

**SUBMISSION OF THE FEDERATION OF COMMUNITY  
LEGAL CENTRES (VIC.) INC**

**TO THE OFFICE OF POLICE INTEGRITY**

**INQUIRY INTO THE POLICE DISCIPLINARY SYSTEM**

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**April 2007**

**This submission was prepared by members of the Police Issues Working Group in consultation with individual member centres including Fitzroy Legal Service, Flemington Kensington Community Legal Centre and Brimbank Melton Community Legal Centre on behalf of the Federation of Community Legal Centres (Vic).**

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## **The Federation of Community Legal Centres**

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for fifty-two community legal centres across Victoria, including both generalist and specialist centres. Community legal centres provide free legal advice, information, assistance and representation to more than 100,000 Victorians each year. We exercise an integrated approach combining assistance of individual clients with preventative community legal education and work to identify and reform laws and legal and social systems.

Community legal centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We operate within a community development framework. We provide a bridge between disadvantaged and marginalised communities and the justice system. We work with the communities of which we are a part. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard.

The Federation, as a peak body, facilitates collaboration across a diverse membership. Workers and volunteers throughout Victoria come together through working groups and other formal and informal networks to exchange ideas and strategise for change.

The day-to-day work of community legal centres reflects a 35-year commitment to social justice, human rights, equity, democracy and community participation.

## Introduction

The Federation welcomes the opportunity to provide a submission regarding the effectiveness of the current administration of the Victoria Police disciplinary system. Community legal centres work on a daily basis with communities that interact with Victoria Police. Given the nature of our work, and the concerns we share with Victoria Police about the protection and enforcement of justice, the Federation takes a keen interest in ensuring that Victoria Police has the ongoing respect and support of the Victorian community. We regard a just, timely and effective discipline system as necessary to ensuring the integrity of Victoria Police and the public's faith in it.

The Federation is limited in its ability to comment on the disciplinary process that individual police officers undergo when they are suspected of misconduct. Despite the substantial number of police misconduct allegations being raised at the community level, our experience is that very few allegations result in substantiated complaints and a police discipline process. For example, McCulloch and Palmer note

the failure of the complaint process to find a complaint substantiated followed by a court finding in favour of the complainant/plaintiff can impact on the legitimacy of the complaints process. Indeed, many of the lawyers interviewed in this research indicated that they saw the discrepancy in outcomes as evidence of bias in the complaints process.<sup>1</sup>

In our view an investigation into the police disciplinary system needs to encompass the complaints and investigation process to ensure the efficacy of the discipline process.

The Victoria Police Manual – which contains many of the recommendations of Project Beacon from the late 1980s and early 1990s – sets out current management policy to increase the safety of both police and the public, as required under the *Occupational Health and Safety Act 2004*.<sup>2</sup> The Federation is supportive of these measures. However, in practice there have been no means of ensuring increased police compliance with the Manual. For example, in the last few years police have been provided with increased coercive powers and more weapons such as capsicum spray and tasers with calls more recently for the introduction of semi-automatic handguns. The Federation and its members continue to have serious concerns that the Victoria Police Manual is not being sufficiently complied with by Victoria Police and that the current complaint and systemic inquiry processes are inadequate to address these failures or ensure the safety of our communities.

We note that this inquiry commences in the months before division 4 of Part 3 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (“The

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<sup>1</sup> Jude McCulloch and Darren Palmer, “Civil Litigation by citizens against Australian police between 1994 and 2002, Report to the Criminology Research Council” p 84.

<sup>2</sup> *Occupational Health and Safety Act 2004* ss 21, 23.

Charter”) comes into operation. The Charter will impose a new duty on police and thus a new responsibility on the police disciplinary system. Currently, police duties are to preserve the peace, prevent offences and discharge all legally imposed duties<sup>3</sup>. From 1 January 2008 all police members will also be obliged to protect and promote human rights.<sup>4</sup> This inquiry should take full regard of the critical position police play in relation to the Charter.

For example, Charter rights that could apply to complains made at our CLCs include:

- Protection from torture, cruel, inhuman or degrading treatment (s 10);
- Humane treatment when detained (s 22);
- Right to liberty and security of the person (s 21);
- Equality before the law (s 8);
- Freedom of movement, association, expression, religion and belief (ss 12, 14, 15 and 16);
- Privacy and protection of families and children (ss 13 and 17) and
- Right to life (s 9).

This inquiry is an opportunity to ensure that complaint and discipline processes will be adequate to ensure compliance with human rights principles. Because police work constantly risks human rights violations, in our view all police actions, behaviours and methods should be:

- a. explicitly authorized by law;
- b. carefully scrutinized to ensure the behaviour continues to be absolutely necessary and justified in free and democratic society;
- c. thoroughly monitored, documented and supervised;
- d. the responsibility of organisational managers as well as individuals;
- e. subject to review by a fully independent complaint and investigation body as well as the courts.

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<sup>3</sup> Police Regulation Act 1958 Schedule 2.

<sup>4</sup> *R (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55 (Lord Brown) Lord Brown [129].

## Independence of investigations by ESD

In 2006, an ESD investigator told a community legal centre solicitor: 'Look, I know the officer in charge at \*\*\*\* station. He's a good bloke. I asked him about the allegations and he assures me there is nothing in it.'<sup>5</sup>

The Federation believes Victoria Police should not receive, investigate and report on complaints concerning the police and corruption. This function should be administered by a body sufficiently independent to ensure transparency and openness related to complaints, special reports and investigations related to systemic issues.

In our experience complaints of police brutality, racism and excessive use of force made to OPI are routinely referred to ESD for investigation rather than being treated as sufficiently serious to warrant OPI investigation. This perhaps reflects the OPI's original purpose as a corruption-busting organisation or is a resource issue. Nevertheless it is precisely these complaints that require investigation by an independent body to ensure transparent outcomes and to identify systemic issues such as racism and abuses of power.

Other lawyers have observed:

There's not much substance to the [complaints] process...the processes all sound very well and good but when you actually look behind what's actually happening ... the investigations ...just go across the surface.<sup>7</sup>

In our experience the current structure that has the complaints system administered by the Ethical Standards Department (ESD) as a department of Victoria Police, staffed by Victoria Police members who may be members of the Police Association, creates significant problems.

The first problem is that a shared culture exists between ESD and the organisation it is trying to investigate (Victoria Police). ESD may include officers that are part of police culture, such that they fail to see or deny the existence of poor police practice within the complaints they are investigating (including excessive force or racism within regular policing practices). Only an external perspective can bring about the necessary cultural awareness to identify problems.

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<sup>5</sup> Flemington & Kensington Community Legal Centre.

<sup>7</sup> Interview with a lawyer quoted in Jude McCulloch and Darren Palmer, "Civil Litigation by citizens against Australian police between 1994 and 2002, Report to the Criminology Research Council" p 97

This concern has been identified in wider research projects:

I think it's largely the deficiencies in the Ethical Standards Department system of monitoring police complaints.....Police complaint procedures are so antagonistic to the complainant and equally intimidating to pursue to the end... It's not a sincere attempt to resolve a problem between citizens and the police. It's pretty disappointing I think.<sup>8</sup>

Second, as a department of the Victoria Police, ESD members may have personal ties or links with those who they are investigating. Even if they do not have personal ties, a general sense of loyalty, trust and camaraderie within Victoria Police may impact upon the investigations made by members of ESD. The connection between ESD and serving police members is evident in the example above. It suggests that some ESD investigators have not grasped the need for independence in their roles, which perhaps is an inevitable consequence of a shared culture.

"That's what *you* say, *we* [the officer being investigated and the investigator] say something different": ESD-appointed investigator 2006.<sup>9</sup>

Loyalty and the code of silence have long been noted as problematic features of police accountability mechanisms. John Klenig has noted:

An 'us' develops and is cultivated that distinguishes itself from the "them" [suspects and the community]....such solidarity, often characterised in familial terms manifests itself in forms of loyal support for fellow officers that are sometimes heroic, sometimes foolhardy, and sometimes unconscionable....It is [a] cover up, the blue code, wall or veil of silence...The unwillingness of police to speak about excessive force or other abuses of authority not only subverts the process of accountability but probably also contributes to the likelihood of deviance."<sup>10</sup>

Other lawyers have said:

I've come to the conclusion that making a complaint through a body such as the ombudsman or the Police Integrity Commission or the internal affairs or the local area command is a complete and utter waste of time. Because the police have this attitude, in my experience, that they will not accept responsibility for any wrong doing and that they will find some way in which to justify their behaviour. And given the culture of ... backing up of one's fellow officer for example, it doesn't matter whether he's a member of the internal

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<sup>8</sup> Interview with a lawyer quoted in Jude McCulloch and Darren Palmer, "Civil Litigation by citizens against Australian police between 1994 and 2002, Report to the Criminology Research Council." p 92.

<sup>9</sup> Flemington & Kensington Community Legal Centre.

<sup>10</sup> John Klenig, "Police Violence and the Loyal Code of Silence" in Cody et al, *Violence and Police Culture* (2000) 222,223.

affairs or of the local area command, the highway patrol or a detective, he's still a card-carrying member, so to speak.<sup>11</sup>

As McCulloch and Palmer recorded:

The bottom line is when they investigate these things it seems to me they investigate them from the perspective of the police and how the police go about their activity, and often they seem to take the view that the complaint, because they'd been arrested and accused of being involved in criminal activity, could not be a reliable witness... And so it seems to me that the role of the investigators at the ombudsman's level and the...Ethical Standards Department, as it is now called, they are given the job of being both the investigator and judge, and as a consequence of being both the investigators and being in a sense closely associated with those that they are investigating and then being the judge leads them to be, in my view, quite biased as judges.<sup>12</sup>

The Federation supports the establishment of an independent Criminal Justice Commission to receive, investigate and report on complaints concerning the police or corruption. Such a body could investigate matters of police misconduct.

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<sup>11</sup> Interview with a lawyer quoted in Jude McCulloch and Darren Palmer, "Civil Litigation by citizens against Australian police between 1994 and 2002, Report to the Criminology Research Council" p 92.

<sup>12</sup> Interview with a lawyer quoted in Jude McCulloch and Darren Palmer, "Civil Litigation by citizens against Australian police between 1994 and 2002, Report to the Criminology Research Council" p 96-97.



## **Independence of investigations by OPI**

As stated above, the Federation believes that police discipline should be administered by a body sufficiently independent to ensure transparency and openness. The Federation is concerned about the lack of independence of the Office of Police Integrity (OPI) from Victoria Police and its relatively weak powers since its inception in November 2004. We are concerned that this can compromise OPI investigations.

The presence of police officers within OPI needs to be addressed. The Federation acknowledges that former or current police officers may provide excellent investigative skills to OPI. However, the Federation observes police may be seconded to OPI, which could tarnish its reputation within the wider community as an independent body.

It should also be made clear in legislation that no member complained of should be involved in the investigation of a complaint. This could be done by amending the *Police Regulation Act*. A limit on the total number of former or acting (through secondment) Victoria Police officers involved in the OPI could also be included.

## Due process of investigations

### Equality of processes

A young person lodged a complaint with the OPI alleging police assault and excessive use of force. The young person was subsequently charged with assault and resisting police. At the time of the hearing of the criminal charges, the ESD investigator had taken a statement from the young person, but not from the police about whom the young person had complained. At the hearing of the charges, the ESD investigator made it clear to the young person that if their evidence in Court was sufficiently different to the evidence provided to the ESD investigator in the complaint, the ESD investigator would notify the presiding magistrate.<sup>13</sup>

The example above reveals the different processes that apply to complainants and to police within the police disciplinary system. Without having taken a prior statement from the police members, the ESD investigator was not in a position to make similar notifications should the police perjure themselves. This situation discourages and intimidates complainants from making legitimate complaints in circumstances where charges may be laid against them.

ESD, through the police officers they appoint to conduct the investigation, often rely upon police statements made when charging a complainant rather than arresting and/or interviewing the police officer.<sup>14</sup> This process would not be followed in any other investigation into a complaint of a criminal offence. The Federation is uncertain why different processes apply when the alleged offender is a police officer. Until complete parity is brought into the procedures, there will be a perception that police operate above the law.

In 2007, an ESD appointed investigator told a community legal centre solicitor “We wouldn’t arrest him and interview him [the police officer] no, he’s on sick leave, there’s nothing we can do about it.”<sup>15</sup>

The Federation is concerned that while complaints made to OPI containing admissions of potentially criminal behaviour cannot be used for the purpose of prosecuting the complainant, the same is not automatically true of complaints made to ESD.

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<sup>13</sup> Flemington & Kensington Community Legal Centre .

<sup>14</sup> For example, this was the approach taken by an Investigating Officer in 2007: source Flemington & Kensington Community Legal Centre.

<sup>15</sup> Flemington & Kensington Community Legal Centre.

## Confidentiality of Complaints

In 2007, a confidential meeting about complaints was arranged between an ESD investigator and the complainant's solicitor. The ESD investigator brought the region's superintendent along to the meeting. During the meeting, the ESD investigator said that solicitor's refusal to provide information would hamper the investigation. The solicitor was asked by the ESD investigator to not to go the media about the subject matter of the complaint as it would undermine public confidence in Victoria Police.<sup>16</sup>

In the example above, the actions of the ESD investigator removed the possibility of independence between ESD and regional command. The actions revealed a lack of awareness that confidentiality and independence ought to exist in a proper disciplinary process. The ESD investigator failed to understand their role as the investigator of police complaints, not the upholder of police public perception.

The Federation is concerned that as a result of a lack of confidentiality systems, ESD may intentionally or inadvertently alert local police to charges that could be laid against a complainant. Such actions breach the requirement that all matters should be dealt with confidentially.

In 2006, a solicitor in a community legal centre received an email from a region's superintendent stating that the OPI complaint handler had given him the names of three of the complainants who had lodged a complaint with OPI.<sup>17</sup>

The transfer of information about complaints leaves complainants vulnerable to harassment and later charges and is entirely unacceptable. It also undermines the independence and confidentiality of the complaint handling processes.

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<sup>16</sup> Flemington & Kensington Community Legal Centre.

<sup>17</sup> Flemington & Kensington Community Legal Centre.

## Cultural sensitivity

A complainant was asked to come to a meeting at the local police station to discuss his complaint with the police officer who assaulted him and the senior sergeant. His complaint was utterly denied, and police spent much time justifying the reason for the complainant's "arrest".  
A year has passed and no charges have been laid.

The Federation believes there can be improvements made to the investigation of complaints.

Complainants are usually asked to come to a police station to have their complaints investigated. This is an inappropriate venue for an investigation into police misconduct. Complainants should be asked where they wish to be talked to and complainants' legal representatives should always be present.

Investigators must be sensitive to multi-cultural issues, language difficulties and the vulnerabilities of young people. For example, young people should be questioned with empathy and appropriate language. Research suggests that young people tend to minimise any pain they experienced when confronted with an authoritarian person.

Examples of poor investigative technique encountered by CLCs include:

- In one interview the investigator reframed the young person's term, 'dragging' to 'escorting'. This eliminated from the evidence the suggestion that the officer used excessive force.
- A young person was taken from their workplace by the investigator who knew the manager. This undermines the dignity and best interests of the complainant.

These practices have been recognised:

You find with ....Ethical Standards.....that it's a kind of 'he said, she said, and if that's the case then it's unsubstantiated and we can't ...find in favour either way.' But that's a real problem and ...in any complaints mechanism there's going to have to be a way that evidence can be tested so that a finding can be made one way or the other, and neither the ombudsman or the ethical Standards Department will do that....They don't test the evidence. <sup>18</sup>

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<sup>18</sup> Interview with a lawyer quoted in Jude McCulloch and Darren Palmer, "Civil Litigation by citizens against Australian police between 1994 and 2002, Report to the Criminology Research Council." p 96.

### Transparency of the complaint process

Effective transparency and public access to information allows scrutiny of ESD, OPI, Police Board investigatory and disciplinary functions and would bring effectiveness and confidence in these systems.

Timeliness and continuity of disclosure of information is critical to effective accountability and transparency. The Federation has previously recommended the establishment of a Crimes Statistical Unit, independent of police and government, which would among other benefits, provide accurate statistical information to the community.

Of particular importance is information about police complaints including the number of police complaints each year, the nature of the complaint, and how these have been resolved. Section 102J of the Act could be amended to require quarterly reporting to Parliament. Further, the Federation supports tabling before Parliament detailed reporting of individual.

Each of the bodies involved in police discipline need to make the following classes of information available in order to discharge their public transparency and accountability obligations to the Victorian Parliament and the Victorian community:

1. All complaint handling, investigation, hearing and resolution policies and procedure. For example, OPI Policies and procedures as to how it manages complaints and its internal criteria for referring complaints back to ESD;
2. More detailed and more frequent (eg at least every 4-6 months) reporting to the Victorian Parliament about the progress of investigations and recommendations flowing from investigations as well as the status and implementation of previous recommendations of OPI and other investigations;
3. Reports of ethical health checks and other activities of the ESD Standing Committee;
4. The impact of agreements between the Victorian Government and the Police Association of Victoria in relation to investigation, discipline and prosecution of police corruption and other forms of illegal activity by Victoria Police members;

The existence and role of the Special Investigations Monitor remains low. Greater awareness and use of the SIM and its policies and procedures should be facilitated.

The Federation believes that public evaluations of interstate and overseas models and outcomes achieved in those jurisdictions (such as the WA Corruption and Crime Commission) will assist any reform process in Victoria.

## **Outcomes of the Investigation process**

### OPI Powers

Under section 86NA of the *Police Regulation Act* where the Director of OPI conducts an investigation on his/her own motion, the Director can report to the Chief Commissioner, the Minister and the Premier, requesting any action that the Director considers should be taken.<sup>19</sup> Under s86S of the Act, the Chief Commissioner is not required to follow these steps. The Director can also report any criminal matters to the DPP.

The Queensland Crime and Misconduct Commission has broader scope than the Victorian provision. The Federation supports section 50 of the *Crime and Misconduct Act 2001* (Qld), which allows the Commission to charge a member of the police service with the relevant misconduct by way of a disciplinary charge. Official misconduct is defined as criminal offence or a disciplinary breach providing reasonable grounds for terminating the person's service. Disciplinary charges are heard in a Misconduct Tribunal. Thus the Crime and Misconduct Commission is able to refer matters for criminal prosecution,<sup>20</sup> but is also able to deal with issues of internal discipline. This ensures greater scrutiny of Victoria Police and enhanced public confidence in the integrity of it because of independent oversight.

Further, the Commissioner of the Crime and Misconduct Commission has the power to make reports.<sup>21</sup> These reports include the power to make recommendations to the Minister (after first consulting with the Commissioner of Police) that a directive requesting a certain course of action be issued to the Commissioner of Police.<sup>22</sup> If the Minister does not wish to issue this direction, they must table the recommendation and their reasons for not supporting it in Parliament. Again, this ensures greater public scrutiny and accountability in the administration of discipline within Victoria Police.

The Federation supports an independent body being given expanded powers with regards police discipline in line with other states.

### Dismissal of unsuitable members

Under section 68 of the *Police Regulations Act*, the Chief Commissioner may dismiss a police officer if she is satisfied that the member is unsuitable to continue as a member of Victoria Police, having regard to-

- (a) the member's integrity; and
- (b) the potential loss of community confidence in Victoria Police were the

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<sup>19</sup> *Police Regulation Act 1958* s 86P.

<sup>20</sup> *Crime and Misconduct Act 2001* (Qld) s 49.

<sup>21</sup> *Crime and Misconduct Act 2001* (Qld) s 64.

<sup>22</sup> *Police Service Administration Act* section 4.6. This is used in New South Wales and Queensland.

member to continue as a member of Victoria Police.

There are suggestions that over thirty police officers have been earmarked for dismissal, yet very few have been successfully dismissed.<sup>23</sup> The Federation is concerned about the effectiveness of this provision, and by extension, the effectiveness of the police disciplinary system. Provided natural justice is accorded, dismissal should be utilised as an outcome of the complaints process. The failure to remove officers recommended for dismissal for serious misconduct undermines public confidence in the system.

Consideration should be given to the establishment of an independent alternative disciplinary body that can act on complaints referred by the OPI. This would be a statutory body given equivalent powers to the Chief Commissioner's powers under section 68. Its decisions would be subject to the same Police Appeals Board appeal process. The primary advantage of this new avenue of police discipline is that it removes the perceived bias that exists when only the Chief Commissioner may dismiss police officers. The Chief Commissioner would still retain the same powers, but an alternate and independent body could also take action if it was politically sensitive for the Chief Commissioner to act. By analogy this new body is similar to the professional bodies in Victoria that register and discipline a range of professionals such as the Psychologists Registration Board or the Legal Practice Board.

#### Interaction with Police Appeals Board

The police disciplinary process should be taken into account by the Police Appeals Board when deciding promotions or appointments.

Section 91O of the *Police Regulation Act* states that the Police Appeals Board is not bound by the rules of evidence and may inform itself on any matter as it sees fit. This could include a history of complaints and also the existence of all unresolved complaints. Section 91K requires that the Board consider the interests of the applicant but that equally, the Board must consider the public interest. Public interest is defined as including the community interest in maintaining the integrity of Victoria Police.

The Federation suggests that the Board be alerted to an officer's complaint history, or at the very least unresolved complaints.

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<sup>23</sup> <http://www.theage.com.au/news/national/sacked-police-officers-win-court-challenge/2005/08/11/1123353420958.html>; <http://www.theage.com.au/news/opinion/no-way-to-fight-crime/2006/09/13/1157827016488.html?page=2>

## **Conclusions**

The Federation is committed to promotion and protection of justice within the community. It believes that the proposals made above go some way to enhancing this.

We look forward to working with OPI, Victoria Police and other stakeholders in the future in recognising these goals and values.