VALS Policy Paper

Reforming Police Oversight in Victoria



Victorian Aboriginal Legal Service

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Acknowledgement of Traditional Owners

The Victorian Aboriginal Legal Services acknowledges all of the traditional owners in Australia and pay our respects to their Elders, past and present. Soveriegnty was never ceded. Always was, always will be, Aboriginal land.

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Glossary

Civilian control: A structure for a police complaints system, in which a civilian agency (independent of police) is fully in control of the receipt and investigation of complaints about police.

Civilian review: A structure for a police complaints system, in which a civilian agency (independent of police) reviews the investigation of complaints by an internal police process.

IBAC: The Independent Broad-based Anti-corruption Commission, the body established in 2010, which is responsible for oversight of police complaints, as well as a range of broader anti-corruption functions.

Mixed civilian review: A structure for a police complaints system, in which a civilian agency fulfils a review role (described above) and also investigates some complaints in its own right.

OPCAT: The Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, an international treaty that Australia has ratified, which requires the establishment of a dedicated body to inspect the treatment of people who are deprived of their liberty by police or the government.

Police-contact death and serious injury: Any death or serious injury which follows contact with police, including shootings or assault by police, deaths in hospital after an incident with police, deaths or serious injuries sustained or aggravated in police custody, and deaths or serious injuries sustained during a police pursuit.

Professional Standards Command (or PSC): The internal investigations unit of Victoria Police, which investigates complaints against police or refers complaints to local or regional level for investigation.





Summary of Recommendations

The Police Oversight System

Recommendation 1. In addition to the current review, the Government must undertake a more comprehensive reform process to consult on, design and implement all the core pillars of a police oversight system.

Recommendation 2. The reform process must examine accountability and oversight mechanisms for addressing systemic racism within Victoria Police.

Recommendation 3. The reform process must prioritise the voices of people and communities who are disproportionately affected by systemic racism and the lack of police accountability.

Police Complaints

Recommendation 4. The Victoria Government must establish a new independent police complaints body that is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of Aboriginal complainants.

Recommendation 5. Police must not be responsible for investigating and handling police complaints, except minor customer service matters. All police complaints other than minor customer service matters must be investigated and managed by the independent police complaints body.

Definitions and Classification of Police Misconduct

Recommendation 6. The legislation establishing the new independent body should define `conflict of interest'. The definition must encompass actual, potential and perceived conflicts.

Recommendation 7. The legislation establishing the new independent police complaints body should define 'customer service complaint' and specifically exclude the following:

- (a). Any complaint about the exercise of any police power (including powers to stop, question, search, arrest, use force) or issue any kind of infringement or direction;
- (b). Any complaint about a decision not to exercise a police power (for example, a decision not to investigate an alleged offence);



(c). Any complaint which makes reference to Aboriginality, or to any protected attribute under Section 6 of the *Equal Opportunity Act 2010*.

Recommendation 8. Legislation must require that complaints classified as customer service matters by Victoria Police must be reported to the independent police complaints body, with the report including, at a minimum, the race and gender of the complainant, or their Aboriginality, the officers subject to the complaint, and the broad context (for example, whether the conduct occurred during a phone call, on patrol, during a call-out, etc.)

Recommendation 9. Complainants must have the right to request a review of the classification of their complaint.

Recommendation 10. The legislation establishing the new independent police complaints body must define 'serious police misconduct', to enable the independent body to prioritise and appropriately investigate all complaints. The definition must include:

- (a). any allegations regarding assault, mistreatment or failure of duty of care in custody, and excessive use of force;
- (b). any misconduct accompanied or motivated by discrimination, or that has a discriminatory outcome;
- (c). the use of coercive techniques during questioning and interviews, and any failure to contact a person's lawyer, the Custody Notification Service, the Independent Third Persons program, or the Youth Referral and Independent Person Program;
- (d). any retaliation or reprisals against a person who has made a complaint about police.

Systemic Police Misconduct

Recommendation 11. Systemic police misconduct must not be investigated by Victoria Police; it must be investigated by a new independent police complaints body. The legislation establishing the new independent police complaints body should define 'Systemic police misconduct' in its own right, not as a sub-type of 'serious police misconduct'.

- (a). The definition of systemic police misconduct should include:
 - A pattern of behaviour or omissions indicative of systemic issues;
 - A culture indicative of systemic issues, or a culture that allows or encourages patterns of behaviour or omissions indicative of systemic issues; and



- The aggregate impact of a pattern of behaviour or omissions, where that impact is indicative of systemic issues.
- (b). The definition of 'systemic issues' should include issues involving discrimination, a disproportionate impact on particular communities, or inadequate police responses to particular issues (such as family violence).

Recommendation 12. The independent complaints body should have own-motion powers to conduct investigations of individual incidents, thematic investigations of related incidents, and systemic investigations of wider problems within Victoria Police. These powers must be provided for in the legislation establishing the new independent police complaints body.

Recommendation 13. To ensure the independent police complaints body is capable of identifying and investigating systemic issues, the body must:

- (a). Have access to: the complaints history of police officers, information from any civil litigation involving a police officer, and information on any impropriety or illegality by a police officer raised as part of a criminal proceeding; and be required to consider this information in the initial classification of a complaint and in the assessment of possible systemic misconduct;
- (b). Initiate an early intervention and complaint profiling system, with a particular focus on officers or units that have received multiple complaints from Aboriginal people;
- (c). Provide transparency and routinely publish data in relation to police complaints.

Recommendation 14. The independent complaints body should have a 'super-complaints' process which allows representative organisations to make complaints about systemic issues on behalf of a group of affected people. Those representative organisations must include Aboriginal Community Controlled Organisations.

Recommendation 15. The independent complaints body should develop a strategy for identifying and investigating systemic racism, in consultation with Aboriginal Community Controlled Organisations.

Improving the Complainant Experience

Recommendation 16. The legislation establishing a new, independent police complaints body must enshrine a complainant-centred approach throughout the complaints process.



Procedural Fairness

Recommendation 17. The legislation establishing a new independent police complaints body must incorporate procedural fairness for complainants, including:

- (a). Right to review of classification decision;
- (b). Right to receive written and oral communication throughout the complaint process, including when the complaint is first received, after the initial assessment of the complaint, and when the complaint is resolved;
- (c). Right to access the investigation file;
- (d). Right to have complaint resolved in a reasonable time;
- (e). Right to participate in the investigation process, including the opportunity to provide additional information and/or correct false assumptions throughout the investigation process and comment on any adverse material before a complaint is dismissed;
- (f). Right of review if the complaint is dismissed or referred;
- (g). Right of review of outcome of the complaint.

Any relevant policies and procedures should be made publicly available.

A Prompt Complaints Process

Recommendation 18. The legislation establishing a new independent body must establish specific timeframes for dealing with complaints. The body should develop publicly available policies on setting out the expected timeframes for dealing with the complaint, including the initial assessment, investigation and final resolution of the complaint.

Culturally Appropriate Handling of Complaints

Recommendation 19. A new independent police complaints body must respond to the needs of Aboriginal complainants, including by establishing a Koori Engagement Unit, with responsibility for:

- (a). Raising awareness of the complaints process within Aboriginal communities, including through outreach sessions;
- (b). Establishing culturally appropriate options for lodging a complaint;
- (c). Liaising with Aboriginal complainants throughout the complaint process, including to provide regular updates;
- (d). Providing and/or coordinating access to culturally safe support for complainants, including through warm referrals to culturally safe providers;



(e). Coordinating access to culturally safe legal assistance, including through warm referrals to VALS and other legal service providers.

Recommendation 20. A new independent police complaints body must ensure that Aboriginal communities are aware of and understand the police complaints process, including by:

- (a). Providing culturally appropriate and easily accessible information about the complaints process, including on the website and in public locations;
- (b). Developing publicly available policies setting out values and standards for handling complaints, including a commitment to provide a culturally appropriate service.

Recommendation 21. The Victorian Government should provide funding to VALS to develop and implement targeted community legal education (**CLE**) on police powers, interacting with police and police complaints.

Recommendation 22. Victoria Police must provide publicly available and culturally appropriate information on the process for handling customer service complaints.

Recommendation 23. A new independent police complaints body should establish culturally appropriate avenues for submitting a police complaint, including online, in person, over the phone and by post. The Koori Engagement Unit at the new body should lead this process, in collaboration with ACCOs and the Aboriginal Justice Caucus.

Recommendation 24. A new independent police complaints body must communicate regularly with complainants throughout the complaints process, including written notification:

- (a). When the complaint is first submitted (advising on the process);
- (b). After the initial classification and assessment (advising of how the complaint has been classified, whether the complaint will be investigated, referred or dismissed, and providing information on rights to review/respond);
- (c). Throughout the investigation or restorative justice process (at least every 4 weeks);
- (d). Written notification of the outcome of the complaint, including a description of each allegation forming the complaint, a brief summary of the evidence in relation to each allegation, the determination reached and how the investigator reached that conclusion (including the steps taken to investigate that allegation), and the action taken in response to the complaint, as well as information on review rights.





Recommendation 25. A new independent police complaints body should establish mechanisms to receive feedback from complainants about their experiences and continually improve processes based on this feedback. The Koori Engagement Unit at the new body should establish mechanisms for receiving feedback from Aboriginal complainants and Aboriginal communities more broadly, for example, outreach sessions with Aboriginal communities, or by liaising with service providers such as VALS, about the experiences of our clients.

Recommendation 26. To ensure that the new independent police complaints body is able to provide a culturally appropriate complaints process, it should:

- (a) Employ Aboriginal investigators and/or involve Aboriginal staff in the classification process for complaints submitted by Aboriginal people;
- (b) Ensure that there are Aboriginal people in management positions;
- (c) Require all non-Aboriginal staff to undergo substantive training in cultural awareness, systemic racism, anti-racism, unconscious bias and trauma-informed approaches;
- (d) Adopt a de-centralised model, with regional offices around the State.

Recommendation 27. The Victorian Government should provide funding to VALS to provide culturally safe legal advice and representation for Aboriginal complainants.

Access to Documents and Footage

Recommendation 28. Complainants should be able to access documents relating to the police complaint, including the investigation file:

- (a). The legislation establishing a new independent body should not exempt documents and footage relating to the police complaint from the *Freedom of Information Act 1982*, as is currently the case for IBAC;
- (b). The *Freedom of Information Act 1982* should be amended to ensure that documents and footage relating to the police complaint are not exempted from this Act.

Recommendation 29. The Victorian Government should take measures to ensure that Victoria Police comply with timeframes set out in the *Freedom of Information Act 1982* (Vic).



Restorative Justice

Recommendation 30. The new independent police complaints body and Victoria Police should work with Aboriginal communities and ACCOs to develop restorative justice processes at each agency.

Recommendation 31. Restorative justice approaches for resolving police complaints should meet the following international best practice principles:

- (a). All parties must consent and parties can withdraw consent at any time;
- (b). The process should be driven by the complainant;
- (c). There should be safeguards in place to guarantee fairness for both parties;
- (d). Neither party should be coerced or induced by unfair means to participate in the process;
- (e). Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration at all stages;
- (f). The processes must be designed to maximise a sense of justice and healing and minimise chances of harm;
- (g). Both parties have a right to legal advice and representation, including culturally safe legal services;
- (h). Discussions should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by law.

Recommendation 32. Not all police complaints are appropriate for resolution through restorative justice approaches. The new independent body for police complaints should develop clear guidelines on when a restorative justice approach may be appropriate.

Recommendation 33. Restorative justice processes used by Victoria Police to resolve customer service complaints should be legislated, and guidelines regulating the process should be publicly available. The mediator or conciliator must be independent from police and the new independent police complaints body should have strict oversight of the processes.

Protections for Complainants

Recommendation 34. Legislation establishing a new independent body for police complaints should include robust protections for complainants, including:

(a). Making it an offence to threaten or intimidate, persuade or attempt to persuade another person not to make a complaint, or subject them to any detriment;





(b). Monitoring charges laid against a complainant once they have submitted a complaint.

Recommendation 35. The new independent body for police complaints should recognise in its policies and procedures that investigations may need to be deferred to avoid interfering with the defence in a criminal prosecution. These procedures should include:

- Advising complainants that they may wish to seek legal advice;
- Highlighting the importance of legal advice where there may be related matters before a court;
- With consent, putting a complainant in touch with an appropriate legal service (VALS in the case of Aboriginal complainants).

Complaint Outcomes

Recommendation 36. The independent complaints body should have the power to refer matters for prosecution. The Office of Public Prosecutions should be required to provide a written explanation to the complaints body and the complainant if it declines to prosecute after a referral.

Recommendation 37. Complainants and their legal representatives should have a legal right to access the complaint investigation file once a matter has been finalised, and evidence from the file should be admissible in civil litigation.

Recommendation 38. Victoria Police should be required to consider the findings of an independent investigation when deciding whether to settle a civil suit.

Recommendation 39. Findings of the independent police complaints body should be reviewable by an external, public tribunal. Review rights should be available to both the complainant and the police officer(s) subject to the complaint.

Recommendation 40. The independent complaints body must have the power to make recommendations for reform of systems, policies and procedures within Victoria Police.

Recommendation 41. Victoria Police should be required to submit an annual report to the independent complaints body, providing details on its implementation of recommendations from the complaints body, including plans for ongoing implementation and any barriers to successful implementation.



Complaints Data

Recommendation 42. Data relating to police complaints from Aboriginal complainants must be gathered, managed and used in accordance with the principles of Indigenous Data Sovereignty and Indigenous Data Governance.

Powers of Police Complaints Bodies

Recommendation 43. Victoria Police should be legislatively prohibited from investigating any matter that is being investigated by the new independent complaints body. The complaints body should have a power to order police to cease any related investigation if it could interfere with an ongoing complaint investigation.

Recommendation 44. Where Victoria Police is investigating a complaint (i.e. the complaint is assessed as a customer service matter), the independent body must have the power to take over the investigation of any complaint at any time – both complaints received directly by police and those referred by the independent body – and to require police to suspend their investigation.

Recommendation 45. Investigators employed by the independent complaints body should be granted all the investigative powers of a police officer while they are investigating a complaint.

Police-Contact Deaths and Serious Injuries

Recommendation 46. Police-contact deaths and incidents involving serious injuries must not be investigated by police; they must be investigated by a new independent police-complaints body.

Recommendation 47. Coronial investigations into police-contact deaths must not be carried out by police. They must be carried out by a specialist civilian investigation team that is independent from police, is culturally appropriate and includes Aboriginal staff and leadership.

Recommendation 48. The Government should consult with the families of Aboriginal people who have died in custody regarding the mechanism for independent coronial investigation of police-contact deaths.



Recommendation 49. Family members of an Aboriginal person who has died in police custody should be given the option of providing a statement through the Koori Engagement Unit at the Coroners Court or VALS lawyers.

Recommendation 50. The Government should establish an Aboriginal Social Justice Commissioner to provide independent oversight for Aboriginal justice outcomes in Victoria. One of the key functions of the Commissioner should be to provide independent oversight for implementation of all coronial recommendations arising from the police-contact death of an Aboriginal person.

Legal and Disciplinary Sanctions

Civil Litigation

Recommendation 51. Complainants should be able to access footage from body-worn cameras (**BWC**s) worn by police and Protective Service Officers (**PSO**s). To enable access to this footage, Sections 30D and 30F of the *Surveillance Devices Act 1999* should be amended, to remove BWCs from the ambit of this legislation.

Police Disciplinary System

Recommendation 52. As recommended by the IBAC Committee Inquiry, the Victorian Government should "review the disciplinary system for Victoria Police, including the nature and operation of the *Victoria Police Act 2013* (Vic) with respect to that system." The review should be open to submissions from the public and stakeholder organisations and should publish its final report.

Recommendation 53. The review of the police disciplinary system should make recommendations for linking the disciplinary system with the police complaints system, to avoid re-investigation of matters that have been independently investigated through the complaints process.

Recommendation 54. The review of the police disciplinary system should make recommendations to provide for greater transparency and accountability in the operation of the disciplinary process.



Monitoring, Auditing and Record-Keeping

Recommendation 55. Monitoring of Victoria Police should be conducted by a single dedicated monitoring body, not fragmented between agencies. The monitoring function should be carried out by a body that is separate to the independent police complaints body. If the complaints and monitoring functions are located in a single agency, there should be a strict information firewall.

Recommendation 56. Monitoring must not be limited to procedural monitoring, but should also include substantive, outcome-focused monitoring of the exercise of police powers. The monitoring body should significantly expand the use of substantive monitoring, through a merits review of documented police decision-making.

Recommendation 57. The monitoring body should use reporting obligations of Victoria Police as the basis for regular and timely publishing of statistical analysis of the exercise of police powers.

Recommendation 58. Data published by the monitoring body should be disaggregated to the greatest extent possible, and published in consistent formats, which facilitate analysis and comparison over time.

Recommendation 59. The scope of procedural and substantive monitoring should be expanded to a wider range of police powers than the currently monitored major investigative powers, including powers that are frequently exercised in the community or disproportionately impact on Aboriginal people and other marginalised communities. These should include:

- Police stops and searches
- Move-on orders
- Any new police powers relating to public intoxication
- Powers under the Mental Health Act and future relevant Acts
- Charges against children in out-of-home care
- Arrest of child or young person rather than proceeding by way of summons
- Cautioning
- Diversion
- Use of weapons at rallies/protests (rubber bullets, OC spray, armoured vehicles etc.)
- Use of force during arrest
- Treatment in police custody, including use of force, drug testing, strip searching and provision of medical care
- Police bail decisions
- Police use of Custody Notification Service (**CNS**), bail justices, Aboriginal Community Justice Panels (**ACJP**) and Independent Third Person services.



Recommendation 60. The monitoring body should be granted the flexibility to establish monitoring arrangements in new areas of police conduct as appropriate, not restricted to an established list of monitoring areas.

Recommendation 61. Victoria Police should be required by legislation to keep detailed records in relation to the exercise of specific police powers, and provide disaggregated data to an independent body for the purposes of monitoring. Data collection and collation should adhere to the principles of Indigenous Data Sovereignty.

Detention Inspections in Compliance with OPCAT

Recommendation 62. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 63. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

Recommendation 64. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained by Victoria Police or Protective Service Officers, regardless of the length of time of detention.

Recommendation 65. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 66. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively. OPCAT implementation is a joint responsibility of the Commonwealth and State Governments.

Accountability for Implementation

Recommendation 67. The Victorian Government should establish an independent, statutory office of the Aboriginal Social Justice Commissioner. This office should be properly funded and report directly to the Parliament. The mandate of the Commissioner should include monitoring the implementation of RCIADIC recommendations, as well as recommendations from coronial inquests into Aboriginal deaths in custody.



Introduction

Systemic racism¹ in Victoria Police impacts Aboriginal communities on a daily basis and manifests itself in the way that Aboriginal people are over-policed, over-represented in police custody and under-served when they need assistance from police. It also evident in police use of force and assaults against Aboriginal people and explicit racial abuse.

An effective police oversight system is crucial to holding police accountable for this systemic racism and violence. But the mechanisms for police oversight in Victoria are fundamentally failing. Individual victims of police misconduct – including those who die or are seriously injured after contact with the police – almost never see justice done, even in their individual cases. Real systemic reform is even more lacking, despite the indisputable evidence of systemic problems that has accumulated for many years.

There is an urgent need for meaningful police oversight, to hold police accountable and help drive change to fix the deep problems with policing in Victoria. The Government is conducting a review of the police oversight system, which provides an opportunity to address some issues – but the scope of the review is too narrow, with a heavy focus on police complaints, and is unlikely to result in the wider changes to the oversight system that Victoria needs.

This Policy Paper sets out VALS' position on the reforms that are needed across all the different pillars of an effective oversight system. The paper has a particular focus on the police complaints system, because this is the main subject of the Government's current systemic review of police oversight.² VALS' strong view, however, is that this systemic review is too narrow. It does not respond to the true intention of the Royal Commission into the Management of Police Informants when it called for a systemic review,³ and it does not cover many crucial aspects of an effective police oversight system. VALS has been advocating strongly for the necessary, more extensive reform of the wider police oversight system. While this paper addresses the Government's immediate priorities in more detail, VALS will be doing more work in future on other fundamental pillars of the oversight system, particularly on criminal prosecutions of police.



¹ Systemic racism refers to the way that laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups.

² Engage Victoria, '<u>Consultation: Systemic review of police oversight</u>', web page accessed 20 April 2022. 3 Royal Commission into the Management of Police Informants, *Final Report*, Recommendation 61.

Aboriginal People and the Police Oversight System

Aboriginal communities, including VALS clients, Aboriginal Community Controlled Organisations (**ACCO**s) and the Aboriginal Justice Caucus (**AJC**), have consistently shared their experiences and proposed solutions as part of numerous inquiries and reviews. In particular, the AJC has repeatedly called for an Aboriginal Social Justice Commissioner, to oversee Aboriginal justice outcomes in Victoria and operate as an oversight mechanism for implementation of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) recommendations and coronial recommendations.⁴ Establishing an independent and well-resourced Aboriginal Social Justice Commissioner continues to be a priority for VALS and the AJC.

The following extract from the Coronial findings into the passing of Raymond Noel Lindsay Thomas, a proud Gunnai, Gunditjmara and Wiradjuri man, is a poignant reminder of the historical and contemporary violence and abuse perpetrated against Aboriginal people by police. Reflecting on the fear that his son must have felt whilst being pursued by police, Raymond Noel's father recounted the following incident from his son's childhood:

"... the boys were playing on a woodchip mound, you know, on the docks with a couple of other cousins. Just being young boys, ten or eleven years old. Just what they do. And two police officers came along and their cousins run off and two police apprehended our boys, handcuffed them and made them sit on the gutter and one of the officers said, "If you move I'll shoot ya". Now, that's the first interaction with police for a ten year old, eleven year old. So you could imagine the fear they must have felt..."⁵

Aboriginal people are far more likely to suffer police misconduct, and to experience negative interactions with police. In Victoria, Aboriginal people are more likely to be apprehended and arrested by police, and report higher rates of being hassled by police.⁶ The recent Inquiry by the Commission for Children and Young People (**CCYP**) found that



⁴ Establishing an Aboriginal Social Justice Commissioner has been one of the AJC's key priorities since it was recommended by the Victorian RCIADIC Review in 2005.

⁵ Raymond Noel Thomas passed away on 25 June 2017 during a police pursuit in Thornbury, Melbourne. See *Finding into the Death of Raymond Noel Lindsey Thomas*, COR 2017 003012, p. 28.

⁶ H. Blagg, N. Morgan, C. Cunneen, A. Ferrante (2005), "Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System".

Aboriginal children and young people were substantially over-represented in arrests.⁷ Over 70% of Aboriginal children and young people consulted throughout the Inquiry spoke about racism, violence or mistreatment by police; 25 Aboriginal children mentioned racism and racial abuse in the context of police interactions.⁸ Excessive policing of Aboriginal women has been noted by the Coronial Inquest into the death of Tanya Day.⁹

Given this record of maltreatment, it is not surprising that complaints made by Aboriginal people are typically more serious than those made by non-Aboriginal people. The Koori Complaints Project found that, in the files it reviewed, the largest number of allegations related to assaults by police.¹⁰ Complaints about racist abuse and failure to provide medical treatment were also common.¹¹ At the same time, Aboriginal people report being under-served by police when they need support – research by VALS and the Centre for Innovative Justice found VALS clients made complaints about police failure to investigate reports or respond adequately to family violence callouts.¹²

Despite the fact that Aboriginal people in Victoria are routinely subjected to racism and misconduct by police, they are less likely to bring a complaint than non-Aboriginal people.¹³ This is a clear sign of a police oversight system which is failing. A recent audit found that Victoria Police systematically mishandles complaints made by Aboriginal people, including by failing to consider the human rights of complainants or to properly gather evidence to investigate their complaints.¹⁴ After two hundred years of police violence against Aboriginal communities in Victoria, the continuing lack of accountability means that Aboriginal people have lost faith in

8 Ibid, p433.

10 Koori Complaints Project 2006-2008: Final Report, p18.

11 Ibid.

12 VALS and the Centre for Innovative Justice, *The Effectiveness of the Victoria Police Complaints System for VALS Clients* (2016).

VALS, Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria ("Submission to IBAC Inquiry") (2017).

13 See <u>Koori Complaints Project</u>, pp. 18-21; Victorian Parliament (2019), <u>Inquiry into the external oversight of police</u> corruption and misconduct in Victoria, pp. 152 – 154; VALS (2017), <u>Submission to the Inquiry into the External Oversight of</u> <u>Police Corruption and Misconduct in Victoria</u>, p. 8.

14 IBAC (2022), Victoria Police handling of complaints made by Aboriginal people: Audit report.



⁷ CCYP (2020), *Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* ("Our Youth, Our Way"), p. 430.

⁹ Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day, 9 April 2020, COR 2017 6424.

both police and the police oversight system. Reform is urgently needed.

Pillars of Police Oversight

There have been many inquiries and royal commissions examining police violence and the accountability mechanisms that are meant to address and prevent it.¹⁵ No doubt, the ongoing lack of police accountability will continue to be a key theme in future processes, including in the work of the Yoo-rrook Commission. This will remain the case until an adequate oversight system for police is put in place.

The police oversight system in Victoria needs to be capable of responding to both individual instances of misconduct and to the systemic problems that plague Victoria Police and its relationship with Aboriginal people. A complaints system is not enough. Neither are oversight procedures limited to the specialised, rarely-used coercive powers that police have for dealing with organised crime and terrorism.

Oversight needs to be built into every part of Victoria Police's operations, from its most everyday policing activity, to its special operations, to the way it engages with coronial inquests. This Paper examines each of the key pillars of a police oversight system. These are:

• Police complaints:

- o Independent investigation of individual police complaints
- Independent investigation of systemic issues (including through own motion investigations)
- Legislative mechanisms for accessing documents and footage from Body Worn Cameras (**BWC**s), for the purposes of making a complaint against police
- Investigation of police-contact deaths and serious injuries
 - Independent investigation of police-contact deaths and serious injuries, including for the purposes of assessing whether disciplinary or criminal offences have been committed, as well as for the coronial process



¹⁵ *Royal Commission into Aboriginal Deaths in Custody National Report* (1991); *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (2005); IBAC Committee (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, pp. 152 – 154; Victorian Parliament (2022), *Inquiry into Victoria's Criminal Justice System*.



- A robust police disciplinary system, to ensure that officers are held accountable for disciplinary offences
- Criminal prosecution of police officers
- Civil litigation against police officers and/or Victoria Police

• Monitoring, Auditing & Reporting

- *Record-keeping and reporting*: Robust legislative provisions for comprehensive record-keeping practices, including in relation to body worn cameras (**BWC**s); publicly available and transparent reporting on police activity and the use of police powers
- *Auditing*: Independent auditing of police record-keeping and public reporting requirements; independent auditing of the police complaints system
- *Monitoring*: Independent monitoring of police decisions and exercise of police power

• Detention Inspections in Compliance with OPCAT

• Independent visits to places where police or the government may deprive people of their liberty (implementation of the *Optional Protocol to Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**))

• Accountability for Implementation

 Independent oversight of implementation of police-related recommendations, including Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) recommendations, coronial recommendations and recommendations from police complaints.

It is also important that all parts of the police oversight system attend to the conduct of Protective Service Officers (**PSO**s) who operate with many of the same powers as sworn police officers, but without the same degree of training. VALS has repeatedly raised concerns about over-policing of "antisocial behaviour" by PSOs, which disproportionately impacts Aboriginal people, homeless people, people with mental health or substance use issues, and children.¹⁶ Police contact which starts with needless over-policing of "antisocial behaviour" can easily lead to detention, further police contact and entrenchment within the criminal legal system.



¹⁶ VALS (2021), *Submission to the Inquiry into Victoria's Criminal Justice System*. See also IBAC (2016), *Transit Protective Services Officers: An exploration of corruption and misconduct risks*.

As noted above, the Government's current systemic review does not address many of these pillars of an effective oversight system.

RECOMMENDATIONS

Recommendation 1. In addition to the current review, the Government must undertake a more comprehensive reform process to consult on, design and implement all the core pillars of a police oversight system.

Recommendation 2. The reform process must examine accountability and oversight mechanisms for addressing systemic racism within Victoria Police.

Recommendation 3. The reform process must prioritise the voices of people and communities who are disproportionately affected by systemic racism and the lack of police accountability.

Challenges for Oversight Reform

Any reform to the police oversight system needs to prioritise the voices of people and communities who are disproportionately affected by systemic racism and the inadequacies in Victoria's systems of police accountability.

Too often, the powerful voices of Victoria Police and the Police Association Victoria (**TPAV**) overshadow the perspective of those most affected by police misconduct. Victorian politics has come to feature law and order issues at almost every election.¹⁷ The current Labor Government has invested heavily in police personnel and equipment (including tasers).¹⁸ The Government has been focused on defeating Opposition attacks over crime issues, which have been a major



¹⁷ The Guardian, 20 November 2018, 'Victorian election: what the parties are promising'. Available at https://www.theguardian.com/australia-news/2018/nov/20/victorian-election-what-the-parties-are-promising.

¹⁸ Premier of Victoria, 21 April 2017, Media release: 'Frontline Police Numbers Keep Climbing'. Available at <u>https://www.premier.vic.gov.au/frontline-police-numbers-keep-climbing</u>.

The Age, 23 December 2021, 'Victoria to issue all frontline police with Tasers'. Available at <u>https://www.theage.com.au/</u> national/victoria/victoria-to-issue-all-frontline-police-with-tasers-20211223-p59jrp.html.

focus of Liberal campaigning at the 2014 and 2018 elections.¹⁹ There are also close personal ties to the police force, with Daniel Andrews' former chief of staff Brett Curran now an Assistant Commissioner with Victoria Police.²⁰

The Police Association Victoria

The Police Association has historically been a particularly significant obstacle to establishing greater oversight of police. Around 98% of Victoria Police's sworn staff (officers and PSOs) are members of the Police Association. This is far above the density of most trade unions and means the Association is regarded as a strong representative voice of police officers.

Resisting greater oversight and accountability has been one of the Police Association's key aims throughout its history.²¹ The Association has grown in strength when it has had opportunities to advocate for stronger protections for police officers against disciplinary and other sanctions. In 1946, the Police Association's advocacy was instrumental in legislation to remove the Chief Commissioner's power to dismiss officers and the creation of a separate Police Discipline Board.²² In 1965, TPAV publicly attacked the credibility of a police informer turned whistleblower, and supported the defence of a small number of officers charged with misconduct.²³ In 1976, the specially constituted Beach Inquiry made adverse findings against 55 police officers and recommend "beyond doubt the undesirability of police investigating complaints against police.²⁴ It recommended an increase in the Ombudsman's powers to investigate complaints and the creation of a tribunal, independent of police, to make findings and impose disciplinary and other

21 Office of Police Integrity (2007), *Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct*, pages 27, 41, 47-50, 107-9, 111.

24 Ibid, p49.



¹⁹ The Guardian, 26 October 2018, 'Victorian election roundup: Dutton reprises 'gang' fears as Liberals run on crime'. Available at <u>https://www.theguardian.com/australia-news/2018/oct/26/victorian-election-roundup-dutton-reprises-gang-fears-as-liberals-run-on</u>.

The Guardian, 14 November 2014, 'Victorian election: why 'tough on crime' has failed the crucial test'. Available at <u>https://</u> www.theguardian.com/australia-news/victorian-election-the-countdown/2014/nov/14/victorian-election-why-tough-on-hasfailed-the-crucial-test.

²⁰ The Australian, 2 December 2019, 'Daniel Andrews' ex-staffer Brett Curran now assistant police commissioner'. Available at https://www.theaustralian.com.au/nation/politics/daniel-andrews-exstaffer-brett-curran-now-assistant-police-commissioner/ news-story/4c156005c4961dad92e8beb08e842a65.

²² Ibid, pp33-4.

²³ Ibid, pp41-2.

sanctions.²⁵ Before the report was even released, the Association discussed industrial action, won concessions from government, and started a 'fighting fund' for defence of members in misconduct cases. The 1976 action in particular galvanised the Police Association and boosted its organising efforts, including through a 4,200 person meeting about the inquiry's report.²⁶ The Association faced some public criticism for the strength of its defence of officers accused of misconduct, but its standing among police generally grew.

Since that time, the Police Association has continued to dedicate major efforts to misconduct defence and to preventing any strengthening of the disciplinary or complaints investigation systems. When the Police Complaints Authority (**PCA**) was established in 1986 it was fiercely criticised by the Association.²⁷ The PCA had around five staff and fell far short of the powers of an adequate oversight body, but the Police Association and Victoria Police command nevertheless viewed it as an intrusion on internal policing matters. The PCA was also highly critical of police, in particular the way Victoria Police managed internal affairs investigations. An independent review in 1987 largely supported the PCA against its critics, but the Police Association's advocacy continued and the PCA was abolished in 1988, after less than two years of operation.

This historic focus on opposing stronger oversight has persisted to this day. The Police Association supported the abolition of the Office of Police Integrity, and its replacement by the Independent Broad-Based Anti-corruption Commission (**IBAC**), on the grounds that it was unfair to have an agency focused on police in particular, when other public officials also commit misconduct.²⁸ In 2017, the Association made a written submission to Parliament arguing that the only reform needed to IBAC is "a diminution of the IBAC's investigative capacity", not any strengthening of independent investigation.²⁹ Many people who make complaints about police feel that they are not listened to, but the head of the Police Association told MPs that those people are "hopelessly conflicted" and their judgement should not be relied on.³⁰

25 Parliament of Victoria (1978), *Report of the Board of Inquiry into Allegations against Members of the Victoria Police Force*, pp107-111.

26 Office of Police Integrity (2007), *Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct*, p49.

27 Ibid, pp105-6.

28 Herald Sun, 6 January 2010, 'Don't point finger at us, says Police Association boss Greg Davies'.

The Age, 5 December 2007, 'Police union wants new watchdog'.

29 The Police Association Victoria (2017), *Submission to the IBAC Committee Inquiry into the external oversight and investigation of police corruption and misconduct*.

30 IBAC Committee, *Transcript: Inquiry into the external oversight and investigation of police corruption and misconduct in Victoria – 19 February 2018*.



As long as the voices of the Police Association, Victoria Police and law-and-order proponents are prioritised, there will not be adequate reform of the police oversight system. The Government needs to recognise that a functioning oversight system is necessary for Victoria Police to regain the trust of the Victorian community, and that opposition to reform is short-sighted and selfdefeating.

We appreciate that the task of reforming the police oversight system is immense. However, it is not as immense as the legacy created by over two centuries years of racist policing. Over thirty years ago, the Royal Commission into Aboriginal Deaths in Custody found that "far too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent."³¹ The recommendations of that Royal Commission have not been implemented. Police intervention in the lives of Aboriginal people continues to be discriminatory and violent, but real accountability for police misconduct is still absent. The creation of a robust police oversight system is long overdue.

³¹ RCIADIC National Report, Volume 2, Section 13.2.3.





Police Complaints

A Broken System

The police complaints system in Victoria is broken, falls drastically short of international human rights standards and fundamentally fails to respond to the needs of Aboriginal people. To ensure a police complaints mechanism that complies with international principles, the Government must establish a new independent police complaints body that is complainant-centred, transparent, has adequate powers and resources, and responds to the needs of Aboriginal complainants.

International human rights law³² requires that a police complaints system must comply with the following standards:³³

- *Independent*: the investigating body must be institutionally, functionally, culturally and politically independent from police.
- *Capable of conducting adequate investigations*: adequately resourced to be able to ascertain whether police have breached legal or disciplinary standards, and whether they have acted in compliance with human rights;
- *Prompt*: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law. Enforceable timelines for investigations are critical;³⁴
- *Transparent*: regular and public reporting of police complaints including outcomes, disciplinary action, civil litigation and prosecutions;
- *Victim-centred and victim participation*: the complainant should be protected against reprisals or harassment after making a complaint and should be involved in the complaints process in order to safeguard their legitimate interests.

33 See: Council of Europe (2009), *Opinion of the Commissioner for Human Rights concerning independent and effective determination of complaints against the police*; UN Office on Drugs and Crime (2011), *Handbook on police accountability, oversight and integrity*; Police Accountability Project (2017), *Independent Investigations of Complaints Against Police*.

They have also been applied by the UN Human Rights Committee in: Corinna Horvath, Individual communication to the United Nations Human Rights Committee in Horvath v Australia, 19 August 2008; UN Human Rights Committee, Views: Communication No. 1885/2009 (5 June 2014), 110th sess (Horvath v Australia).

34 Police Accountability Project (2017), *Independent Investigations of Complaints Against Police*.



³² The right to remedy under international human rights law provides that individuals whose rights have been violated must be able to access an effective remedy through a competent authority. See Article 2(3) *International Covenant on Civil and Political Rights* (ICCPR).

The experience of VALS, our clients and the legal assistance sector is that the current police complaints system does not comply with these standards. The current system provides for almost no independent investigation of complaints by IBAC, which is severely underfunded and does not have adequate powers or resources. There is a complete lack of transparency and public scrutiny of IBAC investigations into police misconduct.

In Victoria's current police complaints system, complaints can be made either to Victoria Police or directly to IBAC. Victoria Police is required to notify IBAC of all complaints it receives; conversely, IBAC can – and in the majority of cases does – refer complaints back to Victoria Police for investigation. Very few complaints are investigated by IBAC itself. Shortcomings of the existing approach include:

- **Failure to serve Aboriginal complainants**: Despite clear evidence that Aboriginal people face more frequent and more serious police misconduct, IBAC has consistently failed to respond to the needs of Aboriginal complainants. IBAC has not established culturally appropriate complaints-handling processes or recognised the need to liaise with Aboriginal complainants and communities.
- Lack of independence: IBAC has developed a cooperative and trusting relationship with Victoria Police through its anti-corruption investigations, which is not appropriate for a complaints-investigating body. This culture of collaboration with police is reflected in the high number of referrals back to Victoria Police for investigation (94.3% of allegations in 2020-21)³⁵, and in the limited trust that community members have in IBAC as an independent investigator.
- Lack of complaints-handling culture: IBAC does not consider itself a complaintshandling body.³⁶ Much of its organisational culture and the legislation which governs it are intended for public sector corruption investigations, which require secrecy. It is not well suited for complaints investigations which require transparency and clear communication with complainants.
- **Investigations are inadequate**: The above shortcomings, combined with insufficient resourcing, mean that IBAC's investigations into police complaints are not adequate. Investigations rarely deliver meaningful outcomes, even when there is sufficient evidence to pursue civil litigation. For example, in Operation Turon, IBAC found that the Assistant Commissioner for Professional Standards Command had posted racist and homophobic material on the internet over a period of several years and faced civil litigation for using racist language in person, but concluded that this had no bearing on his decision-making about complaints investigations.³⁷ In another investigation, IBAC



³⁵ IBAC (2021), Annual Report 2020/21, p. 26.

³⁶ Police Accountability Project (2017), *Independent Investigations of Complaints Against Police*, p. 5. 37IBAC (2021), *Operation Turon: special report*.

cleared police officers of using unlawful force after they stomped on a man's head and rammed him with a police vehicle during an acute mental health episode.³⁸ This has led to VALS and many community legal centres regularly advising clients that there is no value in making complaints to IBAC. VALS has experience of cases where IBAC has referred complaints back to Victoria Police, or found them not substantiated, when the same incidents were later pursued successfully in civil litigation.

The failings of IBAC are so dire that many complainants and legal services see no reason to engage with it.³⁹ This is primarily due to the lack of independence in its investigations, but also because IBAC consistently fails to provide tangible outcomes, both in relation to individual complaints and systemic issues.

Further, IBAC is completely incapable of dealing with systemic issues, including systemic racism. As noted above, systemic racism within Victoria Police affects Aboriginal people on a daily basis and must be addressed through significant cultural and institutional change. IBAC's current annual plan and five-year strategy do not make any reference to racism, in Victoria Police or in society more broadly.⁴⁰ The profound change needed in Victoria Police can only be catalysed by a police complaints system that is seriously committed to addressing systemic racism.

The existing complaints system has also repeatedly failed victim-survivors of family violence, particularly family violence committed by police officers. IBAC and the Victorian Equal Opportunity and Human Rights Commission have identified that Victoria Police are less likely to lay family violence charges against a serving police officer than against other people.⁴¹ Complaints about police handling of family violence matters – like other complaints – are almost always investigated by police themselves. This approach has led to major procedural and substantive failures: in one recent investigation, the victim-survivor of family violence at the hands of police officer was not told that a complaint investigation was under way, and her child's testimony was dismissed as unreliable in a manner that re-traumatised him.⁴² These failings necessitate major reform. The Victorian Parliament's recent Inquiry into the Criminal Justice System received extensive

38 ABC News, 16 July 2021, 'Watchdog finds police acted lawfully when head-stomping mentally ill man during arrest'.

39 VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria, Koori Complaints Project 2006-2008: Final Report*, p. 23; CCYP (2020), *Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 436.

40 IBAC (2021), The IBAC Plan 2021-25.

IBAC (2021), *IBAC Annual Plan 2021/22*.

41 Ibid, p11.

42 ABC News, 14 April 2022, 'Child survivor of family violence says police 'essentially' called him a 'liar' during misconduct probe'.



evidence on the problems with the current police complaints system, but recommended only that the Government 'consider' establishing a new body, as well as considering possible reforms to strengthen IBAC.⁴³ That recommendation does not go far enough; the evidence clearly shows that IBAC must no longer be responsible for investigating complaints against police in Victoria. A new body must be established to rectify the current system's shortcomings and ensure independent investigation of complaints against police.

RECOMMENDATIONS

Recommendation 4. The Victoria Government must establish a new independent police complaints body that is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of Aboriginal complainants.

Recommendation 5. Police must not be responsible for investigating and handling police complaints, except minor customer service matters. All police complaints other than minor customer service matters must be investigated and managed by the independent police complaints body.

43 Victorian Parliament (2022), Inquiry into Victoria's Criminal Justice System, pp255-6.



A New Independent Body for Police and PSO Complaints

Victoria needs a new independent body to take on the police complaints functions, currently carried out by IBAC. There are profound problems with the way IBAC approaches police complaints. Some of these are structural problems with the integration of corruption and police complaints functions, while others are cultural problems with IBAC specifically. Given these insurmountable challenges, IBAC must not handle complaints even under reformed legislation.

There are three models for a police complaints body commonly discussed in Victoria, including in the report of the IBAC Committee. The existing model is an oversight body that has within its mandate both police misconduct and public sector corruption. A second model would require only a slight modification: the creation of a dedicated police misconduct division within the single oversight body was the recommendation of the IBAC Committee's inquiry. A third model is a standalone police complaints body.

Public Sector Corruption vs Police Misconduct

Treating public sector corruption and police misconduct under the same legislation, through the same oversight body, is a major impediment to an effective police complaints system. While investigation of police misconduct must be independent, public sector corruption can be appropriately investigated by police under the direction or supervision of a specialist institution. An agency tasked with investigating public sector misconduct is likely to develop a collaborative and trusting relationship with police, which can undermine the independence required of a police complaints body. From VALS' perspective, the IBAC Committee's recommendation – to establish a separate, dedicated division at IBAC to specialise in the investigation of police misconduct⁴⁴ – does not address this issue, when IBAC has repeatedly demonstrated that it places a high value on collaboration with police.

Treating public sector corruption and police misconduct through the same oversight body also means that police complaints do not receive the necessary resources and do not prioritise the requisite complainant-centred approach. IBAC has repeatedly demonstrated that its institutional culture prioritises anti-corruption work,⁴⁵ and that it "does not currently consider itself to be a complaint handling body."⁴⁶ Accordingly, the IBAC Committee concluded "that serious police

45 Under s.15(1A) of the Independent Broad-based Anti-corruption Commission Act 2011, ("IBAC Act"), IBAC is required to prioritize serious corrupt conduct or systemic corrupt conduct, not police misconduct.



⁴⁴ Victorian Parliament (2019), Inquiry into the external oversight of police corruption and misconduct in Victoria, p. xxix.

⁴⁶ Police Accountability Project (2017), Independent Investigations of Complaints Against Police, p. 5.

misconduct has been neglected by IBAC relative to its functions [relating to] corruption and misconduct in other parts of the public sector."⁴⁷This has included both insufficient priority for police misconduct issues, and a mode of working designed for public sector corruption investigations, which is wholly inappropriate for dealing with complaints from community members. IBAC's broad exemptions from Freedom Of Information legislation,⁴⁸ lack of transparency and poor communication with complainants – discussed in more detail below – are emblematic of how the agency is built around its anti-corruption functions, not its police complaints role. Although the IBAC Committee's inquiry recommended legislative changes so that IBAC is required to prioritise police misconduct,⁴⁹ the reality is that priority will always be given to high-profile, public sector corruption cases.

The model of a combined police and public sector oversight body is used in several Australian jurisdictions but not, to the best of VALS' knowledge, anywhere outside Australia. In New South Wales, the Independent Commission Against Corruption (**ICAC**) originally had responsibility for police oversight at its establishment, but "was unable to devote sufficient resources to adequately address police misconduct."⁵⁰ This led to the creation of the Police Integrity Commission, which later evolved into the current Law Enforcement Conduct Commission, "when the Wood Royal Commission found corruption in the Police Force that the ICAC had failed to detect."⁵¹ This experience demonstrates that a general public sector oversight body is unlikely to have the culture, expertise or resourcing to tackle corruption in the police force, let alone police misconduct more broadly. That has been Victoria's experience with IBAC, which has repeatedly demonstrated that it places a high value on collaboration with police.

It is also worthy of note that one of the strongest advocates for a combined police-andpublic-sector oversight model in Victoria was the Police Association.⁵² The Police Association has historically been associated with a strong opposition to oversight of the police force, including being the primary driving force (along with Victoria Police itself) behind the abolition

48 VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, p. 19. 49 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 36.

52 Prenzler (2011), 'The evolution of police oversight in Australia', Policing & Society 21(3), p. 290.



⁴⁷ Victorian Parliament (2019), Inquiry into the external oversight of police corruption and misconduct in Victoria, p. 51.

⁵⁰ Prenzler (2011), 'The evolution of police oversight in Australia', Policing & Society 21(3), p287.

⁵¹ Prenzler & Faulkner (2010), 'Towards a Model Public Sector Integrity Commission', Australian Journal of Public Administration 69(3), p253.

of the Independent Police Complaints Authority.⁵³ Further, the Police Association's reason for supporting a combined oversight body was that corruption does not 'start or stop' with the police force – demonstrating that supporters of a combined body believed that its focus should be on corruption. That has been reflected in the practice of IBAC and the inadequate priority it has given to police misconduct.

Police Complaints Agencies in Victoria

Victoria did not have a complaints or oversight body separate from the police force for many decades. One-off commissions and boards of inquiry were convened to investigate misconduct on several occasions, such as the 1976 Beach Inquiry.

Victoria Police created an internal complaints investigation process in 1965. Prior to this, complaints were investigated by the local section where they had been made. The internal investigations function grew with time, notably with the creation of the Internal Investigations Bureau in 1975, and its elevation into a separate Internal Investigations Department in 1985.

The Victorian Ombudsman was responsible for reviewing the investigation of complaints against police starting from 1971, though it had very limited formal powers to conduct these reviews.

The **Police Complaints Authority (PCA)** was established in 1986 as an independent body. It had around five staff and primarily functioned to review and supervise police investigation of complaints, rather than investigating matters itself. The PCA was fiercely criticised by Victoria Police and the Police Association, in particular for its lack of investigative expertise, and was abolished in 1988.

After the abolition of the PCA, the office of **Deputy Ombudsman (Police Complaints)** was established within the Victorian Ombudsman. The Deputy Ombudsman similarly was responsible for overseeing and reviewing police investigation of complaints, and only rarely for conducting its own investigations.

The **Office of Police Integrity** (**OPI**) was established in 2004 amid growing concern about police corruption in relation to the Melbourne gangland wars. The OPI had greater powers than the Ombudsman to conduct its own investigations, including own-motion investigations where a complaint had not been submitted. The OPI lost significant public credibility from around 2007, with a series of prosecutions collapsing due to procedural errors and accusations of misconduct within the office itself.

53 Office for Police Integrity (OPI), <u>Past Patterns – Future Directions: Victoria Police and the Problem of Corruption and</u> Serious Misconduct (2007) p. 106.



At the same time, there were calls for a more effective public sector corruption watchdog to be established in Victoria. The legislation establishing the **Independent Broad-based Anticorruption Commission** (**IBAC**) was passed in 2011. IBAC has jurisdiction over both public sector corruption and police misconduct, and took over the functions of the OPI.

Sources:

Office of Police Integrity (2007), <u>Past Patterns – Future Directions: Victoria Police and the</u> problem of corruption and serious misconduct.

The Age, 11 December 2011, 'Lessons from a troubled anti-corruption body'.

The Age, 9 February 2012, 'OPI staff misconduct claims'.

Herald Sun, 4 March 2013, 'Office of Police Integrity not corrupt, says former director Michael Strong'.

These problems are also reasons why it would be inadequate to create a dedicated police complaints division within IBAC. An internal division is unlikely to create a sufficiently distinct organisational culture to address the challenges identified above, particularly if – as the IBAC Committee report suggested, in highlighting the need for a flexible allocation of resources⁵⁴ – staff work across both divisions, or regularly rotate between them. In addition, IBAC's history of failings means that a wholly new and distinct agency would have a far better chance of establishing community trust in the complaints system.

For these reasons, it is clear that Victoria needs a new, standalone police complaints body.

One challenge highlighted by opponents of a new standalone body is that a more focused agency would have less capacity and flexibility than a broad-based body, and face a risk of duplicating or 'siloing' functions that the public sector corruption body also fulfils.

This challenge for the standalone body model is greatly overstated. The question of resourcing and capacity is not related to whether police complaints investigation is undertaken by a standalone body or a broad-based agency. The IBAC Committee Report found that too many complaints are referred to Victoria Police and that there must be a greater number of independent investigations. If resourcing is inadequate to enable this, it is not a solution to 'flexibly' take resources away from the investigation of public sector corruption to support police complaints investigation, or vice versa. Police complaints already outnumber all other types of public sector

54 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 2.



complaints received by IBAC,⁵⁵ and the volume is likely to increase if a new complaints body establishes greater credibility with the community.⁵⁶ Complaints against police are received on a routine basis, not in 'surges' that could be covered by temporary reallocation of resources. This is particularly the case when, as noted above, the approach needed for effective police complaints investigation is very different to the approach to corruption investigations.

The Government must provide the resources to enable this expansion, as it has continually been willing to dedicate billions of dollars to expand the resourcing of police and PSOs.⁵⁷ VALS does not accept that there are hard constraints on either financial resources or qualified staff which would prevent the creation of a new independent body. The Police Ombudsman for Northern Ireland employs a full-time staff of 141 people, of whom 102 work in complaints and investigation.⁵⁸ This is approximately equal to the staffing of IBAC across all of its functions, and greater than the staff numbers at the former Office of Police Integrity, even though Victoria's population is more than three times larger than Northern Ireland's.⁵⁹ Victoria clearly has the capacity to properly resource and staff a standalone police complaints body.

Another concern often raised is the risk of duplication or siloing between a standalone complaints agency and an anti-corruption body. Given that the functions and key skills of these two agencies would be very different, this risk is, in reality, very low. The knowledge, experience and approaches needed for handling police complaints are very different to those appropriate for anti-corruption work – as is recognised in the IBAC Committee's Report, which identifies a number of areas in which IBAC needs to develop greater expertise and capacity in handling police complaints because its anti-corruption expertise is not applicable. If police misconduct and public sector corruption were handled by different agencies, those agencies would have staff with different knowledge, skills and experience. There is no reason why there should be duplication of functions between the two bodies in this context. This critique of the independent agency model is also overstated.



⁵⁵ IBAC (2021), Annual Report 2020/21, p2.

⁵⁶ For example, the Police Ombudsman for Northern Ireland received more allegations of misconduct in 2020/21 than IBAC did, despite the fact that Northern Ireland's population is more than 70% smaller than Victoria's. See Police Ombudsman for Northern Ireland, *Annual Statistical Bulletin 2020/21*, p17.

⁵⁷ Victorian Government, 23 December 2021, 'Statewide Rollout of Conducted Energy Devices for Police'.

⁵⁸ Police Ombudsman for Northern Ireland (2021), Annual Report & Accounts for the year ended 31 March 2021, p57

⁵⁹ Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p365.

VALS strongly supports a new standalone police complaints body for these reasons. However, creating a standalone body is not enough if that body continues to play a reviewing role, and many complaints are still referred back to be investigated by police.

Independent Investigations

Key Data

- In 2020-2021, 94.3% of complaints against police were investigated by Victoria Police without meaningful involvement from IBAC, or not investigated.⁶⁰
- In 17% of regional command level complaint files audited by IBAC in 2016, Victoria Police's choice of investigator was not appropriate.⁶¹
- In 95% of Professional Standards Command complaint files audited by IBAC in 2018, potential and actual conflicts of interest were not considered.⁶²
- 22% of audited complaints treated as customer service issues by police had been misclassified.⁶³

Independent investigation of police complaints is essential if both Victoria Police and the complaints body are to earn and retain the trust of the community. This is particularly important for VALS' clients. Aboriginal people in Victoria are frequently victimised by police misconduct but are less likely to make formal complaints.⁶⁴ Aboriginal communities' trust in police and the complaints system is almost non-existent. VALS supports independent investigation of all police complaints except for genuine customer service issues.⁶⁵

63 Victorian Parliament (2019), Inquiry into the external oversight of police corruption and misconduct in Victoria, p. 128.

65 It is critical that a strict legislative definition of customer service issues governs this exception, as discussed below.



⁶⁰ IBAC (2021), Annual Report 2020/21, p. 26.

⁶¹ IBAC (2016), Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report, p. 11.

⁶² IBAC (2018), Audit of Complaints Investigated by Professional Standards Command, Victoria Police, p. 5.

^{64 &}lt;u>Koori Complaints Project 2006-2008: Final Report</u>, pp. 18-21; Victorian Parliament (2019), <u>Inquiry into the external</u> oversight of police corruption and misconduct in Victoria, pp. 152 – 154; VALS (2017), <u>Submission to the Inquiry into the</u> <u>External Oversight of Police Corruption and Misconduct in Victoria</u>, p. 8.

The need for fully independent investigation of complaints against police is amply demonstrated by the failings of the current system in Victoria. Audits of Victoria Police's handling of complaints⁶⁶ have highlighted a serious and systematic disregard for conflicts of interest, including within the Professional Standards Command (the specialist division which is meant to provide for more rigorous complaints investigation).⁶⁷ This is clear evidence that proper investigation of police misconduct cannot be achieved through Victoria Police.

The current oversight system provides for almost no independent investigation of complaints against police. In 2020-21, IBAC assessed 2,726 allegations against police and determined that 1,217 required investigation.⁶⁸ However, only 5 were investigated directly by IBAC, and of those referred to other bodies – mostly Victoria Police – only 64 were comprehensively reviewed. This leaves 94.3% of allegations which were either investigated by Victoria Police without any meaningful involvement from IBAC, or not investigated at all.⁶⁹ The equivalent figure for 2019-20 was 93.5%, demonstrating a continuing problem.⁷⁰

Independent investigation is important both for the fair treatment of individual complaints, and for the proper recognition of systemic issues. For individual complainants, investigation by police creates no confidence that their complaints are being fairly assessed. Complainants may feel that their matters are not being taken seriously because they are being investigated by colleagues of the officer subject to the complaint. In some cases, they may feel that police are closing ranks to protect their own, or to avoid substantiating a complaint about behaviour that is widespread. These doubts about the investigative process are virtually impossible to address without an independent complaints body. The importance of ensuring the public is confident that their complaints are fairly investigated is discussed further below.

Standards Command, Victoria Police, p. 10.

68 IBAC (2021), <u>Annual Report 2020/21</u>, p. 26. 69 Ibid., p. 26. 70 IBAC (2020), <u>Annual Report 2019/20</u>, p. 44.





⁶⁶ Office of Police Integrity (2010), <u>Managing conflict of interest in Victoria Police</u>; IBAC (2016), <u>Audit of Victoria Police</u> <u>Complaints Handling Systems at Regional Level: Summary Report</u>, p. 11; IBAC (2018), <u>Audit of Complaints Investigated by</u> <u>Professional Standards Command, Victoria Police</u>, p. 5.

^{67 &}quot;Professional Standards Command is the central area within Victoria Police responsible for the organisation's ethical health and integrity. As at March 2018, PSC employed 200 full-time equivalent (FTE) staff and is comprised of five divisions: Conduct and Professional Standards Division; Investigations Division; Intelligence, Innovation and Risk Division; Support Services Division; Forensic Investigations Division." Professional Standards Command is meant to be independent and specifically constituted to provide for more independent investigation. See IBAC (2018), *Audit of Complaints Investigated by Professional*

The lack of independent investigation also impacts on the ability of the oversight body to identify and respond to systemic issues. The excessive use of referrals to Victoria Police has contributed to IBAC's failure to grapple with systemic issues in the police force, because there is limited capacity to identify patterns and systemic issues when investigations into individually 'minor' incidents are conducted by police rather than IBAC itself. This is particularly problematic if referrals to Victoria Police lead to investigations of such 'minor' complaints being conducted by officers affected by the same cultural and systemic factors, making it unlikely the complaints will be treated seriously or identified as part of a wider problem. VALS is particularly concerned about this issue because Aboriginal people are routinely affected by systemic issues in the criminal legal system. The perception among Aboriginal people that making complaints to police is futile strongly suggests that the complaints system is not equipped to identify structural issues or take complaints about systemic racism seriously.

There is ample evidence that complaints by Aboriginal people are systematically mishandled by a system which refers most matters back to Victoria Police. IBAC has published, after a long delay, an audit of Victoria Police's handling of complaints made by Aboriginal people.⁷¹ The audit's findings show that complaints from Aboriginal people are routinely treated even less appropriately than other complaints. For example, the audit found an inappropriate investigator was appointed in 45% of files,⁷² compared to 17% of files in the 2016 audit of regional complaints-handling systems.⁷³ The data strongly suggest that these complaints are not being seriously investigated: in more than half of audited files, relevant evidence was not collected or analysed.⁷⁴ In 41% of audited files, there were indicators of bias from the investigator – including the complaints investigator irrelevantly starting to investigate the complainant, or downplaying the conduct they are meant to be investigating.⁷⁵ There is an ongoing failure to consider the complaint histories of officers subject to a new complaints – a problem which has been identified in previous IBAC audits, and is particularly significant for Aboriginal complainants, but has still not been addressed by Victoria Police.

It is clear that the current police complaints process cannot address systemic racism in Victorian policing. Independent investigation of police complaints is crucial if the oversight system is going to respond to the needs and experiences of Aboriginal people in Victoria.



⁷¹ IBAC (2022), Victoria Police handling of complaints made by Aboriginal people: Audit report.

⁷² Ibid, p11.

⁷³ IBAC (2016), Audit of Victoria Police complaints handling systems at regional level, p11.

⁷⁴ IBAC (2022), *Victoria Police handling of complaints made by Aboriginal people: Audit report*, p12. 75 Ibid, p11.

Mixed Civilian Review is Inadequate

The police complaints system in Victoria, as in other Australian jurisdictions, currently operates as a 'mixed civilian review' model. This means that an external (civilian) agency is responsible for reviewing police's own internal investigations. The system is referred to as 'mixed' because IBAC sometimes investigates complaints itself, though this is very rare. An alternative model of operation is often called 'civilian control', in which the independent body has full control of the entire complaints and investigation process.

VALS' position is that civilian review cannot be an adequate model for police complaints in Victoria. The IBAC Committee has cited research identifying that civilian review models "hold out a false promise" to the public by suggesting independent investigation when the reality is that most complaints are investigated by police.⁷⁶ This is particularly important in a context where the police complaints system has lost credibility with the community, as is clearly the case in Victoria. Building trust in these circumstances will be a difficult task for a new complaints body, and it will be effectively impossible if many complainants' first experience with the body is that it remits their complaint to Victoria Police.

It is worth noting the rationale for the introduction of a civilian control approach in Northern Ireland. Authorities in Northern Ireland have recognised that fully independent investigation is necessary to rebuild trust in the police complaints system and the police force, after decades of police misconduct and a breakdown in police-community trust.⁷⁷ The Police Ombudsman for Northern Ireland (**PONI**) investigates all complaints. This model has been adopted despite the fact that its governing legislation allows for the possibility of referrals to police.⁷⁸ Civilian review has been recognised as inadequate in the context of a police force with a history of sectarianism, bias and brutality.

The same considerations make civilian review inappropriate for Victoria's police complaints system. While the loss of faith in police is not as widely spread in Victoria's population as it was in Northern Ireland, it is profound among the communities affected by over-policing – including Aboriginal people and racialised minorities. These communities are more likely to be affected by police misconduct and less likely to make a complaint. This is a deep failing of both policing

76 Prenzler (2016), 'Scandal, Inquiry, and reform: the evolving locus of responsibility for police integrity', in Prenzler & den Heyer (eds), Civilian oversight of police: advancing accountability in law enforcement, p5. Cited in Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p34.

77 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p15. See also p34.

78 Ibid, p34.



and police complaints, which can only be rectified through a fundamental 'reset', of the kind pursued in Northern Ireland.

Secondly, even defenders of civilian review admit that certain conditions must be met for this model to provide adequate independence. The IBAC Committee's report, for example, stated that a complaints body did not need to investigate all complaints itself but must "exercise oversight over the entire police complaints system and be informed about all complaints".79 These conditions are clearly not met by IBAC, and there is well-founded reason to doubt they could be met by any civilian review-style body in Victoria. In particular, aside from the fact that it investigates very few complaints itself, IBAC does effectively no work to monitor complaints which are referred back to Victoria Police. While IBAC annual reports have sometimes stated that IBAC has "oversight of all complaints received in relation to police", this oversight is purely nominal for the overwhelming majority of complaints. In 2020-21, there were 1,212 allegations against police which were not investigated directly by IBAC, and only 64 of these were comprehensively reviewed by IBAC.⁸⁰ This is not a level of monitoring which can provide any assurance that complaints are being properly handled. To the contrary, when IBAC has conducted occasional audits - of Professional Standards Command or of regional complaints handling – it has consistently found major problems with police investigation of complaints.⁸¹ The fact that those problems persist strongly indicates that IBAC does not exercise meaningful oversight over the complaints handling system.

In addition, lack of direct involvement makes it extremely difficult for the complaints body to identify systemic problems. This is a problem which will continue to affect any complaints body that is limited to investigating serious incidents on an individual basis. Given that systemic racism and other forms of systemic misconduct are among the most serious issues with policing in Victoria, this means that no agency operating on a civilian review model could effectively hold police accountable and drive improvements in conduct.

The Role of Victoria Police

Defenders of the current police complaints system frequently state that involving police in the investigation of complaints is important, because fully independent investigation amounts to

79 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p45. 80 IBAC (2021), *Annual Report 2020/21*, p26.

81 IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*. IBAC (2016), *Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report*. IBAC (2018), *Audit of Victoria Police's oversight of serious incidents*.



outsourcing Victoria Police's organisational ethics.82

It is crucial that Victoria Police is responsive to complaints and findings of misconduct, and that police leadership is responsible for upholding standards of conduct and addressing systemic problems with policing in Victoria. However, this does *not* require Victoria Police to be actively involved in the handling of complaints.

A civilian control system which excludes police from the investigation of complaints does not mean that police have no role in managing ethical and professional standards. The disciplinary system would remain separate from the independent complaints body and could (subject to the outcome of a review of the disciplinary system, discussed further below) continue to give Victoria Police organisational responsibility for responding to misconduct. Victoria Police will also be responsible for training and professional development, which are critical to proactively addressing and reducing misconduct, under any form of police oversight system. Police will also be responsible for implementing recommendations from the independent complaints body, arising from investigations into systemic issues, and recommendations from other inquiries, reviews and coronial inquests. The desire to maintain a role for police in upholding ethical and professional standards is understandable, but it does not mean that Victoria Police should be involved in the investigation of complaints.

Definitions and Classification of Police Misconduct

The IBAC Committee Inquiry proposed a three-category definition of the kinds of police wrongdoing that can be complained about.⁸³ The purpose of this approach is to allow for complaints to be directed along different 'pathways' and given different levels of priority.

VALS supports a change to legislative definitions to improve clarity and address overlaps and important gaps within the existing definitions. As identified by the IBAC Committee, the current definitions are unclear, with similar misconduct being covered under three different pieces of legislation. While these overlaps exist, they create a risk that complaints against police will be classified as complaints about corruption or misconduct in public office, and be investigated without the necessary independence from police.



⁸² Hansard, 19 February 2018, *Transcript of evidence to the IBAC Committee: The Police Association Victoria*, p11. 83 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 189. See Recommendation 20. The Committee recommended that complaints should be classified into the following three categories: customer service and similar matters (generally dealt with by police); misconduct (dealt with by either police or IBAC) and serious police misconduct (generally dealt with by IBAC).

However, for the reasons given above, a reformed police oversight system in Victoria must ensure independent investigation of all complaints. As such, VALS does not support the proposed definitions and classification approach recommended by the IBAC Committee Inquiry. Complaints should be classified such that all complaints of misconduct, serious misconduct or systemic misconduct are investigated by an independent complaints body.

Conflicts of Interest

VALS supports a clarified definition of conflicts of interest and a strong legislative requirement that actual, potential and perceived conflicts be identified and addressed before any response to a police complaint, whether that is a formal investigation or an alternative approach to resolving a customer service issue.

However, the steps needed to address conflicts of interest in police complaints investigations go far beyond definitional clarifications. Victoria Police has longstanding problems with addressing conflicts of interest, which illustrate the deeper need for independent investigation. Audits of the police complaints process since 2010 have identified serious problems which remain unaddressed.

The Office of Police Integrity found in 2010 "a persistent failure by some within Victoria Police to properly identify and appropriately deal with conflict of interest."⁸⁴ In 2016, IBAC's audit of complaint handling systems at the regional command level found that the form designed to identify and manage conflicts of interest "was rarely completed." As a result of this and other reasons, the audit found that "the choice of investigator was not appropriate" in 17% of audited files.⁸⁵ IBAC's 2018 audit of Professional Standards Command – which is meant to be independent and specifically constituted to provide for more independent investigation⁸⁶ – found that "the vast majority of files (95 per cent) did not explicitly address potential or actual conflicts of interest".⁸⁷ The report noted that:

86 "Professional Standards Command is the central area within Victoria Police responsible for the organisation's ethical health and integrity. As at March 2018, PSC employed 200 full-time equivalent (FTE) staff and is comprised of five divisions: Conduct and Professional Standards Division; Investigations Division; Intelligence, Innovation and Risk Division; Support Services Division; Forensic Investigations Division." Professional Standards Command is meant to be independent and specifically constituted to provide for more independent investigation. See IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*, p. 10.

87 IBAC (2018), Audit of Complaints Investigated by Professional Standards Command, Victoria Police, p. 5.



⁸⁴ Office of Police Integrity (2010), Managing Conflict of Interest in Victoria Police.

⁸⁵ IBAC (2016), Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report, p. 11.

While PSC may be physically removed from other areas of Victoria Police, its officers are not immune from potential conflicts of interest. Most, if not all, PSC investigators have previously worked elsewhere in Victoria Police and may have come into contact with officers who are the subject of a complaint.⁸⁸

A separate IBAC report in 2018, on Victoria Police's oversight processes for serious incidents, found that "[c]onflicts of interests... were generally poorly identified and managed."⁸⁹ The mandatory conflict of interest form was not completed in one-third of cases, and the forms which were filled out had "significant shortcomings".⁹⁰ Of particular concern, a "pattern of deficiencies" and serious conflicts of interests were identified in oversight of serious incidents involving the heavily armed and specialised officers of the Special Operations Group.⁹¹ Although Victoria Police has taken steps to respond to each of these findings, the IBAC Committee's report noted "the persistence of the serious problems with Victoria Police's management of conflicts of interest".⁹²

These findings strongly indicate a systematic disregard in Victoria Police for the importance of adequate investigation. Over a period of more than a decade, oversight bodies have consistently found, not only that conflicts of interest are going unaddressed, but that in many cases Victoria Police is not even considering whether any conflicts might exist. The nominal independence of the Professional Standards Command within Victoria Police has clearly not been an adequate safeguard.

An oversight system in which almost all complaints are investigated by police themselves, and the overwhelming majority are not even investigated by the dedicated Professional Standard Command,⁹³ but by officers in the same station or region, cannot instil in police the importance of independent investigation. It is unsurprising that police officers working in this system frequently fail to address clear and direct conflicts of interest. This is not a problem which can be effectively addressed while the oversight system continues to be built on the premise that police can adequately investigate their colleagues.

88 Ibid., p. 14.

89 IBAC (2018), Audit of Victoria Police's oversight of serious incidents, p. 6.

90 Ibid.

91 Ibid.



⁹² Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 301. 93 Ibid, p79.

The appropriate solution to Victoria Police's ongoing problems with conflicts of interest is to adopt a fundamentally different approach to handling complaints, which removes police from the process, except in minor customer service matters.

RECOMMENDATION

Recommendation 6. The legislation establishing the new independent body should define `conflict of interest'. The definition must encompass actual, potential and perceived conflicts.

Customer Service Matters

Under any approach to classifying and triaging complaints, those defined as 'customer service matters' will be deprioritised and investigated less rigorously – or not at all, particularly if alternative dispute resolution processes are preferred. A clear definition of customer service matters is especially vital to avoid significant issues being dealt with through an inappropriate complaint pathway.

At present, there is no clear definition of customer service matters in the *Independent Broadbased Anti-corruption Commission Act 2011* (**IBAC Act**) or the *Victoria Police Act 2013*; the procedures for these types of complaints are a matter for Victoria Police policy, currently as part of the Victoria Police Manual.⁹⁴ IBAC has previously raised issues about Victoria Police misclassifying complaints as customer service matters, and these concerns have been reflected in the IBAC Committee's findings. IBAC's audit found an extraordinary misclassification rate of 22%.⁹⁵

VALS has particular concerns about the use of the 'customer service' category because of its implications for Aboriginal complainants. There is a high risk that the kinds of police misconduct frequently faced by Aboriginal people will be misclassified as customer service issues. For example, a police officer using racist language could be inappropriately classed as merely using inappropriate language, rather than treated as a serious form of racism warranting a more serious response. Similarly, over-policing of Aboriginal people is one of the most pervasive forms of systemic racism, but individual instances could be treated as rudeness or "over-zealousness" and dealt with as customer service issues.

Customer service matters can be handled by Victoria Police, provided that the definition of these matters is limited and appropriate safeguards are in place. The IBAC Committee's report



⁹⁴ Ibid., p. 65. 95 Ibid., p. 128.

quoted the example of "whether or not a desk sergeant was rude to somebody,"⁹⁶ and it is important that the matters to be dealt with by Victoria Police are strictly limited to minor issues.

In light of these concerns, customer service complaints need to be clearly defined in legislation, including relevant police legislation and the legislation establishing a new independent police complaints body. This definition should specifically:

- Exclude any complaint about the exercise of a police power from being treated as a customer service matter including powers to stop, question, search or issue any kind of infringement or direction;
- Exclude any complaint about a decision not to exercise a police power (for example, a decision not to investigate an alleged offence or not to intervene in a situation);
- Exclude any complaint which makes reference to Aboriginality, or to any protected attribute under Section 6 of the *Equal Opportunity Act 2010* (Vic.)

Conduct falling under these exclusions should automatically be classified as misconduct or serious misconduct.

There should be safeguards in place to ensure this definition is strictly applied, discussed further below under 'Complaint Pathways'.

RECOMMENDATIONS

Recommendation 7. The legislation establishing the new independent police complaints body should define 'customer service complaint' and specifically exclude the following:

- (a). Any complaint about the exercise of any police power (including powers to stop, question, search, arrest, use force) or issue any kind of infringement or direction;
- (b). Any complaint about a decision not to exercise a police power (for example, a decision not to investigate an alleged offence);
- (c). Any complaint which makes reference to Aboriginality, or to any protected attribute under Section 6 of the *Equal Opportunity Act 2010*.

Recommendation 8. Legislation must require that complaints classified as customer service matters by Victoria Police must be reported to the independent police complaints body, with the report including, at a minimum, the race and gender of the complainant, or their Aboriginality, the officers subject to the complaint, and the broad context (for example, whether the conduct occurred during a phone call, on patrol, during a call-out, etc.)

96 Ibid., p. 187.



Recommendation 9. Complainants must have the right to request a review of the classification of their complaint.

Serious Police Misconduct

The threshold of serious police misconduct would be less significant to the operation of the oversight system if, as VALS recommends, all misconduct complaints (except customer service issues) are independently investigated. However, a category of serious police misconduct could remain important for triage and to emphasise findings of serious wrongdoing. It would support the independent police complaints body to dedicate appropriate resources to different complaints, without implying that any police misconduct is insignificant or not worthy of independent investigation.

The IBAC Committee recommended to define serious police misconduct as "conduct... that could result in the prosecution... for a serious indictable offence or serious disciplinary action," including corrupt conduct, 'serious assault', use of excessive force, 'serious mistreatment in police custody', and human rights violations.⁹⁷

VALS firmly believes that this definition sets the bar for serious misconduct far too high. The threshold of prosecution for a serious indictable offence excludes highly problematic police misconduct. Police officers are public officials granted extensive coercive powers, and they should be held to a higher standard than ordinary citizens. A definition which provides that only serious criminal behaviour constitutes serious police misconduct fails to achieve this.

The definition of serious police misconduct must reflect the concerns of people subject to that misconduct – in particular, Aboriginal people and other marginalised communities – and the matters they consider to be serious. A definition which is tilted towards Victoria Police's view of what issues are or are not serious will not succeed in engendering public confidence in police or the oversight system.

Certain types of conduct should always be classified as serious police misconduct. Police assaults, excessive use of force, wrongful arrest, false imprisonment and mistreatment in custody are serious forms of misconduct, which are experienced frequently by Aboriginal people. An assault does not need to be 'serious' in itself to constitute a serious form of misconduct and a grave failure of police's duty.

The definition should also explicitly provide that any misconduct accompanied by or motivated

97 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 20, p. 189.



by discrimination constitutes serious police misconduct. The inappropriate use of any police power is significantly aggravated when it is to the detriment of people and communities already marginalised by the criminal legal system and in society overall. This should be recognised by the definition of serious police misconduct.

The inclusion of human rights violations in the definition of serious police misconduct is welcome, but leaves significant ambiguity. A legislated definition should provide more specific detail of what constitutes a human rights violation. VALS would welcome a definition which incorporated breaches of the full range of rights under the *Victorian Charter of Rights and Responsibilities*, but not a definition which saw 'human rights violations' as limited to particularly egregious infringements of a few key rights.

RECOMMENDATION

Recommendation 10. The legislation establishing the new independent police complaints body must define 'serious police misconduct', to enable the independent body to prioritise and appropriately investigate all complaints. The definition must include:

- (d). any allegations regarding assault, mistreatment or failure of duty of care in custody, and excessive use of force;
- (e). any misconduct accompanied or motivated by discrimination, or that has a discriminatory outcome;
- (f). the use of coercive techniques during questioning and interviews, and any failure to contact a person's lawyer, the Custody Notification Service, the Independent Third Persons program, or the Youth Referral and Independent Person Program;
- (g). any retaliation or reprisals against a person who has made a complaint about police.

Complaint Pathways

Appropriate definitions are only one part of ensuring that complaints are properly treated and investigated. A new complaints system will also need to clearly establish 'pathways' for different types of complaints. The issue of complaint pathways is considerably simplified by adopting a fully independent model, under which only customer service matters are handled directly by Victoria Police. Any complaint that is assessed as not being a customer service issue should be fully investigated by the independent complaints body.



As a further safeguard, VALS supports the IBAC Committee's recommendation that there should be a legislative requirement for the independent oversight body to be notified of all customer service complaints.⁹⁸ This notification should report enough information to enable the oversight body to monitor for systemic issues: this should include at a minimum the race and gender of the complainant, identities of the officers subject to the complaint, and the broad context (for example, whether the conduct occurred during a phone call, on patrol, during a call-out, etc.) When a complaint is classified as a customer service complaint, complainants should also have the right to a review of the classification decision by the independent body.

The appropriate pathway for the handling of police complaints is as follows:

- If police receive a complaint, a senior officer at a different police station assesses whether it is a customer service matter. If it is not, the complaint is referred to the independent complaints body. This assessment should not involve any judgement about whether the complaint is likely to be true – it should be classified on the basis that all the matters raised by the complainant are true.
 - When a complaint is assessed as a customer service matter, the complainant is promptly informed of this and of their right to appeal the classification to the independent body. The complainant should also be provided with information about supports, including community legal centres, which could assist them with their complaint.
 - If no appeal is made, the complaint can be investigated and resolved by Victoria Police. Regular updates must be given to the complainant during the Victoria Police resolution process.
 - $\circ~$ Key information on the complaint must be passed on to the independent body to enable monitoring of customer service complaints.
- Complaints are received by the independent body, both directly and on referral from Victoria Police.
 - For complaints received directly, the independent body assesses whether it is a customer service matter. If it is assessed as a customer service matter, the complainant is promptly informed of the classification and their right to request the independent body review the classification.
 - If no review is requested or the review confirms the classification, the complaint is referred back to Victoria Police for investigation and resolution.
 - If the complaint is classified as relating to misconduct, or the complaint has been referred from Victoria Police, the independent body conducts the investigation.

98 Ibid, Recommendation 18, p. 184.





- - $\circ\,$ The independent body provides regular updates to the complainant on the investigation & monitors for police retaliation against the complainant.

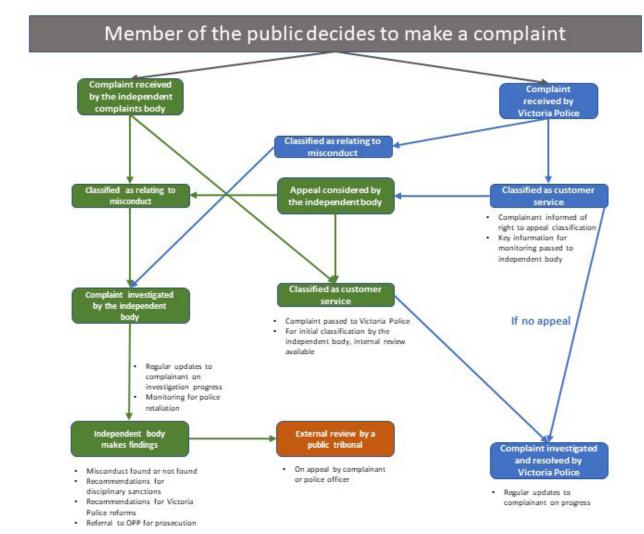


Figure 1. Complaint pathways

Victoria Police must not conduct any investigation into a complaint while the independent body has carriage of a matter. Where Victoria Police is investigating (i.e. the complaint is assessed as a customer service matter), the independent body must have the power to take over the investigation of any complaint at any time – both complaints received directly by police and those referred by the independent body – and to require police to suspend their investigation. This might be done, for example, if the independent body's ongoing monitoring of customer service complaints indicates a possible misclassification or an officer with a track record of



complaints being made against them.

Referrals

The complaint pathways under the current system are structured around referrals between IBAC and Victoria Police, and within Victoria Police between Professional Standards Command and local police commands. VALS' position is that the system of referrals is fundamentally flawed, both because it cannot achieve independent investigation and because of numerous more specific deficiencies. These failings are endemic both to referrals from IBAC to Victoria Police, and internal referrals within Victoria Police (from Professional Standards Command to regional and local commands.)

Problems with the current system of referrals include:

- Lack of transparency there is no transparency about the fact that the vast majority of complaints are referred to Victoria Police and then further referred to local commands. Complainants have little understanding of, or ability to influence, the referral process, and are frequently surprised to find their complaint to IBAC ends up being investigated by police. Complainants should have rights in relation to referral of customer service matters, including a legislated definition of 'customer service matter', a right to appeal the classification, and monitoring of customer service complaints by the independent body.
- No active oversight by IBAC while IBAC sometimes claims that it 'has oversight' of all complaints, the reality is that almost no complaints referred to Victoria Police are ever reviewed by IBAC, as noted above. This provides no safeguard against the risk that a referral to Victoria Police will lead to an inadequate or biased investigation. In Northern Ireland, the Police Ombudsman has an explicit power to supervise any complaint investigation and to impose requirements on how the investigation is conducted.⁹⁹ Police investigators are also required to submit a report to the Ombudsman.¹⁰⁰ As noted above, in practice, PONI conducts all investigations itself and does not make referrals to police, but the legislation governing potential referrals is still instructive.
- Regular referral of serious matters IBAC consistently investigates misconduct that has attracted media attention, but complaints without a high profile are regularly referred to Victoria Police, even when they involve serious misconduct. VALS has experience of complaints being referred to Victoria Police, and found unsubstantiated, in instances where subsequent civil litigation led to a court finding serious misconduct and awarding damages.

99 *Police (Northern Ireland) Act 1998*, ss 57(4) and (7). 100 *Police (Northern Ireland) Act 1998*, ss 57(8).



Ongoing failure to manage conflicts of interest – failings of Victoria Police in identifying or managing conflicts of interest when investigating complaints are well-documented, as discussed above. This failure leads to biased investigations and potentially enables reprisals against complainants. The current complaints referral process provides no safeguard against this mismanagement. In Northern Ireland, legislation requires that the Police Ombudsman must approve the choice of police investigator to handle a complaint.¹⁰¹ By contrast, in Victoria, IBAC has identified conflict management problems only in audit reports published years after the fact.¹⁰² Later audits have credited Victoria Police with improvements, but also found new problems, and there is no transparency about the implementation of any changes within Victoria Police.

All complaints about police misconduct warrant fully independent investigation. The chronic problems with the referral of complaints to Victoria Police under the existing system, and the fact that they have not been addressed despite being repeatedly identified, demonstrate the fundamental shortcomings of a complaints system in which complaints are handled by police. This type of system cannot instil in the police force a culture which respects the value of properly independent investigation. The result is that deficiencies in appointing appropriate investigators and managing conflicts of interest will remain endemic, unless there is a fundamental shift in the complaints system towards fully independent investigation.

Systemic Police Misconduct

The inclusion of systemic police misconduct in the remit of the police oversight system is essential, and the failure to properly respond to it is a major shortcoming of the current system. VALS has previously recommended to IBAC that it needs to expand its investigation of systemic misconduct issues. These problems often evade oversight because the individual matters do not constitute 'serious misconduct', even though they would have collectively demonstrated systemic issues.

Effective treatment of systemic police misconduct requires both a robust definition and an appropriate set of investigation powers and procedures, to facilitate the investigation of issues which may not always be the subject of individual complaints.

101 Police (Northern Ireland) Act 1998, s57(3).

102 The *Audit of complaints investigated by Professional Standards Command, Victoria Police* was published in June 2018 and dealt with investigations conducted in 2015 and 2016.

The *Audit of Victoria Police complaints handling systems at regional level* was published in September 2016 and dealt with investigations conducted in 2014 and 2015.



Definition

Systemic police misconduct must be defined in its own right, rather than as a sub-type of 'serious police misconduct' as in the IBAC Committee's recommendation. An investigation into systemic police misconduct may, in many cases, be sparked by complaints which are individually not classified as serious misconduct, or not addressed by the oversight body at all. Incorporating systemic police misconduct within the definition of serious police misconduct will obscure this distinction for potential complainants, police officers and independent investigators. This would create a risk that opportunities to investigate systemic issues are missed because of confusion about the thresholds involved and their relationship to serious police misconduct.

The IBAC Committee's proposed definitions incorporate systemic police misconduct issues as follows:

a pattern of officer misconduct carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues.

This definition would not adequately cover the full range of systemic problems that can arise in Victoria Police. The nature of systemic problems in a police force is that they are composed of a pattern of conduct which may not, in individual cases, be recognised as problematic. The Committee's recommendation does recognise that a pattern of incidents which are not individually 'serious misconduct' can, overall, be a serious issue. This logic needs to be extended, to further recognise that a serious systemic problem can be made up of incidents which are individually classified as customer service issues, or otherwise fall short of 'officer misconduct'. For some VALS clients, police misconduct takes the form of police constantly being outside their house, checking on them, and giving out noise complaints. It may be argued that these isolated incidents do not constitute 'misconduct' in single cases, but their repetition, without justification, can have serious adverse effects and clearly amounts to misconduct in aggregate.

Other systemic problems of concern to VALS include the use of move-on powers¹⁰³ and the arrest of Aboriginal children for breaching bail conditions. Move-on powers involve a margin of police discretion, and it may not be possible to demonstrate that their use in a single incident constitutes misconduct, but it would be a systemic issue of great concern if these orders were used disproportionately against Aboriginal people. In other cases, incidents which are



¹⁰³ Under Section 6 of the *Summary Offences Act* 1966, police officers (and PSOs in some circumstances) can direct a person to leave a public place if they reasonably suspect that one of a range of criteria apply. These include suspecting that someone is likely to breach the peace, likely to endanger a person's safety, likely to damage property or pose a risk to public safety.

individually serious can, taken collectively, amount to an even more serious systemic issue. For example, VALS has observed a pattern of children being arrested and remanded in a police cell for breaching bail conditions, despite the fact that the *Bail Act 1977* specifically provides that it is not a criminal offence for a child to breach bail conditions.¹⁰⁴ This pattern elevates the issue from being an individual misconduct problem to a serious systemic issue, and a driver of ongoing overincarceration of Aboriginal people.

Systemic problems in the police force can also emerge from a policing culture which allows or encourages inappropriate conduct, or discourages officers from reporting or speaking up about it. VALS understands that some police officers feel unable to report or intervene in even serious misconduct because of a culture within Victoria Police which licences that conduct and shuns people who speak out. The emergence and maintenance of this kind of problematic culture should be identified as a systemic problem, able to be complained about and investigated. This would allow pre-emptive investigation of problematic culture before it has led to widespread acts of misconduct.

The definition should also take a different approach to identifying which systemic issues are of concern. The IBAC Committee's definition was limited to systemic issues "that could adversely reflect on the integrity and good repute of Victoria Police." While this is a potentially broad definition, it is inappropriately inward-looking: the focus of the oversight system should be on the impact of policing on the community, not on the reputation of Victoria Police. The legislated definition should instead focus on systemic issues which involve discrimination, a disproportionate impact on particular communities, or inadequate police responses to particular issues, such as family violence.

RECOMMENDATIONS

Recommendation 11. Systemic police misconduct must not be investigated by Victoria Police; it must be investigated by a new independent police complaints body. The legislation establishing the new independent police complaints body should define 'Systemic police misconduct' in its own right, not as a sub-type of 'serious police misconduct'.

(a). The definition of systemic police misconduct should include:

- A pattern of behaviour or omissions indicative of systemic issues;
- A culture indicative of systemic issues, or a culture that allows or encourages patterns of behaviour or omissions indicative of systemic issues; and

104 Section 30A(3), Bail Act 1977 (Vic).



- The aggregate impact of a pattern of behaviour or omissions, where that impact is indicative of systemic issues.
- (b). The definition of 'systemic issues' should include issues involving discrimination, a disproportionate impact on particular communities, or inadequate police responses to particular issues (such as family violence).

Recommendation 12. The independent complaints body should have own-motion powers to conduct investigations of individual incidents, thematic investigations of related incidents, and systemic investigations of wider problems within Victoria Police. These powers must be provided for in the legislation establishing the new independent police complaints body.

Recommendation 13. To ensure the independent police complaints body is capable of identifying and investigating systemic issues, the body must:

- (a). Have access to: the complaints history of police officers, information from any civil litigation involving a police officer, and information on any impropriety or illegality by a police officer raised as part of a criminal proceeding; and be required to consider this information in the initial classification of a complaint and in the assessment of possible systemic misconduct;
- (b). Initiate an early intervention and complaint profiling system, with a particular focus on officers or units that have received multiple complaints from Aboriginal people;
- (c). Provide transparency and routinely publish data in relation to police complaints.

Recommendation 14. The independent complaints body should have a 'super-complaints' process which allows representative organisations to make complaints about systemic issues on behalf of a group of affected people. Those representative organisations must include Aboriginal Community Controlled Organisations.

Recommendation 15. The independent complaints body should develop a strategy for identifying and investigating systemic racism, in consultation with Aboriginal Community Controlled Organisations.

Powers and Procedures

The police complaints body needs to have extensive powers and appropriate procedures for responding to systemic misconduct in Victoria Police, to complement the system of classification for individual complaints.



Legislation should provide that the independent complaints body may conduct thematic investigations of multiple related or similar incidents, and systemic investigations of widespread problems within Victoria Police. To make these investigations effective, the complaints body will need specific powers.

First, *own-motion investigative powers* are critical. Some police misconduct will not be the subject of formal complaints, for a range of reasons. The victims of misconduct may be unwilling to proactively engage with the complaints process, or may not see an individual incident as worth the effort of complaining. Systemic problems generally involve many small incidents, and are highly likely to affect marginalised individuals who are less willing to engage with the complaints process. Without effective own-motion powers, these issues are likely to fall through the cracks of the complaints system.

Secondly, the complaints body should have *access to the complaint histories of police officers*. Complaint history should be available to the person making the initial assessment and classification of the complaint, as well as later in the investigation process. If an officer is found to have had multiple complaints made against them by Aboriginal people, an immediate risk assessment should be undertaken.

Thirdly, the independent body should initiate an *early intervention and complaint profiling system*, with a particular focus on police or units that have received multiple complaints from Aboriginal people. This system should support the body in using its own-motion powers to identify possible systemic issues and properly investigate them.

Fourth, effective investigation of systemic misconduct requires the *production and transparent release of data on police complaints*. As noted in the UN Office on Drugs and Crime's *Handbook on Police Accountability, Oversight and Integrity*, this data can "be used to identify the operational areas where the abuse of police powers is most likely to occur and also which officers are subject to an unusually high number of allegations."¹⁰⁵

Finally, in addition to own-motion powers, the police complaints body should have a '*super-complaints' process*. For the reasons identified above, individual complaints about systemic problems may not be forthcoming or adequate to initiate a broad investigation. It is therefore important that the police complaints body can receive complaints from representative bodies raising systemic issues. The super-complaints system used in the United Kingdom is a good practice model and is discussed in the box below.



¹⁰⁵ UN Office on Drugs and Crime (2011), Handbook on police accountability, oversight and integrity, p. 43.

Good Practice: Super-complaints in the United Kingdom

The United Kingdom has adopted a super-complaints system in a wide range of consumer affairs areas, and more recently introduced it for policing. This model allows designated organisations to bring a complaint about general or systemic issues that are harming the community, and have this complaint be treated as a priority by the relevant regulatory body.

In policing, super-complaints are received by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services – a monitoring and inspection body which does not receive individual complaints – and then assessed by HMICFRS, the Independent Office for Police Conduct, and the College of Policing.¹⁰⁶ Since the introduction of the super-complaints system for policing in 2018, HMICFRS has investigated super-complaints on matters including police cooperation with immigration authorities,¹⁰⁷ the treatment of victims of modern slavery,¹⁰⁸ and the protection of women and girls from domestic violence.¹⁰⁹ Sixteen organisations are 'designated' by the government as able to make super-complaints.¹¹⁰

A reformed police oversight system in Victoria should include an avenue for super-complaints to be made, to assist in identifying and addressing systemic problems in Victoria Police. The model of designated bodies is a useful safeguard to ensure that super-complaints are not abused and can therefore be urgently investigated. However, it is concerning that the UK Government designated sixteen bodies and does not appear to have allowed any other organisations to apply for designation since 2018. The approach to designating bodies should be more flexible. Aboriginal Community Controlled Organisations and Aboriginal representative bodies should be designated bodies for the purposes of the police super-complaints system, reflecting the disproportionate harms inflicted on Aboriginal people by police in Victoria.

More broadly, the independent complaints body should develop a specific strategy for identifying and investigating systemic racism, utilising all the powers identified above. This strategy should be developed in consultation with Aboriginal Community Controlled Organisations and other key stakeholders. IBAC has repeatedly failed to recognise the centrality of systemic racism to police misconduct issues in Victoria, and a new complaints body must not repeat that shortcoming.

108 HMICFRS, Report on Hestia's super-complaint on the police response to victims of modern slavery (2021).

110 UK Government, Police super-complaints.



¹⁰⁶ Independent Office for Police Conduct (IOPC), 'Super-complaints and working with other policing oversight bodies'.

¹⁰⁷ HMICFRS, Safe to share? Liberty and Southall Black Sisters' super-complaint on policing and immigration status (2020).

¹⁰⁹ HMICFRS, <u>*A duty to protect: Police use of protective measures in cases involving violence against women and girls* (2021).</u>

Improving the Complainant Experience

A reformed police complaints system in Victoria needs to put the experience of complainants at the centre of its design and operations. As discussed above, Aboriginal communities and Aboriginal complainants do not have confidence in the existing police complaints system. As well as the lack of independent investigation, this lack of trust has emerged because the current process is culturally unsafe, there is a lack of transparency and poor communication with complainants, and potential complainants may also be afraid of reprisals. A new complaints body must recognise these failings and respond to the specific experiences of Aboriginal complainants throughout the entire complaint process.

Complainant-Centred Approach

A new independent police complaints body must be grounded in a complainant-centred approach. As noted in the IBAC Committee Inquiry, this will help to build the confidence of Aboriginal communities in the complaints process and improve the experiences of Aboriginal complainants who engage with the body.

The complainant-centred approach of a new, independent police complaints body must be established in legislation, as well as publicly available policies. While a Complaints Charter will not achieve systemic change in and of itself, it is important that a new police oversight body publicly communicate its commitment to Aboriginal complainants from the outset. This could include a Complaints Service Charter that acknowledges the specific experience of Aboriginal complainants, and commits to providing a culturally appropriate complaint service, including culturally appropriate support for complainants.

RECOMMENDATION

Recommendation 16. The legislation establishing a new, independent police complaints body must enshrine a complainant-centred approach throughout the complaints process.

Procedural Fairness

A new independent body for police complaints must incorporate rights and principles derived from procedural fairness, as provided by the international standards for police complaints bodies discussed above.





RECOMMENDATION

Recommendation 17. The legislation establishing a new independent police complaints body must incorporate procedural fairness for complainants, including:

- (a). Right to review of classification decision;
- (b). Right to receive written and oral communication throughout the complaint process, including when the complaint is first received, after the initial assessment of the complaint, and when the complaint is resolved;
- (c). Right to access the investigation file;
- (d). Right to have complaint resolved in a reasonable time;
- (e). Right to participate in the investigation process, including the opportunity to provide additional information and/or correct false assumptions throughout the investigation process and comment on any adverse material before a complaint is dismissed;
- (f). Right of review if the complaint is dismissed or referred;
- (g). Right of review of outcome of the complaint.

Any relevant policies and procedures should be made publicly available.

A Prompt Complaints Process

Timely resolution of complaints is required by international principles and is critical to building trust and confidence of complainants in the police complaints system.¹¹¹ The legislation establishing a new independent body must specify the timeframes for dealing with a complaint. The body should also adopt publicly available policies setting out the expected timeframes for dealing with the complaint, including the initial assessment, investigation and final resolution of the complaint. The body must be adequately resourced to be able to complete investigations in a timely manner.

The following international examples provide some guidance on timeframes for dealing with complaints:

• The Civilian Office of Police Accountability (**COPA**) in Chicago¹¹² seeks to resolve all investigations in a timely manner and expects most investigations will be concluded within six months. Some investigations, such as officer-involved shootings are more

111 See Council of Europe, *Opinion of the Commission for Human Rights*, ("The promptness principle plays a crucial part in preserving trust and confidence in the rule of law and upholding the core policing principle that police officers are accountable to and protected by the law throughout the police complaints process."), para 72.

112 Home - Civilian Office of Police Accountability



complex and may require additional time. For cases that are ongoing after six months, COPA must notify the complainant(s) and involved officer(s) with reasons why the case is still ongoing. Such notice is required every six months that the case remains open.¹¹³ COPA notify a complainant within five business days of receiving a complaint or incident notification, identifying whether the incident will be investigated by COPA and explaining the next steps.¹¹⁴

• The Special Investigations Unit (**SIU**) in Ontario¹¹⁵ aims to conclude investigations within 120 days and is required to publish information about investigations that exceed this timeframe. Reports must be published every 30 days following the expiry of the initial 120-day period unless doing so may compromise the integrity of the investigation.¹¹⁶

To facilitate a prompt complaints process, it is also important to ensure that relevant information to support police complaints can be accessed in a timely manner. The *Freedom of Information Act 1982* provides that a decision on a Freedom of Information (**FOI**) request should be made within 30 days of receiving the request, although the Act provides avenues for extending this timeframe.¹¹⁷ Currently VALS clients are experiencing delays of up to 20 weeks with FOI requests, which undermines their ability to submit a complaint in a timely manner. FOI requests can be even further delayed because of the way that record-keeping practices vary significantly between police stations.

RECOMMENDATION

Recommendation 18. The legislation establishing a new independent body must establish specific timeframes for dealing with complaints. The body should develop publicly available policies on setting out the expected timeframes for dealing with the complaint, including the initial assessment, investigation and final resolution of the complaint.





¹¹³ Municipal Code of Chicago, Chapter 2-78-135.

¹¹⁴ Municipal Code of Chicago, Chapter 2-78-130.

¹¹⁵ Special Investigations Unit -- SIU Homepage

¹¹⁶ *Special Investigations Unit Act*, S.O. 2019, c. 1, Sched. 5, s. 35.

¹¹⁷ *Freedom of Information Act 1982* (Vic), Section 21.



Koori Engagement Unit

The IBAC Committee Inquiry acknowledged the barriers faced by Aboriginal complainants and made the following two recommendations to improve the experience of Aboriginal complainants:

- 1. Victoria Police and IBAC should create a role for a complainant welfare manager, who is authorised to assist the complainant in making a complaint and provide support throughout the process, including providing culturally appropriate information and support (recommendation 17);¹¹⁸
- 2. Victoria Police and IBAC should ensure that they take proper account of the particular needs and backgrounds of diverse, and sometimes marginalised and vulnerable, Victorians. This includes taking proper account of the needs and backgrounds of Aboriginal people (recommendation 16).¹¹⁹

While these recommendations are a step in the right direction, they are insufficient to improve the experience of Aboriginal complainants, build the confidence of Aboriginal communities and complainants in the system and increase reporting of police complainants by Aboriginal complainants.

The new independent police complaints body should have a Koori Engagement Unit, to operate as the point of contact for Aboriginal complainants throughout the entire complaint process. Appointment of an Aboriginal Liaison Officer was first recommended by the Victorian Government 10-year implementation review of the RCIADIC in 2005, to assist Aboriginal complainants in lodging complaints.¹²⁰ This role could be positioned within a broader Koori Engagement Unit, modelled off the Koori Engagement Unit at the Coroners Court.

The role of this unit could include:

- Raise awareness of the body and the complaints process within Aboriginal communities;
- Provide support (in person and over the phone) for Aboriginal complainants who wish to lodge a complaint;
- Liaise with Aboriginal complainants throughout the complaint process, including to provide regular updates;
- Provide and/or coordinate culturally safe support for complainants, including through warm referrals to culturally safe providers;¹²¹

118 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 179. 119 Ibid.

120 Victorian RCIADIC Review: Conclusions and Recommendations, p. 711.

121 See Council of Europe, *Opinion of the Commission for Human Rights*, para 78.



- Coordinate access to culturally safe legal assistance, including through warm referrals to VALS and other legal service providers;
- Respond to feedback from Aboriginal complainants about their experiences with the complaints process.

The Special Investigations Unit in Ontario provides an interesting model for support through the Affected Persons Program, which is a 24 hour service providing: crisis response and intervention; psychological first aid and emotional support; practical support; referrals/advocacy for navigating social welfare and justice systems, legal support, medical support and victim assistance programs; court support.¹²² The Special Investigations Unit also has a First Nations, Inuit and Métis Liaison Program (**FNIMLP**) to develop cultural competence within the Unit, and a protocol for incidents involving Indigenous communities.¹²³

RECOMMENDATION

Recommendation 19. A new independent police complaints body must respond to the needs of Aboriginal complainants, including by establishing a Koori Engagement Unit, with responsibility for:

- (a). Raising awareness of the complaints process within Aboriginal communities, including through outreach sessions;
- (b). Establishing culturally appropriate options for lodging a complaint;
- (c). Liaising with Aboriginal complainants throughout the complaint process, including to provide regular updates;
- (d). Providing and/or coordinating access to culturally safe support for complainants, including through warm referrals to culturally safe providers;
- (e). Coordinating access to culturally safe legal assistance, including through warm referrals to VALS and other legal service providers.

Communicating with Aboriginal Complainants

Culturally Appropriate Information about the Complaints Process

To be accessible for Aboriginal communities and complainants, a new independent police complaints body must be known and understood. Raising awareness about this body and building the trust of Aboriginal people to make a formal complaint can be achieved by:

• Culturally appropriate and easily accessible information regarding the complaints

122 Special Investigations Unit, *Quarterly Report Jan – March 2020*, 5-6. (SIU 2020). 123 Ibid, 6-7.



process, available on the website and in relevant locations, including police stations, youth hubs, correctional centres, court houses and other community/social services;¹²⁴

- Publicly available and easily accessible policies, setting out values and standards for handling complaints, including a commitment to provide a culturally appropriate service;
- Outreach sessions carried out by the Koori Engagement Unit to build public awareness of and confidence in the system;
- Providing Community Legal Education (**CLE**) for Aboriginal communities, carried out by VALS, on police powers, interacting with police and police complaints. VALS should receive funding to develop and deliver targeted CLE on these topics.

If customer service complaints continue to be handled by Victoria Police, there must also be publicly available and culturally appropriate information on the process for handling these complaints, including information on the Victoria Police website and in police stations. The Victoria Police policy for handing these complaints must be publicly available on the Victoria Police website.

RECOMMENDATIONS

Recommendation 20. A new independent police complaints body must ensure that Aboriginal communities are aware of and understand the police complaints process, including by:

- (a). Providing culturally appropriate and easily accessible information about the complaints process, including on the website and in public locations;
- (b). Developing publicly available policies setting out values and standards for handling complaints, including a commitment to provide a culturally appropriate service.

Recommendation 21. The Victorian Government should provide funding to VALS to develop and implement targeted community legal education (**CLE**) on police powers, interacting with police and police complaints.

Recommendation 22. Victoria Police must provide publicly available and culturally appropriate information on the process for handling customer service complaints.

124 UN Office on Drugs and Crime (2011), *Handbook on police accountability, oversight and integrity*, p. 35; Council of Europe, *Opinion of the Commission for Human Rights*, p. 9.



A Culturally Appropriate Process for Submitting a Complaint

A new police complaints body must ensure that it is accessible for all potential Aboriginal complainants by developing culturally appropriate ways of submitting a complaint, and ensuring warm referrals to organisations that can provide culturally safe legal assistance and support. As noted above, the Koori Engagement Unit should develop these processes, in collaboration with ACCOs and the Aboriginal Justice Caucus. As previously recommended by the Koori Complaints Project, this should include:

- A 1800-Freecall number that is accessible 24 hours a day;
- A culturally appropriate, friendly, sealable, postage-paid complaints form that: is drafted in easy English; explains the complaints process; includes a guided complaints form; and is widely available.¹²⁵

It should also be possible for complainants to lodge a complaint online, and complaints should be provided with information and warm referrals for culturally safe legal assistance and nonlegal support.

RECOMMENDATION

Recommendation 23. A new independent police complaints body should establish culturally appropriate avenues for submitting a police complaint, including online, in person, over the phone and by post. The Koori Engagement Unit at the new body should lead this process, in collaboration with ACCOs and the Aboriginal Justice Caucus.

Communication with Complainants Throughout the Investigation

A new police complaints body must learn from the significant failure of IBAC and Victoria Police to communicate with complainants throughout the complaint process.¹²⁶ As discussed above, the Koori Engagement Unit should play a lead role in liaising with Aboriginal complainants at all stages of the complaints process.¹²⁷ Similar to the Victorian Ombudsman,¹²⁸ the requirement to notify the complainant if the complaint is referred, and to provide written notice of the outcome

125 Koori Complaints Project 2006-2008: Final Report, p. 2.

126 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, pp. 175-177; VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, pp. 20-22.

127 Council of Europe, *Opinion of the Commission for Human Rights*, para 77. ("The complainant should be consulted and kept informed of developments throughout the determination of his or her complaint"). 128 Section 24, Ombudsman Act 1973 (Vic).



of the complaint, must be provided for in legislation.

Complainant Survey and Feedback

As recommended by the IBAC Committee Inquiry, a new independent police complaints body should establish mechanisms to receive feedback from complainants about their experiences and continually improve processes based on this feedback. Although a complainant survey may be a useful tool to gather feedback from complainants, surveys are often not accessible for Aboriginal people and communities.

The Koori Engagement Unit should establish additional mechanisms for receiving feedback from Aboriginal complainants and Aboriginal communities more broadly, for example, through outreach sessions with Aboriginal communities, or by liaising with service providers such as VALS, about the experiences of our clients.

RECOMMENDATIONS

Recommendation 24. A new independent police complaints body must communicate regularly with complainants throughout the complaints process, including written notification:

- (a). When the complaint is first submitted (advising on the process);
- (b). After the initial classification and assessment (advising of how the complaint has been classified, whether the complaint will be investigated, referred or dismissed, and providing information on rights to review/respond);
- (c). Throughout the investigation or restorative justice process (at least every 4 weeks);
- (d). Written notification of the outcome of the complaint, including a description of each allegation forming the complaint, a brief summary of the evidence in relation to each allegation, the determination reached and how the investigator reached that conclusion (including the steps taken to investigate that allegation), and the action taken in response to the complaint, as well as information on review rights.

Recommendation 25. A new independent police complaints body should establish mechanisms to receive feedback from complainants about their experiences and continually improve processes based on this feedback. The Koori Engagement Unit at the new body should establish mechanisms for receiving feedback from Aboriginal complainants and Aboriginal communities more broadly, for example, outreach sessions with Aboriginal communities, or by liaising with service providers such as VALS, about the experiences of our clients.



Culturally Appropriate Investigation

To be accessible for Aboriginal communities and complainants, a new independent police complaints body must have the skills, experience and expertise to respond to the needs of Aboriginal complainants. As discussed above, the IBAC Committee Inquiry recommended that IBAC and Victoria Police ensure that the particular needs and backgrounds of diverse, and sometimes marginalised and vulnerable, Victorians are taken into account.¹²⁹

RECOMMENDATION

Recommendation 26. To ensure that the new independent police complaints body is able to provide a culturally appropriate complaints process, it should:

- (a). Employ Aboriginal investigators and/or involve Aboriginal staff in the classification process for complaints submitted by Aboriginal people;
- (b). Ensure that there are Aboriginal people in management positions;
- (c). Require all non-Aboriginal staff to undergo substantive training in cultural awareness, systemic racism, anti-racism, unconscious bias and traumainformed approaches;
- (d). Adopt a de-centralised model, with regional offices around the State.

Culturally Safe Legal Assistance

International standards require that complainants should be able to access legal advice and representation from a legal representative of their choice. Complainants should receive financial assistance to facilitate this.¹³⁰

VALS receives a large volume of requests for advice and assistance with lodging police complaints, and is often unable to meet demand in full.¹³¹ Consequently, we have had to prioritise assistance for more serious complaints, while providing self-help kits to those people we cannot assist. VALS should receive dedicated funding to provide culturally safe legal advice and assistance regarding police complaints.

131 VALS, *Submission to IBAC Inquiry*, above note 14, p. 22.



¹²⁹ Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 179.130 Council of Europe, *Opinion of the Commission for Human Rights*, p. 10.

RECOMMENDATION

Recommendation 27. The Victorian Government should provide funding to VALS to provide culturally safe legal advice and representation for Aboriginal complainants.

Access to Documents and Footage Relating to the Complaint

Unlike IBAC, a new independent police complaints body must facilitate access to documents relating to the complaint, including the investigation file. This is necessary to ensure that complainants are able to participate in the investigation, including to correct false assumptions or provide additional information. Additionally, access to the investigation file is essential to ensure that complainants can effectively exercise their right of review and challenge the way in which their complaint was handled or resolved.¹³²

As noted previously, one of the main barriers to accessing documents relating to a police complaint is s194 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), which includes a broad exemption from the *Freedom of Information Act 1982* (Vic) for documents that disclose information about a complaint, investigation or a notification to IBAC.¹³³ Legislation establishing a new independent police complaints body should not include a similar exemption.¹³⁴

RECOMMENDATIONS

Recommendation 28. Complainants should be able to access documents relating to the police complaint, including the investigation file:

- (e). The legislation establishing a new independent body should not exempt documents and footage relating to the police complaint from the *Freedom of Information Act 1982*, as is currently the case for IBAC;
- (f). The *Freedom of Information Act 1982* should be amended to ensure that documents and footage relating to the police complaint are not exempted from this Act.



¹³² See Council of Europe, *Opinion of the Commission for Human Rights*, ("Without access to reports and documents after completion of the complaints process complainants may be denied the opportunity to challenge the way in which their complaint was handled or resolved.") para 76.

¹³³ VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, p. 19. 134 Section 194, *IBAC Act 2011* (Vic).

Recommendation 29. The Victorian Government should take measures to ensure that Victoria Police comply with timeframes set out in the *Freedom of Information Act 1982* (Vic).

Restorative Justice

VALS supports the use of restorative justice approaches¹³⁵ in relation to police complaints.¹³⁶ A new independent body on police complaints should work with Aboriginal communities and ACCOs to design and implement legislated restorative justice processes that are culturally appropriate. Restorative justice processes can empower complainants and achieve more meaningful resolution of the complaint.¹³⁷ They may also help to improve relationships between Aboriginal communities and the police.

Restorative justice approaches must only be used if the complainant consents, and should only be used for less serious complaints that will not lead to criminal charges or disciplinary action. They should also comply with the following international best practice principles for use of restorative justice processes in criminal matters:¹³⁸

- Both parties must consent and parties can withdraw consent at any time;
- The process should be driven by the complainant;
- There should be safeguards in place to guarantee fairness for both parties;
- Neither party should be coerced or induced by unfair means to participate in the process;
- Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration at all stages;

138 UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Resolution 2002/12



^{135 &}quot;'Restorative process' means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles." See <u>UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters</u>, ECOSOC Resolution 2002/12.

¹³⁶ VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, Recommendation 4 ("Culturally appropriate mediation should be developed for police complaints, to be available where both parties consent. This should be developed in partnership with Aboriginal and Torres Strait Islander communities and organisations, including VALS.")

¹³⁷ Benefits of restorative justice approaches include: victims can participate and be treated fairly and respectfully; victims are able to participate in decision-making; receive restoration and redress; victim has a say in determining acceptable outcome(s). See UNODC, *Handbook on Restorative Justice Programs* (2020), p. 10.

- The processes must be designed to maximise a sense of justice and healing and minimise chances of harm;¹³⁹
- Both parties have a right to legal advice and representation, including culturally safe legal services;
- Discussions should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by law.¹⁴⁰

Victoria Police should also work with Aboriginal communities and ACCOs to develop restorative justice processes for resolving complaints that continue to be managed by Victoria Police (i.e. customer service complaints). This process should be legislated, and guidelines regulating the process should be publicly available. The mediator or conciliator must be independent from police and the new independent police complaints body should have strict oversight of the processes.

RECOMMENDATIONS

Recommendation 30. The new independent police complaints body and Victoria Police should work with Aboriginal communities and ACCOs to develop restorative justice processes at each agency.

Recommendation 31. Restorative justice approaches for resolving police complaints should meet the following international best practice principles:

- (a). All parties must consent and parties can withdraw consent at any time;
- (b). The process should be driven by the complainant;
- (c). There should be safeguards in place to guarantee fairness for both parties;
- (d). Neither party should be coerced or induced by unfair means to participate in the process;
- (e). Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration at all stages;
- (f). The processes must be designed to maximise a sense of justice and healing

139 See also, the *Mental Health Act 2014* which obliges the Mental Health Complaints Commissioner to take reasonable steps to ensure that the conciliation is conducted in a manner that promotes the wellbeing of the complainant. Mental Health Act 2014 (Vic), s 244(5).

140 See also, s. 43 *Health Complaints Act 2016* (information given or agreement made in conciliation must not be disclosed); s 13G(9) *Ombudsman Act 1973* (information provided during alternative dispute resolution is not admissible in proceedings);

s. 117, *Equal Opportunity Act 2010* (evidence from conciliation is not admissible before VCAT or in other legal proceedings);

s. 249, <u>Mental Health Act 2014</u> (evidence from conciliation is not admissible before a court or tribunal, unless it is information required to be disclosed to the Commissioner to prevent serious and imminent harm).



and minimise chances of harm;

- (g). Both parties have a right to legal advice and representation, including culturally safe legal services;
- (h). Discussions should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by law.

Recommendation 32. Not all police complaints are appropriate for resolution through restorative justice approaches. The new independent body for police complaints should develop clear guidelines on when a restorative justice approach may be appropriate.

Recommendation 33. Restorative justice processes used by Victoria Police to resolve customer service complaints should be legislated, and guidelines regulating the process should be publicly available. The mediator or conciliator must be independent from police and the new independent police complaints body should have strict oversight of the processes.

Protections for Complainants

One of the reasons for under-reporting by Aboriginal complainants is that they may be too scared to make a complaint because they fear harassment and/or other repercussions.¹⁴¹ This is particularly the case when complainants are facing criminal charges in relation to the same set of facts. For example, a person facing charges of resist or assault police, where the person complains that the arrest involved excessive use of force, or some other type of misconduct.¹⁴² Potential complainants may also fear that their anonymity cannot be properly protected during a complaints investigation, especially if the complaint is investigated by other Victoria Police officers. This is a particularly serious issue in rural areas where communities have a smaller population and an investigating officer is very likely to know the officer who is the subject of the complaint.¹⁴³

The IBAC Committee acknowledged the need to provide protections for complainants and recommended that the *Victoria Police Act* be amended to prohibit Professional Standards Command referring a complaint back to regions, departments or commands if there is an



¹⁴¹ VALS and Centre for Innovative Justice, *The Effectiveness of the Victoria Police Complaints System for VALS Clients*; VALS, VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, p. 23.

¹⁴² VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, p. 23. 143 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, pp228-230.

unreasonable risk of serious harm to the complainant's health, safety or welfare due to a reprisal.¹⁴⁴ Similarly, the IBAC Committee recommended that the *Independent Broad-based Anti-corruption Commission Act 2011* (**IBAC Act**) be amended to prohibit IBAC from referring a complaint back to Victoria Police if there is an unreasonable risk of serious harm to the complainant's safety, health or welfare due to a reprisal.¹⁴⁵

While the IBAC Committee recommendations would provide some protection for complainants, VALS does not believe that the proposals are sufficient. We recommend that the Victorian Government establish a criminal offence for victimising a complainant and consistent monitoring of any charges laid after a complaint is made for possible misconduct.¹⁴⁶ The *Health Complaints Act 2016* - which makes it an offence threaten or intimidate, persuade or attempt to persuade another person not to make a complaint, or subject them to any detriment¹⁴⁷ – provides a good model. Similarly, the legislation establishing the Civilian Office of Police Accountability in Chicago protects complainants through an express prohibition on harassment or retaliation against a complainant by any officer.¹⁴⁸

People who make complaints about police will often be facing criminal charges relating to the same incident, since many complaints are about police conduct during an arrest. A key part of ensuring that the system is complainant-centred is ensuring that making a complaint does not interfere with a complainant's defence against criminal charges. This is particularly important when, as VALS has seen occurring with growing frequency, the initial complaint is not made by the victim of misconduct, but rather by a bystander (including someone who may only have seen the incident via video posted to social media.) The independent police complaints body must recognise that, in some cases, interviews with the victim of police misconduct may need to be deferred until after the resolution of a criminal matter.

147 s. 80, Health Complaints Act 2016 (Vic).

148 Municipal Code of Chicago, Chapter 2-78-160.



¹⁴⁴ Ibid, Recommendation 32, p. 230.

¹⁴⁵ Ibid, Recommendation 31, p. 230.

¹⁴⁶ VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, Recommendation 8, p. 5.



RECOMMENDATIONS

Recommendation 34. Legislation establishing a new independent body for police complaints should include robust protections for complainants, including:

- (a). Making it an offence to threaten or intimidate, persuade or attempt to persuade another person not to make a complaint, or subject them to any detriment;
- (b). Monitoring charges laid against a complainant once they have submitted a complaint.

Recommendation 35. The new independent body for police complaints should recognise in its policies and procedures that investigations may need to be deferred to avoid interfering with the defence in a criminal prosecution. These procedures should include:

- Advising complainants that they may wish to seek legal advice;
- Highlighting the importance of legal advice where there may be related matters before a court;
- With consent, putting a complainant in touch with an appropriate legal service (VALS in the case of Aboriginal complainants).

Complaint Outcomes

A robust investigative process and findings of misconduct are important in their own right, but will only meaningfully contribute to reducing the harmful effects of over-policing on Aboriginal people if the system is designed to ensure effective outcomes. The design of the complaints process must ensure it facilitates and supports just outcomes through the police disciplinary system, criminal proceedings and civil litigation. It must also provide appropriate appeal rights and a mechanism for addressing systemic problems, where these are identified by investigations.

Police Disciplinary System

To ensure just outcomes from police complaint investigations, the police disciplinary system needs to be linked to the outcomes of the independent complaints investigation process. Where there has been an independent investigation with findings made against a police officer, it is not sufficient for these findings to be treated as recommendations by the Chief Commissioner or the disciplinary system. When a complaint is investigated independently, it can only destroy confidence in both Victoria Police and the complaints body, for the matter to be subsequently re-investigated by an internal disciplinary process.



The police disciplinary system is discussed further below, in the standalone discussion of legal and disciplinary sanctions as a key pillar of an effective police oversight system.

Criminal Prosecution

Prosecution of police officers is a crucial form of accountability for misconduct, and one of the key pillars of an effective police oversight system. Criminal prosecution is a distinct process from the police complaints system, and it is discussed in its own right below.

However, it is vital that the complaints process is able to support criminal prosecutions far more effectively than it does at present. In 2020/21, prosecutions were finalised against only five police officers. The prosecutions were all successful and related to extremely serious misconduct – the assault of an elderly man with a disability, and leaking of information from police databases to undermine ongoing investigations.¹⁴⁹ The very low number of prosecutions, their success rate and the seriousness of the misconduct involved suggest that IBAC is extremely conservative in bringing prosecutions of police officers for misconduct. This is a key reason for under-reporting by Aboriginal complainants and lack of confidence in the existing police complaints system.

Criminal prosecution is and should remain a separate process from the complaints system. However, complaints investigation is clearly related to the potential for prosecution of police, and the system should be designed so that complaints investigations can facilitate prosecutions where appropriate. The independent complaints body should have the power to refer matters for prosecution when it makes its findings. This referral may be made alongside any recommendations for police disciplinary outcomes. There is a risk that the Office of Public Prosecutions (**OPP**), which works closely with police on a regular basis, will not be perceived as a reliable prosecutor of police misconduct matters. To address this concern, the OPP should be required to provide a written explanation to the complaints body and the complainant if it declines to prosecute after a recommendation.

RECOMMENDATION

Recommendation 36. The independent complaints body should have the power to refer matters for prosecution. The Office of Public Prosecutions should be required to provide a written explanation to the complaints body and the complainant if it declines to prosecute after a referral.



¹⁴⁹ IBAC (2021), Annual Report 2020/21, p35.

Civil Litigation

Civil litigation will always be a separate process from the police complaints system, and is a key element of a broad and robust police oversight system. Civil litigation is discussed further below. However, the outcomes of independent complaints investigations should support the fair and prompt resolution of civil litigation. This can be achieved if the complaints system is appropriately designed.

At present, it is very difficult to access information from IBAC investigations as a result of a legislative framework designed to protect its anti-corruption functions. The new complaints body should be significantly more transparent, and complainants and their legal representatives should have access to the complaint investigation file once the matter has been finalised, and earlier, to the greatest extent possible. Evidence from the investigation file should be admissible in civil proceedings. Victoria Police's model litigant obligations should be extended to explicitly require that the findings of an independent investigation are considered when deciding whether to settle a civil suit.

RECOMMENDATIONS

Recommendation 37. Complainants and their legal representatives should have a legal right to access the complaint investigation file once a matter has been finalised, and evidence from the file should be admissible in civil litigation.

Recommendation 38. Victoria Police should be required to consider the findings of an independent investigation when deciding whether to settle a civil suit.

Review Rights

IBAC's findings about police complaints are not reviewable. If a member of the public is unsatisfied with IBAC's frequently inadequate investigation of a complaint, their only option is to make a complaint about IBAC to the Victorian Inspectorate, which does not directly engage a review of the substance of the complaint.¹⁵⁰

It is crucial that a reformed police complaints system in Victoria provides an avenue for review, accessible to both complainants and police officers, to increase transparency and trust in the system. This is common practice in international jurisdictions. For example, in Manitoba, Canada, police complaints are investigated by the Law Enforcement Review Agency (**LERA**) and complainants can appeal to a provincial court judge if LERA closes the complaint without

150 IBAC, 'If you disagree with IBAC's decision', web page accessed 22 April 2022.



taking action.¹⁵¹ At the other end of the spectrum, New Zealand's Independent Police Conduct Authority (**IPCA**) conducts an internal review if a complainant provides new information or raises issues that were not properly addressed by the initial investigation, and provides a written decision at the end of that review.¹⁵² Victoria's lack of any avenue for review of findings from a complaint investigation further undermines public confidence in the oversight system.

In the Victorian context, a new complaints body needs to be designed to maximise transparency and accountability. This is necessary if the new body is to gain public confidence and overcome the longstanding failures of investigation that have plagued IBAC. With this in mind, the appropriate model for review rights is a public review hearing by an external body.¹⁵³ Given the difficulties of accessing courts for marginalised people, who are most frequently affected by misconduct, the review should be by an external tribunal – either as an expansion of VCAT's function or a newly constituted tribunal. The principle of accessible, timely and thorough external review is crucial to building an effective police complaints system. The court system must also continue to be available for judicial review of complaints investigations. VALS and other community legal services should be funded to represent complainants throughout both the complaints process and any subsequent review stages.

RECOMMENDATION

Recommendation 39. Findings of the independent police complaints body should be reviewable by an external, public tribunal. Review rights should be available to both the complainant and the police officer(s) subject to the complaint.

Systemic Reforms

VALS recommends, as discussed above, that the reformed oversight system includes a definition of systemic police misconduct and robust powers (including own motion powers and a supercomplaints process) for the complaints body to investigate systemic issues. This would mean that a key form of complaint outcome would be recommendations for systemic reform, not only findings about individual incidents.

152 Independent Police Conduct Authority, *Complaints*, web page accessed 20 April 2022.



¹⁵¹ Office of the Commissioner, Law Enforcement Review Agency, Annual Report 2018, p11.

¹⁵³ VALS continues to support the recommendation of the Police Accountability Project that investigation decisions must be administratively and judicially reviewable. See Police Accountability Project (2017), *Independent Investigation of Complaints against the Police: Policy Briefing Paper*, p6. Available at https://www.policeaccountability.org.au/wp-content/ uploads/2017/09/Policy-Briefing-Paper-2017_online.pdf.

As there is no mechanism for the independent complaints body to enforce systemic changes in Victoria Police, it is crucial to create accountability and transparency with respect to Victoria Police's response to these recommendations. Accountability for implementation of reform is discussed in a dedicated section below.

RECOMMENDATIONS

Recommendation 40. The independent complaints body must have the power to make recommendations for reform of systems, policies and procedures within Victoria Police.

Recommendation 41. Victoria Police should be required to submit an annual report to the independent complaints body, providing details on its implementation of recommendations from the complaints body, including plans for ongoing implementation and any barriers to successful implementation.

Complaints Data

Complaints data is essential to building an effective oversight system and rebuilding community trust in police oversight. Existing data published by both Victoria Police and IBAC is limited, fragmented, and published in inconsistent ways, which makes comparison over time very difficult.

We note in particular that IBAC's use of special reports and individual audits tends to produce very delayed and non-comparable data, which inhibits the ability of the community and civil society organisations to monitor and evaluate the complaints system. IBAC was due to publish an audit of how Victoria Police handles complaints made by Aboriginal people in 2020. The audit was repeatedly delayed, and by the time of its publication, it provided out-of-date information that did not reflect significant changes in the police's relationship with the community, notably over the course of repeated COVID-19 lockdowns. This delay underscores the need for regular, transparent publication of data on police complaints.

Transparent data release is also essential for identifying and dealing with systemic problems with policing. As noted in the UN Office on Drugs and Crime's *Handbook on Police Accountability, Oversight and Integrity,* this data can "be used to identify the operational areas where the abuse of police powers is most likely to occur and also which officers are subject to an unusually high number of allegations."¹⁵⁴





¹⁵⁴ UN Office on Drugs and Crime (2011), Handbook on police accountability, oversight and integrity, p43.

The independent complaints body should routinely publish data on police complaints and should initiate an early intervention and complaint profiling system, as noted above.

We also note that collection and publication of data relating to police complaints in Victoria must be informed by the fundamental principles of Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**). In 2018, the Indigenous Data Sovereignty Summit in Australia developed the following definitions for key concepts relating to IDS and IDG:

- Indigenous data is "information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually."¹⁵⁵
- IDS refers to "the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data."¹⁵⁶
- IDG refers to "the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity."¹⁵⁷

The importance of Indigenous Data Sovereignty is recognised under the Victorian Aboriginal Affairs Agreement (**VAAF**),¹⁵⁸ the Closing the Gap National Agreement¹⁵⁹ and the Closing the Gap Victorian Implementation Plan.¹⁶⁰ *Burra Lotjpa Dunguludja*, the Aboriginal Justice Agreement Phase 4, also includes a commitment to increase Aboriginal community ownership of and access to justice data, including through improved collection and availability of Aboriginal justice data.¹⁶¹



¹⁵⁵ Indigenous Data Sovereignty, Communique. Indigenous Data Sovereignty Summit, 20 June 2018, p. 1.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Department of Premier and Cabinet (DPC), *Victorian Aboriginal Affairs Framework 2018-2023* (VAAF) (October 2018), pp. 27 and 59.

¹⁵⁹ *National Agreement on Closing the Gap* (an Agreement between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments) (July 2020), paras 69-77.

¹⁶⁰ DPC, Victorian Closing the Gap Implementation Plan 2021-2023 (June 2021), p. 27.

¹⁶¹ Burra Lotipa Dunguludja: Aboriginal Justice Agreement Phase 4, A partnership between the Victorian Government and

Aboriginal Community, (*"Burra Lotjpa Dunguludja"*) (2018), p. 50. To date, this has included work by the Crime Statistics Agency to improve *"the availability of high-quality data,"* investment by Victoria Police in IT enhancements *"to improve the recording and reporting of Standard Indigenous Question (SIQ) data,"* and measures to improve police practice in relation to asking individuals whether they identify as Aboriginal. See *Aboriginal Justice Agreement In Action* (website).

Greater access to data on police complaints will help to rebuild community trust in the police complaints system, but to do so, approaches to data collection, management and publication must incorporate IDS and IDG. This is a critical to support the rights of Aboriginal people and communities, individually and collectively, to:

- 1. Exercise control over the manner in which data concerning Aboriginal individuals and communities is gathered, managed, interpreted and utilised; and
- 2. Access and collect data obtained about Aboriginal individuals and communities.

RECOMMENDATION

Recommendation 42. Data relating to police complaints from Aboriginal complainants must be gathered, managed and used in accordance with the principles of Indigenous Data Sovereignty and Indigenous Data Governance.

Powers of Police Complaints Bodies

The independent police complaints body must be granted adequate powers to enable it to conduct investigations without being reliant on cooperation from Victoria Police. Generally, powers which are coercive or intrusive should have safeguards in the form of external oversight or warrant requirements, but the complaints body should not need to request support from Victoria Police to exercise any power necessary to fulfil its investigative function. Safeguards are important to ensure that the powers required for independent investigation of complaints do not themselves lead to misconduct, as alleged in Victoria's former Office of Police Integrity.¹⁶²

Jurisdictional Powers

Some powers provided under legislation serve mainly to determine the scope of IBAC's investigations, rather than being powers exercised during an investigation. We refer to these here as 'jurisdictional' powers.

The complaints body should have explicitly legislated review powers, including the power to review Victoria Police's characterisation of a matter as a customer service issue and a requirement on Victoria Police to report the outcome of customer service matters to the complaints body.



¹⁶² Nick McKenzie & Richard Baker, The Age, 9 February 2012, 'OPI staff misconduct claims'. Available at <u>https://www.theage.com.au/national/victoria/opi-staff-misconduct-claims-20120208-1rf2e.html</u>.

The complaints body should be able to conduct these reviews on the request of a complainant or on its own motion. In addition to reviewing these decisions, the independent complaints body should be able to play an active role in oversight where it determines this is necessary. As noted above, this should include a power to impose requirements on how police investigate a customer service complaint and a power of veto over the choice of police investigator/complaint handler.

'Cease and desist' powers are critical to avoiding duplication and ensuring fully independent investigation. Victoria Police should not be permitted to investigate any matter that is being investigated by the complaints body, and the complaints body should have the power to order police to cease any investigation that could interfere with an ongoing complaints investigation.

As discussed above, the independent complaints body must have strong own motion powers and be empowered to receive and investigate 'super-complaints' from representative bodies.

RECOMMENDATIONS

Recommendation 43. Victoria Police should be legislatively prohibited from investigating any matter that is being investigated by the new independent complaints body. The complaints body should have a power to order police to cease any related investigation if it could interfere with an ongoing complaint investigation.

Recommendation 44. Where Victoria Police is investigating a complaint (i.e. the complaint is assessed as a customer service matter), the independent body must have the power to take over the investigation of any complaint at any time – both complaints received directly by police and those referred by the independent body – and to require police to suspend their investigation.

Investigative Powers

The small number of independent investigations undertaken by IBAC are hampered by reliance on Victoria Police to exercise certain powers. IBAC's powers with respect to conducting searches, seizing substances, obtaining names and addresses, taking physical evidence and making arrests are restricted by comparison to Victoria Police's powers.¹⁶³ For example, IBAC has powers to search police premises, but searches are sometimes ineffective because evidence can easily be concealed on someone's person, because IBAC investigators do not have any power to search



¹⁶³ Victorian Parliament (2019), Inquiry into the external oversight of police corruption and misconduct in Victoria, p251.

people.¹⁶⁴ IBAC officers cannot direct a person to provide a password, meaning evidence on a computer or mobile phone can be concealed. IBAC also has no power to take fingerprints or DNA samples.¹⁶⁵

These deficiencies risk impeding independent investigation, and creating actual and perceived conflicts of interest when Victoria Police become involved in an investigation. This is a serious problem with the existing complaints investigation system. A new system, putting far greater value on independent investigation, must grant significantly expanded powers to the complaints body.

In Northern Ireland, investigators employed by the Police Ombudsman are granted all the powers of a police officer while they are investigating a complaint.¹⁶⁶ As a rule, PONI uses only those powers relevant to an investigative function, and does not use other powers such as those concerning arrest or use of force.¹⁶⁷ It is appropriate that the independent complaints body should not have powers to use force or make arrests, and in the Victorian context this limitation could be established in legislation rather than as a matter of practice. Beyond this, VALS sees no significant drawbacks in the Northern Ireland approach to the powers of complaints investigators, provided that there are also appropriate oversight mechanisms and avenues for complaints about the conduct of staff of the complaints body.

Expanded powers, in particular powers to take physical evidence, would require the oversight agency to be notified of the incident as soon as possible. Any delay while the complaint body determines whether to refer the complaint to Victoria Police could compromise an investigation. This underlines the need for a simple system in which the complaints body is responsible for independently investigating all police complaints and critical incidents, reducing the risk of delays of this kind.

RECOMMENDATION

Recommendation 45. Investigators employed by the independent complaints body should be granted all the investigative powers of a police officer while they are investigating a complaint.

164 Ibid, pp256-7.

165 Ibid, p259.

166 Police (Northern Ireland) Act 1998, s56(3).

167 Police Ombudsman of Northern Ireland, 'Power of Constable' web page accessed 10 April 2022.



Police-Contact Deaths and Serious Injuries

Police-contact deaths and serious injuries (also referred to as "critical incidents"¹⁶⁸) are currently investigated by Victoria Police,¹⁶⁹ who also perform an oversight function for these investigations.¹⁷⁰ The purpose of the investigation is to determine if there have been criminal or disciplinary offences.¹⁷¹ The purpose of the oversight is to determine whether policies, procedures and guidelines were adhered to, and to determine whether any action is necessary to prevent similar incidents in the future.¹⁷²

The role of IBAC in relation to police-contact deaths and serious injuries is primarily to provide oversight of Victoria Police investigations and oversight.¹⁷³ IBAC can also start an 'own motion' investigation in relation to a police-contact death or serious injury,¹⁷⁴ but this is rare. Victoria Police are not required by legislation to notify IBAC when an investigation is opened into a police-contact death or serious are instead provided through an administrative arrangement.

174 IBAC, 'Our Investigative Powers', web page accessed 15 April 2022.



¹⁶⁸ Section 82, *Victoria Police Act 2013* (Vic).

¹⁶⁹ An investigation of a death or serious injury/illness may be undertaken by Victoria Police's Homicide Squad, the Major Collision Investigation Group or another squad or unit nominated by a deputy commissioner. See IBAC (2018), <u>Audit of</u> <u>Complaints Investigated by Professional Standards Command, Victoria Police</u>.

¹⁷⁰ Professional Standards Command (PSC) provides oversight for all investigations into a police-contact death and serious injury/illness before or following police-contact. If appropriate, Regional investigators may perform the oversight function for investigations into serious illness/injury. Guidelines relating to oversight of investigations is provided under Victoria Police's Integrity Management Guide (IMG) and the Victoria Police Manual (VPM); it is not provided for under the Victoria Police Act 2013. See IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*; Victoria Police Manual, "Death or Serious Injury/Illness incidents involving police."

¹⁷¹ Office of Police Integrity (2011), *Review of the investigative process following a death associated with police contact*,

p14. See also Victoria Police Manual, "Death or Serious Injury/Illness Incidents involving Police."

¹⁷² IBAC (2018), Audit of Complaints Investigated by Professional Standards Command, Victoria Police.

¹⁷³ IBAC's functions include: assessing police personnel conduct; ensuring that the highest ethical and professional standards are maintained by police officers; and ensuring police officers have regard to the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006*. See Section 15, *IBAC Act 2011* (Vic) These functions provide grounds for IBAC's oversight of police-contact deaths and serious injuries involving Victoria Police.

Some police-contact deaths will also be the subject of a coronial investigation, and possibly an inquest. All deaths in police custody¹⁷⁵ are subject to a mandatory coronial inquest, and other police-contact deaths may also trigger a coronial investigation and inquest, depending on the circumstances.¹⁷⁶ Coronial investigation of police-contact deaths is carried out by a police officer ("the Coronial Investigator"), on behalf of the Coroner, and is usually carried out by the Homicide Squad¹⁷⁷ with support and oversight from the Police Coronial Support Unit (**PCSU**).¹⁷⁸ The role of the police in preparing the coronial brief, and the relationship between the Coroner and the police officer is not clearly regulated under legislation.¹⁷⁹

As outlined above, police investigating police fundamentally contravines international law and principles. This is particularly the case for police-related injuries and police-contact deaths, where the right to life and the right to an effective remedy under international human rights law¹⁸⁰ and the Victorian Charter¹⁸¹ require an independent investigation. The United Nations Human Rights Committee (**UNHRC**) has found internal investigations by Victoria Police into alleged human rights abuses by police are in breach of the *International Covenant on Civil and Political Rights*.¹⁸² In response to a complaint brought by Corinna Horvath, whose nose was broken by a police office during an arrest in 1996. The UN Human Rights Committee found that

176 Under the *Coroners Act 2008* (Vic), when a person dies in connection with a police operation (but not in police custody), the death must be reported to the coroner (s. 4) and the coroner may carry out an investigation and possibly an inquest, depending on the circumstances.

177 See Victorian Police Manual (VPM), "Death or Serious Injury/Illness incidents involving police."

178 The *Police Coronial Support Unit* (PCSU) is staffed by members of Victoria Police who assist coroners with their investigations into deaths and fires. The PCSU can attend scenes at the request of the coroner, provides coronial briefs of evidence for the coroner and supports Victoria Police members who are investigating matters on behalf of a coroner. 179 Under Section 59 of the *Victoria Police Act 2013*, a police officer may assist a coroner in the investigation of a death. The role of police in preparing the coronial brief is set out under the State Coroner's *Practice Direction 3 of 2021*, above note 28. 180 Article 6, *International Covenant on Civil and Political Rights* (ICCPR); Article 14, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

181 Section 9, Charter of Human Rights and Responsibilities Act 2006 (Vic).

182 UN Human Rights Committee, Views: Communication No. 1885/2009 (5 June 2014), 110th sess (Horvath v Australia).



¹⁷⁵ Under the <u>Coroners Act 2008</u> (Vic), when a person dies in police custody, the death must be reported to the Coroner and a coronial investigation and inquest into the death is mandatory (ss. 4 and 11). The purpose of the coronial investigation and inquest is to establish the identity, cause and circumstances of the death and contribute to a reduction in the number of preventable deaths (s 1(c)). A coronial inquest is not required if a person has been charged with an indicatable offence in respect of the death (s. 52(3)(b)). The coronial inquest may result in the matter being referred to the Director of Public Prosecution for a criminal investigation (s. 72).

Victoria Police's internal investigative process did not provide an adequate remedy for police misconduct because of its failure to hear from civilian witnesses, hold a public hearing, or reopen its investigation after the County Court awarded civil damages against the police officers involved.¹⁸³

Criminal and Disciplinary Investigation

As discussed above, police investigation of police-contact deaths and serious injuries is deeply problematic for Aboriginal people and communities. Aboriginal people do not trust police to investigate police complaints and they do not trust police to investigate the death of a loved one who has died in police custody or as a result of a police operation.

This lack of trust is firmly justified by the evidence. A 2018 audit by IBAC indicated serious problems with Victoria Police's oversight of critical police incidents. In particular, "over half of the oversights conducted by Victoria Police failed to consider evidence that should have been included."¹⁸⁴ This included a failure to include statements from independent witnesses and an over-reliance on police statements. Additionally, 61% of oversights failed to identify relevant human rights issues, did not address rights in sufficient detail, or demonstrated a poor understanding by mischaracterising other issues as `rights'."¹⁸⁵

At present, Victoria Police investigate internal incidents and the investigation is overseen by (but typically not conducted by) Professional Standards Command. IBAC then performs an after-the-fact review of PSC's oversight of the investigation. This approach evidently does not provide for independent investigation, and it is clear that in practice it also has not ensured thorough or reliable investigation of critical incidents.

One possible alternative to the current oversight approach is a model of 'real-time' oversight, which would involve an independent body essentially shadowing the Victoria Police investigation as it occurs. In practice, real-time oversight could only be effective if the powers involved are so extensive that the oversight body essentially runs the investigation. For example, the supervisory powers granted to the Law Enforcement Conduct Commission (**LECC**) in New South Wales do not allow it to manage or even influence the conduct of an investigation, and many of its powers are restricted to use with the consent of the police officers involved in the incident.

183 Ibid, p15.



¹⁸⁴ IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*, p. 27. 185 Ibid, p. 44.

This is a manifestly inadequate degree of oversight.¹⁸⁶ By contrast, New Zealand's Independent Police Conduct Authority (**IPCA**) can actively monitor interviews, as well as conducting joint interviews or supplementary interviews of its own, and examine all information gathered by police. This approach does not provide adequate independence, and it is also a duplication of investigative effort, which would not be necessary if fully independent investigation was adopted as a simpler, more streamlined approach to such incidents.

Enabling this kind of independent investigation would require a fully resourced independent body, with the staffing and resources to rapidly respond to calls and attend the scene of an incident. Jurisdiction of the body to investigate police-contact deaths and serious injuries should be mandated by legislation, and the body must have adequate powers to carry out these investigations effectively. There should also be a mechanism in place for oversight of the investigations undertaken by the independent body.

Victoria Police may be involved in securing a scene, but should be required to immediately call the independent body to attend and commence the substantive investigation. For example, in Northern Ireland, PONI investigators are called to the scene of serious incidents, where they are distinguished from police by a different uniform.¹⁸⁷

A new independent body should learn from the experiences in other jurisdictions. In Northern Ireland, all critical incidents are investigated by the Police Ombudsman of Northern Ireland, which also receives and investigates police complaints.¹⁸⁸

In British Columbia, Canada, the Independent Investigations Office (**IIO**) conducts investigations into police-related incidents resulting in death or serious harm, following mandatory notification by police when an incident has taken place.¹⁸⁹ The IIO has jurisdiction over all the policing agencies operating in British Columbia, including on- and off-duty officers. It conducts investigations to a criminal standard and may refer the matter to the British Columbia Prosecution Service to consider laying charges. If a matter is not referred to prosecutors, the IIO can release a detailed public report or a press release to provide information about its investigation.¹⁹⁰

Police-contact deaths and serious incidents are likely to have a higher media profile and be more

Ombudsman's Office', web page accessed 7 April 2022.

189 Independent Investigations Office (IIO), '<u>What we Do</u>', web page accessed 20 April 2022. 190 Ibid.



¹⁸⁶ Law Enforcement Conduct Commission Act 2016 (NSW) ss 114, 115(4), 116.

¹⁸⁷ Tamar Hopkins (2009), 'An Effective System of Complaints Against the Police', 44, 52.

¹⁸⁸ Police Ombudsman for Northern Ireland (PONI), 'Information for Police Officers: When you must contact the Police

traumatic for the victims of police conduct. It is crucial that they have full confidence in the investigation, and any reform which falls short of fully independent investigation of these cases cannot achieve that. The IBAC Committee Inquiry recommended that the Victorian Government review the basis and extent of IBAC's jurisdiction with respect to the investigation and oversight of critical incidents in which death or serious injury has occurred in connection with police activity.¹⁹¹ The Inquiry also recommended that Victoria Police be required by legislation to notify IBAC when they commence an investigation into a critical police-contact incident.¹⁹² VALS does not support these recommendations, as we fundamentally oppose police investigation of these incidents.

RECOMMENDATION

Recommendation 46. Police-contact deaths and incidents involving serious injuries must not be investigated by police; they must be investigated by a new independent police complaints body.

Coronial Investigations

Coronial processes are a critical component of a comprehensive and effective police accountability system. The current system – whereby police investigate police-contact deaths – is deeply problematic for Aboriginal families whose loved ones have died in police custody or as a result of police contact.

While previous inquiries have noted concerns with the current coronial process and recommended that the investigating coroner be given authority under the *Coroners Act 2008* to direct the police investigation,¹⁹³ this is not enough to meet international requirements for an independent investigation.

193 *RCIADIC National Report*, <u>Volume 5</u>, Recommendation 29; Parliament of Victoria, <u>Inquiry into the Review of the Coroners</u> <u>Act 1985</u> (2006), Recommendation 42; <u>Tanya Day Inquest</u>, Recommendation 2, p. 107. In 2011, the OPI carried out a review of the investigative process following a death associated with police contact, and recommended that: "That the Victorian Government consults with key stakeholders regarding an optimal legislative framework for the investigation and oversight of deaths associated with police contact in Victoria." See Office of Police Integrity (2011), <u>Review of the investigative process</u> <u>following a death associated with police contact</u>, Recommendation 3, p. 16.



¹⁹¹ Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 67, p. 315.

¹⁹² Ibid., Recommendation 66, p. 315.

In addition to the lack of independence, there are often serious deficiencies in the coronial investigations carried out by police. This includes failures to preserve critical evidence, poor exercise of discretion regarding the investigation and "an alarming lack of rigour."¹⁹⁴

Practice Direction 6 of 2020 ("Indigenous Deaths in Custody") of the Coroners Court addresses some of these concerns by requiring, where practicable, that the State Coroner and/or delegate (such as the duty coroner) immediately attend the scene of the death, when an Aboriginal person dies in custody.¹⁹⁵ Moreover, the investigating coroner should contact the coroner's investigator at the earliest opportunity to determine appropriate arrangements for the collection of time-critical evidence (such as CCTV footage).¹⁹⁶ Although the Direction applies specifically to Aboriginal deaths in custody, coroners are encouraged to apply the Direction in relation to all Aboriginal deaths that are subject to a coronial investigation and possibly an inquest.¹⁹⁷ This direction is an important development and has contributed to enhancing the quality of recent investigations.

Additionally, *Practice Direction 3 of 2021* ("Police Contact Deaths") provides that "the investigating coroner as soon as reasonably practicable will refer the matter to the In-House Legal Service (**IHLS**) to take carriage of and assist the investigating coroner at all stages of the investigation (from inception to closure)." It also provides that "under no circumstances are the Police Coronial Support Unit (**PCSU**) to take carriage of or have any substantive involvement in the investigation of a police contact death."¹⁹⁸ The IHLS was established to assist the coroner with investigations, principally police-contact deaths, where it would be inappropriate for the Coroner to be assisted by Victoria Police.¹⁹⁹ However, even when the IHLS has carriage of a matter, they still rely on police officers (usually from the Homicide Squad) to do the investigatory work.

Additionally, Aboriginal families have raised concerns with VALS regarding police practice and approaches when taking statements from family member. Often, family members are required to give statements in the days immediately following the passing of their loved one, even when there are no clear reasons for the statement to be provided so quickly (e.g. for reasons related to freshness of evidence). In some cases, family members have been required to wait in police

198 *Practice Direction 3 of 2021*, paras 3.1 and 3.2. Emphasis omitted.

199 Coroners Court of Victoria, <u>Annual Report 2014-15</u>, p27.



¹⁹⁴ See for example, *Finding into the Death of Raymond Noel Lindsey Thomas*, p. 28. The coroner criticised the independent police investigation for an "alarming lack of internal rigour," para. 148.

¹⁹⁵ State Coroner, *Practice Direction 6 of 2020* ("Indigenous Deaths in Custody"), para 3.1.

¹⁹⁶ Ibid., para 3.4.

¹⁹⁷ Ibid., para 1.5.

stations for hours to give their statements and have received inappropriate direction from police officers on what they should include in their statement.

In response to some of these concerns, *Practice Direction 6 of 2020* provides that the investigating coroner will ensure that the coroner's investigator is contacted at the earliest possible opportunity to determine appropriate arrangements for "obtaining statements (such as to facilitate witness interviews being held in a location other than a police station, or for the presence of support persons at interviews of family members where requested)."²⁰⁰ To ensure the evidence gathering process does not unnecessarily retraumatise a client, and is done at a time that works best for them, VALS has also started taking client statements for the Coroner in recent inquest matters.

Practice Direction 6 of 2020 is a welcome development that can help to alleviate some of the trauma experienced by Aboriginal family members in the days immediately following the death of their loved one. However, it does not address the fundamental issue of police carrying out investigations, including the well-founded distrust that Aboriginal communities have of police and their ongoing experiences of systemic racism.

To address the concerns raised above, coronial investigations into the death of an Aboriginal person in police custody or as a result of a police operation must not be carried out by police. They must be carried out by a specialist civilian investigation team that is independent from police,²⁰¹ is culturally appropriate and includes Aboriginal staff and leadership.

There are a number of options for independent coronial investigations, including the models identified below. In determining the best model, the voices of Aboriginal families whose loved ones have died in police custody, or as a result of a police operation, must be prioritised.

- *A specialised investigation team at the Coroners Court* and an independent investigations office for all police-contact deaths and serious injuries. This is the case in British Colombia, Canada where:
 - \circ The Independent Investigations Office (**IIO**) conducts investigations into all police-related incidents resulting in death or serious harm to determine whether



²⁰⁰ Practice Direction 6 of 2020, para 3.4.

²⁰¹ Federation of Community Legal Centres (FCLC) (2011), *Effective, Transparent, Accountable: An independent system to investigate police-related deaths in Victoria*. Police Accountability Paper, *Independent Investigations*,; T. Hopkins (2009), *An Effective System for Investigating Complaints Against Police: A Study on Human Rights Compliance in Police Complaint*. *Models in the US, Canada, UK, Northern Ireland and Australia*, p. 7.

any offences have been committed;²⁰²

- The Special Investigations Unit (SIU) at the BC Coroners Service, which includes a Special Investigations Coroner who provides specialised knowledge and expertise for police-involved deaths.²⁰³
- A specialised team at the independent police complaints body:
 - This is the case in Northern Ireland, where the Police Ombudsman of Northern Ireland (**PONI**) investigates all deaths where police appear to be involved or implicated, for the purposes of determining whether any criminal or disciplinary offences have occurred, as well as to prepare a brief for the coronial proceeding and make recommendations to this inquiry.²⁰⁴
 - Similarly, the independent police complaints body for England and Wales, the Independent Office for Police Conduct (**IOPC**), investigates all deaths where the person had direct or indirect contact with police at the time of, or shortly before their death, and the investigation report is shared with the coroner.²⁰⁵
- An independent Aboriginal-led body to investigate Aboriginal deaths in custody: this was recommended by the Jumbunna Institute it its submission to the NSW Parliamentary Inquiry into the high level of First Nations People in Custody and Oversight and Review of Deaths in Custody.²⁰⁶

The coronial investigation is in addition to the immediate independent investigation of all policecontact deaths and serious injuries for criminal and disciplinary purposes, discussed above. Any model for independent coronial investigations should attempt to minimise duplication, and in particular avoid repeated re-questioning of family members. This can be achieved either by having a coronial brief prepared by the team that conducts the criminal investigation (the second model above) or by facilitating information-sharing.

In addition to independent coronial investigations, there must also be a robust oversight mechanism for implementation of coronial recommendations relating to police-contact deaths. The Government should establish an Aboriginal Social Justice Commissioner to perform



²⁰² IIO, 'What We Do', web page accessed 30 March 2022.

²⁰³ BC Coroners Service, 'Special Investigations Unit', web page accessed 30 March 2022.

²⁰⁴ FCLC (2011), *Effective, Transparent, Accountable: An independent system to investigate police-related deaths in Victoria*, p. 8.

²⁰⁵ Independent Office for Police Conduct (IOPC) '<u>What We Investigate and Next Steps</u>', web page accessed 30 March 2022. 206 Jumbunna Institute of Education and Research, Research Unit (2020), <u>Submission to the Select Committee on the High</u> <u>Level of First Nations People in Custody and Oversight and Review of Deaths in Custody</u>, para 144.

this function, and the Commissioner should also provide oversight for implementation of recommendations from the RCIADIC and other Aboriginal justice outcomes in Victoria.

RECOMMENDATIONS

Recommendation 47. Coronial investigations into police-contact deaths must not be carried out by police. They must be carried out by a specialist civilian investigation team that is independent from police, is culturally appropriate and includes Aboriginal staff and leadership.

Recommendation 48. The Government should consult with the families of Aboriginal people who have died in custody regarding the mechanism for independent coronial investigation of police-contact deaths.

Recommendation 49. Family members of an Aboriginal person who has died in police custody should be given the option of providing a statement through the Koori Engagement Unit at the Coroners Court or VALS lawyers.

Recommendation 50. The Government should establish an Aboriginal Social Justice Commissioner to provide independent oversight for Aboriginal justice outcomes in Victoria. One of the key functions of the Commissioner should be to provide independent oversight for implementation of all coronial recommendations arising from the police-contact death of an Aboriginal person.



Legal and Disciplinary Sanctions

Robust legal sanctions are key to deterring misconduct and creating accountability for the abuse of police power. These sanctions can be delivered through criminal prosecution or civil litigation.

These legal processes operate independently, though there are important interconnections between them. The relationship of these legal processes to the police complaints system is discussed above, in the 'Complaint Outcomes' subsection.

Criminal Prosecutions

There are significant challenges to prosecutions of police officers in jurisdictions all over the world. Addressing these is critical to ensuring effective accountability and oversight of police. Criminal accountability is one of the most high-profile and serious forms of sanction that an officer can face, and it is crucial to ensure that this form of accountability is not rendered ineffective.

IBAC very rarely brings prosecutions against police officers. Prosecutions were finalised against only five police officers in 2020/21, as noted above.²⁰⁷ A very low number of prosecutions, all of which were successful and all of which related to extremely serious misconduct, suggests a conservative approach, in which prosecution for police misconduct is only brought when it is almost certain to succeed. While prosecutors are required to proceed only if there is a reasonable prospect of conviction,²⁰⁸ it appears clear that a much higher bar is being applied in decisions about whether to prosecute police officers.

As noted above, the prosecution process should be linked to the independent police complaints system, so that when misconduct has been established by the independent oversight body, the Director of Public Prosecutions must justify any decision not to prosecute. In other jurisdictions internationally, the willingness to prosecute police officers and expertise in doing so have been supported by establishing a dedicated unit within the public prosecutor's office.²⁰⁹ The lack of independent investigations of police, and the reluctance of IBAC and Victoria Police's Professional Standards Command to bring prosecutions, have been major impediments to criminal prosecution being an effective pillar of the oversight system.

However, even with greater willingness to prosecute, significant obstacles will remain because

207 IBAC (2021), Annual Report 2020/21, p35.

208 Office of Public Prosecutions (2021), *Policy of the Director of Public Prosecutions for Victoria*, p2. 209 UN Office on Drugs and Crime (2011), *Handbook on police accountability, oversight and integrity*, p40.



the current law simply makes it very difficult to successfully prosecute police officers. Legislation grants police very significant powers to use force – including lethal force. As a result, a successful prosecution will often depend on proving facts about the officer's state of mind, which are extremely difficult to show beyond reasonable doubt. For example, in the recent trial relating to the shooting of Kumanjayi Walker in the Northern Territory, the jury was directed that police officer Zachary Rolfe could not be found guilty if he had honestly believed the shooting was reasonably necessary to perform his police duties – even if that belief was based on an inaccurate perception of events.²¹⁰

The prospects for success in prosecutions of police officers are also reduced because it is difficult to introduce evidence about a police officer's previous conduct. Excluding evidence about past incidents is an important protection for all types of defendants, and it is important to retain the principle that such evidence can only be introduced in special circumstances. However, there are some cases in which this kind of evidence may be appropriate to permit in trials of police officers, particularly where the officer is relying on character evidence as part of their defence. Clearer legislated rules about when evidence of past conduct is admissible, with safeguards to prevent its inappropriate use, would improve consistency in how this evidence is treated and lead to fairer trials.

For Aboriginal victims of police misconduct, these challenges come on top of the broader biases of the court system. Opportunities to give evidence in a culturally safe way are extremely rare. Judges and jury members may have biases that lead them to give less weight to the testimony of Aboriginal people. The existence of a past criminal record – which is disproportionately likely for Aboriginal people, as a result of over-policing and the ongoing impacts of colonisation – may be used to justify a police officer's behaviour or discredit a victim's evidence.

Without reform, prosecutions will remain challenging and proper police accountability will be restricted. Recent prosecutions of police officers who have shot and killed Aboriginal people have not been successful. Officer Zachary Rolfe was found not guilty. In Western Australia, an unnamed police officer was prosecuted for murder after he shot and killed JC, a 29-year old Aboriginal woman, when other police officers were attempting to de-escalate the situation; the officer was found not guilty.²¹¹ The importance of successful prosecutions of police officers is demonstrated by experiences in the United States, where the conviction of the police officer



²¹⁰ The Guardian, 10 March 2022, 'Judge urges jurors to 'guard against' emotion when considering verdict in Zachary Rolfe murder trial'. Available at <u>https://www.theguardian.com/australia-news/2022/mar/10/judge-urges-jurors-to-guard-against-emotion-when-considering-verdict-in-zachary-rolfe-trial</u>.

²¹¹ ABC News, 22 October 2021, 'Police officer not guilty of murdering woman during confrontation on Geraldton street'.

who killed George Floyd helped energise the Black Lives Matter movement,²¹² but failure to prosecute or secure convictions in other cases – such as the police shooting of Michael Brown in Ferguson – has severely undermined confidence in police and the bodies that oversee them.²¹³

VALS intends to conduct further research on the changes that are needed to improve criminal prosecutions of police officers, and ensure that they are a functioning part of the police oversight system.

Civil Litigation

Civil litigation is a key mechanism for justice in relation to police misconduct, particularly given the current complaints system does not provide for independent investigation or meaningful remedies. While a reformed complaints system would mitigate the need for civil litigation in some cases, it will remain an important way for complainants and victims of police misconduct to achieve satisfaction and compensation.

Litigation against police is very challenging. Courts and juries are often deferential to police evidence and police documentation, and courts have historically been reluctant to find against police out of concern that liability could make police officers excessively risk-averse while on duty.²¹⁴

As discussed above, civil litigation needs to be connected to the police complaints process so that the evidence uncovered by complaints investigators is available to the victims of police misconduct. There are a number of other changes which also need to be made, to make civil litigation a more effective tool for police oversight. VALS has been advocating consistently to improve access to Body-Worn Cameras in civil litigation, as discussed below. We will be doing further work in future on reforms that are needed to improve the effectiveness of civil litigation as a fair tool for holding police accountable.

Body-Worn Cameras

The limited ability to access Body-Worn Camera (**BWC**) footage also creates barriers to civil claims. Victoria Police have been using BWCs for around five years. In principle, the widespread deployment of BWCs creates vital objective evidence that can help hold police accountable and

212 BBC News, 25 June 2021, 'George Floyd murder: Derek Chauvin sentenced to over 22 years'.

213 CNN, 25 November 2014, 'Fires, chaos erupt in Ferguson after grand jury doesn't indict in Michael Brown case'.

214 Ransley, Janet, Jessica Anderson and Tim Prenzler (2007), 'Civil Litigation Against Police in Australia: Exploring Its Extent,

Nature and Implications for Accountability', The Australian & New Zealand journal of criminology 40(2), pp 143, 174.



improve the transparency of police operations. At present, these benefits are limited in practice because of the difficulty of accessing BWC footage, except through court proceedings. The *Surveillance Devices Act 1999* and *Surveillance Devices Regulations 2016* place strict limits on how BWC footage can be accessed and used.

Until late 2021, BWC footage was only disclosed during criminal proceedings – it could not be accessed for civil litigation, meaning that VALS clients found themselves in the position of having BWC footage used to prosecute them, while being unable to rely upon the same footage in their efforts to obtain justice for wrongs done to them by public officials.

Recent changes to regulation have enabled BWC footage to be accessed at the discovery stage of civil litigation.²¹⁵ However, there are still significant barriers to this footage being an effective oversight tool. Commencing civil litigation and sustaining it through to the stage at which BWC footage would be disclosed is costly and time-consuming. Understanding what is shown on BWC footage is often a crucial part of assessing whether a client has a viable legal claim, and whether it is worth pursuing a matter. A broader reshaping of the legislation and regulations is needed so that BWC footage can be accessed through the Freedom of Information (**FOI**) system. VALS welcomes the recent changes as a starting point and looks forward to further engagement with the Victorian Government in relation to additional reforms in this area.

RECOMMENDATION

Recommendation 51. Complainants should be able to access footage from body-worn cameras (BWCs) worn by police and Protective Service Officers (PSOs). To enable access to this footage, Sections 30D and 30F of the *Surveillance Devices Act 1999* should be amended, to remove BWCs from the ambit of this legislation.

Police Disciplinary System

For many instances of police misconduct, the Victoria Police disciplinary system will be the first line of sanction, particularly in cases where misconduct has occurred, but a full criminal prosecution or lengthy civil litigation would be difficult to sustain. It is therefore crucial for police accountability that the police's internal disciplinary system provides a robust process, and takes seriously the effects of misconduct on victims and the Victorian community more broadly.

The operation of the disciplinary system is, at present, extremely opaque. Disciplinary matters are wholly internal and it is difficult for outside stakeholders to understand how they operate in

215 The Age, 21 December 2021, 'Police body camera footage allowed in Victorian civil lawsuits'.



practice. While it may be understandable that police discipline is internally managed, it is crucial that the operation of the discipline system is subject to examination, critique and accountability from the outside. Without this transparency – as with the complaints process – it will be very hard to dispel public concern that the internal discipline system is weighted to the interests of police, rather than to the community members affected by police misconduct. Aboriginal people are overpoliced, and just as they are disproportionately affected by police misconduct, they are profoundly affected by failings of the police disciplinary system.

The detailed procedures of the Victoria Police disciplinary system – including what factors are considered in determining a sanction, how hearings are conducted, and avenues for appeal or review – should be the subject of a specific and public review. A full review of the police disciplinary system has been repeatedly recommended by the IBAC Committee,²¹⁶ the Victorian Equal Opportunity and Human Rights Commission,²¹⁷ the State Services Authority²¹⁸ and the Office of Police Integrity.²¹⁹ The latest Victoria Police annual report indicates that an internal review of the disciplinary system, the Discipline Transformation Project, has been essentially completed.²²⁰ This project has evidently involved minimal consultation with external stakeholders or people affected by police misconduct, including VALS, despite the fact that the police disciplinary system routinely fails Aboriginal people. A full, public review is required to identify the changes that the police disciplinary system needs.

220 Victoria Police, Annual Report 2020-2021, p25.



²¹⁶ Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 65.

²¹⁷ VEOHRC (2015), Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in *Victoria Police: Phase 1 Report*, Recommendation 20.

²¹⁸ State Services Authority (2011), *Inquiry into the command, management and functions of the senior structure of Victoria Police.*

²¹⁹ Office of Police Integrity (2011), Improving Victoria Police discipline and complaint handling systems.

Office of Police Integrity (2007), A fair and effective Victoria Police discipline system.



Recommendation 52. As recommended by the IBAC Committee Inquiry, the Victorian Government should "review the disciplinary system for Victoria Police, including the nature and operation of the *Victoria Police Act 2013* (Vic) with respect to that system." The review should be open to submissions from the public and stakeholder organisations and should publish its final report.

Recommendation 53. The review of the police disciplinary system should make recommendations for linking the disciplinary system with the police complaints system, to avoid re-investigation of matters that have been independently investigated through the complaints process.

Recommendation 54. The review of the police disciplinary system should make recommendations to provide for greater transparency and accountability in the operation of the disciplinary process.





Monitoring, Auditing & Record-keeping

Monitoring of police decision-making is a crucial piece of an effective oversight system. It enables problematic practices to be identified and addressed even where there is not an individual willing or able to make or complaint. Ensuring that monitoring approaches are effective in holding Victoria Police to account is vital to tackling the problems with policing in Victoria.

At present, monitoring requirements for Victoria Police are mainly focused on 'coercive and intrusive' powers used in major crime investigations. It is crucial to appreciate that monitoring of police should not only mean resource-intensive, substantive review of individual police decisions to use major investigatory powers. Effective monitoring must also involve increased data transparency and routine analysis of the use of more 'everyday' police powers, whose misuse disproportionately affects Aboriginal people in Victoria and other over-policed communities.

All police powers are coercive and intrusive, particularly in their cumulative effect on overpoliced communities, and greater monitoring of all types of police powers is clearly warranted.

Principles for Effective Monitoring

Monitoring of police in Victoria can be broadly divided into two categories, procedural and substantive. Current monitoring schemes in Victoria are almost exclusively procedural – that is, oversight bodies monitor compliance with reporting and other procedural requirements, rather than assessing the substance of police decision-making and resultant outcomes. There are multiple ways of improving this model of police monitoring, all of which should be adopted in different parts of a reformed police oversight system. All kinds of monitoring should be conducted by an independent body, with oversight of a range of police powers, rather than being fragmented between different oversight bodies and internal Victoria Police functions.²²¹

The monitoring agency should be separate to the police complaints body, to ensure an appropriate level of independence in the operation of these very different oversight functions. If this is not the case, and the complaints and monitoring functions are located in a single agency, there should be a strict information firewall. Monitoring bodies require extensive data-sharing and cooperation from police, which are unlikely to be forthcoming if the same agency is involved in receiving and investigating complaints against police. Similarly, complainants may be reluctant to engage with an agency which is in regular dialogue with police about the details of their operational processes and how they should be improved. The effectiveness of both monitoring



²²¹ Royal Commission into the Management of Police Informants, Final Report: Volume III, pp230-5.

and complaints processes therefore depends on a firm separation of the two functions.

All types of monitoring must be highly transparent, with regular publication of reports, which do not only summarise information reported by police but analyse what it shows about the exercise of police powers. While it may not be possible to publish all details in relation to the exercise of some police powers, the general principle should be that monitoring is a public exercise. Its purpose is to improve police conduct and accountability, and improve the public's confidence in policing. This can only be achieved with transparency about what is being monitored and what police need to change. Transparent monitoring also supports the effective operation of the police complaints body, by providing information which could be the basis of an own-motion investigation into systemic issues.

It is also critical that the monitoring body's culture and practice support and engage with parallel accountability through civil society. Non-government actors regularly analyse official statistics and the experiences of their clients to identify problems with police conduct, and this practice is vital to ensuring police accountability and establishing community trust. It should be facilitated, including by providing regular and timely publication of data and analysis, which community organisations can work with. The work of community organisations may also highlight areas of police conduct which the monitoring agency is not focused on. The body needs to have both the structural flexibility and the right internal culture to recognise and respond to this kind of outside information.

Key forms of monitoring that should take place in line with these principles are:

- *Procedural/reporting-based*: as outlined below, there is significant scope for making this form of monitoring far more effective than it currently is by using reporting requirements as the basis for data analysis.
- *Substantive/outcome-focused*: monitoring should include the substantive review of the exercise of police powers, particularly where detailed reporting requirements provide the materials for a full assessment of decision-making.

Different forms of monitoring are appropriate to different police powers, but all need to be conducted in line with the principles of independence and transparency.





Shortcomings of Existing Monitoring Schemes

While monitoring is one of the critical elements of an adequate police oversight system, the monitoring schemes currently in place in Victoria are ineffective at preventing police misconduct.

There are a range of reasons for the inadequacy of current monitoring arrangements. The Royal Commission into the Management of Police Informants identified the purely procedural focus of most monitoring (on compliance with reporting requirements) and the fragmentation of monitoring between different bodies as major issues.²²²

In addition to these problems, monitoring schemes are currently ineffective because they are limited to a small set of police powers, and because they do not have the transparency needed to create proper accountability. As a result, monitoring and oversight extends to only a tiny proportion of police activity, with limited mechanisms for effecting change when problems are identified. This means that the current monitoring arrangements allow serious systemic problems in police conduct to develop outside their purview, with serious consequences for communities being over-policed and for the culture of the police force.

An illustrative example of a police power that is not currently subject to independent monitoring is the power to stop and search. Police searches are not generally regarded as a major or 'intrusive' power that needs specific monitoring. Searches are, however, highly intrusive for individuals from over-policed and marginalised communities, like Aboriginal people, for whom the cumulative effect of routine searching can be very harmful. 'Minor' powers like police stops are also significant because everyday police activity is where deep cultural problems can develop and perpetuate themselves. There is strong evidence, for example, of a problem with racial profiling in police searches in Victoria.²²³ This is both a symptom of systemic racism, and contributes to it by exposing new police officers to an everyday culture of racially-biased searching.

The issue of police searches demonstrates both the need for expanded monitoring and the need for greater transparency in monitoring schemes. The existing evidence of racial profiling in Victoria comes largely from an analysis conducted during a court case, because there is no ongoing monitoring mechanism in place.²²⁴ Data on police searches is not routinely collated or analysed, and the current practice of searches – with limited record-keeping requirements –



²²² Royal Commission into the Management of Police Informants, Final Report: Volume III, pp234-5.

²²³ Court documents from *Haile-Michael v. Konstantinidis*, 'Summary of Professor Gordon's and Dr Henstridge's First Reports'. 224 Police Stop Data Working Group (2017), *Monitoring Racial Profiling: Introducing a scheme to prevent unlawful stops and searches by Victoria Police*, p6.

would not facilitate such analysis. To the extent that any data is collated within Victoria Police, it is not published or shared with civil society groups and the broader community, a step which is crucial in providing oversight and accountability.

This lack of monitoring stands in contrast to the practice in the United Kingdom. National data on police stop and search are published annually, with breakdowns by ethnicity and geography.²²⁵ This overall data is complemented by Stop and Search Community Monitoring Groups, which are empowered to examine individual incidents (including viewing body-worn camera footage), as well as data on stops.²²⁶ VALS is one of many civil society groups which have previously called for the establishment a police stops monitoring scheme in Victoria.²²⁷

The Victorian Parliament's recent Inquiry into the Criminal Justice System recommended the establishment of "a three-year trial of a racial profiling monitoring scheme".²²⁸ The importance of active monitoring of police searches is well established by international evidence, and by the evidence which exists about Victoria Police's use of searches. However, this is not a reform which needs to be subject to trials or reviews – it is a key and urgent form of accountability. VALS does welcome the recommendation as a sign of growing recognition of the need for improved monitoring of police searches.

Monitoring should be an important element of Victoria's reformed police oversight system. As the example of police searches shows, this will require both an improvement in the effectiveness of monitoring schemes and an expansion of their scope. These two elements are addressed in turn below.

Effective Monitoring Using Reporting Requirements

Procedural monitoring has an important part to play in the system, alongside greater substantive monitoring. This can be achieved by ensuring that the monitoring scheme is not a mere reporting arrangement, which requires specific documentation of decisions, but does not use this reporting to any wider effect. Such an arrangement may have a minimal effect on police conduct simply by increasing the burden of using particular powers, but it cannot create real accountability.



²²⁵ UK Government, Stop and Search, web page accessed 20 November 2021.

²²⁶ Mayor of London, Stop and Search, web page accessed 20 November 2021.

²²⁷ Police Stop Data Working Group (2017), *Monitoring Racial Profiling - Introducing a scheme to prevent unlawful stops and searches by Victoria Police*.

²²⁸ Victorian Parliament (2022), Inquiry into Victoria's Criminal Justice System, Recommendation 20.

Reporting requirements can be leveraged into effective monitoring through the use of trend analysis of the exercise of police powers. This may not be possible in relation to major crime powers which are not frequently exercised, but for police powers that are exercised more regularly, a robust reporting requirement can create the basis for a rich dataset, which can give significant insight into whether police are conducting themselves appropriately. Detailed data on, for example, police stops or drug testing in police custody can reveal important patterns, even without a substantive judgement about particular incidents. If data revealed a low percentage of searches or tests resulting in any contraband being found, that would suggest that the powers are being used inappropriately. If the data reveals a disproportionate use of these powers against Aboriginal people – which we anticipate it would – that would reveal a problem with systemic racism, and help identify particular stations or commands where that problem is particularly serious.

Trend analysis based on reporting requirements can be an effective form of monitoring only if certain standards are met. The key is a high degree of transparency. Data must be published on a regular basis, not as a subject of occasional or one-off reports. It should be published in a format which enables comparison of trends over time and comparison with other data sources. The importance of these standards is illustrated by the following two examples.

- *COVID-19 fines*: Data on COVID-19 fines is published by the Crime Statistics Agency. It includes a breakdown by Aboriginal status and a breakdown by Local Government Area (**LGA**), but not both, making it impossible to identify areas of particularly biased enforcement.
- Police stop data: Police do record information about stops and searches in the Law Enforcement Assistance Program (LEAP), Victoria Police's database for tracking police operational activity, as part of their standard practice. This information is not developed into a dataset enabling monitoring of police searches. As a result, the best information on racial profiling comes from an analysis conducted on a limited subset of LEAP data for two suburbs more than a decade ago, because this data was released in the course of a lawsuit.²²⁹ Even that data was limited by the fact that police are highly inconsistent in whether they record key variables like ethnicity and country of birth, and how they do so.

With the appropriate standards and legislative provisions in place, reporting requirements can be the basis of a highly effective and transparent form of monitoring, rather than merely imposing a compliance burden to minimal effect, as in the current system.



²²⁹ Court documents from Haile-Michael v. Konstantinidis, 'Summary of Professor Gordon's and Dr Henstridge's First Reports'.

Effective monitoring requires, as a foundation, complete data. This must be guaranteed by strong reporting requirements, as discussed further below (see sub-section 'Police Record-keeping).

RECOMMENDATIONS

Recommendation 55. Monitoring of Victoria Police should be conducted by a single dedicated monitoring body, not fragmented between agencies. The monitoring function should be carried out by a body that is separate to the independent police complaints body. If the complaints and monitoring functions are located in a single agency, there should be a strict information firewall.

Recommendation 56. Monitoring must not be limited to procedural monitoring, but should also include substantive, outcome-focused monitoring of the exercise of police powers. The monitoring body should significantly expand the use of substantive monitoring, through a merits review of documented police decision-making.

Recommendation 57. The monitoring body should use reporting obligations of Victoria Police as the basis for regular and timely publishing of statistical analysis of the exercise of police powers.

Recommendation 58. Data published by the monitoring body should be disaggregated to the greatest extent possible, and published in consistent formats, which facilitate analysis and comparison over time.

Expanding the Scope of Monitoring Schemes

There are a large number of 'everyday' police powers which, as discussed above, are intrusive and have serious consequences for people subjected to them, including Aboriginal people. These powers should be within the scope of police monitoring schemes.

VALS has identified a number of police powers and areas of police conduct where monitoring should be instituted. This is not an exhaustive list, and the types of police activity which are subject to monitoring should not be fixed once, never to be revisited. The police oversight system needs the flexibility to identify new areas where potentially problematic conduct needs to be monitored, and to establish new monitoring arrangements as appropriate. This will only be possible with a more unified approach to monitoring of police, since, as identified by the Royal Commission into the Management of Police Informants, current monitoring arrangements are highly fragmented – established under their own pieces of legislation and implemented



by different oversight bodies.²³⁰ A single monitoring body with a broader remit would have the flexibility needed to establish monitoring arrangements as necessary, without needing the creation of a new statutory scheme in every instance.

The areas in which monitoring schemes should be established include:

- *Police stops and searches* as discussed above.
- *Move-on orders*²³¹— these powers give police a significant amount of discretion, making space for biased enforcement. Requiring recording of (at least) Aboriginality, race, gender, and the reason for the order would enable monitoring of whether powers are being used discriminatorily.
- Any new police powers relating to public intoxication when the decriminalisation
 of public intoxication takes effect, police callouts relating to intoxication should be
 subject to strict recording requirements, to enable monitoring of whether police are
 contravening the purpose of public intoxication reforms, by laying other types of
 charges or misusing any powers (eg. to transport) granted under the reforms.²³²
- *Powers under the Mental Health Act* similarly to public intoxication, police involvement in mental health crisis incidents should be strictly limited, and the exercise of any powers under the *Mental Health Act*²³³ (including new powers under the new Act) should be monitored.
- Charges against children in out-of-home care Victoria Police has made commitments under the Framework to reduce criminalisation of young people in residential care.²³⁴ Requiring detailed reporting before and after any arrests or charges would potentially help prevent unnecessary police contact, and allow monitoring of whether police commitments are being met.
- Arrest of children and young people the Children, Youth and Families Act 2005 creates a presumption in favour proceeding by way of summons, rather than arresting a child or young person.²³⁵ However, police regularly fail to apply this presumption in

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residential care.



²³⁰ Royal Commission into the Management of Police Informants, Final Report: Volume III, pp234-5.

²³¹ Summary Offences Act (s. 6).

²³² Expert Reference Group on Decriminalising Public Drunkenness (2020), *Seeing the Clear Light of Day: Report to the Victorian Attorney-General*, pp48-50 and Recommendation 25.

²³³ Mental Health Act 2014, s. 351.

²³⁴ Department for Families, Fairness and Housing (2020), *Framework to reduce criminalisation of young people in*

²³⁵ Section 345, Children, Youth and Families Act 2005 (Vic).

practice²³⁶ and Aboriginal children are substantially over-represented in arrests.²³⁷

- Cautioning cautions for young people play an important role in reducing unnecessary contact with the criminal legal system and avoiding the risk of further offending. Regularly published statistics would enable monitoring of whether police commitments to expand the use of cautions are being met.
- Diversion diversion offers an important alternative to criminal prosecution for many offences and can help reduce reoffending and incarceration rates. At present, police consent is required for a person charged with an offence to enter a courtbased diversion program.²³⁸ Police should be required to prepare reports whenever this consent is not given, enabling monitoring of aggregate consent rates and substantive review of a sample of individual decisions.
- Use of weapons at rallies/protests (rubber bullets, oleoresin capsicum spray, armoured vehicles etc.) police should be required to prepare written reports explaining why the use of this equipment was required and demonstrating that all alternatives were properly considered. These reports should be audited for accuracy and consistency with the public record, and in some cases subjected to substantive review.
- Treatment in police custody, including use of force, drug testing, strip searching people in police custody are particularly vulnerable to physical harm and traumatisation by police decisions. Documenting of actions such as the use of force, drug testing and strip searching would enable the monitoring body to assess whether these measures are being overused.
- Medical care in police custody people in custody are entirely dependent on police decision-making for their medical needs to be met and their health to be protected. There should be thorough documentation of police decisions about contacting a doctor, calling an ambulance, or decisions not to seek medical assistance when a person in custody has requested it.
- Police bail documentation of decisions about whether to grant police bail should facilitate regular publication of statistics about how often bail is being denied, whether bail denials are disproportionately affecting Aboriginal people, and how often people in custody are subsequently granted bail by a magistrate or bail justice. The decrease in bail being granted by police or a bail justice has been a major factor in Victoria's increasing incarceration rate, and more effective monitoring of bail is crucial to

237 CCYP (2020), *Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 430.

238 Victorian Parliament (2022), Inquiry into Victoria's Criminal Justice System, p218.



²³⁶ Data from the Crimes Statistics Agency shows that between January 2018 and December 2019, police were substantially more likely to arrest Aboriginal children and young people aged 10 to 17 years than proceed in any other way. See CCYP, Our Youth Our Way, 2020, p. 430.

understand and address the causes of this problem.²³⁹

• Custody Notification Service (**CNS**), bail justice, Aboriginal Community Justice Panels (**ACJP**), Independent Third Person services, and Youth Referral and Independent Third Person services – people in custody have a right to various supports including notification to VALS' CNS and ACJPs for Aboriginal people, access to a bail justice, support from an Independent Third Person for those with cognitive disabilities, and the Youth Referral and Independent Person Program. Regular statistics should be published on the number of requests for these supports and the time taken to provide them, broken down by Aboriginal status and by police station.

Many of these powers would benefit even from the introduction of procedural monitoring schemes, provided that those arrangements included the elements described above to avoid being 'mere' reporting schemes.

Outcome-focused monitoring, through a substantive review of a sample of files, would provide further benefits in many of these areas. This is particularly the case in relation to police custody, where the circumstances and decisions should be comprehensively recorded so that they can be reviewed in detail. In some areas, particularly those involving the exercise of powers by police on the street, a substantive review of individual incidents may not be possible (unless a specific complaint has been brought and can be investigated by the complaints body.) Outcome-focused monitoring of these powers should primarily take the form of trend analysis, as discussed above.

RECOMMENDATIONS

Recommendation 59. The scope of procedural and substantive monitoring should be expanded to a wider range of police powers than the currently monitored major investigative powers, including powers that are frequently exercised in the community or disproportionately impact on Aboriginal people and other marginalised communities. These should include:

- Police stops and searches
- Move-on orders
- Any new police powers relating to public intoxication
- Powers under the Mental Health Act and future relevant Acts
- Charges against children in out-of-home care
- Arrest of child or young person rather than proceeding by way of summons
- Cautioning
- Diversion
- Use of weapons at rallies/protests (rubber bullets, OC spray, armoured vehicles etc.)

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239 VALS (2021), *Submission to the Inquiry into Victoria's Criminal Justice System*, pp54-5.



- Use of force during arrest
- Treatment in police custody, including use of force, drug testing, strip searching and provision of medical care
- Police bail decisions
- Police use of Custody Notification Service (**CNS**), bail justices, Aboriginal Community Justice Panels (**ACJP**) and Independent Third Person services.

Recommendation 60. The monitoring body should be granted the flexibility to establish monitoring arrangements in new areas of police conduct as appropriate, not restricted to an established list of monitoring areas.

Police Record-keeping

A fully effective police oversight system will require an improvement in Victoria Police's recordkeeping, to expand both the range of matters recorded and the level of detail that records involve. While there are some areas in which police do currently keep records, and the necessary action is to use these records for improved monitoring, as discussed above, there are also many areas of police operations where record-keeping is inadequate.

In addition, the Government needs to incorporate new record-keeping requirements into any and all changes it makes to police powers and duties in the future. For example, the planned decriminalisation of public intoxication may involve new police powers to detain (without arresting) people who are intoxicated in public, under certain circumstances. To ensure these powers are not used inappropriately, the Expert Reference Group on public intoxication reform recommended that:

Victoria Police keeps detailed records of the enquiries they make in relation to locating a safe place for the person, including any reasons for concluding that the location is not a safe place, such as risk of family violence.²⁴⁰

It remains essential that this recommendation is implemented. Similar consideration must be given to record-keeping as a safeguard whenever the powers or duties of police are being amended.

Record-keeping obligations must be enacted through legislation rather than regulations or Victoria Police policy. This is critical to ensure that record-keeping standards are not weakened,



²⁴⁰ Expert Reference Group on Decriminalising Public Drunkenness (2020), *Seeing the Clear Light of Day: Report to the Victorian Attorney-General*, Recommendation 25.

or routinely altered in a way that makes it difficult to compare records over time.

Legislation should also establish penalties for police officers and PSOs who fail to comply with record-keeping requirements. These could include disciplinary action as well as civil or criminal sanctions in more serious cases. Without clear penalties, there is a risk that police will see their record-keeping obligations as an unimportant paperwork requirement. Legislation and policy must make clear that record-keeping is a crucial accountability measure and a key part of building confidence in Victoria Police.

RECOMMENDATION

Recommendation 61. Victoria Police should be required by legislation to keep detailed records in relation to the exercise of specific police powers, and provide disaggregated data to an independent body for the purposes of monitoring. Data collection and collation should adhere to the principles of Indigenous Data Sovereignty.



Detention Inspections in Compliance with OPCAT

Under the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**), the Australian Government is required to establish and maintain a National Preventive Mechanism (**NPM**) with jurisdiction to visit "any place under its jurisdiction and control where persons are or may be deprived of their liberty."²⁴¹ In Australia, OPCAT will be implemented through a national network of bodies fulfilling the functions of an NPM.²⁴² The Victorian Government has responsibility for designating and maintaining a body or group of bodies to fulfil the functions of the NPM in Victoria,²⁴³ with the support of the Commonwealth Government.

The powers exercised by NPMs established under OPCAT are an example of preventative inspections or monitoring, as opposed to reactive complaints handling and investigations. While the NPM's jurisdiction will be much broader than police custody, its oversight of police cells and other places of police detention (such as vehicles) will be a critical part of the police oversight system in Victoria.

To ensure this part of the oversight system is effective, it is crucial that the jurisdiction of the NPM in Victoria is not inappropriately limited. As noted by the Australian Human Rights Commission, OPCAT does not permit any temporal limit – such as a minimum time in custody – to be imposed on when oversight obligations are engaged.²⁴⁴ OPCAT implementation in Victoria must include all police places of detention. This will provide for routine, unannounced visits to police cells and vehicles to ensure that conditions are adequate and that people's rights and welfare are being protected.

The importance of robust detention oversight of police custody has been demonstrated:

Carver and Handley, in their study on whether prevention of torture works, found that despite the fact that the greatest risk of torture (noting this study did not extend to ill-treatment) is in police custody, monitoring bodies focused more on prisons.

241 *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 3(1). According to Article 3(2), "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."

242 Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, September 2019, p. 7. 243 Ibid.

244 Australian Human Rights Commission, *Implementing OPCAT in Australia* (2020), p. 8.



They recommended that monitoring bodies more frequently visit police stations. Similarly, the UN *Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (SPT) recognises that 'while all detainees are in a position of vulnerability, those in police cells awaiting questioning and those in pretrial custody... are particularly vulnerable.²⁴⁵

Australia ratified OPCAT in December 2017, and the deadline for implementation of its legal obligations was January 2022. The Australian Government then sought a further one year extension, until January 2023. Progress has stalled, seemingly as a result of Victorian and Commonwealth Governments disputing who is responsible for funding OPCAT implementation. In fact, this is a joint responsibility, and they are both shirking that responsibility.²⁴⁶ The Commonwealth Government has ratified OPCAT and voluntarily signed up to meeting obligations under OPCAT, and it is the Victorian Government's criminal legislation the leads to people being arrested, it is the Victorian Government that is responsible for other key legislation, such as the bail laws.

The urgent need to implement OPCAT in Victoria has been identified by the Victorian Ombudsman, who carried out two OPCAT style investigations in custodial facilities in 2017 and 2019.²⁴⁷ The Victorian Government had not responded to the Ombudsman's recommendation to establish, and properly resource, a NPM in Victoria.²⁴⁸ According to the Ombudsman, "DJCS has advised that a considerable amount of work has been done on the government's implementation of its responsibilities under OPCAT, and that a lack of public statements about OPCAT is not an indicator that progress is not being made."²⁴⁹

Since June 2020, the Government has remained silent on its "considerable" progress. The only information in the public record is the allocation of \$500,000 for OPCAT implementation

246 Lachsz, *Dragging its feet on torture prevention: Australia's international shame* (December 2021), available at https://theconversation.com/dragging-its-feet-on-torture-prevention-australias-international-shame-171729

247 Victorian Ombudsman, Implementing OPCAT in Victoria: Report and inspection of Dame Phyllis Frost Centre, 2017;



²⁴⁵ VALS, Building Back Better: COVID-19 Recovery Plan, p. 110.

Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019), p. 61.

²⁴⁸ Victorian Ombudsman (2020). *Ombudsman's Recommendations – Third Report*, p. 14. 249 Ibid., p. 14.

between 2021-2025.²⁵⁰ This is woefully inadequate, and VALS is concerned that this once in a generation opportunity is being squandered.

In August 2021, the Commonwealth Government released the Commonwealth Closing the Gap Implementation Plan, which dedicates funding over two years (2021-2022) to support states and territories to implement OPCAT.²⁵¹ Although the document indicates the amount of funding for other actions under the Plan, it is silent on the amount of funding that will be provided to States and Territories for OPCAT implementation.²⁵² The funding is also, seemingly, just a one-off, rather than ongoing funding.

VALS takes this opportunity to reiterate the recommendations that it has made previously. The Victorian Government must be transparent and provide a public update on its progress in implementing OPCAT. VALS and the Aboriginal Justice Caucus expect the Victorian Government to engage in robust consultations in developing an appropriate model and legislation for Victoria.

You can find out more about OPCAT from VALS' <u>OPCAT factsheet</u> and <u>Unlocking Victorian Justice</u> <u>webinar</u>, OPCAT: An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody. VALS' Head of Policy, Communications and Strategy also completed a <u>Churchill Fellowship on culturally appropriate OPCAT implementation for Aboriginal</u> and Torres Strait Islander people.

RECOMMENDATIONS

Recommendation 62. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 63. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

251 Commonwealth of Australia (2021). *Commonwealth Closing the Gap Implementation Plan*, p. 48. The funding is linked to Targets 10 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15%) and Target 11 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30%).

252 Ibid., pp. 152 and 157.



²⁵⁰ VALS (2021), 'This International Day in Support of Victims of Torture, the Andrews Government must do better on OPCAT'.

Recommendation 64. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained by Victoria Police or Protective Service Officers, regardless of the length of time of detention.

Recommendation 65. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 66. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively. OPCAT implementation is a joint responsibility of the Commonwealth and State Governments.





Accountability for Implementation

Victoria Police should be required to report annually to the independent complaints body providing information on implementation of recommendations. This report may not be made public in its entirity and should therefore provide highly detailed information on the progress of implementation, any barriers to implementation, and Victoria Police's plans for ongoing implementation of recommendations. The independent complaints body should prepare an annual report to be tabled in Parliament, based on Victoria Police's report and its own investigation and analysis, discussing Victoria Police's progress in implementing its recommendations.

In addition, VALS and the Aboriginal Justice Caucus have for many years called for the establishment of an Aboriginal Social Justice Commissioner to monitor Aboriginal justice outcomes in Victoria.²⁵³ This would include monitoring implementation of recommendations from the Royal Commission into Aboriginal Deaths in Custody, and recommendations from coronial inquests. The functions of the proposed Aboriginal Social Justice Commissioner should also include monitoring implementation of recommendations from the independent police complaints body.

RECOMMENDATIONS

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Recommendation 67. The Victorian Government should establish an independent, statutory office of the Aboriginal Social Justice Commissioner. This office should be properly funded and report directly to the Parliament. The mandate of the Commissioner should include monitoring the implementation of RCIADIC recommendations, as well as recommendations from coronial inquests into Aboriginal deaths in custody.

253 VALS & Djirra, 26 March 2021, 'It is time for a Victorian Aboriginal and Torres Strait Islander Social Justice Commissioner'.



Artwork

The artwork used in this document was originally designed by Gary Saunders for the Victorian Aboriginal Legal Service.

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Date of Publication

August 2022



