at the hearing. All decisions are appealable.

There are numerous further examples where police are investigated by a body independent of police for example:

- Independent Police Complaints Commission (UK)
- Special Investigations Unit (Ontario, Canada)
- Independent Investigations Office of British Columbia (Canada)
- Independent Police Conduct Authority of New Zealand.

31 Dealing with complaints against police, p 9. 32 Police Ombudsman for Northern Ireland, Dealing with complaints against police, p 7. Accessed from: <https://www.policeombudsman.org/PONI/files/e9/e9fd9c06-639f-43e7-a44c-050bf8426a5c.pdf>

32 Police Ombudsman for Northern Ireland, Dealing with complaints against police, p 7. Accessed from: <https://www.policeombudsman.org/PONI/files/e9/e9fd9c06-639f-43e7-a44c-050bf8426a5c.pdf>

33 <https://www.policeombudsman.org/About-Us/Access-to-Information/Requesting-Information-the-Freedom-of-Information>

34 <https://www.policeombudsman.org/About-Us/Access-to-Information/Policy-on-the-Public-Disclosure-of-Information>

35 <http://policecomplaints.dc.gov/page/complaint-examiner-decisions>

36 <https://www.gov.mb.ca/justice/lera/>

## 4. Overcoming the barriers to independent investigations

There a number of reasons that have been offered over many years as reasons for not independently investigating police.

1. Expense. An independent investigative body is too expensive;
2. Civilians can't investigate police, it takes police officers with the technical skills and expertise to investigate;
3. Independent investigation of police complaints takes resources away from corruption investigations;
4. You need a rapid response team, only the police are resourced to respond rapidly to the "golden hours";
5. The police will shut down and refuse to co-operate with civilian investigators; you need police so that they can develop the relationships needed;
6. The Police Association will be too hostile.

It is vital that policy makers understand that each of these purported barriers have been overcome in other jurisdictions and that many are based upon myths or inaccurate understandings. We will go through each in turn.

### 4.1 Expense

A thorough and adequate investigation of police complaints is a time consuming and resource intensive job. However someone has to be resourced to do it. Northern Ireland (Police Ombudsman of Northern Ireland) Ontario and New Zealand (Independent Police Conduct Authority) are independent civilian bodies that investigate complaints against police. Using figures obtained from the Annual Reports of each organisation we can observe the following:

Region	Police expenses	Independent investigation expenses	Cost as % of police budget	Total population of region
Northern Ireland	798.5 million pounds in 2014	9 million pounds in 2014	1.127%	1,810,000 (2011)
New Zealand	1,481 million NZ dollars in 2014	4.19 million NZ dollars in 2014	0.28%	4, 471,000 (2013)
Victoria, Australia	2,292 million dollars	No independent investigation of the overwhelming majority of police complaints		5, 791,000 (2013)

From these figures, we can see that in Northern Ireland independent investigation costs 1.127% of the total budget for police.

In New Zealand, independent investigation is 0.28% of the total budget for the police. In Victoria, then, if we took a figure somewhere in between these two figures, we would expect to need to pay \$16 million a year for independent investigations. (0.7% of the total police budget.) This is a very modest price to pay for the size of the police force in Victoria and the importance of the issue. Furthermore, Victoria Police currently pay for internal investigation. There are currently 200 staff employed by the Police Conduct Unit. The money spent on police internal investigation could be re-directed into the independent body with a result that there will be very little overall cost to the budget.

## 4.2 Only police can investigate police

There are clear examples from other parts of the world of resourced civilian agencies that investigate complaints involving police.

The Police Ombudsman of Northern Ireland, a fully civilian agency, investigates all complaints against police.<sup>37</sup> Civilian agencies such as the Independent Police Complaints Commission in the UK and the Special Investigations Unit in Ontario, investigate deaths in police custody while others such as the Office of Police Complaints in Washington DC and the Law Enforcement Review Agency in Manitoba, Canada investigate non-lethal complaints. Non police investigators can include Worksafe investigators, Centrelink investigators, lawyers, former judges etc. In Ireland and Ontario investigators attend a few units at a police academy on investigations, however, they quickly develop expertise in these investigations give that is all they do. Indeed, very quickly, civilian investigators become far more expert at investigating police than police.<sup>38</sup>

In British Columbia, Canada, in June 2010, a police chief argued for increasing the mandate of civilian investigations bodies:

*“Vancouver Police Chief Jim Chu says a planned new civilian-led provincial unit should cover all complaints against police and not just in-custody deaths and serious incidents as proposed by the B.C. government. Few incidents meet this threshold, Mr. Chu told a news conference Wednesday, suggesting only an average of four incidents in Vancouver meet this standard each year.*

*“By allowing the civilian investigators to investigate a broader range of incidents, they would develop more experience and expertise,” he said.*

He noted that broadening the role of the new unit would also save money for BC municipal police forces, which are spending more on professional standards units, he said.

Giving an example, Mr. Chu said that since the introduction of a new police act this March, professional standards investigations for his own force have risen 46 per cent or \$803,000 on an annual basis.

*“Extending the mandate of the [new unit] would not only improve public confidence in the investigation of allegations against police officers but allow every police agency to concentrate more resources on investigating crime,” he said.<sup>39</sup>”*

## 4.3 Independent investigation of complaints takes resources away from corruption investigations;

Independent Investigation of human rights abuses requires resources. In Victoria, these resources are currently given to Victoria Police.

By re-directing these resources to an independent body, both corruption and investigation of deaths and human rights abuses are possible. The independent investigation of human rights abuses must be a priority for the Victoria Government.

37 Hopkins, Tamar 2009, An Effective system for investigating complaints against the police, Flemington & Kensington Community Legal Centre.

38 Specialist bodies such as the PONI and SIU become experts in these investigations.

39 <http://www.theglobeandmail.com/news/national/british-columbia/vancouver-police-chief-calls-for-greater-powers-for-complaints-unit/article1746253/>

#### 4.4 You need a rapid response team, only the police are resourced to respond rapidly to the “golden hours”;

The Police Ombudsman of Northern Ireland prides itself on getting to police involved incidents within the “golden” hour—that is, the time immediately after an incident occurs. The Special Investigation Unit (SIU) in Ontario, which covers a huge geographical area, has mobile rapid response vehicles and mobile buses. They also fly to further destinations.

The rapid response vehicles cost about \$85,000 are set up with all the necessary equipment. The mobile bus is very large and contains interview rooms fully equipped with video-recording equipment, a meeting room, computer terminal, power generators, internet access, evidence collection requirements etc.

The SIU have two people on duty 24/7 to receive calls and assess whether the SIU will activate a response. They also tell the police how to control the scene before the SIU arrives. Police are required under legislation to co-operate with the civilian investigation.

Both SIU and Police Ombudsman require the police at the scene to cordon and contain the scene and separate witnesses until they arrive. Both SIU and Police Ombudsman report strong civilian response and co-operation to their arrival on the scene.

24 hour on-call rapid response is a requirement of an independent investigation agency investigating deaths in custody and critical incidents and both SIU and Police Ombudsman of Northern Ireland demonstrate this is not only possible but preferable to having the police do this work.

#### 4.5 The police will shut down and refuse to co-operate with civilian investigators;

Investigations always risk lack of co-operation by police members. As now, co-operation can be required through legislation making it a disciplinary offence to do otherwise. On the other hand however, many police will co-operate with civilian investigations. There are currently in Victoria, police officers who refuse to make complaints because of their lack of faith in the impartiality of PSC investigations/station based investigations. Independence will actually increase the confidence and co-operation of police members.

A 2010 survey was done of officers who had dealings with the civilian Police Ombudsman of Northern Ireland. The main findings are given below:

- The majority of police officers who had spoken to an Investigating Officer from the Police Ombudsman's Office had positive perceptions of staff.
- Eighty two per cent of police officers thought that they were treated fairly by the Police Ombudsman's Office.
- Sixty eight per cent were satisfied with the overall service they received.
- Seventy seven per cent were confident that the Police Ombudsman deals with complaints in an impartial way.
- Sixty eight per cent thought that the Police Complaints System provides for greater accountability of the police.<sup>40</sup>

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<sup>40</sup> Police Ombudsman of Northern Ireland, “Final Police Officer Satisfaction Report” 2010 accessed on 27 March 2011 <http://www.policeombudsman.org/modules/publications/Publications.cfm/CatID/6/action/list>

## 4.7 The Police Association will be too hostile

Internal police resistance to non-police investigation is often more emotional than reasoned. Police Association hostility can be overcome through demonstration that independent investigation has the following benefits:

- Increases police member confidence in making complaints and the impartiality of the complaint systems;
- Focuses police attention and resources back on the job of effective policing rather than dealing with complaints;
- Removes the focus on police investigative biases in inquests and other complaint matters as investigations will now be conducted independently;
- Enhances accountability and public perception of accountability, so increasing public confidence in policing.

In the end, Police Association objections to independent investigation are mainly political and historical, arising due to perceptions of an overly close relationship between the former OPI/PSC and police command. By ensuring relationships between the independent investigative agency and police command is completely arm's length and separate, some of these concerns can be alleviated.

## 5. Key policy recommendation:

The Victorian Government must, as a matter of urgency, establish a body separate from police to independently investigate all complaints made against police. The best model for such a body is the Police Ombudsman of Northern Ireland, however, the role could be conducted by IBAC with some significant legislative and cultural changes.<sup>41</sup>

Whichever model is adopted, the body must be properly resourced and empowered to be:

- Independent of the police;
- Capable of conducting an adequate investigation (ie an investigation leading to criminal and/or disciplinary outcomes);
- Prompt;
- Open to public scrutiny;
- Victim centred; enabling the victim to fully participate in the investigation, including access to information.
- Effective Investigation of Police Complaints

This Policy Briefing has been produced by the Police Accountability Project, a project of the Flemington Kensington Community Legal Centre.

A more detailed account of what is necessary to effectively and independently investigate complaints against police can be found here:

<http://www.policeaccountability.org.au/wp-content/uploads/2014/03/VLF-REPORT-Effective-Investigation.pdf>



<sup>41</sup> It is worth noting that IBAC does not consider itself to be a complaint handling body and does not consider that it is subject to the rules of natural justice or that it owes complainants transparency or explanation for its actions.

## About the Police Accountability Project

The Police Accountability Project is a specialist, innovative, public interest not for profit legal practice located within the Flemington and Kensington Community Legal Centre taking the lead in police accountability law and strategies within Victoria, Australia.

Our casework, advocacy and law reform work is informed by our experience, by comprehensive research and by human rights principles and practises.

The Police Accountability Project provides tailored client support for young and vulnerable clients, a full suite of highly specialist legal advice, and assistance

from the complaint stage to the potential of litigation along with ongoing systemic advocacy on the core accountability issues.

The Police Accountability Project is a combination of individual and community based work, combining the Walking Alongside Program, expert and strategic legal casework, Victoria's first Police Complaints Clinic and strategic law reform and advocacy work.

The Flemington Kensington Community Legal Centre (FKCLC) is a non-profit and independent community organisation, incorporated in Victoria in 1980.

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