

Systemic review of police oversight

Submission on behalf of the Law and Advocacy Centre for Women Ltd

Background

The Victorian Government is conducting a systemic review into Victoria's police oversight system following a recommendation of the *Royal Commission into the Management of Police Informants*. The review will consider:

- how to improve the system of complaints about police misconduct to ensure that it meets the needs of all Victorians;
- how to ensure that police misconduct matters are assessed, classified, and addressed consistently and are managed in a way that appropriately reflects the nature and seriousness of the complaint; and
- how to ensure that the exercise of police coercive and intrusive powers, decisions, and actions is subject to effective oversight.

This submission responds to each of these issues in addition to advocating for key reforms that are vital in improving the police oversight system, in particular for our cohort of clients.

Introduction

The Law and Advocacy Centre for Women (LACW) is a community legal centre located in Carlton and operating across Victoria. It is the only legal service in Victoria whose primary focus is to provide a gender-specific approach to assisting women who are in, or at risk of entering, the criminal justice system. LACW was established in 2016, specifically in response to the rising rates of imprisonment and criminalisation for women. Its mandate is to combat these trends by providing a holistic approach to women in the justice system, providing a wraparound service that combines legal advice and representation alongside case management to address the underlying causes of women's criminalisation and imprisonment. The majority of LACW's legal work is in the provision of criminal defence advocacy. Other areas of practice include infringements and fines; victims of crime assistance; child protection and family violence intervention orders.

LACW acknowledges that we operate on Aboriginal land, and that our office is located on the stolen land of the Wurundjeri people of the Kulin Nation. We pay our respects to Elders past and present. Sovereignty over this land was never ceded and it always was, and always will be, Aboriginal land.

We acknowledge that Aboriginal and Torres Strait Islander people experience disproportionate adverse impacts across the whole spectrum of the justice system – including as a result of discriminatory and racist policing practices, inter-generational trauma, and systemic failures leading

to their gross over-representation in the prison system. We also recognise the resilience and strength of Aboriginal and Torres Strait Islander communities, and the leadership they have shown and continue to show in advocating for and implementing reforms to this system.

We encourage the review to centre the voices of women with lived experience of the criminal justice system – in particular, Aboriginal and Torres Strait Islander women – in identifying the problems with the current police oversight system and developing proposed reforms.

LACW supports the advocacy of a range of allied legal centres and community organisations that are working together to reduce women’s criminalisation in Victoria. We endorse the submission made to this inquiry on behalf of the Victorian Aboriginal Legal Service, and the contents of the Police Accountability Project’s 2017 paper *Independent Investigation of Complaints against the Police*. Below, we emphasise or expand on the matters raised in those papers as they relate to this review.

Introduction

LACW represents many criminalised women who have had negative experiences with members of Victoria Police. The following responses to questions raised by the consultation paper are born out of the experiences of LACW’s clients, so it is instructive to describe some of those experiences.

Deploying Victoria Police as first responders in circumstances of family violence and mental ill-health is increasing interactions between criminalised women and police. These problems are especially pronounced for Aboriginal women and women from culturally and linguistically diverse backgrounds, who are subject to racial profiling and over-policing.

While likely outside the purview of this review, it is LACW’s view that funding for Victoria Police should be redirected to community services, including front-line health services and Aboriginal and Torres Strait Islander community-controlled organisations, in order to combat these trends of increasing criminalisation for women.

Complainant experience

1. What could help all complainants to feel safe and be supported to participate in complaints processes about police?

A police complaints system must provide thorough, culturally appropriate, gender-responsive and independent investigation of all complaints.

The importance of independence from Victoria Police

Complainants must have confidence that the investigation of complaints will be independent of Victoria Police. LACW clients who report police misconduct to their lawyers or support workers frequently do not make complaints, or choose to discontinue complaints about police because they do not trust police to investigate the matter thoroughly and fairly.

This reluctance of LACW clients is born out of a history of over-policing of particular communities by Victoria Police, in particular of Aboriginal and Torres Strait Islander women and women from culturally or linguistically diverse backgrounds.

For example, a recent study showed that such discriminatory practices in relation to Aboriginal people were reflected in prosecutions by police: 80 per cent of Aboriginal people arrested for possession of small amounts of cannabis were prosecuted, compared with just over 52 per cent of

non-Aboriginal people arrested for the same offence.¹ Aboriginal women are more likely than non-Aboriginal women to be imprisoned for minor offences such as disorderly conduct, minor property and traffic offences and breaches of court orders.²

People from culturally and linguistically diverse backgrounds are also subject to over policing in Victoria. There has been renewed concern about racial profiling in Victoria following the policing response to the media generated African gang crime scare and recent reporting of Victoria Police's use of a "Youth Network Offender" database.³ Discrimination in policing during the COVID-19 pandemic has also been reported.⁴ Racial profiling increases interactions between people from culturally and linguistically diverse backgrounds and police. The experiences of LACW's clients show that such interactions can lead to charges relating to resisting arrest or assaulting police officers, thus increasing criminalisation and recidivism.

Case Examples: Over policing of ATSI and CALD communities

Some examples of over policing and racial profiling experienced by LACW clients include:

- An Aboriginal woman with an acquired brain injury was released on bail while she was facing charges of low-value thefts from a supermarket and a petrol station. She called our office when she was highly distressed to inform us that the police informant had been attending her property every day to check that she was complying with her bail conditions.
- One LACW client from a CALD background appears to be targeted due to her association with other members of her community. Police briefs of evidence often contain descriptions of charges alleged against people she associates with, even if there is no allegation that she is involved in the commission of those offences. This is not a practice commonly seen with other clients.

The long history of over-policing and police mistreatment of these client groups makes them very unlikely to trust a complaints process involving Victoria Police. The experiences of these client groups should be central to the design of the new investigative body, to ensure access to a fair and transparent complaints and redress system is available to those who are most impacted by policing practices. Without independence from Victoria Police, other reforms suggested – like progressing complaints in a timely fashion – will do little to rebuild community trust in the investigative process.

¹ Michael McGowan and Christopher Knaus, 'NSW police pursue 80% of Indigenous people caught with cannabis through courts,' *The Guardian Australia* (online, 10 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>>.

² Anthony, Thalia and Harry Blagg, 'STOP in the Name of Who's Law? Driving and the Regulation of Contested Space in Central Australia' (2013) 22(1) *Social and Legal Studies* 43; Cunneen, Chris and Juan Tauri, *Indigenous Criminology* (Policy Press, 2016); Purdy, Jeannine, 'Postcolonialism: the emperor's new clothes' (1996) 5 (3) *Social and Legal Studies* 405; Heffernan, Edward; Anderson, Kimina and Abhilash Dev, 'Inside Out—The Mental Health of Aboriginal and Torres Strait Islander People in Custody,' *Queensland Government* (Final Report, 2012); Finnane, Mark and John McGuire, 'The uses of punishment and exile: Aborigines in colonial Australia' (2001) 3 (2) *Punishment and Society* 279.

³ Leanne Weber, 'You're Going to Be in the System Forever: Policing, Risk and Belonging in Greater Dandenong,' *Monash University* (Report, 2020) 16.

⁴ Osman Faruqi, 'Compliance Fines under the Microscope,' *The Saturday Paper* (online, 18 April 2020) <<https://www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-themicroscope/15871320009710>>.

Other recommendations

During the investigation process, Victoria Police routinely ask complainants to attend a police station to make a complaint.⁵ This is highly inappropriate in many cases. This may be a site of trauma for a complainant given that they have had negative interactions with police, and may also undermine trust by complainants that their information will remain confidential and be investigated independently from the subject of the complaint. The complaints process must be independent of police, including providing a different location for making a statement. If a complainant makes a statement at a police station, the contents of that statement should not be used against them, for example to bring criminal charges.

Complainants should be given an opportunity to give feedback to an investigation before it is finalised. The opportunity to provide feedback before an investigation is finalised would enable them to provide more information where required and correct any mistakes in the report.

2. Are tailored approaches required for some groups of complainants? For example, access to support and advocacy services, complaint welfare officers, and interpreters and communications aids.

The investigating body must be culturally-sensitive, accessible and gender-responsive. Referrals should be made to support and advocacy services as soon as a complaint is made.

The investigating body must be accessible to all people, with information provided in multiple languages. The complaints process should be tailored to the lived experience of the complainant and the complaint in question. For example, a complainant for whom English is not their first language should have access to a translator throughout the process. Likewise, a woman making a complaint about sexual harassment or assault should be able to make that complaint to a female complaints officer if she chooses. Such options should not rely on the complainant requesting them but should be offered to all complainants at the intake stage.

The importance of advocates for complainants

Complainants should be permitted to provide evidence through an advocate. Many LACW clients have disclosed experiences of police misconduct to their lawyers or support workers, and having such advocates attend or support them in providing evidence would help reduce their revictimization through the complaints process.

Complainants should be allowed to be accompanied by an advocate in all interactions with the investigating body. This should not be up to complainants to elect but should be asked as a matter of course as soon as possible in the complaints process. LACW clients who have experienced police misconduct are often understandably mistrusting of figures of authority, so having an advocate attend all meetings or interviews with the investigating body would help build trust in the complaints process.

The involvement of an advocate or support person will be especially important for people who are distrusting of police based on previous negative experiences. For example, LACW assists many women who have been misidentified as the primary aggressor in family violence incidents, who would benefit greatly from the involvement of an advocate or support person if they wished to make a complaint about police conduct. This is a significant issue in Victoria, with the Women's Legal

⁵ <https://www.policeaccountability.org.au/independent-investigations/police-complaints-public-survey-now-open/>

Service finding that 57 per cent of women surveyed who were initially named as perpetrators of family violence on police-initiated FVIVO applications were in fact victim/survivors.⁶ The experience of LACW's clients indicates that this is a prevalent issue faced by women who have had previous contact with the criminal justice system, in particular women from culturally and linguistically diverse backgrounds.

Case Examples: Police responses to family violence

LACW has represented several women who have been mis-identified as the primary aggressor in family violence incidents, including:

- One LACW client was charged with assault and made the subject of a police application for an intervention order, despite neighbours identifying her as the victim of family violence and contacting police to call for help.
- LACW was assisting one client who was on a spousal visa and her husband had perpetrated family violence against her for many years. This included physical violence and coercive control. Police attended their home after the pair had an argument and her husband called the police. Upon their arrival at the scene, our client was heightened and emotional and was misidentified as the perpetrator of the violence. Our client instructs that her misidentification as the perpetrator was due in significant part to the fact the English is not her first language, whereas her husband is a native English speaker.
- One woman's ex-partner perpetrated family violence against her for many years. She was misidentified as the primary aggressor when police attended her home. An intervention order was put in place where she was the respondent. She suffered from depression and suicidal ideation. Police were called when she attempted suicide. Her ex-partner was also in attendance, and she was charged with breaching the family violence intervention order.

Such LACW clients would be reluctant to make a complaint to police given these experiences and the likely significant impact that misidentification has had on their lives. They would be especially reluctant to make a complaint to police given their stories have not been believed or heard by police in the past. Having the complaints process be completely independent of Victoria Police and allowing complainants to be accompanied by an advocate in all interactions with the investigating body, will go some way to rebuild trust in the process.

Another example of LACW clients that would benefit from having an advocate in the complaints process are women who have been mistreated by police following or during a police apprehension under s 351 of the *Mental Health Act 2014* (Vic). Under that section, police have the power to apprehend a person who appears to have mental illness where the person needs to be apprehended to prevent serious and imminent harm to the person or any other person. A lack of mental health services is contributing to an increased reliance on the police to respond to people experiencing mental illness or psychological distress.⁷

Given the circumstances under which women experience mental health crises, the involvement of police in these circumstances can be humiliating and traumatic. This is especially true for women who have previously had negative interactions with police or have been subject to over policing, like Aboriginal and Torres Strait Islander women and women from culturally and linguistically diverse backgrounds. The experiences of LACW clients demonstrate that the use of police as responders in

⁶ Ulbrick, Madeleine and Marianne Jago, "Officer, she's psychotic and I need protection': police misidentification of the 'primary aggressor' in family violence incidents in Victoria," *Women's Legal Service Victoria* (Report, 2018).

⁷ *Royal Commission into Victoria's Mental Health System* (Final Report, 2021) Vol 1, 514.

these circumstances frequently escalates the crises and regularly leads to women in crisis being charged with offences for resisting arrest or assaulting police officers.

Case Examples: Police responses under the *Mental Health Act 2014* (Vic)

LACW has represented several women who have been charged with criminal offending following a police dispatch under the *Mental Health Act 2014* (Vic), including:

- A LACW client with bipolar disorder was having a mental health episode in a shopping centre. She was highly distressed and crying out for help. Shopping centre staff called triple zero for assistance and reported that they believed that she had a knife in her bag. She hid from police and they eventually threatened her with pepper spray. She tried to push past them and was charged with assaulting a police officer and resisting arrest.
- LACW was approached to act for a woman who was 50 years old and had no criminal history. She had borderline personality disorder and post-traumatic stress disorder and was struggling with grief. She called triple zero for assistance but became highly distressed when police arrived. She became fearful and refused to leave the premises. Police entered the premises and she became more and more distressed and allegedly kicked one of the police officers who was trying to restrain her. She was charged with recklessly causing injury, which attracts a minimum term of imprisonment of six months when committed against an emergency worker on duty unless the court finds that a special reason exists.

LACW clients who have been apprehended under s 351 of the *Mental Health Act 2014* (Vic) are often held involuntarily in hospitals or other psychiatric institutions, causing great distress. Given the role of police in their apprehension and transport to such facilities, these women are unlikely to trust members of Victoria Police in the first instance. If they are then mistreated by police, that lack of trust is compounded. For women who live with mental illness that involves any symptoms of paranoia, those symptoms will only further exacerbate their concerns about the independence of the complaints process. The experiences of these LACW clients further highlight the importance of the complaints process being independent of police and of complainants being accompanied by an advocate or trusted person.

To be clear, LACW is not endorsing a model where only some groups of complainants are able to be accompanied by an advocate or support person – such a reform should be available to all complainants as a matter of course. The experiences of particular LACW client groups are being used to highlight the importance of such a reform, and of the investigative body being independent of Victoria Police.

3. What changes to law or procedures could make conciliation and restorative justice processes practical tools in police oversight? Are there any barriers to consider?

Individuals who are members of communities that have historically been subject to over-policing and police mistreatment – like Aboriginal and Torres Strait Islander women and women from culturally and linguistically diverse backgrounds – may feel intimidated, mistrusting and/or sceptical of any real benefit being achieved if asked to engage in a restorative justice process with Victoria Police.

For these people – especially when they have raised a complaint about police misconduct – meeting with a senior member of Victoria Police to share their experience and its impact may make them feel as though their complaint was not being treated seriously, and that there would be no real consequences for the subject of the complaint.

Any restorative justice process recommended by the Review must be facilitated and led by a person or body that is independent of Victoria Police.

The breakdown of trust experienced by women who have been mistreated by police is completely different to the example given in the discussion paper of former and current police officers who have experienced discrimination or harassment. There is no doubt that being harassed at work would lead to a significant breakdown in trust between an individual and the institution of Victoria Police. However, this experience as an individual employee is completely unlike the experience of individuals who have been mistreated by police, especially where their families and communities have been subjected to over-policing on a systemic level. For these people, the harm they have experienced as an individual is situated within this wider context. Accordingly, a restorative justice process would not be satisfactory unless it was organised by an independent investigative body and was cognisant of that history and context in which the individual complaint was situated.

Definitions and complaint classifications

1. Which types of police wrongdoing do you think should generally be investigated by an independent oversight agency, rather than Victoria Police?

All complaints – except for customer service issues – should be investigated by an independent oversight agency, rather than Victoria Police. We refer to the evidence collated by the Police Accountability Project in their 2017 paper *Independent Investigation of Complaints against the Police* on the problems with Victoria Police being involved in the investigation of complaints.

2. How could legislative definitions best provide for a range of behaviour from ‘low-level’ conduct to serious misconduct and corruption?

The most important distinction in these definitions is between customer service complaints – the only complaints that should be investigated by Victoria Police – and all other complaints, which should be handled by the independent investigative body.

3. Do you have any views on the IBAC Committee’s proposed definitions?

The following addition to subsection ‘b.’ that deals with systemic misconduct is recommended:

*“a pattern of officer misconduct carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good reputation of Victoria Police, **or cause harm to a member or members of the community.**”*

LACW recommends this addition because systemic misconduct towards particular groups or individuals is harmful in and of itself, not only because it might adversely reflect on the integrity and good reputation of Victoria Police. Additionally, the definition as it stands relies on community standards or perceptions being critical of the misconduct of Victoria Police (so that such misconduct may have the required adverse reflection on the institution). The investigation of systemic misconduct should not require such perceptions to be worth investigating.

For example, the fierce advocacy of Aboriginal and Torres Strait Islander people over many decades now means that there is some understanding in the community about the over-policing perpetrated against them and a general level of agreement that it should not continue. This may not have been the case in the past, when Aboriginal and Torres Strait Islander people were being subject to the same mistreatment, and as such their mistreatment may not have then met the definition of

“adversely reflecting on the integrity and good repute of Victoria Police.” That does not mean that their systemic mistreatment by Victoria Police fifty years ago was any less worthy of investigation at that time.

Complaint pathways and outcomes

1. What considerations should an independent oversight agency have to take into account before deciding whether to refer a complaint about police wrongdoing to Victoria Police for investigation?

As noted above, no complaints – except for customer service complaints – should be investigated by Victoria Police.

2. What considerations should Professional Standards Command have to take into account before deciding whether to refer a complaint about police wrongdoing to a Victoria Police division, region or command for investigation?

As above.

3. How could the police discipline system better support police personnel and complainants to seek to resolve complaints through conciliation or restorative justice processes?

See above discussion of conciliation and restorative justice processes.

Investigative and oversight powers

1. What powers do you think an independent oversight agency should have to investigate police misconduct?

We support the recommendations made by the Police Accountability Project in their 2017 paper *Independent Investigation of Complaints against the Police* on the best model for police oversight.

We likewise endorse the recommendation of the Victorian Aboriginal Legal Service in their submission to this review that the complaints body have ‘own motion’ powers to start investigations without a complaint, and a ‘super-complaints’ process that allows organisations to bring a complaint about a systemic problem on behalf of a group of complainants.

Some examples of systemic issues experienced by LACW clients include:

- Victoria Police attending welfare call-outs for women who are drug or alcohol affected and proceeding to search them, laying criminal charges when they are found in possession of drugs;
- The ongoing misidentification of women victim/survivors as perpetrators in family violence incidents, and the consequences that follow where intervention orders are put in place naming them as the Respondent; and
- Victoria Police attending as first-responders when clients are experiencing a mental health crisis, and later charging them with resisting arrest or assaulting emergency workers.

These examples highlight the importance of giving an independent oversight agency the power to investigate systemic issues.

The new agency should have the power to investigate and publicly report on policy decisions made by Victoria Police. This should extend to decisions regarding the use of new technology in conducting investigations, for example, Victoria Police's recent use of a "Youth Network Offender" database as discussed above.

2. Is it appropriate for an independent police oversight agency to have powers like police? Why or why not?

LACW endorses the comments and recommendations of the Victorian Aboriginal Legal Service in their submission to this review in relation to this question.

3. What role should an independent police oversight agency have in relation to the investigation and/or oversight of critical incidents?

Investigations involving death or serious injury following contact with Victoria Police must be investigated by an independent investigative agency. Victoria Police must not continue to investigate such matters.

Governance models for police oversight

1. Which model of police oversight do you think best meets the best-practice principles? Why?

LACW endorses the Victorian Aboriginal Legal Service's submission to this review, and the Police Accountability Project's 2017 paper *Independent Investigation of Complaints against the Police* and the proposed models for police oversight described therein.

2. What would be the benefits or barriers to setting up a police corruption and misconduct division in IBAC?

A fundamental reset of the police oversight system is required to rebuild trust between police and racialized and marginalised minorities. A new division within IBAC would not represent the fundamental shift required to rebuild community trust.

Monitoring and reporting of police powers, decisions and actions

LACW endorses the comments and recommendations of the Victorian Aboriginal Legal Service in their submission to this review in relation to the issues raised under this section.

Thank you for the opportunity to provide a submission to this review. For further information please contact Elena Pappas, CEO, at epappas@lacw.org.au.

With thanks to Eleanor Ryan for her assistance in preparing this submission.