

VMIAC Policy Position Paper #6: Police Misconduct and Accountability

Purpose

To protect the human rights of consumers during interactions with police and to address the stigma and distress that is caused by police acting as first responders.

The Issue

One in five police encounters involve someone experiencing mental and emotional distress.¹ It is estimated that police respond to mental health crises approximately every 12 minutes.² Consumers come into contact with and experience force from police more frequently and severely than the general population.³ Of particular concern is:

- **Police as first responders to mental health crises** – situations involving police acting as first responders to mental health crises tend to escalate,⁴ causing trauma and harm to consumers.⁵ Tactics such as intimidation, invasion of personal space and confrontation have been shown to increase the risk of escalation.⁶ Police are not and should not be expected to be clinically trained,⁷ which raises questions over why they are required to be involved in mental health crises at all. Victoria Police has also raised concerns about the appropriateness of police officers performing this function.⁸
- **Abuse of powers under the Mental Health Act and excessive use of force** – we are six times more likely to be the victim of a fatality involving police than the general population.⁹ Under the *Mental Health Act 2014 (Vic)* ('the Act'), police are permitted to use reasonable force against us in order to apprehend us.¹⁰ Verbal de-escalation tactics are often ineffective as police do not understand why we may not want to be taken to hospital or what is happening for us when we are in crisis¹¹ and tend to interpret distress as 'antagonistic', which often contributes to police decisions to use force and leads consumers to feel 'trapped' by interactions with police.¹² This is often the case when consumers are perceived to be resisting or running away from police,¹³ despite this being an understandable response during an emotional crisis or when under threat.¹⁴ This abuse of power can amount to human rights violations, for which police are rarely held accountable.¹⁵
- **Systemic discrimination against consumers** – police acting as first responders perpetuates the stigma experienced by consumers by treating us as criminals who have broken the law in some way.¹⁶ Criminalising distress leads to systemic discrimination against us: we are more likely to be subjected to the use of force by police (including pepper spray),¹⁷ police are more likely to exercise 'stop and search' powers on us,¹⁸ and we are overrepresented within the prison system¹⁹ which perpetuates the myth that we are dangerous, in spite of an abundance of evidence to show that people with mental health issues are more likely to experience violence than perpetrate it.²⁰

¹ Flemington Kensington Community Legal Centre, Submission no. 0002.0028.0215 to the Royal Commission into Victoria's Mental Health System, *Royal Commission into Victoria's Mental Health System*, 4 July 2019, 3.

² Glenn Weir, Witness statement no. WIT.0003.0002.0001 to the Royal Commission into Victoria's Mental Health System, *Royal Commission into Victoria's Mental Health System*, 5 July 2019, 11.

³ Dragana Kesic, Stuart D.M. Thomas & James R.P. Ogloff, 'Use of Nonfatal force on and by persons with apparent mental disorder in encounters with police' (2013) 40(3) *Criminal Justice and Behaviour* 321, 322 – 324; Flemington Kensington Community Legal Centre, above n 1, 3.

⁴ Flemington Kensington Community Legal Centre, above n 1, 3.

⁵ For example, recent research conducted by ANROWS described a woman who was subject to a 'welfare check' by police during which she started to experience a flashback, which was interpreted by police as 'resisting': Australia's National Research Organisation for Women's Safety, 'Violence Against Women and Mental Health' (ANROWS Insights, April 2020) 8.

⁶ Marie E. Rueve & Randon S. Welton, 'Violence and Mental Illness' (2008) *Psychiatry* 34, 43.

⁷ Which is acknowledged in the Mental Health Act, which states that police are not expected to make a clinical assessment: Mental Health Act 2014 (Vic) s 351(2).

⁸ Victoria Police, Submission no. 0002.0029.0370_0003 to the Royal Commission into Victoria's Mental Health System, *Royal Commission into Victoria's Mental Health System*, 5 July 2019, 3; Simone Fox Koob & Erin Pearson, 'Union boss says police should be last people called to mental health incidents', *the Age* (online) 16 September 2020 <<https://www.theage.com.au/national/victoria/union-boss-says-police-should-be-last-people-called-to-mental-health-incident-20200916-p55w2m.html>>

⁹ Flemington Kensington Community Legal Centre, above n 1, 3.

¹⁰ *The Mental Health Act 2014 (Vic)*, ss 350(a) & 351(7).

¹¹ VMIAC, Submission to the Royal Commission into Victoria's Mental Health System Terms of Reference, Royal Commission into Victoria's Mental Health System, January 2019, 25.

¹² Flemington Kensington Community Legal Centre, above n 1, 6 - 7.

¹³ Dragana Kesic et al, above n 3, 322.

¹⁴ Flemington Kensington Community Legal Centre, above n 1, 7; Or, at times, a trauma response: Australia's National Research Organisation for Women's Safety, above n 5, 8.

¹⁵ Flemington Kensington Community Legal Centre, above n 1, 13.

¹⁶ Victoria Police, above n 8, 3; Law Institute of Victoria, Submission to the Royal Commission into Victoria's Mental Health System Terms of Reference, Royal Commission into Victoria's Mental Health System, 20 May 2019, 5.2.

¹⁷ It is important to note that while pepper spray is often considered a better alternative to shootings, there are proven serious interactions with many psychotropic medications and drugs, which in some cases can lead to fatalities and therefore overwhelmingly risks the lives of consumers: Jude McCulloch, 'Policing the Mentally Ill: An Examination of the Shootings of Individuals with a History of Mental Illness by Victoria Police' (2000) 25(5) *Alternative Law Journal* 241, 244.

¹⁸ Flemington Kensington Community Legal Centre, above n 1, 9.

¹⁹ Australian Institute of Health and Welfare, The health of Australia's prisoners 2018, 27.

²⁰ Mohit Varshney et al, 'Violence and mental illness: what is the true story?' (2016) 70(3) *J Epidemiol Community Health* 223, 223; The Mental Health Complaints Commissioner, 'The Right to Be Safe – Ensuring Sexual Safety in Acute Mental Health Inpatient Units: Sexual Safety Project Report' (State of Victoria, March 2018) 45; Flemington Kensington Community Legal Centre, above n 1, 3 – 4.

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- **Insufficient oversight process for police misconduct** – the Victorian system for dealing with complaints about police misconduct is complex, inconsistent and not fit for purpose.²¹ Despite the creation of the Independent Broad-based Anticorruption Commission (IBAC) to investigate misconduct and corruption in Victoria Police, most complaints continue to be dealt with internally by police,²² leading to only 10% of complaints being substantiated.²³ Victoria police have wide discretions in relation to how they classify, investigate and manage complaints.²⁴ Additionally, IBAC is subject to wide exemptions to Freedom of Information (FOI) requests,²⁵ which limits our ability to dispute findings made by IBAC.²⁶ This risks creating inaccessible and ineffective oversight processes that retraumatise consumers.²⁷

Our Position

- **Police should not be first responders to mental health crises** – police involvement causes escalation of mental health crises and only serves to perpetuate stigma and cause further harm to consumers. Police training is inconsistent with the principles of trauma informed care and it is unlikely that further training in mental health will decrease the use of force against consumers by police.²⁸ We need compassion and support when we are experiencing emotional crisis. We are not criminals, and police acting as first responders only serves to reinforce the stigma that we are dangerous. Mental health and welfare checks must be conducted by trained mental health and peer workers.
- **Oversight mechanisms for police misconduct must be improved in order to protect consumers** – the Act as it currently stands permits police to act as first responders to mental health crises. While VMIAC in no way supports this, we acknowledge that police are often the only available service to respond to someone in crisis, in large part due to the limitations and underfunding of mobile mental health teams.²⁹ It is therefore critical that adequate and independent oversight mechanisms are put in place in order to protect consumers. We should not have to go through stressful legal processes in order to address the harms we have suffered at the hands of police. The lack of accountability in cases of police misconduct does not only harm mental health consumers – it erodes public faith in an institution that is supposed to uphold and enforce the law.³⁰
- **The function of the police is to uphold and enforce the law, including upholding human rights** – in situations involving criminal behaviour or violence police presence is clearly appropriate. The Tactical Options Model as used by Victoria Police is inappropriate to deal with the vast majority of volatile situations as it permits police to use force or violence at their discretion, regardless of the perpetrator's mental health status,³¹ which further marginalises consumers. This is despite the fact that we are more likely to be victims of crime than the general population. The indiscriminate use of force is also inconsistent with human rights – even where people have committed a crime, they have the same human rights as anyone else.

Our Recommendations:

VMIAC calls upon the Victorian Government to amend the *Mental Health Act 2014* (Vic) so that police are not used as first responders to mental health crises. Until this happens, VMIAC recommends that:

1. **The Victorian Government immediately fund appropriately trained, 24-hour mobile mental health teams as an alternative to police as first responders.** Such teams should be co-designed and utilise non-aggressive, de-escalatory and care-based strategies to assist consumers during times of crisis.³² Hospitals, if necessary, should be a last resort with community-based treatment alternatives being

²¹ Independent Broad-based Anti-corruption Commission Committee, Parliament of Victoria, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (2018) 5.

²² Independent Broad-based Anti-corruption Commission Committee, above n 21, 18.

²³ Police Accountability Project, 'Independent Investigation of Complaints against the Police' (Policy Briefing paper, Police Accountability Project, 2017) 9. Of note, less than 4% of complaints in relation to assault were substantiated.

²⁴ Independent Broad-based Anti-corruption Commission Committee, above n 21 76 – 86.

²⁵ Independent Broad-based Anti-corruption Commission Act 2011 (Vic), s 194.

²⁶ Police Accountability Project, above n 23, 6 – 16.

²⁷ Flemington Kensington Community Legal Centre, above n 1, 2 – 3.

²⁸ Mahmood Fazal, 'Theatre of strength': where the thin blue line meets the mental health crisis, *the Guardian* (online) 26 September 2020

<https://www.theguardian.com/australia-news/2020/sep/26/theatre-of-strength-where-the-thin-blue-line-meets-the-mental-health-crisis>; and additionally, police training in relation to racial profiling proved to be ineffective and even harmful to the communities it was trying to protect: Michele Grossman, 'Re-Thinking 'Vulnerability' in the Context of 'Diversity': Cross-Cultural Reform in Policing Education and Training in Australia' in N. L. Asquith et al (eds), *Policing Encounters with Vulnerability* (Palgrave MacMillan, 2017) 119, 128 – 135.

²⁹ Flemington Kensington Community Legal Centre, above n 1, 5.

³⁰ Independent Broad-based Anti-corruption Commission Committee, above n 21, 28 – 29.

³¹ Jessica Saligari and Richard Evans, 'Beacon of Hope? Lessons Learned from Efforts to Reduce Civilian Deaths from Police Shootings in an Australian State' (2015) 93(1) *Journal of Urban Health: Bulletin of the New York Academy of Medicine* 578, 579 – 584.

³² Flemington Kensington Community Legal Centre, above n 1, 8.

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preferred. As an interim measure, if police must attend, they should be plain clothed and play a secondary role only.

- 2. The Victorian Government immediately fund the establishment of an independent Police Corruption and Misconduct division set up under the IBAC.**³³ This would require amendments to existing legislation so that police are involved in complaint investigations for disciplinary proceedings only, and should include amendment of the *Independent Broad-based Anticorruption Commission Act 2011* (Vic) ('the IBAC Act') to remove the exemptions for FOI requests. The IBAC presently has the power to investigate police misconduct that amounts to human rights breaches. The new division must maintain and strictly enforce this power.
- 3. The Victorian Government fund and implement the recommendations from the Parliamentary Inquiry into External Oversight of Police Misconduct.** Specifically, that the IBAC Act and the *Victoria Police Act 2013* (Vic) be amended to ensure that police are not permitted to investigate complaints about police misconduct other than for disciplinary proceedings and only at the conclusion of an IBAC investigation; and that investigations in relation to police misconduct are not exempted from FOI legislation. A number of recommendations made by the Inquiry would need to be amended in order to stop the practice of police investigating complaints about police.³⁴
- 4. The Victorian Government improve funding for legal advice in relation to police misconduct.** Specialist legal services should be comprehensively funded for Victorians to address police misconduct, with priority funding given to people with lived experience to access these services.
- 5. Victoria Police review and replace its Tactical Options Model.** The new model should require that de-escalation tactics are employed prior to resorting to force and should include mandatory police training in human rights to reinforce their importance in police work and ensure that police are accountable for violations of human rights. There should be necessary reporting requirements with sufficient oversight from IBAC, including the offer of access to specialist police misconduct legal services in instances where force has been used by Victoria Police.

Background

- In the years between 1982 and 2014, there were 54 fatalities as a result of police shootings. More than 87% of these fatalities were people with mental health issues.³⁵
- In 1994, an inquiry titled 'Task Force Victor' released its findings into police shootings in Victoria. Among other things, the inquiry found that police training lacked critical non-violent methods for dealing with suspects and that police methods of control in volatile situations were based on the assumption that the suspect was able to think and respond rationally while in distress.³⁶
- Project Beacon was announced by Victoria Police in 1994 as a way to implement the findings of the 'Victor' inquiry. This project included safety-based training for police that emphasised avoidance or minimisation of use of force in favour of non-physical tactics.³⁷ While the impact of Project Beacon was initially optimistic, its effects were short lived.³⁸
- By 2008 it was clear that the initial positive effects of Project Beacon were declining, when 15-year-old Tyler Cassidy was fatally shot by police. The teenager had a history of mental health issues and was under the influence of alcohol at the time of the shooting.
- Two reviews by the Office of Police Integrity in 2009 and 2012 confirmed that police are not equipped to respond to people experiencing mental health issues and that they lack appropriate training in de-escalation techniques and communication skills; and even where they were trained in these tactics, they often failed to use them and instead quickly resort to the use of force.³⁹
- As of 2020, there have been eight police shootings in Victoria of which five victims were identified to be experiencing mental health issues.⁴⁰ The police were aware of the existence of mental health issues in the majority of these cases.⁴¹
- Common law jurisdictions, including Australia, have had many inquiries into the investigation and oversight of complaints relating to police corruption and misconduct.⁴² In November of 2000, Northern

³³ Independent Broad-based Anti-corruption Commission Committee, above n 21, 52.

³⁴ This would mean that recommendations 34, 37, 53, 56, 58 & 62 would need to be amended in order to prevent police involvement in investigations about police misconduct: Independent Broad-based Anti-corruption Commission Committee, Parliament of Victoria, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (2018).

³⁵ Dragana Kesic et al, above n 3, 465; Jessica Saligari and Richard Evans, above n 31, 579.

³⁶ Ibid, 581.

³⁷ Ibid, 582.

³⁸ Ibid, 582.

³⁹ Ibid, 582 – 585.

⁴⁰ Mahmood Fazal, above n 28.

⁴¹ Ibid.

⁴² Independent Broad-based Anti-corruption Commission Committee, Parliament of Victoria, above n 21, 11.

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Ireland established the Police Ombudsman for Northern Ireland (PONI), which was the first fully funded and completely independent police oversight body in the world.⁴³ PONI uses comprehensive, university backed training programs for its investigators and has ensured that the percentage of investigators who are former police officers is capped, so as to maintain the appearance of independence as well as actually being independent.⁴⁴

- In Victoria, inquiries have emphasised the importance of police accountability in maintaining public confidence, but thus far have maintained that Victoria Police should have a role in investigations of complaints against them.⁴⁵
- In 2018, the Parliamentary Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria released its final report. The report contained 69 recommendations to improve police accountability and oversight that are largely positive, however still include a number of recommendations that support the role of police investigating misconduct complaints about police that are not deemed as 'serious'.⁴⁶
- In November 2020, the Productivity Commission released its report into mental health. Among other things, the report recommended incorporating mental health specialists as first responders, with suggestions for mental health teams to be incorporated into emergency service communications, to allow for them to attend mental health crises.⁴⁷

⁴³ Police Ombudsman for Northern Ireland, *History of the Office* (2019) PONI <<https://www.policeombudsman.org/About-Us/History-of-the-Office>>

⁴⁴ Police Accountability Project, above n 23, 29.

⁴⁵ Independent Broad-based Anti-corruption Commission Committee, above n 21, 25 – 28.

⁴⁶ *Ibid*, recommendations 34, 37, 53, 56, 58 & 62.

⁴⁷ Productivity Commission, *Mental Health Inquiry Report*, (2020) vol 1, 46.