Submission to the Parliamentary Committee of the Australian Commission for Law Enforcement Integrity

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Part 1 -Introduction

Critical issues impacting the integrity of federal law enforcement agencies are the use and abuse of force, coercive powers and the cruel, inhuman and degrading treatment of suspects and detainees.

The abuse of force against suspects and detainees is indicative of a breakdown in command and control within the agency. A failure to detect and punish abuses of force creates a culture of impunity and tolerance. Detection and punishment is thus a priority task of all law enforcement oversight agencies.

Concerns involving Federal law enforcement agencies include the abuse of strip-search powers, coercive questioning techniques and practices that violate international law prohibitions on torture, cruel, inhuman and degrading treatment and punishment. For example any complicity in the use of torture and extraordinary rendition of Australian Mamdouh Habib by Australian federal agents is a concern the ACLEI must be empowered to thoroughly investigate and punish[1].

Areas where federal law enforcement integrity requires close scrutiny includes involvement in the treatment and removal of detainees in immigration detention facilities, the conduct of customs and immigration officials at boarder check-points, potential abuse of anti-terror powers, and its role in combating human and drug trafficking. A key integrity issue for federal agencies in working within these areas of law enforcement is the elimination of institutional sexism and racism[2].

A critical source of information about the integrity of law enforcement bodies is individual complaints[3]. Due to minimal public trust in the impartiality of complaint investigation processes, and the failure of the process to provide protection to members of the public who do complain, formal complaints against law enforcement officers are a rarity[4].

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[1] Tim McCormack, *The Age*, 2 February 2009, p 9.
[2] See the Recommendations of the Stephen Lawrence Inquiry 1999 (UK).
[3] See Tim Prenzler 2009 Preventing Misconduct and Maintaining Integrity (draft manuscript).
[4] See for example the findings of the Koori Complaint Project, Final Report, 2008 Ethical Standards Department, Victoria Police, Indigenous Justice Unit, Department of Justice as

The pattern of complainant reticence is also evident in studies overseas[5]. These studies reveal only 1 in 10 people who feel aggrieved make a complaint. In situations where a person's visa status is uncertain, a decision to complain about police practice is even more unlikely.[6]

Lack of public confidence in the investigation of complaints against law enforcement officers is not the only concern.

Investigations of public complaints by law enforcement officers are routinely criticized for their lack of independence[7], their inadequacy[8], delays[9], secrecy and lack of public scrutiny[10] and their failure to protect or involve complainants or in cases of deaths in custody, their families[11].

Police involved deaths and injuries to members of the public are issues that can bring police forces into serious disrepute and their thorough, impartial and independent investigation is essential in maintaining public confidence in law enforcement integrity.

Part 2 The Duty to Investigate – The Human Rights Frame Work

International law mandates the independent and effective investigation of all deaths involving police and all allegations of torture, cruel, inhumane and degrading treatment and punishment.

<u>The Committee Against Torture</u>

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well as interviews by author with legal practitioners and complainants in Victoria.
Professor Richard Harding notes of prisoner complaint in *Own Motion Investigation into the Department of Corrective Services' Prisoner Grievance Process*: Office of the WA Ombudsman, May 2006 at paragraphs 65-72 there is an analysis of the fate of complaints referred back to the prisoner-complainant by the Ombudsman with the advice that this should first be pursued via internal departmentalprocesses. Prisoners only took up this option in 5% of such cases.

[5] *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).

[6] Presentation on 15 October 2008 by Javier Maldonaldo for the National Lawyers Guild, Police Accountability Project in Detroit.

[7] Taman Inquiry, Manitoba Canada October 2008.

[8] Ibid

[9] Oversight Unseen, Ontario Ombudsman Report 2008.

[10] Stephen Lawrence Inquiry 1999, UK, McPherson Report.

[11] 2008 Commonwealth Ombudsman's Report under Part V of the Australian Federal Police Act 1979 at page 1. And *Amin, R (on the application of) v. Secretary of State for the Home Department* [2003] UKHL 51 (16 October 2003)

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[12].

In its concluding observations concerning Australia in 2008, the Committee provided some 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, 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."

<u>European Convention of Human Rights</u>

Under the European Convention of Human Rights, where a person alleges, or a situation exists that raises the possibility that the *right to life*[13] or the *right to freedom from torture, cruel, inhumane and degrading treatment (ill-treatment)* has been breached by law enforcement officers, these exists a legal obligation on the State to conduct an independent and effective investigation into its cause[14].

The duty to effectively investigate alleged human rights breaches, is not just a secondary procedural obligation, but is part of the right itself[15]. Lord Bingham of Cornwell described the duty to investigate is so fundamental as to be "parasitic" to the right itself[16].

In the United Kingdom, a victim, or in deaths in custody, their family members, can obtain a legal remedy when the State fails to provide an effective investigation of an

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[12] See for example its General Comment No 2. 23 November 2007 at para

[13] 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.

[14] When a member of the public is alleged to have violated these rights, there is also an obligation on the State to effectively investigate however issues as independence are less of a concern in these cases, investigations of these matters will not be addressed in this report but, for further information see *Menson & Ors v United Kingdom* (1998) EHRR 107 (16 September 1998) p 21.

[15] 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.

[16] *R (Gentle) v Prime Minster* [2008] UKHL 20. The better word maybe be symbiotic, meaning the right and the duty are in severable.

allegation of a breach of these rights by an application to the European Court of Human Rights.

In *Khan v The United Kingdom*, the European Court of Human Rights found that a breach to the right to privacy would not remedied through an in investigation under the UK's then operating Police Complaints Authority because the Authority left the investigation of the complaint in the hands of police[17]. The consequence of this and subsequent House of Lords and European Court decisions is that in the UK, the Independent Police Complaints Commission, a body intended to be independent[18] of police has been required to expand the range of investigations it conducts to meet legal requirements[19].

The European Convention on Human Rights operates in the United Kingdom through the *Human Rights Act 1998* (UK). Comparable rights to those imposing a legal duty to investigate in the UK appear in the *Charter of Human Rights and Responsibilities Act 2006* (Victoria) ss 9,10, and the *Human Rights Act 2004* (ACT) ss 9,10.

The duty to conduct an effective investigation of an alleged breach of rights also arises under the *International Covenant on Civil and Political Rights* and the *Convention Against Torture.* Australia is a party to both these conventions.

Compliance with the right to life and freedom from torture and all forms of ill-treatment, and the corresponding duty to effectively and independently investigate allegations of their breach is mandatory under these Conventions. Australian legislation must be compatible with these instruments or Australia will violate international law.

The European Court of Human Rights jurisprudence is an important source of the principles of the duty of investigation in relation to police complaints. Additional sources of principles come from the United Nations Committees and United Nations principles relating to use of firearms by law enforcement agencies and principles relating to extra-legal executions.

<u>The Human Rights Committee</u>

The Human Rights Committee oversees the International Covenant on Civil and Political Rights. It notes the following with respect to the content of the duty to investigate:

In it concluding observations on Hong Kong:

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[17] 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.

[18] The extent of the IPCC's institutional independence is questionable, given its Commissioner is appointed by the same department that has responsibility for the police.

[19] Report of the Comptroller and Auditor General, National Audit Office, London 12 November 2008, p5.

"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."[20]

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."[21]

In its concluding observations on Brazil:

"The State party should ensure that the constitutional safeguard of federalization of human rights crimes becomes and efficient and practical mechanism in order to ensure prompt, thorough, independent and impartial investigations and prosecution of serious human rights violations."[22]

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.

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. The principles are as follows:

1. The investigation should be amenable to an independent administrative and judicial review as well as independent prosecution.[23]

[20] Concluding observations of the Human Rights Committee 9 November 1995 Hong Kong para 11.
[21] Concluding observations of the Human Rights Committee 9 August 2005 in the Syrian Arab Republic para 9
[22] Concluding observations of the Human Rights Committee 1 December 2005, Brazil, para 13
[23] Para 22.

2. The victims and families should have access to judicial review.[24]

UN Principles on Extra-Legal Executions

Principles on investigation arising from 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) 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 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.[25]

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[26].

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 ..."[27]

The Content of the Duty to Investigate

Graham Smith, the Rapporteur to the European Commissioner for Human Rights on police complaints identifies five principles for the effective investigation of complaints against the police arising from European Court of Human Rights jurisprudence:

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

[24] Para 23.
[25] Para 10.
[26] Para 16.
[27] Para 17.

["This means not only a lack of hierarchical or institutional connection but also a practical independence[28]" "independent in law and practise"[29] "Supervision by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation[30]]

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[31]] and to identify and punish those responsible;

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;

> [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.[32]]

5. Victim involvement: in order to safeguard his or her legitimate interests the victim is entitled to participate in the process."[33]

A further principle arising from the European case law is that the investigation must be initiated by the State itself.[34] 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.[35] A similar requirement for state initiation of investigation arises in cases where the person whose rights may have been

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[28] *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 325.
[29] *Nachova and Others v Bulgaria* [GC] ECHR 2005 at para 112.
[30] *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 337.
[31] Jordan v The United Kingdom [2001] ECHR 327 (4 May 2001) para 107.
[32] *ECHR 2002* at para 40.
[33] Graham Smith, (2008) "European Commissioner for Human Rights Police Complaints Initiative" – *172 JPN 399*, pp 1,2.
[34] See *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008) para 35.
[35] *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008) para 65.

violated has "disappeared."[36] The principle, is relevant however beyond death in custody cases.

Because complaint investigation is the only mechanism where by disciplinary or criminal outcomes[37] can be achieved, the State is required to initiate investigation for these potential purposes in all cases where cruel, inhuman and degrading treatment of a person in custody is alleged.

The themes arising from the UN Committees, Firearms and Extra-Judicial killings principles are broadly consistent with the 5 principles identified by the Rapporteur to the European Commission for Human Rights on police complaints. Access to an appeal mechanism as identified in the UN Firearms Principles, must also be observed.

The next two parts of this submission deal firstly with the meaning of independence in the context of investigations into human rights abuses and secondly with the meaning of adequacy.

Both parts conclude with recommendations.

Part 3 – Independence

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."[38]

A former police officer now employed by the Commission for Public Complaints Against Royal Canadian Mounted Police expressed the view that critically focusing on police investigating themselves, rather than when lawyers or doctors investigate their own is unfair.[39] 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."

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[36] For an example of a disappearance case see *Tahsin Acar v Turkey* [2003] ECHR 233 (6 May 2003)

[37] *Hugh Jordon v The United Kingdom* [2001] ECHR 327 (4 May 2001) at paragraph 141.

[38] Communication with the author on 23 October 2008.

[39] Interview by the author with a complaint analyst from the Commission for Public Complaints Against the Royal Canadian Mounted Police.

While the decision making level is important, it is however the process of gathering the facts that determines whether a decision to apportion blame can be made. 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.

The argument that only police are capable of investigating police is widely disputed and evidence exists that such an assertion is not in fact correct. Indeed the Washington DC Police Complaint Authority currently employs no former police officers and yet appears highly capable in its conduct of the investigations it does. Similarly only 25% of the investigating staff in the Northern Ireland Police Ombudsman's Office are former police officers.

It is true, however, that transparency is the critical feature of a complaint system and that any body investigating itself is open to genuine allegations of bias. The unique nature of law enforcement agencies, however makes self-investigation in the policing context unacceptably 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 basis 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 with which violence gains its meaning.[40]"

While this was written in 1964, its observation of police secrecy and occupational values is no less applicable today.

Monash University's Dr 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.'

In 1995, The Australian Law Reform Commission (ALRC) after reviewing complaint handling by the Australian Federal Police (AFP) and National Crime Authority (NCA)

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[40] William A Westley, '*Violence and the Police*," in Police patrol readings, ed. Samuel G. Chapman (Springfield IL: Charles C Thomas, 1964), 284

stated:

> 'To ask the police to investigate complaints against their own places them in a 'hopeless conflict of interest position'. Police investigators, whether consciously or otherwise, will tend to be skeptical of complainants and will be 'softer' on the police concerned.'

Dr Craig Futterman of the University of Chicago raises the impact of the police code 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."

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:

- Institutional, organisational and hierarchical independence[41].
- Practical/functional/cultural (willingness to act) independence[42]
- Legal and political independent[43];

A. Institutional, organisational and hierarchical independence

In an attempt to achieve a form of independence, police agencies in many jurisdictions created specialist internal units to investigate allegations against police officers. The idea behind these units is that they will be protected from a hierarchy or a culture that might otherwise defeat their ability to investigate. Moral in these units is typically poor. For example, the Law Enforcement Review Agency Commission, visiting a unit of this nature in Winnipeg noted officers commenting, "Only x 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." [44]

In Victoria, a legal centre reported that police investigators, viewing video footage of police beating a Sudanese man failed in their conversations with him to appreciate the

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[41] *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 337.
[42] *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 325.
[43] *Nachova and Others v Bulgaria* [GC] ECHR 2005 at para 112.
[44] Michael W Quinn, 2005 "The Police Code of Silence, Walking with the Devil" at page 74.

excessive nature of the force used by police contained in the footage. According to the lawyer who viewed the footage at the police station, the repeated beating by the police was brutal, severe and unnecessary. Police subsequently lost the footage of this incident[45].

Internal investigation units are not sufficiently independent to meet the standard imposed under human rights law. The fact is however, that many police complaint systems, even those with civilian review agencies, utilise police to investigate complaints. Examples of these include the Office of Police Integrity in Victoria in Australia, the Independent Police Complaint Commission for England and Wales and the Office of Police Complaints against the Royal Mounted Canadian Police.

Police investigating police will never find acceptance from complainants and are steadily critiqued in academic literature[46], Public Inquiries[47] and human rights case law.

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 the public complains.[48]

While this would overcome some of the issues raised by Michael Quinn, it does not deal with the scepticism, hostility and acceptance at face value of police officer accounts that police officers tend to bring to investigations of police. It does not overcome the years of ingrained thinking that complainants are wielding a grudge or that "but for the grace of god there goes I". The majority of police will have had a complaint made against them in the course of their career. From this, they will carry a preconception that complainants are incredible. Their long standing biases will prevent impartial investigation. Police tend to view police as hard done by. The lens through which they investigate is the same one that criminalises the public. Rationalisation and toleration of police violence within the agency taint 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 intolerable given the critical importance of complaint investigation.

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[45] Report from the South West Community Legal Centre in Warnambool.
[46] See for example Prenzler & Ronken 2001 157 "Models of Police Oversight: A critique," *Policing & Society* Vol 11 No 3 at page 157.
[47] MacPherson Inquiry, The Scarman Report, The Fitzgerald Inquiry.
[48] William McDonald, Investigative Analyst for the Office of Police Complaints, Vancouver BC.

For these reasons, the Human Rights Committee and European Court of Human Rights have been scathing of complaint systems that leave investigations in the hands of police.[49]

Colonel Thomas Streicher, the Cincinnati Chief of Police in 2008 is also a strong advocate for civilian complaint investigation without which, he says, the risk of police abusing their power is too great[50].

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."[51]

Making the internal agency external.

In Chicago, the Independent Police Complaints Authority was formed by taking police from the former internal investigation unit, externalising them and re-naming them "Independent".[52]

According to its published figures, its substantiation rate dropped and according to advocates in the field, the same people in organisation means the same culture of poor performance and hostility towards complainants continues. While advocates in Chicago are quietly confident of the worthy and genuine intentions of the new head of this body, they fear that the culture of the unit as well as the lack of political will in Chicago to support real investigation is so ingrained nothing will change[53].

Using seconded police in the civilian agency

Many civilian agencies second police from the forces they are investigating to investigate on their behalf. This is the case in Victoria and Queensland. This is effectively the same as creating an internal department or externalising an internal unit and leaves the civilian

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[49] See *Khan v The United Kingdom* and Concluding observations of the Human Rights Committee 9 November 1995 Hong Kong at paragraph 11.

[50] Speech given to the National Association of Civilian Oversight of Law Enforcement in October 2008.

[51] See the Recommendations at paragraph 58.

[52] Tracy Siska, Chicago Justice Project interview November 2008.

[53] 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, any perjury he commits in explaining or otherwise his actions could be used.

agencies vulnerable to replicating the very same concerns facing these bodies. Many complaint bodies recognised the highly unsatisfactory situation of seconded police in independent oversight bodies - its "like have the fox in the hen house"[54].

It is not merely sufficient to have investigations conducted by an institutionally independent body. Case law indicates that practical independence is required as well.

B. Practically/functionally/culturally independent, (willingness to act)

Probably the most critical lesson arising from research and jurisprudence on police complaint bodies is the need for them to be practically and culturally independent from the police they investigate. Furthermore they must be willing to act.

Graham Smith notes that it is all very well to set up a body to investigate police complaints, but unless it is genuinely oriented towards achieving complainant satisfaction, it will fail to achieve its goals. The history of the reform of police investigation in the UK is instructive in its catalogue of instituting poorly performing investigating agencies. Each creation focuses on police concerns, leaving complainants interests disregarded.[55]

The attitude of investigators toward complainants is essential. This does not mean accepting their complaints regardless. It does mean however, determinedly and doggedly setting out to find if there is evidence to support them. It means treating the complainant's evidence as just a credible, if not more so than any police witnesses. It means being thoroughly cogent of the endlessly documented police habit of colluding and lying for each - the Code of Silence - and the very reason why independent investigation is so essential[56].

The Code of Silence and the systemic collusion police engage in to hide police misconduct renders police evidence about misconduct unreliable. Analysis conducted in Chicago indicates that while 10% of police conduct the 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)[57]. This leaves a tiny fraction of police (the whistleblowers), who can be reasonably treated as credible witnesses regarding police misconduct.

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[54] Interview with William McDonald, Investigative Analyst Office of the Police Complaint Commissioner British Columbia, 7 October 2008.
[55] Smith Graham 2005, A Most Enduring Problem; Police Complaints Reform in England and Wales, *Jnl Soc. Pol.* 35, 1, 121-141.
[56] See an example the Office of Police Integrity's 2008 Report "The Victorian Armed Offenders Squad – a case study"
[57] Futterman et all "The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices" p 20.

Given these stark and repeated patterns across police departments, it is clear that police witnesses in these cases enjoy undeserved respect by police complaint agencies, courts and juries. In Howard Becker's hierarchy of credibility, in misconduct investigations police should occupy the bottom rung.

Practical independence demands civilian agencies be aware of this concern when they drew conclusion about the credibility of witnesses.

Many complaint bodies get stuck in the lack of perfection they see in their complainants, forgetting that the fragrant[58] white middle class are not their average customer. Many complainants will stumble, have engaged in criminal behaviours, forget, be angry 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 have refused to stop their car prior to the abuse they complain about. These features in no way invalidate their complaints. Torture, ill-treatment and the unnecessary loss of life are absolutely prohibited under all human rights instruments.

Political/Legislative Independence

The New York Civil Liberties Union 2006 report "Mission Failure" into the New York Civilian Review Board noted that civilian agencies can be intimidated by the police into adopting a permissive stance and be hampered by a poor legislative framework granting only weak powers to compel police to respond. These are issues of "regulator capture" where by the regulator is not sufficiently independent and protected from the regulated.

The issue of regulator capture is a widely studied phenomenon. A study by Tim Prenzler of the Queensland Criminal Justice Commission established following the ground breaking Fitzgerald Inquiry into police and public sector corruption in Queensland, found evidence of exposure to regulatory capture specifically as a result of its "role in facilitating police management, joint operations [with police] against organised crime and reliance on seconded police investigators."[59] He also found that the agency had adopted an appeasement strategy towards the police and the political interference that later dramatically curtailed its activities.

Functional, practical, and political independence demands that exposure to regulatory capture is designed out of a civilian agency. It also means that States make a genuine commitment to sufficiently funding, empowering and protecting these agencies from political interference.

A powerful study of the failure by the Victorian Government to protect a genuinely committed civilian review authority by Ian Freckelton, examined the demise of the Police Complaints Authority in Victoria. This agency operated for two years in the late 1980's.

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[58] This descriptor is used by Raju Bhatt and sets the tone nicely.

[59] Tim Prenzler, 2000 "Civilian Oversight of Police, A Test of Capture Theory," in *British Journal of Criminology* (2000) 40 at 659.

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 willing to exercise of its power to investigate "public interest" complaints, its thorough re-investigation of complaints where complainant's raised concerns about the initial police investigation and its high media profile on police misconduct. Unfortunately the PCA was seriously under funded by the Government, hampered by badly drafted legislation and shut down by the Government within 2 years of its operation following a powerful backlash from the Police Association[60].

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 Giulliani, 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 who had had concluded the shooting was unlawful were all subsequently fired[61].

These examples reveal the essential need for a civilian investigation body to be politically independent.

In British Columbia, the Office of Police Complaints has been calling for legislative reform to remove it from the legislation in which police are also regulated. This would provide it with freedom to make regulations and amendments separate from police ministers and government departments governing the police and provide for direct reporting to parliament. It would seem that fixed tenures would also assist in their political independence.

The Northern Ireland Police Ombudsman is widely cited as the "Golden Standard in Police Investigations".

Meeting with its staff clarifies how it has achieved this label. Staff are highly motivated and complainant centred. They have also received the respect of the local police agency.

One of its 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 are capable of investigating themselves. Police investigations are bad for the police and for the public."

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[60] Freckelton, Ian 1991 "Shooting the Messenger" in *Complaints Against the Police, The Trend to External Review*, edited by Andrew Goldsmith.

[61] Justifiable Homicide, Reality Films, by Jon Osman, 2002.

He describes the Independent Police Complaints Commission 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 the Police Ombudsman in my limited time in Northern Ireland was that it needed more Catholics in order to achieve the trust of this minority. This is an important observation.

A similar body, the Special Investigations Unit in Ontario, 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 that operates within the agency.

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[62]. 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.[63] He notes the cozy relationship between the SIU and police.[64]

He notes the concerns of civilians that SIU officers talk and act like police and their reluctance to interact with the unit. By comparison, it is worth noting that in an real effort to address this concern, 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.

Andre Marin quotes one SIU investigator as saying:

> "Its 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 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."[65]

The Ombudsman also noted that the Unit was filled with white aging men and needed to more adequately reflect the community who needed it to work for them.

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[62] At paragraph 346
[63] At paragraph 345
[64] At paragraph 331
[65] At paragraph 344

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.

Another 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 seriously reduces its independence.

Out of this Part several observations can be made of the human rights principle of independence in police investigation.

1. Investigations of allegations of misconduct must be conducted by an agency that is not only institutionally independent of police but also practically and culturally independent. This means that the use of former police officers should be minimal if at all. My study in the field did bring me in contact with some rigorous former police investigators within agencies and it would be wrong to criticise all former police in these positions. 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 and to be avoided. On the other hand, civilians can and do perform investigations in civilian bodies throughout these regions. They can be trained to be highly effective and all effort should be to make this a central feature of civilian complaint bodies.

2. The agency must operate with a very real and healthy scepticism of police accounts concerning misconduct. It must be complainant centred and complainant oriented.

3. 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.

4. The agency must be protected from political and police union interference through separate enabling Acts and regulations and 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 its oversight.

5. It must be properly and securely funded so that it does not need to rely on seconded police for any of its functions. The Northern Ireland Police Ombudsman's budget is 1% of the Police budget.

6. It 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 gain information.

7. It must have all the powers of a standing royal commission.

8. Its decisions must be administratively and judicially reviewable.

9. It must be staffed by people who reflect the community who rely on it: it must contain young people, people from ethnic, religious, indigenous, disabled and gay lesbian queer identified and trans-gendered communities and contain a sex balance.

Part 4 – Adequacy and Promptness

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[66]] and to identify and punish those responsible."

He also notes the requirement of 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."

There are three types of investigations the authorities may conduct into a police complaint. The first is a criminal investigation. The second is an administrative or disciplinary investigation. When the complaint involves a death in custody, a third investigative process – an inquest, is also required.

A. Criminal and Administrative Investigations

Because a criminal investigations must, if justified, be capable of leading to a prosecution, 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 is conducted.

Administrative or disciplinary investigations, on the other hand, are quite different. The purpose of administrative investigations is to ensure that police officers conduct themselves with the highest integrity and that officers who cannot be relied upon 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 employment and public safety related it is absolutely essential that all police officers be legally 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 use force, the corollary is that they must be prepared to account for its use. In order to protect the officer's rights at criminal trial however, anything said by an officer during administrative questioning must be inadmissible in criminal proceedings against the officer when they have chosen to exercise that right.

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[66] Jordan v The United Kingdom [2001] ECHR 327 (4 May 2001) para 107.

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 in invoked.

This is the approach favoured too in the 2005 Taylor Report which reviewed and made recommendations on Police Disciplinary Processes in the UK.[67]

The other right that applies in criminal investigations is the right to speak to a solicitor prior to interview.

In many ways it would be better if administrative investigation preceded criminal investigation to reduce the impact of these delays. The right to counsel during administrative investigation is not mandated in law or fair trial principles. Rights to know the case against you apply at the time a decision-maker, with capacity to make a finding that affect your interest, is considering the information. Rights prior to that time are concessions police unions have forced from governments.

The right to a solicitor 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 a civilian delaying investigations for months for this purpose.

In other models such as Victoria, police have in some cases, not be required to account beyond their statement made as part of a prosecution brief against the complainant.

B. The importance of time

All investigators, judges, lawyers, doctors, nurses, coroners, 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, gun power dissipated, evidence planted, fingerprints lost, splatter marks removed, collusion, stories and alibis concocted.

When police investigate their own, their assistance with this process of loss of evidence has been evidenced: for example see the 2008 Taman Inquiry, Frank Paul Inquiry submissions 2008, 1999 Stephen Lawrence Inquiry, 2008 Ontario Ombudsman Report, *Anguelova v Bulgaria* [2002] ECHR 489.

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[67] http://press.homeoffice.gov.uk/documents/police-disciplinary-arrangements/report.pdf?view=Binary page 30.

Rather than assisting to cover up the evidence, effective 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, photographs taken and that there is a thorough assessment of the injuries by a doctor capable of assessing not just the visible injuries, but the pains, numbness, movement loss, tingling, nerve and tissue damage that may exist for the victim[68].

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. The processing and charging of a murder can occur within 6 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.

C. 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, reported in *the Age* on 25 February 2008.

Despite the existence of police members with long histories of complaints still working within the force, successful prosecutions and disciplinary action against police accused of excessive use of force and brutality are unusual.

Community Legal Centres receive numerous reports from people alleging assault by police in police interview rooms. For example in the 2006-2007 there were been 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. These are very serious allegations.

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

It is essential that equipment be installed to record whether human rights violations such as assaults of suspects within police stations occur. The capacity to effectively investigate allegations of human rights abuses is an essential component of the right to

[68] Dr Frank Arnold, Medical Justice, UK speech to a House of Commons Committee Room meeting on 10 December 2008.

life (section 9) and protection from torture and other forms of ill-treatment (s10) in the *Charter of Human Rights and Responsibilities Act 2006*. Victoria police have a duty to protect and promote human rights in the Charter. The provision of recording equipment in police interview rooms should be viewed in light of these obligations.

In Northern Ireland, police cars and stations are all monitored by video cameras.

D. 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 information must be provided to other team after wards. Usually this means the Police Ombudsman investigation has primacy.

The Police Ombudsman operate a 24-hour service. There is a team of 8 investigators. If there is not a lot of evidence, they send 2 people out. They wear orange jackets to distinguish them from the police. 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 are friendly and approachable. The public perceives them to be independent and competent.

The Northern Ireland Police Ombudsman use independent scientists and medical experts. 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.

The Police Ombudsman usually collects much more evidence than the police. They seem to have much better access to witnesses too. The public are willing to talk to them[69].

E. Role of the Police Ombudsman at prosecutions of complainants

When the Northern Ireland Police Ombudsman have information that would assist the defence of a complainant who is being prosecuted they disclose this to the prosecution. They will not release evidence that will assist the prosecution of complainants. This is not their role. Its 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.

"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."[70]

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[69] Conversations with staff on 28 November 2008

[70] Coversations with an investigator on 28 November 2008.

F. Police Collusion/Debriefing/Conferral/Provision of Statements

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."

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.

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[71]. 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 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 questions until nearly three days later. Although, as already noted, there is not 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 this 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 IPCC, at the request of the Metropolitan Police, did not start investigation until 3 or 4 days after the shooting. She said that CCTV footage went missing.

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[71] Thames Police, Regulation 9 Policy paper.

Not surprisingly, the evidence from the two suspect police officers in the shooting was remarkably similar, both in phrases used and internal feelings about the incident.

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 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"."[72]

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 brought by police, it seriously undermines the adequacy of investigations when police are being investigated.

G. 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, police investigators accept statements made by complainants through their solicitors[73]. In Victoria and Chicago, the complaints body regularly terminate investigations when then complainant refuses to give evidence in person to them[74]. While it is preferable that investigators take the statements to enable them to reach conclusions about credibility, it is the police whose credibility must be examined through investigation.

Complainant reluctance to speak is less a problem when the investigation is conducted by civilians, as in Northern Ireland, where the investigators have the support of the public - and where there are clear rules guiding at what stage in the process and how much of the complainant evidence will be provided to the police.

Many complainant advocates raise questions about the investigators focussing on their client's criminality and through distortion, omission or intimidation, their failure to document the evidence as told by their client. 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. 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.

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[72] *Momodou, R v* [2005] EWCA Crim 177 (02 February 2005) at paragraph 61.
[73] See for example *R (on the application of Deborah Clare) v IPCC and others* [2005] EWHC 1108 (Admin)
[74] Interview with Locke Bowman, MacArthur Justice Centre, Chicago.

Obviously if a matter goes to a disciplinary, criminal or civil trial all witnesses will be required to submit evidence in person. The protection of evidence in chief and re-examination is, however, built into these processes to reduce the impact of distortion.

H. 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.

Taman Inquiry Report 2008 Manitoba, Canada: "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 offices, 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."

Failures to interview police correctly will impact on the investigation's adequacy. Indeed, as Raju Bhatt a leading UK lawyer observed after reading transcripts of interviews of police investigating police, very often these interview have been exercises in mitigation rather than investigation. It is not the role of the investigation to work out to explore the defence strategies of the police. For example, it is unacceptable for anyone to ask a suspect officer a question such as "When bullets hit car glass they can reflect light and give the appearance that bullets being fired back, did you see this?"

I. Accessibility

A frequent concern raised by advocates and surveys of complainants is lack of accessibility. Complainants are not always able to attend city offices or arrange childcare. Armchair investigation does not discharge the burden on the state to adequately investigate. Similar issues surround complainants who are in custody or incarcerated. 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. Complaints in the US concern treatment of people at boarder crossovers. Capturing these complaints also needs consideration.

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.

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. Outreach to street setting and brothels are necessary to capture the issues arising for people in vulnerable situations.

People whose visa status is vulnerable will need assistance and protections such as confidentially and special visas to enable them to complain about police behaviours. Often these people are vulnerable to police abuse and deliberately kept silenced by police aware of their vulnerability.

Finally the risks of cover charges and harassment require serious consideration. If a complainant reports harassment, steps must be taken to protect that person from further abuse, ranging from temporary accommodation elsewhere to the protection afforded to whistleblowers, such as identity changes. Further more, the laying of a charge after notification of a complaint should be treated with great suspicion and investigated for misconduct in and of itself.

J. Standards of Proof

The standard of proof in disciplinary proceedings, like all civil proceeding is the balance of probabilities. This standard applies in Canada[75] in Australia[76], and in the UK[77].

The question then, is what standard should apply to the substantiation of complaints? Surely the standard should be the same as applied when the department of public prosecutions decides to proceed, with a prosecution – that is – lower than the standard at which the Court applies. 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."[78]

Translating this into the complaint process is that where, on one possible view of the evidence, a tribunal could find that the alleged misconduct occurred. In these cases, the complaint should be substantiated and disciplinary proceedings initiated. It is not up to the investigators to conclude themselves on the balance of probabilities that the conduct did or did not occur, it is merely for them to decide whether is possible, on one view of the evidence, that the conduct did occur.

The testing and determination of the evidence should occur in a hearing process. An excellent example of a process that manages this well is Washington DC Office of Police Complaints. Another example can be seen in the in Manitoba Canada, through

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[75] F.H. *v.* McDougall, 2008 SCC 53

[76] http://www.opi.vic.gov.au/documents/A_Fair_and_Effective_Victoria_Police_Discipline_System_(online).pdf at page 36.

[77] Interview with Graham Smith 2008.

[78] *R v Gallbraith* (1981) 73 Cr App R 124, 127 per Lord Lane CJ.

complaints made to the Law Enforcement Review Agency. Both of these processes lead to public hearings where a finding, after any disputed evidence has been properly tested, can occur. In Manitoba these hearings can lead to disciplinary findings, in Washington: to recommendations.

Concerns with the Manitoba process, readily admitted by the LERA staff, includes however, that Agency can not act as counsel assisting in these hearings and as complainants are rarely if ever represented, the process does not adequately protect their interests. In Washington DC it appears that complainants are regularly represented by practitioners paid for by the agency.

It is also worth noting that 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[79]. 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."[80]

K. Application of the Law

One of the issues raised by advocates for complainants is that police and police investigators don't understand the law of assault. The fact that unsubstantiated complaints can be successfully litigated in civil law suits lends support to this proposition. It was a point also made by an investigative analyst in the Office of Public Complaints British Columbia. He noted, that police tend to overlook issues of unnecessary levels of force in their investigations[81].

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 that was used in complaint findings provided to complainants by complaint bodies. A good example of this can be found in the Office of Police Integrity's letter to the Federation of Community Legal Centres in Victoria declaring that as the use of batons had been authorised by commanders against singing and dancing protesters at the Melbourne Museum in November 2006, the use of batons by police officers was therefore lawful. This is far from the analysis required to meet the standard. Each and every individual use of a police baton must be justified through the application of the law. Was each of those strikes that seriously injured that person justified? Was another less forceful alternative available to police? Would containment have been a more appropriate course of action? These are the kinds of questions that complainant evidence must be subject to. If such analysis has in fact been conducted, then the letters to complainants have not reflected this.

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[79] *Hugh Jordan v The United Kingdom* [2001] ECHR 327 (4 May 2001) at paragraph 103
[80] *Alsayed Allaham v Greece*, 18 January 2007, Strasbourg Court at paragraph 27.
[81] Interview with William McDonald, Investigative Analyst on 7 October 2008.

Another example of an apparent failure to apply the law can be seen in what appears to be the 'capture' of The Commission for Complaints Against the Royal Canadian Mounted Police on the lawfulness of use of lethal force in firearm incidents.

One of the Commission's complaint analysts said to me that when a person is running at you with a knife there is no time for you to run away, you have to shoot to immobilise the threat. The best place to shoot is in the body bulk. He said all police were trained in this way. He said in light of this, 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. "You have to shoot them, there is no time to do otherwise."

There are several problems with training police officers to shoot to kill when they perceive their life is in danger. The first is that police officers are also trained to always perceive that their life is in danger. The agency trains police to shot first, and think second.

In their evidence to a coronial inquest jury in 2008, the two police who shot Jean Charles de Menezes in 2005 said that they realised that everything about their training was wrong. They are right. Training that institutionalises irrational fear of the public causes deaths.

By training police in this way, Police organizations set police up to kill.

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 was 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, Police fatalities per 100,000 workers were lower than Groundkeepers (14.9), those in the agricultural industry (20.9), truck drivers (27.6), miners (30.0) and timber cutters (122.1).[82]

The chance of death in these other professions is much greater than for police. The level of fear police report clearly far and away oversteps the reality of the dangers they face in their work.

The Canadian Charter of Rights and Freedoms sets out at Article 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The principles of the use of firearms by police in the UN's "Basic Principles on the Use of Force and Firearms by Law Enforcement" 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.

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[82] Kristian Williams, 2007, "*Our Enemies in Blue, Police and Power in America*" at p 20.

Any police training, such as the one suggested existing in Canada for the RMCP that directs police to shoot at a person running towards a police officer with a knife, and not only this, to shoot at the bulk of a person, is effectively a shoot to kill policy and is in violation of these principles[83].

If, as was suggested, the Commission for Complaints against the RCMP has uncritically adopted the picture of police training given to me, it permits right to life violations to go undetected.

Another area of concern is the justification of police action in situations where force is illegal. For example, punching a complainant for turning their head against a police order to stay still or for speaking when ordered to be silent, is an assault. The use of force to ensure compliance with orders that are beyond that necessary to effect an arrest is an abuse of power[84], an assault, and potentially cruel, inhuman and degrading punishment.

Police should know these boundaries, but they don't profess to when they analyse complaint information.

L. 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 about compensation. If an investigation is terminated due to the complainant accepting a cash payment from police, as occurs in Manitoba, the States obligation to discipline and punish wrong-doing cannot be fulfilled. In some jurisdictions, complainants are forced to mediate before an investigation will occur[85].

The purpose of the investigation is subverted in these situations.

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 a mediation 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 each other are coming from[86].

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[83] 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.
[84] *Alsayed Allaham v Greece* 2007, ECtHR 18 January 2007 para 24.
[85] Oakland complaint process for example.
[86] See an example of this in Tim Prenzler 2009 (unpublished manuscript).

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

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. Where no independent evidence exists, the person who makes the decision about how the complaint should proceed should be the complainant. A complaint withdrawing because they are not sufficiently resourced to proceed (such as through the provision of a lawyer) is not acceptable. The process must empower the complaints to make choices about what they want to happen, not dictate to them a diminished option.

Similarly, if the complainant seeks compensation, the State must ensure legal assistance is available for them to seek this option through the civil courts.

M. 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 an administrative and judicial review of the investigation.

In the England and Wales, investigation findings and decisions by the police can be reviewed by the Independent Police Complaints Authority. In these cases the IPCC discloses as a matter of presumption, the full police investigation reports and invites the complainant to comment and make further submissions before making a decision on whether to re-investigate, otherwise amend or accept the police decisions. 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 complaints is the disclosure of investigation reports that is part of this process. Decisions of the IPCC are also judicially reviewable through the courts.

As the IPCC deals at first instance with deaths in custody, access to administrative (that is merits review) of its decisions however, as recommended under the UN principles on the use of Fire Arms does not appear to be available under this scheme.

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.

Administrative (merit) review of investigative decisions is a critical accountability 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. 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. Accessibility of this mechanism and lack of legal aid is a concern in the US, Canada and Australia.

Recommendations:

1. 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 the body is notified into all other police complaints that, on their face, reveal an allegation that could lead to criminal or disciplinary outcomes.

2. 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).

3. In cases where a person has lost their life in custody, civilian investigators should prepare the coroners report.

4. 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 a mediation in these situations.

5. Police suspects and witnesses must be separated and interviewed immediately 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.

6. Civilian witnesses must be separated and interviewed immediately after a death in custody/police involved death and in other cases as soon as is practical.

7. Complainants must be permitted to provide evidence through an advocate if they so wish.

8. Civilian investigators must by their attitude and attire be distinguishable from police.

9. Civilian investigators should interview complainants with respect to their complaint and not to collect evidence in relation to prior criminal behaviour if that behaviour is under investigation by police. 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 shattering (may complainants report their world has been shattered as a result of police misconduct) 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.

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.

11. Properly trained doctors must be free and available to assess pain and injuries at all police stations, prisons, detention centres, when victims contact the complaint body and when they contact a solicitors/advocates. It must be clearly obvious to people in custody that the doctor they are seeing is independent and not "working for the police."

12. 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 attorney/lawyer.

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

14. 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.

15. After statements have been obtained from all witnesses, copies of their own statement should be provided to each witness.

16. 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, the police and any advocates involved. The reasons must contain an analysis of the law that applies to the facts.

17. The standard of proof applied to substantiate a complaint is whether is it possible to conclude, on one view of the evidence, that the conduct did occur.

18. If a complaint is substantiated it should be heard in a public hearing where complainant, police and complaint body are represented at the cost of the State. In a disciplinary hearing the standard is the civil standard.

19. The decision not to substantiate 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.

20. Civilian investigators must attend prisons, police stations, holding cells, immigration detention centres/ boarder areas where police work and provide contact numbers and record complaints in these locations.

21. Civilian investigators must be active in pursuing evidence and must be mobile. Information must be available in multiple languages, by podcast/radio broadcasts and talks must be given to communities who would not otherwise access this information.

22. Protection visas must be provided to complainants and their witnesses during the investigation of their complaint and any appeals. Witness protection and safe houses must also be available for those in fear of harassment or the subject of threats.