

# **An Effective System for Investigating Complaints Against Police**

**A study of human rights compliance in police complaint models in the US, Canada,  
UK, Northern Ireland and Australia**

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Chapter Two contains an analysis of the human rights principles that have emerged in overseas courts and committees concerning investigation of police complaints. The core principles emerging from these cases have been identified by the European Commission of Human Rights rapporteur on police complaints as: Independence, Adequacy, Promptness, Transparency/Public Scrutiny and Effective involvement of the victim or family. I use these principles as a structure for this report.

Chapters Three to Six draw out the practical implications of each of these principles and makes recommendations that will ensure compliance. These chapters will draw on case law, interviews with police complaint agencies and advocates, reports, media and Inquiry findings in each of the jurisdictions studied.

Chapter Seven explores the current Victorian police complaint system and in particular its treatment of complaints from Flemington from 2006- 2009.

Chapter Eight concludes with general recommendations for Victoria. Specific recommendations are in the executive summary.

Appendix 1 contains a list of all the individuals and agencies whose expertise I have drawn from in making this report.

Appendix 2 contains an essay examining civil litigation as a police accountability mechanism and the lessons which can be drawn from civil litigation for police complaint systems.

### **Acknowledgements**

This work is dedicated to and inspired by the courage and conviction of the victims and families who have experienced police abuse in Victoria and have witnessed the failure of Victoria's police accountability mechanisms.

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The errors in the work are all mine. Please send comments and feedback to [Tamar\\_Hopkins@clc.net.au](mailto:Tamar_Hopkins@clc.net.au)

### *List of Acronyms*

ACT – Australian Capital Territory, Australia  
ALRC – Australian Law Reform Commission

ACLU- American Civil Liberties Union  
CIB – former name for Criminal Investigations Unit (detectives) Victoria Australia  
ESD –Ethical Standards Department, Victoria Australia  
FKCLC – Flemington & Kensington Community Legal Centre, Victoria Australia  
FOI – Freedom of Information (Australia)  
FOIA – Freedom of Information Act (USA)  
ICCPR – International Covenant of Civil and Political Rights  
IPCC – Independent Police Complaints Commission (UK)  
IPRA – Independent Police Review Authority (Chicago)  
LERA- Law Enforcement Review Agency  
NYCLU- New York Civil Liberties Association  
OPI – Office of Police Integrity, Victoria Australia  
PONI- Police Ombudsman of Northern Ireland  
PCA – Police Complaints Authority (Victoria, Australia)  
RCIADIC – Royal Commission into Aboriginal Deaths in Custody (Australia)  
MIM –Management Intervention Model (Victoria Police)  
TIO – Telecommunications Industry Ombudsman (Victoria Australia)  
SIU – Special Investigations Unit (Ontario)  
UK – United Kingdom  
UN – United Nations  
US – United States of America  
VPM- Victoria Police Manual

# Executive Summary

In this study, I explore the five human rights standards identified by the European Rapporteur on Police Complaints necessary for the effective investigation of alleged human rights violations by police.

I then examine responses to complaints in the US, Canada, the UK, Northern Ireland and Australia in order to draw out the practical implication of the five standards.

I then set out the Victorian complaint investigation process.

Finally I made recommendations for the reform of Victoria's complaint investigation systems to ensure compatibility with human rights.

The study was funded through a Victorian Law Foundation Community Legal Centre Fellowship. I was advised by Associate Professor Jude McCulloch through an Honorary Fellowship at Monash University.

During the research phase of the study (2008-2009), I visited and interviewed police complaint agencies in:

- Vancouver,
- Winnipeg,
- New York,
- Northern Ireland and
- Victoria

I also attended the National Association of Civilian Oversight of Law Enforcement conference in Cincinnati in 2008 where I was able to listen to the views of staff at numerous police complaint agencies across the United States, as well as active and former Police Chiefs from some jurisdictions.

In addition, I interviewed:

- the Manitoba Human Rights Commission Chair Person,
- the European Commission for Human Rights Police Complaint Rapporteur,
- Police board members in Winnipeg

I also interviewed Attorneys/ solicitors, academics, advocates and activists in locations including:

- Oakland California,
- Vancouver,

- Winnipeg,
- Chicago,
- New York,
- Belfast,
- Manchester and
- London.

I attended a National Lawyers Guild Conference in Detroit where I was able to hear from US attorneys from the National Police Accountability Project and I attended three days of the coronial inquest into Jean Charles de Menezes in London. In total I conducted 56 interviews.

The report that follows is influenced by the views of all these people and also by my own experiences in Victoria working on behalf of people reporting police abuse. This report does not represent the views of any of these individuals or agencies.

## **RECOMMENDATIONS**

These recommendations are directed to the following agencies: the Victorian Government “VG”, Victoria Police (“VP”) and the Independent Investigation Commission “IIC” that will do the investigations. The agency to which each recommendation is directed is noted the end of each recommendation.

### **Independence:**

1. Investigations of allegations of misconduct, criminality and human rights abuses must be conducted by an agency that is not only institutionally independent of police but also practically culturally and politically independent. This means that the use of former police officers should be minimal if at all. If they are used they must come from forces outside the one under investigation. My study in the field did bring me in contact with some rigorous former police investigators within agencies. However, unless carefully selected for the absence of police cultural biases, and removed from positions of influence in the organisation, the risk of using former police in this central task is considerable. On the other hand, civilians can and do perform investigations in civilian bodies throughout these regions. They can be trained to be highly effective. Civilians must dominate the organisation both in number and culture. Former police should be less than 25% and should not have previously been employed in the agency under scrutiny. (VG and IIC)
2. The agency must operate with a healthy scepticism of police accounts concerning misconduct. It must be complainant centred and complainant oriented. (IIC)
3. Civilian investigators must by their attitude and attire be distinguishable from police. (IIC)

4. The agency must be protected from the risks of agency capture through minimising collegiate working relationships with the police agency. While meetings are important, more than this becomes problematic. No seconded police officers from the agency under examination or other law enforcement agencies should be used. (VG, IIC)
5. The agency must be protected from political and police union interference through separate enabling legislation and regulations as well as independent reporting to parliament. Its key positions must be long-term appointments. A parliamentary committee must be established to assist with improving its functions and to provide oversight to the agency. (VG)
6. The agency must be properly and securely funded so that it does not need to rely on seconded police for any of its functions. (VG)
7. The agency must be adequately empowered to perform its tasks in the face of police resistance so that it does not need to rely on maintaining good will with police to do its task. (VG)
8. The agency must be staffed by people who reflect the community; it must contain young people, working class people, people from ethnic, religious, indigenous, disabled and gay lesbian queer identified and trans-gendered communities and maintain a gender balance. (VG, IIC)

### **Adequacy of Investigation**

9. Police suspects and witnesses must be separated and interviewed immediately for both criminal and administrative purposes or no later than 24 hours after notification of the details of a complaint. Refusal to participate in an administrative interview must be grounds for dismissal. (IIC)
10. Enforceable timelines for investigations are critical. Provision of documents by police agencies must be prioritised and investigators should use warrants to collect documents themselves where any delay occurs. (VG, IIC)
11. Civilian investigation should commence immediately and must thoroughly and effectively collect and preserve the evidence at a scene of a police involved death, near death or serious injury. The reporting by police of these incidents to the civilian body must be mandated. Civilian investigation must commence as soon as they are notified of complaints that reveal an allegation that could lead to criminal or disciplinary outcomes. (VG, IIC, VP)
12. In cases where a person has died in custody, independent civilian investigators should investigate and prepare the coroners brief. (VG, IIC)
13. Civilian investigators must investigate as if a crime has been committed. (IIC)

14. Properly trained doctors must be free and available to assess pain and injuries at all police stations, prisons, detention centres, when complainants contact the complaint body and when they contact solicitors/advocates. It must be clearly obvious to people in custody that the doctors they are seeing are independent and not “working for the police.” (VG, VP)
15. CCTV should be placed in all police stations and cars and data from these should be removed immediately along with all data recording systems (such as taser data, c/s spray, weapons/bullet logs, use of force forms, weapons used, log books etc). (VP, IIC)
16. Civilian investigators should interview complainants with respect to their complaint and not to collect evidence in relation to prior behaviour if that behaviour is under investigation by police. (IIC)
17. Civilian investigators must not provide evidence to assist the prosecution of complainants, but, may provide evidence to the defence and prosecution if the complainant consents on the advice of their lawyer. (IIC)
18. At the first interview, police are to be told of the allegations during the interview, but not through prior written notice containing the detail of those allegations. The complainant’s statement must not be given to police unless disciplinary, civil or criminal proceedings have commenced against them. (IIC)
19. Civilian investigators must question police for the purpose of investigating the complainant’s allegations, not to assist the defence of the officers. (IIC)
20. The standard of proof applied to substantiate a complaint should be “could the evidence support a finding of misconduct by the police officers at a hearing”. In complaints where the complainant is injured, the burden of proof falls on the police to explain how the complainant was injured in custody.(VG, IIC)
21. Complaints should be determined on the balance of probabilities at a hearing. (VG, IIC)
22. At the conclusion of the investigation, an investigation report explaining, in full and thorough detail the reasons for the decision should be given to the complainant any advocates involved. The reasons must contain an analysis of the law that applies to the facts and any force that was used. (IIC)
23. Mediations should only be considered where on the face of the complaint, no facts leading to discipline or criminal charges are evidenced. Both complainant and police must agree to mediation in these situations. (IIC)



24. Allegations of ill-treatment should be resolved in a public hearing. Where a pattern or practice of abuse is alleged, a full public inquiry capable of not only establishing individual fault, but inquiring into institutional cultures, underlying causes and systemic failures is required. (VG, IIC)
25. The decision following investigation should be open to administrative review and subsequent to this judicial review. If the complainant is considering administrative or judicial review, the entire investigation evidence and reports should be made available to them to assist them with their appeal. (VG, IIC)

### **Public Scrutiny**

26. Daily or weekly data on complaints against police should be reported in the daily papers. Weekly or fortnightly analysis from the police complaint agency and accountability experts and human rights bodies should be publicly reported describing current trends in complaints. Disciplinary action, civil litigation and prosecutions against police should all be regularly reported. (IIC, VP)
27. Investigation bodies should be subject to freedom of information requirements and establish units to meet the public demand for requests of information. (VG, IIC)
28. Complaint data and outcomes as well as trends should be reported in full on the investigation body websites and its annual reports. (IIC)
29. Adjudication of complaints and disciplinary proceedings should occur in public. Results of adjudications should be reported publicly via media and websites. (IIC, VP)

### **Involvement of the Victim/ Effective Participation**

30. Views about the adequacy of the complaint body should be obtained from complainants and solicitors and improvements made in line with suggestions. (IIC)
31. Complainants must be permitted to provide evidence through an advocate if they so wish. (IIC)
32. Complaint bodies must provide outreach and support for people in vulnerable groups such as sex workers, drug users, homeless people, women, young people, Muslim, refugee and migrant communities, prisoners and queer communities (including multilingual support). (IIC)
33. Civilian investigators must attend prisons, police stations, holding cells, immigration detention centres/ border areas and rural communities where police work and provide contact numbers and record complaints in these facilities and

- regions. Civilian investigators must be active in pursuing evidence and must be mobile. (IIC)
34. Information must be available in multiple languages and by podcast/radio broadcasts and talks must be given to communities who would not otherwise access this information. (IIC)
  35. Complainants need to be protected once they have lodged a complaint through the provision of special visas, removal from places where they are being harassed (including in prisons) to safe places. Legislation should be in place making it an offence to victimise a complainant, including laying false charges. Other forms of protection, such as that provided to whistle-blowers should be available. (VG, IIC)
  36. Charges laid after a complaint is made must be scrutinised for possible police misconduct in and of themselves. (IIC)
  37. Complainants should be entitled to full and frank reasons for the decision on their complaint as well as a full copy of the investigation report and the evidence on which the decision was made. The release of this information should be subject only to the harm test, which concerns protection of the identity of vulnerable witnesses. The harm test should not concern the protection of the agency that makes the decision. Transparency is the hallmark of accountable decision-making. No generalised Public Interest Immunity should be attached to complaint documents. (VG, IIC)
  38. The victim should have access to the complaint histories of police when preparing their case against police officers. (VG, IIC)
  39. Civilian investigators should treat complainants with the same care as all victims of alleged crime should be treated. It must be understood that their experience could have been highly traumatic and that it may be hard to discuss. Particular care must be taken with interviewing young people, people from non-English speaking backgrounds, people from religious, ethnic minorities, Indigenous people, people with disabilities, trans-gendered people, sex workers. At all times advocates (like a lawyer) and support persons (such as youth workers) should be permitted to be in attendance. (IIC)
  40. Complainants should be given full access to preliminary findings and evidence in order to make submissions prior to the finalisation of a complaint. (IIC)
  41. Complainants should be kept up to date throughout the period of the investigation and be permitted make suggestions about additional lines of enquiry. (IIC)
  42. There should be adjudicative hearings to determine complaints. (VG, IIC)

43. Complainants should be provided with a lawyer paid for by the State and at the rates equivalent to that paid to lawyers acting for the police throughout the investigation process. (VG, IIC)
44. The complainant should have full standing in all complaint processes and should be able to call witnesses, require that witnesses be called, cross-examine witness and make submissions. (VG, IIC)
45. Complainants should be able to choose not to have their complaint investigated. However this decision should not be because they have not been adequate resourced or have been intimidated. (IIC)
46. There should be established a Police Complaint Civil and Disciplinary Proceedings List at the Magistrates or County Court.

Magistrates or Judges hearing these matters could be provided with the power to:

- a) judicially determine complaints on the balance of probabilities,
- b) award compensation to victims and
- c) make prosecutorial recommendations to the DPP,
- d) demote and dismiss police from employment, (including police who refuse to testify<sup>1</sup>,) and
- e) recommend policy and procedural changes within Victoria Police. (VG)

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<sup>1</sup> Police must give evidence under compulsion through this process, but their evidence should not be admissible in criminal proceedings

# Chapter 1

## Introduction

Police abuses cover a wide range of behaviours. Many abuses are breaches of human rights<sup>2</sup>. The daily harassment of young people of African and Afghani descent in Flemington reported to the Flemington & Kensington Community Legal Centre, Victoria includes<sup>3</sup>:

- police driving passed groups of youths and calling out “Get back to Africa” while covering their badges<sup>4</sup>; (racial abuse<sup>5</sup>)
- a young African Australian being stopped up to three times a day by police wanting details (racial profiling<sup>6</sup>);
- the detention, sometimes by force of groups of African youths at the base of housing estates in order to run their names and addresses through police databases in case any charges come up (racial profiling, unlawful detention, assault)<sup>7</sup>;
- the regular raids and unwarranted arrests of the same people without ever laying charges (racial profiling, abuse of police powers)<sup>8</sup>;
- the photographing and verbal abuse of young people as they come out of the gym (racial profiling and breaches of privacy)<sup>9</sup>.

These are all routine forms of everyday abuses reported to the Flemington & Kensington Community Legal Centre by young migrants in Flemington<sup>10</sup>. Routine police abuse of migrants reported to the Legal Centre has also included:

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<sup>2</sup> Hilary Charlesworth defines Human rights as “the conditions necessary for a human being to live a life in dignity”. Charlesworth, H 2002, *Writing in Rights: Australia and the Protection of Human Rights*, UNSW Press, Sydney.

<sup>3</sup> Some of these abuses are included in Tamar Hopkins 2007, “Policing in an era of human rights” *AltLJ* 32:4 December 2007 p 224

<sup>4</sup> Interview with the author on Feb 2007.

<sup>5</sup> Breach of section 8 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter)

<sup>6</sup> Breach of section 8 of the *Charter*, reported to the author on April 2007, racial profiling means an incident where a person is subject to law enforcement scrutiny/suspicion because of their race.

<sup>7</sup> Breach of section 8, 12, 13, 16, 17, 21 of the *Charter*, reported to the author in Feb 2008.

<sup>8</sup> Breach of section 8, 13, 17, 21 of the Charter, reported over 2006, 2007

<sup>9</sup> Breach of section 8, 13 of the Charter, reports made during 2007.

<sup>10</sup> See for example Tamar Hopkins 2007, Complaints Against Police Behaviour in Flemington, *ALJ* 32:1 March 2007, 32.

- assaults by punching people while they are handcuffed,<sup>11</sup>
- throwing objects at people<sup>12</sup>,
- slamming people's heads against interview walls<sup>13</sup>,
- being threatened with sexual violence during interactions with police<sup>14</sup>,
- threats to kill made during assaults<sup>15</sup>,
- excessive batoning<sup>16</sup>,
- using capsicum spray as a punishment<sup>17</sup>,
- assaulting people with torches<sup>18</sup>,
- assaulting a person during an interview with fists until he loses consciousness<sup>19</sup>
- producing a firearm during a raid of an unarmed child and in the presence of very young children<sup>20</sup>
- desecrating a Qu'ran during a raid by throwing it on the ground and calling it "shit".<sup>21</sup>
- a group of officers beating and kicking a young person of African origin who is handcuffed on the ground<sup>22</sup>,
- punching a person of African origin in the eye with a torch causing permanent visual impairment<sup>23</sup>.

Many of these reports were made as complaints to the Office of Police Integrity. They were all found to be unsubstantiated following a police investigation. The pattern of human rights violations reported by people of migrant descent is strongly indicative of institutional racism within Victoria Police.

The 1999 Stephen Lawrence Inquiry into racism within the Metropolitan Police defined of institutional racism to be:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people<sup>24</sup>.

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<sup>11</sup> Breach of section 22 and 10, numerous reports made to the author.

<sup>12</sup> Breach of section 22 and 10, report made in February 2006 to the author.

<sup>13</sup> Breach of section 22 and 10 numerous reports made to the author.

<sup>14</sup> Breach of section 22 and 10 report made to the author in 2008.

<sup>15</sup> Breach of section 22, potentially 10 and 9- report to the author in 2006.

<sup>16</sup> Breach of section 22, potentially 10 and 9 – numerous reports.

<sup>17</sup> Breach of section 22, 10- report to the author in 2007.

<sup>18</sup> Breach of section 22, 10 several reports made to the author.

<sup>19</sup> Breach of section 22 and 10 and potentially 9 – report to the author in 2008.

<sup>20</sup> Breach of section 22 and potentially 9 – reported to the author in 2006.

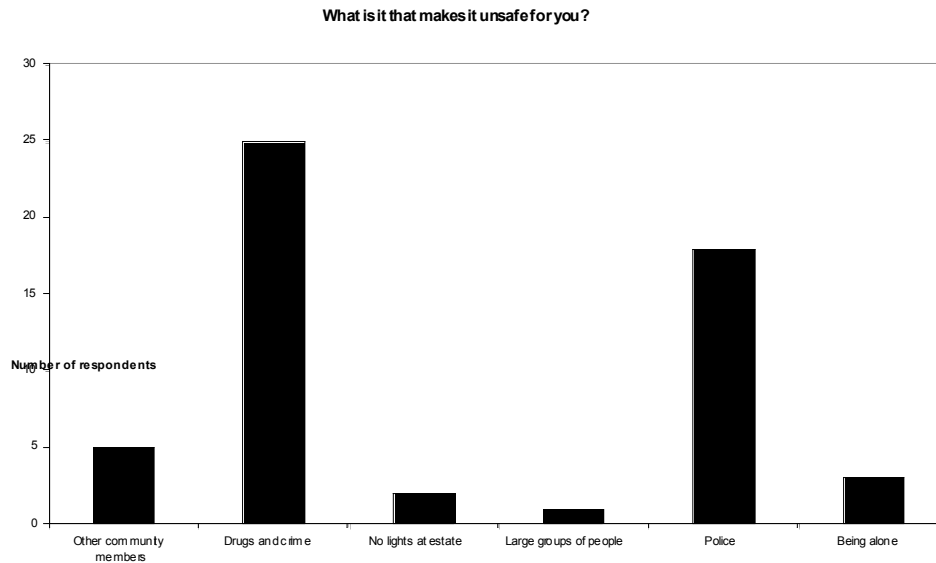
<sup>21</sup> Breach of section 22 and 10 – reported to the author in 2007.

<sup>22</sup> Breach of section 22, and 10 and potentially 9 – report to the author in 2007

<sup>23</sup> Breach of section 22, 10 and potentially 9 – report to the author in 2007.

<sup>24</sup> <http://www.archive.official-documents.co.uk/document/cm42/4262/sli-06.htm#6.6>

Moonee Valley City Council Youth Services produced a report in December 2006 about young people's safety concerns in the Flemington region. In that report the two most significant safety concerns for young people were drugs/crime and Police<sup>25</sup>:



More generally, reports across Victoria include:

- excessive force and degrading treatment of people with disabilities<sup>26</sup>, mental illnesses<sup>27</sup>, Indigenous and homeless people<sup>28</sup>,
- strip-searches in public places<sup>29</sup>,
- assaults on bystanders<sup>30</sup>,
- assaults of handcuffed people in lifts and police stations<sup>31</sup>,
- thefts of property including drugs, needles and cash<sup>32</sup>,
- neglect of people's needs in custody, such as medical attention, hygiene needs and food<sup>33</sup>,

<sup>25</sup> Graph reproduced from: Creating a Better City for Young People "The needs of young people living in Flemington, North Melbourne, Kensington and Ascot Vale" Final Report December 2006, Anna Duff, Simone Perkin, Ahmed Dini, Daniel Hale-Michel et al.

<sup>26</sup> Report to the author in 2008, also see *Walker & Anor v Hamm & Ors, Walker & Anor v Carter & Anor* [2008] VSC 596 (19 December 2008)

<sup>27</sup> Communication with advocates at the Mental Health Legal Centre in 2009,

<sup>28</sup> Reports from Fitzroy Legal Centre, Victorian Aboriginal Legal Service, Koori Complaints Project 2008,

<sup>29</sup> Reports from Fitzroy Legal Centre,

<sup>30</sup> Reported to the Flemington & Kensington Community Legal Centre after incidents in November 2007 and October 2007.

<sup>31</sup> Report from the Fitzroy Legal Centre and from an incident at Glen Waverly Police Station in 2008.

<sup>32</sup> Reports from the Fitzroy Legal Centre in 2009 and to the Flemington & Kensington Community Legal Centre in 2005.

- assaults following high speed pursuits<sup>34</sup>,
- sexual assaults<sup>35</sup>
- physical assaults in homes<sup>36</sup> and in police vehicles<sup>37</sup>
- assaults on protesters<sup>38</sup>. Frequently, excessive use of force by police results in serious injury to individuals. Less frequently, but repeatedly, police action results in a death<sup>39</sup>.

These patterns and themes are widespread throughout the world and affect the daily lives of thousands if not millions of people. Those traumatised by police initiated human rights abuses include victims' families and communities. Torture does not only occur in countries in civil wars, such as Sudan or Somalia. Large numbers of torture victims endure their abuse in democratic nations at the hands of police<sup>40</sup>.

Australian law enforcement integrity agencies tend to focus their efforts on large-scale corruption to the exclusion of human rights breaches. When police accept a bribe or deal in drugs they engage in misconduct. These are not, however, human rights breaches. A singular focus on corruption ignores the real and daily abuses experienced by everyday people and in particular, marginalised groups. The primary attention of police complaint bodies must be the prevention, detection and punishment of human rights violations.

Victoria now has a *Charter of Human Rights and Responsibilities 2006* ("the Charter"). Victoria Police has publicly announced its commitment to uphold the rights in this

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<sup>33</sup> Reports from Fitzroy Legal Centre, Mental Health Legal Centre, communications by clients with the author,

<sup>34</sup> For example Raymond Merrit was assaulted by Police in Victoria after a high speed pursuit: Reported in the SunHerald on 22 August 2008  
<http://www.news.com.au/heraldsun/story/0,21985,24221234-2862,00.html>

<sup>35</sup> See for example the Ombudsman's Report into Maryborough Police Investigation 1997

<sup>36</sup> Horvath Communication to the United Nations Human Rights Committee under the 1<sup>st</sup> Optional Protocol to the *International Covenant of Civil and Political Rights* 17 August 2008 copy available from the Flemington & Kensington Community Legal Centre

<sup>37</sup> Reported to the Flemington & Kensington Community Legal Centre in 2007.

<sup>38</sup> Complaint to the Office of Police Integrity by the Federation of Community Legal Centres following the November 2006 G20 museum protests.

<sup>39</sup> See for example Tyler Cassidy, Paul Carter, Royal Commission into Aboriginal Deaths in Custody. In Australia one person dies on average every 4.5 days in prison and police custody or in related police operations –communication with Charandev Singh, deaths in custody expert.

<sup>40</sup> Green & Ward, 2004 "*State Crime, Governments, Violence and Corruption*" Pluto Press p 124.

Charter<sup>41</sup>. One of the objectives of Office of Police Integrity (“the OPI”) is to ensure that Victoria Police have regard to the rights in the Charter<sup>42</sup>.

Each of the reports made from people in Flemington and throughout Victoria are allegations of Charter violations. These reports indicate that Victoria Police is not complying with the Charter. The Office of Police Integrity, in investigating only 3% complaints made to it<sup>43</sup>, is doing little to ensure police compliance with the Charter and is therefore complicit in these Charter breaches.

After recording repeated human rights breaches reported by people in the Flemington region and witnessing the failure of Victoria’s police complaint system to provide a remedy for abuses of this nature I was motivated to look outside Australia to countries that may have a more effective way of responding to allegations of human rights abuses by police. The central question to my exploration was, what is a human rights compliant response to an allegation of a human rights violation by police and what are the practical implications for agencies receiving complaints.

This report contains some of the answers to this question. By implementing the recommendations in this report I contend that the Victorian Government will improve its compliance with the Charter and more importantly, increase the safety of all Victorians in their interactions with police. A robust complaint process will encourage greater individual and systemic police accountability and better policing.

### **The human rights standards**

When police actions or omissions impact on a person’s right to life, the right to freedom from torture and ill-treatment, the right to privacy and in some circumstances, the right to equal treatment and non discrimination<sup>44</sup>, international human rights law requires that an effective investigation into the alleged treatment is conducted.

The European Commission of Human Rights’ Rapporteur on Police Complaints identifies that an *effective* investigation is a State initiated investigation that is:

- a) Independent,
- b) Adequate and capable of resulting in discipline and prosecution of perpetrators,
- c) Prompt
- d) Transparent and open to public scrutiny

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<sup>41</sup> See “2008 report on the operation of the Victorian Charter of Human Rights and Responsibilities: *Emerging Change*” Victorian Human Rights and Equal Opportunity Report, page 19. See Carly Crawford and Nick Higginbottom, *Herald Sun* 11 January 2008

<sup>42</sup> See section 8 *Police Integrity Act* 2008

<sup>43</sup> [http://www.opi.vic.gov.au/documents/OPI\\_Annual\\_Report\\_2008.pdf](http://www.opi.vic.gov.au/documents/OPI_Annual_Report_2008.pdf) page 46.

<sup>44</sup> These rights give rise to a duty of “effective investigation” under the European Court of Human Rights jurisprudence. This will be discussed in detail in Chapter two.



d) Involves and protects the victim of the alleged abuse.

### **An example**

On 11 December 2008 in Melbourne, 15 year old Tyler Cassidy was shot dead by members of the Victoria Police. Had the incident occurred in Belfast, London or Toronto, an independent civilian body would have commenced investigation of the incident immediately. Trained civilian investigators would have attended the scene, separated and interviewed civilian and police witnesses and collected and preserved forensic evidence. This evidence would then form part of coronial inquest proceedings, and if appropriate, a prosecution and misconduct proceeding against the police. The fruits of the investigation would also be available to the family for the purposes of civil proceedings as well as to assist them to participate in the inquest.

In Melbourne, Tyler's shooting is being investigated by the Victoria Police Homicide Squad. This investigation is overseen by the Ethical Standards Department ("ESD") also an internal branch of the Victoria Police<sup>45</sup>. There is no institutional or practical independence between the investigators and the police they are investigating.

This process is incompatible with Australia's international human rights obligations under the *International Covenant of Civil and Political Rights* and also Victoria's *Charter of Human Rights and Responsibilities Act 2006*.

### **The purpose of investigation**

The purpose of an investigation is two fold. Firstly it must lead to an effective individual remedy. Secondly the lessons learned from it must be used by the police agency to reduce the likelihood of abuse of rights in the future<sup>46</sup>.

An effective individual remedy requires compensation and rehabilitation for the victim but also disciplinary or criminal sanctions against the perpetrator/s<sup>47</sup>.

An effective remedy for the victim is also an important prerequisite for ensuring systemic reform in that it removes or punishes individuals who perpetrate abuses from the police agency and identifies practises and procedures that contribute to human rights violations.

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<sup>45</sup> <http://www.news.com.au/heraldsun/story/0,21985,24787921-661,00.html>

<sup>46</sup> Lord Bingham of Cornwell in *R (Amin) v Secretary of the State for the Home Department* [2003] UKHL 51 at paragraph 31.  
<http://www.bailii.org/uk/cases/UKHL/2003/51.html>

<sup>47</sup> See for example the definition of effective remedy in the International Covenant on Civil and Political Rights: General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant 26/05/2004.  
<http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>

As the New York American Civil Liberties Union note:

“[P]atterns and practices of police misconduct will not become apparent without the rigorous investigation of individual complaints. Absent thorough investigation it is unlikely that discipline of an individual police officer or reform of flawed policing practices will occur. Complaint investigation is therefore the critical function of an oversight agency”.<sup>48</sup>

In Australia, effective remedies are denied to individuals by limited access to civil justice<sup>49</sup> and the ineffective investigation of human rights abuses by police in each of its jurisdictions<sup>50</sup>.

In Victoria, most complaints are managed by supervisors in local police stations<sup>51</sup>. Most of these complaints will not be investigated<sup>52</sup>. This process ignores that fact that public complaints and the investigations of police that follow are *the gateway to criminal or disciplinary sanctions against the perpetrators of human rights abuses*<sup>53</sup> and that these outcomes are required under international law. Without an effective investigation of police misconduct, police criminality and disciplinary offences go without punishment. Failure to investigate allegations of police criminality, decriminalises police behaviour.

Despite extensive and current evidence accumulated by human rights agencies, non-government organisations and community legal centres, the extent of police violence and abuse in our communities is officially unrecognised and vigorously denied by police agencies<sup>54</sup>. Furthermore states fail to recognise the use of excessive force by police as a crime. Additionally, they fail to identify that degrading, inhuman, abusive and wilfully neglectful practices are human rights violations deserving of detection, investigation and punishment.

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<sup>48</sup> Mission Failure, Perry et al A Report Into The New York Civilian Complaint Review Board 2005, [http://www.nyclu.org/files/ccrb\\_failing\\_report\\_090507.pdf](http://www.nyclu.org/files/ccrb_failing_report_090507.pdf)

<sup>49</sup> These limits include lack of legal aid or community lawyers conducting civil litigation, short limitation periods, injury thresholds, limited State liability in some jurisdictions and risks of adverse cost awards. Also see the Concluding Observations on Australia by the Human Rights Committee <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

<sup>50</sup> In Queensland, NSW, the ACT, police investigate or otherwise manage the vast majority of complaints.

<sup>51</sup> [http://www.opi.vic.gov.au/documents/Improving\\_Victorian\\_policing\\_services\\_through\\_effective\\_complaint\\_handling\\_31.pdf](http://www.opi.vic.gov.au/documents/Improving_Victorian_policing_services_through_effective_complaint_handling_31.pdf) page 30

<sup>52</sup> [http://www.opi.vic.gov.au/documents/Improving\\_Victorian\\_policing\\_services\\_through\\_effective\\_complaint\\_handling\\_31.pdf](http://www.opi.vic.gov.au/documents/Improving_Victorian_policing_services_through_effective_complaint_handling_31.pdf) page 30

<sup>53</sup> Conversation with Graham Smith, Rapporteur Police Complaints, European Commission of Human Rights on 11 December 2008.

<sup>54</sup> See Herald Sun article cited above.

Until states properly investigate human rights abuses, not only are individuals denied effective remedies, but the public and particularly its marginalised members remain unacceptably at risk of death, injury and ill-treatment by police officers.

## Chapter 2

### The Human Rights Framework – The Duty to Investigate

#### 2.1 Introduction

Where, by complaint or other means, the State becomes aware of the possibility that the *right to life*<sup>55</sup> or the *right to freedom from torture, cruel, inhuman and degrading treatment (ill-treatment)* has been violated by law enforcement officers, there exists an obligation on the State to conduct an effective investigation into the cause<sup>56</sup>. The right to life and the right to freedom from torture, cruel, inhuman, degrading treatment and punishment (ill-treatment) impose both a negative obligation on the state - to refrain from engaging in such treatment - and a positive (procedural) obligation on the state – to conduct an effective investigation into an allegation of a violation<sup>57</sup>. There is a third positive obligation – to prevent violations of human rights. This chapter will examine the law that establishes the meaning of an “effective investigation”.

Police conduct can violate human rights deliberately or negligently. For example the police decision to pursue a vehicle in dangerous circumstances which causes the death of the driver or a member of the public is a violation of the right to life – even if the violation was negligent and not deliberate. A deliberate violation will occur when police engage in rape or use of force beyond that which is necessary to arrest a person, such as punching, tasering or capsicum spraying a handcuffed and restrained person to punish them for suspected lawlessness, prior resistance, or their refusal to provide answers. This conduct amounts to cruel, inhuman and degrading treatment. When the inhumane treatment is intentionally used to coerce a confession or information it is torture.

The duty to effectively investigate alleged human rights breaches by police, is not just a secondary obligation, but is an intrinsic component of these rights<sup>58</sup>.

In the United Kingdom, victims of ineffective state-run investigations can pursue legal remedies through domestic courts and then appeals to the European Court of Human

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<sup>55</sup> See *McCann v United Kingdom* (1995) 21 EHRR 97 (the Gibraltar case) at para 161 for the first time the duty of an effective investigation was recognised in cases of deaths caused by state agents.

<sup>56</sup> See for example *Reynolds, R(on the application of) v Independent Police Complaints Commissioner & Anor* [2008] EWCA Civ 1160 (22 October 2008) at paragraph 20, 21. When a member of the public is alleged to have violated these rights, there is also an obligation on the State to effectively investigate, for example see *Menson & Ors v United Kingdom* (1998) EHRR 107 (16 September 1998) p 21.

<sup>57</sup> Assessing Damage, Urging Action 2009 Report of the Eminent Jurist Panel on Terrorism, Counter-terrorism and Human Rights at page 87.

<sup>58</sup> House of Lords decision in *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008) para 26.

Rights. In *Khan v The United Kingdom*, the European Court of Human Rights found that a breach to the right to privacy was not remedied through an investigation under the Police Complaints Authority because complaints about breaches to the right to privacy would leave the investigation of the complaint in the hands of police<sup>59</sup> with only minimal if any oversight by the Police Complaints Authority. This and subsequent House of Lords and European Court decisions has expanded the legal requirement on the Independent Police Complaints Commission (“the IPCC”) to investigate matters itself<sup>60</sup>.

## 2.2 The Content of the Duty to Investigate

Graham Smith, the Rapporteur to the European Commissioner for Human Rights on police complaints extrapolates five key principles from the European Court of Human Rights jurisprudence that are necessary for an investigation of a complaint against police to be effective. He states:

1. “Independence: there should be organizational and functional independence; that is by non-police investigators according to established principles of independence and impartiality;

[“This means not only a lack of hierarchical or institutional connection but also a practical independence<sup>61</sup>” “independent in law and practise”<sup>62</sup>  
“Supervision [of the police investigation] by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation<sup>63</sup>”]

2. Adequacy: the investigation should be capable of gathering evidence to determine whether the behaviour complained of was unlawful [whether the force used was justified<sup>64</sup>] and to identify and punish those responsible; [Furthermore, the investigation is “not simply about what happened...it is about why it happened”]<sup>65</sup> [the investigative obligation of the state may – depending on the facts at issue – go well beyond the ascertainment of individual fault and reach questions of

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<sup>59</sup> Also see the Committee Against Torture’s report on its visit to the United Kingdom and the Isle of Man from 8 to 17 September 1999, published on 13 January 2000, the European Committee for the Prevention of Torture at para 55 where it recommends fully independent complaint body rather than the Police Complaints Authority.

<sup>60</sup> Report of the Comptroller and Auditor General, National Audit Office, London 12 November 2008, p5.

[http://www.nao.org.uk/publications/0708/police\\_complaints\\_commission.aspx](http://www.nao.org.uk/publications/0708/police_complaints_commission.aspx)

<sup>61</sup> *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 325.

<sup>62</sup> *Nachova and Others v Bulgaria* [GC] ECHR 2005 at para 112.

<sup>63</sup> *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 337. *Bati v Turkey* [2004] ECHR (3.6.2004) para 135

<sup>64</sup> *Jordan v The United Kingdom* [2001] ECHR 327 (4 May 2001) para 107.

<sup>65</sup> *AM & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2009] EWCA Civ 219 (17 March 2009) page 9.

system, management and institutional culture.]<sup>66</sup>

2. Promptness: a speedy response and expeditiousness is crucial for maintaining trust and confidence in the rule of law and in order to dispel any fear or collusion in any attempt to conceal misconduct;
3. Public scrutiny: accountability is served by open and transparent procedures and decision-making at every stage of the determination of a complaint against police;

[In *Anguelova v Bulgaria* this principle was put: “there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.”<sup>67</sup>]

4. Victim involvement: in order to safeguard his or her legitimate interests the victim is entitled to participate in the process.”<sup>68</sup> [Effective Participation]<sup>69</sup>

The Rapporteur’s five principles are based on a synthesis of the extensive authorities emanating from the European Court of Human Rights (ECtHR) and the UK House of Lords.

To these five core principles, I would add a further core principle. That is that the investigation must be initiated by the State.<sup>70</sup> This principle is clearly apparent in cases where there has been a death or debilitating injury in custody leaving the complainant unable to bring a complaint or give an account about what occurred.<sup>71</sup> A similar requirement for state initiation of investigation arises in cases where the person whose

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<sup>66</sup> AM & Ors, R (on the application of) v Secretary of State for the Home Department & Ors [2009] EWCA Civ 219 (17 March 2009) para 60.

<sup>67</sup> ECHR 2002 at para 40.

<sup>68</sup> Graham Smith, (2008) “European Commissioner for Human Rights Police Complaints Initiative” – 172 JPN 399, pp 1,2. These standards have also been recommended by Amnesty International in their 2009 Report on France – *Public Outrage, Police Officers Above the Law in France*.

<sup>69</sup> For example in *Khan, R (on the application of) v Secretary of State for Health* [2003] EWCA Civ 1129 (10 October 2003) the England and Wales Court of Appeal found that the central role at the inquest of the family of a young girl who died in state care entitled them to state funded legal assistance.

<http://www.bailii.org/ew/cases/EWCA/Civ/2003/1129.html>

<sup>70</sup> See *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008) para 35. *Hugh Jordan v The United Kingdom* [2001] ECHR 327 (4 May 2001) Para 105

<sup>71</sup> *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008) para 65.

rights may have been violated has “disappeared.”<sup>72</sup> This principle of state initiated investigation applies however in all complaint contexts. Because civil proceedings cannot result in disciplinary or criminal outcomes<sup>73</sup> these proceedings alone are not sufficient to met the state’s obligation. Despite identifying state initiation as a sixth principle, I will not discuss this principle as a stand alone feature of complaint system, but rather treat it as intrinsic to the principle of adequacy of investigations (principle 2 and discussed in Chapter 4 of this report).

Together, these five broad and to some extent interwoven principles set out the content of the duty to effectively investigate allegations human rights abuses by police.

The rights that give rise to the duty to effectively investigate are located in the *Human Rights Act 1998* (UK). I contend that equivalent rights appear in the *Charter of Human Rights and Responsibilities Act 2006* (Victoria) (section 9, 22 and 10), the *Canadian Charter of Human Rights and Freedoms (1982)* and the *5<sup>th</sup> and 8<sup>th</sup> Amendments* to the *United States Constitution*.

I contend that the duty imposed on the UK Government to *effectively* investigate alleged breaches of rights by police (or other public authorities) is similarly imposed by human rights legislation on the Victorian, the ACT, Canadian and the US Governments. The right to life or freedom from ill-treatment would be meaningless if this was not the case.

### 2.2.1 Threshold Issue

There is a threshold issue that must be decided before the duty of effective investigation will be imposed on the State under the European Court jurisprudence. Article 3 of the European Convention of Human Rights states: “No one shall be subject to torture or inhuman or degrading treatment or punishment”.

An allegation that Article 3 has been violated must be effectively investigated where the following test has been satisfied:

“Ill-treatment must attain a minimum level of severity if its is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. The Court has considered treatment to be “inhuman” because inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be “degrading” because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them..... The

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<sup>72</sup> For an example of a disappearance case see *Tahsin Acar v Turkey* [2003] ECHR 233 (6 May 2003)

<sup>73</sup> *Hugh Jordan v The United Kingdom* [2001] ECHR 327 (4 May 2001) at paragraph 141.

suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.”<sup>74</sup>

Article 3 covers a continuum of treatment. Intentional torture is at one end of the spectrum<sup>75</sup>. Inhumane, degrading treatment and punishment (ill-treatment) covers a larger range of experiences. For example other factors found to contribute to treatment meeting the minimum threshold of ill-treatment and to trigger the duty to adequately investigate include:

- a. Delay in the provision of medical treatment (and degrading comments while in the police station);<sup>76</sup>
- b. Unnecessary handcuffing;<sup>77</sup>
- c. Close monitoring in hospital;<sup>78</sup>
- d. Arbitrary detention;<sup>79</sup>
- e. Recourse to physical force not made strictly necessary by the victim’s own conduct.<sup>80</sup>

Importantly the right to freedom from ill-treatment arises irrespective of the victim’s conduct<sup>81</sup>.

*Summary of the facts in Menesheva v Russia*<sup>82</sup>

*On 13 February 1999, Olga Menesheva was arrested without warrant or legal authority, and detained for 5 days at a Russian police station. She forcefully resisted her wrongful arrest and was injured during the struggle. She was later repeatedly beaten, including with batons on the head, kicked threatened with rape for about two hours at the police station. The next day she was beaten and intimidated again. Finally on the day of her release she was forced to clean the hallway at the police station. She was denied medical assistance throughout the period. Despite medical evidence of her injuries, an internal inquiry found her claims of ill-treatment unsubstantiated. The European Court of Human Rights found, inter alia, that Ms Menesheva’s treatment reached the ill-treatment*

<sup>74</sup> *Stoica v Romania* [2008] ECHR 191 (4 March 2008) § 60, 61.

<sup>75</sup> *Istratii and Others v. Moldova* 2007 While intention is part of definition of torture in the UN Declaration on the Protection of All Persons from Being Subjected to Torture, it is not a necessary component in cruel, inhumane and degrading treatment and punishment. [http://www.unhchr.ch/html/menu3/b/h\\_comp38.htm](http://www.unhchr.ch/html/menu3/b/h_comp38.htm)

<sup>76</sup> *Istratii and Others v. Moldova* 2007 § 47.

<sup>77</sup> *Istratii and Others v. Moldova* 2007 § 57

<sup>78</sup> Ibid.

<sup>79</sup> *C v Australia*- decision under the ICCPR of the Human Rights Committee found arbitrary detention can amount to ill-treatment.

<sup>80</sup> *Assenov and Others v Bulgaria* (1998) 28 EHRR 652 § 93. Also see *Kmetty v. Hungary* (Application no. 57967/00) ECHR 16 December 2003

<sup>81</sup> *Alsayed Allaham v Greece* 2007, ECtHR 18 January 2007 para 24.

<sup>82</sup> ECtHR, 9 March 2006



*threshold and that the State's response, in failing to provide an investigation that was independent, adequate, prompt, transparent or involving of Ms Menesheva violated the duty to effectively investigate. Ms Menesheva was awarded 100, 000 Euros in compensation for pain and suffering and the failure of the investigation.*

In the case of an alleged breach to the right to life, a duty to effectively investigate has been found to exist by the House of Lords in interpreting European Court of Human Rights decisions, not only when there has been a death in custody, but also where there has been a near death in custody such as an attempt to commit suicide, or a life threatening injury, in circumstances where it is arguable that the State was responsible.<sup>83</sup> Thus a violation of the right to life can occur when a near death in custody occurs. The exact content of the effective investigation may vary depending on whether a death has occurred however. For example, a near death investigation may mean the victim's representatives have a reduced right to cross-examine the evidence during the investigation of the violation<sup>84</sup>.

It is submitted that the European Court of Human Rights' definition of torture is not well defined. Because of its nature as an appellate forum from national legal systems, the European Court applies a "margin of appreciation" in favour of states when drawing conclusions about whether enforcement obligations have been met<sup>85</sup>. As a result, the Court's conclusions about when the five standards of effective investigation apply is, at times, unnecessarily narrow.

In contrast, the Commission for Human Rights Concerning Independent and Effective Determination of Complaint Against the Police is of the opinion that the standards identified by the Commission, and used in this report, are an appropriate framework for determining *all* complaints against police<sup>86</sup>.

For example, the Police Ombudsman in Northern Ireland, independently investigates all complaints by the public against the police. This includes police involved fatalities and excessive force allegations to discrimination, incivility and duty failures. There are

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<sup>83</sup> *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008) § 6,7,8.

<sup>84</sup> *Ibid.*

<sup>85</sup> Alistair Mowbray, 2007 "Cases and Materials on the European Convention on Human Rights," 2<sup>nd</sup> Edition, Oxford University Press, 630.

<sup>86</sup> Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against the Police, Commissioner for Human Rights, 12 March 2009, DommdH(2009)  
<https://wcd.coe.int/ViewDoc.jsp?id=1417857&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>

civilian bodies in other jurisdictions that also investigate complaints that fall below the European Court minimum threshold<sup>87</sup>.

I contend that a more appropriate threshold from which to decide whether a complaint should be effectively investigated, is whether the conduct alleged is capable of constituting a criminal or disciplinary offence<sup>88</sup>. This threshold is applied by the independent and fully civilian Office of Police Complaints in Washington DC in deciding whether to investigate a complaint.

Commissioner Roger Salhany QC appointed to head the *Taman Inquiry* in Manitoba Canada, an inquiry into the police investigation of the death of a civilian by a police officer found a clear need for independent investigation of police criminality.<sup>89</sup> He stated in his October 2008 report: “Based on my findings in the case, it graphically demonstrated that internal police investigations are ill-advised in criminal cases. Regardless of how prevalent the practice may be nationally, this case epitomizes why it is simply a bad, if not an intolerable, idea<sup>90</sup>.”

It is also worth noting that European Court has found that that the *right to freedom from discrimination*, in conjunction with the right to freedom from torture<sup>91</sup>, as well as the *right to privacy*<sup>92</sup> should be effectively investigated when a breach of those rights is alleged.

These positions point to a need for the principles of effective investigation to apply more broadly than to allegations of deaths, torture and cruel inhumane and degrading treatment in custody, and extend to encompass all complaints against police.

The European Court of Human Rights jurisprudence is but one of the sources of the principles of the duty to investigate in relation to police complaints. The duty to conduct an effective investigation of alleged rights violations also arises under the *International Covenant on Civil and Political Rights*<sup>93</sup> and the *United Nations Convention Against Torture*<sup>94</sup>, the *United Nations Declaration on the Protection of All Persons from Being*

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<sup>87</sup> See for example the Law Enforcement Review Agency in Manitoba and the New York Civilian Review Agency.

<sup>88</sup> This is also the view of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against the Police, Commissioner for Human Rights, 12 March 2009, DomMDH(2009)

<sup>89</sup> <http://www.tamaninquiry.ca/>

<sup>90</sup> Taman Inquiry; p 13. Also see the Davies Commission into the Death of Frank Paul 12 February 2009, Vancouver, Canada.

<sup>91</sup> *Stoica v Romania* (2008) EHRR 191 (4 March 2008) § 124. See also *Bekos and Koutoupoulous v Greece* (2005) ECHR (13 December 2005).

<sup>92</sup> *Khan v The United Kingdom* (2000) EHRR (4 May 2000) § 47.

<sup>93</sup> [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

<sup>94</sup> <http://www.hrweb.org/legal/cat.html>

*Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>95</sup> the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*<sup>96</sup>, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*,<sup>97</sup> *Code of Conduct for Law Enforcement Officials*<sup>98</sup> and numerous inquiry findings<sup>99</sup>.

### 2.3 The Committee Against Torture

The Committee Against Torture, which oversees the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, requires State Parties to ensure effective measures are taken to “prevent, investigate, prosecute and punish” perpetrators of ill-treatment<sup>100</sup>.

In its concluding observations concerning Australia in 2008, the Committee provided some further guidance as to the content of these measures. At paragraph 27, the Committee noted:

“The Committee is concerned over allegations against law enforcement personnel in respect of acts of torture or cruel, inhuman or degrading treatment or punishment and notes a lack of investigations and prosecutions. The State Party should ensure that all allegations of actions of torture or cruel, inhuman or degrading treatment or punishment committed by law enforcement officials, and in particular any deaths in detention, are investigated **promptly, independently and impartially** and – if necessary – **prosecuted and sanctioned**. Furthermore, the State party should also ensure the right of victims of police misconduct to obtain redress and fair and adequate compensation.” [emphasis mine]<sup>101</sup>.

### 2.4 The Human Rights Committee

A further source of law on the need for effective investigations comes from the Human Rights Committee which oversees the *International Covenant on Civil and Political Rights*. In its concluding observation on Australia it noted the following with respect to the content of the duty to investigate:

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<sup>95</sup> [http://www.unhchr.ch/html/menu3/b/h\\_comp38.htm](http://www.unhchr.ch/html/menu3/b/h_comp38.htm)

<sup>96</sup> [http://www.unhchr.ch/html/menu3/b/h\\_comp43.htm](http://www.unhchr.ch/html/menu3/b/h_comp43.htm)

<sup>97</sup> <http://www1.umn.edu/humanrts/instree/i7pepi.htm>

<sup>98</sup> [http://www.unhchr.ch/html/menu3/b/h\\_comp42.htm](http://www.unhchr.ch/html/menu3/b/h_comp42.htm)

<sup>99</sup> See for example the Stephen Lawrence Inquiry 1999 UK, the Taman Inquiry (Manitoba, Canada) 2008.

<sup>100</sup> See for example its General Comment No 2. 23 November 2007

[http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4\\_en.pdf](http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf)

<sup>101</sup> Concluding observations of the Committee Against Torture 15 May 2008 Australia <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-AUS-CO1.pdf>

“21. The Committee expresses concern at reports of excessive use of force by law enforcement officials against groups, such as indigenous people, racial minorities, persons with disabilities, as well as young people; **and regrets that the investigations of allegations of police misconduct are carried out by the police itself.** The Committee is concerned by reports of the excessive use of the electro-muscular disruption devices (EMDs) “TASERS” by police forces in certain Australian states and territories. (articles 6 and 7). The State party should take firm measures to eradicate all forms of excessive use of force by law enforcement officials. It should in particular: **a) establish a mechanism to carry out independent investigations of complaints concerning excessive use of force by law enforcement officials; b) initiate proceedings against alleged perpetrators; c) increase its efforts to provide training to law enforcement officers with regard to excessive use of force, as well as on the principle of proportionality when using force; d) ensure that restraint devices, including TASERS, are only used in situations where greater or lethal force would otherwise have been justified; e) bring its legislative provisions and policies for the use of force into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and e) provide adequate reparation to the victims.**”<sup>102</sup>

In its concluding observations on Hong Kong:

“11. The Committee expresses concern over the investigative procedure in respect of alleged human rights violations by the police. It notes that the investigation of such complaints rests within the Police Force itself rather than being carried out in a manner that ensures its independence and credibility. In light of the high proportion of complaints against police officers which are found by the investigating police to be unsubstantiated, the Committee expresses concern about the credibility of the investigation process and takes the view that investigation into complaints of abuse of authority by members of the Police Force must be, and must appear to be, fair and independent and must therefore be entrusted to an independent mechanism. The Committee welcomes the changes made to strengthen the status and authority of the Independent Police Complaints Council but notes that these changes still leave investigations entirely in the hands of the police.”<sup>103</sup>

In its concluding observations on the Syrian Arab Republic:

“The State party should.....ensure prompt, thorough, and impartial investigations by an independent mechanism into all allegations of torture and ill-treatment, prosecute and punish perpetrators, and provide effective remedies and rehabilitations to the victims.”<sup>104</sup>

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<sup>102</sup> Concluding observations of the Human Rights Committee 3 April 2009 Australia, para 21. <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

<sup>103</sup> Concluding observations of the Human Rights Committee 9 November 1995 Hong Kong para 11. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d77da23e9c76121d802565610053e9d9?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d77da23e9c76121d802565610053e9d9?OpenDocument)

<sup>104</sup> Concluding observations of the Human Rights Committee 9 August 2005 in the Syrian Arab Republic para 9 <http://www.unhcr.org/refworld/country,,,CONCOBSERVATIONS,SYR,4562d8cf2,43f2ff770,0.html>

In its concluding observations on Brazil:

“The State party should ensure that the constitutional safeguard of federalization of human rights crimes becomes an efficient and practical mechanism in order to ensure prompt, thorough, independent and impartial investigations and prosecution of serious human rights violations.”<sup>105</sup>

Key themes arising from the Human Rights Committee are that investigations into allegations of mistreatment must be independent, prompt, credible and capable of resulting in prosecution and punishment of offenders as well as redress for victims.

## **2.5 The UN Force and Firearms Principles**

The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles) also sets out principles of an effective investigation, this time, into deaths or injuries involving the use of firearms by law enforcement officers. Additional principles are as follows:

1. The investigation should be amenable to an independent administrative and judicial review as well as independent prosecution.<sup>106</sup>
2. The victims and families should have access to judicial review.<sup>107</sup>

The avenue of appeals, extends our understanding of what an effective investigation must involve. It also addresses issues relating to the victims involvement in the complaint process: that is that the victim or their family, must have access to an appeal. Appeals are essential in ensuring the investigation process has been appropriate (merits review) and has complied with the law and natural justice (judicial review).

## **2.6 UN Principles on Extra-Legal Executions**

Further sources of the principles of investigation arise in the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65, (UN Principles on Extra-Legal Executions)<sup>108</sup>. They include:

1. “There shall be a thorough, prompt and impartial investigation of all suspected cases of extra legal, arbitrary and summary executions, including cases where complaints by

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<sup>105</sup> Concluding observations of the Human Rights Committee 1 December 2005, Brazil, para 13  
[http://www.unhchr.ch/tbs/doc.nsf/0/13b32e118dfc49d8c12570ae00393223/\\$FILE/G0545344.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/13b32e118dfc49d8c12570ae00393223/$FILE/G0545344.pdf)

<sup>106</sup> Para 22.

<sup>107</sup> Para 23.

<sup>108</sup> <http://www1.umn.edu/humanrts/instree/i7pepi.htm>

relatives or other reliable reports suggest unnatural death in the above circumstances ...”

2. The investigative authority should have the power to oblige police to appear and testify.<sup>109</sup>

3. In cases involving patterns of abuse or investigators who lack in impartiality or expertise, the investigation must be conducted by an independent, impartial, and expert commission, independent from any “institution, agency, or person” the subject of the inquiry.

4. Families to have access to all information relevant to investigation, and be entitled to present other evidence at any hearings<sup>110</sup>.

5. The investigation report must be made public and is to include the “ scope of the inquiry, procedures, methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law ...”<sup>111</sup>

Finally UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions<sup>112</sup> discusses the purposes of a death in custody inquiry which is:

“(a) to identify the victim;

(b) to recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible;

(c) to identify possible witnesses and obtain statements from them concerning the death;

(d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;

(e) to distinguish between natural death, accidental death, suicide and homicide;

(f) to identify and apprehend the person(s) involved in the death;

(g) to bring the suspected perpetrator(s) before a competent court established by law.”

In section D, it is stated that “In cases where government involvement is suspected, an objective and impartial investigation may not be possible unless a special commission of

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<sup>109</sup> Para 10.

<sup>110</sup> Para 16.

<sup>111</sup> Para 17.

<sup>112</sup> <http://www1.umn.edu/humanrts/instree/executioninvestigation-91.html>

inquiry is established ...”<sup>113</sup>

The themes arising from these additional sources are broadly consistent with the 5 principles identified by the Rapporteur to the European Commission for Human Rights on police complaints. A further principle identified in the UN Firearms Principles requires there be access to an appeal mechanism. I will deal with appeals under the chapter relating to “adequacy” as well as in the chapter relating to “victim involvement”.

## 2.7 Application to Victoria

Victoria Police, the Department of Justice, the Special Investigations Monitor and the Office of Police Integrity are all public authorities under section 4 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*. Section 1 of *the Charter* imposes an obligation on public authorities to act in way that is compatible with human rights. “International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.”<sup>114</sup> Sections 9 and 10 of the Charter concern the rights to life and freedom from torture, cruel, inhuman and degrading treatment. International law has determined that these rights include the obligation to effectively investigate allegations of their breach. Section 38 of *the Charter* make it unlawful for public authorities to act incompatibly with human rights or fail to give human rights consideration in their decision making. The Office of Police Integrity is thus bound to investigate alleged breaches of Section 9 and 10 of *the Charter* in line with the Rapporteur’s principles of effective investigation and the international law that these principles encapsulate. This requirement has been most recently articulated at paragraph 21 of the Human Rights Committee’s Concluding Observations on Australia 3 April 2009<sup>115</sup>.

In the next 4 chapters I will examine in closer detail each of the Rapporteur’s principles. I will use practical examples drawn from the US, Canada, Northern Ireland and the UK. The intention of each chapter to draw out the practical and detailed content of the duty to investigate. The recommendations that follow appear in the executive summary of this report.

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<sup>113</sup> Quoted from *Hugh Jordan v The United Kingdom* [2001] ECHR 4 May 2001 at para 92.

<sup>114</sup> Section 32 of the Charter.

<sup>115</sup> <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

# Chapter 3

## Independence

### 3.1 Introduction

Independence is the first of the five standards necessary for the investigation of a police complaint to be effective and consistent with human rights. In this chapter I examine the importance of independence and then look at various attempts to create an independent bodies to investigate police complaints to see if they overcome the problems that exist when police investigate themselves. I will conclude the chapter with recommendations.

Police retention of the power and authority to investigate themselves is a highly contentious issue. In the words of retired Royal Canadian Mounted Police Superintendent and current executive director of the Winnipeg Police Advisory Board, Bob McIntyre, “the issue of police investigating police is not going to go away.”<sup>116</sup>

On the other hand, a former police officer now employed by the Commission for Public Complaints Against Royal Canadian Mounted Police expressed the view that it is unfair to criticise police for investigating themselves, when lawyers or doctors also investigate their own.<sup>117</sup> He said:

“I am intolerant of these police investigating police arguments. Police have been tainted as being so biased you can never trust any of them. I don’t buy the assumption of police being tainted by culture. I think you have to be acquainted with police culture to do this job or you will be searching for a pin in a haystack. Transparency is the issue. Whoever gathers the facts is irrelevant. The problem is at the decision making level not the gathering of facts.”

The assumption in this opinion is that fact gathering is a neutral process. The reality is that the decision to conclude that a human rights violation has occurred is dependent and informed by the thoroughness of the fact gathering process. On numerous occasions the European Court of Human Rights has been unable to determine whether a violation occurred because of serious flaws in the investigation process.

In the case of *Anguelova v Bulgaria* [2002] ECHR 489 at paragraphs 142- 144, the European Court found that the failure of the police investigators to sufficiently document the injuries of a boy allegedly mistreated by police in custody undermined its capacity to determine the causes of those injuries.

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<sup>116</sup> Communication with the author on 23 October 2008.

<sup>117</sup> Interview by the author with a complaint analyst from the Commission for Public Complaints Against the Royal Canadian Mounted Police on 10 October 2008.



In the investigation into the police involved death of Indigenous man Frank Paul in Vancouver, a police detective failed to collect all relevant evidence in his initial investigation. This had a profound effect on the outcome<sup>118</sup>:

**British Columbia Civil Liberties Association Submission 2008, Canada:** “Detective Staunton was responsible for directing the investigation at the scene [of the police involved death of Frank Paul in Vancouver, Canada on 5 December 1998] . From the outset Detective Staunton did not approach the scene as a suspicious death, and failed to collect and direct others to collect pertinent information. Detective Staunton was immediately confronted with inconsistencies in the evidence that he failed to identify. His failure resulted in the permanent loss of critical evidence and compromised the investigation.”<sup>119</sup>

In Australia, the Royal Commission into Aboriginal Deaths in Custody noted:

The breadth and quality of the coronial inquest often "reflected the inadequacies of perfunctory police investigations and did little more than formalise the conclusions of police investigators". The Report emphasised the "general inability of coroners to control the quality of preliminary police investigations which lay the foundation for the subsequent coronial inquest" (RCIADIC 1991, Vol. 1, p. 130)<sup>120</sup>.

These examples reveal how important the initial investigation is and why concerns about who does it are so important.

### 3.2 Police investigating police

Most police and former police argue that only other police are capable of investigating police. Examples of civilians investigating police reveal otherwise. The Washington DC Office of Police Complaints currently employs no former police officers and yet is capable of conducting investigations<sup>121</sup>. Only 25% of the investigating staff in the Northern Ireland Police Ombudsman's Office are former police officers and none of these officers previously worked in Northern Ireland<sup>122</sup>.

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<sup>118</sup> <http://www.frankpaulinquiry.ca/> See other examples, *Semsi Onen v Turkey* - 22876/93 [2002] ECHR 445 (14 May 2002). Also see the Royal Commission into Aboriginal Deaths in *Custody*, Australia Vol 1 4.2.2, 4.2.3

<sup>119</sup> Submissions by the British Columbia Civil Liberties Association to the Frank Paul Inquiry in 2008. The BCCLA had been granted participant status to this Inquiry. [http://bccla.org/othercontent/Frank\\_Paul\\_Final\\_Submissions.pdf](http://bccla.org/othercontent/Frank_Paul_Final_Submissions.pdf)

<sup>120</sup> Quoted from Bronia Halsted, November 1995, Australian Deaths in Custody, No. 10 Coroners' Recommendations and the Prevention of Deaths in Custody: A Victorian Case Study. <http://www.aic.gov.au/publications/dic/dic10.html>

<sup>121</sup> Kesha Taylor, Chief Investigator Washington DC Office of Police Complaints, 27 October 2008

<sup>122</sup> Jim Coupland, Senior Director of Investigations Northern Ireland Police Ombudsman 28 November 2008.

It is true that any body investigating itself faces a conflict of interest. The unique nature of law enforcement agencies, however makes self-investigation particularly problematic.

William Westley wrote in 1964:

“[The policeman] regards the public as his enemy, feels his occupation to be in conflict with the community and regards himself as a pariah. The experience and the feeling give rise to a collective emphasis on secrecy, an attempt to coerce respect from the public, and a belief that almost any means are legitimate in completing an important arrest. These are for the policeman basic occupational values. They arise from his experience, take precedence over his legal responsibilities, are central to an understanding of his conduct, and form the occupational context within which violence gains its meaning.”<sup>123</sup>

While this was written in 1964, it is no less applicable today.

Monash University’s Associate Professor Colleen Lewis notes:

‘This strong group loyalty is one of the culture’s many beneficial features in dangerous operational situations. However, it has proven to be its “Achilles’ heel” in relation to complaints about police behaviour. The exceptionally strong unwritten code, that police must stick together at all times, encourages police to cover up the misconduct, even the criminal activities of other officers.’<sup>124</sup>

A pattern of collusion and cover-up by police officers was noted by lawyers acting for the family in the Inquest into the police shooting of Gary Abdullah in Victoria in 1989. In submissions to the Coroner, lawyers noted:

“It is the inescapable conclusion, taking the presentation of evidence by police witnesses as a whole [at the Inquest], that the majority were schooled in both the manner in which they were to give their evidence and the content of it.”<sup>125</sup>

It has been found that police investigations are motivated by self-interest;<sup>126</sup>

**The Aboriginal Justice Inquiry** into the police investigation of the Winnipeg Police Departments shooting of JJ Harper on 9 March 1988 stated:  
“Our second conclusion is that the Winnipeg Police Department was guided more by self-interest in the Harper investigation than by public interest. There were many errors and poor decisions. Supervision was not competent and evidence was mishandled. Harper’s death was not investigated in a thorough and independent fashion. This resulted

<sup>123</sup> William A Westley, ‘*Violence and the Police*,’ in Police patrol readings, ed. Samuel G. Chapman (Springfield IL: Charles C Thomas, 1964), 284

<sup>124</sup> Lewis 1991 as quoted in Liberty, UK 2000 Harrison & Cunneen, “An Independent Police Complaint Commission.”

<sup>125</sup> Submissions for the family, the Inquest of Gary Abdullah at page 81.

<sup>126</sup> Report of the Aboriginal Justice Implementation Commission, Manitoba, report into the investigation of the death of JJ Harper, chapter 9, 29 June 2001.

<http://www.ajic.mb.ca/volumelll/chapter9.html>

in the failure of the subsequent inquest to examine and explain all the circumstances surrounding the death in a manner that the public could accept and respect.”

On 12 February 2009 the Davis Commission Report into the Death of Frank Paul found that:

Having concluded that the current practice of a home police department conducting criminal investigations of police-related deaths is fundamentally flawed due to conflict of interest, it follows that no amount of tinkering with the current practice can eliminate that underlying conflict of interest. The challenge lies in developing a new system for the investigation of police-related deaths.<sup>127</sup>

Dr Craig Futterman of the University of Chicago raises the impact of the police code of silence on complaint handling noting that:

“Veteran Chicago police abuse investigators and officers consistently report that they are not aware of a single instance in which a Chicago police officer reported having observed a fellow officer abuse a civilian.”<sup>128</sup>

In response to systemic themes surrounding police investigations of themselves, human rights jurisprudence mandates the following requirements of investigation into allegations of police human rights violations:

1. Institutional, organisational and hierarchical independence<sup>129</sup>.
2. Practical/functional/cultural (willingness to act) independence<sup>130</sup>
3. Legal and political independence<sup>131</sup>;

The remainder of this chapter is devoted to discussing these three requirements.

### 1. Institutional, organisational and hierarchical independence

Police agencies in many jurisdictions have come up with five ways to attempt independent investigations. The first of these methods is to create specialist internal units to investigate allegations against police officers.

#### *(a) Specialist internal units*

The theory behind specialist units is that they will be protected from a hierarchy and a culture that might otherwise undermine an ability to investigate. Morale in these units is

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<sup>127</sup> At page 218.

<sup>128</sup> Futterman, Craig 2008, The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department’s Broken System, *DePaul Journal for Social Justice*, Vol 1 Number 2

<sup>129</sup> *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 337.

<sup>130</sup> *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 325.

<sup>131</sup> *Nachova and Others v Bulgaria* [GC] ECHR 2005 at para 112.

typically poor. For example, the Law Enforcement Review Agency Commissioner, visiting a unit of this nature in Winnipeg noted officers commenting, “Only 200 days left here and counting.”

Michael Quinn, a former police officer from Minneapolis writes:

“If you are looking to move up the ranks, then an assignment to Internal Affairs is seen as a ticket punch on your promotion card. You do your time, try not to hurt anyone, then get out as soon as you can. You will be investigating former partners, future bosses, part supervisors, and friends – the same people who covered for you when you made mistakes. You know and they know that a thorough investigation often means breaking the Code of Silence, and most cops are not going to do that.”<sup>132</sup>

In describing the investigation by the ethical standards unit in Queensland into the death in custody of Indigenous man **Mulrunji Doomagee** in Palm Island Australia, the Queensland Coroner said in a finding dated 27 September 2006:

“It was inappropriate for the officer most likely to be under investigation to be the person picking up the investigators from the airport. It was a serious error of judgment for the investigating team, including officers from ethical standards, to be sharing a meal at the home of that officer that evening. If a police officer needs support, it is not the task of investigators to provide this support, but to identify the need and delegate someone else to provide it.”<sup>133</sup>

Internal investigation units are not sufficiently independent to meet the standard imposed under human rights law. Many police complaint systems however, even those with civilian review agencies, utilise specialised police units at the first stage to investigate complaints.

For example, 97% of complaints in Victoria are investigated or otherwise managed by the Ethical Standards Department of the Victoria Police or police in regional stations. Another example of a civilian agency that refer complaints to police is the Commission for Public Complaints against the Royal Mounted Canadian Police<sup>134</sup>.

Because investigations of conduct require the investigation not only of the individual conduct alleged, but also any organisational causes that led to that conduct, the entire agency’s practises and procedures fall under question. This means that no one within the agency’s overall hierarchy is truly independent from the investigation.

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<sup>132</sup> Michael W Quinn, 2005 “The Police Code of Silence, Walking with the Devil” Quinn & Associates at page 74.

<sup>133</sup> <http://www.courts.qld.gov.au/1680.htm#2006>

<sup>134</sup> <http://www.cpc-cpp.gc.ca/>

*(b) Using another police force to investigate*

Another mechanism used to investigate complaints is to call in another police force to investigate complaints. For example, the Vancouver Police is sometimes investigated by Royal Mounted Canadian Police when members of the public complains.<sup>135</sup>

While this would overcome concerns raised by former police officer Michael Quinn in the quote above, that police will be investigating colleagues, it does not deal with the issues brought by police to the investigation process. Issues such as a general scepticism and hostility to complainants as well as the common practice of accepting police accounts at face value.

The Frank Paul Inquiry Commission 12 February 2009 notes:

Given that the RCMP polices 70 percent of British Columbia's population and has the largest police force in the province, it would seem to make sense to assign police-related death investigations to that force, as an alternative to using other municipal forces. On the issue of independence, however, I question whether the level of public confidence would increase significantly if the criminal investigation of police-related deaths were assigned to the RCMP rather than to another municipal police department—it is still the police investigating themselves. Though the RCMP has a well-earned reputation for competence in serious crime investigations, and though it has the capacity to respond immediately and has access to specialized services, I have deep reservations about making such a recommendation.<sup>136</sup>

Typically, police, whether from the same agency or another have years of ingrained thinking that complainants are wielding a grudge. The majority of police will have had a complaint made against them in the course of their career which they will regard as unreasonable. This experience then informs a preconception that complainants are not credible. Their long-standing biases will prevent impartial investigation. Police tend to view police as hard done by. The lens through which they investigate the complainant is the same one they use to criminalise that person. This means they view the complainant as criminal and therefore motivated to lie. A further concern is that police rationalise and tolerate police violence within their work and this taints their perceptions of complainant/police interactions. There exists a reluctance to find fault on the part of the officer and a readiness to blame the complainant. Institutionalised bias exists across all police agencies, means that asking one to investigate another does not overcome these concerns. While, there will be exceptions to these generalisations, the risk of failing to overcome bias is unacceptable given the critical importance of complaint investigation.

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<sup>135</sup> Interview between the author and William MacDonald, Investigative Analyst for the Office of Police Complaints, Vancouver BC on 7 October 2008.

<sup>136</sup> "Cold and Alone" Davis Commission Inquiry into the Death of Frank Paul page 223 <http://www.frankpaulinquiry.ca/>

For these reasons, the Human Rights Committee and the European Court of Human Rights have been scathing of complaint systems that leave investigations in the hands of police.<sup>137</sup>

The groundbreaking Stephen Lawrence Inquiry in the United Kingdom recommended in 1999:

“That the Home Secretary, taking into account the strong expression of public perception in this regard, consider what steps can and should be taken to ensure that serious complaints against police officers are independently investigated. Investigation of police officers by their own or another Police Service is widely regarded as unjust, and does not inspire public confidence.”<sup>138</sup>

*(c) Making the internal agency external.*

In Chicago, the Independent Police Review Authority (the “IPRA”), the “new” city agency responding to police complaints was formed by taking police from the former internal investigation unit, externalising them and re-naming them “Independent”.<sup>139</sup>

According to its published figures, the IPRA’s substantiation rate is lower than the former unit. This could indicate the new agency is performing more poorly than when it was an internal unit, or that the restructure has either temporarily or permanently taken resources away from its investigation capacity.

According to Professor Craig Futterman at Chicago University and Tracy Siska of the Chicago Justice Project, IPRA employs the same investigators, who they had previously critiqued for their culture of poor performance and demonstrated bias against complainants. They note however that that IPRA's new leader is making real attempts to change the culture, and are they confident of her genuine intentions. It will be instructed to watch whether this change in leadership will be sufficient to overcome the ingrained culture of the unit and the absence of political support from City Hall in ensuring Chicago's police are held accountable. A level of skepticism does not seem unrealistic in these circumstances.<sup>140</sup>

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<sup>137</sup> See *Khan v The United Kingdom* and Concluding observations of the Human Rights Committee 9 November 1995 Hong Kong at paragraph 11.

<sup>138</sup> See the Recommendations at paragraph 58. <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

<sup>139</sup> Tracy Siska, Chicago Justice Project interview with the author on 5 November 2008.

<sup>140</sup> Interviews on 5 & 6 November 2008. It is worth noting that the current Mayor of Chicago is a former prosecutor who is accused by advocates of using confessions he knew to be made under torture to convict numerous African Americans during the 60s and 70s. The Mayor is currently working hard to avoid being forced to answer questions on the matter before a grand jury. While the time has run out to use his alleged use of these confession as the basis for a charge against him, any perjury he commits in explaining his actions could be used. <http://www.peopleslawoffice.com/news/articles/13/>

*(d) Using seconded police in the civilian agency*

Many civilian agencies second police from the forces they are investigating to investigate on their behalf. While they are temporarily removed from their policing positions, the reality is that police are still doing the investigation. Having seconded police in independent oversight bodies is “like have the fox in the hen house”<sup>141</sup> and civilians find themselves having to “agree to disagree” with these officers. Furthermore, the seconded officer’s loyalty and future employment lies with the police agency under investigation. A further critique of the use of seconded police will be provided in the next section of this chapter.

*(e) Civilian Oversight of police investigations*

As we have seen, deficiencies in the process of collecting evidence can render an investigation unable to reach conclusions. The issue of oversight was commented on in *Hugh Jordan v The United Kingdom*, where in 2001 the Strasburg Court said:

“The Investigation into the killing by a RUC police officer was headed and carried out by other RUC officers, who issued the investigation report on the file. The Government pointed out that, as required by law, this investigation was supervised by the ICPC, an independent police monitoring authority. A member of the ICPC was present during the interview of Sergeant A, for example. Their approval was required of the officer leading the investigation. There was nonetheless a hierarchical link between the officer in the investigation and the officers subject to the investigation, all of whom were under the responsibility of the RUC Chief Constable....”<sup>142</sup>

This observation goes a critical issue. It is the person who *does* the investigation, not the person (such as the coroner or an oversight agency) that *directs* the investigation or even determines the avenues of inquiry, who is determinative of whether the investigation is independent.

Police investigators will never find acceptance with complainants, are widely criticised in academic literature<sup>143</sup>, Public Inquiries<sup>144</sup> and human rights case law. Independent civilian investigation is necessary to overcome these criticisms.

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<sup>141</sup> Interview with William MacDonald, Investigative Analyst Office of the Police Complaint Commissioner British Columbia, 7 October 2008.

<sup>142</sup> *Jordan v The United Kingdom* [2001] ECHR 327 (4 May 2001) paragraph 120.

<sup>143</sup> See for example Prenzler & Ronken 2001 157 “Models of Police Oversight: A critique,” *Policing & Society* Vol 11 No 3 at page 157.

<sup>144</sup> MacPherson Inquiry 1999, <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

The Taman Inquiry 2008 <http://www.tamaninquiry.ca/> The Frank Paul Inquiry 2009.



## 2. Practical/functional/cultural independence, (willingness to act)

Independent civilian investigation in name alone is not sufficient to meet the principle identified by the Rapporteur on Police Complaints to the European Commission on Human Rights. Case law, research and jurisprudence indicates that practical independence is required as well.

The Human Rights Commission Rapporteur on Police Complaints notes that it is all very well to set up a body to investigate police complaints, but unless they are genuinely oriented towards complainant interests, they will fail to achieve their goals. The history of the reform of police complaint systems in England and Wales provides an instructive catalogue of poorly performing agencies. After each agency is created, a boom in complaints occurs as complainant's and their solicitor's hopes are raised that the new body will be effective. The hope is quickly dashed and complaints drop down to normal levels a short while later. Interesting, substantiation rates also dropped after each body was created and these rates did not improve over time. A cause of complainant dissatisfaction was that each creation remained focussed on police concerns disregarding the interests of complainants.<sup>145</sup>

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

- ❖ A pattern of favouritism towards the police with some complaints being rejected in spite of apparently powerful evidence in their support;
- ❖ Cases of indifference and rudeness towards complainants;
- ❖ Extreme delays, with some complaints remaining unresolved after years of inaction and confusion;<sup>146</sup>

Following an unsubstantiated finding by the IPCC, complainants have successfully litigated their complaints against police. This success of civil litigation where complaint investigation fails is indicative of possible errors in the investigation process such as failure to obtain information, inappropriateness of conclusions on the law or positions on the credibility of witnesses.<sup>147</sup>

As both complaint adjudication by the IPCC and in civil litigation proceed “on the balance of probabilities” these discrepancies raise serious concerns about the effectiveness of IPCC investigations.

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<sup>145</sup> Smith Graham 2005, A Most Enduring Problem; Police Complaints Reform in England and Wales, *Jnl Soc. Pol.* 35, 1, 121-141.

<sup>146</sup> Crisis at police watchdog as lawyers resign | Politics | The Guardian  
<http://www.guardian.co.uk/politics/2008/feb/25/police.law1>

<sup>147</sup> Imran Khan, Senior Partner, Imran Khan & Associates, interview with the author December 2008.



A good example of IPCC failure was reported in the Guardian on 19 March 2009. In this case the IPCC investigation failed to conclude that a police officer, with a lengthy complaint history, tortured Barbar Ahmad in December 2003. After civil litigation proceedings were commenced, the police admitted the “serious, gratuitous and prolonged attack”<sup>148</sup> and agreed to pay Mr Amad £60,000. This outcome raises serious concerns about the adequacy<sup>149</sup> of IPCC managed investigations as well as the IPCC’s orientation and willingness to act against police.

Speaking of a House of Common’s Public Accounts Committee Report concerning the IPCC on 9 March 2009, Edward Leigh MP, chairman of the committee was reported on the BBC to say, “Public confidence in the police complaints system looks to have improved. But when it comes to how effective the IPCC actually is, that’s where the questions start to be asked. Systems for checking the quality of its work are conspicuously absent. There is no external independent scrutiny and the IPCC has no formal internal processes to monitor its work, exposing it to potential allegations of incompetence or bias.”<sup>150</sup>

Concerns have also been raised about the New York Civilian Complaints Review Board (the “CCRB”):

“CCRB deference to the NYPD [New York Police Department] is often cloaked in the rhetoric of cooperation. But there is no mistaking what is going on: capitulation, within the universe of municipal governance, to a superior force.”<sup>151</sup>

When the CCRB receives cases involving alleged criminality by police cases are simultaneously investigated by the police. The media spokesperson from CCRB told me he was not aware of the CCRB reaching a different conclusion to the police in these investigations. In these cases complainants are made to provide a statement to the CCRB and a different one to the Police<sup>152</sup>.

Dr Craig Futterman from the Chicago University says “The [complaint body’s] interests need to be to protect the public from the officers who abuse them. It should care deeply about the investigation of allegations of abuse by officers, not just think it’s the right thing to do.”<sup>153</sup>

The attitude of investigators toward complainants is essential. Being complainant oriented does not mean accepting complaints on face value. It does mean however,

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<sup>148</sup> <http://www.guardian.co.uk/politics/2009/mar/18/babar-ahmed-met-police/print>

<sup>149</sup> Adequacy of investigation is discussed in Chapter 5

<sup>150</sup> [http://news.bbc.co.uk/2/hi/uk\\_news/7973120.stm](http://news.bbc.co.uk/2/hi/uk_news/7973120.stm)

<sup>151</sup> Robert Perry, 2006, *Mission Failure: Civilian Review of Policing in New York City* New York Civil Liberties Union, at page 39.

<sup>152</sup> Interview with New York CCRB media spokesperson on 19 November 2008. It is also pertinent to note that salaries for CCRB investigators are well below those for police.

<sup>153</sup> Interview with the author on 6 November 2008.

determinedly and doggedly setting out to find if there is evidence to support the complaint. It means treating the complainant's evidence as just as credible, if not more so, than police evidence. It means being thoroughly familiar with the endlessly documented police habit of colluding and lying for each other that underpins the code of silence and the reason why independent investigation is so essential<sup>154</sup>.

The code of silence and the systemic collusion police engage in to hide misconduct renders police evidence about misconduct unreliable<sup>155</sup>. Analysis conducted in Chicago indicates that while only 10% of police conduct physical torture and abuse of people (the repeater beaters), the vast majority are silent in the face of this abuse, or actively cover up for it (the enablers)<sup>156</sup>. This leaves a tiny fraction of police (the whistleblowers), who can be reasonably treated as credible witnesses regarding police misconduct.

Given this stark pattern it is clear that police witnesses in cases involving allegations of police misconduct enjoy undeserved deference by police complaint agencies, investigators, courts and juries<sup>157</sup>. In Howard Becker's hierarchy of credibility<sup>158</sup>, in misconduct investigations police should occupy the bottom rung.

A good example of an investigation that gave too much credit to police officer evidence was described by the Taman Inquiry:

**Taman Inquiry Report 2008 Manitoba, Canada** said the following of the police investigation into a police caused death of a civilian: "The evidence before me showed that there was an uncritical presumption during the [police] investigation that the officers would tell the truth because they were police officers, and that officers should not be pushed or challenged. The interviews that were conducted were *pro forma*, brief in length, cursory and incomplete. Indeed, some were conducted with leading questions that could have had no other effect than to assist officers, if so minded, to claim that they knew nothing helpful. The problem was not just one of method. No attempt was made to consider whether any of the officers had a motive to mislead or minimize events, even though it was patent that a number did. As a result, even intuitively-suspect claims were accepted at face value."

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<sup>154</sup> See an example the Office of Police Integrity's 2008 Report "The Victorian Armed Offenders Squad – a case study"

<sup>155</sup> John Kleinig 2000 "Police Violence and the Loyal Code of Silence," in *Violence and Police Culture*, edited by Coady et al, Melbourne University Press at page 219.

<sup>156</sup> Futterman, Craig 2008, The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System, *DePaul Journal for Social Justice*, Vol 1 Number 2 p 20.

<sup>157</sup> An example of jury deference was provided by an Investigator at the Police Ombudsman of Northern Ireland on 28 November 2008 to the author.

<sup>158</sup> See a discussion of this in Carlton, Bree 2007 "Imprisoning Resistance" Sydney Institute of Criminology Press p 49, 50.

Practical independence demands civilian agencies be aware of that police may have a motive to mislead when they are being investigated and that this should be considered in drawing conclusions about the credibility of police witnesses and the reliability of their evidence.

Craig Futterman sees the issue facing civilian review of complaints in terms of “institutional denial” of police brutality. If you don’t ask difficult questions, you won’t get difficult answers. By adopting the position that “most complainants are vexatious” low substantiation rates can appear justified<sup>159</sup>.

Studies however indicate that most complainants are genuine in feeling aggrieved.<sup>160</sup> Futterman suggests that complaints bodies must understand that even if there has not been a violation of rights of the person, the person has still had a very bad experience that will effect how they feel about the police<sup>161</sup>.

Many complaint bodies criticise complainants for not meeting the idealised behaviour of the fragrant<sup>162</sup> white middle class. Some complainants will have engaged in criminal behaviours, be extremely fearful and distrustful, suffer mental illnesses, miss appointments, have no transport options, be unable to write, have yelled abuse at the police or resisted (at times an unlawful) arrest or refused to stop their car prior to the abuse they complain about. These behaviours in no way invalidate their complaints. They do not justify torture, ill-treatment or the unnecessary loss of life all of which are absolutely prohibited under all human rights instruments.

#### *Cultural independence –a case study on the difference between Northern Ireland and Ontario*

The Police Ombudsman Northern Ireland (“PONI”) has been described as the “Golden Standard in Police Investigations”<sup>163</sup>. It investigates all complaints it receives, from deaths in custody to religious and socio-economic profiling. Meeting with its staff clarifies how it has achieved its label. Staff are highly motivated and complainant centred in their attitude and operation. They also retain the respect of the local police agency. More detail concerning its operations will be described in the next chapter on “adequacy of investigations”.

One of PONI’s investigators, a former police officer from Scotland who worked as a homicide investigator and then worked in internal affairs said, “I don’t think the police

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<sup>159</sup> Communication with the author on 6 November 2008.

<sup>160</sup> Maguire, M. & Corbett, C. (1991). *A Study of the police complaints system*. London: Her Majesty’s Stationery Office.

<sup>161</sup> Communication with the author on 6 November 2008.

<sup>162</sup> This descriptor is used by Raju Bhatt, interview with the author in December 2008.

<sup>163</sup> Discussion at the NACOLE Conference in Cincinnati October 2008.

are capable of investigating themselves. Police investigations are bad for the police and for the public.”<sup>164</sup>

He sees the IPCC which conducts only the most serious complaints as a hybrid system that does not match the system in Northern Ireland. He moved to the Police Ombudsman of Northern Ireland because of the quality of the investigations it carries out.

The one critique I heard of PONI in my limited time in Northern Ireland was that it needed more Catholic staff in order to be trusted by this minority<sup>165</sup>. This is an important observation.

A similar body, the Special Investigations Unit in Ontario (“SIU”) a unit that investigates all police involved deaths and serious injuries in custody, has not received the same acclaim. In his September 2008 report into its operation and credibility, Andre Marin, the Ontario Ombudsman noted the significant influence of police culture within the agency<sup>166</sup>.

He notes that former police are a commanding influence in the Unit and that many wear their police watches, ties and “thin blue line” rings while at work<sup>167</sup>. He notes the use of derogatory language prevalent in policing circles has become part of the common language of the Unit including: “crack whores” to denote female prostitutes, “shit rats” – those with criminal histories, and “Jamaicans” anyone from a black racial group assumed to have a criminal record.<sup>168</sup> He notes a “cosy” relationship between the SIU and police.<sup>169</sup>

He notes the view of civilians that SIU officers talk and act like police and their concerns with interacting with the unit.

In a real effort to address the concern of complaint body staff being seen as similar to police, the Northern Ireland Police Ombudsman staff wear reflective orange clothing clearly stating “Police Ombudsman” and go to lengths not to replicate police behaviours. The Northern Ireland Police Ombudsman staff report strong public support at their presence at crime scenes and considerable public willingness to share information<sup>170</sup>.

Ontario Ombudsman Andre Marin quotes one SIU investigator as saying:

“It’s what you bring from your work experience, or your life experience, and a lot of them [the SIU investigators] have had very similar experiences. So if you work for 30 years arresting...the same sort of people and you decide that those sorts of people are a

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<sup>164</sup> Interview with the author on 28 November 2008

<sup>165</sup> Communication with a taxi driver in Belfast 2008.

<sup>166</sup> <http://www.ombudsman.on.ca/media/30776/siureporteng.pdf>

<sup>167</sup> Ibid at para 346

<sup>168</sup> Ibid at para 345

<sup>169</sup> Ibid at para 331

<sup>170</sup> Interview with the author on 28 November 2008.

certain way, its hard to get out of that mindset. And if you work for 30 years with certain types of people and you think that they are terrific, its hard to get into the mindset that once in a while someone can do something that is not ideal or is criminal.....There are some that are not influenced by pre-set notions, but I would say the majority of them are.”<sup>171</sup>

The Ontario Ombudsman also noted that the SIU was filled with white aging men and needed to more adequately reflect the community who needed it to work for them<sup>172</sup>.

The Ontario Ombudsman’s report is a damning critique of the use of former police as investigators in civilian investigation agencies. His critique is also a thorough account of poor investigative practices within the Unit.

The dominance and control of police culture and attitude is a major difference between PONI and the SIU. While 25% of PONI’s staff are former police officers, leadership and attitudes within PONI are assertively civilian. The latter is also strongly influenced by the history of Northern Ireland and the dominant role that the European Convention of Human Rights has played in ensuring that investigation of human rights abuses is its primary function and that the involvement of the victim is central in its operation.

A further limitation of Ontario’s Special Investigation Unit, is that its director reports to a government department (the Attorney General) and not directly to Parliament. This reduces its independence from the incumbent Government.

### 3. Legal and Political Independence

The Commissioner of the Independent Police Complaints Commission in the UK is appointed by the same department that has responsibility for the police. This means that there are risks that the Commissioner, if too outspoken, could be removed from office by same the department with relationships and responsibilities for the police. A government department is an inherently political body under the control of and answerable to ministers.

The New York Civil Liberties Union (“the NYCLU”) report into the New York Civilian Complaint Review Board (the “NYCCRB”) noted that the NYCCRB has been intimidated by the police into adopting a permissive attitude to the failure of police to co-operate and is hampered by a poor legislative framework granting only weak powers to compel police to respond<sup>173</sup>.

These examples raise two issues. The first is the issue of an absence of structural or political independence, which leaves the agency open to intimidation or renders it

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<sup>171</sup> Ibid at para 344

<sup>172</sup> Ibid at Para 332

<sup>173</sup> <http://www.nyclu.org/node/1343>

powerless and forced to “agree to disagree”. The second is part of a broader concern that relates to regulator capture – which I will discuss at the end of this section.

In order to combat structural powerlessness governments must make a genuine commitment to sufficiently fund, empower and protect oversight agencies from political interference.

A powerful study by Ian Freckelton described the failure of the Victorian Government to protect a genuinely committed civilian review authority. The Police Complaints Authority (“the PCA”) in Victoria operated for two years in 1986 to 1988. The PCA’s willingness to act was evidenced by its complainant focussed attention to investigation. It operated a 24 hour complaint hot-line and was willing to travel to complainants. It was also willing to exercise its power to investigate “public interest” complaints and saw these as including complaints made by ordinary people about police abuses. It conducted thorough re-investigations of complaints where complainant’s raised concerns about the initial police investigation. It also had a high media profile on trends and issues in police misconduct. Unfortunately the PCA was seriously under funded by the Government and hampered by badly drafted legislation. It was then shut down by the Government within 2 years of its commencement following a powerful backlash from the Police Association<sup>174</sup>.

A further example of “shooting the messenger” occurred in New York following a vigorous investigation of Antonio Rosario’s death on 12 January 1995. Antonio died after police shot him in the back while he lay face down on the floor of an apartment in New York. The New York Civilian Review Board concluded that the police action was unlawful. During the investigation, New York’s Mayor Giuliani, had taken a strong pro-police stance. He knew the detectives involved in the incident personally: they had been his bodyguards during his election and one was a childhood friend. The civilian investigators involved in finding the police conduct unlawful were subsequently fired<sup>175</sup>.

These examples reveal the essential need for a civilian investigation body to move beyond mere formal independence and to be politically independent.

Political independence requires that the investigation body be answerable to parliament rather than the government of the day. It also means its enabling legislation be protected from opposing interests.

In British Columbia, the Office of Police Complaints has been calling for legislative reform to separate it from the legislation in which police are also regulated. They want it to be free to seek amendments to regulation and legislation away from the ministers and

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<sup>174</sup> Freckelton, Ian 1991 “Shooting the Messenger” in *Complaints Against the Police, The Trend to External Review*, edited by Andrew Goldsmith.

<sup>175</sup> Justifiable Homicide, Reality Films, by Jon Osman, 2002.

<http://realityfilms.net/justifiable/index.shtml>

departments that are also involved in governing the police. In order to protect bodies from government interference, they must report directly to parliament. Monash University Associate Professor Colleen Lewis argues for a Parliamentary sub-committee to be formed to assist in its oversight and provide functions that would normally be provided by government departments<sup>176</sup>. Fixed tenures beyond political terms would also assist in the political independence of its directors.

### Regulatory capture

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

“Regulatory capture occurs ‘when officials inappropriately identify with the interests of a client or industry’<sup>ii</sup>. For example, a liquor licensing inspector could, after years of contact with people in the industry, begin to favour the wishes of the industry rather than public interest. Alternatively, the inspector may be biased toward a single firm or company, motivated by a ‘white knight’ kind of sympathy. In such cases the regulator may fail to enforce because they believe the firm is struggling and the management team are ‘nice folk’ who ought to be protected.”<sup>177</sup>

A study by Tim Prenzler into the Queensland Criminal Justice Commission set up following the 1989 Fitzgerald Inquiry into police and public sector corruption in Queensland, found evidence that the CJC was exposed to regulatory capture through its “role in facilitating police management, joint operations [with police] against organised crime and reliance on seconded police investigators.”<sup>178</sup> He also found that the CJC had adopted an appeasement strategy towards the police and politicians. Political interference resulted in a dramatic curtailment of its independence.

Functional and practical independence demands that exposure to regulatory capture is designed out of a civilian agency.

### **Recommendations**

Out of this Chapter several recommendations can be made to ensure the human rights principle of independence is practically discharged through the investigation of alleged police human rights abuses.

1. Investigations of allegations of misconduct must be conducted by an agency that is not only institutionally independent of police but also practically culturally and politically independent. This means that the use of former police officers should be minimal if at

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<sup>176</sup> Interview with the author in January 2009.

<sup>177</sup> Gary Adams, Sharon Hayes, Stuart Weierner and John Boyd, *Regulatory Capture: Managing the Risk Australian Public Sector Anti-Corruption Conference* 24 October 2007 – Sydney page 1

<sup>178</sup> Tim Prenzler, 2000 “Civilian Oversight of Police, A Test of Capture Theory,” in *British Journal of Criminology* (2000) 40 at 659.

all. If they are used they must come from forces outside the one under investigation. My study in the field did bring me in contact with some rigorous former police investigators within agencies. However, unless carefully selected for the absence of police cultural biases, and removed from positions of influence in the organisation, the risk of using former police in this central task is considerable. On the other hand, civilians can and do perform investigations in civilian bodies throughout these regions. They can be trained to be highly effective. Civilians must dominate the organisation both in number and culture. Former police should be less than 25% and should not have previously been employed in the agency under scrutiny.

2. The agency must operate with a healthy scepticism of police accounts concerning misconduct. It must be complainant centred and complainant oriented.
3. Civilian investigators must by their attitude and attire be distinguishable from police.
4. The agency must be protected from the risks of agency capture through minimising collegiate working relationships with the police agency. While meetings are important, more than this becomes problematic. No seconded police officers from the agency under examination or other law enforcement agencies should be used.
5. The agency must be protected from political and police union interference through separate enabling legislation and regulations as well as independent reporting to parliament. Its key positions must be long-term appointments. A parliamentary committee must be established to assist with improving its functions and to provide oversight of the agency.
6. The agency must be properly and securely funded so that it does not need to rely on seconded police for any of its functions.
7. The agency must be adequately empowered to perform its tasks in the face of police resistance so that it does not need to rely on maintaining good will with police to do its task.
8. The agency must be staffed by people who reflect the community, it must contain young people, working class people, people from ethnic, religious, indigenous, disabled and gay lesbian queer identified and trans-gendered communities and maintain a gender balance.



## Chapter 4

# Adequacy of Investigation

### 4.1 Introduction

Adequacy of investigation is the second of the five standards necessary for the investigation of a police complaint to be *effective* and consistent with human rights. The Rapporteur on police complaints to the European Commission of Human Rights states that the investigation: “should be capable of gathering evidence to determine whether the behaviour complained of was unlawful [whether the force used was justified<sup>179</sup>] and to identify and punish those responsible.”<sup>180</sup>

The Rapporteur also notes the requirement of promptness that is: “a speedy response and expeditiousness is crucial for maintaining trust and confidence in the rule of law and in order to dispel any fear or collusion in any attempt to conceal misconduct”<sup>181</sup>.

For the purpose of this report, I am treating promptness as a subset of an adequate investigation, and for convenience including a discussion about it in this chapter.

In this chapter I will explore what is meant by an adequate and prompt investigation by looking at the kinds of investigations that are conducted into police complaints in Victoria, the US, Canada, the UK and Northern Ireland.

I will conclude with recommendations that arise from these examples.

### 4.2 Capacity to lead to criminal or disciplinary outcomes

Where sufficient evidence exists of a criminal offence, the officer should be arrested, interviewed and charged immediately.<sup>182</sup> Because a criminal investigation must be capable of leading to a prosecution in appropriate cases, police officers facing a criminal investigation must be given the same rights as all suspects before an interview is conducted or their evidence will be inadmissible. This means that police officers must be free to exercise the right to silence before an interview for this purpose.

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<sup>179</sup> *Jordan v The United Kingdom* [2001] ECHR 327 (4 May 2001) para 107.

<sup>180</sup> Graham Smith, (2008) “European Commissioner for Human Rights Police Complaints Initiative” – 172 *JPN* 399, pp 1,2.

<sup>181</sup> Ibid and at

<https://wcd.coe.int/ViewDoc.jsp?id=1417857&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>

<sup>182</sup> <http://www.guardian.co.uk/uk/2009/apr/10/g20-assault-investigation/print>

On the other hand, administrative or disciplinary investigation, is quite different. The purpose of administrative investigation is to ensure that police officers conduct themselves with the highest integrity and that unsuitable officers are dismissed from the force. This ensures the safety of the public and is an important risk management strategy for the agency. Because the outcomes of an administrative investigation are related to public safety and officer integrity, it is essential that all police officers be legislatively required to respond to these investigations immediately and with full candour. Failure to submit or respond to questioning for an administrative investigation must itself be a disciplinary offence and dismissal from service for failures to comply is an appropriate penalty.

If police are to be permitted to exercise police powers, carry weapons and use force for the purposes of arrest and control of public order, the corollary is that they must be prepared to account when they use that force and exercise those powers. The use of force and invasive police powers are a routine part of a police officer's job. While the public may use force for self-defence and defence of others, police have weapons for this purpose. Police also stop, question, search people and enter their houses, all of which impacts on their freedoms and rights. Because these powers and the use of force impacts directly on fundamental human rights, accounting transparently and publicly for their use is essential to ensure that the public are satisfied that the use police powers and force is not abused. These issues make the policing profession entirely unique to non-coercive professions. As a result accountability requirements need be far more rigorous than in other professions.

When officers provide an immediate and independent account of events, there is a reduced risk of collusion and cover-up that could occur if police are only required to account after they are provided with the facts. Because of the operation of the code of silence police are more susceptible than other professions to covering up for themselves and others<sup>183</sup>. This means that legislative requirements for them to account immediately are essential.

In order to protect the officer's human rights during any criminal trial relating to the complaint, anything said by an officer during administrative questioning must be inadmissible against the officer when they have chosen to exercise the right to silence.

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<sup>183</sup> See for example the Age 12 February 2009 – Stephen Linnell pleads guilty to attempting to assist colleagues escape detection at misconduct proceedings. <http://www.theage.com.au/national/linnell-spared-jail-over-lies-leaks-20090325-99n7.html> See also a discussion of the code of silence in the Office of Police Integrity's Armed Offenders Squad report at: [http://www.opi.vic.gov.au/documents/The\\_Victorian\\_Armed\\_Offenders\\_Squad\\_-\\_a\\_case\\_study.pdf](http://www.opi.vic.gov.au/documents/The_Victorian_Armed_Offenders_Squad_-_a_case_study.pdf)

It is possible and indeed practical for the two investigations to occur simultaneously. In Northern Ireland, Police Ombudsman investigators start with the criminal investigation and move straight to an administrative investigation if the right to silence is invoked.

This is also the approach favoured by the 2005 UK Taylor Report which reviewed and made recommendations on police disciplinary processes.<sup>184</sup>

The other right that applies is the right to speak to a solicitor prior to interview for criminal investigation.

This right has caused interview delays of hours in Northern Ireland, delays of days in Ontario and delays of months in Manitoba. It would be hard to imagine in the investigation of a civilian, delays of this length being permitted. The right to a solicitor is the same for police and civilians and excessive delays for police officers is indicative of a bias towards their interests.

In other models such as Victoria, in some cases, police have not been required to account beyond their statement made as part of a prosecution brief against the complainant. In some cases officers who were waiting to provide their side of the story were told their response was not needed<sup>185</sup>. For an investigation to be adequate, all police witnesses must be interviewed for the purpose of that investigation. As well as being essential in terms of natural justice, accounts provided by police for other purposes will lack critical information relevant to the complainant's allegation.

**Josiah Wood QC Vancouver Canada:** "Another factor which accounted for those complaint files that were improperly concluded was the lack of cooperation by respondents. Without the power to force a respondent to give a statement, or submit to an interview, the best professional standards officer is left with little more than a written duty report from which to assess that officer's response to a complaint."<sup>186</sup>

## Recommendations

*1. Police suspects and witnesses must be separated and interviewed immediately for both criminal and administrative purposes or no later than 24 hours after notification of the details of a complaint. Refusal to participate in an administrative interview must be grounds for dismissal.*

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<sup>184</sup> Review of Police Disciplinary Arrangements Report 2005 (the Taylor report) at page 30. <http://press.homeoffice.gov.uk/documents/police-disciplinary-arrangements/report.pdf?view=Binary>

<sup>185</sup> OPI Improving Victorian Policing Services Through Effective Complaint Handling Report 2008 at p 49 available at: [http://www.opi.vic.gov.au/documents/Improving\\_Victorian\\_policing\\_services\\_through\\_effective\\_complaint\\_handling\\_31.pdf](http://www.opi.vic.gov.au/documents/Improving_Victorian_policing_services_through_effective_complaint_handling_31.pdf)

<sup>186</sup> Josiah Wood QC - Report on the review of the Police Complaint Process in British Columbia, February 2007 at paragraph 25

*2. Enforceable timelines for investigations are critical. Provision of documents by police agencies must be prioritised and investigators should use warrants to collect documents themselves where any delay occurs.*

### 4.3 The importance of time

Investigators, judges, lawyers, doctors, coroners and forensic technicians understand that time is critical in ensuring evidence is collected and retained for subsequent purposes.

Memories fade, evidence is tampered with, scenes are altered, footage “lost”, cameras stolen, witnesses intimidated or even murdered, bruises fade, clothes removed, shot residue dissipated, false evidence planted, fingerprints lost, splatter marks removed, collusion, stories and alibis concocted<sup>187</sup>.

There must be time limits set for investigations. Delay is a major issue facing most complaint bodies. This can be an issue of deficient resources or of complacency. Charging a person with murder can occur within days or weeks where the offender is not a police officer and brief preparation can occur within one or two months. The times involved in matters where the suspect is a police officer should replicate those involving civilian suspects. Most complaint bodies see the need for specific time limits introduced into the legislation under which they are set up.

#### **Case Study: The “Golden Hour” - Northern Ireland Police Ombudsman**

In Northern Ireland, Police Ombudsman investigators pride themselves at being able to get to a scene within the hour of police involved death or serious injury occurring. They will interview all police and civilian witnesses. If the police are also investigating in cases where a civilian may be charged, the rule is that that the investigation with the more serious allegation has primacy and that relevant forensic information must be provided to other investigation afterwards. Usually this means the Police Ombudsman investigation has primacy.

The Police Ombudsman operate a 24-hour service. There is a team of eight investigators. For small investigations, they send two people out. They wear orange jackets to distinguish them from the police. According to Police Ombudsman investigators, they are highly visible and get their fast. They believe this takes the tension out of the incident for people. While they investigate like police, they don’t have the attitude of the police. They say they are friendly and approachable and that the public perceives them to be

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<sup>187</sup> See for example the Victorian Coroner Hal Hallenstein’s Findings into the Inquest of Gary Abdullah, 31 October 1994, Case No. 2060/89.

independent and competent. These views are reflected in their complainant satisfaction survey of 2007<sup>188</sup>.

The Northern Ireland Police Ombudsman use independent scientists and medical experts<sup>189</sup>. They attend post mortems that are conducted by the state pathologist. They produce the file and are in charge of collecting the evidence for the coroner.

## Recommendations

*3. Civilian investigation should commence immediately and must thoroughly and effectively collect and preserve the evidence at a scene of a police involved death, near death or serious injury. The reporting by police of these incidents to the civilian body must be mandated. Civilian investigation must commence as soon as they are notified of complaints that reveal an allegation that could lead to criminal or disciplinary outcomes.*

*4. In cases where a person has died in custody, independent civilian investigators should prepare the coroners report.*

## 4.4 Thoroughness

When police investigate their own, they have been found to either delay investigation so that this evidence is lost, or neglect to collect it. For example in the 2008 Taman Inquiry, the police investigators failed to breathalyse the police officer who killed Crystal Taman<sup>190</sup>, in the Frank Paul Inquiry 2009, the police investigator failed to accurately record the scene and the position in which Frank Paul's body was found<sup>191</sup>. In the 1999 Stephen Lawrence Inquiry, suspects with whom the police investigators were ideologically aligned, were permitted to get rid of incriminating evidence before being arrested<sup>192</sup>. The 2008 Ontario Ombudsman Report found that investigators (in this case civilian investigators, but former police officers and thoroughly ensconced in police culture) allowed police but not civilian witnesses to recovered from the trauma of the incident before interviewing them<sup>193</sup>. The Neil Stonechild Inquiry<sup>194</sup> finalised in 2004,

<sup>188</sup> See complainant satisfaction survey available at:  
<http://www.policeombudsman.org/Publicationsuploads/Satisfaction%20Report%20complainant%202006-07.pdf>

<sup>189</sup> Medical experts obtained by police have been accused of bias see:

<http://www.guardian.co.uk/uk/2009/apr/11/g20-pathologist-ian-tomlinson/print>

<sup>190</sup> <http://www.tamaninquiry.ca/>

<sup>191</sup> <http://www.frankpaulinquiry.ca/>

<sup>192</sup> <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

<sup>193</sup> <http://www.ombudsman.on.ca/media/30776/siureporteng.pdf>

<sup>194</sup> <http://www.stonechildinquiry.ca/>

found that the original police investigators had closed the file without any real investigation at all<sup>195</sup>.

In *Anguelova v Bulgaria* [2002] ECHR 489 the European Court noted at paragraph 142:

“that the failure of the autopsy to record morphological data and the absence or presence of “*contre-coup* lesions” made it impossible to establish what object might have caused the skull fracture.

It is highly significant, furthermore, that the police officers were never asked to explain why the detention register had been forged, why they had not called for an ambulance right away or why they had given apparently false information to Dr Mihailov. These were crucial questions which obviously had to be raised in examinations and confrontations. The reconstruction of the events conducted on 20 March 1996 was, for reasons that are unclear, exclusively concerned with the number of times and the places where Mr Zabchekov had fallen to the ground when he had been trying to escape and ignored the events that took place at the police station, the moments between the boy's arrest and his arrival at the police station and the times when he had been lying on the ground, handcuffed to a tree or was alone with Sergeant Mutafov (C) and his friend D (see paragraphs 21, 26, 29-40 and 68 above).

Furthermore, there is no record of any timely visit of the investigator to the scene of Mr Zabchekov's arrest in Beli Lom Street. The site was visited at about 11 a.m. on 29 January 1996 by a police officer from the same police station as the implicated officers. Finally, the investigation concentrated on the origin and timing of the skull injury and paid scant attention to the other traces left on the boy's body. The Government have not explained these omissions.

143. The Court also refers to its findings above that the testimony of the police officers was considered fully credible despite their suspect behaviour and that, notwithstanding the obvious contradiction between the two medical reports, the authorities accepted the conclusions of the second report without seeking to clarify the discrepancies (see paragraph 120 above). Indeed, the decisions of the prosecution authorities to put an end to the investigation relied exclusively on the opinion in the second medical report about the timing of the injury, an opinion that had been based on a questionable analysis (see paragraphs 79, 81, 84 and 88-90 above).

144. The Court finds, therefore, that the investigation lacked the requisite objectivity and thoroughness, a fact which decisively undermined its ability to establish the cause of Mr Zabchekov's death and the identity of the persons responsible. Its effectiveness cannot, therefore, be gauged on the basis of the number of reports made, witnesses questioned or other investigative measures taken.

Rather than assisting to cover up the evidence, adequate civilian investigation must ensure evidence is collected and preserved at the earliest possible time, this means scenes are processed as if a crime has been committed, bullet trajectory diagrams made, re-enactments conducted and photographs taken. It is also essential that there is a thorough assessment of injuries sustained by a doctor who is capable of assessing not just the visible injuries, but the pains, numbness, movement loss, tingling, nerve and cartilage

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<sup>195</sup> <http://www.stonechildinquiry.ca/>

damage and all other forms of injury physical or psychological that may have been inflicted on the victim<sup>196</sup>.

## **Recommendations**

*5. Civilian investigators must investigate as if a crime has been committed.*

*6. Properly trained doctors must be free and available to assess pain and injuries at all police stations, prisons, detention centres as well as when complainants contact the complaint body and when they contact solicitors/advocates. It must be clearly obvious to people in custody that the doctors they are seeing are independent and not “working for the police.”*

### **4.5 Provision of cameras in Police Stations**

The requirement that a complaint process must be capable of leading to prosecutions and discipline has implications for the provision of cameras and voice recording in police stations, throughout holding cells and police vehicles. If the State does not ensure that this evidence can be gathered, it fails to meet its duty to ensure complaints can be adequately investigated.

For example, image recordings were a critical part in the successful prosecution of police involved in the May 2006 assaults of suspects in the St Kilda Police Station in Melbourne, reported in *the Age* on 25 February 2008<sup>197</sup>.

Community Legal Centres receive numerous reports from people alleging assault by police in police interview rooms. For example in the 2006-2007 there were 7 separate reports made to the Flemington & Kensington Community Legal Centre of assaults occurring inside police interview rooms at the Flemington and Moonee Ponds Police Stations<sup>198</sup>. These are very serious allegations.

Unfortunately there are no cameras to provide independent evidence of the events that unfolded.

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<sup>196</sup> Dr Frank Arnold, Medical Justice, UK speech to a House of Commons Committee Room meeting on 10 December 2008. Also see the Effective Investigation and Documentation Manual of Torture and other Cruel Inhuman and Degrading Treatment at: [http://www.reliefweb.int/rw/lib.nsf/db900sid/DPAL-5ZLDT7/\\$file/8istprot.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/DPAL-5ZLDT7/$file/8istprot.pdf?openelement)

<sup>197</sup> <http://www.theage.com.au/news/national/exdetectives-admit-to-bashing-suspect/2008/02/25/1203788246914.html>

<sup>198</sup> Report to the Chief Commission of Victoria Police in a letter from the Flemington & Kensington Community Legal Centre on the 28 February 2008.

It is essential that equipment be installed to record whether human rights violations such as assaults of suspects within police stations occur. In Northern Ireland, there is video surveillance of police cars and stations.<sup>199</sup>

## **Recommendations**

*7. CCTV should be placed in all police stations and cars and data from these should be removed immediately along with all data recording systems (such as taser data, c/s spray, weapons/bullet logs, use of force forms, weapons used, log books etc).*

### **4.6 Independence from prosecutions of complainants**

When complainants also face charges by police, there will be two investigations into similar facts. It is essential that the complaint investigation into the police is completely separate from the police investigation into the complainant. Otherwise the complaint investigation could end up providing evidence to the police in their prosecution of the complainant and undermine the impartiality and separateness of the process.

When the Police Ombudsman Northern Ireland [ the “PONI”] have information that would assist the defence of a complainant who is being prosecuted they will disclose this to the prosecution with the consent of the complainant. They will not release evidence that will assist the prosecution of complainants. This is not their role. It's up to the police to collect that evidence. Occasionally the prosecution drops the case against the complainants after the Ombudsman have supplied them with information.

A PONI investigator said: “Our job is not to assist the prosecution of the complainant. It's a totally distinct task. Mostly I do not ask anything about what the complainant has done prior to the issue they are complaining about. This is the police role. It up to the police to collect that evidence. When the police have already spoken to the complainant it's a non-issue.”<sup>200</sup>

## **Recommendations**

*8. Civilian investigators should interview complainants with respect to their complaint and not to collect evidence in relation to prior behaviour.*

*9. Civilian investigators must not provide evidence to assist the prosecution of complainants, but, may provide evidence which assists the complainant in their defence of police charges to both the defence and the prosecution with the complainant's consent.*

### **4.7 The need for uncontaminated police statements**

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<sup>199</sup> Interview with staff from the Police Ombudsman of Northern Ireland on 28 November 2008.

<sup>200</sup> Interview with a PONI investigator on 28 November 2008.



The Northern Ireland Police Ombudsman's staff says: "We require the police to give us a different statement to their statement they have made for the prosecution of the complainant. The issues are entirely different and we need to probe further. When we interview, we have different questions than what the police have put in their statements."<sup>201</sup>

This is a critical issue. Many complaint bodies rely on police notes or statements they have put together themselves. Alternatively they call police in for an interview well after the police are fully briefed on the allegations against them, have access to the full complaint by the victim, and have thoroughly discussed it with their colleagues.

For example, in Manitoba Canada, the Law Enforcement Review Agency sends a copy of the complaint to the suspect police officer as soon as they receive it and well prior to their investigation<sup>202</sup>.

When investigations fail to separate police witnesses and allow police to provide their own statements and notes, remarkable similarities in the statements are observed<sup>203</sup>;

**The Honourable Roger Salhany QC stated in the October 2008 Taman Inquiry in Manitoba Canada:**

"Moreover, both [Police Officers] Bakema and Graham misspelled the name of the RCMP analyst as Chris Landford, when, in fact, his name was Chris Blandford. Pedersen and Maloney testified that it was a common practise for Bakema and Graham to collaborate in preparing their notes. I am satisfied that Bakema and Graham prepared their notes together in this investigation to paint a misleading picture of an uneventful investigation."<sup>204</sup>

**The Davies Commission into the Death of Frank Paul notes:**

Det. Staunton did not meet and interview the many police officers, Corrections employees, and Jail staff who had relevant evidence about the Paul case. Instead, he asked them for written statements. He testified that if these people were given adequate direction on what to describe, their written report would be superior to a civilian witness's written report. This may be true, but having studied the numerous short written statements provided by police officers and other non-civilians in this case, I can only say that most of them invite as many questions as they answer. Many of these reports are short and cursory. Some two-member police teams prepared reports jointly, clearly not a "best practice." I would expect a meaningful and critical investigation to require more

<sup>201</sup> Interview with a PONI investigator on 28 November 2008.

<sup>202</sup> Section 7 of the *Law Enforcement Review Act*  
<http://web2.gov.mb.ca/laws/statutes/ccsm/l075e.php>

<sup>203</sup> *Taman Inquiry* September 2008, Manitoba Canada, Vol A pg 46. *Saunders & Anor, R (on the application of) v The Association of Chief Police Officers & Ors* [2008] EWHC 2372 (Admin) (10 October 2008)

<sup>204</sup> *Taman Inquiry* 2008 page 58

than written statements. I would expect probing and interactive questioning to occur.<sup>205</sup>

In the United Kingdom, Regulation 9 of the *Police (Conduct) Regulations 2004* requires that police be informed in writing the detail of the complaint and the nature of the allegations against them<sup>206</sup>. It does not entitle them to a copy of the complaint.

Civilians being questioned by police do not get this level of detail before they are questioned. In my view Regulation 9 represents, at the early stages of an investigation, an unnecessary concession to police. Obviously full disclosure is required prior to civil, disciplinary or criminal trial proceedings, and should be done following investigation to ensure transparency of the process, but at the initial stages of the investigation, delay and full provision of information is indicative of police being treated advantageously in comparison to their civilian counter-parts. Given that the issue of full disclosure before questioning is central to why many attorneys in the US and Australia advise their clients against putting in complaints to police, it is vital that the mechanics of the system remove bias from the start of the process.

In *Ramsahai and Others v The Netherlands* [2007] ECHR 393 the European Court said at paragraph 330 “What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later. Although, as already noted, there is no evidence that they colluded with each or with their colleagues on the Amsterdam/Amstelland police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation.”

A similar criticism can be made of the investigation in the Jean Charles de Menezes shooting in the London underground on 22 July 2005. In that case the officers were left to write up their notes together without any supervision or taping of their conversations. They said during Inquest proceedings that they had a “general conversation about the statements” while they were doing this. Yasmin Khan from the UK organisation Inquest, noted that the Independent Police Complaints Commissions, at the request of the Metropolitan Police, did not start investigation until 3 or 4 days after the shooting. She said that CCTV footage of the shooting went missing<sup>207</sup>.

Not surprisingly, the evidence from the two suspect police officers in the shooting was remarkably similar, in the phrases they used to describe the incident and their internal feelings<sup>208</sup>.

There is... “a well known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any

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<sup>205</sup> *Davies Commission in to the Death of Frank Paul* 12 February 2009, Vancouver Canada, at p111 and 112.

<sup>206</sup> Thames Police, Regulation 9 Policy paper.

<sup>207</sup> Conversation with Yasmin Khan from *Justice for Jean* in December 2008.

<sup>208</sup> Coroner’s summary of evidence in December 2008.

other witness. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussion or informal conversations.....A dishonest witness will very rapidly calculate how his testimony may be “improved”.<sup>209</sup>

The critical importance of this issue is frequently set aside when it comes to police witnesses. In many cases, police statements will be word for word replicas of each other, with perhaps a phrase here or there altered to create the semblance of individuality. While this is problematic in normal criminal cases involving police, it seriously undermines the adequacy of investigations when police are being investigated.

### **Recommendations**

*10. At the first interview, police are to be told of the allegations during the interview, but not through prior written notice containing the detail of those allegations. The complainant’s statement must not be given to police unless disciplinary, civil or criminal proceedings have commenced against them.*

## **4.8 Questioning techniques**

The *Taman Inquiry* conducted in Manitoba and completed in 2008 made some stark observations about police investigators accepting police evidence at face value, failing to ask probing questions and asking leading questions that allowed police to avoid difficulty. Failures to interview police correctly will impact on the investigation’s adequacy. Indeed, as Raju Bhatt observed as a result of reading transcripts of police investigating police, very often these interview have been exercises in mitigation rather than investigation<sup>210</sup>. It is not the role of the investigation to explore or even create the defence strategies of the police.

### **Recommendations**

*11. Civilian investigators must question police for the purpose of investigating the complainant’s allegations, not to assist the defence of the officers.*

## **4.9 Standards of Proof**

Standards of proof are applied at every point where a decision is made regarding a complaint. The decision to investigate, is not so much a standard of proof, but an assessment of whether the allegation meets the agency’s investigation guidelines. The decision to substantiate, the decision that a disciplinary offence has occurred or that a criminal offence has occurred all involve different standards of proof.

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<sup>209</sup> *Momodou, R v* [2005] EWCA Crim 177 (02 February 2005) at paragraph 61.

<sup>210</sup> Interview with Raju Bhatt of Bhatt Murphy on 2 December 2008 in London.

The standard of proof that a disciplinary offence has occurred, like all civil proceeding is the balance of probabilities. This standard applies in Canada<sup>211</sup> in Australia<sup>212</sup>, and in the UK<sup>213</sup>.

In Australia, the case of *Briginshaw v Briginshaw* 60 CLR 336 (30 June 1938) established that there is no third standard. It did however find that a serious allegation, required quality evidence to meet the standard of proof. That is where the allegations are serious, a civil court must, in the same way as disciplinary tribunals, be satisfied that the evidence is sufficient to support a balance of probabilities test.

The question then, is what standard should apply to the substantiation of complaints? The standard applied when the department of public prosecutions decides to proceed with a prosecution is lower than the criminal standard applied by the Court. The standard to proceed for the Crown Prosecuting Service in the UK is “where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty.”<sup>214</sup>

In Victoria the Office of Public Prosecution Guidelines state:

“the initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution....Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction....A prosecution should not proceed if there is no reasonable prospect of a conviction being secured”<sup>215</sup>.

Translating this into the complaint process, the standard must be that whether there is a reasonable prospect that an adjudicator at a disciplinary tribunal could find that the

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<sup>211</sup> *F.H. v. McDougall*, 2008 SCC 53 Prior to this case, the standard applied in Canada to police complaint matters was “clear and convincing evidence,” see for example section 27(2) of the Law Enforcement Review Act. While not necessarily different to the civil standard, complaint agencies are now recognizing the need to clarify these standards to reflect the ruling in McDougall that only two standards apply in Canada and that the civil standard applies to disciplinary hearings as well – communication with the Law Enforcement Review Agency Commissioner George Wright on 15 October 2008 and Cameron Ward, Attorney, Vancouver BC on 10 October 2008. Also see

[http://www.mpcc-cppm.gc.ca/alt\\_format/300/2007-10-12-0-eng.pdf](http://www.mpcc-cppm.gc.ca/alt_format/300/2007-10-12-0-eng.pdf)

<sup>212</sup> [http://www.opi.vic.gov.au/documents/A\\_Fair\\_and\\_Effective\\_Victoria\\_Police\\_Discipline\\_System\\_\(online\).pdf](http://www.opi.vic.gov.au/documents/A_Fair_and_Effective_Victoria_Police_Discipline_System_(online).pdf) at page 36.

<sup>213</sup> Interview with Graham Smith Manchester University 2008.

<sup>214</sup> *R v Gallbraith* (1981) 73 Cr App R 124, 127 per Lord Lane CJ.

<sup>215</sup> <http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/Home/Director+of+Public+Prosecutions/OPP+-+Prosecution+Policies+and+Guidelines+%28PDF%29>

alleged conduct occurred. If this standard is reached, the complaint should be substantiated and disciplinary proceedings initiated.

In 2009 a police investigator told the author following his investigation of a complaint in Victoria, Australia, that if an explanation exists that is consistent with the innocence of the police officer that, despite the existence of plausible and credible evidence implicating the officer, the complaint would be found to be unsubstantiated.

A concern raised in the 2006-2008 Koori Complaint Project in Victoria Australia was the issue of who was applying the standard of proof. At page 22, it noted that the standards were being applied “from the perspective of police” as to whether the weight of the evidence supported the complainant.

Decisions about the weight of evidence and prospects of success are strongly susceptible to bias. As with complaint investigation, decision-making about the strength of a case is not value neutral. Decisions about whether to substantiate must be made by an independent person.

The balance of probabilities test should apply when the complaint is being determined in a hearing. Such determinations occur in Washington DC Office of Police Complaints and Manitoba Canada, through complaints made to the Law Enforcement Review Agency. Both of these processes lead to public hearings where a finding is made, after any disputed evidence has been properly tested. In Manitoba these hearings also lead to disciplinary findings and sentences. The Manitoba model is exceptional in combining complaint adjudication and discipline in the one hearing. It is worthy of replication in this particular feature.

It is also worth noting that under European human rights law in cases where injuries occur in custody, a reverse onus of proof arises and that it is up the State to provide a “plausible explanation” for how the injuries occurred<sup>216</sup>. In *Alsayed Allaham v Greece*, the European Court said:

“The Court recalls in particular that where a person is injured while in detention or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment.”<sup>217</sup>

The onus on the State to account for injuries was similarly articulated by the Human Rights Committee at paragraph 9.2 in *Womah Mukong v. Cameroon*, Communication No. 458/1991, (1994).<sup>218</sup>

## Recommendations

<sup>216</sup> *Hugh Jordan v The United Kingdom* [2001] ECHR 327 (4 May 2001) at paragraph 103 Also see the comments by Stephen Craig in:

<http://www.guardian.co.uk/politics/2009/apr/11/g20-ian-tomlinson-death/print>

<sup>217</sup> *Alsayed Allaham v Greece*, 18 January 2007, Strasbourg Court at paragraph 27.

<sup>218</sup> <http://www1.umn.edu/humanrts/undocs/html/vws458.htm>

*12. The standard of proof applied to substantiate a complaint should be “could the evidence support a finding of misconduct by the police officers at a hearing”. In complaints where the complainant is injured, a burden of proof falls on the police to explain how the complainant was injured in custody.*

*13. Complaints should be determined on the balance of probabilities at a hearing.*

#### 4.10 Unlawful use of force

A concern raised by advocates for complainants is that some police and police investigators don't appear to understand the law regarding assault.

**Douglas King, Attorney, Pivot Law Society Vancouver, Canada**<sup>219</sup>; I think the police believe they have an exemption from the laws of assault. They believe that they have the ability to physically strike someone. They don't understand how restrictive the assault laws are. They think so long as they are not beating someone up it's not an assault. But unless they have a need they can't touch the person.

The investigators are the same, they don't see that it's an assault.

The fact that complaints found through police investigation to be unsubstantiated can be successfully litigated in civil law suits lends support to this proposition<sup>220</sup>.

The human rights standard is that a finding must be reached as to whether the use of force was justified. It is rare if ever to find a thorough analysis of the lawfulness or otherwise of force used in letters provided to complainants<sup>221</sup>. A good example of this can be found in a letter from the Office of Police Integrity to the Federation of Community Legal Centres in Victoria dated 9 January 2008. The letter's thesis was that because the use of batons had been authorised by force command against singing and dancing protesters at the Melbourne Museum in November 2006, the use of batons by police officers was automatically lawful. This is far from the analysis required to meet the standard.

<sup>219</sup> Interview by the author with Attorney Douglas King, Pivot Law Society, Vancouver, Canada on 9 October 2008

<sup>220</sup> See McCulloch & Palmer *ibid*, Graham Smith 2003 “*Actions for Damages Against the Police and the Attitudes of Claimants*” *Policing and Society* 2003, Vol 13, No. 4 pp 413-422, Clifford Zimmerman and G. Flint Taylor, “*The Interrelationship of Police Disciplinary Decisions and Police Misconduct Litigation*” *Police Misconduct and Civil Rights Law Report* May-June 1994, conversations in 2008 with Pivot Law Society, Vancouver Canada, Joey Mogel, Flint Taylor, Craig Futterman, Chicago USA, Raju Bhatt and Imran Khan UK, Dyson Hore-Lacy SC, Melbourne Australia

<sup>221</sup> I have not seen a letter following a complaint that analyses the law that applies to the allegations made.

William MacDonald, an investigative analyst in the Office of the Police Complaint Commissioner in British Columbia noted, that police tend to overlook the unlawful use of pre-emptive force in their investigations<sup>222</sup>.

The OPI letter states that police feared the peaceful protestors – there is no evidence in the letter of a legal basis to use force – that is what led to the police fear, whether lives were in danger, or whether the police assertion of fear was credible or merely a poor attempt to justify their violence. There was no analysis of whether the Victoria Police safety first principles<sup>223</sup> had been engaged prior to the use of force. These principles require the use of negotiation, containment and retreat before using force. Furthermore rather than asserting that as batons had been authorised, their use was justified, each and every individual use of a police baton must be justified. A generalised authority to use force is simply not enough. Police have authority to use force only when absolutely necessary and all other options have been exhausted. An effective investigation must critically examine whether the planning, control and training of the officers had taken into account the safety first principles and human rights principles (such as the right to life and the freedom of political expression) as well as a close consideration as to whether each strike was justified<sup>224</sup>. In this case, a least one person was seriously injured and required an ambulance. Because of the extremely serious and potentially lethal implications of the use of long arm batons, their use must be reserved for extreme situations where all other alternatives have been exhausted<sup>225</sup>. These are the kinds of questions and issues that complaint facts must be subject to. If such analysis had in fact been conducted, then the OPI letter to the Federation did not reflect this.

Another controversial example concerns the lawfulness of lethal force when a police officer perceives his or her life is in danger.

One of the Commission for Complaints Against the Royal Canadian Mounted Police's complaint analysts said that the Commission has made a decision that it will find a shooting lawful when police act without knowing for certain that the threat is real. He said that so long as the police officer perceives a threat to their life, the Commissioner will endorse their use of lethal force<sup>226</sup>.

A concern with training police officers to shoot to kill when they perceive their life is in danger is that police officers are trained to perceive their life is in danger in situations

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<sup>222</sup> Interview with William MacDonald, Investigative Analyst on 7 October 2008.

<sup>223</sup> Victoria Police Manual Instruction 101-1.

<sup>224</sup> *McCann & Others v The United Kingdom* - 18984/91 [1995] ECHR 31 (27 September 1995) at paragraph 149. <http://www.bailii.org/eu/cases/ECHR/1995/31.html>

<sup>225</sup> For example note the death of Ian Tomlinson following a baton hit by police in the 2009 G20 protests in London in April. <http://www.guardian.co.uk/uk/2009/apr/07/video-g20-police-assault>

<sup>226</sup> Communication with the author on 10 October 2008.

where an ordinary person would not have the same perception<sup>227</sup>. Often they will say they feared their life was in danger at the time they shot the person to escape liability<sup>228</sup>.

In their evidence to the coronial inquest jury one of the police officers who shot Jean Charles de Menezes in 2005 after believing him, on basis of flawed intelligence and surveillance evidence, to be a suicide bomber, said that: “Everything I have ever trained for, for threat assessment, seeing threats, perceiving threats and acting on threats proved wrong, and I am responsible for the death of an innocent man. That's something I have to live with for the rest of my life.”<sup>229</sup>

The fact is that policing is a relatively safe profession. In the US National Census of Fatal Occupational Injuries in 2000, police fatalities per 100,000 workers ranked at 12.1. This is a country where citizens can carry guns. In countries with strict gun controls, the statistics are likely to be lower. In the US, the fatality rate for police was lower than the rates for Groundkeepers (14.9), those in the agricultural industry (20.9), truck drivers (27.6), miners (30.0) and timber cutters (122.1).<sup>230</sup>

The fear of lethal violence described by police oversteps the reality of the dangers they face in their work.

The principles of the use of firearms by police is set out in the UN’s “Basic Principles on the Use of Force and Firearms by Law Enforcement” which state that police may use force “only when strictly necessary” and that when the use of firearms is unavoidable they shall minimize “damage and injury” caused<sup>231</sup>.

Any police training or planning that over states the danger a member of the public poses to police or others, trains police to kill where other options would be sufficient and effective.

Another area of concern is where police justify their actions based on something the complainant has done. For example, police will sometimes punch a person for turning their head against a police order to stay still or when they speak when ordered to be

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<sup>227</sup> Police shoot Amadou Diallo in 1999, New York, saying they thought the wallet in his hand was a gun.

<sup>228</sup> David Robinson, Attorney who has acted for both police and plaintiffs in police misconduct suits on 15 October 2008.

<sup>229</sup> Oral summary of the officer’s evidence given by the Coroner on 4 December 2008, UK. See page 58 [http://www.stockwellinquest.org.uk/hearing\\_transcripts/dec\\_03.pdf](http://www.stockwellinquest.org.uk/hearing_transcripts/dec_03.pdf)

<sup>230</sup> Kristian Williams, 2007, “*Our Enemies in Blue, Police and Power in America*” at p 20.

<sup>231</sup> [http://www.unhchr.ch/html/menu3/b/h\\_comp43.htm](http://www.unhchr.ch/html/menu3/b/h_comp43.htm) 5(b) Also see comments by Berny Maubach reported in the New Zealand news on 28 January 2008 concerning the shooting of New Zealand teenager Halatau Naitoko. <http://tvnz.co.nz/national-news/expert-calls-police-shooting-overhaul-2455508>



silent<sup>232</sup>. These punches are assaults. The use of force to compel compliance with orders that are beyond that necessary to arrest a person or to punish some one for failing to comply with an order is an abuse of authority<sup>233</sup> and unlawful.

**David Robinson Attorney, Detroit US, 15 October 2008:**

Police through their training misconstrue power for authority. My client Luis Hamilton was told to leave a venue by a police officer. He had a disability and his rate of movement was slower than the police officer liked. In sight of cameras, the police officer assaulted him. The police office had the power to ask him to leave, but no power to ask him to move faster. The police officer misconstrued his power.<sup>234</sup>

Civilian agencies must apply the law and UN principles when they analyse allegations against police rather than defer to common police practice and culture.

### **Recommendations**

*13. At the conclusion of the investigation, an investigation report explaining, in full and thorough detail the reasons for the decision should be given to the complainant and advocates involved. The reasons must contain an analysis of the law and human rights principles applying to any force that used by police.*

#### **4.11 Role of Mediation/Settlement**

If a complaint body permits mediation to occur where on the face of the allegation disciplinary or criminal charges may arise, it will fail to detect and punish abuses. Complaint investigations are not like civil proceedings, where outcomes are concern compensation. If an investigation is terminated due to the complainant having accepted a cash payment from police, as occurs in Manitoba, the States obligation to discipline and punish wrong-doing cannot be fulfilled. In an example in 2007 in NSW, an investigation into a false imprisonment and excessive use of force claim was stopped after the victim took civil action:

“The documents released to news.com.au show that the internal investigation was brief, with the investigators never bothering to identify the arresting officers. The investigators then decided to close the case because they argued the civil action could be considered a “satisfactory means of redress”.

But Stephen Blanks from the NSW Council for Civil Liberties said the investigator’s action seem like a coverup. “It’s inappropriate for officers to decline to investigate a

<sup>232</sup> Examples reported to the Flemington & Kensington Community Legal Centre in 2007 and 2008.

<sup>233</sup> *Alsayed Allaham v Greece* 2007, ECtHR 18 January 2007 para 8.  
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=813016&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

<sup>234</sup> Speech given to the National Police Accountability Project of the National Lawyers Guild, 15 October 2008.

complaint simple because they have had the opportunity to (try to) buy confidentiality,” he said. “The public has a legitimate interest in knowing the outcome of complaints and that appropriate action has been taken.”<sup>235</sup>

In some jurisdictions, complainants are forced to mediate before an investigation will occur<sup>236</sup>.

The purpose of the investigation (to detect, investigate, punish and discipline abuse) is subverted in these situations.

**Kijani Obalaye Tafari, Ella Baker Centre for Human Rights:** “Clients are very frustrated about the process. They don’t want to mediate, they don’t want to be friends, they want restitution or the officer fired. They are very dissatisfied. It’s a waste of time for them.”<sup>237</sup>

Washington DC Office of Police Complaints has adopted a sound policy concerning these issues. If it receives a complaint that would not on its face lead to disciplinary or criminal outcomes it will attempt resolution between the parties. For example, where police have lawfully arrested a person and the complaint is that the arrest was unlawful, and it is clear from the facts provided by the complainant that the arrest was lawful, then mediation is appropriate. This allows the complainant and police office in a mediated conversation to understand where the other is coming from<sup>238</sup>.

If a disciplinary or criminal breach appears on the face of the complaint, then it must be investigated or the complaint system cannot be said to be capable of detecting and punishing misconduct as is required under this standard.

A further issue arising from United Kingdom case law on purpose of investigations into allegations of ill-treatment, degrading and inhuman treatment is that they should “go well beyond the ascertainment of individual fault and reach questions of system, management and institutional culture”.<sup>239</sup> This means that complaints raising allegations of ill-treatment need hearings and on some occasions will require full public inquiries in order to meet the State’s obligation to guarantee the right to freedom from torture, cruel, inhuman and degrading treatment and punishment.

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<sup>235</sup> Activist Padriac 'Paddy' Gibson lands payout after APEC arrest | National News | News.com.au 6/03/09 <http://www.news.com.au/story/0,27574,25143875-421,00.html>

<sup>236</sup> Oakland complaint process for example.

<sup>237</sup> Interview with Kijani Obalaye Tafari, Police Accountability Project, Ella Baker Centre for Human Rights 28 September 2008.

<sup>238</sup> See an example of this in Tim Prenzler 2009 Manuscript.

<sup>239</sup> *AM & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2009] EWCA Civ 219 (17 March 2009) para 60. (the Harmondsworth case)

An example of a full public inquiry into an allegation of ill-treatment, cruel, inhumane and degrading treatment was the public inquiry into the Canadian Government's role in the torture, rendition and detention of Canadian Maher Arar. The Commission released its report on 18 September 2006<sup>240</sup>.

## Recommendations

*15. Mediations should only be considered where on the face of the complaint, no facts leading to discipline or criminal charges are evidenced. Both complainant and police must agree to mediation in these situations.*

*16. Allegations of ill-treatment should be resolved in a public hearing. Where a pattern or practice of abuse is alleged, a full public inquiry capable of not only establishing individual fault, but inquiring into institutional cultures, underlying causes and systemic failures is required.*

## 4.12 Appeals

The UN Force and Firearms Principles set out the need for the family of a victim of a shooting death to have access to administrative and judicial review of the investigation<sup>241</sup>.

In England and Wales, investigation findings and decisions by the police can be reviewed by the Independent Police Complaints Authority (the "IPCC")<sup>242</sup>. In order for the complainant to be involved and informed in the appeal, the IPCC can disclose, as a matter of presumption, the full police investigation reports and invite the complainant to comment and make further submissions before making a decision on whether to re-investigate, otherwise amend or accept the police decisions<sup>243</sup>. The provision of administrative review where the IPCC can seek further information/conduct further investigations is an important feature of the IPCC. Probably of most importance to complainants is the disclosure of investigation reports that is part of this process<sup>244</sup>. Decisions of the IPCC are also judicially reviewable through the courts.

However, as the IPCC deals at first instance with deaths in custody, access to administrative (that is merits review) of its decisions, as required under the UN principles on the use of Fire Arms are not available under this scheme. This is because the IPCC is the final layer of administrative review<sup>245</sup>. Where the IPCC has conducted the

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<sup>240</sup> [http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher\\_arar/07-09-13/www.ararcommission.ca/eng/26.htm](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm)

<sup>241</sup> See provision 22 and 23 [http://www.unhchr.ch/html/menu3/b/h\\_comp43.htm](http://www.unhchr.ch/html/menu3/b/h_comp43.htm)

<sup>242</sup> [http://www.ipcc.gov.uk/index/resources/evidence\\_reports/ipccguidelines\\_papers/ipcc\\_resources\\_caseworkmanual.htm](http://www.ipcc.gov.uk/index/resources/evidence_reports/ipccguidelines_papers/ipcc_resources_caseworkmanual.htm) Go to Appeals

<sup>243</sup> [http://www.ipcc.gov.uk/makinginformation\\_available121108.pdf](http://www.ipcc.gov.uk/makinginformation_available121108.pdf)

<sup>244</sup> Communication with Raju Bhatt in December 2008.

<sup>245</sup> See note 238.

investigation, there ought to be an administrative review option to a further independent body, such as a Court or Tribunal.

In Manitoba, a decision of the Law Enforcement Review Agency to find a complaint unsubstantiated can be judicially reviewed. However the lack of merit review is a source of considerable frustration for complainants under this scheme<sup>246</sup>.

Administrative (merit) review of investigative decisions is a critical feature of good decision-making. For example there are three layers of administrative review available for decisions in relation to social security payments in Australia. There is firstly internal review to an Authorised Review Officer. Secondly there is merit review to the Social Security Review Tribunal, thirdly, there is merit review to the Administrative Appeals Tribunal. Merit review adds a layer of accountability and transparency for contentious decision-making such as those involving police complaints decisions.

Judicial review should also be available. Restrictions to judicial review is a serious concern in Victoria<sup>247</sup>. It is incompatible with provisions of the UN Firearms Principles and at odds with underlying principles of justice.<sup>248</sup>

## **Recommendations**

*17. The decision following investigation should be open to administrative review and subsequent to this judicial review. The entire investigation evidence and reports should be made available to the complainant or family members to assist them with their appeal.*

### **4.15 Body that makes the decision about the complaint**

Complaints should be decided judicially by an independent body in a public hearing where both sides have the opportunity to cross-examine and call evidence. Examples of such hearings are under the Law Enforcement Review Agency in Manitoba Canada and the Office of Police Complaints in Washington DC, USA. Ideally this body would also make disciplinary decisions and award compensation. This issue will be discussed further in Chapters 5 and 6 and in Appendix 2.

### **4.14 Conclusion**

As we examined in Chapter 4, an adequate investigation of a police complaint, requires independent investigation of a complaint by a body culturally, practically, politically and

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<sup>246</sup> Communication with Nahinni Fontaine, Director of Justice for the Southern Chiefs' Organization, 22 October 2008.

<sup>247</sup> See Section 109 of the *Police Integrity Act* 2008.

[http://www.austlii.edu.au/au/legis/vic/consol\\_act/pia2008193/s109.html](http://www.austlii.edu.au/au/legis/vic/consol_act/pia2008193/s109.html)

<sup>248</sup> See for example the discussion in *Plaintiff S157* at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?&nocontext=1>

institutionally independent of police. As we see in this chapter, it also needs to be adequate and prompt. To ensure the adequacy of the investigation, it needs to:

- ❖ Be capable of leading to criminal and/or disciplinary outcomes.
- ❖ Be prompt so that evidence is not lost.
- ❖ Thoroughly collect all forensic, medical, video, eye-witness evidence.
- ❖ Interview police separately and immediately and ensure police evidence is uncontaminated and not the result of collusion.
- ❖ Test police evidence critically, without assisting in the police defence, and using effective questioning techniques;
- ❖ Be separate from any investigation into an allegations of a criminal offence by the complainant;
- ❖ Apply the correct standard of proof;
- ❖ Apply the correct legal tests to the evidence;
- ❖ Not unduly pressure the complainant to mediate;
- ❖ Be subject to merit and judicial review.

Many of these requirements are met by the Police Ombudsman of Northern Ireland. The models that best test the police evidence are those that put the evidence under cross-examination –such as in Manitoba and Washington DC, though it is important that the complainant is legally represented in this process.

#### 4.14 Recommendations arising from this Chapter

- 1. Police suspects and witnesses must be separated and interviewed immediately for both criminal and administrative purposes or no later than 24 hours after notification of the details of a complaint. Refusal to participate in an administrative interview must be grounds for dismissal.*
- 2. Enforceable timelines for investigations are critical. Provision of documents by police agencies must be prioritised and investigators should use warrants to collect documents themselves where any delay occurs.*
- 3. Civilian investigation should commence immediately and must thoroughly and effectively collect and preserve the evidence at a scene of a police involved death, near death or serious injury. The reporting by police of these incidents to the civilian body must be mandated. Civilian investigation must commence as soon as they are notified of complaints that reveal an allegation that could lead to criminal or disciplinary outcomes.*
- 4. In cases where a person has died in custody, independent civilian investigators should prepare the coroners report.*
- 5. Civilian investigators must investigate as if a crime has been committed.*
- 6. Properly trained doctors must be free and available to assess pain and injuries at all police stations, prisons, detention centres as well as when complainants contact the*

*complaint body and when they contact solicitors/advocates. It must be clearly obvious to people in custody that the doctors they are seeing are independent and not “working for the police.”*

*7. CCTV should be placed in all police stations and cars and data from these should be removed immediately along with all data recording systems (such as taser data, c/s spray, weapons/bullet logs, use of force forms, weapons used, log books etc).*

*8. Civilian investigators should interview complainants with respect to their complaint and not to collect evidence in relation to prior behaviour if that behaviour is under investigation by police.*

*9. Civilian investigators must not provide evidence to assist the prosecution of complainants, but, may provide evidence if the complainant consents on the advice of their lawyer.*

*10. At the first interview, police are to be told of the allegations during the interview, but not through prior written notice containing the detail of those allegations. The complainant’s statement must not be given to police, unless disciplinary/civil/criminal proceedings are to commence.*

*11. Civilian investigators must question police for the purpose of investigating the complainant’s allegations, not to assist the defence of the officers.*

*12. The standard of proof applied to substantiate a complaint is that would the evidence on one view of the facts support a finding of misconduct by the police officers.*

*13. Complaints should be determined on the balance of probabilities at a hearing.*

*14. At the conclusion of the investigation, an investigation report explaining, in full and thorough detail the reasons for the decision should be given to the complainant and any advocates involved. The reasons must contain an analysis of the law that applies to the facts and any force that was used.*

*15. Mediations should only be considered where on the face of the complaint, no facts leading to discipline or criminal charges are evidenced. Both complainant and police must agree to mediation in these situations.*

*16. Allegations of ill-treatment should be resolved in a public hearing. Where a pattern or practice of abuse is alleged, a full public inquiry capable of not only establishing individual fault, but inquiring into institutional cultures, underlying causes and systemic failures is required.*

*17. The decision following investigation should be open to administrative review and subsequent to this judicial review. If the complainant is considering administrative or*

*judicial review, the entire investigation evidence and reports should be made available to them to assist them with their appeal.*

# Chapter 5

## Public Scrutiny

### Introduction 5.1

The fourth human rights standard identified by the Rapporteur to the European Commission on Human Rights is as follows:

“Public scrutiny: accountability is served by open and transparent procedures and decision-making at every stage of the determination of a complaint against police;”<sup>249</sup>

In *Anguelova v Bulgaria* this principle was put: “there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.”<sup>250</sup>

This chapter examines three issues.

1. The public’s role and right to scrutinise data and information relating to police complaints.
2. Transparency in individual decision-making.
3. A brief look at examples of public investigative/adjudicative inquiries.

The chapter concludes with recommendations.

Issues concerning the complainant’s right to investigation reports and the evidence collected during the investigation of their allegations, also involve issues of transparency. These will be addressed in Chapter 6.

While transparency is mandated by the human rights standards, access to information is also implicit in the Australian Constitution’s establishment of Australia as a democracy<sup>251</sup>. Transparency and public scrutiny of data and decision-making are not merely best practice, but essential principles of representative democracy. Moreover, as public inquires and investigative journalism has repeatedly shown, transparency and public scrutiny are frequently only true form of accountability that exists against government and police misconduct<sup>252</sup>.

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<sup>249</sup> <https://wcd.coe.int/ViewDoc.jsp?id=1417857&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>

<sup>250</sup> *ECHR 2002* at para 40.

<sup>251</sup> See *Open Government, a Review of the Federal Freedom of Information Act* Report by the Australian Law Reform Commission at paragraph 2.4 <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/2.html>

<sup>252</sup> For an excellent example see *the Guardian’s* coverage of the police involved death of Ian Tomlinson as a result of the policing of protests to the G20 meeting in April 2009 in



## 5.2 Public Scrutiny of Complaint Data

In Winnipeg the local papers report the daily crime statistics. These statistics are derived from non-investigated reports of crime rather than the figures of the number of charges or even successful prosecutions of crime<sup>253</sup>. In addition, once a week there is a report by the local police chief published by the paper. Through these reports, the public is kept well informed of trends in crime. Winnipeg Mayor Sam Katz describes the reporting of these details as “a sign of unprecedented transparency and openness”<sup>254</sup>.

In contrast to the reporting of crime, there is no equivalent reporting in the Winnipeg Press of the number of complaints against police every day or the locations where these incidents occur. Nor is there a weekly report in the papers from human rights defenders or the Law Enforcement Review Authority into current themes arising in police misconduct allegations<sup>255</sup>.

Dr Craig Futterman from the University of Chicago notes:

“When someone is arrested in the US, their identity is reported and what they are charged with is known... You would think that where a public official, a police officer is charged, or a complaint filed that there would be an even greater public interest in this information.”

Futterman argues that when a public official is charged with the abuse of public trust, there is no greater public interest than in knowing who it was, where it happened, and the causes and patterns that are emerging in official misconduct more generally. He describes as scandalous, the denial of this information to the public and that this data is kept hidden from the scrutiny of the courts. He notes the power that police and governments have over whom they choose to give information. For example, there is considerable incentive for governments to give information to people who will write favourably of them. In contrast, those who are prepared to write highly critical pieces when the need arises, are starved of government and police sources. This is a considerable problem for good independent, investigative journalists who operate in the highly competitive media business<sup>256</sup>.

Futterman notes that one of the problems in holding police and officials accountable in Chicago has been the failure of the press. They might report a one-off scandal, but not ongoing persistent problems. When a new complaint system starts operating they stop

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London. <http://www.guardian.co.uk/commentisfree/2009/apr/11/police-surveillance-marina-hyde/print> <http://www.guardian.co.uk/uk/2009/apr/07/video-g20-police-assault>

<sup>253</sup> <http://www.winnipeg.ca/crimestat/interpretation.stm>

<sup>254</sup> [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070202/crimestat\\_070202?s\\_name=&no\\_ads=](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070202/crimestat_070202?s_name=&no_ads=)

<sup>255</sup> The Law Enforcement Review Agency does however put complaint rates and cases studies into their annual report.

<sup>256</sup> Communication with the author on 6 October 2008.

reporting, appearing satisfied by claims that the problems have been solved. However it is the period after these claims are made when intense public scrutiny is necessary to ensure the agency is working as it should<sup>257</sup>.

The Guardian Newspaper's regular investigative analysis of the UK's Independent Police Complaints Commission over 2007-2009 reveals the critical importance this form of accountability. The intense public scrutiny its coverage permitted on the decision-making into who and how the investigation was conducted into Ian Tomlinson's police involved death during the G20 meeting in London in April 2009 has revealed some critical flaws in the investigation processes and shone light on the issue of access to legal aid for victims of police violence<sup>258</sup>.

In Chicago there have been numerous scandals around police misconduct. One of these scandals involved the systematic torture of African-Americans to gain confessions to a range of serious crimes in the 1980s. The torture included the use of an electric shock-box, metal prods, plastic bags, handcuffing and forcing people against electric heaters, beatings and mock executions. Some 100 or more African Americans were jailed for years as a result of confessing to crimes they never committed. Some are still in prison now despite the extremely serious and documented pattern of torture by detectives. The details of the torture and its systematic use has been established in numerous lawsuits and appeals<sup>259</sup>.

While some of this particular scandal has been well reported by the press, the persistent and on-going mistreatment of Chicago residents is not covered<sup>260</sup>.

Nicola Rollock, in a 2009 report by the Runnymede Trust in the UK concerning the impact of Stephen Lawrence Inquiry on UK policing of black and ethnic minority communities 10 years later said:

**Public scrutiny should continue beyond the publication of an Inquiry report -**

Government should be obliged to ensure greater coherence and transparency in the ways in which recommendations emanating from Public Inquiries are implemented and followed up. In addition, all evidence submitted to a Public Inquiry should be made available to the public within a minimum period of time.

Daily or weekly reporting to the public of complaints against police would be a powerful and regular indicator of police integrity. Coverage of their outcomes and disciplinary/prosecutorial action taken and civil litigation results would also enhance the public understanding of the extent of the issue and the State's effectiveness in detecting, deterring and punishing police misconduct.

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<sup>257</sup> Communication with Dr Craig Futterman on 6 October 2008.

<sup>258</sup> <http://www.guardian.co.uk/politics/2009/apr/11/g20-ian-tomlinson-death/print>

<sup>259</sup> <http://www.peopleslawoffice.com/news/articles/13/> Also see John Conroy, 2000,

*Unspeakable Acts, Ordinary People*, p26.

<sup>260</sup> Dr Criag Futterman conversation with the author on 6 November 2008.

The 1989 Queensland Fitzgerald Inquiry into government and police corruption and misconduct stated:

It is obvious....that confidentiality....provides a ready means by which a Government can withhold information which it is reluctant to disclose. A Government can deliberately obscure the processes of public administration and hide or disguise its motives. If not discovered there are no constraints on the exercise of political power. The rejection of constraints is likely to add to the power of the Government and its leader, and perhaps lead to an increased tendency to misuse power.

The risk that the institutional culture of public administration will degenerate will be aggravated if, for any reason, including the misuse of power, a Government's legislative or executive activity ceases to be moderated by concern for public opinion and the possibility of a period in Opposition....

The ultimate check on public maladministration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of Parliament and public administration to manipulate, exploit and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended. Secrecy and propaganda are major impediments to accountability, which is a prerequisite for the proper functioning of the political process. Worse, they are the hallmarks of a diversion of power from the Parliament.

Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect<sup>261</sup>.

Tracy Siska, the President of the Chicago Justice Project sees the need for the public, government and police leadership to be provided with "undeniable, unquestionable information" about police decisions around the introduction of new weapons<sup>262</sup>, police misconduct, crime and prosecutions and any attempts at concealment<sup>263</sup>.

The Project's guiding principle: "is that access to information is the foundation for any meaningful reform to the criminal justice system."<sup>264</sup>

The aim of the Chicago Justice Project is to provide unbiased, full information about all aspects of policing and the criminal justice system. This is exactly the kind of information that should be provided by government agencies. Claims by government agencies that they are in fact providing full and unbiased information must be treated with some cynicism. Due to the nature of government and its aim of retaining power, it is non-government agencies and the public that instead must hold police and government accountable. To do this, they require unfettered access to information.

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<sup>261</sup> Fitzgerald Inquiry p126.

<sup>262</sup> <http://www.chicagojustice.org/blog/> 1 September 2008 – a report on the decision to use M4 Assault weapons at a school in Chicago.

<sup>263</sup> Interview with Tracy Siska on 5 November 2008, Chicago.

<sup>264</sup> <http://www.chicagojustice.org/>

Futterman argues that, “the public has a deep interest in how police abuse complaints are investigated and treated by public officials.”<sup>265</sup>

After sustained litigation to obtain documents, he and his research team conducted an analysis of investigations into complaints against the police. He and his research team found:

“In more than 85% of the Chicago Police Department police abuse investigations analyzed, the accused officer was never even interviewed. In many of the remaining 15% of the investigations, the Department determined that the complaint was “not sustained” without ever requesting *any* information from any of the officers on the scene. In the instances in which the charged officer was contacted by an investigator, the contact usually occurred months after the incident. The officer was then provided with the specifics of the charges, including the name of the complainant and victims, and given, on average, an additional seven to ten days to return a brief “To/From” report, generally denying the allegations. In some cases, the charged officer took longer than a month to respond to the charges. The months-long delay between the incident and required response from the accused creates opportunities for collusion. It was not uncommon to see a group of officers submit nearly verbatim responses, even mimicking the same typographical errors. Following the receipt of these form denials, the complaints were almost invariably “not sustained” by the Department. Canvasses were rarely conducted. Investigators rarely even visited the scene of the incident. Physical evidence was not preserved, much less tested. Recordings of “911” calls of police abuse were routinely destroyed. Police and civilian witnesses were rarely interviewed in person. While investigators frequently ran background checks on civilian complainants and witnesses who corroborated police abuse, they did not consider the complaint histories of any Chicago police officer involved in the investigation<sup>266</sup>.

This extraordinary account of inadequacies and bias in the investigation of complaints was possible following full access to investigation information. While ever information about investigations is with-held from public scrutiny, corrupt, inadequate and collusive practices in the process can go unchecked.

Retired Victorian Policeman Paul Delianis told *the Age*’s Karen Kissane in an article reported on 7 February 2009 that “The thing that has curtailed corruptions more than anything else has been the media, I think. Reporting. Investigative journalists.”<sup>267</sup>

The regular reporting of complaints made and, disciplinary and prosecutorial outcomes is

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<sup>265</sup> Interview with Dr Craig Futterman, Chicago University, 6 November 2008.

<sup>266</sup> Craig Futterman, 2008, The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department’s Broken System, *DePaul Journal for Social Justice*, Vol 1 Number 2 at page 18, 19.

<sup>267</sup> <http://www.theage.com.au/national/another-bloody-underbelly-20090206-7zz9.html?skin=text-only>

one of the many critical ways needed to fulfill this function. There is every reason for transparency of this accumulated data.

When information and data is released, it must be in full so that selective reporting of information that artificially enhance the appearance of police and government compliance with standards, human rights and inquiry recommendations does not occur.

When complaint investigation agencies are wary of their funding or sustainability and when they need to maintain good relationships with police, police unions and police command in order to get the information they need, they too will be reluctant to report critical information about policing. When investigating agencies are the police, this issue is of even greater concern. Some independent investigating bodies with particularly cosy relationships with their policing partners report police misconduct only once it has been disciplined and prosecuted. Given the rareness of these outcomes, systemic problems such as the everyday abuse of human rights and poor investigative practice do not come to light through these means.

*1. Daily or weekly data on complaints against police should be reported in the daily papers. Weekly or fortnightly analysis from the police complaint agency and accountability experts and human rights bodies should be publicly reported describing current trends in complaints. Disciplinary action, civil litigation and prosecutions against police should all be regularly reported. Inquiry recommendations and their implementation should also be fully reported.*

### 5.3 Transparency in individual decision-making

According to complainants, advocates and many complaint body staff, transparent decision-making is the most important aspect of an effective police complaint mechanism and ensuring public support for it. It is also of critical importance in meeting human rights standards.

Some complaint handling/investigation bodies are exempted from Freedom of Information Act requirements<sup>268</sup> and are entitled to withhold all information. On the other hand, others have units set up specifically to facilitate the provision of this information<sup>269</sup>.

*2. Investigation bodies should be subject to freedom of information requirements and establish units to meet the public demand for requests of information.*

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<sup>268</sup> See for example the Office of Police Integrity in Victoria, Australia. [http://www.austlii.edu.au/au/legis/vic/consol\\_act/pia2008193/s51.html](http://www.austlii.edu.au/au/legis/vic/consol_act/pia2008193/s51.html)

<sup>269</sup> See for example the Independent Police Complaints Commission for England and Wales. <http://www.ipcc.gov.uk/index/resources/foi.htm>

*3. Complaint data and outcomes as well as trends should be reported in full on the investigation body websites and its annual reports.*

## 5.4 Public investigations

Inquests and some investigations into police human rights abuses do occur in public through a public inquiry. For example, in Washington DC, and in Manitoba, the investigation of a complaint against police and its adjudication is routinely conducted publicly<sup>270</sup>. There is power in other models for investigative hearings to be public too. While many bodies rarely exercise these powers, when they do, these models, offer an increased level of public scrutiny of investigations.

For example, in Washington DC, the Office of Police Complaints routinely refers public complaints after an initial investigation to public adjudication. In these forums, both police and complainants can, through legal representatives, cross examine witnesses and make submissions. Decisions are published on their website.

*4. Adjudication of complaints and disciplinary proceedings should occur in public. Results of adjudications should be reported publicly via media and websites.*

## 5.5 Public Disciplinary hearings

If a complaint investigation has been substantiated, there are two possible further hearings necessary. The first hearing needed will be a disciplinary hearing. It should also be public. The other kind of hearing that could occur is a criminal prosecution.

In Manitoba, both adjudicative and penalty hearings occur in public and decisions are published on the Law Enforcement Review Agency website<sup>271</sup>. This is a significant step forward in transparency and accountability.

## 5.6 Recommendations arising from this Chapter

*1. Daily or weekly data on complaints against police should be reported in the daily papers. Weekly or fortnightly analysis from the police complaint agency and accountability experts and human rights bodies should be publicly reported describing current trends in complaints. Disciplinary action, civil litigation and prosecutions against police should all be regularly reported.*

*2. Investigation bodies should be subject to freedom of information requirements and establish units to meet the public demand for requests of information.*

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<sup>270</sup>[http://policecomplaints.dc.gov/occr/frames.asp?doc=/occr/lib/occr/pdf/opc\\_fy07\\_annual\\_report.pdf](http://policecomplaints.dc.gov/occr/frames.asp?doc=/occr/lib/occr/pdf/opc_fy07_annual_report.pdf)

<sup>271</sup><http://www.gov.mb.ca/justice/lera/index.html>

*3. Complaint data and outcomes as well as trends should be reported in full on the investigation body websites and its annual reports.*

*4. Adjudication of complaints and disciplinary proceedings should occur in public. Results of adjudications should be reported publicly via media and websites.*

## Chapter 6

# Effective participation of the victim

### 6.1 Introduction

Effective participation of the victim is the 5<sup>th</sup> principle of effective investigation. The European Rapporteur on Police Complaints, identifies it as follows:

*“in order to safeguard his or her legitimate interests the victim is entitled to participate in the process.”*<sup>272</sup>

Complainants perform a vital public service in filing complaints against police, without which the State would be unable to fulfil its obligation to discipline and punish perpetrators of human rights abuses. The transmission of information is critical at the time a complaint is lodged and on an ongoing basis throughout its investigation. It is the complainant who knows what happened and has critical background information and insight. As a result they are well placed to assist and scrutinise investigations. An effective investigation requires victim involvement, not just for the sake of victims' rights, but because victims are critical in ensuring the investigation occurs and that it has the capacity to get to the truth of what occurred and hold police, who abuse their power, to account. The victim must be central to an investigation process.

This chapter will examine the role of the victim in the complaint process and in particular:

1. Inhibitions on the filing of a complaint against police.
2. Concerns raised by legal practitioners about complaint investigation.
3. Protections for victims.
4. The provision of information to the victim.
5. The role of the victim in the investigation process and adjudicative hearings.
6. Withdrawal of complaints

This Chapter concludes with recommendations.

### 6.2 Inhibitions on filing complaints

The very first part of the complaint process is the filing of a complaint by a victim.

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<sup>272</sup> Graham Smith, (2008) “European Commissioner for Human Rights Police Complaints Initiative” – 172 JPN 399, pp 1,2.



In Victoria, as in many places in the world, the State's mechanisms for handling complaints against the police do not inspire confidence in the community and people are reluctant to complain.

The Flemington & Kensington Community Legal Centre's experience is that complaints to the police complaints authority are unsuccessful. Complainants and their families – mainly African Australian refugees, continue to experience high levels of fear and continue to report police misconduct to the centre. The legal centre has logged over 50 complaints, the majority involving allegations of police assault since October 2005. However, its clients no longer want to make complaints.

These experiences reflect those making complaints in Indigenous communities in rural parts of the State. A 2006-2008 report into Indigenous views of the complaint system by the Indigenous Justice Unit of the Department of Justice notes:

“Many Indigenous people were of the view that making a complaint about police behaviour was futile and, in some cases, counter-productive. Many within the Indigenous Community are of the view that successfully pursuing a complaint against police is especially difficult. The Koori community is largely disillusioned with the system and significant work is needed to develop confidence, which can only be achieved if the process is reformed and Koori-friendly interventions are built into the process. It would be reasonable to expect low levels of complaints to continue until these changes are made.”

Studies across in the United States indicate that only 1 in 10 people who feel violated by police complain<sup>273</sup>. I suggest the proportion of people who complain is in fact well below this number. Anecdotal evidence from solicitors and workers at the Moreland Community Legal Centre, Fitzroy Legal Centre, Mental Health Legal Centre, Victorian Aboriginal Legal Service and Youthlaw in Victoria indicate that despite the reports of police caused injuries, assaults, false imprisonment, thefts and unlawful strip searches, people who are willing to complain are a tiny fraction of the overall number. For example, despite some serious injuries not one of the 20 complainants seen by the Moreland Community Legal Centre in 2007- 2008 submitted a formal complaint.<sup>274</sup>

The reasons people don't make formal complaints are:

- a) Lack of faith in the complaint system;<sup>275</sup>
- b) The fact that complaints will be investigated by police officers;<sup>276</sup>

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<sup>273</sup> *Oakland Police Survey*, Pueblo, Tryon Woods, October 2006, Mathew J Hickman , *Bureau of Justice statistics Special Report, US Department of Justice*, NCJ 210296, Complaints about Police Use of Force 1 (June 2006).

<sup>274</sup> Communication with the author in February 2009.

<sup>275</sup> 2008 Report NY Lawyers for the Public Interest “No Place Like Home”.

<sup>276</sup> Interview with a Complaint intake worker at the RCMP Office of Public Complaints in Vancouver in October 2008.

- b) Hostility by the complaint system, or a process that does not support or assist complainants;<sup>277</sup>,
- c) Fear of physical retribution or increased harassment;<sup>278</sup>
- d) To reduce the risk that cover charges will be laid;<sup>279</sup>
- d) That communities have come to expect police mistreatment and do not trust the system to uphold complaints that police are acting unlawfully<sup>280,281</sup>,
- e) Lack of faith in any institutional commitment to do something about the police violence;<sup>282</sup>
- f) Lack of legal support;<sup>283</sup>
- g) The lack of independence between police and complaint system<sup>284</sup>,
- h) Visa status<sup>285</sup>,
- i) Marginalisation- (for example sex workers, drug users, illiteracy, language/cultural barriers, youth, informants, muslims, indigenous people or complaints involves police sexual abuse<sup>286</sup>);
- j) the victim has been incarcerated;<sup>287</sup>
- k) the victim has been deported;<sup>288</sup>
- i) A preference to use civil proceedings due to significantly better outcomes;<sup>289</sup>.
- j) inaccessibility;<sup>290</sup>
- k) time lag;<sup>291</sup>

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<sup>277</sup> Interview with Professor Locke Bowman from Northwestern University Chicago November 2008,

<sup>278</sup> Interview with Tracy Siska, Chicago Justice Project 5 November 2008

<sup>279</sup> Some clients of the FKCLC reported this reason not to formally complain.

<sup>280</sup> Interview with Dr Craig Futterman University of Chicago

<sup>281</sup> Interview with Tracy Siska, Chicago Justice Project.

<sup>282</sup> Interview with a client of the Flemington & Kensington Community Legal Centre in 2007.

<sup>283</sup> Interview with Investigator at the LERA Commission in Winnipeg, Manitoba, October 2008.

<sup>284</sup> Interview with a Complaint intake worker at the RCMP Office of Public Complaints in Vancouver, but repeated throughout the US, Canada, UK and Victoria.

<sup>285</sup> Javier Maldonado, Attorney, National Lawyers Guild, Police Accountability Project talk given on 15 October 2008

<sup>286</sup> Interview the Civil Rights Attorney Andrea Richie, New York

<sup>287</sup> Michela Bowan and Juliene James of the Vera Institute speaking at the National Association of Civilian Oversight of Law Enforcement Conference in Cincinnati, US 6 October 2008.

<sup>288</sup> Medical Justice, UK, 10 December 2008 meeting in the House of Commons.

<sup>289</sup> Mara Verheyden-Hillard, Attorney, Washington, 16 October 2008

<sup>290</sup> Report on Complainant Non-cooperation with the Complaint Process, Northern Ireland Police Ombudsman, October 2006 pp 5,6.

<sup>291</sup> Ibid

Many of those who are assaulted by police become conditioned into silence through a view that; “what’s complaining going to do anyway?”

Complainants provide a benefit to the community. When a person makes a formal complaint, there exists a potential for detecting, investigating, disciplining and prosecuting police engaged in misconduct and the reform of systemic failures in police practices.

However, complaint systems expose complainants to considerable risks. Without proper safeguards, they increase complainant’s risks to false charges, police harassment and can prejudice civil action they may later be the position to take<sup>292</sup>.

As a complainant is likely to get a better result through taking civil action rather than making a complaint<sup>293</sup> there is little incentive for a complainant to lodge a complaint.

In order to increase the public faith in the efficacy of complaining, it is essential that the complaint system is not only functional but also protective of complainant interests rather than their traditional focus on the rights of police.

### 6.3 Legal practitioner views on complaint systems

One way to increase the use of complaint systems is to address concerns raised by legal practitioners. Many of these concerns are reflected in earlier chapters in this report. Solicitors have fiduciary obligations to protect their clients. This means that if they believe it is against their client’s best interest to make a complaint, they will advise against using the process. Unless their concerns are addressed by complaint agencies, formal complaints filed with an agency will represent a tiny fraction of the real problem.

Many legal practitioners advise clients against lodging complaints. For example, an attorney I spoke to in Chicago, US said that advising a client to file a complaint was tantamount to professional negligence.

In one Melbourne legal centre I visited, solicitors require their clients to sign a form saying that they acknowledge the physical and legal risks they face in making a complaint before they will file a complaint on their client’s behalf.

In Vancouver, Canada, legal centres are formally boycotting the complaint handling system due to its poor outcomes for complainants and lack of independent investigation<sup>294</sup>.

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<sup>292</sup> For example, complainants in New York are required to make a statement to police and a separate statement to the civilian review board when they make a complaint. Inconsistencies will hamper any civil action.

<sup>293</sup> Mary Seneviratne, 2004 “Policing the Police in the United Kingdom, *Policing & Society* Vol 14, No. 4 December 2004, at page 331

In London, solicitors have walked off the board of the Independent Police Complaint Commission in dismay over its delays and bias<sup>295</sup>.

### **Recommendation**

- 1. Views about the adequacy of the complaint body should be obtained from complainants and solicitors and improvements made in line with suggestions.*

#### *6.3.1 What do complainant advocates specify is the problem?*

Dr Locke Bowman of the Northwestern Law School MacArther Justice Centre in Chicago identified three specific concerns:

1. Making a complaint to a complaint body exposes the plaintiff to making another statement of their evidence.
2. When complaint bodies take a statement from a complainant the person taking the statement is hostile and interested in undermining the complainant's story.
3. There does not appear to be a lot to gain from the process, given the low substantiation rates<sup>296</sup>.

A forth difficulty identified by a Washington DC Attorney in October 2008, was that the statement given to the police complaint authority by the complainant is then immediately provided to the police. This permits police to construct their responses with other police officers before attending the complaint handling body to account.

A fifth issue is the risk of cover charges and further harassment and victimisation by police and police investigators who assist police in the complainant's prosecution. In a case in the US, a complaint led to the person's deportation before the matter was finalised<sup>297</sup>.

A sixth concern raised by solicitors is that the return letter from the complaint body is re-traumatising. As Dr Bowman says that you are not given adequate reasons, you are locked out as if you don't matter, when you should be central to the process.

Dr Bowman says, "there needs to be a way of respecting the needs of the investigation while respecting the litigation tactics and concerns of complainants. It requires some good will between both sides. I would like to find out a way of making it work."

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<sup>294</sup> See the January 2009 Press Release put out the by the British Columbia Civil Liberties Association.

<sup>295</sup> <http://www.guardian.co.uk/politics/2008/feb/25/police.law1>

<sup>296</sup> Interview in November 2008 with the author.

<sup>297</sup> Javier Maldonado, Attorney, National Lawyers Guild, Police Accountability Project talk given on 15 October 2008

The concerns raised by solicitors about complaint investigation processes are also raised and by those who have made complaints without the assistance of a solicitor. Unrepresented complainants report to community legal centres in Victoria hostile, rude, inflexible and accusatory attitudes by investigators as well as pressure to drop the complaint<sup>298</sup>.

The distrust between complaint bodies and victims and their solicitors is a world-wide phenomena. In my opinion solicitor and complainant concerns are a strong and valid indicator of failures that exist in the investigation process.

Police complaint bodies, if truly interested in detecting and investigating police misconduct, have the same interest as complainant's and their solicitors. There should be a level of mutual respect between these players in the police accountability system.

This is unfortunately not the case. Instead, in some cases, the closest relationships seem to be between the complaint bodies and the police. In Victoria, where the police and the Office of Police Integrity conduct joint operations, the maintenance of this primary relationship is central to their business.

A solicitor discussing the Ombudsman in Victoria, prior to the Ombudsman's appointment as Director of the Office of Police Integrity says:

“The Ombudsman is supposed to be considered to be independent of the police and one of the problems is that [he] is so dependent on the Ethical Standards Department and the Victoria Police Force that I think [he] has no lost touch with the other parts of the community.”<sup>299</sup>

In 2005, Graham Smith analysed police complaint and substantiation rate data in the UK over a 40-year period<sup>300</sup>. During this time four statutory reforms to complaint handling processes occurred. Each reform was precipitated in part by an inquiry or serious scandal in policing but also a build up in dissatisfaction<sup>301</sup>. Noting the continued dissatisfaction of complainants and solicitors despite these reforms, Smith concludes that:

“the search for effective complaints systems is severely damaged by under representation of complainant's interests in the reform process and by those responsible for procedures.”<sup>302</sup>

How might some of the concerns raised by legal practitioners and complainants be addressed? Chapter 3 discussed the need for complaint bodies to be culturally

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<sup>298</sup> Discussions with victims by the author.

<sup>299</sup> McCulloch & Palmer 2005 at p 96.

<sup>300</sup> Graham Smith 2005, A Most Enduring Problem: Police Complaints Reform in England and Wales, *Jnl Soc. Pol.* 35, 1, 121-141.

<sup>301</sup> *Ibid* at 136.

<sup>302</sup> *Ibid* at p 137.

independent and willing to act. In the next paragraphs I discuss some processes that are needed to overcome complainant concerns and better involve complainants.

### *6.3.2 Provision of Statement by Complainants*

When police conduct investigations of police, complainants are often very reluctant to attend and give statements to police. In the UK, to overcome this problem police investigators accept statements made by complainants through their solicitors<sup>303</sup>. On the other hand, in Victoria and Chicago, complaints bodies (or police) regularly terminate investigations when then complainant refuses to give evidence in person to them<sup>304</sup>. While it is preferable that investigators take the statements in person to enable them to reach conclusions about credibility, it is the police whose credibility must be examined through investigation.

Complainant reluctance to speak may be reduced when the investigation is conducted by civilians. In Northern Ireland, where the investigators have the support of the public, there are clear protocols guiding at what stage in the process and how much of the complainant evidence will be provided to the police regarding the complaint.

The focus on complainant criminality is one reason why complainants are reluctant to give statements to police. Many complainant advocates have noted that police investigations are like interrogations. They also say that through distortion, omission or intimidation police often fail to document the evidence as told by their client<sup>305</sup>.

In Victoria, people already distrustful of police based on the experience about which they are complaining, are loathe to go anywhere near an investigating police officer with an account of their experience<sup>306</sup>. Many who do submit to the process walk away traumatised by this experience in itself. A fully independent and complainant oriented investigation body is less likely to suffer from these serious concerns.

Obviously if a matter goes to a disciplinary, criminal or civil trial all witnesses will be required to submit evidence in person. Re-examination is built into these processes to reduce the impact of distortion.

## **Recommendations**

*2. Complainants must be permitted to provide evidence through an advocate if they so wish. Complaint bodies should concentrate on the allegations against police rather than any prior criminality alleged against the victim.*

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<sup>303</sup> See for example *R (on the application of Deborah Clare) v IPCC and others* [2005] EWHC 1108 (Admin)

<sup>304</sup> Interview with Locke Bowman, MacArthur Justice Centre, Chicago.

<sup>305</sup> [www.communitylaw.org.au/public\\_resource\\_details.php?resource\\_id=1218](http://www.communitylaw.org.au/public_resource_details.php?resource_id=1218) - p 12

<sup>306</sup> Communications with many clients of the Flemington & Kensington Community Legal Centre

### 6.3.3 The need to outreach to complainants

A frequent concern raised by advocates and surveys of complainants is lack of accessibility of investigating officers. Complainants are not always able to attend city offices or arrange childcare. Office based investigation does not discharge the burden on the state to adequately investigate. Similar issues surround complainants who are in custody or incarcerated or those who are otherwise unable to travel to the complaint bodies office. It is essential that complaint bodies ensure outreach exists to people in custody. Capturing complaints from those who have been deported also requires considerable thought. Some complaints in the US concern treatment of people at border crossovers. Without outreach to these locations, accountability for allegations of human rights abuses that occur in these locations will be non-existent.

People who are in vulnerable positions such as those who work in the sex-trade or illegal drug industry or homeless people also face serious barriers in making complaints<sup>307</sup>. Outreach to street setting and brothels are necessary to capture the issues arising for people in vulnerable situations.

Language barriers and illiteracy are also critical barriers and need to be managed through interpreters and oral communication of complaints to complaint bodies. On-line complaint forms do not sufficiently manage this accessibility issue.

Recommendations:

*3. Complaint bodies must provide outreach and support for people in vulnerable groups such as sex workers, drug users, homeless people, women, young people, muslim, refugee and migrant communities, prisoners and queer communities. (including multilingual support).*

*4. Civilian investigators must attend prisons, police stations, holding cells, immigration detention centres/ border areas and rural communities where police work and provide contact numbers and record complaints in these facilities and regions. Civilian investigators must be active in pursuing evidence and must be mobile.*

*5. Information must be available in multiple languages and by podcast/radio broadcasts and talks must be given to communities who would not otherwise access this information.*

## 6.4 Protection of Complainants

Where complainants are incarcerated or subject to serious targeting by police, means to protect them, such as providing safe houses, new identities or changing the location of their incarceration is essential<sup>308</sup>.

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<sup>307</sup> Communication with Andrea Richie, New York Attorney in November 2008.

People whose visa status is vulnerable will need assistance. Protections such as confidentially and special visas that will enable a person to complain without risking deportation is necessary. A person's vulnerability to deportation leaves them exposed to exploitation and abuse by police aware of their vulnerability<sup>309</sup>.

Finally the risks of cover charges and harassment require serious consideration. Where the police charge a person after notification of a complaint, this should be treated with great suspicion and investigated for misconduct in and of itself.

Article 13 of the United Nations Convention Against Torture requires that States:

“ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of his (sic) complaint or any evidence given.”<sup>310</sup>

REDRESS, an organisation based in London notes:

“A person who complains about torture or ill-treatment may subsequently be charged with an offence related to the alleged torture, for example having resisted police officers, or any other offence, which may related to the initial arrest or a separate incident. Bringing such charges will constitute a violation of the right to complain about torture if the charge is unfounded and the state authorities take such action in response to the complaint in order to deter the person from pursuing the complaint further. The obstruction of an investigation intended by such conduct will also constitute a violation of the state's duty to investigate a complaint promptly, impartially and effectively. The same reasoning applies to unfounded charges being brought against any person in anticipation of any complaint if it is clear that its purpose is to deter him or her from pursuing a complaint.”<sup>311</sup>

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<sup>308</sup> While this report does not focus on complaints against prison guards, prisoners who complain about treatment are at serious risks while they remain in the custody of those they complain about: communication with Donna Williams, Darebin Community Legal Centre 2008.

<sup>309</sup> Incite! Women of Color Against Violence, “Law Enforcement Violence Against Women of Colour & Trans People of Police” p13 (available at [www.wincite-national.org](http://www.wincite-national.org))

<sup>310</sup> <http://www.hrweb.org/legal/cat.html>

<sup>311</sup> REDRESS, February 2009, “*Memorandum on the compatibility of the practice of bringing fabricated charges with international human rights standards, national jurisprudence and international standards on policing*” in Recovering the Authority of Public Institutions.

<http://www.redress.org/documents/Sri%20Lanka%20report%20Feb09.pdf>



People who filed complaints against police with human rights commissions are protected by victimisation clauses. These clauses make it an offence to victimise someone who has complained<sup>312</sup>. As well as other strategies, anti-victimisation clauses must be built into police complaint legislation.

## Recommendations

*6. Complainants need to be protected once they have lodged a complaint through the provision of special visas, removal from places where they are being harassed (including in prisons) to safe places, legislation making it an offence to victimise a complainant and other forms of protections provided to whistle blowers.*

*7. Charges laid after a complaint is made must be scrutinised for possible police misconduct in and of themselves.*

### 6.5 Provision of information to the complainant

Victim involvement requires that victims are given access to investigation information and are regularly updated of the progress of the investigation so that they can make suggestions and offer further information. Unfortunately, very few complaint bodies comply in practise with these requirements.

**Cameron Ward, Attorney, Vancouver Canada:** “The shooting [of a young man killed by the police] occurred on 13 October 2006, almost exactly two years ago. Neither the family nor I have received a single piece of information from the coroner or the police and I was retained even before the funeral and I have been asking since then. We don’t have the autopsy reports we don’t have the police investigation reports, we don’t have a scrap of paper and I have been writing regularly, asking for the material so I can prepare for the inquest. Meanwhile the police lawyers I am sure, have access to the files.”<sup>313</sup>

#### **Commonwealth Ombudsman’s Review of AFP complaint handling in 2008:**

“At the first review, issues of concern were inconsistent practice in acknowledging complaints; uninformative and, in some cases, abrupt outcome letters to complainants; and a failure to provide information to complainants about the role of the Commonwealth Ombudsman.”<sup>314</sup>

<sup>312</sup> See for example section 96 and 97 of the *Equal Opportunity Act 1995*  
[http://www.austlii.edu.au/au/legis/vic/consol\\_act/eoa1995250/s97.html](http://www.austlii.edu.au/au/legis/vic/consol_act/eoa1995250/s97.html)

<sup>313</sup> Interview by the author with Cameron Ward, Attorney, British Columbia, Canada on 10 October 2008.

<sup>314</sup> Report on Commonwealth Ombudsman’s Activities under Part V of the AFP Act at page 8.

In New York, the Civilian Review Board says that it can't release information to complainants because the complaint and the details of the investigation form "part of the police officers internal employment records."<sup>315</sup>

The issue of how documents are characterised is good example of the phenomena of agency capture described by Tim Prenzler referred to in Chapter 3. In this case, police interests have pressured the complaint body to override the public and particularly the complainant's interest in transparency.

**Douglas King, Attorney, Pivot Law Society Vancouver, Canada** October 2008 "[After the police investigation]...you get a written report about a page or two. Its verbatim from the officers, you don't get the video or anything like this.

It's re-victimising. A lot of the time you get, "this is what you did wrong." The officer responded because you were drunk, you did this wrong, you did that wrong. It's all about blaming the person. Its not written like a judge's decision. I've looked at both sides etc, its all blame. Its like someone giving a lecture about what that person did wrong."

Victoria Police refuses to release information about the extent of the inquiries undertaken by police investigators into police misconduct or investigator's opinions as to the veracity of information supplied to them. They also refuse to release information as to the overall scope and direction of individual investigations<sup>316</sup>.

They say that "members of police must be able to freely communicate their opinions and thought processes so as to ensure that complaints are thoroughly investigated and decision made regarding the direction of the investigation are subject to proper and thorough deliberation....Disclosure would "impede the ability of police to engage in robust and meaningful deliberation..."<sup>317</sup>

In *Ogur v Turkey*, the European Court of Human Rights concluded that the State failed to conduct an effective investigation into a death in custody. One of the reasons for its conclusion was that "the [investigation] file was inaccessible to the victim's closest relatives, who had no means of learning what was in it." In this case an additional flaw was that a decision was made about cause of death without the victim's family being able to make submissions to the decision maker. Nor were the family served with a copy of the final order. This meant they could not exercise their right to appeal<sup>318</sup>.

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<sup>315</sup> Communication with the CCRB press officer in November 2008.

<sup>316</sup> See for example the reasons given by the Freedom of Information Unit in response to a request for the complaint investigation report in Victoria, received by the FKCLC in 2008

<sup>317</sup> See for example the reasons given by the Freedom of Information Unit in response to a request for the complaint investigation report in Victoria, received by the FKCLC in 2008.

<sup>318</sup> *Ogur v Turkey* ECHR (20 May 1999) paragraph 92.

Similarly in *Khalitova v Russia* ECtHR on 5 March 2009, the European Court of Human Rights found that the failure to involve the wife of a man killed by Russian military forces in the investigation and to provide her with access to investigation reports during the course of the investigation was a key reason for the Court's decision that Russia had failed to conduct an adequate investigation into the death.

Withholding the true basis for which a decision is made from the complainant is a recipe for inconsistent, poor quality and prejudicial decision-making where by irrelevant and biased considerations can influence outcomes. This is especially concerning given the large volume of complaints that are unsubstantiated. Secrecy invites concerns that there has been collusion between investigators and police they are investigating. If investigators have come to conclusions about credibility, the reasons for these conclusions must be provided. So too should all information that has materially effected their decision-making.

If the police officer has been exonerated, the complainant is more likely to accept the result if they can see for themselves the evidence gained from the investigation and the full reasons the decision was made. Transparency will have a profound effect in raising trust in the investigation process and policing in general.

Other than protecting informant/complainant identity, there is very little ground for any form of secrecy concerning specific complaints, particularly once all parties to the process are aware of the investigation of the complaint and after witness statements have been obtained from police involved.

The refusal by investigators to release information during an "on-going investigation" appears very suspect when weeks, months or years have passed and an investigation is not resolved. There is no reason either to protect specific facts (identities removed) from public release. For example, Manitoba's Law Enforcement Review Authority's releases complaint case studies in its Annual Report. The Office of Police Complaints in Washington DC publishes the full findings of complaint adjudications on its website.

Recommendation 26, Chapter 47, 1999 Stephen Lawrence Inquiry states:

"That Senior Investigating Officers and Family Liaison Officers be made aware that good practice and their positive duty shall be the satisfactory management of family liaison, together with the provision to a victim's family of all possible information about the crime and its investigation."

Covering up the investigation information further reduces the incentive for complainants to use public accountability mechanisms.

As a result of complainants boycotting complaint systems due to the fact that complaint material would be available to police and not complainants in subsequent civil proceedings, in 1994 the House of Lords reversed its prior position that complaint investigation results could be withheld on the basis of public interest immunity. As a

result investigation results are now available to plaintiffs in civil trials unless a specific and unique reason exists to exclude the material.<sup>319</sup>

In England, investigation reports are released to the complainants subject only to the “harm test”<sup>320</sup>. The investigating body has responsibility to give the complainant a full and frank explanation of how and why decisions are made. It is possible for the report to incorporate all the relevant evidence considered during the investigation<sup>321</sup>.

This has enabled complainants to have access to the entire body of evidence from the investigation: the investigation reports and the underlying witness statements<sup>322</sup>.

These steps in the UK have been essential in permitting proper public access to investigative mechanisms and exposing failures in complaint processes.

## Recommendations

*8. Complainants should be entitled to full and frank reasons for the decision on their complaint as well as a full copy of the investigation report and the evidence on which the decision was made. The release of this information should be subject only to the harm test, which concerns protection of the identity of vulnerable witnesses. The harm test should not concern the protection of the agency that makes the decision. Transparency in decision-making is the hallmark of accountable decision-making. No generalised Public Interest Immunity should be attached to complaint documents.*

### 6.6 Release of complaint history of police officer

Dr Craig Futterman’s research into complaints against police in Chicago reveals that a small number of police attract a large volume of complaints. And yet, he finds that a “complaint against a repeater officer is no more likely to lead to meaningful discipline than a complaint against the 80% of Chicago officer who do not accumulate complaints.”<sup>323</sup>

Where a police office accumulates complaints and no steps are taken by the state to protect the public from further abuses, the State is complicit in promulgating a culture of abuse and impunity. Complainants are entitled to know if the police against whom they complain are “repeater beaters” and complaint bodies should be thoroughly aware of

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<sup>319</sup> *R v Chief Constable of the West Midlands, ex p. Wiley* [1994] UKHL 8 (14 July 1994)

<sup>320</sup> Complaints against the police, Framework for a new system, December 2000, UK Home Office report, p 7. Information that is withheld includes for example the identity of vulnerable witnesses or confidential police informants.

<sup>321</sup> Complaints against the police, Framework for a new system, December 2000, UK Home Office report, p 7. <http://www.homeoffice.gov.uk/documents/comp-against-pol/complaints-against-police.pdf?view=Binary>

<sup>322</sup> Interview with Raju Bhatt on 2 December 2008

<sup>323</sup> Futterman et al 2008 at page 22.

police complaint histories when they adjudicate complaints. Previous complaints may be admissible where they indicate a *modus operandi*, that is, unvarying or habitual method or procedure<sup>324</sup> and have significant probative value<sup>325</sup>. Providing complaint histories is also critical in assisting complainants to cross-examine police, prepare their case and identifying possible witnesses.

Officers who display patterns of abuse complaints also provide key information about the effectiveness or otherwise of a complaint investigation and disciplinary processes and statistics of these patterns must also be made public.

A good example of these issues was reported on 20 March 2009 in *the Guardian*:

"The [Metropolitan Police] commissioner has today admitted that his officers subjected Babar Ahmad to grave abuse tantamount to torture during his arrest," Ahmad's solicitor, Fiona Murphy, said outside the court. During the hearing, it emerged that the Met had lost "a number of large mail sacks" containing details of other similar allegations against the officers who assaulted Ahmad. "The horrifying nature and volume of complaints against these officers should have provoked an effective response from the Metropolitan police and the Independent Police Complaints Commission (IPCC) long ago," she said. "Instead, it has fallen to Babar Ahmad to bring these proceedings to achieve public recognition of the wrong that was done to him." She said other crucial documents relating to the case were also lost. They included all the officers' contemporaneous notebooks and the taped recording of an interview with the senior officer in the case. Murphy added: "The papers will be referred to the director of public prosecutions for urgent consideration of criminal charges against the officers concerned and for an investigation as to whether events surrounding the mislaid mail sacks constitute evidence of a conspiracy to pervert the course of justice." During his arrest, Ahmad was punched, kicked and throttled, the court heard. Officers stamped on the 34-year-old's feet and repeatedly punched him in the head before he was forced into the Muslim prayer position and they shouted: "Where is your God now? Pray to him." After a sustained attack, he was forced into the back of a police van, where he was again beaten and punched before being put in a "life threatening" neck hold and told: "You will remember this day for the rest of your life." At one stage, one of the officers grabbed his testicles and he was also deliberately wrenched by his handcuffs – a technique known to cause intense pain. An IPCC investigation in 2007 ended with no action being taken against any officer."<sup>326</sup>

## **Recommendations:**

9. *The victim should have access to the complaint histories of police when preparing their case against police officers.*

## **6.7 Involvement of the Victim in the investigative process**

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<sup>324</sup> For examples of similar fact evidence found admissible see *Vaitos* (1981) 4 ACR 238 and *Harris v DPP* [1952] AC 694.

<sup>325</sup> *Evidence Act 2008 (Victoria)* s 97.

<sup>326</sup> <http://www.guardian.co.uk/politics/2009/mar/20/met-police-officers-accused-assaults>

Provision of information is a critical part of fulfilling the obligation on the State to involve the victim in the investigation. However, it alone is not sufficient.

The protection of complainant interests requires their thorough involvement in the complaint process. It also requires that complaint bodies are “complainant oriented”<sup>327</sup>.

When the Police Ombudsman in Northern Ireland investigate complaints, they generally collect more evidence than the police who may be investigating a related matter such as the complainant’s criminality. They say they have much better access to witnesses than police because their attitude and attire increase the public’s willingness to talk to them<sup>328</sup>. As well as increasing the thoroughness of the investigation, the complainant centred approach of PONI increases the victim’s willingness to be involved in the process.

*10. Civilian investigators should treat complainants with the same care as all victims of alleged crime should be treated. It must be understood that their experience could have been highly traumatic and that it may be hard to discuss. Particular care must be taken with interviewing young people, people from non-English speaking backgrounds, people from religious, ethnic minorities, indigenous people, people with disabilities, transgendered people, sex workers. At all times advocates (like a lawyer) and support persons (such as youth workers) should be permitted to be in attendance.*

#### *6.7.1 Participation in the Investigation*

In order to participate in the investigation, the victim must also be given the opportunity to respond to provisional findings and make recommendations for additional courses of inquiry. The models that most enable victim participation in the process, will involve a public hearings where the victim is permitted to cross-examine the police on their evidence. (See for example in Manitoba Canada and Washington DC, USA).

- 11. Complainants should be given full access to preliminary findings and evidence in order to make submissions prior to the finalisation of a complaint.*
- 12. Complainants should be kept up to date throughout the period of the investigation and be permitted make suggestions about additional lines of enquiry.*
- 13. There should be adjudicative hearings to determine complaints.*

In each of these levels of participation, it is essential that the victim have access to representation. Complaints of police misconduct are frequently made by those not well placed to ensure their needs are met in the process or to realistically fund a solicitor.

Concerns with the Manitoba process, raised by the LERA staff is that the Agency does not have a role in adjudicative hearings and that as complainants are rarely if ever

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<sup>327</sup> Interview with Graham Smith, Manchester University December 2008.

<sup>328</sup> Conversations with staff on 28 November 2008

represented, the process does not adequately protect their interests. On the other hand, police in these proceedings are represented by some of the most experienced counsel in Winnipeg – paid for by their union<sup>329</sup>. These one-sided contests are stacked up against the complainant. In many cases, complainants don't show<sup>330</sup>. In contrast Washington DC's Office of Police Complaints provides lawyers to complainants for free. These experiences reveal that it is essential that victims are provided with State funded lawyers. Furthermore, to level the playing field, these lawyers should be paid at equivalent rates to those paid by police unions.

### 6.7.2 Legal Aid

In *Hugh Jordan v The United Kingdom*, [2001] ECHR 327 the European Court of Human Rights stated that “The inquest was flawed by the delays, limited scope of the enquiry, a lack of legal aid for relatives, lack of access to documents and witness statement...”<sup>331</sup>.

In cases of deaths in custody, family members are entitled to “a sufficient measure of participation in the investigation....and...an appropriate forum for securing the public accountability of the State and its agents for the alleged actions and omissions leading to the death...”<sup>332</sup> Furthermore, the effective participation of the family requires they be provided with legal aid funding<sup>333</sup>.

Because the right to an effective investigation also extends to victims of torture, cruel, inhuman and degrading treatment (ill-treatment), legal aid for victims in these cases is also necessary.

14. *Complainants should be provided with a lawyer paid for by the State and at the rates equivalent to that paid to lawyers acting for the police.*

### 6.7.3 Cross-examination of evidence

Where an investigation results in two very different versions of the facts, proper resolution of the complaint requires a public hearing where the complainant is represented and can cross-examination the police evidence<sup>334</sup>. One of the reasons for the higher success rate of civil litigation to complaint processes, is that the

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<sup>329</sup> Communication with LERA staff and Jeff Giddin in October 2008.

<sup>330</sup> See LERA website for examples.

<sup>331</sup> Paragraph 97.

<sup>332</sup> *Bubbins v The United Kingdom*, [2005] ECHR 159 (17 March 2005), para 156

<sup>333</sup> *Bubbins v The United Kingdom*, [2005] ECHR 159 (17 March 2005) para 121. *Khan, R (on the application of) v Secretary of State for Health* [2003] EWCA Civ 1129 (10 October 2003) <http://www.bailii.org/ew/cases/EWCA/Civ/2003/1129.html>

<sup>334</sup> Manitoba, Canada and Washington DC USA use public hearings and allow cross-examination by the complainant.

plaintiff/complainant is a party to the proceedings and can cross-examine police officers<sup>335</sup>.

In the UK there is uncertainty about whether a victim has the right to cross-examine police in a public inquiry where no death has occurred<sup>336</sup>. There is currently no right of cross-examination in the UK outside inquests. In contrast the victim has a right to cross-examine evidence in complaint adjudication in Washington DC and Manitoba Canada. In Victoria where a public inquiry is held by the OPI, witnesses have a limited opportunity to cross-examine other witnesses. This has in practice however, only been used by police witnesses<sup>337</sup>. There is no emphasis on the role of the victim in OPI proceedings.

In a UK decision concerning the involvement of victim in an inquiry who had been seriously injured through an attempted suicide in custody, the Court found that the victim's representatives "must be entitled to see the written evidence, to be present during evidence and to make appropriate submissions, including submissions as to what lines of enquiry should be adopted, what questions asked and indeed who would should be permitted to ask witnesses questions about what."<sup>338</sup>

The critical reason that victims must have a high level of involvement in the process is that their complaint is about the break down of the State's adherence to the rule of law. The allegation is that the state's agents may have committed a violation of their rights. In order to overcome their fears that collusion with this violation has occurred at all levels of the state's investigation process, their standing, ability to cross-examine and make submissions is essential to ensure the protection of their interests in the investigation and inquiry.

The concern of collusion at all levels of the State's law enforcement and investigation processes in human rights violations is a very real one. The role of the Bush and Major administrations in authorising torture at Guantanamo, Bagram, Abu Grahb and beyond is being established by investigative journalists,<sup>339</sup> through Freedom of Information requests<sup>340</sup> and judicial inquiries. The role of the Courts and prosecutors in leading and accepting evidence obtained under torture in Chicago during the 1980s has been well

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<sup>335</sup> Civil litigation is frequently successful after a complaint has been found unsubstantiated by a complaint body. Graham Smith 2003 "*Actions for Damages Against the Police and the Attitudes of Claimants*" Policing and Society 2003, Vol 13, No. 4 pp 413-422

<sup>336</sup> *JL, R (On The Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008)

<sup>337</sup> Conversation with Victoria's Special Investigations Monitor in February 2009.

<sup>338</sup> *D, R (on the application of) v Secretary of State for the Home Department* [2006] EWCA Civ 143 (28 February 2006) at paragraph 42.

<sup>339</sup> Williams Kristian, 2006 "*American Methods, Torture and the Logic of Domination*" South End Press.

<sup>340</sup> <http://www.aclu.org/safefree/torture/torturefoia.html>



documented<sup>341</sup>. The police immunity from discipline and prosecution in Northern Ireland during “the Troubles” is a further example<sup>342</sup>.

Genuinely ensuring the complainant can protect their interests during an investigation requires state funded legal aid and full standing in all investigative processes and proceedings<sup>343</sup>.

15. *The complainant should have full standing in all complaint processes and should be able to call witnesses, require that witnesses be called, cross-examine witness and make submissions.*

## 6.8 Proceeding with complaints that have been withdrawn

It is the case that some complainants do not wish their complaints to be investigated. In these cases, the state cannot force the complainant to proceed. The person who makes the decision about how the complaint should proceed should be the complainant. Care must be taken that a complaint has not been withdrawn as a result of intimidation or because they have not been provided with legal representation. The process must empower the complainants to make choices about what they want to happen, not force them to withdraw or mediate.

Some complainants do not want a complaint investigated, but wish the allegation to be drawn to the attention of police management. If this is what the complainant wishes then this is an appropriate option for the processing of the complaint<sup>344</sup>.

Similarly, if the complainant seeks compensation, the State must ensure legal assistance is available to them to pursue this course of action.

16. *Complainants should be able to choose not to have their complaint investigated. However this decision should not be because they have not been adequately resourced or have been intimidated.*

## 6.9 Recommendations

1. *Views about the adequacy of the complaint body should be obtained from complainants and solicitors and improvements made in line with suggestions.*

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<sup>341</sup> Peoples Law Office et al, 2007, “*A report on the failure of special prosecutors Edward Egan and Robert Boyle to fairly investigate police torture in Chicago*” (available at [www.peopleslawoffice.com](http://www.peopleslawoffice.com))

<sup>342</sup> Rolston, Bill 2000 “*Unfinished business, state killings and the quest for truth*” for example see p102, 312

<sup>343</sup> Interviews with Pivot Law Society, Cameron Ward and BCCLA in Vancouver.

<sup>344</sup> Conversations with Graham Smith, Manchester University in December 2008.

2. *Complainants must be permitted to provide evidence through an advocate if they so wish. Complaint bodies should concentrate on the allegations against police rather than any prior criminality alleged against the victim.*
3. *Complaint bodies must provide outreach and support for people in vulnerable groups such as sex workers, drug users, homeless people, women, young people, muslim, refugee and migrant communities, prisoners and queer communities (including multilingual support).*
4. *Civilian investigators must attend prisons, police stations, holding cells, immigration detention centres/ border areas and rural communities where police work and provide contact numbers and record complaints in these facilities and regions. Civilian investigators must be active in pursuing evidence and must be mobile.*
5. *Information must be available in multiple languages and by podcast/radio broadcasts and talks must be given to communities who would not otherwise access this information.*
6. *Complainants need to be protected once they have lodged a complaint through the provision of special visas, removal from places where they are being harassed (including in prisons) to safe places, legislation making it an offence to victimise a complainant and other forms of protections provided to whistle blowers.*
7. *Charges laid after a complaint is made must be scrutinised for possible police misconduct in and of themselves.*
8. *Complainants should be entitled to full and frank reasons for the decision on their complaint as well as a full copy of the investigation report and the evidence on which the decision was made. The release of this information should be subject only to the harm test, which concerns protection of the identity of vulnerable witnesses. The harm test should not concern the protection of the agency that makes the decision. Transparency in decision-making is the hallmark of accountable decision-making. No generalised Public Interest Immunity should be attached to complaint documents.*
9. *The victim should have access to the complaint histories of police when preparing their case against police officers.*
10. *Civilian investigators should treat complainants with the same care as all victims of alleged crime should be treated. It must be understood that their experience could have been highly traumatic and that it may be hard to discuss. Particular care must be taken with interviewing young people, people from non-English speaking backgrounds, people from religious, ethnic minorities, indigenous people, people with disabilities, trans-gendered people, sex workers. At all times*

*advocates (like a lawyer) and support persons (such as youth workers) should be permitted to be in attendance.*

- 11. Complainants should be given full access to preliminary findings and evidence in order to make submissions prior to the finalisation of a complaint.*
- 12. Complainants should be kept up to date throughout the period of the investigation and be permitted make suggestions about additional lines of enquiry.*
- 13. There should be adjudicative hearings to determine complaints.*
- 14. Complainants should be provided with a lawyer paid for by the State and at the rates equivalent to that paid to lawyers acting for the police.*
- 15. The complainant should have full standing in all complaint processes and should be able to call witnesses, require that witnesses be called, cross-examine witness and make submissions.*
- 16. Complainants should be able to choose not to have their complaint investigated. However this decision should not be because they have not been adequate resourced or have been intimidated.*

## Chapter 7

# Complaints Against Police in Victoria

This is a lengthy chapter and has been divided into two parts. Part A examines the corruption focus of the Office of Police Integrity (“the OPI”) and whether it is in compliance with the OPI’s legislatively imposed objective to ensure Victoria Police complies with human rights. Part B provides a case study of recent complaints in Flemington.

### PART A – Corruption and human rights

#### 7.1 Introduction

Victoria’s independent police watchdog, the Office of Police Integrity has a primary focus on corruption. Corruption is generally defined by activities such as police accepting bribes, covering-up for each other, lying on legal documents, stealing and dealing in drugs. The shutter scandal – which involved police accepting money from companies in exchange for calling them to crime scenes to secure damaged property is a example of wide-spread corruption that effected 10% of Victoria police members<sup>345</sup>.

While the OPI definition of corruption is broad<sup>346</sup>, most examples of what is generally seen as corruption do not involve human rights abuses. Human rights abuses include deaths and life-threatening injuries in police custody, torture and ill-treatment, racial and other forms of discrimination and abuse. The humiliating and degrading strip-search of 463 people in front of each other at the Tasty Night Club in 1994 is a well known example of a human rights abuse in Victoria<sup>347</sup>.

A focus on a narrow definition of corruption ignores these abuses.

The investigation of human rights abuses must be a core concern to a police complaint body. This focus is necessitated through the *Victorian Charter of Human Rights 2006*, the *International Covenant of Civil and Political Rights* and the *United Nations Convention Against Torture*. Ensuring the Victoria Police comply with human rights is also a key object of the Director of Police Integrity under the *Police Integrity Act 2008*.

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<sup>345</sup> Operation Bart – 1998 Victorian Ombudsman Report  
[http://www.ombudsman.vic.gov.au/resources/documents/Operation\\_Bart\\_-\\_allegations\\_against\\_Police\\_relatng\\_to\\_the\\_shutter\\_allocation\\_system\\_-\\_final.pdf](http://www.ombudsman.vic.gov.au/resources/documents/Operation_Bart_-_allegations_against_Police_relatng_to_the_shutter_allocation_system_-_final.pdf)

<sup>346</sup> [http://www.opi.vic.gov.au/documents/OPI\\_Fact\\_Sheet\\_-\\_Misconduct\\_and\\_Corruption.pdf](http://www.opi.vic.gov.au/documents/OPI_Fact_Sheet_-_Misconduct_and_Corruption.pdf)

<sup>347</sup> Jude McCulloch 2001, “Blue Army, Paramilitary Policing in Australia” Melbourne University Press, at p 88.

Section 8(1)(d) of the Police Integrity Act 2008 reads as follows:

## 8. Objects, functions and powers of Director

(1) The objects of the Director are-

- (a) to ensure that the highest ethical and professional standards are maintained in Victoria Police; and
- (b) to ensure that police corruption and serious misconduct are detected, investigated and prevented; and
- (c) to educate Victoria Police and the general community regarding police corruption and serious misconduct, including the effect of police corruption and serious misconduct; and
- (d) to ensure that members of Victoria Police have regard to the human rights set out in the Charter of Human Rights and Responsibilities.

Under the current model, the Director's object of ensuring Victoria Police have regard to human rights, receives lip-service rather than any on-going investigative commitment<sup>348</sup>. For example 3% of complaints made by the public are investigated by the OPI<sup>349</sup>.

The pattern of ignoring human rights abuses while concentrating on a narrow definition of corruption is evident across police integrity commissions in Australia<sup>350</sup>. Investigation of human rights abuses are routinely dismissed and deprioritised. The institutional denial of violence forms part of an "authoritarian consensus" across accountability structures and police agencies<sup>351</sup>. Violence against those defined as criminal or deviant is trivialised, while procedural irregularities gain attention.

### **Case Study from the Koori Complaints Final Report 2006-2008<sup>352</sup>**

In June 2003, two complaints were made arising from the same incident: one alleged assault by police to obtain a confession by "bashing" between interview tapes and a separate allegation of releasing confidential information (criminal history) made by a

<sup>348</sup> The OPI's Investigation into torture conducted by the Armed Offenders Squad is one of a small handful of exceptions to this general rule. This investigation was carried out thoroughly and effectively. Similar areas where torture allegations are made have not been met with the same investigative commitment, nor are individual complaints investigated to this standard.

<sup>349</sup> This is the figure from OPI 2008 Annual Report at page 46

[http://www.opi.vic.gov.au/documents/OPI\\_Annual\\_Report\\_2008.pdf](http://www.opi.vic.gov.au/documents/OPI_Annual_Report_2008.pdf)

<sup>350</sup> The NSW Ombudsman refers complaints of serious misconduct to the NSW Police to investigate. The Qld CMC refers the majority of complaints to the Qld Police to deal with. The Commonwealth Ombudsman refers all complaints to the AFP.

<sup>351</sup> Penny Green and Tony Ward, "State Crime, Governments, Violence and Corruption" p80.

<sup>352</sup> Indigenous Justice Unit, p 35.

family member. The assault was classified as a management issue, not an offence, referred to the local police to resolve, not investigate. However the release of confidential information was considered serious misconduct and allocated to an ESD investigation who undertook an exhaustive investigation.

The OPI, like the Police Ombudsman of Northern Ireland (“PONI”) receives funding that is equivalent to about 1% of the Police annual budget<sup>353</sup>. PONI dedicates the overwhelming majority of its staff to the investigation of public human rights complaints. In contrast about 5% of the OPI staff are dedicated to public complaints. Public complaint investigation is the core-function of PONI. The OPI’s focus drastically de-prioritises investigations of public complaints. This failure leaves the Victoria public without effective protection of their human rights.

While attention to corruption is important, a civilian complaint agency, must place the investigation of human rights abuses at the top of its agenda to comply with Australia’s international obligations and *the Charter*.

Two solutions will be considered here. The OPI will investigate complaints if it is in the public interest for it to do so. One solution is for the OPI to define “public interest” investigations as those involving human rights abuses. It currently only defines corruption as “public interest.” This shift in interpretation is supported by the objects of the Director and *the Charter*.

Alternatively the Victorian Government could fund a new independent civilian agency that can focus on the investigation of complaints relating to human rights abuses.

There are some good reasons for preferring this second option. The OPI and Victoria Police conduct joint operations<sup>354</sup>, the OPI has the capacity to use seconded police<sup>355</sup> and it uses of former Victoria Police members<sup>356</sup>. Furthermore, reports on the 3 March 2009 in *the Age* indicate that a close “three amigos” relationship exists between the OPI deputy director, the Chief Commissioner and the head of the Ethical Standards Department<sup>357</sup>. These factors expose the OPI to regulatory capture<sup>358</sup>.

William MacDonald an investigative analyst from the Office of the Police Complaint Commissioner in Vancouver, notes the need for complaint bodies to be independent not only from police association links, but also the chain of command in order to retain true

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<sup>353</sup> Figures taken from the Victoria Police Annual Report 2007-2008 and OPI Annual Report 2008.

<sup>354</sup> See for example <http://news.ninemsn.com.au/national/796439/uranium-drugs-seized-in-victorian-raids>

<sup>355</sup> See s19 of the Police Integrity Act 2008.  
[http://www.austlii.edu.au/au/legis/vic/consol\\_act/pia2008193/s19.html](http://www.austlii.edu.au/au/legis/vic/consol_act/pia2008193/s19.html)

<sup>356</sup> Many of its staff are former Victoria Police members.

<sup>357</sup> <http://www.theage.com.au/national/simon-says-20090302-8mfs.html?page=-1>

<sup>358</sup> See Chapter 3 for an analysis of regulatory capture.

impartiality in their oversight functions<sup>359</sup>.

One of the criticisms made by the Police Association in Victoria is that the OPI investigates on behalf of the chain of command<sup>360</sup>. It is certainly true there is little transparency about exactly how and when the OPI will use its "public interest" investigation powers.

In light of these pressures, I recommend the establishment of an Independent Investigation Commission into Complaints Against the Police (and perhaps authorised transport officers, prisons, private security guards and detention centres) to focus on human rights investigations and comply with human rights standards from inception.

## 7.2 The Current Complaint Scheme

In Victoria, complaints against police can be made to the Police Conduct Unit within the Ethical Standards Department ("ESD"), to Police Stations or to the Office of Police Integrity ("OPI"). The ESD is an internal police department. Within the overall hierarchy of command, it sits under an Assistant Commissioner who reports to the Chief Commissioner for Police. The OPI is a separate statutory body that reports directly to Parliament.

If a complaint is made to the OPI, there are three possible outcomes built into the legislative framework. If the OPI decides that the complaint is frivolous and does not warrant investigation or if it is made 12 months after the incident and the OPI decides there is no valid reason for the delay, the OPI can dismiss the complaint<sup>361</sup>.

If the complaint is against the Chief Commissioner or an assistant commissioner the OPI must investigate. If the complaint concerns practises and procedures that need revision or the OPI decide it is in the "public interest" for it to investigate it can also investigate.

All other complaints must be forwarded to the Victoria Police for investigation.

When the Victoria Police receive a complaint from the OPI, the ESD will classify it and either investigate it, or send it to the regional offices for resolution or in some cases

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<sup>359</sup> Communication with the author in October 2008.

<sup>360</sup> <http://www.theage.com.au/national/nixon-duped-by-corrupt-exofficer-says-opi-20080626-2xi0.html?page=-1> <http://www.theage.com.au/national/new-rules-aim-to-weed-out-crooked-police-20080604-2lvz.html?page=-1> "Sen-Sgt Mullett also read out a motion noting that the association had complained to the OPI about allegations Mr Overland leaked confidential material. That motion claimed the OPI had shown an appalling double standard by not using its coercive powers to seek answers on that issue." <http://www.melbournecrime.bizhosting.com/ashby.lalor.linnell.htm>

<sup>361</sup> [http://www.austlii.edu.au/au/legis/vic/consol\\_act/pia2008193/s40.html](http://www.austlii.edu.au/au/legis/vic/consol_act/pia2008193/s40.html)

investigation. Matters that involve corruption or serious misconduct, if they are correctly classified<sup>362</sup>, are investigated by ESD.

Between 80-90% of complaints are managed through investigation or alternative dispute resolution by police in regional offices<sup>363</sup>. The remaining 10% of complaints involving “serious misconduct” or corruption are investigated by the Ethical Standards Department. Overall 30-40% of all complaints will be investigated.<sup>364</sup>

The OPI will review complaints in the serious misconduct and corruption bracket, and will provide occasional audits of the remaining 80-90% of complaints<sup>365</sup>. The OPI does not provide information to or invite comment from the complainant prior to completing a review.<sup>366</sup>

### **The Focus of the OPI is corruption<sup>367</sup>**

On 24 September 2008 the lawyers and advocates from legal centres and other agencies met with staff from the Office of Police Integrity.

During this meeting, the OPI made it clear that its intention was not to investigate or even regularly review public complaints. While they encourage the public to forward complaints to the OPI for their own information, they forward these complaints on to Victoria Police.

An OPI staff member set out their position. They have three complaint handlers and four complaint reviewers. There are 130 people who work at the OPI.

She stated as follows:

"Our role is an anti-corruption agency. The Ombudsman's role may have been taking complaints from the public, but the OPI role is quite different. We have to focus on our anti-corruption agenda. We are now an anti-corruption unit<sup>368</sup>. We did 1000 reviews of

<sup>362</sup> The Koori Complaints Report notes that a large number of complaints are incorrectly classified to a lower level of seriousness.

<sup>363</sup> Improving Victorian Policing Services through effective complaint handling – OPI 2008, p 11. Communication with the OPI on 24 September 2008.

<sup>364</sup> [http://www.opi.vic.gov.au/documents/OPI\\_Annual\\_Report\\_2008.pdf](http://www.opi.vic.gov.au/documents/OPI_Annual_Report_2008.pdf) p31.

<sup>365</sup> Koori Complaints Report p 12.

<sup>366</sup> Koori Complaints Report p 12.

<sup>367</sup> The information in this text box was recorded in notes I took during the meeting and wrote up straight afterwards. The words used convey the effect of the words used at the meeting as recorded in my notes and recollected a few hours after the meeting.

<sup>368</sup> Also see the OPI 2008 Annual Report p 5.



complaints in 2007. We can't do this on an individual one on one basis anymore. We can only do audits of the system. We can't do reviews when members of the public are annoyed. Complaints need to be a core priority of the police. We are working on making supervisors accountable for the troops on the street. We are handing it back to them. We are concerned with leadership practice. We are into cultural change. There needs to be local ownership of complaints. We are not a complaint investigation body. The police are. The new complaint model sends complaints out to the regions."

During the meeting Frank Guivarra from the Victorian Aboriginal Legal Service noted that Aboriginal community has no faith in police investigating police.

The OPI staff said, "Assaults that are criminal will come back to us for review."

They noted that blaming OPI or ESD for failures in investigation is a waste of time: "We are not doing investigations. We deal with public interest matters and problems with practice and procedure. This means corruption. We won't investigate conduct. We have a problem that people are not coming forward to us."

Simone Elias, a solicitor from the Aboriginal Family Violence Prevention Legal Service asked "What about people who get victimised when they complain to police?"

OPI staff said "We can only protect complainants to a minimal extent."

A staff member said, "I accept the system does not work on an individual level. However this is not our problem. We need to look at the big picture."

"We are very keen on the Management intervention model. (MIM) We have found through polling of the public that we are increasing the public's faith in the integrity of the police. Changing public perception is our purpose. Our model comes from the model used by the Australian Federal Police and every other jurisdiction in Australia."

Q: What evidence was that the management intervention model had reduced the level of assaults on the public?

A: It has reduced the number of complaints being made.

Q: Do you have any other way of gauging the success of their model?

A: We conducted an independent telephone poll of the broader public<sup>369</sup>. But that complaint reduction is the test of the system.

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<sup>369</sup> In the OPI's 2008 report on complaint handling, the OPI conducted a review of complainants and police members who had their complaints managed through the Management Intervention Model. The review indicates that 72% of complainants who responded to the questionnaire found the process unsatisfactory with 50% saying it was a "waste of time".

Q: Has the new model had increased the substantiation rates of complaints.

A: We don't know.

They said they used to explain the detail of the investigation in their letters. They now see this as the role of Victoria Police so are no longer providing information to complainants about the investigation. I said that when we ask VicPol for information about the investigation, they tell us to obtain the investigation information through a Freedom of Information Request.

They agreed this was problematic, as an FOI request would not produce the investigation results.

They said the new investigation model places the responsibility on line managers.

They said they would hold line managers to account for failings. I asked a staff member how the OPI would do this. She said through auditing the timeliness of investigations. I asked about the quality of investigations. She said timeliness is their gauge.

We asked why the Flemington complaints [A group of complaints that raised systemic concerns about racist epithets and physical assaults by police against a refugee community in the Flemington region] weren't seen as public interest. They said that they had three staff complaints [internal police complaints] that they were dealing with, and that this had priority.

In summary, they said they were wiping their hands of the complaint handling issues.

The communication of the OPI staff to Community Lawyers and others is worth a close examination in light of the issues raised in earlier chapters of this report. I identify 9 issues worthy of discussion:

### 7.3 Critique of OPI position

#### *7.3.1 Number of staff dedicated to complaints*

Complaints are a key source of information about the integrity of a police agency. However they can be counter productive to individuals who complain. Unless barriers to complaining are removed, complaints will reduce further. Failure to independently investigate police complaints is a key barrier for people in deciding to complain. The OPI has dedicated 7 of its 130 staff that is 5.4% to this critical area of public concern.

### *7.3.2 Failure to investigate complaints*

This means there is no independent investigation of human rights abuses in Victoria. As a result Victoria fails to comply with human rights requirements<sup>370</sup>.

### *7.3.3 Audits and classification of complaints*

Audits of timeliness alone fails to address issues such as attitudes to complainants, adequacy, independence, capacity to detect and punish human rights abuses, collusion and failure to apply to the law.

In the Flemington complaints, by African and Afghani communities in the Flemington area, the overwhelming majority of complaints involved allegations of criminal assault. Injuries sustained as a result of these allegations included broken teeth, cuts, bruising, scaring, ongoing and permanent back pain, arm pains, black eyes, severe headaches and eye injuries. All of these were investigated by regional police officers. If criminal matters are to be investigated by ESD and not by police in the region, these cases have been inappropriately handled by the OPI's current standards.<sup>371</sup>

The Koori Complaint Report 2006-2008, an investigation by the Indigenous Issues Unit of the Department of Justice found that almost 40% of Koori complaints over a 15 year period related to assaults. Injuries arising from these assaults included "permanent brain damage, broken cheekbones, severe facial injuries, cuts, dislocations, abrasions and soft tissue injuries including eye injuries."<sup>372</sup> Assaults are a criminal offence. If complaints involving assaults are being dealt with through alternative dispute resolution in the regions, then criminal offences by police officers are not being investigated. The current process de-criminalises criminal behaviour by police.

The Koori Complaint Report notes that assaults are frequently wrongly characterized as minor misconduct. "Serious misconduct" is an offence punishable by imprisonment. Offences punishable by imprisonment are also disciplinary offences where police are liable to be dismissed. As a result assault complaints should all be investigated by ESD under the current complaint classification process. The report notes that since 2004, no assault complaints by Koori people had been classified correctly.<sup>373</sup> Indeed, it is notable that many of the assaults identified in the report constitute torture<sup>374</sup>.

### *7.3.4. Use public telephone polling to gauge success*

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<sup>370</sup> <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm> Para 21 of the concluding observations on Australia, Human Rights Committee 3 April 2009.

<sup>371</sup> A Similar conclusion was drawn in the Koori Complaints Report at page 22 where they found that 50% of complaints about assault were being handled by line managers.

<sup>372</sup> Koori Complaints Report p 18.

<sup>373</sup> Page 34.

<sup>374</sup> Page 35.

Random phone polls and complaint reduction are not good gauges of the effectiveness of complaint processes. Firstly, the average Victorian is not aware of the extent of the problem of human rights abuses by police and is not a good gauge as to whether MIM is working.

In questioning a similar survey by the Independent Police Complaints Commission (“the IPCC”) in the UK, Mr Mitchell of the House of Common’s public accounts committee put to an IPCC representative:

**Mr Mitchell:** You have done two surveys of the general public and they seem to be slightly daft because you have asked people who have not necessarily got any knowledge of what you are about whether they approve of it. That is rather like the famous American survey in the 1950s which got 56% of the population to say that they approved of the Metallic Minerals Act when there was no such Act! It is a daft survey, is it not, to ask people who do not know anything about it what they think of it?<sup>375</sup>

Secondly, complaint reduction can indicate a problem has been solved, but is more likely to indicate that people have stopped complaining. Complainants in both indigenous communities and newly arrived, migrant, working class<sup>376</sup> and other vulnerable communities have openly expressed their distrust of police investigating their complaints<sup>377</sup>. This is why they are not making complaints to the OPI. To use reduction in complaints to indicate the success of the complaint system or to claim a reduction in levels of police abuse is a highly unsatisfactory guide to success. Increased substantiation rates may be a better guide as well as surveys of solicitors, advocacy groups and complainants.

#### *7.3.5. Failure on an individual level*

An acceptance that the process does not work on an individual level, is an acceptance that impunity exists for police engaged in human rights abuses. The concluding observations of the UN’s Committee Against Torture 2008 instructed Australia to ensure human rights abuses are investigated, detected and punished<sup>378</sup>. The process must work on an individual level. Resources must be put into video and telephone recording of police. Individual complaints must be investigated with human rights standards in mind and by an independent body. The Victorian Government must immediately resource the investigations of human rights abuses to make the process work on an individual level.

On 26 February 2009, the Director of the OPI noted that is too expensive to prosecute

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<sup>375</sup> House of Commons Public Accounts Committee IPCC Inquiry Report 9 March 2009 p 24.

<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubacc/335/335.pdf>

<sup>376</sup> See the Flemington & Kensington Community Legal Centre’s submissions to the Inquest of Jedd Houghton.

<sup>377</sup> See 2008 Victorian Equal Opportunity Commission Report “Rights of Passage” at page 36. [http://www.humanrightscommission.vic.gov.au/pdf/rights\\_of\\_passage.pdf](http://www.humanrightscommission.vic.gov.au/pdf/rights_of_passage.pdf)

<sup>378</sup> <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-AUS-CO1.pdf>

police for minor matters: they fight hard and engage top lawyers<sup>379</sup>. However it is not just in minor matters where the police escape prosecution. The vast majority of police found through civil proceedings to have engaged in serious criminal human rights abuses are never prosecuted either<sup>380</sup>. Thus in reality both minor and serious criminality by police is simply not prosecuted.

On the other hand, the public are regularly prosecuted for offensive language, public drunkenness, begging and stealing \$2 chocolate bars. Most people charged with these offences use publicly funded lawyers who are too stretched to provide top quality services. In contrast the State puts large resources in prosecuting the public and through its agreement with the Police Association, defending police officers<sup>381</sup>. This disparity in resourcing is a major cause of police impunity.

Until police offenders are prosecuted for all criminal conduct, they are above the law.

Criminal penalties are intended to operate in several ways that are relevant to human rights protections:

- ❖ Send a message that such behaviour is unacceptable.
- ❖ Act as a specific and general deterrence against future behaviour.
- ❖ Protect the community from the offender
- ❖ Enable rehabilitation of the offender.

Failure to prosecute police officers who have engaged in criminal offences undermines any potential deterrent effect of the law.

Section 8 of the Victorian Charter states that every person is equal before the law. It is clear however, that police are not even subject to the law.

The Committee Against Torture noted, “Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or defacto permission.”<sup>382</sup>

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<sup>379</sup> Communication between the author and the Director Michael Strong in February 2009.

<sup>380</sup> For example none of the Police officers involved in the assault on Corinna Horvath in 1997 have been disciplined or prosecuted despite strong findings of misconduct by a County Court Judge against the police involved. See Communication to the Human Rights Committee by Corinna Horvath dated 19 August 2008, Flemington & Kensington Community Legal Centre.

<sup>381</sup> <http://www.theage.com.au/news/national/bracks-secret-deal-with-police-union-on-legal-aid/2007/02/19/1171733684682.html>

<sup>382</sup> General Comment Number 2 CAT/C/GC/2/CRP.1/Rev.4 23 November 2007  
[http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4\\_en.pdf](http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf)

A failure to discipline or punish State actors, such as the police, is even more so a form of encouragement, *defacto* permission and deliberate indifference.

#### *7.3.6. The public interest test*

The OPI states that it will investigate a matter under its public interest category where it relates to serious corruption. This interpretation of “public interest” ignores human rights abuses. It is a serious concern that Victoria’s only independent complaint investigators ignore the high public interest and human rights requirement that deaths, serious injuries and allegations of torture and ill-treatment be independently, adequately and thoroughly investigated and that police found to be in violation of human rights are disciplined and punished for abuses.

#### *7.3.7. The responsibility for investigating complaints*

The theory that police should investigate complaints is prevalent in policing circles and integrity commissions across Australia and widely disputed by complainants, academics, inquiry findings and human rights jurisprudence<sup>383</sup>.

In the OPI’s 2008 Annual Report, the Director notes that complaint handling by police under the Management Intervention Model is consistent with the “modernisation of Victoria Police and OPI recommendations.”<sup>384</sup> An independent complaint body investigates complaints against the police in Northern Ireland, Winnipeg, Washington and New York. It makes no sense to argue that police handling of complaints is form of modernisation. Police traditionally handle complaints against them. The Management Intervention Model replaces what was formerly called Public Incident Resolution Process<sup>385</sup>. All these processes involve police investigating or otherwise dealing with complaints. The OPI’s own report in 2008 into police handling of complaints reveals serious and systematic problems with its functioning<sup>386</sup>.

In Victoria, a legal centre lawyer watched video footage of a group of police beating his Sudanese client. According to the lawyer who watched the footage at the police station, the repeated beating by the police was brutal, severe and unnecessary. Subsequently police lost the footage of this incident. The lawyer’s client was then charged with assaulting a police officer.<sup>387</sup>

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<sup>383</sup> See Chapter 3.

<sup>384</sup> OPI Annual Report 2008 page 32

<sup>385</sup> Page 13 of OPI Report 2008:

[http://www.opi.vic.gov.au/documents/Improving\\_Victorian\\_policing\\_services\\_through\\_effective\\_complaint\\_handling\\_31.pdf](http://www.opi.vic.gov.au/documents/Improving_Victorian_policing_services_through_effective_complaint_handling_31.pdf)

<sup>386</sup> See foot note above. Also see <http://news.smh.com.au/national/opi-slams-police-complaints-process-20080731-3nrx.html>

<sup>387</sup> Report from a Community Legal Centre in Victoria.

It is argued that removing complaint investigation from police gives a green light to police to ignore their ethical obligations. However police do not need to investigate complaints against them in order to uphold human rights and ethical duties. Ethical duties include reporting complaints to an independent body, completing use of force forms, complying with police manuals, legal standards and human rights, attending training, passing integrity tests and reporting the misconduct of others<sup>388</sup>. Increasing local accountability that is- getting managers to test and scrutinise police as well as identify and implement training needs and recommend changes, does not require local investigation of public complaints. It must be remembered that even “modern” police forces are still the primary cause of significant numbers of human rights abuses and are not like another workforce. Thus strategies that might be appropriate in a civilian workplace are out of place in managing police misconduct.

The OPI uses serving officers to conduct undercover operations in police stations. These are forms of integrity testing. Integrity testing could and should be part of the functions of the Victoria Police<sup>389</sup> enhanced by civilian oversight. It is critical to realize that integrity testing is not a complaint investigation function.

I contend that the roles of complaint investigation and integrity testing have been reversed in Victoria. Integrity testing requires police involvement, with civilian oversight. However complaint investigation requires civilians.

It is significant to note that police in Northern Ireland are reported to be performing better to human rights standards as a result of a fully independent complaint investigation process. Indeed, the independent complaint investigation by PONI is credited as being part of this improvement<sup>390</sup>.

At the same time as the OPI is pushing for regional management of complaints, it is reducing its scrutiny of these investigations. It will no longer conduct reviews of each of these matters and is “wiping its hands of complaints.”<sup>391</sup> The victims in this process are individual complainants and the public at large.

In its Annual report the OPI note that the most serious complaints will be reviewed by the OPI. However the detection and punishment of human rights abuses depends on the quality and adequacy of the investigation process in itself. Review of these matters is simply not enough to satisfy human rights requirements. “Supervision [of the police

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<sup>388</sup> See Prenzler, Tim 2009 *Police Corruption: Preventing Misconduct and Maintaining Integrity*, CRC Press.

<sup>389</sup> See a good description of stings and integrity tests in Tim 2009 *Police Corruption: Preventing Misconduct and Maintaining Integrity*, CRC Press.

<sup>390</sup> Graham Ellison 2007, “*A Blue Print for Democratic Policing Anywhere in the World?*” *Police Quarterly* 2007, 10: 243.

<sup>391</sup> See Text box above.

investigation] by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation.”<sup>392</sup>

In deciding whether allegations should be investigated or proceed through the MIM, the OPI applies the following test: If the conduct alleged would lead to the dismissal of the police officer, it should be investigated. If not, the complaint should be managed through dispute resolution by police<sup>393</sup>.

A problem with this test is that there are no clear guidelines about what warrants dismissal. Police disciplinary results are not on the public record in Victoria so we cannot compare misconduct with disciplinary results<sup>394</sup>. However in jurisdictions with higher levels of transparency, excessive use of force by police rarely results in dismissal. Where substantiated, excessive force in these locations has resulted in warnings, a brief suspension or more usually, no discipline at all.<sup>395</sup>

If Victoria Police is not dismissing police who assault members of the public, and they will not investigate complaints that don't lead to dismissal, then police will never be investigated for excessive force allegations under the current framework. According to the UN Human Rights Committee concluding observation on Australia dated 3 April 2009, all excessive force allegations must be independently investigated<sup>396</sup>.

#### *7.3.8. Feedback from solicitors*

The OPI states in its annual report how important critical feedback is in improving its operation.<sup>397</sup> The OPI recently invited solicitors to comment on its new website. However in terms of its decision making about whether to investigate, there is no evidence that concerns raised by complainants and their advocates have been listened to. It is also worth noting that appeals concerning OPI decisions to investigate to the Supreme Court are limited if not totally restricted under the new Police Integrity Act 2008<sup>398</sup>.

#### *7.3.9. Information Provision to Complainants (transparency)*

When complainants request information about investigations from the OPI they are

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<sup>392</sup> *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 337.

<sup>393</sup> Communication with the Director of Police Integrity in February 2009.

<sup>394</sup> This information is currently being sort under an FOI application.

<sup>395</sup> See for example in 2004 in New York in 57.7% of cases where excessive use of force had been substantiated, the New York Police Department did not discipline the officer involved at all see page 53 Mission Failure, Civilian Review of Policing in New York City by the New York Civil Liberties Union.

<sup>396</sup> <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm> Para 21 of the concluding observations on Australia, Human Rights Committee 3 April 2009.

<sup>397</sup> OPI 2008 Annual Report p31.

<sup>398</sup> [http://www.austlii.edu.au/au/legis/vic/consol\\_act/pia2008193/s109.html](http://www.austlii.edu.au/au/legis/vic/consol_act/pia2008193/s109.html)



referred to the Victoria Police. When complainants request information from the Victoria Police they are referred the Freedom of Information Unit. The FOI Unit, often refuses to provide information about investigation reports saying these documents are internal working documents. Complainants are left with no real information about the investigation, the evidence it obtained or the reasons a decision was made. This lack of transparency in the process does nothing to dispel any concerns by complainants that it has been anything other than a cover-up. Failure to provide information means the complainant has no capacity to scrutinise the investigation or its result, to participate in it to protect their interests, or to appeal the basis for the decision. As discussed in Chapter 7, these are further breaches of human rights standards.

Hala Attwa a solicitor from Youthlaw contrasted the Police Complaint system with the way the Telecommunication Industry Ombudsman (the “TIO”) operates. She noted that the TIO provides copies of communications from the telecommunication company to complainants and invites their comment as part of the ongoing process of investigation<sup>399</sup>. The Police Complaint system in Victoria offers no opportunity for complainants to submit comments on the evidence gathered in the investigation. This concern was also raised repeatedly in the Koori Complaints Final Report 2006-2008.

In the next Part of this Chapter, I will use the Flemington complaints submitted during 2006-2007 to provide some examples of failures in the current complaint system.

## **PART B – A study of the Flemington Complaints**

### **7.4 Background**

Reports of police brutality, excessive use of force and human rights abuses are not new in Victoria<sup>400</sup>. Community Legal Centres throughout Victoria have received, since their inception in the early 1980s, a constant stream of reports about excessive use of force and other human rights violations. In response to the ongoing reports, the Police Issues Working Group of the Federation of Community Legal Centres formed in 1983 to work collectively on the human tragedy these reports represent<sup>401</sup>.

Along with other centres, police accountability has been a central concern of the Flemington & Kensington Community Legal Centre since its inception in 1980.

The Flemington & Kensington Community Legal Centre draws clients from four housing estates - North Melbourne, Ascot Vale, Flemington and Kensington. Over 12 thousand public housing tenants currently live in these estates, a great proportion of whom are refugees or migrants.

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<sup>399</sup> Interview with Youthlaw in February 2009.

<sup>400</sup> “Past Patterns Future Directions” OPI Report tabled February 2007.

<sup>401</sup> The first minutes of the Police Issues Working Group in 1983 detailed a CLC client experience of police mistreatment: Liz Curran 2007, *Making the Legal System More Responsive to Community*, Report on Community Legal Centres in Victoria.

Between 1987-1989 eleven people were shot dead by police in Victoria. The families of four of those killed lived or had close connections to the Flemington & Kensington area. In response to the killings, the Flemington & Kensington Community Legal Centre commenced a community based campaign that saw it working closely with the families of the four deceased to support them through the coronial inquests that followed the deaths and to expose abuse and systemic failures in police actions and procedures<sup>402</sup>.

In submissions to the Inquest of Gary Abdullah, who was shot by police in Victoria on 9 April 1989, counsel for Abdullah's family critiqued the internal investigation into his death. Mr Abdullah had been fatally shot in his flat by a bullet to the back of his head. Evidence before the Coroner was strongly suggestive of a deliberate and well-planned execution. Counsel for the family noted:

"It is an alarming thought that considering the magnitude and significance of the [Internal Investigations Department ("IID")] investigation, Inspector Basham showed his report to Detective Avon [one of the two police present at the shooting] for approval. It is even more alarming that he edited it to accord with what Avon said on 14 April 1989. This reinforces our submissions that IID's function was not to investigate but to justify."<sup>403</sup>

During 1980s, some complainants sought justice from police assaults through the complaint processes. Until 1986 when the Police Complaint Authority (the "PCA") became operational, the investigation of these complaints was conducted by an internal police investigation unit and oversights by the Ombudsman. Ian Freckelton, in the course of his role in the PCA, analysed a large number of complaint investigations during the 1980s. His comments reveal a familiar pattern of investigations by police of complaints in other jurisdictions.

"Little effort was made to ask probing questions of police against whom allegations had been made. Their word was accepted at face value. Often there was no record of interview with questions and answers. Police officers were simply allowed to make a statement after having the full details of the complaint against them set out. Sometimes they were shown the statement of another member and simply asked if they had anything to add."<sup>404</sup>

Police investigators were found to assist police they were investigating to improve their case/escape liability;

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<sup>402</sup> The families of Mark Militan, Graeme Jensen and Jedd Houghton and the Flemington & Kensington Community Legal Centre 1992, *Police Shootings in Victoria 1987-1989 You deserve to know the truth*, Fitzroy Legal Centre Press.

<sup>403</sup> Submissions to the Inquest of Gary Abdullah by counsel for Mr Abdullah's family (Dyson Hore-Lacy) at page 133-124.

<sup>404</sup> Ian Freckelton, "Shooting the Messenger" in "Complaints against the Police, The Trend to External Review" edited by Andrew Goldsmith, 1991 at page 75.

...there were occasions on which the officers most directly the subject of the complaint were interviewed last, by which time their colleagues had had the opportunity to explain in detail to them the direction which the investigation was taking. If they were not by then able to fabricate a plausible, exculpatory version of events, they did not deserve to be in the police force because of lack of intelligence!<sup>405</sup>

Police were found to waste time interviewing irrelevant witnesses;

Time played into the hands of police malefactors. Memories faded, documents could be doctored, stories could be concocted, and alibis cemented. The hierarchy in the Internal Investigations Department would not acknowledge this. Instead, they stressed the importance of following procedures and interviewing all witnesses, however tangentially relevant (or irrelevant) their contribution to the investigation manifestly was<sup>406</sup>.

Police investigators focus was on discrediting the complainant:

It was discovered that the police internal unit in Victoria, which at that stage numbered some seventy people, lacked any real investigating energy, the initial attitude to the complainant was one on of suspicion and readiness to disbelieve. This meant that immediate attention was devoted to means of discrediting the complainant.<sup>407</sup>

The Police Complaints Authority was disbanded in 1988 and the oversight of complaint investigation was returned to the Ombudsman. Complaint investigations continued to be conducted by an internal police unit.

Sam Biondo, then of the Fitzroy Legal Service writes:

“During [the 1990s] Victoria has achieved an ignominious national reputation of use of violence. The ‘Force’ has been criticised for its excessive use of both deadly and non-deadly force. Aside from the considerable criticism it has received as regards the large and disproportionate number of police shootings which have occurred in Victoria, it has also come under increased public scrutiny following a serious of events which entailed the excessive use of non-deadly force. Such events have included mass strip searches, the use of long arm batons and accusations of police brutality”<sup>408</sup>.

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<sup>405</sup> Ibid.

<sup>406</sup> Ian Freckelton, “*Shooting the Messenger*” in “Complaints against the Police, The Trend to External Review” edited by Andrew Goldsmith, 1991 at page 75.

<sup>407</sup> Ian Freckelton, “*Shooting the Messenger*” in “Complaints against the Police, The Trend to External Review” edited by Andrew Goldsmith, 1991 at page 73.

<sup>408</sup> Sam Biondo, “Police Brutality in Victoria: Invisible Victims of State Power” February 1997 Masters Thesis.

Biondo's work documents the prevalence of police violence and abuse across Victoria in the early 1990s.

Also in the 1990s a significant number of complaints were made concerning a disturbing pattern of sexual assaults of women by police in regional Victoria<sup>409</sup>. At least eight police from the Maryborough police station were specifically referred to in the complaints. Complaints included police picking up 16 year old girls from the street and driving them to the bush to sexually assault them, entering the homes of women and raping them while on duty, the rape of one woman in her home by three armed men, allegedly police, police tampering with running sheets to cover up activities, engaging in threats and bartering sex in exchange for speeding fines. The investigation into these complaints resulted in two police being dismissed from the force. Others were fined for their conduct.

Police investigators were troubled by the fact that complainants were reluctant to speak to them. In one case they interviewed a woman under a criminal caution for perjury.

Astonishingly the 1997 Ombudsman report into the investigation indicated little understanding of the concerns facing complainants who are required to provide statements to police investigators about police sexual assault, or that giving a statement under a criminal caution leads to concerns about the orientation of the investigation. Instead, praise was given to the investigators "in the face of a total lack of co-operation from the women involved." Furthermore an investigator's decision to drop disciplinary charges solely on the basis that the DPP was not proceeding with criminal charges was endorsed. The Ombudsman claimed that the standards of proof in both criminal and disciplinary proceedings were effectively equivalent. Most worrying about the Ombudsman's report was its total lack of concern for complainant's needs and its failure to make recommendations that ensure the victims of police sexual assault are central to a complaint process. It is clear from this report that the women had completely lost faith in the investigation process available and that a fully independent civilian and complainant oriented investigation was necessary to uncover the full scale of human rights abuses being perpetrated against them and to protect their interests. Indeed, the Ombudsman's Report and the human rights abuses of police described demands a full public inquiry capable of protecting the interests of the victims, uncovering the scale of that abuse and "identifying the root causes of the culture of abuse that existed."<sup>410</sup>

Police abuses in Victoria continued into the 2000<sup>411</sup> and again investigation by police has been negatively critiqued. The Koori Complaints Project 2006-2008 analysed the

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<sup>409</sup> "The Maryborough Police Investigation" Report of the Victorian Ombudsman, November 1997.

<sup>410</sup> AM & Ors, R (on the application of) v Secretary of State for the Home Department & Ors [2009] EWCA Civ 219 (17 March 2009) paragraph 43.

<sup>411</sup> See for example Jude McCulloch 2001, "*Blue Army*" and S11 Complaint to the Victoria Ombudsman by the Federation of Community Legal Centres.

investigation by police into 13 years of Koori complaints in Victoria until 2006. This report paints a grim tale of poor quality investigation.

McCulloch and Palmer interviewed a number of lawyers about their perception of the complaint process for a report released in 2005. Comments from lawyers included:

We've tried to be really creative in how we deal with problems with the police, and we've tried all sort of different things....The complaints system is so completely inadequate and completely lacking in any transparency and accountability and it's the complete frustration that we have with that that leads us to looking at other options including civil litigation."<sup>412</sup>

I'm not a great believer in the complaints system anymore in spite having participated in it. I don't think that over the last two decades it has yielded much that is effective in making police more accountable or in changing police culture."<sup>413</sup>

I have never known an ethical standards complaint to be upheld in this area that I can think of....the formal complaint mechanisms are useless.....the ombudsman is useless...It [civil litigation] is the only way you can ever get any recourse to justice.<sup>414</sup>

The case of Corinna Horvath provides a further example of the disturbing failure in Victoria's complaint systems. In 2001, the County Court found that Ms Horvath and her household had been subject to "...a disgraceful and outrageous display of police force in private house", characterised by "...excessive and unnecessary violence wrought out of unmeritorious motives of ill will."<sup>415</sup> As a result of the unlawful police raid, Ms Horvath suffered a fractured nose, facial injuries, bruising, scratches, a chipped tooth, psychological injuries and was hospitalised for five days. Despite the Court's finding, no police have been disciplined or criminally charged for their illegal activities<sup>416</sup>.

## 7.5 Recent Complaints

### 7.5.1 Introduction

Since October 2005, the Flemington & Kensington Community Legal Centre has received over 50 reports of human rights abuses against African and Afghani Australians in the Flemington and surrounding regions.

Police behaviour reported to the legal centre includes assaults requiring hospitalization of

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<sup>412</sup> McCulloch & Palmer 2005 "*Civil Litigation against Australian Police between 1994-2002*" Report to the Criminology Research Council p 90.

<sup>413</sup> Ibid at p 91

<sup>414</sup> Ibid.

<sup>415</sup> *Horvath & Ors v Christensen & Ors*, Judge Williams, County Court of Victoria, 21 February 2001.

<sup>416</sup> Communication to the UN Human Rights Committee by Corinna Horvath on 19 August 2008, Flemington & Kensington Community Legal Centre.

victims, punitive beatings of handcuffed or otherwise restrained people, unlawful imprisonment, acts of torture and brutality within police stations, excessive use of force, unlawful searches, threats of sexual violence, unjustified use of capsicum spray, strip searches conducted after such threats are made, searches in unjustified and humiliating circumstances, racist and sexist comments, thefts of money and mobile phones, loss of vehicles, harassment, degrading and humiliating conduct and ill-treatment against racial and religious minorities. In some of the reports, children as young as 10 have been assaulted and mothers sprayed with capsicum spray.

People have reported being told by police to “get back to Africa,” “go home”, “we won’t stop till you are locked up”, you are a “terrorist”, a “monkey” and your Qu’ran is “shit”.

Reported and observed effects on individuals and witnesses to the violence have included intense paranoia, fear, refusal to leave the house, helplessness, loss of weight, dropping out of school, long term injuries, loss of sight, long term pain, scaring and deep distress at being in Australia, distrust of institutions. In some cases people have left Victoria and Australia rather than continue facing the degree of harassment they receive in Flemington at the hands of police. Some people have ongoing medical needs as a result of police misconduct that they cannot afford to fix.

In the words of a 16 year old Somali young person: "In my experience the police are racist. They are racist to black people. They think we are all gangsters. We are not gangsters. We are normal people. They should treat us like normal people. Since this incident [an allegation of severe beating by police] I haven't been sleeping properly. I've been paranoid. I've been hating cops. I don't want want to associate with police. I don't want anything to do with police."<sup>417</sup>

### *7.5.2 Police Complaints*

In early 2006 through the local legal centre and in many cases with the assistance of Moonee Valley Youth Services, victims of police misconduct started lodging complaints with the Office of Police Integrity.

By December 2007, the number of complaints lodged was over 19.

In each complaint lodged through the legal centre we noted the racialised nature of the complaint, the severity of the reported conduct of the police, the vulnerability of the victim and the concern we had that the victim and their family would be adversely affected by putting in a complaint. We requested that the Office of Police Integrity investigate the complaint.

Under section 86N of the then *Police Regulations Act 1958* and section 40 of the *Police Integrity Act 2008*, the OPI had the option to investigate complaints indicating systemic practice failures and public interest matters. Rather than adopt this course the Office of

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<sup>417</sup> Report to the FKCLC in 2007.

Police Integrity referred the complaints down to the Ethical Standards Department (ESD).

Despite the fact that most of the complaints involved assaults, ESD referred the complaints to Victoria Police members based in regional police stations.

The majority of the complaints initially lodged with the OPI were investigated by a police officer in Region 3 from Broadmeadows. Region 3 is the policing region in which the Flemington and Moonee Ponds Police Stations are located. As a result there is no hierarchical separation between the investigator and the police being investigated<sup>418</sup>.

In one example we had to request a new investigator twice after the complaint was allocated on two occasions to police officers from the same station as the allegation. This complaint involved the beating of a young person by a group of police<sup>419</sup>.

### **7.5.3 Ethical Health Check**

Along side the initial investigation into some of individual complaints, in 2006 Victoria Police, with OPI approval, conducted an “Ethical Health Check” of the Flemington Police Station. Inspector Mark Doney conducted this review.

The review involved interviewing police about the culture at the Flemington Police Station and in particular police attitudes towards young people from African backgrounds. As far as the Legal Centre is aware, none of the complainants themselves were interviewed as part of this review.

Before this review occurred, two police moved out of the Flemington Police Station. One was moved, firstly to Moonee Ponds and then Boxhill. This officer had been placed in charge of “Operation Molto” an operation specifically targeting young African Australians from the horn of Africa. This officer had a long complaint history prior to being put in this position and there were widespread complaints of him driving around and harassing young people and taking their mobile phones from them to “check” whether they were stolen. This practice is unlawful. He was also accused by one person of beating him to obtain information (torture) in the police station.

A Leading Senior Constable who later became the Flemington Station’s Multicultural Liaison Officer reports the period until the previously described police officer left as “like a war zone”. Many young people describe being assaulted by police during this period. The Leading Senior Constable stated that African Australians were referred to by police as “Skinnyies”. This term was used by American “peacekeepers” in the movie drama “Black Hawk Down” which contains racist depictions of Somalis as lawless

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<sup>418</sup> Hierarchical separation is an international law requirement for human rights abuse investigations: *Ogur v. Turkey* 20 May 1999 ECHR Para 91

<sup>419</sup> Complaint made to the OPI in April 2007.

aggressors<sup>420</sup>.

The then head of the Flemington Police Station (uniform division) was moved to the city. Also in charge of policing in Flemington is the Manager of Criminal Investigation Unit. No steps appear to have been taken to deal with his managerial responsibility for what was experienced on the streets as a police culture of violence, misconduct and racism.

The police officer, who was moved to Boxhill has subsequently been promoted, despite his lengthy complaint history<sup>421</sup>.

Inspector Doney concluded his review of the Flemington Police Station in about July 2006. Following unsuccessful informal requests for a copy of his report, Doney's report became the subject of an FOI application heard in VCAT during July 2007. VCAT upheld the police assertion that the police who "ratted" would be at risk if the report was released and would be unlikely to speak out again. The Legal Centre argued that it was in the public interest for the community to know the truth about what was happening at the Station, that the Senior Sergeant had already seen the report and that the report contained no material identifying the police who spoke out.

In his decision, VCAT's Deputy President Macnamara said:

"I accept that if it were demonstrated that the processes surrounding the Office of Police Integrity were not functioning adequately, there might be something to be said for the public interest favouring the release of the Doney report as it were to fill the vacuum or make up the deficiency. The delay in the disposition of the bundle of complaints to the OPI is somewhat disquieting."<sup>422</sup>

Around the time of this decision, Victoria Police appointed another police officer from Region 3, (Investigator 2) to assist the previous Region 3 Police Officer (Investigator 1) with the investigation of some of the individual complaints.

The Doney report is not an adequate substitute for the kind of public inquiry that is needed into the policing in Flemington. It was not open to public scrutiny, independent of the overall police hierarchy, able to reach conclusions on the lawfulness of the police conduct or involving of the victims in order that they be able to protect their interests. All of these requirements are necessary to meet the human rights standards set out in this report.

#### **7.5.4 Raising Issues Directly with the Police**

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<sup>420</sup>For more information, see Razack, 2004, "*Dark Threats and White Knights. The Somalia Affair, Peacekeeping, and the New Imperialism.*"

<sup>421</sup>Communication by senior police to the author in 2006.

<sup>422</sup>*Flemington Kensington Community Legal Centre v Victoria Police (General)* [2007] VCAT 1237 (13 July 2007)



As well as making formal complaints, we tried to raise issues with local police. By way of background to the following conversation, the Victoria Police Manual makes it a requirement that Use of Force forms are filled in at the end of every shift where force has been used against a member of public. Force includes the use of handcuffs. As handcuffs are used in the vast majority of arrests one would expect use of force forms to be filled in on a daily basis<sup>423</sup>.

In a conversation with the author a senior police officer in region 3 said as follows<sup>424</sup> (senior police officer indented):

We have one senior sergeant and 17 detectives and 4 Detective Sergeants. We used to be housed in [ ], we would all like to be housed together but we are not. We operate reactive and proactive strategies. Such as targeted drug operations or follow up on patterns of theft.

We work in plain clothes, no uniforms. If a matter needs expertise then it will involve the CIU. We have authority through our rank, but generally leave issues to each area. Sometime we do operations with the uniform police to make up the numbers.

Police in unmarked cars are not always from our branch, they could be coming in from different regions.

We are into appropriate customer service. We aim to give appropriate service.

Do you check up on use of force forms?

I haven't sighted one of those forms in years.

How do you ensure police use their powers accountably?

We get held to account in court. At the end of the day accountability is in court. There is also a complaint system.

I am not aware of any complaints against CIB. If anything happens, I'd know.

How do you check?

I get verbal reports from members, then I read their statements. I haven't seen any use of force forms.

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<sup>423</sup> Use of force forms are not used in up to 70% of cases according to the OPI report 2007 Annual Report.

<sup>424</sup> Conversation on 14 March 2008 with the author, notes recorded during the conversation and written up immediately afterwards. The words used reflect the notes taken and are to the effect of what was communicated.

We haven't had one complaint. I don't want to hear about poor police service. I wouldn't want to know that there is misconduct happening. I haven't heard a single problem in the last 12 months. I am entitled to believe we have acted professionally.

Do you look at interview rooms [while police are with suspects]?

Its so boring, I cook cakes to give to suspects.

How do you ensure appropriate force is being used?

It's all about subjective judgment.

What kind of training do you get on the use of force?

We get two days on defence tactics twice a year.

I have a group of mature and family oriented detectives. I am not aware of these issues. We had a meeting on statistics and our stats are fine.

We have heard 35 reports in two years. We have made 19 formal complaints.

I haven't heard anything.

How do you ensure the Operational safety procedures are being followed?

We don't have these issues out here.

What are you doing about the Charter of Human Rights? You must ensure that people are treated with respect and dignity for the person.

We take our guidance from the department

When someone is custody we have to take care, we are vulnerable.

I haven't heard one complaint.

We'll what about on Friday,

Well our guys say he was resisting.

And our guy says police assaulted him. What are you going to do about it?

Well it comes down to evidence.

We haven't heard a complaint.

I am making one right now.

Well you've made it to [my boss], so we'll see what he does.

What are you going to do about it?

Well what are the allegations?

Our client was punched while handcuffed.

Well it comes down to veracity.

So if its your word against ours nothing can be done?

So what are you going to do to ensure this does not happen again?

Until we have hard evidence, we are not going to do anything.

So If I say to you we have 35 reports in the passed two years what are you doing to ensure this doesn't happen again.

Well it will get sorted out in the courts.

It is worth noting, that many of the concerns raised by people in the Flemington area concern the CIU. For example in one report made to the Legal Centre, but not referred to the OPI, Detectives in an unmarked car drove slowly passed a group of black teenagers and told them to "Get back to Africa." (February 2007) The young people made a report to the Moonee Ponds police station, but received no further word<sup>425</sup>.

Many assaults and attempts to victimize and silence young complainants have been reported to have been perpetrated by CIU members. One detective, has been reported by many young people to drive passed them giving them "the finger."

The complaint discussed with this officer involved a complaint where one of this officer's "Family oriented detectives" was reported to have threatened to "fuck [our client] up the arse."

This response to this series of questions is remarkable for a number of reasons:

- a) The Management Intervention Model is not being applied.
- b) Who ever has been investigating has not appeared to have informed CIU management

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<sup>425</sup> Reported by clients of the legal centre in February 2007.

about the complaints made by clients of the Flemington & Kensington Community Legal Centre. Nor does it appear police are being questioned about incidents.

b) Unless a court finds an officer has committed misconduct, this officer is not going to do anything.

c) The officer appears to have no interest in taking a proactive approach to preventing police misconduct.

d) He has taken no steps to create a culture of accountability and responsibility.

e) He fails to understand the Police Safety First Principles and police policy around use of force.

It is worrying to note that there is move to increase police access to weapons<sup>426</sup>. If basic accountability mechanisms like use of force forms, are not being completed or supervised, how is the public to trust accountability in the widespread introduction of potentially lethal weapons such as tasers?<sup>427</sup>

### **7.5.5 Protections for Victims**

In our complaint letters to the OPI and on instructions from our clients, we made it clear that we were to be the contact point between our clients and the investigators.

During 2006 and 2007, complaint investigators met with many complainants, family members and witnesses at the Legal Centre. Because of the trust we had built up with our clients, and in reliance on this trust, our clients and their families were willing to give statements to the investigator. Some times we facilitated contact on week-ends in order to assist the investigator meet his deadlines. Sometimes we would go to collect our clients from their homes.

The process was highly unpleasant for the victims, many told us afterwards they felt like the criminal and that it was clear that he (the police investigator) didn't believe what they were saying. We witnessed the investigator changing the language of the victim in order to minimise the complaint. "Dragged" became "Escorted", Racist abuse become "a discussion about issues to do with race."

On one occasion, the investigator went to a young person's work place and took him away in order to question him. The experience was akin to being arrested.

### **7.5.6 Obtaining Undertakings**

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<sup>426</sup> <http://www.theage.com.au/national/we-will-look-at-tasers-20090302-8mge.html?page=-1>

<sup>427</sup> The Critical Incident Response Team and the Special Operations Group currently use tasers in Victoria. [http://www.police.vic.gov.au/content.asp?Document\\_ID=13689](http://www.police.vic.gov.au/content.asp?Document_ID=13689), <http://www.news.com.au/heraldsun/story/0,24825685-2862,00.html>

Because of people's concerns that the investigator was a police officer and their concerns that speaking to him might lead to them being charged or otherwise disadvantaged we sought undertakings from ESD and the OPI about the role of the investigator.

In a meeting at the OPI office with the OPI complaint handler, an ESD officer and a police investigator investigating 13 of these complaints, a series of undertakings were made and then reduced to writing in a letter dated 23 June 2006:

One the undertakings stated the following:

The Ethical Standards investigation into these complaints is **quarantined** from any prosecution process involving the complainants except where it appears a complainant may have committed perjury or contempt.

Undertaking six states:

In the event it appears to the investigating officer during the course of prosecution proceedings involving a complainant that a person may have committed a contempt or perjury the investigating officer will raise the matter directly with the presiding magistrate, not the prosecutor.

#### *7.5.7 Undertakings in Action*

In one hearing involving the prosecution of a complainant, the investigators engaged in discussion with the prosecution over the evidence of a defence witness. After much discussion between them, the prosecutor raised a concern with the defence team that a defence witness was giving evidence in the witness stand that was different to the evidence in his ESD statement. For the prosecutor to know this, he would have been briefed by the ESD, an action specifically breaching of the undertaking which required ESD's investigator to independently inform the Magistrate. The prosecutor was then given the witness's ESD statement to enable the witness to be cross-examined on his evidence.

This had the effect that the ESD investigation information was used to assist the prosecution's case.

Perjury is a criminal offence and if ESD wished to charge the young person with perjury after the incident, this would have been appropriate. Instead the information was used to attempt to undermine the complaint and add information to assist the prosecution. No charge of contempt or perjury was laid against the young witness after the incident. It is worth asking what the purpose of the provision is. If it is to prevent perjury, then charging a person with perjury is appropriate.

The provision in the undertaking to notify the magistrate of perjury by witnesses (and the VPM 210-4) works in practice to undermine complainants, not to protect the integrity of

the police investigation processes. It became clear that the police complaint investigators and the prosecution were working together.

It is also important to note that during subpoena proceedings before the substantive case was heard, we were informed that, well over a year after the original complaint was submitted, accused Police had not made statements to police investigators<sup>428</sup>. This meant that the only people who could be subject to investigator claims of perjury and contempt were the complainants and their witnesses<sup>429</sup> not the police. This raises the question of who in fact is the subject of the police complaint investigations.

### **7.5.8 Problems in the Investigation Process**

#### *7.5.8.1 Treatment of individuals*

Some police complaint investigators have exhibited extreme suspicion of victim's stories – In one case where a young person alleged that police stole his mother's car, the investigator stated: "the car has not been stolen, I know the way Somali families work, someone will be holding on to it, this is just a false claim".... "the complaint has a history of lodging complaints, this is a good indication that this is another false complaint"..... "the excessive force complaint is just a vehicle for him to get his property back."<sup>430</sup>

On advice from counsel, and on instructions from clients on some occasions we provide our client's instructions to police investigators rather than facilitate direct contact between the investigators and the client. On some occasions, police investigators, with the approval of OPI have discontinued the complaint where this has occurred.

#### *7.5.8.2 Harassment by investigators*

The legal centre is frequently telephoned by people saying, "ESD have been banging on people's doors, everyone is terrified." Police complaint investigators "banging on people's doors" replicates the experience that the complainants originally had. To have investigators then knocking on doors after people are complaining about police raids is very disturbing. Especially when a client has requested they not be contacted.

One client came up to the Legal Centre after an investigator had been knocking to say his family were so scared, they didn't want the investigator coming to the door<sup>431</sup>.

We wrote to the OPI and ESD asking them again to contact complainants through our legal centre to prevent re-traumatisation<sup>432</sup>.

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<sup>428</sup> We had subpoenaed those statements and were told they didn't exist.

<sup>429</sup> We complained about this to the OPI and they invited us to contact ESD. ESD said that it was standard practice.

<sup>430</sup> Investigator to the author in December 2007.

<sup>431</sup> November 2007.

<sup>432</sup> November 2007

The investigators continued to refuse to co-operate with this request<sup>433</sup>.

#### *7.5.8.3 Getting people to sign withdrawal of complaint forms*

In another case, after repeated harassment by the police investigator, and without communicating with the Legal Centre, who had made the complaint on the family's behalf, a police investigator obtained a withdrawal of her son's complaint from the complainant's mother. This mother speaks Somali and requests interpreters for complex communication in English. Her son and indeed the whole family were so terrified by the incident that led to the initial complaint that he, with his family's support, left to go to Perth shortly after. He had complained to the Legal Centre on the understanding that he and his family would only be contacted through the Legal Centre.

In obtaining the mother's withdrawal of her son's complaint without any contact with the legal centre the investigator acted against the express wishes of the complainant and in circumstances where the withdrawal must be viewed as highly suspect.

Rather than showing any concern about the investigator's action to withdraw the complaint, and the real possibility that she had been intimidated into withdrawing the complaints, in reviewing this complaint the OPI found that the mother's withdrawal of her son's complaint, was consistent with and supported the police version of events.

#### *7.5.8.4 Police charging complainants*

In six complaints made to the OPI, police subsequently charged the complainant with police related charges. Charges laid against complainants included use threatening words, resist police, hinder police and assault police. In many of these cases charges were laid after the police investigator had taken a statement from the complainant.

In all cases, charges were laid against complainants 3 to 12 months after the complaint was made. The delay is unreasonable. Unlike other crimes, offences against police officers are known entirely by the police at the time of the arrest and can be laid immediately. A delay of 3 to 12 months raises a reasonable inference that charges have been fabricated to cover the police misconduct.

Having experienced this pattern repeatedly, we have asked police not to investigate until after charges have been laid and the criminal case concluded. This could cause a loss of evidence capture, but it needs to be balanced against the risks to the complainant that the investigation will actually assist prosecution and also lead to a charge.

#### *7.5.8.5 Filing late Use of Force Forms*

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<sup>433</sup> Most recent report of investigator harassment was in February 2008.

As noted earlier, Victoria Police Manual requires Use of Force forms to be filled in at the end of any shift during which force was used<sup>434</sup>.

Reportable force includes:

Handcuffing, restraint holds, blows with batons, choke holds and the use of O/C spray.

All our clients report handcuffing. Many report other forms of force. In one case where we subpoenaed use of force forms, it was clear they were been completed at the time of charging, many months after the incident.

In many other cases where complainants have been charged with assault police type charges, no use of force forms have been completed. Force used against and by police is reportable<sup>435</sup>.

The failure to complete paperwork about the use of force is problematic in terms of the risks that evidence will be fabricated after a complaint has been submitted, but it also means that police managers are not able to monitor and analyse when and to what extent police are using force.

Victoria Police policy emphasizes that the “success of an operation will be judged by the extent to which force is minimized.”<sup>436</sup> Failure to fill in use-of-force forms means that the police are denying themselves any possibility of monitoring the success of their operations using the criterion they have set themselves.

#### *7.5.8.6 Two Statements*

In one case where a young person was charged with assault police following his complaint three months earlier to the OPI, it became apparent in the hearing that that a police officer had made two statements in relation to the matter<sup>437</sup>. In the first statement the officer’s description of client’s behaviour was fairly minimal. In the second, our client’s alleged resistance had been “ramped up” and a basis for an assault police charge had been added. Our guess was that the statements represented the officer’s pre and post awareness of the complaint. Under cross-examination by Jane Dixon SC for the complainant, the officer denied this, but could not offer any explanation for the existence of the two statements. The charges against our client were dismissed by the County Court Judge who found our client’s arrest had been unlawful. Despite this decision by a County Court judge the OPI agreed with the police investigator that our client’s

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<sup>434</sup> VPM 101-4

<sup>435</sup> The OPI 2007 Annual Report notes that police fail to complete use of force forms in up to 70% of cases (page 41)

[http://www.opi.vic.gov.au/documents/OPI\\_Annual\\_Report\\_2006-2007\\_online.pdf](http://www.opi.vic.gov.au/documents/OPI_Annual_Report_2006-2007_online.pdf)

<sup>436</sup> VPM 101-1.

<sup>437</sup> County Court Hearing on 15, 16 November 2007 Judge Murphy.



allegation of unlawful arrest was *unfounded*<sup>438</sup>. We have requested a review of this decision. A complaint was also lodged about the two statements to the OPI who then referred the complaint to the ESD.

### **7.5.9 Involvement in the Prosecution of Complainants**

#### *7.5.9.1 Attempts to induce complainants to plead guilty to charges*

In one case where police had charged a person with hinder police over six months after he had complained of being assaulted by police, our client alleged that a police investigator, through another police officer who was neither engaged in prosecuting our client or the investigation of his complaint, attempted to induce him to plead guilty to the charge of hinder police in exchange for a payment of some thousands of dollars.

If the investigator had attempted to influence the prosecution in this way, it would constitute an out right breach of the undertaking that he is to remain separate from the prosecution of the complainant. Had our client accepted the inducement, the police conduct would not have been exposed in a court in the way it was. (Police charges were dismissed and the Magistrate disbelieved the police evidence).

A complaint about this was made to the OPI. Unlike other complaints the OPI decided to investigate this complaint itself. The OPI determined that while conversations had occurred had between the Investigator 1, Leading Senior Constable A (who was not involved in the prosecution of our client or the investigation of his complaint), and the complainant, the complaint was unsubstantiated. Yet these are the facts in the OPI response on 7 November 2007:

- Leading Senior Constable A states that on 1 June 2007 Investigator 1 spoke to him about our client accepting a diversion (pleading guilty) for the hinder police charges.
- Investigator 1 does not acknowledge this. (Indeed it does not appear he was asked a direct question on this point).
- Investigator 1 admits he spoke to A about our client accepting an ex-gratia payment from the police.
- A acknowledges he spoke to our client on 1 June 2007 about both a payment and pleading guilty.
- A neither denies nor agrees the two issues were linked as an inducement. (It does not appear he was asked this critical question.)

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<sup>438</sup> Letter from the OPI dated 25 February 2009.

- Our client states that the issues were linked and that the money was offered to induce a plea of guilt.

The account given by police witness A tend to support our client's allegation that Investigator 1 was engaged in an attempt to induce our client to plead guilty to the charge of hinder police.

Critical questions appear to have been missed in the questioning of both Investigator 1 and A by the OPI.

The questions asked of the police witnesses as reported to us in an OPI's letter of 7 November 2007 avoided the key issue at stake. The questioning process permitted the cover up of the alleged misconduct.

Key questions that have not been asked include:

- What was A's purpose in telephoning our client to speak to him about pleading guilty?
- What was A's purpose in raising the issue of money?
- What did A understand were the implications of what he was doing?
- Did, as a result of Investigator 1's call, A offer our client money if he chose to plea guilt?
- What was Investigator 1's purpose in making this call to A?
- Did Investigator 1 speak to A about our client pleading guilty?
- Why did A choose to ring our client on the same day as the call from Investigator 1?
- Why does he deny he is ringing on behalf of Investigator 1? On whose behalf is he ringing? What is his interest in the topic?
- Why did Investigator 1 make a call to A about an ex-gratia payment despite the advice not to mention anything from Assistant Commissioner L?
- What was Investigator 1 doing involving himself in a prosecution process against the undertakings and Victoria Police Manual guidelines?

Rather than noting the absence of these critical questions, and on the basis of the material available to her, the OPI decision maker concluded that: "there has been some degree of confusion in the conversation between Investigator 1 and Leading Senior Constable A and then Leading Senior Constable A and [our client]"....and that... "neither Leading Senior Constable A or Investigator 1 have, in anyway acted inappropriately."

The OPI labels the conversation's inconsistencies the result of "confusion". The accounts in fact weigh in our client's favour and yet a conclusion is reached that exonerates Investigator 1 and A.

If there had been no strings attached, why wouldn't our client have accepted the money

that was offered?

Our client's version of events is the only one that makes sense of and gives meaning to the existing evidence provided by A and Investigator 1 and yet it too is dismissed as confusion.

There is no suggestion that our client lacks in credibility and yet the decision appears to dismiss his account. The decision privileges a curious, non-sensical, and side stepping official explanation against a logical civilian account<sup>439</sup>.

In this case, had the complainant been able to cross-examine the police witnesses, and the matter heard by an independent judicial body/disciplinary tribunal, a substantiated finding against investigator 1 may have been obtained.

#### *7.5.9.2 Coaching police witnesses to improve their evidence*

During the hearing of a charge against a complainant, complaint investigator (2) was overheard by a solicitor in the area outside the hearing room to strongly advise the police officer who the complainant had alleged had assaulted him to change his evidence to improve his credibility. When the conversation occurred, police officer, X had not yet finished giving evidence in the witness stand.

X changed his evidence in Court in line with the suggestions from investigator 2 who was investigating the police complaint<sup>440</sup>.

This is extraordinary for a number of reasons. Firstly it is clear that the police investigator has utterly failed in his assigned duty to independently investigate not assist X: his actions are designed to undermine the complainant and exonerate the police. Secondly, it is a contempt of court for anyone to tell a witness to change their evidence, let alone in this particular situation. This is a perversion of the course of justice. The fact that it is an attempt by a police complaint investigator is utter extraordinary and undermines the entire complaint handling process.

We asked for this officer to be removed from his position pending the investigation into our complaint. He was not removed from duties.

Following his investigation, Investigator 2 came to the conclusion that our client had not been assaulted. The OPI accepted this police officer's conclusion. The OPI did not seem to have any concerns that the decision maker had been alleged to have engaged in misconduct (coaching a police witness) himself.

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<sup>439</sup> For further examples of this see Carlton, Bree 2007, *Imprisoning Resistance*, Sydney Institute of Criminology Series p 195.

<sup>440</sup> See the complaint to the OPI dated 14 October 2007.

Our allegations suggest that the complaint investigator was not impartial decision maker. On 25 June 2008 we wrote to the Director of the OPI requesting he conduct a public hearing into Investigator 2's involvement in this case, the allegations against Investigator 2 and the finding that the complaint was unsubstantiated, (other than a failure to provide prompt medical attention).

Shortly afterwards we found out that the complaint about the police investigator attempting to pervert the course of justice by coaching the police witness had been overlooked by the OPI and remained "in their draw" for 6 months. It was subsequently sent to the Ethical Standards Department who sent it to a police officer who works at the same station as Investigator 2 to conciliate. At this stage it appears that the complaint will be found unsubstantiated, despite clear evidence that suggests misconduct.

It has been reported to the Legal Centre that Investigator 2 told a young witness who had given evidence against police in a case he was monitoring, "you shouldn't have given evidence." This was very intimidating to the young person.

These examples indicate that police are inappropriate investigators of human rights abuses. Their loyalties lie with the police organization and with the police they are investigating. They work to undermine complaints and do not hold the agency or individual police to account. They themselves engage in misconduct in behaving in these ways.

#### **7.5.10 Problems with the OPI oversight**

##### *7.5.10.1 Interest in supporting the efforts of the police*

The Legal Centre wrote to the OPI complaining about Investigator 2 coaching a police witness. The OPI responded to this complaint on 5 November 2007 noting:

"Finally, I note that the number of complaints coming from the Flemington area has significantly decreased since you originally brought your concerns to our attention in 2006. I consider that Victoria Police have taken a number of positive steps to improve their relationship with the local community you both serve since that time. In my view it is in the public interest for their ongoing efforts to be acknowledged and supported."

There are three points to make about this paragraph. Firstly, an absence of complaints is not an indicator of an absence of incidents of police misconduct. The Legal Centre continues to receive a large number of complaints. Complaints to the OPI have not made due to clients increasing skepticism about the effectiveness of the complaint process and its ability to achieve individual or systemic justice. At the same time, the individual victims are increasingly aware of the real risks involved in lodging a complaint in inducing the laying charges or other forms of victimization.

Secondly, the issue of whether the number of complaints has decreased is not a relevant

response to a complaint letter to the OPI.

The third point to make is that this paragraph contains an expression of support for police by a complaint handling manager. Her role should not be to acknowledge and support police, but rather to ensure allegations of police misconduct are effectively and thoroughly investigated. This letter is a formal response to a complaint letter detailing allegations of misconduct by police investigators. This comment leads to an inference that in the OPI's complaint handler views our clients' complaints as a nuisance, negatively impacting on the good public image of the police she is working to foster.

#### *7.5.10.2 Lower standard of investigation for external verses internal complaints*

There have been no public hearings conducted into our client's complaints. To our knowledge, there have been no telephone intercepts used against the police complained against. Indeed there appears to be hostility towards complainants. We invited the OPI to address our clients and answer their questions at a gathering in December 2006. They declined to do so. The approach of the OPI has been to dismiss and minimize our client's concerns.

It appears to us that in relation to the Flemington complaints<sup>441</sup> the OPI complaint handler is functioning to support Victoria Police and its internal complaint handling systems despite our concerns that they have led to the charging of our clients and the assistance of prosecution proceedings against complainants.

It is noteworthy that complaints by police members do appear to gain a rigorous and sympathetic response from the OPI. See for example the 2007 Kit Walker investigation and the OPI public hearings in late 2007 and 2008. No police accused of misconduct by our clients have been cross-examined through public hearings by the OPI. Police accused in the OPI's public hearings underwent vigorous cross-examination<sup>442</sup>.

Public hearings are the only forum currently available to fully explore and examine complaints. They are an essential feature of any functional complaint system and should be routinely used in all complaints where serious allegations of ill-treatment, assault and excessive force are made.

Funding must be available to ensure public hearings are available in each of these cases.

#### *2.5.10.3 Systemic Bias*

An intimate and dependent relationship exists between the OPI and ESD. This

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<sup>441</sup> Similar to other investigations into complaints by people external to the organisation, a good example is the Murray Inquiry into the Jika Jika Fire in Pentridge Prison in 1987: Carlton, Bree 2007 Imprisoning Resistance, Sydney Institute of Criminology.

<sup>442</sup> Records available on the OPI website.

relationship has been noted in many of the OPI's reports<sup>443</sup>. Due to its focus on corruption, the OPI is largely (though not totally) dependent on ESD to investigate police complaints. It is contended that this dependency undermines the OPI's ability to scrutinize and hold ESD officers to account and increases the risk of it adopting rather than resisting Victorian Police culture.

It is contended that by having to maintain a close and dependent relationship with ESD, the OPI will tend to adopt and support official explanations that re-enforce rather than undermine negative aspects of police culture.

#### *7.5.10.4 Failure to independently assess ESD files*

One of the roles of the OPI is to review ESD files.<sup>444</sup> It appears from our experience that the OPI review is superficial at best. In one case we requested from the OPI reasons for its decision to accept the ESD recommendations. It replied: The investigation of the complaint was conducted by the Ethical Standards Department (ESD) and any decisions recommendations or results are the product of investigation and deliberation by ESD not the Director of the OPI.<sup>445</sup> Because it hadn't made a decision, the OPI refused to supply us with reasons.

If the OPI has not made a decision in relation to the matter, it is abdicating its role as an independent review forum. Surely in order to assess the adequacy of the ESD investigation the OPI needs to read ESD's interviews with Police, look through the LEAP database, ring the complainant's representative to clarify issues, look at D24 tapes, assess policy manuals and case law.

In this particular case, the police officer who was complained against was the Acting Sergeant who was removed from the Flemington Police Station in 2006. This officer is the subject of a very large number of complaints. The claims against him in this case were severe and included, amongst other allegations serious assault, ill-treatment and death threats while assaulting our client within a police station and during interrogation (this is torture). His continued employment and in fact promotion within Victoria Police all point to a serious failure in the capacity of police to investigate effectively and the need for the OPI to thoroughly monitor this particular investigation.

We note that our clients have not received a letter from the ESD explaining the delays beyond 3 months of the date of their complaint and giving anticipated dates of finalisation. This is required under the VPM 210-4 6.4.3. This very simple failure in the ESD process has not been commented on by OPI either in its letters of "unsubstantiated" findings to our clients.

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<sup>443</sup> See for example p 17 & 18 of the OPIs 2007 Annual Report.

<sup>444</sup> See page 35 of the OPI Annual report 2006-2007.

<sup>445</sup> See a letter from the OPI dated 15 February 2008.

Surely the OPI's consideration of these issues are "deliberations". If the OPI is not deliberating, then it is not exercising its review function.

#### **7.5.11 Oversight of the OPI – the Special Investigators Monitor and the Victorian Ombudsman**

At present, the Special Investigators Monitor, an independent statutory agency, is only able to review complaints about coercive questioning by the OPI in OPI hearings. It can not receive complaints about whether an OPI decision to refuse to investigate a complaint is sound nor examine the other functions performed by the OPI, such as reviewing Ethical Standards Department or police investigations.

In all but one of our cases, the OPI has refused to investigate complaints against police investigators and complaints that raise allegations of serious human rights abuses such as ill-treatment, torture and unprovoked assaults.

Complaints about the OPI decision whether or not to investigate can be made to the Ombudsman, however the Ombudsman until recently *was* the Director of the OPI and was the Director at the time these decisions were made. As a result there is a conflict of interest in complaining to him about these decisions.

Appeals to the Supreme Court are seriously hampered by an extremely restrictive legislative regime.

There are no effective appeal mechanisms from the OPI in Victoria in relation to decisions whether or not to investigate complaints.

### **7.6 Conclusion**

The pattern and scale of reports to the Flemington & Kensington Community Legal Centre of police inflicted human rights abuses against African and Afghani Australians indicates dangerous, institutional and systemic failures. Furthermore the failure of the complaint system to result in the discipline or punishment any police involved in these abuses calls for a total overhaul of the complaint systems in Victoria.

The history of complaints against police in Victoria reveals that the recent concerns raised by clients of the Flemington & Kensington Community Legal Centre are not unusual or isolated. Across Victoria, and over a considerable period of time, reports, organizations and individuals have criticized Victoria's system of police investigating the police. Recent international scrutiny of Australian police complaint systems re-enforces these on-going and widespread concerns.

## Chapter 8

# Recommendations For Victoria

There are many measures needed to eliminate the ill-treatment by state authorities of ordinary people. For example, Professors Richard Harding and Neil Morgan from the Centre for Law and Public Policy in Western Australia, in a 2008 report to the Australian Human Rights Commission recommend the introduction of National Prevention Mechanisms (NPMs) across Australia to ensure Australia's compliance with the Optional Protocol to the Convention Against Torture. NPMs concern the independent monitoring of places where people are retained in state custody.<sup>446</sup>

The Office of Police Integrity's current strategy for reducing police misconduct involves assisting the police to guard against corruption through integrity testing and cultural change.

The independent investigation of complaints of human rights violations is a fundamental and essential *addition* to these strategies. At present there is no effective and independent investigation of complaints against police in Victoria. The Office of Police Integrity refers complaints to the Victoria Police. In contrast, the effective investigation of public complaints requires investigation that is fully independent of police.

I recommend the introduction of an Independent Investigation Commission into Complaints Against the Police created from inception on the principles arising from human rights standards and the experience of similar bodies in overseas jurisdictions. Ideally the Commission would investigate complaints against all organisations exercising policing and detention roles. For example Victoria Police, Corrections Victoria, Security guards, Authorised Public Transport Officers, organisations in charge of security for transport or detention facilities and locked facilities at mental health institutions and hospitals.

A good model is the Police Ombudsman of Northern Ireland. Its one draw back is that it does not conduct public hearings when it adjudicates complaints. On the other hand, the Office of Police Complaints in Washington DC uses hearings to adjudicate complaints. In these hearings, the complainant is represented at the cost of the state. The Law Enforcement Review Agency takes this a step further and makes disciplinary orders at these hearings. A combination of the best features of these three bodies would provide a good model for the Independent Complaint Investigation Commission in Victoria.

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<sup>446</sup> Harding & Morgan 2008, *"Implementing the Optional Protocol to the Convention Against Torture: Options for Australia."* Report to the Australian Human Rights Commission.



## **Measuring success**

How do we measure the success of the system? I have identified nine ways that could be used to measure how the complaint system is working:

### **1. Analyse comparative substantiation rates between jurisdictions.**

I have not discussed comparative substantiation rates in this report. This is partly because of the different methods that organizations use to measure substantiation rates. It is also because this report has focussed on qualitative standards rather than quantitative measures.

### **2. Seek the views of community legal centres, Aboriginal justice centres, legal practitioners and community based advocates about whether they are receiving less reports of abuse.**

This is an important tool in monitoring whether the complaint body is being accessed as well as patterns and improvements in police practices.

### **3. Analyse whether deaths in custody are falling.**

A person dies in custody every 4.5 days in Australia. This is a critical measure of people's safety within police and prison custody and should be featured in public reports as a measure of police practises.

### **4. Analyse whether complaint substantiations match the results of civil litigation.**

This is a central guide to whether a complaint system is effective. While ever the complaint system does not substantiate complaints that are later proven in litigation, serious questions about its efficacy arise. (see appendix 2 – civil litigation as a police accountability measure).

### **5. Measure whether substantiation matches the dismissal by Magistrates of charges relating to assault, resist and hinder police and a finding that evidence was improperly obtained.**

Where a court excludes evidence on the basis that it has been obtained improperly, the complaint body should have come to the same conclusion as the Magistrate. If no complaint has been made, the complaint body should act on its own motion to refer the incident to a police disciplinary process.

Where a Magistrate has dismissed a charge laid against a person who has complained against a police officer, the complaint body should check their own conclusions against those of the Magistrate. If their investigation has been adequate, it should match Magistrate's court decisions.

Complaint bodies should measure their effectiveness by these outcomes.

**6. Measure the use of, engagement with and satisfaction of complainants and legal practitioners in the complaint process.**

Questionnaires to practitioners and complainants/families are a good indication of the effectiveness of the complaint process. Suggestions and feedback from these questionnaires should be used to improve the complaint system.

**7. Analyse whether police with complaint histories significantly greater than average are being dismissed from the police agency.**

Where police officers attract a number of complaints, a failure to substantiate complaints is an indication that the complaint system is failing to protect the public.

**8. Analyse substantiation rates from groups of officers who receive a disproportionate number of complaints.**

Patterns of unsubstantiated complaints from groups of officers indicate that the complaint system is not working effectively.

**9. Measure consistency in prosecution, discipline, civil litigation, inquest findings and complaint substantiation rates.**

There should be consistency across each system of accountability. Substantiated complaints should result in disciplinary and criminal proceedings where appropriate. Civil litigation findings should also be matched by disciplinary and criminal proceedings. Inquest finding that cast doubts on police conduct should also be examined to ensure the complaint process has come to similar conclusions.

Each of these measures should be publicly reported on at least an annual basis.

## **Conclusion**

Until the investigation of complaints is prioritised and complies with human rights standards, human rights remain rhetorical and Victorians will remain a serious risk of abuse by police.

It is submitted that adherence to the recommendations in executive summary of this report will enable Victoria to meet the requirements of international human rights obligations and the Victorian *Charter of Human Rights and Responsibilities Act 2006*. This will require a re-orientation in the current direction of complaint investigation in

Victoria. Costs can be somewhat off-set by reallocation from the resources currently provided to ESD and the Victoria Police for complaint investigation.

Further observations that will lead to improved complaint investigation and adjudication comes through comparing complaint investigation to civil proceedings. These observations are included in Appendix 2 of this report.

A recommendation arising from this comparison is:

There should be established a Police Complaint Civil and Disciplinary Proceedings List at the Magistrates or County Court.

Magistrates or Judges hearing these matters must be provided with the power to:

- a) judicially determine complaints on the balance of probabilities,
- b) award compensation to victims and
- c) make prosecutorial recommendations to the DPP,
- d) demote and dismiss police from employment, (including police who refuse to testify<sup>447</sup>,) and
- e) recommend policy and procedural changes within Victoria Police.

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<sup>447</sup> Police must give evidence under compulsion through this process, but their evidence should not be admissible in criminal proceedings

## **Appendix 1 organizations and individuals studied/interviewed during this Fellowship.**

### **California US**

Kijani Obalaye Tafari, Ella Baker Centre for Human Rights Oakland California  
John Buriss – Attorney California  
Andrea Prichett, Berkley Copwatch  
Rashidah Grinage - Pueblo  
Tryon Woods- Sonoma State University

### **Vancouver BC Canada**

Murray Mollard - BC Civil Liberties Association  
Douglas King – Pivot Law Society  
William MacDonald, Office of the Police Complaint Commissioner  
Cameron Ward – Attorney  
Lorraine Blommaert - Commission for Public Complaints against the RCMP

### **Winnipeg, Manitoba Canada**

MacIntyre, Robert Winnipeg Police Advisory Board  
Kendra Ballingall -Winnipeg Copwatch  
Elizabeth Comack University of Manitoba  
George Wright Commissioner, LERA Manitoba  
Max Churley LERA Investigator  
Jerry Woods – Manitoba Human Rights Commission Chairperson  
Patricia Knipe – Communications Director – Manitoba Human Rights Commission  
Maria Kucher Attorney  
Jeff Gindin Attorney  
Nahanni Fontaine Director of Justice for the Southern Chief's Association  
Daniel Manning- Attorney  
Allan Wise – Community Development Worker  
Leslie Spillet - Executive Director Ka Ni Kanichihk Inc.

### **Chicago**

Joey Mogul – Peoples Law Office  
Flint Taylor – Peoples Law Office  
Jan Susler- Peoples Law Office  
Craig Futterman – University of Chicago  
Locke Bowman – Northwestern University  
Tracy Siska – Chicago Justice Project  
Gerald Frazier- Program Director Citizens Alert

### **Washington DC**

Mara Verheyden-Hillard, Attorney  
Kasha Taylor Investigation Officer Office of Police Complaints

### **New York US**

Andrea Ritchie – Attorney, Incite!  
King Downing- American Civil Liberties Union  
Robert Perry - New York Civil Liberties Union  
The Coney Island Avenue Project  
New York members of the National Lawyers Guild  
New York Civilian Review Board  
Lawyers for the Public Interest  
Malcolm X Grassroots Association

### **Northern Ireland**

Police Ombudsman of Northern Ireland  
Families for Justice

### **UK**

Campaign Against Criminalising Communities  
Medical Justice UK  
Yasmin Khan - Justice for Jean, Inquest  
Liberty  
Imran Khan – Imran Khan & Associates  
Raju Bhatt – Bhatt Murphy  
Rapporteur on Police Complaints for the European Commission for Human Rights  
Graham Smith,

### **Australia**

Jude McCulloch –Professor, Monash University  
Associate Professor Colleen Lewis  
Professor Tim Prenzler  
Dale Mills – Human Rights Monitors Sydney  
Amanda Young – Koori Complaints Project, Department of Justice  
Special Investigations Monitor – David Jones  
Victorian Ombudsman – George Brower  
Director of the Office of Police Integrity- Michael Strong  
Fitzroy Legal Centre  
Mental Health Legal Centre  
Moreland Legal Centre  
Sunshine Youth Legal Centre  
YouthLaw

### **Conferences Attended:**

Critical Resistance Conference: Oakland California  
National Lawyers Guild Conference: Detroit US  
National Association of Civilian Review of Law Enforcement, Cincinnati 2008.

## Appendix 2 – Civil Litigation as a Police Accountability Mechanism

### Civil litigation as a police accountability mechanism

In Australia and throughout the world, police are rarely prosecuted or disciplined for torturing, killing, assaulting or ill-treating members of the public<sup>448</sup>. In contrast, civil litigation against the police results in findings of police misconduct in significant numbers of cases<sup>449</sup>. While civil litigation offers only a partial solution to the endemic problem of police human rights abuse, its ability to find against police where other accountability mechanisms fail justifies expanding its availability to victims of police abuses. It also warrants its close analysis as a tool to improve state accountability mechanisms.

This article examines the following questions:

1. What forms of accountability are needed when police abuse human rights?
2. Why does civil litigation achieve results in favour of complainants when State controlled systems that handle complaints against police do not?
3. Why is civil litigation more available in the USA and the UK than Australia and Canada?
4. How can civil litigation be made more accessible in Australia?
5. What lessons from the successes achieved through civil litigation can be drawn to increase the discipline rates of police who abuse rights in Australia?

#### 1. What forms of accountability are needed?

The Committee Against Torture, which oversights the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, requires State Parties to ensure effective measures are taken to “prevent, investigate, prosecute and punish” perpetrators of ill-treatment<sup>450</sup>.

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<sup>448</sup> See for example McCulloch & Palmer 2005 – Report to the Criminology Research Council, “Civil Litigation by citizens Against Australian Police between 1994 and 2002”, Human Rights Watch 1998 “Shielded from Justice, Police Brutality and Accountability in the United States.” British Columbia Civil Liberties Association Press Release dated 30/09/08 Deaths in Custody Investigation needs reform, “Torture in Chicago” 2008 Report by Peoples Law Office et al. Conversations with Imran Khan and Raju Bhatt in the UK 2008.

<sup>449</sup> Ibid.

<sup>450</sup> See for example its General Comment No 2. 23 November 2007

In its concluding observations concerning Australia in 2008, at paragraph 27, the Committee noted:

“The Committee is concerned over allegations against law enforcement personnel in respect of acts of torture or cruel, inhumane or degrading treatment or punishment and notes a lack of investigations and prosecutions. The State Party should ensure that all allegations of actions of torture or cruel, inhuman or degrading treatment or punishment committed by law enforcement officials, and in particular any deaths in detention, are investigated promptly, independently and impartially and – if necessary – prosecuted and sanctioned. Furthermore, the State party should also ensure the right of victims of police misconduct to obtain redress and fair and adequate compensation.”<sup>451</sup>

Similarly, Article 2 of the *International Covenant on Civil and Political Rights* (the “IPCCR”), to which Australia is also a Party, requires states to ensure that victims of rights violations achieve an effective and enforceable remedy for that abuse.

In its Concluding Observations on Australia, on 3 April 2009, the Human Rights Committee noted:

“21. The Committee expresses concern at reports of excessive use of force by law enforcement officials against groups, such as indigenous people, racial minorities, persons with disabilities, as well as young people; **and regrets that the investigations of allegations of police misconduct are carried out by the police itself.** The Committee is concerned by reports of the excessive use of the electro-muscular disruption devices (EMDs) “TASERS” by police forces in certain Australian states and territories. (articles 6 and 7). The State party should take firm measures to eradicate all forms of excessive use of force by law enforcement officials. It should in particular: **a) establish a mechanism to carry out independent investigations of complaints concerning excessive use of force by law enforcement officials; b) initiate proceedings against alleged perpetrators;** c) increase its efforts to provide training to law enforcement officers with regard to excessive use of force, as well as on the principle of proportionality when using force; d) ensure that restraint devices, including TASERS, are only used in situations where greater or lethal force would otherwise have been justified; e) bring its legislative provisions and policies for the use of force into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and **e) provide adequate reparation to the victims.**”<sup>452</sup>

Police are the principle agents of human rights abuses and torture<sup>453</sup>. It is thus imperative that States ensure that police violators are:

a) Prosecuted;

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<sup>451</sup> Concluding observations of the Committee Against Torture 15 May 2008 Australia

<sup>452</sup> Concluding observations of the Human Rights Committee 3 April 2009 Australia, para 21. <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

<sup>453</sup> Penny Green & Tony Ward 2004, “State Crime, Governments, Violence and Corruption” Pluto Press, p 124.

- b) Disciplined  
And that:
- c) Compensation is paid to the victim<sup>454</sup>

Furthermore, victims are entitled to assurances that the State has learnt the lessons that led to the abuse and has reduced the likelihood of further abuses<sup>455</sup>.

## 2. Why civil litigation succeeds where complaint investigations fail

Traditionally compensation for police abuses has been paid as a result of the victim taking civil proceedings against police. In the UK police misconduct litigation finds for the plaintiff in 40% of cases, while complaint substantiation rates are 4%.<sup>456</sup> A reason for this discrepancy provided by police complaint bodies is that only complaints with good evidence get litigated.

However, the fact that many complaints determined as “unfounded” or “unsubstantiated” by complaint mechanisms are subsequently found for the plaintiff in litigation through the courts<sup>457</sup> reveals alternative explanations are needed.

A second explanation given by police for the difference in findings is that the processes have (a) different standards of proof and (b) are working towards different outcomes<sup>458</sup>.

It is correct that criminal proceedings against police operate at a higher standard of proof than civil litigation. However, it is now clearly established in Australia<sup>459</sup>, Canada<sup>460</sup> and the UK<sup>461</sup> that the standard of proof at both disciplinary hearings and civil hearings is “the balance of probabilities”. In the US the standard is the “preponderance of the evidence.”<sup>462</sup>

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<sup>454</sup> It is the State, as the party to human rights covenants that holds the obligation to compensate people for human rights abuses.

<sup>455</sup> *R (Amin) v Secretary of the State for the Home Department* [2003] UKHL 51 paragraph 31.

<sup>456</sup> Conversation with Graham Smith, Manchester University, UK 2008.

<sup>457</sup> See McCulloch & Palmer *ibid*, Graham Smith 2003 “*Actions for Damages Against the Police and the Attitudes of Claimants*” Policing and Society 2003, Vol 13, No. 4 pp 413-422, Clifford Zimmerman and G.Flint Taylor, “*The Interrelationship of Police Disciplinary Decisions and Police Misconduct Litigation*” Police Misconduct and Civil Rights Law Report May-June 1994, conversations in 2008 with Pivot Law Society, Vancouver Canada, Joey Mogel, Flint Taylor, Craig Futterman, Chicago USA, Raju Bhatt and Imran Khan UK, Dyson Hore-Lacy SC, Melbourne Australia.

<sup>458</sup> See for example Police interview in McCulloch & Palmer at page 98.

<sup>459</sup> See OPI 2007 “A Fairer Disciplinary System”, Victoria, Australia at page 36.

<sup>460</sup> *F.H. v. McDougall*, 2008 SCC 53

<sup>461</sup> Interview with Graham Smith 2008.

<sup>462</sup> Mission Failure, New York Civil Liberties Association, 2006.



It has been noted that because disciplinary hearings result in adverse findings against the police, the balance of probabilities is harder to meet in these forums<sup>463</sup>. In *Briginshaw v Briginshaw* 60 CLR 336 (30 June 1938) the High Court of Australia established that there is no third standard. It did however find that a serious allegation, required quality evidence to meet the standard of proof. That is where the allegations are serious, a civil court must, in the same way as disciplinary tribunals, be satisfied that the evidence is sufficient to support a balance of probabilities test. *Briginshaw* also states that the consequences of a finding must be considered in reaching a conclusion about whether the evidence meets the standard.

The consequences of a disciplinary finding could be a suspension, a dismissal, retraining, a probationary period, or a delay in promotion. The consequences of civil proceedings may be a monetary debt. Frequently civil courts award “punitive (or exemplary) damages” against police. Damage awards thus both compensate the victim and provide a form of punishment to police perpetrators. Consequences in civil proceedings are therefore no less serious for defendants. For this reason, the quality of evidence required in both forums will be similar.

A third difference raised by police is that negligence claims are easier to demonstrate than disciplinary offences. In Victoria, the definition of a disciplinary offence includes where a police officer:

“(c) engages in conduct that is likely to bring the force into disrepute or diminish public confidence in it; or

(e) is guilty of disgraceful or improper conduct (whether in his or her official capacity or otherwise); or

(f) is negligent or careless in the discharge of his or her duty;”<sup>464</sup>

Given that an act of negligence is defined as a disciplinary offence, the tests applied by Civil Courts in negligence proceedings will be the same as that applied through disciplinary processes<sup>465</sup>.

A fifth reason given by police for the better results achieved by civil litigation is that Judges are more inclined to believe the plaintiff than the police.<sup>466</sup> The grounds for this assertion are not made out. In criminal cases judges accept and believe police evidence against civilians on a daily basis<sup>467</sup>.

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<sup>463</sup> Ian Freckelton 2009 interview.

<sup>464</sup> Section 69 of the *Police Regulations Act 1958*

<sup>465</sup> Other torts such as intentional battery would fall under the definition of disgraceful and improper conduct making the issues to consider similar in both forums.

<sup>466</sup> See McCulloch & Palmer at page 97

<sup>467</sup> This article indicates that juries are more likely to believe police.

[http://www.huffingtonpost.com/earl-ofari-hutchinson/federal-probes-no-antidot\\_b\\_35752.html?view=print](http://www.huffingtonpost.com/earl-ofari-hutchinson/federal-probes-no-antidot_b_35752.html?view=print)

The real reasons for discrepancies start to become apparent when one focuses on the decision makers in the complaint system: the police themselves. It is the lack of independence of these decision-makers that is part of the reason why police complaint systems rarely find for the complainant.

Civil litigation achieves results for a number of reasons:

1. The victim is a party

Civil litigation is driven by the victim and the victim has full standing and representation. The victim chooses who will give evidence and on what basis to cross-examine witnesses. The victim determines what lines of enquiry to pursue and what kind of evidence must be discovered.

2. The independence of the decision-maker

The decision maker is usually a judge or jury. If the jury selection has been adequate, the jury, like the judge will be impartial.

3. The evidence can be tested

Until a person is cross-examined on their evidence, it is difficult to come to a view on their credibility. Cross-examination in court permits a better assessment of credibility than a decision on pre-prepared and potentially fraudulent evidence.

4. The process is transparent

Hearings and interlocutory proceedings occur in open court and according to regulation and law. Both parties are involved at each stage. The media and public may attend.

5. Full-disclosure of documents

While this ideal is not always reached, the disclosure of documents in civil proceedings is certainly much better than anything the complainant receives through the police complaint process. It is important to realise that police lawyers will have access to the full complaint investigation material as soon as a suit is lodged<sup>468</sup>. Failure to disclose all of this material to the plaintiff results in inequalities between the parties.

6. The decision is legally reasoned and open to full review and scrutiny.

Decisions by Judges in civil proceeding must be legally reasoned, address the facts and be available in full to both parties and the public. Decisions can be appealed.

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<sup>468</sup> McCulloch & Palmer at page 100.

Combined, these qualities make up the reasons why civil litigation processes are more likely to reach findings of fact against police than police complaint processes.

### 3. The availability of civil litigation in the US and UK

In the US, the *Civil Rights Act of 1871* (the *Klu Klux Klan Act*) (now provision 42 USC section 1983) establishes a mechanism to sue a person acting under colour of law custom or practice who deprives a person of any right or privilege secured by the US Constitution or any other law. Actions are brought in the Federal Courts. The US Constitution contains rights such as the right to life<sup>469</sup>, freedom from unlawful search and seizure<sup>470</sup> and freedom from torture and ill-treatment<sup>471</sup>.

In 1961, *Monroe v Pape* 365 US 167, section 1983 applied section 1983 to police acting under apparent or purported authority of law, custom or practice. This application opened the way for police misconduct litigation.

Under section 1983 successful plaintiffs can receive damages for pain and suffering, injuries and lost wages. Punitive damages are frequently awarded and in addition, attorney and witness fees can also be recovered.

If a police officer is successful in defeating the litigation, his or her legal fees are only recoverable from the plaintiff if a court finds the plaintiff's case is frivolous, unreasonable or without foundation: *Christianberg Garment Co. v. EEOC*, 434 U.S. 4012 (1978). This means that unsuccessful plaintiffs in the US are not liable to pay costs provided their claim is reasonable.

The provision for attorney fees in damage claims also means that lawyers can recover their costs in taking action against the police. Obviously if the plaintiff loses, lawyers will not recover their costs. This is a risk the lawyers must take in accepting these cases.

In the US, as in Australia, cities (or states), on whose behalf police act, are not automatically vicariously liable for damage awards. Without vicarious liability, damage awards are "paper victories" for plaintiffs. A series of US cases (Monell litigation) demonstrated that cities can be liable for police misconduct and many cities now offer indemnity certificates to prevent exposing themselves through discovery under Monell actions and to satisfy police associations. The existence of vicarious liability remains however, greatly variable across US jurisdictions.

A Monell claim can be brought where the perpetrator of a rights violation is a police officer who has received previous complaints. The claim is made by demonstrating that the State/City's police disciplinary system has failed, leaving the public, and the plaintiff in particular, vulnerable to rights abuse. It is foreseeable that a police officer who has

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<sup>469</sup> 14<sup>th</sup> Amendment

<sup>470</sup> 4<sup>th</sup> Amendment,

<sup>471</sup> 8<sup>th</sup> Amendment.

previously violated the rights of a person will do so again unless dismissed or otherwise re-trained and effectively supervised. Failure to ensure the disciplinary process acts to prevent foreseeable abuses, renders the State/City directly liable for the abuse suffered by a plaintiff.<sup>472</sup>

Monell type claims are worth exploring in the UK, Canada and Australia.

As a result of *Monroe v Pape*, there now exists a body of lawyers across the US with substantial skill and expertise in police misconduct litigation<sup>473</sup>. However, Police misconduct cases are not highly profitable and many of these lawyers, despite their expertise, operate on extremely tight budgets.

The existence of a remedy against human rights abuses in the US has led to some extremely significant decisions about police misconduct. For example, civil litigation uncovered the links between the police, Klu Klux Klan and Nazi groups in the 1985 Greensboro litigation, it brought to public attention the relationship between police, the FBI and Cointelpro in conducting an unlawful shooting of Black Panther leaders in the Fred Hampton case<sup>474</sup>. In 1983, civil litigation assisted in uncovering the existence of “street files” – files held by police, never shown to defence lawyers, that contained exculpatory evidence that could assist individuals police were prosecuting. Civil litigation was essential in uncovering the systemic torture of over 100 African Americans to obtain false confessions in the Burge cases in Chicago<sup>475</sup>. It has been used to uncover the failure of police command to control and dismiss police using their police weapons against their wives<sup>476</sup> and has been critical in uncovering systemic and entrenched failures in police disciplinary systems (the Monell litigation)<sup>477</sup>. Civil suits have also resulted in settlements agreements (consent decrees) in which cities and police departments agreed to the establishment of civilian bodies that receive police complaints<sup>478</sup>.

While civil rights litigation has been very effective in bringing to public attention some profound examples police misconduct and the State’s complicity in this misconduct, this

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<sup>472</sup> Futterman, Craig 2008, The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department’s Broken System, *DePaul Journal for Social Justice*, Vol 1 Number 2.

<sup>473</sup> The National Lawyers Guild has a National Police Accountability Project which supports the work of these lawyers.

<sup>474</sup> *Hampton v. Hanrahan* 446 U.S. 754 (1980)

<sup>475</sup> *Wilson v. City of Chicago* 6 F.3d 1233 (1993)

<sup>476</sup> *Czajkowski v. City of Chicago* 810 F.Supp. 1428 (N.D. Ill.) (1992)

<sup>477</sup> See for example *Means v. City of Chicago* 535 F. Supp. 168 (N.D. Ill. 1982) These cases mention in this paragraph were all conducted by Chicago attorneys from the People’s Law Office.

<sup>478</sup> See for example the 2003 Cincinnati Consent Decree

avenue is largely inaccessible to the vast majority of US victims of police misconduct<sup>479</sup>. The high risk and long trial times provide little commercial imperative for lawyers to take on police misconduct cases. As a result civil rights cases in the US represent a fraction of the problem.

Despite these drawbacks, civil rights litigation is a far more accessible option to victims in the US than Australia and Canada.

### Civil Litigation in the UK

Since in the mid 1980s, UK civil litigation against the police has been funded by through legal aid assistance schemes. Prior to this, civil actions against the police were only available to those who could pay rendering them inaccessible to the vast majority of victims<sup>480</sup>. From the 1980s civil litigation began exposing the failures of the complaint systems as plaintiffs found success where complaint mechanisms failed<sup>481</sup>.

Plaintiff lawyers and the people and families they represent used civil cases to revealed the prevalence of police brutality and its disproportionate impact on people from working class backgrounds and on racial, cultural and religious minorities<sup>482</sup>. They also exposed the systemic biases towards police in State run police accountability measures. They forced the State to be more transparent with investigation results<sup>483</sup>, and found means, through creative use of defamation laws, to ensure that even when cases settled, police misconduct could be exposed through the media.<sup>484</sup> For example, Bahar Ahmed a Muslim man who was tortured by the Metropolitan police in London in 2003, received £60,000 in a civil settlement with the police admitting their actions. Following an investigation by the Independent Police Complaint Commission, no police were disciplined. This settlement, the police human rights abuse and the failure of the police complaint process was reported in the media<sup>485</sup>.

The advent of the UK *Human Rights Act 1998*, the *1999 Stephen Lawrence Inquiry*, and cases such as *R (Amin) v Secretary of the State for the Home Department* [2003] UKHL 51 has shifted the UK legal system towards a focus on the rights of victims and families. Appeal avenues from domestic judicial review, litigation and inquest findings (also with lawyers now funded by legal aid) to the European Court of Human Rights has placed

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<sup>479</sup> Ella Baker Centre for Human Rights interview with Tayfanye Om, and interview with King Downing from the ACLU in New York.

<sup>480</sup> Interview with Raju Bhatt, 2 December 2008.

<sup>481</sup> Graham Smith, 2003 "Actions for Damages Against the Police and the attitudes of claimants" *Police and Society*, 2003, Vol 13, No 4 pp 413-422.

<http://www.guardian.co.uk/politics/2009/mar/18/babar-ahmed-met-police/print>

<sup>482</sup> Ibid.

<sup>483</sup> *R v Chief Constable of the West Midlands, ex p. Wiley* [1994] UKHL 8 (14 July 1994)

<sup>484</sup> Interview with Raju Bhatt, 2 December 2008

<sup>485</sup> Metropolitan police pays Muslim man £60,000 damages over 'serious attack' | Politics | guardian.co.uk

some enforceable legal pressure on the UK Government to improve investigation of police, prison, immigration and military abuses, improve police practices and increase the role of the victim and families in investigations<sup>486</sup>. Civil litigation is currently being used to uncover the UK Government's role in the abuse, interrogation and detention without trial of Moazzam Begg and Tarek Dergoul at Guantanamo Bay<sup>487</sup>.

Section 88 of the *Police Act 1996* makes the Chief Constable liable for all wrongs committed by police in the performance or purported performance of their duties.<sup>488</sup>

Under UK law, damages can be awarded against police “for tortious conduct deserving punishment, deterrence or disapproval and involving oppressive arbitrary or unconstitutional action by the servants of government.”<sup>489</sup>

These avenues for redress and improving the legal and investigation systems were made possible through the availability of Legal Aid to victims and the intense lobbying of families, advocacy agencies and grassroots organizations.

As small number of specialist legal practises now exist to assist the victims of police, prison, immigration, intelligence and military abuses<sup>490</sup>. As in the US, these practices exist on extremely tight budgets.

The high damage awards in the US and legal aid in the UK enables victims of police abuse to seek justice where other mechanisms fail. In Canada, civil litigation is seriously underused as an accountability measure<sup>491</sup>. The absence of legal aid makes these actions rare and dependent on the wealth of the victim or finding pro-bono support<sup>492</sup>. In Vancouver, the Pivot Legal Society has been assisting victims to bring their own cases through the lower courts<sup>493</sup>. However as police are represented by experienced defence counsel the imbalance in these proceedings is substantial<sup>494</sup>.

#### 4. Increasing the availability of civil litigation in Australia

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<sup>486</sup> Interview with Imran Khan on 9 December 2008. See a critique the Human Rights Act's role in relation to control orders at K. Ewing and J. Tham, *'The continuing futility of the Human Rights Act'* (2008) Winter 2008 /Public Law/ 668-693

<sup>487</sup> <http://www.christiankhan.co.uk/ViewNews.asp?NewsID=142>

<sup>488</sup> Bill Dixon and Graham Smith “Laying Down the Law: the Police, the Courts and Legal Accountability” *International Journal of the Sociology of Law* 1998 26, at 428.

<sup>489</sup> Ibid.

<sup>490</sup> See for example, Birnberg Pierce, Bhatt Murphy, Christian Khan, Imran Khan and Associates, Inquest, Liberty.

<sup>491</sup> Interview with Attorney Daniel Manning, Winnipeg 23 October 2008.

<sup>492</sup> Ibid.

<sup>493</sup> See Pivot Legal Society Booklet “How to Sue the Police”.

<sup>494</sup> See a successful case *Willie v. The City of Vancouver* 2007 BCPC 0245

As is Canada, civil litigation in Australia is an under-utilised mechanism for police accountability. Some reasons for its under-utilisation in Victoria are as follows:

1. Plaintiffs risk adverse costs awards when they sue police;
2. The Chief Commissioner or State of Victoria is not liable for police who, in bad faith, abuse members of the public<sup>495</sup>;
3. Where police negligently rather than intentionally injure a member of the public the plaintiff's injury must be permanent and reach a threshold in order to be able to sue<sup>496</sup>;
4. There is a limitation period of three years on taking civil action<sup>497</sup>;
5. There is extremely limited or no legal aid for plaintiffs<sup>498</sup>;
6. The community legal sector is under-resourced to run the number of cases needed for these cases to have an accountability impact on police.
7. Some private law firms who previously specialised in taking action for victims of police misconduct are now acting exclusively for the Police Association which is well resourced and can guarantee high fees for high value of work.<sup>499</sup>
8. Police are represented by lawyers either paid directly by the State of Victoria or by the Police Association.
9. Cases are lengthy, are high risk and legal firms driven by profit motives have no incentive to take cases on<sup>500</sup>.
10. Damage awards are much lower than the US or UK (for example \$15,000 was awarded as both compensatory and exemplary damages for a false imprisonment case in 1998<sup>501</sup>.) In Victoria courts will award the winning party their costs, however generally this amount is only about 68% of the actual legal costs of the plaintiff.<sup>502</sup>

As a result of these barriers, the victims of human rights abuses by police officers do not have realistic access to redress and compensation in Victoria. The few cases that are run rely on the generosity of pro-bono counsel who often work for years without receiving a cent.<sup>503</sup>

The vast majority of cases, even those with strong evidence, do not see the inside of a court-room. This means that Australia is not meeting its international law obligations to adequately compensate the abuse.

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<sup>495</sup> *Enever v The King* (1906) 3 CLR 969, the effect of which is only partially ameliorated by section 123 of the current *Police Regulations Act 1958*.

<sup>496</sup> *Wrongs Act 1958* Part VBA

<sup>497</sup> *Limitation of Actions Act 1958* section 5.

<sup>498</sup> Legal Aid Grant Handbook Chapter 2 page 25. Legal aid may be granted to assess merits and settle disputes.

<sup>499</sup> There are two well known firms in this category in Victoria.

<sup>500</sup> Discussions with firms specifically and generally about this issue

<sup>501</sup> *Sadler v Madigan*, Court of Appeal, Victoria, 1 October 1998.

<sup>502</sup> Colbran et al, 1998 "*Civil Procedure, Commentary and Materials*," p864, 865.

<sup>503</sup> *Hovarth v Christensen & Ors*, County Court of Victoria 23 February 2001.

To remedy this situation, and drawing on the lessons from both the US and the UK, legislative amendments and the reallocation of resources is necessary.

### Legislative Amendments

1. No costs awarded against unsuccessful plaintiffs unless their case is frivolous, unreasonable or without foundation.
2. The *Police Regulations Act 1958* must be amended to make the State vicariously liable for all damages awarded against police officers acting within the performance or purported performance of their duty. The State is responsible for ensure compensation is paid under the International Covenant of Civil and Political Rights<sup>504</sup>.
3. The *Wrongs Act 1958* must be amended to remove injury thresholds for victims of human rights abuses.
4. The *Limitation of Actions Act 1958* must be amended to increase the limitation period for victims of human rights abuses.

### Resource allocation

There are two solutions to funding civil action against police. It is perhaps a combination of both that will provide the most realistic options.

#### Solution 1

- a) Legal Aid must be available for lawyers and counsel acting for victims of human rights abuses. Furthermore rates must provide for the use of experienced and senior counsel.
- b) The State must fund the provision of police litigation practises within community legal centres and Aboriginal legal aid services across the State and in particular in areas where complaints against police are made or raised with advocates, for example in Mildura, Swan Hill, Lakes Entrance, Moreland, Warrnambool, Sunshine, Flemington, Dandenong, Fitzroy, St Kilda, West Hiedleburg and Collingwood.

#### Solution 2 (legislative amendment)

In cases involving human rights abuses, Courts should award costs that cover the full legal bill of the plaintiff. This will encourage private practises to undertake work on behalf of victims of police abuses.

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<sup>504</sup> General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : . 26/05/2004.CCPR/C/21/Rev.1/Add.13. (*General Comments*)



The UK has adopted the first solution with the result that solicitor and counsel fees are paid through legal aid rather than cost awards against the police<sup>505</sup>.

## 5. Using the lessons of civil litigation to improve complaint handling

There are 6 features earlier identified that make civil litigation better able to come to a finding of fact against police officers than complaint systems.

To improve complaint systems against the police, these features should be adopted by complaint investigation bodies.

Firstly, victims must be parties to the complaint process. Secondly, decision makers must be independent of both police and the victim. Thirdly, evidence obtained via the investigation process must be tested through cross-examination. Fourthly the process must be transparent and subject to victim and public scrutiny. Fifthly, the victim should be entitled to full disclosure of all documents generated through the investigation process. Sixthly, police complaint decisions must be fully reasoned and set out all the facts and law that applies and these decisions must be judicially reviewable.

It is noteworthy that the adoption of these characteristics by the complaint system will increase the State's compliance with its human rights obligations to provide an effective investigation into complaints against police.

The Rapporteur for Police Complaints to the European Commission on Human Rights has identified five guiding principles for police complaint systems to comply with human rights<sup>506</sup>. These are:

1. "Independence: there should be organizational and functional independence; that is by non-police investigators according to established principles of independence and impartiality;
2. Adequacy: the investigation should be capable of gathering evidence to determine whether the behaviour complained of was unlawful [whether the force used was justified<sup>507</sup>] and to identify and punish those responsible;

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<sup>505</sup> Interview with Raju Bhatt 2 December 2008.

<sup>506</sup> Graham Smith, (2008) "European Commissioner for Human Rights Police Complaints Initiative" – 172 *JPN* 399, pp 1,2. Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against the Police, 12 March 2009.

<sup>507</sup> *Jordan v The United Kingdom* [2001] ECHR 327 (4 May 2001) para 107.

3. Promptness: a speedy response and expeditiousness is crucial for maintaining trust and confidence in the rule of law and in order to dispel any fear or collusion in any attempt to conceal misconduct;
4. Public scrutiny: accountability is served by open and transparent procedures and decision-making at every stage of the determination of a complaint against police;
5. Victim involvement: in order to safeguard his or her legitimate interests the victim is entitled to participate in the process.<sup>508</sup>

### A model system

Rather than duplicate processes, it is submitted that a more cost effective solution would be to combine the public hearing functions of complaint determination and civil litigation into one proceeding.

A solution would be the establishment of Police Complaint Civil and Disciplinary Proceedings List at the Magistrates or County Court.

Magistrates or Judges hearing these matters could be provided with the power to:

- a) judicially determine complaints on the balance of probabilities,
- b) award compensation to victims and
- c) make prosecutorial recommendations to the DPP,
- d) demote and dismiss police from employment, (including police who refuse to testify<sup>509</sup>), and
- e) recommend policy and procedural changes within Victoria Police.

It is submitted that the Courts are logically placed to run such hearings and less likely than other forums to be the subject of bias claims. Furthermore, decisions by a Magistrate can be appealed in the normal process, enabling judicial and or merits review of decisions.

An initial forensic investigation, including the separation and interview of police witnesses should be conducted by independent civilian investigators.

Investigators may then act as counsel assisting at the hearing. Alternatively, the matter could be run, like civil proceedings, with the victim bearing the evidentiary burden<sup>510</sup>.

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<sup>508</sup> Graham Smith, (2008) "European Commissioner for Human Rights Police Complaints Initiative" – *172 JPN 399*, pp 1,2.

<sup>509</sup> Police must give evidence under compulsion through this process, but their evidence should not be admissible in criminal proceedings

<sup>510</sup> The Law Enforcement Review Agency in Manitoba, Canada, operates similarly to this process.

However it is the State that bears the obligation to discipline and prosecute police perpetrators of human rights abuses<sup>511</sup>.

Evidence collected by the independent investigators should be available to all parties. The Court's power to subpoena evidence and discovery processes, will provide further important mechanism to obtain evidence at the hearing.

A vital consideration in making this model successful will be the provision of quality legal assistance to victims and their full standing at hearings through State funding. Failure to provide such assistance will render the process ineffective. By using legal advocacy rather than a pure investigative model, the rights and interests of people who have suffered police abuse becomes a central rather than peripheral concern.

### Conclusion

This article has explored the use and benefits of civil litigation, concluding that it is a better accountability mechanism than existing police complaint systems. As a result it must be more accessible to ordinary people. I have made some suggestions as to how this may be achieved.

The success of the civil litigation system also offers potential lessons for police complaint systems. To improve their outcomes, qualities such as victim involvement, transparency, testing of evidence, independent decision-making, disclosure of information, and legally reasoned and appealable decisions must be built into their operation.

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<sup>511</sup> See *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008) para 35.

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