



# **Submission to the Independent Broad-based Anti-corruption Commission Committee on the External Oversight of Police Corruption in Victoria**

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## **i. Organisational Context**

As a volunteer organisation comprising of legal practitioners, judges and academics, the International Commission of Jurists (ICJ) Victoria is committed to the primacy, coherence and implementation of international law and principles that advance human rights. The ICJ Victoria is distinguished from other organisations by its impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law.

The ICJ Victoria strives to:

- Promote adherence to and observance of the *Universal Declaration of Human Rights* and other similar international instruments;
- Promote the conclusion, ratification and implementation of conventions, covenants and protocols protecting human rights, especially in Australia and the nations of Southeast Asia and the Pacific;
- Provide an organisation through which the legal profession and others interested in human rights can protect and sustain the Rule of Law and promote the observance of human rights and fundamental freedoms;
- Help, advise and encourage all who seek to achieve, by means of the Rule of Law universal respect for and promote the observance of human rights and fundamental freedoms;
- Co-operate with similar organisation in Australia and other countries through the channels provided by ICJ Geneva and other available means.
- Examine new proposals that affect the administration of justice, both domestic and abroad.

The ICJV seeks to fulfil its objectives through public education and seminars, submissions, publishing, and advocacy.

## **ii. Focus of Submission**

### **i. Scope**

The ICJ Victoria welcomes the opportunity to provide feedback on the Independent Broad-based Anti-corruption Commission (IBAC) Committee's inquiry into the external oversight of police corruption.

This submission will focus on the following questions as outline in the inquiry's Terms of Reference:

- i. Examine the current system for the oversight of police corruption and misconduct in Victoria; and,
- ii. Identify and assess best-practice models for the oversight of police.

### **ii. Argument**

In response to these questions, the ICJ Victoria draws the Committee's attention to Australia's obligations under international law. These obligations provide the best practice for ensuring police oversight and accountability. This is because they demonstrate an effective protection of human rights. Most prominently, these frameworks highlight the need for external oversight of police, with the opportunity for effective and timely remedy.

The findings of the Flemington/Kensington Community Legal Centre's 'Police Accountability Project' demonstrate that Victoria's system for lodging, assessing, and remedying complaints contradicts the rule of law by failing to provide proper access to justice. This is because investigations of police corruption are usually supervise by police. As a result, the experiences of complainants are frequently neglected, with police investigators favouring the accounts provided by their colleagues.

Although external models of investigation exist in comparable jurisdictions, the ICJ Victoria argues that no present model fits in Victoria. Rather, a Victorian model must fit the Victorian situation so it is accessible to everyone in the community.

### **iii. Best Practice: Guiding Principles of International Law**

Given the impact of law enforcement personnel on human rights, a high degree of integrity and accountability is required. Australia is signatory to a number of international treaties with relevance to police oversight. These frameworks provide widely endorsed and consistent standards on integrity and accountability. As authoritative sources of human rights protection, principles arising from these frameworks offer persuasive guidance for a Victorian model. From the perspective of the ICJ Victoria, these principles constitute best practice.

#### **i. *International Covenant on Civil and Political Rights (ICCPR)***

The necessity of a comprehensive framework for police oversight arises directly from Australia's obligations under the ICCPR (as given effect in Victoria through the *Charter of Human Rights and Responsibilities Act 2006*). Such mechanisms are vital for ensuring the protection of individuals' civil rights, including the right to privacy, freedom from discrimination, and right to life. In the event of a breach of these rights, Article 2 of the ICCPR recognises a right to effective remedy. The UNHCR has stated that this right imposes a state duty to investigate relevant matters 'promptly, thoroughly and effectively through independent and impartial bodies'.<sup>1</sup>

#### **ii. *Convention Against Torture (CAT)***

Australia also has a number of obligations under CAT pertaining to police oversight. Similar to the ICCPR, Articles 12, 13 and 14 of CAT require prompt and impartial investigation in the event of torture, inhuman or degrading treatment, with appropriate avenues for compensation or rehabilitation. In the context of police misconduct, CAT requires investigation be external and independent to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

#### **iii. *Optional Protocol to the Convention Against Torture***

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<sup>1</sup> Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), par. 15.

While Australia has not yet ratified OPCAT, it intends to do so by December 2017.<sup>2</sup> The Optional Protocol further provides recommendations relevant to police oversight. By requiring inspection of detention centres (such as correctional facilities and police cells), OPCAT offers an extended framework that necessitates independent scrutiny and oversight of these areas. This is essential for ensuring transparency and compliance with international human rights law in these facilities.

iv. **Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions**

The Special Rapporteur has also outlined the type of framework that best aligns with international human rights law. Although this framework is not specific to Australia, it does offer model guidelines. Fundamental to this framework is the development of mechanisms for external oversight. As the Rapporteur has stated:

‘Without external oversight, police are essentially left to police themselves. Victims are reluctant even to report abuse directly to police, for fear of reprisals, or simply because they do not believe a serious investigation will result. [...] Importantly, external oversight also plays a role in increasing community trust of the police service, and can thereby increase public-police cooperation and improve the effectiveness of the police force’s ability to address crime’.<sup>3</sup>

v. **UN Office on Drugs and Crime Handbook**

The *Handbook on Police Accountability, Oversight and Integrity*, by the UN Office on Drugs and Crime (UNODC), further details best practice mechanisms for adhering to human rights obligations. Key recommendations include:

- Opportunities for the public to voice their concerns;
- Proper reporting procedures and facilities;

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<sup>2</sup> Attorney-General for Australia, ‘Improving oversight and conditions in detention’ (Media Release, 9 February 2017).

<sup>3</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add8.pdf>, para. 3.

- A working culture that promotes transparency and evaluation;
- Monitoring of police actions and operations by both police leadership and external organs;
- Complaints procedures, both for making complaints to the police directly and to independent bodies;
- Fair and effective procedures and policies on how to deal with misconduct, including both disciplinary and criminal codes, adequate investigative capacity, procedures for punishment and appeal procedures;
- An independent body to oversee such procedures;
- Scrutiny and oversight involving feedback to the police in order to improve future activities and prevent future wrongdoings;
  - Evaluation and complaints procedures that contribute to the development of new policies, procedures and instructions; and,
- Procedures for overseeing the feedback, evaluation and complaints procedures and statistics.

As can be seen, the issue of police accountability has been readily addressed by international legal frameworks and bodies. The ICJ Victoria submits that the principles within these frameworks constitute best practice; in particular, external oversight and investigation.

#### **iv. Police Accountability in Victoria**

This section outlines the current system for police accountability in Victoria, listing its shortfalls and drawing on the work of the 'Police Accountability Project.'

##### **i. History and Context**

The current discussion about the police complaints system in Victoria is not a new phenomenon. As Deborah Glass, Victorian Ombudsman and

former Deputy Chair of the Independent Police Complaints Commission (UK), has written: 'Oversight mechanisms never come out of thin air or the random thoughts of politicians. [Rather], they invariably have their roots in some form of public scandal'.<sup>4</sup> For instance, in 2004, the Office of Police Integrity (OPI) was established in response to public concern over possible police misconduct in Victoria. This concern stemmed from the findings of several royal commissions and inquiries in Australia. These findings demonstrated 'significant patterns ... of entrenched and systematic corruption within local police forces'.<sup>5</sup>

As an example, the 1989 Fitzgerald Inquiry examined the Internal Investigations Section of the Queensland Police Service. It concluded that the Section had been woefully ineffective: 'A friendly, sympathetic and inept oversees [which] must be abolished'.<sup>6</sup>

Similar criticism of internal police investigations were made in 1995 by the Australian Law Reform Commission (ALRC):

'The record of internal units is generally inadequate in terms of the effective conduct of investigations and ... excessive delays. A siege-like mentality of police officers and their own police culture means that there are strong risks that they will not be able to conduct thorough and fair investigations'.<sup>7</sup>

This concern was evidenced in the findings of two subsequent royal commissions. Firstly, the Royal Commission into the New South Wales Police Service (1995-97), headed up by Wood J, uncovered instances of bribery, money laundering, drug trafficking, fabrication and destruction of evidence, fraud, and serious assaults against the citizenry. The internal processes for managing these issues had helped keep many of them immune to public scrutiny.<sup>8</sup> Similarly, the Royal Commission into the Western Australia Police Service (2002-04), led by the Hon Kennedy Q.C, revealed instances of stealing, assaults, perjury, drug dealing, and the improper disclosure of confidential information. The Commission

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<sup>4</sup> Deborah Glass, 'Accountability in 21<sup>st</sup> Century Policing,' (Speech to Policing, Law and Justice Conference 2012)

<sup>5</sup> Independent Broad-based Anti-corruption Commission, "Past Patterns – Future Directions: Victoria Police and the Problem of Corruption and Serious Misconduct," (2007), p.115

<sup>6</sup> Cunneen, M. and Harrison, J. (2000), "An Independent Police Complaints Commission," *Liberty*, p.2

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

concluded that the WA Police Service '[had] been ineffective in monitoring [these] events and modifying its procedures to deal with that conduct and to prevent its repetition'.<sup>9</sup>

Although there have been many public inquiries, a royal commission has never been held into police misconduct in Victoria.<sup>10</sup> This is despite calls from judicial officers. For example, in 2007, former Supreme Court Justice Don Stewart stated that Victoria Police was riddled with 'deep-seated and continuing corruption' that could only be resolved through a wide-ranging royal commission.<sup>11</sup>

Prior to the OPI's establishment, the power to investigate police complaints resided with the Police Ombudsman, but this power was limited to monitoring and reviewing. The OPI, in contrast, had a wide-range of powers, including the capacity to investigate and hold hearings. In 2013, the OPI ceased operation, and its functions were incorporated by the IBAC.<sup>12</sup>

However, as this submission will later detail, there are many limitations of the current system in Victoria. In the absence of a royal commission, and as a means of remedying these limitations, the Flemington/Kensington Community Legal Centre have begun specialising in police accountability law. This specialisation was triggered in 2005 by an influx of cases alleging police abuse against individuals of African and Afghani origin. The Centre's 'Police Accountability Project' has examined cases that have included allegations of the hospitalisation of victims, punitive beatings of restrained people, unlawful imprisonment, acts of torture within police stations, excessive use of force, unlawful searches, threats of sexual violence, unjustified use of capsicum spray, strip searches, searches in humiliating circumstances, racist and sexist comments, thefts of money and mobile phones, loss of vehicles, harassment, degrading conduct, and ill-treatment against racial and religious minorities. There have also been alleged incidents where children as young as 10 have been subject to assault.<sup>13</sup>

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<sup>9</sup> Final Report, Vol. 1, Part 1 (2004), at pp.1-2.

<sup>10</sup> However, the Royal Commission into Aboriginal Deaths in Custody (1987-91) did detail the negligence of Victoria Police in providing care and following procedures adequately.

<sup>11</sup> "Victoria Police Corrupt: Ex-judge," *The Australian*, 11 January 2007.

<sup>12</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

<sup>13</sup> Police Accountability Project, *Independent Investigation of Complaints Against the Police: Policy Briefing Paper*, (2015) p.4.

## ii. Problems with Victoria's Three-tiered System

Access to justice is a key principle of the rule of law. It refers to the ability of people to access the legal system; a system which becomes meaningless if social, cultural, economic, and legal barriers prevent them from doing so. This principle incorporates everything people do to try and resolve the disputes they have. This includes accessing information and support to prevent, identify and resolve disputes.

At present, there are three ways in which an individual may resolve a complaint against Victoria Police: through the IBAC, the Police Conduct Unit, or at a local police station. These three processes give the impression that greater access to the complaints system is being provided. In practice, however, access to justice can be compromised. This may be due to the following factors.

Firstly, the IBAC refers a majority of complaints back to police for internal investigation; thus essentially functioning as a triage service. For example, since 2006, the Flemington/Kensington Community Legal Centre have submitted over 70 complaints to the OPI, the IBAC, or Victoria Police. All but three complaints made to the two independent agencies were referred back to Victoria Police for investigation.<sup>14</sup> This creates a conflict of interest where Victoria Police are left to investigate themselves on a range of serious matters.

This situation parallels with that of the Independent Police Complaints Commission (IPCC) in the UK. This statutory entity is responsible for serious complaints and conduct matters relating to staff at the National Crime Agency, Her Majesty's Revenue and Customs, and Home Office immigration and enforcement staff. About 94% of complaints received by the IPCC are referred back to police for investigation.<sup>15</sup>

The IBAC believes that the vast majority of police misconduct complaints can be resolved at the station level.<sup>16</sup> This may well be because of a lack of resources, but it also involves a conflict of interest. That is, that a

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<sup>14</sup> Ibid.

<sup>15</sup> Deborah Glass, 'Towards Greater Public Confidence: A personal review of the current police complaints system for England and Wales,' (2014), p.8

<sup>16</sup> Police Accountability Project, *Independent Investigation of Complaints Against the Police: Policy Briefing Paper*, (2015), pp.9-10

person accused of serious professional misconduct should not be investigated by their own colleagues.

Statistics show that Victorian police officers are rarely disciplined or prosecuted for misbehaviour. As Figure 1 demonstrates, only a small percentage of assault allegations and total allegations against Victoria Police were substantiated between 2000 and 2013.<sup>17</sup>

**Figure 1. Percentage of Substantiated Complaints 2000-2013**

|   | 2000-2011 | 2012 | 2013 |
|---|-----------|------|------|
| <b>Percentage of assault allegations substantiated:</b> | 3.6%      | 2.3% | 3.8% |
| <b>Percentage of total complaints substantiated:</b>    | 6.4%      | 7.2% | 9.8% |

Furthermore, in all 67 complaints filed by the Kensington/Flemington Community Legal Centre and investigated by Victoria Police, investigators found in favour of the police. 13 of these cases were appealed to the courts, where judicial officers ruled in contrast to the assessment made by Victoria Police investigators. This is illustrated in the following case:<sup>18</sup>

**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.

<sup>17</sup> Ibid, p.4.

<sup>18</sup> Ibid, p.5.

From relevant inquiries, reports, and court cases, the ICJ Victoria have identified additional problems with the current system:

- Firstly, in early 2015, the IBAC admitted they have no substantive criteria for the investigation of complaints. The IBAC has the power to investigate police in a wide range of circumstances, including where the alleged conduct could bring the force into disrepute. Arguably, every time a police officer abuses their power, this brings the force into disrepute. Any abuse of power ought to raise serious doubts about their capacity to carry lethal weapons. A critical concern about IBAC is that it is not subject to the *Freedom of Information Act 1982*. IBAC is not required to explain reasons for its decisions, to adhere to natural justice in its decision-making nor is it required to be transparent. It is submitted that IBAC should be subject to the FOI Act in the same way as other Victorian Government agencies.<sup>19</sup>
- Secondly, there can be significant bias in the internal investigations of Victoria Police. Evidence collection is subject to biases, motivations and interests of the investigator. In investigations, there is a lack of motivation to collect evidence from all witnesses or to gather CCTV evidence. Police investigators consistently characterise complainants as criminals or having motivation to lie. Further, there seems to be an entrenched culture in policing that tolerates or accepts police abuse. Police investigators interpret their role as 'picking holes' in a complainant's story rather than that of the police officer. That is, police tend to unquestionably accept a statement from a fellow police officer, without conducting interviews or investigating further. Investigators actively assist police to frame a defence to a complaint, and even go as far as to intimidate or urge a complainant to drop their complaint.<sup>20</sup>

The Wood Royal Commission also identified the problem of bias in the NSW Police Service, arguing:

'There is an inherent bias in investigations as the result of which the Service failed to carry out impartial investigations or pursue allegations with the same rigour or approach seen in ordinary criminal inquiries'.<sup>21</sup>

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<sup>19</sup> Ibid, p.10.

<sup>20</sup> Ibid, p.7.

<sup>21</sup> Cunneen, M. and Harrison, J. "An Independent Police Complaints Commission," (2000), *Liberty*, p.2.

- Thirdly, complainants are rarely given any opportunity to provide feedback to an investigation before it is finalised. Nor are they able to access investigation reports. If access to the report before finalisation were allowed, complainants would have an opportunity to correct false assumptions, provide further information where necessary, and produce further witnesses or other leads. As these reports frequently make negative comments about complainants, natural justice suggests that complainants should be provided with the opportunity to comment.
- Fourthly, evidence suggests that people who are most vulnerable to police misconduct are from a culturally and/or linguistically diverse (CALD) community.<sup>22</sup> At present, the system in place for lodging a police complaint in Victoria is overly complex and resource-intensive. Navigating through the complaints system as a CALD individual can also be extremely difficult, due to the added perception of institutionalised racism.<sup>23</sup>
- Furthermore, vulnerable individuals may not possess the financial means to pursue a claim. According to the Productivity Commission's 2014 report, community legal centres are severely under-funded.<sup>24</sup> This means that the legal needs of vulnerable individuals can go unmet. This quite clearly contradicts access to justice.

## **v. External Oversight and Investigation**

External oversight and investigation is crucial in advancing the idea that public administration serves the citizenry. Members of the public must feel confident and empowered to file a complaint against 'insensitive or callous treatment by the bureaucracy'.<sup>25</sup> The ICJ Victoria submits that the IBAC's mere oversight is not enough. To maintain the integrity of the criminal justice system, complaints against Victoria Police need to be fully investigated by non-police. An external body, therefore, must not only be

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<sup>22</sup> Flemington Kensington Community Legal Centre, "The More Things Change the More they Stay the Same: Report by the Peer Advocacy Outreach Project on Racial Profiling across Melbourne," (2015), p.5.

<sup>23</sup> Ibid.

<sup>24</sup> Productivity Commission, 'Access to Justice Arrangements,' (2014) Inquiry Report No. 72, p.24.

<sup>25</sup> Thomas Smith, "The Comparative Analysis of Bureaucratic Accountability," *Asian Journal of Public Administration* (1991), vol.13, no.1, p.95

'institutionally independent of police, but also practically, culturally and politically independent'.<sup>26</sup>

The 'Police Accountability Project' have detailed what such a body would look like.<sup>27</sup> This includes:

- Minimal use of police officers, if at all;
- Protected from the risks of agency capture through minimising collegiate working relationships with the police;
- Properly and securely funded;
- Protected from political and police union interference through separate enabling legislation and regulations; and,
- Independent reporting to parliament.

A number of overseas jurisdictions have sought to implement such a model. For example:

| <b>Jurisdiction:</b>            | <b>Model:</b>  |
|---------------------------------|--|
| <i>Northern Ireland</i>         | The <i>Police (Northern Ireland) Act, 1998</i> prohibits the police from investigating complaints made by the public against them. Rather, the Office of the Police Ombudsman (created in 2000) provides an independent, impartial police complaints system. |
| <i>Ontario, Canada</i>          | The Office of the Independent Police Review Director receives, manages and oversees all complaints about police in Ontario.  |
| <i>British Colombia, Canada</i> | The Office of the Police Complaint Commissioner ensures that the complaint process is conducted with impartiality.   |

<sup>26</sup> Police Accountability Project, *Independent Investigation of Complaints Against the Police: Policy Briefing Paper*, (2015), p.11.

<sup>27</sup> *Ibid*, p.18.

|                    |  |
|--------------------|--|
| <i>New Zealand</i> | The Independent Police Conduct Authority (IPCA) has both a complaints oversight function and an investigative function within the one agency. It was established in 2007 due to concerns that the previous integrity body – the Police Complaints Authority – lacked independence. |
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Whilst these examples offer persuasive guidance for a model in Victoria, they are unique to their own jurisdiction's history and social factors. The ICJ Victoria would caution the sole replication of any one of these models without the incorporation of key aspects of Victoria's society.

For instance, people in Victoria come from many different cultures, faiths, and ethnicities. According to the 2016 Census:

- 28% were born overseas in over 200 countries;
- 49% were born overseas or born in Australia with at least one parent born overseas;
- 26% spoke 260 languages other than English at home; and
- 59% followed more than 130 different faiths.

Thus, in the interest of access to justice, a Victorian model for external oversight and investigation must be designed in a way so as to be accessible to everyone in the community. The UNODC's *Handbook* provides examples of best practice in ensuring a complaints system is accessible. These include:

- a. Inclusion of information about the complaints procedure in police publicity materials;
- b. Prominent display of information on the complaints procedure in all police premises, particularly in custody areas;
- c. Provision of written information to all persons detained on police premises on how to make a complaint after release;

- d. Information on the complaints procedure to be carried by police officers on duty, which can be given to members of the public who express dissatisfaction with the police;
- e. Display of information on the police complaints procedure in public spaces managed by criminal justice agencies, including prosecution, probation, prison and court services; and,
- f. Display of information on the police complaints procedure in public spaces that do not come under the umbrella of the criminal justice system, including community, advice and welfare organisations.

#### **iv. Concluding Argument**

In conclusion, Victoria's system for lodging, assessing, and remedying complaints is inconsistent with international legal principles. Victoria should adopt a model that more closely follows these principles; most important of which are external oversight and investigation. However, the ICJ Victoria submits that any Victorian model must be created in a context-specific manner so as to be accessible for everyone in the community, thus in keeping with the principle of access to justice.

The ICJ Victoria would be glad to assist the Committee in any ongoing work of the inquiry.