

VALS Policy Brief

# Reforming Police Oversight in Victoria





## Systemic Racism and Police Oversight

Systemic racism<sup>1</sup> in Victoria Police impacts Aboriginal communities on a daily basis and manifests itself in the way that Aboriginal people are over-policed,<sup>2</sup> over-represented in police custody<sup>3</sup> and under-served when they seek assistance from police.<sup>4</sup> It is also evident in police use of force<sup>5</sup> and explicit racial abuse<sup>6</sup> against Aboriginal people. The continuing over-policing of marginalised people leads to shamefully high incarceration rates for Aboriginal people, which were identified more than thirty years ago as the main driver of Aboriginal deaths in custody by the Royal Commission into Aboriginal Deaths in Custody.<sup>7</sup>

Addressing these deep-seated problems requires an effective system of police oversight, which prevents misconduct from occurring and holds police to account when it does take place. Victoria's police oversight system falls drastically short of achieving these goals.


Abuse of police power has been rife, and inadequately investigated, for so many years that only a Royal Commission into Victoria Police could now uncover the years of misconduct that the oversight system has failed to address. Root and branch reform is needed.

The Victorian Government had an opportunity to pursue that reform through a Parliamentary Inquiry into police oversight in 2018 and the Royal Commission into the 'Lawyer X' scandal.<sup>8</sup> Instead, the Royal Commission was given narrow terms of reference, and the Government failed to respond to the Parliamentary Inquiry's report for nearly three years.

## Systemic Review of Police Oversight

In 2021, the Government initiated a systemic review of police oversight, as a combined response to Recommendation 61 of the Royal Commission and the Parliamentary Inquiry. However, the scope of the review is extremely limited, meaning that it will not address many of the key failings of the Victorian police oversight system and will not lead to strong accountability mechanisms to address systemic racism within Victoria Police.<sup>9</sup>

VALS is urging people, communities and organisations affected by policing to take this opportunity to press for change. A broad campaign for oversight reform is needed, alongside participation in the Government's flawed review. The public consultation on police oversight is [open now](#) until the beginning of February, and includes a survey for anyone who has made or considered making a complaint about police misconduct.



This policy brief sets out VALS' position on the key principles for reform of Victoria's broken police oversight system. A full policy paper with more detailed recommendations for the design of a police oversight regime will follow in the coming months.

## Core Components of an Effective Police Oversight System

An effective police oversight system has multiple elements, all of which need to be designed and adequately resourced to function effectively. The core components of a police oversight system include:

- A police complaints system that provides thorough, culturally appropriate and independent investigation of all complaints, other than customer service matters;
- Independent and culturally appropriate investigation of police contact deaths, both for coronial processes and in determining if a criminal or disciplinary offence has been committed;
- Independent monitoring and auditing of the exercise of police powers, supported by transparent record-keeping and reporting by Victoria Police;
- Independent oversight of police places of detention, in compliance with OPCAT;
- Accountability for implementing recommendations relating to police, from coronial inquests, police complaints investigations, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), and other commissions and inquiries.

## Police Complaints

An independent police complaints system that complies with international principles is a core component of a robust police accountability and oversight system.<sup>10</sup> Aboriginal communities do not have confidence in the police complaints system because it lacks independence, is culturally unsafe and does not provide satisfactory outcomes.

The body currently responsible for handling police complaints is the Independent Broad-based Anti-corruption Commission (**IBAC**), but the vast majority of complaints are referred back to Victoria Police to investigate themselves.<sup>11</sup> In 2020-2021, 94.3% of complaints against police were investigated by Victoria Police without meaningful involvement from IBAC, or not investigated.<sup>12</sup> This inevitably leads to inadequate investigations: audits of Victoria Police's



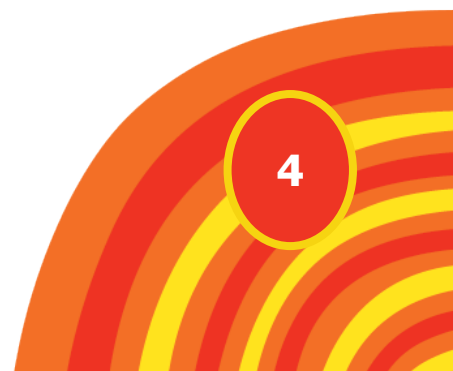
handling of complaints have highlighted a serious and systematic disregard for conflicts of interest.<sup>13</sup>

IBAC's own investigations of complaints, in the rare cases they are conducted, are also frequently inadequate. For example, in one investigation, IBAC cleared police officers of using unlawful force after they stomped on a man's head and rammed him with a police vehicle during an acute mental health episode.<sup>14</sup> This has led to VALS and many community legal centres regularly advising clients that there is no value in making complaints to IBAC. VALS has experience of cases where IBAC has referred complaints back to Victoria Police, or found them not substantiated, when the same incidents were later pursued successfully in civil litigation.

The 'civilian review' model used in Victoria and other Australian jurisdictions – under which an independent body investigates only some complaints, while police themselves handle others – is inadequate for Victoria. The loss of faith in police and the police complaints system in Victoria is profound among communities affected by over policing, including Aboriginal people and other racialised and marginalised minorities. A fundamental reset of the police oversight system is required to rebuild trust. This was the approach taken in Northern Ireland, where a fully independent body, the Police Ombudsman of Northern Ireland, investigates all complaints against police. Without this model, the police complaints system will continue to 'hold out a false promise' by suggesting independent investigation when the reality is that most complaints are investigated by police.<sup>15</sup>

To ensure a police complaints mechanism that complies with international principles, the Government must establish a new independent police complaints body that is complainant-centred, transparent, has adequate powers and resources, and responds to the needs of Aboriginal complainants. This body should investigate all complaints except customer service issues.<sup>16</sup> It should have a dedicated Koori Engagement Unit to provide culturally safe support to Aboriginal complainants, something IBAC has made no effort to do despite the fact that Aboriginal people are more likely to suffer police misconduct than non-Aboriginal people.

The complaints body must also have powers to respond to systemic problems, including systemic racism, which cannot be appropriately addressed solely through individual complaints. These should include strong 'own motion' powers to start investigations without a complaint, and a 'super-complaints' process which allows organisations to bring a systemic complaint on behalf of a group of people and present systemic evidence, not only evidence of individual cases of misconduct.







## Police Contact Deaths and Serious Injuries

When a member of the public dies or is seriously injured during contact with Victoria Police, the incident is currently investigated by Victoria Police. This internal investigation is overseen by Professional Standards Command within Victoria Police, and this oversight is in turn overseen by IBAC.<sup>17</sup> As a result, the investigation is not carried out independently of Victoria Police, and any kind of external scrutiny is several steps removed from the actual investigation.

Independent investigation is absolutely critical for deaths and serious injuries that involve police contact. Aboriginal families who have lost loved ones to police contact deaths often have to deal with a coronial process in which police investigate the death – often with serious investigative deficiencies which undermine the entire coronial process. In some international jurisdictions, this task is part of the complaints body’s mandate, while in others, a separate agency exists for these kinds of serious incidents. In either case, the investigation from start to finish must be conducted independently of the police.

Proper, independent investigation facilitates multiple avenues of accountability. The independent investigators should have the power to refer incidents for criminal prosecution, and their investigation should be used to support coronial inquests.<sup>18</sup> The findings of an independent investigation should also feed into the outcomes of police disciplinary processes and be admissible in civil litigation.

## Criminal Prosecutions

Prosecution of criminal acts committed by the police is essential to maintaining community trust and enforcing high ethical standards in Victoria Police. In 2020/21, only five police officers were prosecuted after an IBAC investigation was finalised. This is a key reason for under-reporting by Aboriginal complainants and lack of confidence in the existing police complaints system.

The independent complaints body should have the power to refer matters for prosecution when it makes its findings. This referral may be made alongside any recommendations for police disciplinary outcomes. There is a risk that the Office of Public Prosecutions, which works closely with police on a regular basis, will not be perceived as a reliable prosecutor of police misconduct matters. To address this concern, the OPP should be required to provide a written explanation to the complaints body and the complainant if it declines to prosecute after a recommendation.



## Monitoring, Auditing & Record-keeping

Monitoring of police decision-making is a crucial component of an effective oversight system. It enables problematic practices to be identified and addressed, even where there is not an individual willing or able to make a complaint. Ensuring that monitoring approaches are effective in holding Victoria Police to account is vital to tackling the problems with policing in Victoria. This requires both strong record-keeping and reporting obligations on Victoria Police, and a new independent monitoring body to oversee the use of police powers.


At present, monitoring extends to only a tiny proportion of police activity. There is almost no transparency about powers which are used every day – such as the power to stop and search members of the public or issue move-on orders. Systemic problems in police conduct can develop outside the scope of monitoring schemes, with serious consequences for communities being over-policed and for the culture of the police force – for example, there is strong evidence of a problem with racial profiling in police searches.<sup>19</sup> Public reporting and transparent data about the use of many more police powers would create accountability directly to the public, as well as enabling monitoring by an independent body.

Victoria Police should be required to publicly release data on the use of a much wider range of police powers, broken down by geography and key demographic characteristics, every quarter. This data would enable accountability through the community, civil society and the media. A more detailed version of the data should also be provided to an independent monitoring body to analyse and identify problems in Victoria Police's practice.

A good practice example is found in the United Kingdom. National data on police stops and searches is published annually,<sup>20</sup> along with data on arrests and youth cautions. This data is complemented by local Stop and Search Community Monitoring Groups, which are empowered to examine individual incidents (including viewing body-worn camera footage), as well as data on stops.<sup>21</sup> VALS is one of many civil society groups which have previously called for the establishment a police stops monitoring scheme in Victoria.<sup>22</sup>

Police activity that should be subject to regular public data release and monitoring includes:

- police stops and searches,
- move-on orders
- powers relating to public drunkenness,
- powers under the Mental Health Act 2014

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- laying of charges against children in residential care
  - the arrest of children and young people
  - use of cautions and diversions
  - use of weapons at protests and demonstrations
  - use of force in police custody
  - provision of medical care in police custody
  - grants of police bail
  - provision of access to supports in custody including the Custody Notification Service and Independent Third Person services

It is also crucial that record-keeping requirements enable both independent monitoring and other forms of accountability, such as police complaints and civil litigation. In particular, VALS is concerned that the rules regarding Body-Worn Cameras (**BWC**) make it far too difficult for somebody with a complaint about police to access footage of an incident. Recent changes to legislation and regulation have enabled BWC footage to be used more widely in civil proceedings. However, footage is still not accessible through the Freedom Of Information system, which means there is no low-cost way to gain access to it and determine whether a civil claim is viable. There is an urgent need for further reform before BWC footage can become an effective tool for police accountability.

## Detention Inspections in Compliance with OPCAT

Under the *Optional Protocol to the Convention Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (**OPCAT**), the Australian Government must establish and maintain a National Preventative Mechanism (**NPM**) with a mandate to visit “any place under its jurisdiction and control where persons are or may be deprived of their liberty.”<sup>23</sup> The Victorian Government is responsible for designating and maintaining a body or group of bodies to act as the NPM in Victoria by January 2022.<sup>24</sup>

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



Victoria. Oversight of police custody is critical because those held in police cells are particularly vulnerable, and because the first 24 hours in custody present a particular high risk of ill treatment.<sup>25</sup>

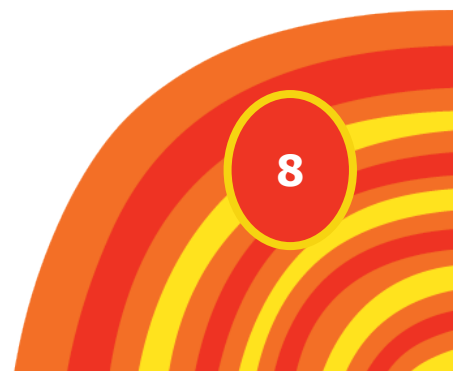
Victoria is on track to miss the deadline for OPCAT implementation, but it remains crucial that OPCAT is implemented urgently and in a culturally appropriate manner. The Victorian Government must carry out robust, transparent and inclusive consultations with Aboriginal communities in Victoria, Aboriginal representative bodies and Aboriginal Community Controlled Organisations (**ACCOs**), to ensure that detention inspections are implemented in a manner that is culturally appropriate for Aboriginal people.

## Accountability for Implementation

There have been many inquiries and royal commissions examining police violence and the accountability mechanisms that are meant to address and prevent it. Aboriginal communities, ACCOs and the Aboriginal Justice Caucus (**AJC**), have consistently shared their experiences and proposed solutions as part of these inquiries and reviews. Yet many of the recommendations arising from these processes have never been implemented.

It is crucial that Victoria creates a mechanism to ensure that these recommendations are translated into practice. Without such a mechanism, recommendations will continue to remain unimplemented for years and systemic racism and violence in policing will remain unaddressed.

VALS and the AJC have repeatedly called for an Aboriginal Social Justice Commissioner, to oversee Aboriginal justice outcomes in Victoria and operate as an oversight mechanism for implementation of the RCIADIC recommendations and coronial recommendations.<sup>26</sup> Establishing an independent and well-resourced Aboriginal Social Justice Commissioner continues to be a priority for VALS and the AJC.







## Key Recommendations

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

**Recommendation 2.** The Government must establish a new independent police complaints body, that has adequate powers and resources, incorporates procedural fairness principles and responds to the needs of Aboriginal complainants.

**Recommendation 3.** All police complaints, except customer service matters, must be dealt with by the independent police complaints body. This includes police contact deaths and serious injuries, which must never be investigated by police.


**Recommendation 4.** The Office of Public Prosecutions must be required to provide a written justification to the complainant and the independent complaints body if it does not pursue charges following a recommendation from the independent police complaints body.

**Recommendation 5.** Victoria Police should be required to publicly release data, broken down by key demographic characteristics including Aboriginality and geography, on the use of key police powers that disproportionately affect marginalised people, including searches, move-on orders, and youth arrests.

**Recommendation 6.** The Victorian Government must establish an independent monitoring body with powers to access and analyse data about the use of police powers, and issue public reports.

**Recommendation 7.** The Victorian Government must carry out robust, transparent and inclusive consultations with Aboriginal communities in Victoria, Aboriginal representative bodies and Aboriginal Community Controlled Organisations (ACCOs), in relation to culturally appropriate implementation of the Optional Protocol on Torture, Cruel, Inhuman and Degrading Treatment and Punishment (OPCAT).

**Recommendation 8.** The Victorian Government must establish an Aboriginal Social Justice Commissioner to oversee Aboriginal justice outcomes in Victoria and operate as an oversight mechanism for the implementation of recommendations from the RCIADIC, coronial inquests, and other inquiries and commissions.



**Recommendation 9.** The police oversight and accountability system in Victoria must be capable of identifying and addressing racism within Victoria Police, including systemic racism. In particular, the new independent police complaints body and all bodies responsible for monitoring police places of detention, must be mandated to investigate systemic racism.

## Further Reading

- VALS [Submission to the Inquiry into Victoria's Criminal Justice System – September 2021](#)
- VALS [Factsheet on OPCAT](#)
- VALS [‘Unlocking Victorian Justice’ webinar on OPCAT](#)
- VALS Factsheet on Systemic Racism
- Police Accountability Project Policy Briefing Paper, [Independent Investigations of Police](#)



## Endnotes

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

<sup>2</sup> Aboriginal people in Victoria are more likely to be apprehended and arrested by police, and they report higher rates of being hassled by police. See H. Blagg, N. Morgan, C. Cunneen, A. Ferrante (2005), *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System*. The recent Inquiry by the Commission for Children and Young People (CCYP) into found that Aboriginal children and young people were substantially over-represented in arrests. See CCYP (2021), *Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 430. Excessive policing of Aboriginal women was also noted in the Tanya Day Inquest. See *Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day*, 9 April 2020, COR 2017 6424.

<sup>3</sup> Data from Victorian police attendance registries in 2006 reveals that Aboriginal people are almost six times more likely to be held in a police station. See *Koori Complaints Project 2006-2008: Final Report*, p. 17.

<sup>4</sup> Previous research by VALS and the Centre for Innovative Justice in relation to police complaints submitted by VALS' clients indicated themes of "under-policing," including failure to investigate allegations and inadequate police responses to callouts regarding family violence. VALS and the Centre for Innovative Justice (2016), *The Effectiveness of the Victoria Police Complaints System for VALS Clients*. VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*.

<sup>5</sup> For example, the CCYP Inquiry found that 5 children and young people reported sustaining broken bones and serious injuries as a consequence of assaults by police. CCYP (2021), *Our Youth, Our Way*, p. 433. The Koori Complaints Project found that the largest number of allegations made by Aboriginal people whose complaint data was reviewed as part of the project, related to assaults by police at arrest, followed by racist language or abuse and failure to provide medical assistance and harassment. See *Koori Complaints Project*, p. 18.

<sup>6</sup> The recent Inquiry by CCYP found that over 70% of Aboriginal children and young people consulted throughout the Inquiry spoke about racism, violence or mistreatment by police; 25 Aboriginal children mentioned racism and racial abuse in the context of police interactions. See CCYP (2021), *Our Youth, Our Way*, p. 433.

<sup>7</sup> Royal Commission into Aboriginal Deaths in Custody (1991), *Final Report: Volume 1*, section 1.3. Available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/12.html>.

<sup>8</sup> Royal Commission into the Management of Police Informants (2020), *Final Report*. Available at <https://www.rcmpi.vic.gov.au/final-report>.

IBAC Committee (2018), *Inquiry into the external oversight of police corruptions and misconduct in Victoria*. Available at [https://www.parliament.vic.gov.au/file\\_uploads/IBACC\\_58-06\\_Text\\_WEB\\_2wVYTGrf.pdf](https://www.parliament.vic.gov.au/file_uploads/IBACC_58-06_Text_WEB_2wVYTGrf.pdf).

<sup>9</sup> Department of Justice and Community Safety, *Systemic review of police oversight: Public consultation*. Online at <https://engage.vic.gov.au/systemic-review-police-oversight>.


<sup>10</sup> International best practice principles for a police complaints system include: independence; adequacy of powers and resources; promptness; transparency and public scrutiny; and victim involvement. The principles were originally developed by the European Court of Human Rights and consolidated in the Council of Europe (2009) [\*Opinion of the Commissioner for Human Rights concerning independent and effective determination of complaints against the police\*](#). The principles have been endorsed by the [\*UNODC Handbook\*](#) and have also been applied by the UN Human Rights Committee in UN Human Rights Committee, Views: Communication No. 1885/2009 (5 June 2014), 110th sess (Horvath v Australia).

<sup>11</sup> Investigations conducted by Victoria Police are investigated either by local or regional commands, or by Professional Standards Command, which has overall responsibility for ethics and integrity in Victoria Police. The majority of complaint investigations are handled at local or regional level, sometimes with oversight from PSC, rather than directly investigated by PSC officers.

<sup>12</sup> IBAC, [\*Annual Report 2020/21\*](#), p. 26.

<sup>13</sup> Office of Police Integrity (2010), [\*Managing conflict of interest in Victoria Police\*](#); IBAC (2016), [\*Audit of Victoria Police complaints handling systems at regional level\*](#), p. 11; IBAC (2018), [\*Audit of complaints investigated by Professional Standards Command, Victoria Police\*](#), p. 5.

<sup>14</sup> ABC News, 16 July 2021, '[Watchdog finds police acted lawfully when head-stomping mentally ill man during arrest](#)'.



<sup>15</sup> Prenzler (2016), 'Scandal, Inquiry, and reform: the evolving locus of responsibility for police integrity', in Prenzler & den Heyer (eds), *Civilian oversight of police: advancing accountability in law enforcement*, p5. Cited in IBAC Committee (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p34.

<sup>16</sup> 'Customer service matters' should be defined in legislation, to exclude any complaint about the exercise of a police power (including powers to stop or question), the decision not to exercise a police power, or complaints which allege racism or other protected attributes.

<sup>17</sup> IBAC (2018), *Audit of Victoria Police oversight of serious incidents*, pp10-15. Professional Standards Command notifies IBAC when it is overseeing an investigation into a police contact death or serious injury, and IBAC reviews some of these investigations after they have been completed.

<sup>18</sup> At present, investigations for coronial inquests are conducted by Victoria Police, under the direction of the Coroner. The Coroner's Court has adopted several practice directions attempting to create a greater degree of independence in the investigation of deaths involving police. However, on-the-ground investigative work is still conducted by police officers. An independent body tasked with investigating all serious police contact incidents would greatly simplify the situation, by taking on all the functions that would be fulfilled by Victoria Police in other inquests.

<sup>19</sup> Court documents from *Haile-Michael v. Konstantinidis*, '[Summary of Professor Gordon's and Dr Henstridge's First Reports](#)'.

<sup>20</sup> UK Government, [Stop and Search](#).

<sup>21</sup> Mayor of London, [Stop and Search](#).

<sup>22</sup> Police Stop Data Working Group (2017), [Monitoring Racial Profiling - Introducing a scheme to prevent unlawful stops and searches by Victoria Police](#).

<sup>23</sup> [Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#), Article 3(1). According to Article 3(2), "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."

<sup>24</sup> Ibid.

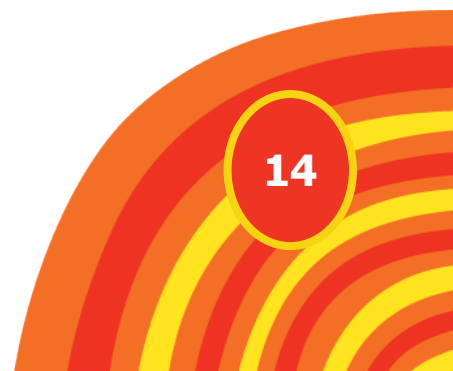




<sup>25</sup> Victorian Equal Opportunity and Human Rights Commission (2018), Submission to the Australian Human Rights Commission, *OPCAT Implementation in Australia Consultation Stage 2*, pp7-8. Available at [https://humanrights.gov.au/sites/default/files/2020-06/4.\\_victorian\\_equal\\_opportunity\\_and\\_human\\_rights\\_commission.pdf](https://humanrights.gov.au/sites/default/files/2020-06/4._victorian_equal_opportunity_and_human_rights_commission.pdf).

VALS (2021), *Building Back Better: COVID-19 Recovery Plan*, p. 110.

<sup>26</sup> Establishing an Aboriginal Social Justice Commissioner has been one of the AJC's key priorities since it was recommended by the Victorian RCIADIC Review in 2005.





### *Acknowledgement of Traditional Owners*

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

### *Artwork*

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

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