

Submission on Systemic Injustice in the Criminal Justice System: Focus on Police Oversight in Victoria

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Masters and PhD in Criminology, all from Melbourne University. She is a fellow of the Academy of Social Sciences in Australia and an internationally recognised expert on police militarisation. In the course of her academic career she has authored or edited thirteen books and more than one hundred peer reviewed articles and chapters, as well as regularly providing expert media commentary on issues relating to policing, crime and justice. Prior to being an academic, Emeritus Professor McCulloch practiced law, specialising in police related matters, including police accountability. As a lawyer she worked with the Flemington/Kensington Legal Centre on a project on fatal police shootings, taking a lead role in researching and writing submissions for a series of coronial inquests in which the Legal Centre had standing. Her book, *Blue Army: Paramilitary Policing* (2001), is the only in-depth analysis on the history and process of police militarisation in Australia, and its significance and consequences. Emeritus Professor McCulloch's work on this topic and other aspects of policing has been published in peer reviewed journals, book chapters, the media, professional and academic magazines, and newsletters. She has been contracted and funded to provide research to Victoria Police on topics including counter-terrorism policing and culturally diverse communities, hate crime and the police use of body worn cameras in family violence matters. In 2005 Emeritus Professor McCulloch received the Griffith University award for research improving policing for women. In 2021 she was commissioned by the Mass Casualty Commission (Canada) to provide an expert report and testimony on the connections between mass casualty attacks and gender based violence. In 2022 she provided an expert statement on police militarisation and police use of firearms to the Northern Territory Coroner investigating a fatal shooting of an Aboriginal teenager by police. Along with co-author Dr Michael Maguire, she is the author of the peer reviewed journal article, 'Reforming Police Oversight in Victoria: Lessons from Northern Ireland' (2022).

Introduction

Since settlement policing has played a key role in systematic injustice in the Victorian criminal justice system. Police as the frontline of the criminal justice system are central to Victorian First Peoples' experience of the criminal justice system and fundamentally shape criminal justice outcomes for First Peoples. This submission focuses on the inadequacies of, and the need for reform of, Victoria's system of police oversight. It argues that the police oversight system is fundamentally flawed with the result that the systemic injustices arising from policing are compounded.

An independent oversight system is critical to police accountability and public trust in policing. A recent survey of nearly six thousand Victorians found trust in Victoria Police has significantly declined with more than one in five of those surveyed indicating they had no confidence in the organisation's integrity (Police Accountability Project 2022). The low level of trust in police integrity is particularly high amongst Victorian First Peoples and Aboriginal Community Controlled Organisations. Nerita Waight, CEO of the Victorian Aboriginal Legal Service, said in response to the research that:

We know from working with our clients that there is a huge amount of police misconduct that goes on without being recorded or reported on. If Victorian's knew the full extent of misconduct committed by Victoria Police, this record low rating would soon be surpassed. The next Victorian Government must establish independent police oversight (Human Rights Law Centre 2022).

This submission calls for the establishment of a substantively independent, adequately resourced, appropriately empowered stand-alone body to respond to complaints against police and initiate investigations of specific events or systemic/thematic issues. It calls for the system of police oversight in Victoria to move from the current model of civilian review to a civilian control model.

Victorian First Peoples are uniquely and disproportionately affected by systemic injustice in policing and a lack of effective, independent and impartial police oversight. Given this the reformed system of police oversight should be culturally appropriate and include Aboriginal staff and leadership (see Victorian Aboriginal Legal Service 2022).

The submission argues that the new police oversight body should be modelled on the Police Ombudsman for Northern Ireland (PONI). PONI was established at the turn of the millennium as part of a peace process initiated to end the 'troubles' (McKittrick and McVea 2001). The police were experienced and perceived by many, especially those in the catholic community, as partisan agents of repression. Police reform, and as part of that, a robustly independent police oversight body to hold police accountable was seen as necessary to establish trust in police and the criminal justice system, address social/economic inequality and heal community division.

More than twenty years since it was established, PONI is widely recognised as having fulfilled its mandate linked to the peace process. Internationally it is looked to as the 'gold standard' in independent police oversight. Attention to and reform of the police oversight system in Victoria should be seen as a critical contribution to acknowledging, addressing and remedying systemic injustice in policing and criminal justice more broadly as part of the treaty making process with Victorian First Peoples.

Historic and continuing systemic injustice linked to policing

Victorian First Peoples historically and today are uniquely impacted by systematic injustice in policing compounded by lack of effective, impartial and independent oversight (see Victorian Aboriginal Legal Service 2022). From the beginning, the nature of policing in the Port Phillip District — Victoria after 1851 — was profoundly influenced by the need to overcome Aboriginal resistance to dispossession. Port Phillip, unlike New South Wales or Tasmania was a free colony, and as a result Aboriginal people, rather than convicts, were the major preoccupation of the colony's early police. Early policing, a combination of mounted and Native police, was highly militarised with Aboriginal people the enemy. When first deployed around Port Phillip in 1836 the main task of police was to create a space in which settlement could grow, by keeping Aboriginal people off land that had been deemed fit for pastoral use. Although the official mandate of Port Phillip's police included the protection of Victorian First Peoples and minimisation of conflict, it is clear that police were involved in violently overcoming any resistance to settlement. This is unsurprising given that police at were under the supervision of local magistrates, dominated by pastoralists. During the first years of European settlement, massacres, rapes and casual killings of First Peoples were so common they barely rated discussion (for a brief overview of early policing in Victoria see McCulloch 2001: 33-36). From the beginning policing and the criminal justice system were instruments of dispossession of Aboriginal and Torres Strait Island people including Victorian First Peoples (see, for example, Blagg 2016). Colonialism remains today a defining paradigm of Australian policing with its attendant features of of genocide and institutional racism (see, for example, Porter & Cunneen 2020).

The Royal Commission into Aboriginal Deaths in Custody found that 'far too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent' (Royal Commission into Aboriginal Deaths in Custody 1991). As Marcus Stewart put it in his Balart keetyarra to the Yoorrook Justice Commission '[t]here is a direct line between structural conditions of Colonisation, including policing practices, and the contemporary criminal justice system which continues to "reproduce marginalised peoples as criminal subgroups"' (2022: para 63 quoting Cunneen 2011).

While laws, prosecutors and courts all play a role in criminalisation, police as the gatekeepers of the criminal justice system are the most influential actors. Victoria's First Peoples are disproportionately policed, coerced and punished. The allocation of police resources to particular geographic locations where Victorian First Peoples live and congregate along with the exercise of individual police discretion in ways that equate First People with offending, are instrumental in producing criminalised identities that conform to, reproduce and reinforce widely held views about who and what constitute criminal groups and criminal activities (see, for example, Cunneen 2001).

The pre-emption of criminal identity ‘proves’ itself through the detection of offenses, which, though committed across the community, are less frequently detected in non-targeted populations, as well as through the generation of street offenses that result solely from police activity. Police are instrumental in determining the offenses and offenders that enter the criminal justice system. Once the gate is open, the typical socially marginalised suspect is often flushed through the system with little chance of engaging the resources required to give substance to due process. Police targeting often translates into conviction without impediment so that the idealised notion of the presumption of innocence underpinned by a system with a number of checks and balances from police action, investigation, charge, prosecution, to trial is not a reality for the majority of Victorian First Peoples.

While Victorian First Peoples and Aboriginal and Torres Strait Islander people throughout Australia are overpoliced as potential offenders or targeted by police based on their identity as First Peoples, they are also underserved, punished and criminalised as victims. Such practices particularly negatively impact First Nations women seeking police assistance from family violence. Australian First Nations women are 32 times more likely to be hospitalized due to family violence, and 11 times more likely to die due to assault than non-Indigenous women (Australian Human Rights Commission 2020: 44). Between 2010–14, despite representing around 3.3% of the Australian female population First Nations women represented 22% of domestic violence femicide victims. A recent study of domestic violence policing of First Nations women in Australian who were killed by male partners found, based on ten years of data, that most had contact with police prior to being killed and that contact was frequently harmful with the police failing to respond or enforce the law, increasing surveillance of the victim’s family eroding their autonomy and criminalising victims (Buxton-Namisnyk 2022).

The Victorian Aboriginal Legal Service’s policy paper on police oversight makes it clear that Victorian First Peoples are uniquely negatively impacted by policing and lack of effective, independent, impartial police oversight. These negative impacts include police contact deaths and excessive use of police force. The policy paper maintains that:

Individual victims of police misconduct – including those who die or are seriously injured after contact with the police – almost never see justice done, even in their individual cases. Real systemic reform is even more lacking, despite the indisputable evidence of systemic problems that have accumulated for many years (2022: 2).

Victorian First Peoples experience more police violence, racism and misconduct than other Victorians but are less likely to make complaints against police than other Victorians due to lack of faith in the system of police oversight. In addition, when Victorian First People’s make complaints against police, they are likely to be about more serious issues than other Victorians (Victorian Aboriginal Legal Service 2022: 24).

Police Oversight in Victoria

The history of inquiries into policing and police accountability in Victoria is one of scandal and conflict (see McCulloch & Maguire 2022; Prenzler 2011). As discussed above from the early days of the colony of Port Phillip the behaviour and reputation of the police was fiercely contested. More recent scandals have led to calls for reform to the system of police oversight (for a detailed overview see McCulloch & Maguire 2022 Appendix 1).

Police complaints systems have been analysed using various typologies. Prenzler & Ronken 2001) propose a three-part model, involving (1) 'internal affairs, 2) 'civilian review', (3) 'civilian control' (see also Prenzler & Maguire 2022 from which the following is taken). The internal affairs model remains the most dominant institutional form in many countries around the world. Since the 1970s numerous democracies have adopted forms of 'civilian review'. Review agencies adopt different powers and processes. These can be limited to audits of police files and recommendations to police to change procedures. Some agencies are empowered to conduct independent investigations but have no authority over disciplinary decisions. This is the dominant form of practice in England and Wales, Scotland, and the Republic of Ireland. New Zealand and Australia have taken an atypical path of amalgamating police ombudsmen within public sector wide commissions, with the exception of New South Wales and the Commonwealth - where specialist police oversight agencies are still in operation within a civilian review framework (Prenzler & Maguire 2022). One agency has been identified – the Police Ombudsman for Northern Ireland (PONI) –which meets the criteria for the civilian control model (Savage 2013).

The current system of investigating police misconduct in Victoria is a mixed civilian review model. This model broadly provides for an independent check of police investigations by the Independent Broad-based Anti-corruption Commission (IBAC) without excessive interference in police management. There are a number of features of the current Victorian model.

- It is a hybrid model in which there is shared responsibility for the investigation of public complaints between IBAC and Victoria Police. IBAC investigates only around 2% of complaints against police, the remainder are carried out by Victoria Police Professional Standards
- IBAC is not solely responsible for investigating police complaints but instead investigates corruption across the public sector.
- IBAC investigators do not have the powers of a police officers

IBAC's low level of investigations of complaints has meant that in operational terms it could be argued that little has changed since the 1970s when there was no mechanism for substantive independent oversight of police complaints and the Victoria Police Internal Investigation Department was responsible for receiving, handling, and investigating all complaints against the

police. Yet, it is widely agreed that the ‘internal affairs’ model of handling police misconduct and corruption is outmoded.

Reform in Victoria has been piecemeal and has taken place over decades. The evolution from Victoria Police handling all complaints in the 1970s through to the short-lived Independent Police Complaints Authority in the 1980s to the Deputy Ombudsman (Police Complaints), Office of Police Integrity and currently IBAC was driven by different political priorities and practical difficulties of establishing strong independent oversight.

In 2016 the Parliament of Victoria established an inquiry into the external oversight of police misconduct and corruption in Victoria. Before the Report of the Inquiry was published further scandals highlighted what many stakeholders asserted was a need for reform in Victoria’s external oversight system. In addition, the integrity of the leadership of Victoria Police’s internal investigation unit, which investigates the vast majority of complaints against officers, was questioned.

In 2018 it was revealed that the (then) assistant commissioner in charge of Victoria Police Professional Standards Command used a pseudonym to post deeply offensive racist and homophobic comments, including encouraging violence against African people. These and other issues were commented upon in the Parliamentary Report which was published in 2018. It made 69 recommendations aimed at improving police oversight arrangements, none of which have been implemented to date. More recently arising from the “Informant X” scandal the Government undertook another review of police oversight arrangements, the details of which have yet to be published (McCulloch & Maguire 2022).

The 2018 Parliamentary Report described the Victorian system as ‘based on an intricate, overlapping and sometimes fraying patchwork of laws policies and processes governing Victoria Police and IBAC’. It concluded that:

The legislative framework is extremely complex, involving parallel but nevertheless interacting systems for the receipt, handling, investigation, oversight and review of both complaints and disclosures from members of the public and police personnel (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee 2018: xvii).

Aside from general concerns about the efficacy of police oversight, particular problems have been identified with regard to the relationship between First Peoples and police complaints. A 2022 audit carried out by IBAC identified specific issues in relation to how the police dealt with Aboriginal complainants.

Based on a review of individual case files of complaints its conclusions are considerable. For example, it states a substantial proportion of investigation files contained indication of bias or of a lack of impartiality on the part of subject officers including dismissing the complainants’ concerns and implying that the complainant was not truthful. In addition, 41% of files contained indicators of bias on the part of investigators, including minimising the seriousness of

allegations, downplaying subject officers conduct, making inappropriate comments about civilian witnesses, scrutinising the complainants' background or criminal history.

In a particularly shocking finding, it stated that conflicts of interest were often poorly identified and managed. Despite conflicts of interest forms being attached in 84% of files, IBAC found deficiencies in how Victoria Police identified and managed investigator conflicts. Problems included investigators working at the same station or in the same police service area as the subject officers they were investigating, conflicts being declared, but no action being taken to remove or manage the conflict and officers not declaring a conflict, despite other material on the file suggesting one existed. Aboriginal stakeholders and other groups have highlighted conflicts of interest as a significant issue that undermines confidence in the integrity of the complaints system (see, for example, Victorian Aboriginal Legal Service 2022).

The prospects of, and success of any reform to police oversight, like other policy domains is highly dependent on the jurisdictional context (see McCulloch & Maguire 2022). Successful reforms cannot simply be transplanted from one jurisdiction to another. However, experiences in one jurisdiction may provide valuable lessons in another. The comparison of police oversight and the road to reform in Victoria and Northern Ireland is instructive for four reasons. First, PONI is considered the 'gold standard' in police accountability. Second, PONI was pointed to as the preferred model by many that made submissions to the Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee Inquiry into police oversight. The recent policy report by the Victorian Aboriginal Legal Service also highlights the PONI model as the preferred option for Victoria. PONI is a civilian control model which provides a useful point of contrast to the current Victorian civilian review model. Finally, the Victorian Parliament Inquiry repeatedly used PONI as a measure of comparison.

We now turn to the development of the PONI model and its key features.

Development of the Police Ombudsman model in Northern Ireland

During the Northern Ireland conflict ('the troubles') the legitimacy of the criminal justice institutions was fiercely contested with large sections of the catholic and nationalist communities distrustful of the role of criminal justice bodies in general and policing in particular. These concerns were not without foundation. The Royal Ulster Constabulary (RUC) was drawn overwhelmingly from the protestant community and widely seen to be partisan participants in the political conflict. The RUC Special Branch, in particular, was the subject of criticism as it was seen to be operating as a 'force within a force' (McCulloch & Maguire 2022).

Policing was seen to be too divisive to be explicitly included as part of the negotiations as part of the peace process initiated in the 1990s. The culmination of this process provided for the establishment of an independent commission to look specifically at police reform and make recommendations about the nature of that reform. A separate critical element of the reform agenda was police accountability and how it should operate. The objective of increasing community confidence in policing was to be achieved by the reform of the RUC and a new approach to police accountability (McCulloch & Maguire 2022: 50).

Police reform was examined by the Independent Commission on Policing in Northern Ireland (ICPNI) also known as the Patten Commission. Its terms of reference were:

Inquire into policing in Northern Ireland and ... bring forward proposals for future policing structures and arrangements designed to ensure that...Northern Ireland has a police service that can enjoy the widespread support from, and is seen to be an integral part of, the community as a whole (1999: 123).

The Patten Commission made 175 recommendations including a change in name, badge and uniform of the RUC. It maintained that changes should not be a cluster of unconnected adjustments that could be bolted onto an organisation that already exists. Rather 'the changes that we propose are extensive and they fit together like the pieces of a jigsaw puzzle...holistic change of a fundamental nature is required' (ICPNI 1999: 5). Recommendations included the replacement of the RUC with the Police Service of Northern Ireland and the creation of new accountability structures including a new Policing Board and District Policing Partnerships.

Prior to the Patten Commission a review undertaken by Maurice Hayes in 1997 recommended the creation of a Police Ombudsman for Northern Ireland. Hayes noted the inadequacies of the existing system with complaint handling, low substantiation rates, low levels of awareness of the complaint handling organisation and fundamental concerns about independence. He indicated that:

The overwhelming message I got from nearly all sides and from all political parties was the need for investigation to be independent and to be seen to be independent...the main value impressed on me was independence, independence, independence (Hayes 1997: v).

The Patten Commission endorsed Hayes' proposal to establish the Police Ombudsman and made the following recommendations:

- The Police Ombudsman should be, and be seen to be, an important institution in the governance of Northern Ireland, and should be staffed and resourced accordingly. Budgets should be negotiated with, and finance provided through, the Northern Ireland Office (or its successor department), both for the core staff of the office and to provide for exceptional demands created by large-scale investigations
- The Ombudsman should take initiative, not merely react to specific complaints received. He/she should exercise the power to initiate inquiries or investigations even if no specific complaint has been received
- The Ombudsman should be responsible for compiling data on trends and patterns in complaints against the police, or accumulations of complaints against individual officers . . . and should work with the police to address issues emerging from this data. It is important that management at all levels should use information from the complaints system as a tool of management and to identify training needs. The Policing Board should utilise such data in developing or reviewing policies or practices. There should be no doubt of the Ombudsman's power to investigate and draw conclusions from clustering in patterns of complaints and to make recommendations for change to police management and the Policing Board
- The Ombudsman should have a dynamic cooperative relationship with both the police and the Policing Board, as well as other bodies involved in community safety issues
- The Ombudsman should exercise the right to investigate and comment on police policies and practices, where these are perceived to give rise to difficulties, even if the conduct of individual officers may not itself be culpable and should draw any such observations to the attention of the Chief Constable and the Policing Board
- The Ombudsman should have access to all past reports on the RUC

Changes to policing and police oversight were made in tandem with other reforms to the criminal justice system, including the establishment of an independent Director of Public Prosecutions (prosecutorial decisions were taken out of the hands of the police) as well as strengthening oversight arrangements with the creation of a criminal justice inspectorate. The independence of a range of decision-making bodies was a critical dimension of the reform agenda. A critical and consistent theme across all criminal justice reforms was the need to improve community confidence in policing and criminal justice (McCulloch & Maguire 2022).

The Hayes Review was clear that the public and the police should have confidence in the complaints system and that the police should no longer investigate complaints against themselves (criminal & misconduct) and these recommendations were incorporated into the *Police (Northern Ireland) Act 2000*. Independence was to be secured by the Police Ombudsman having control over the complaints process, the power to decide what is a complaint, the power to investigate even if there is no complaint, the power to recommend action to the relevant authorities and the ability to issue public reports on the completion of investigations (McCulloch & Maguire 2022). The Act provided the Ombudsman should exercise its powers in such manner and to such extent as appears to be best calculated to secure the efficiency, effectiveness, independence of the police complaints system and the confidence of the public and police.

The task of establishing a new police complaints body was formidable. The first Police Ombudsman had to ensure that all the necessary legislation was in place, to recruit and train staff and to find premises from which the new organisation would operate. (PONI 2020d). One of the first appointments was a Deputy Assistant Commissioner of the Metropolitan Police Service (the service responsible for policing in London). He had over 30 years' experience with 'the Met' much of it focused on operational roles leading teams of detectives. He had direct experience, at a national level, of tackling serious corruption within policing. He brought to PONI a small team of handpicked police officers on secondment from the Metropolitan Police. Other investigation staff were recruited from across the world including USA, Canada, Australia, and Hong Kong. In addition to experienced investigation staff other personnel were recruited in a range of specialisms, including IT, finance, complaints handling and human resource management. After some preparation PONI opened its doors on 3rd November 2000 (PONI 2020d; the above overview is derived from Prenzler & Maguire 2022).

In the initial stages considerable effort was made to make the public aware of PONI, how different it was from what had gone before and how to use the service. The team also began a programme of extensive discussions with interested parties such as the RUC and its successor organisation the Police Service of Northern Ireland (PSNI), with police staff associations, with the newly formed Policing Board, with key civic and political leaders, 'grass roots' leaders in communities and the wider public. The new Ombudsman took the view that the key to success of the Office would be its independence and the public and police perception of that independence. The Office published anonymised statements on a regular basis, setting out in summary form some of the complaints received, how they had been dealt with and the outcomes of investigations. Within 18 months public awareness of the police complaints system rose from 57% to 86%. A total of 79% of those surveyed believed the Office would treat them fairly. A figure, the PONI brief history notes, many observers would have thought impossible under the previous system (PONI 2020d).

The credibility of the Office was always going to rest on the quality and veracity of its investigations. The most significant challenge came in its early days after

the Ombudsman published in 2001, after an extensive investigation, its report into the 1998 Omagh bombing. The bombing was the single most deadly incident during 'the troubles' killing 29 people and injuring 220 others. Concerns had been raised about the effectiveness of the original police investigation which included allegations that the police had information which, if acted upon, could have prevented the bombing, and brought those responsible to justice.

The Ombudsman's report made clear those responsible for the bombing were the terrorists who planned and executed the atrocity. It highlighted concerns, however, over the original police investigation and reported that the police intelligence department (Special Branch) did not provide some critical information to investigators before and after the bombing. It also noted that senior management within the police had been defensive and uncooperative during the PONI investigation (PONI 2020d).

Despite initial resistance from the police the recommendations made in the report were ultimately complied with by the PSNI, including a new investigation into the bombing and an independent review into terrorist related murder inquiries and into the role and function of Special Branch. The House of Commons Northern Ireland Affairs Select Committee (NIAC), looked at the functioning of the Office in 2004-2005, observed that the task of constructing from scratch a credible police complaints service in Northern Ireland had been considerable and said it was impressed by the dedication and leadership of the Police Ombudsman and her staff.

In the first six and a half years of operation the Office received over 20,000 complaints by members of the public following their interaction with police officers. They included allegations of duty failure, oppressive behaviour, assault, harassment, and incivility. In addition, the police referred to the Office for independent investigation each instance where officers fired their weapons, including during public order disturbances. It investigated the circumstances surrounding the deaths of people who had been in contact with the police including fatal road traffic accidents (PONI 2020d).

In most cases the actions of the police were found to be justified and no disciplinary actions were recommended. Other complaint outcomes included informal resolution, disciplinary proceedings, and prosecution. Investigations also continued into the role of policing during 'the troubles'. In 2007, for example, the Office upheld a complaint that the police in 1997 protected informants, who had been involved in murder, from being fully accountable to the law. The Ombudsman's report stated that there was a culture of subservience to RUC Special Branch within the police. (PONI 2007). The PSNI accepted all the recommendations contained in the report (PONI 2020d).

By the end of the tenure of the first Ombudsman (seven-year position by statute) 88% of the public responding to a survey said they had heard of the Office of the Police Ombudsman and the majority of these (86%) believed it to be independent of the police. Over three quarters of the public surveyed (78%) were confident that the Office dealt with cases in an impartial way (PONI

2020b). These figures have been consistent over since the Office was established.

Responses from police officers to the survey initially, were more mixed with just under a third of officers surveyed in 2008 thinking that the Police Ombudsman did a good job, with slightly fewer – just over a quarter – saying that it did a poor job. Forty percent expressed mixed feelings. The attitude was more positive among those with less than six years' service, in other words those who joined the PSNI rather than the RUC. (PONI 2020d). Twenty years on the attitudes of police officers towards the office had improved considerably with a majority of officers surveyed having positive views of the Office; 91% felt they had been treated with respect and 79% felt they had been treated fairly. Seventy-four per cent of Officers believed PONI staff were knowledgeable and just over three quarters of officers surveyed felt their complaint was dealt with independently (PONI 2021: PONI 2020d).

Overview of features, functions, structure and objectives of PONI

The Office of the Police Ombudsman is an Executive Non-Departmental Public Body (NDPB) of the Department of Justice (DoJ). The Office is not governed by a Board but is headed by a Police Ombudsman as a Corporation Sole, who is appointed by Royal Warrant, and normally serves for a period of seven years. The Office of the Police Ombudsman is constituted and operates independently of the DoJ, the Northern Ireland Policing Board and the Police Service of Northern Ireland. It is accountable to the Northern Ireland Assembly and is required to consider all relevant guidance given by Department of Finance (DoF) and the DoJ (PONI 2021).

The Office of the Police Ombudsman for Northern Ireland provides an independent, impartial police complaints system for the people and the Police Service of Northern Ireland. It investigates complaints not only against the Police Service of Northern Ireland but also the Belfast Harbour Police, the Belfast International Airport Police, National Crime Agency officers in Northern Ireland and Ministry of Defence Police in Northern Ireland. The Office also undertakes investigations into certain complaints about Immigration Officers and Designated Customs Officials when operating in Northern Ireland through a legal framework developed jointly with the Home Office and Department for Justice. These investigative functions have been added over the years.

The Police Ombudsman investigates complaints about the conduct of police officers and, where appropriate, makes recommendations in respect of criminal and misconduct matters. The Police Ombudsman also investigates matters referred to it by certain bodies, where appropriate, and reports on these matters to the Department of Justice, the Policing Board and the Chief Constable. In addition, the Police Ombudsman publishes statements and makes policy recommendations aimed at improving policing within Northern Ireland. It also provides statistical reports for management purposes to the Police Service of Northern Ireland and to the Northern Ireland Policing Board and provides management information to the Department of Justice. Its budget in 2019/2020 was £9.863m, employing 144 staff (PONI 2021).

The process for the disposition of cases differs for criminal matters and misconduct. For criminal cases, a report goes to the DPP with a recommendation for prosecution or not depending on the case. The decision on prosecution is made by the DPP. If they decide on prosecution the case goes through the criminal justice system. The Officer can still face a misconduct investigation if there is a no prosecution decision or if they have been found not guilty (with the evidence threshold for the misconduct investigation at the civil rather than the criminal standard). For misconduct cases, a recommendation for discipline/performance is made to the Chief Constable who is responsible for enforcing discipline. The Chief Constable is under no obligation to accept the recommendation. However, the majority of recommendations are accepted. Sections 59(5)(b) and (6)(a) of the *Police (Northern Ireland) Act 1998* state that if 'the Chief Constable is unwilling to bring (the recommended) disciplinary proceedings, the Ombudsman may,

after consultation with the Chief Constable, direct him to bring disciplinary proceedings ... it shall be the duty of the Chief Constable to comply with a direction under subsection (5)'. In practice, concern for the PSNI's reputation, and a shared interest in combatting poor behaviour, have meant that the legislative authority was rarely invoked. An officer may appeal the sanction determined by the PSNI, but they cannot appeal against the disciplinary process itself which is determined by PONI.

During 2019/20, the Police Ombudsman's Office made 152 recommendations that an officer or staff member should receive either a discipline or a performance action. Nearly, three fifths (58%) were for a misconduct meeting and around one third (37%) were for performance action. Formal disciplinary proceedings were recommended in 8 cases (PONI 2020c).

The key aims of the Office, framed by the *Police (Northern Ireland) Act 1998*, are to secure '(a) the efficiency, effectiveness and independence of the police complaints system' and '(b) the confidence of the public and of members of the police force in that system'. The values of the Office (presented in the 2019/2020 Annual Report) (2020a: 20) are:

- Independence – to investigate complaints free from any influence other than evidence
- Impartial – treat people with respect and fairness
- Accountable - explain findings clearly and fully
- Respectful and professional – treat people with respect and to be professional at all times.

Type and length of cases

Although the names of the Directorates have changed over the years the investigative work of PONI can be divided into the following areas. Investigations undertaken by the Current Investigations Directorate are categorised as A, B or C, dependent on the nature and complexity of the matters involved. In 2018/2019 the Directorate dealt with 2627 complaints (figures taken from PONI Annual Report 2018/2019). The Annual Report describes the cases as follows:

- Category A generally involve loss of life or serious injury, serious sexual assault, discharge of firearms and other allegations of serious police malpractice. Such matters are normally allocated to the Significant Cases Teams. In 2018/2019, 14 Category A cases were concluded, of which 8 were completed in 230 working days
- Category B includes allegations of significant physical injury, theft or fraud, discriminatory behaviour, serious neglect of duty associated with the outcome of criminal investigations and/or court proceedings and improper disclosure of information. These cases are generally allocated to the CORE Investigation Team. In 2018/2019 68% of cases were concluded within 110 working days

- Category C cases involve allegations of incivility, use of excessive force not accompanied by significant injury and less serious breaches of police procedure and/or associated legislation. On most occasions this level of casework is retained by the Initial Complaints and Investigation Team who provide the gateway through which complaints are received. In 2018/2019 92% of cases were concluded within 90 days

In 2018 PONI investigated one of the most significant cases relating to allegations about the conduct of many of the most senior officers delivering policing in Northern Ireland. More than 56 allegations were made about a police investigation into the PSNI's awarding of contracts worth around £15 million, with investigations into Bribery and Misconduct in a Public Office relating to the actions of both serving and retired senior officers. The complaint was made by an ex Assistant Chief Constable of the PSNI and a Chief Constable of another force who had been under investigation by the PSNI. PONI investigators interviewed more than 30 witnesses, examined all the relevant material and carried out a number of searches on the PSNI estate. In 2018 the Office published the outcome of that investigation, which found no evidence that the PSNI Chief Constable, members of his senior management team and other named senior police officers, were involved in criminality or misconduct (Kearney 2018).

Also, in 2018 the Police Ombudsman concluded an investigation of complaints made by a victim of sexual abuse concerning the way police had responded to relevant intelligence and the conduct of their subsequent investigation. Central to the investigation were issues that attracted significant public interest and controversy. The importance of the Office's independence and ability to have unfettered access to sensitive information held by the PSNI were particular features of the investigation, the outcome of which was accepted by the parties involved (PONI 2018).

Published reports in 2019/2020 included investigations into alleged unlawful access to information on police computer systems; inappropriate conduct with vulnerable females; alleged failure to respond to an allegation of indecent assault on a child; matters arising from the police response to a serious incident on a motorway which resulted in the death of a member of the public; the circumstances in which police discharged pava spray, taser and attenuated energy projectiles (AEPs) and in dealing with a distressed person in the vicinity of a railway line.

In addition to current investigations, a History Directorate continued to investigate policing during the Northern Ireland conflict. The Directorate had 440 cases in 2019/2020 of which 179 were subject to active inquiries. This is perhaps the most controversial area of the Offices' work. It continues to conduct high-profile investigations and has been subject to legal challenges over the years by retired RUC officers, in efforts to have history reports quashed. None of these legal challenges have been successful to date. In 2014 the then Ombudsman had to threaten the PSNI with judicial review over

failure to provide access to information in sensitive cases. The Ombudsman noted that:

This issue went to the core of accountability, and I could not allow a situation to develop where those who were subject to investigation would decide what information would be given to investigators. Investigation by negotiation was simply not an option (cited in PONI 2020d: 20).

Published reports have included investigations into the use of police informants involved in murderous activity during the conflict and the failures to disseminate intelligence material to investigators. For example, in 2016 the Office reported on the results of a three-year investigation into the police response to six murders in Northern Ireland in 1994, carried out in a public bar, while the inhabitants were watching the world cup. The report stated clearly that those responsible for the attack were Ulster Volunteer Force gunmen and that the police did not have prior intelligence about the attack. The report concluded, however, there was intelligence the police were aware of the importation of weapons used in the attack, police informants were involved in the importation of those weapons (responsible for the death of over 100 people subsequently), there were failures to share intelligence about the murder gang involved prior to the attack and that there were significant failures in the police investigation of the murders (PONI 2016).

Investigative staff within the Office are drawn from a variety of backgrounds including social welfare investigations, Ombudsman organisations, military and audit. A 2011 Inspection Report found that 41% of investigative staff came from a policing background. Many graduates who came into the Office in 2000 were in senior investigative positions 10 years later. In the historical investigations department former senior detectives are employed given the complexity of the cold cases. Whether dealing with current or historical cases investigation non policing staff take part on the Accredited Investigator Training Programme (ATP) delivered by Portsmouth University. This is compulsory for new PONI investigation officers. Around 95% of staff were accredited. The ATP is designed to National Occupational Standards and is equivalent to Professional Investigation Programme (PIP) 2 training. None of the investigation staff within the Historical Directorate are former members of the PSNI, RUC or the military to protect the independence of these investigations (CJINI 2011).

Sharing of information

A further critical area of the Office relates to the provision of statistical information to a range of bodies including the PSNI, Policing Board and the Department of Justice. As it deals with all public complaints against the police there is a significant database which has been built up over time relating to the nature and profile of complaints and how these have changed. The organisation produces a Statistical Information Bulletin on complaints and allegations received by the Office of the Police Ombudsman for Northern Ireland for specific years, as well as showing trend information for the last five years. It is produced independently by statisticians from the Northern Ireland

Statistics and Research Agency (NISRA). The Police Ombudsman's Office uses these statistics to monitor trends in complaints and allegations received and how they were dealt with. It also uses this information to monitor performance against key performance indicators.

The information is also used by the PSNI to monitor trends and patterns in complaints as well as identifying problem areas. PONI statistical team regularly supply the police with information about the numbers and types of complaints including information about individual officers who may be attracting multiple complaints. This information has been used as part of successful complaint reduction strategies by the PSNI. It is also used by the Policing Board to enhance their understanding of what areas of police conduct are attracting public concern and whether these concerns are of substance. In addition, the Office regularly commissions surveys of the experience of individual complainants, police officers and the views of the wider public on the work of the Office. These form part of the performance metrics for the organisation as well as providing valuable insight on client service levels.

The PSNI will also make referrals to PONI in cases where a complaint has not been made, but which relate to interaction between the police and a member of the public. These cases require independent investigation by PONI. In 2018/2019 the police made 13 referrals to the Office (a similar number was received in 2017/2018). In addition, the Police Ombudsman exercised his 'call in' powers on 7 occasions during the year, including a number associated with fatal road traffic incidents (PONI 2019).

Finally, the Office regularly makes recommendations for improvements to police policies and practices based on the issues identified in individual investigations. Examples include the requirement to have identifying marks on police vehicles, improvements in cell van locking, the need to improve how the police deal with high risk missing persons, custody suite design and the handling of monies seized by police officers. Police equipment (radios, handcuffs, batons) are now given markings which allow them to be linked to individual officers after recommendations from the Office.

PONI also has the usual corporate services functions associated with a non-departmental public body, including finance, information technology and human resource management.

How the PONI measures community, complainant and police confidence

The PONI provides detailed data on its work at its website on an annual basis. The provision of long-term stakeholder feedback from the public, complainants, and police – when placed alongside detailed activity data, including complaint numbers and dispositions, case studies and investigation reports – makes it one of the most transparent and accountable oversight agencies in the world. Recognising the impact of public awareness on the use of police complaint systems, the Office has annually surveyed and published information on the level of public awareness of and confidence in the system. Key questions relate to public 'awareness'; perceptions of 'independence',

'impartiality' and 'fairness'; and the 'effect' of the PONI's work on policing (PONI 2022: 2). Results are presented by age group, gender and religion, and compared with the preceding three years. Sample answers are listed below for 2021 (2022: 6).

- 90% of respondents had heard of the Police Ombudsman's Office
- 90% of respondents who had heard of the Police Ombudsman's Office were aware that it is independent from the police
- 68% of respondents who had heard of the Police Ombudsman's Office were confident that complaints are dealt with in an impartial way
- 75% of respondents who had heard of the Police Ombudsman's Office felt they would be treated fairly if they made a complaint
- 75% of respondents who had heard of the Police Ombudsman's Office felt the Office would help ensure the police do a good job

An annual experience survey also measures complainant confidence in the work of the PONI, covering a range of experiences including perceptions of service and treatment by PONI staff. Police who had complaints made against them are also surveyed annually with similar questions. In 2019 75% of officers surveyed said the office was independent and 78% stated they had been treated fairly. The figures for complainants was 54% and 74% respectively (PONI 2019).

Organisational features that have led to PONI's successes

The Hayes Review, which led to the establishment of the Office of the Police Ombudsman as an independent statutory organisation, was clear as to what the community expected from the new police complaints body. It should be entirely independent from the police service. This design principle was the foundation upon which the work of the office rests. Given that many police oversight bodies across the world would describe themselves as independent, it is worth asking what is different about the role and functions of the the Police Ombudsman for Northern Ireland?

The starting point is the strength of the legislation which established the Office as an entirely new organisation, separately financed, with considerable freedom to investigate police activity. There are a range of organisation features – underpinned by strong legislation – which have contributed to the development of an effective police complaints organisation.

PONI deals with every public complaint against the police. It is important to note that the PSNI retain their own disciplinary processes and anti-corruption unit. The range of work undertaken by the Office is extremely broad from the incivility of a traffic officer to the investigation into a fatal shooting or a death in custody. The public can have confidence, therefore, that their concerns are investigated impartially and independently from the police. This is particularly important in those areas of significant public concern. The Office undertakes automatic investigations – whether a complaint exists or not – into deaths in custody, weapons discharge by police officers, the use of tasers and the discharge of AEP's in public order incidents. There was real community concern in Northern Ireland that these areas had not been investigated properly by the police in the past. In high profile incidents involving the police, for example after a death in custody, the ability of the Office to take over the investigation quickly and engage with the family and the media has been important in calming community tensions.

The ability to publish reports on these incidents has been critical in demonstrating the independence of the Office. On many occasions this has worked to the benefit of the police. A report which said the police acted appropriately was as important as one which criticized them. For example, in 2015/2016 the Office considered the allegation that a sectarian mob had beaten a man to death while the police did nothing. These allegations were among the most serious that could be made against a police service. They were particularly toxic given the fraught historical relationship between the police and elements within the catholic community in that part of Northern Ireland. After a thorough investigation the Ombudsman concluded there was no evidence to support these concerns. The Ombudsman's report received considerable coverage in the media. These reports were received, generally without challenge, as the Office demonstrated it is not afraid to criticize the police where justified.

Aside from the wider community impact, the delivery of an impartial, independent investigation has been important for families seeking to understand what happened to their loved ones. For example, a 2012 report concerned the failure of the police to find a young man who had absconded from a hospital unit. His body was found in a secluded part of the hospital grounds ten weeks after he had been reported missing and approximately 40 metres from where he had been last seen. The police investigation contained a catalogue of mistakes, and 12 officers were disciplined. The report was extremely important for the family but left them with the unanswered question of whether he could have been saved by a proper search. Again, this report received considerable coverage in the local media and the police apologized publicly to the family.

These cases while significant did not take up most of the work undertaken by the Office. The 'volume complaints' focused on the day-to-day aspects of operational policing. This enabled the Office to monitor trends over time, provide feedback on individual officers and provide important management information to the police which enabled them to respond to operational concerns. It was from many of these reports that recommendations on changes to police policy and practice emerged. The range of investigations undertaken by the Office and the publication of reports has been important in demonstrating independence in practice.

It is interesting to note that in 2018 the Northern Ireland Secretary of State (UK Cabinet Minister responsible for the Northern Ireland) made a speech in which she paid tribute to the role police officers perform in society. She also made the following observation: 'One of the reasons why the PSNI commands very high levels of support from across the community is due to the accountability structures under which it operates' (cited in PONI 2020d: 29). Public outreach has been an important component of the work of the Office since its establishment. Recent examples include community meetings around public order incidents and engagement with youth groups concerning the low level of complaints among young people.

PONI investigations cover both criminality and misconduct. Investigators have the powers of a police constable and can therefore arrest officers, seize their possessions, search their lockers, their homes and interview them under caution. This is critical to ensure that they can retrieve all the necessary information required to undertake a robust investigation. It also demonstrates that the Office is serious about the work that it does and gives parity of esteem between PONI officers and police officers. If a decision is taken that an incident is a criminal investigation the report is sent to the Director of Public Prosecutions with a recommendation. The decision to prosecute is taken by the DPP. If prosecution is recommended, then it proceeds through the courts. Alternatively, the results of a misconduct investigation are sent to the PSNI Chief Constable with a recommendation. The complainant is provided with a formal letter outlining the investigation and its conclusions. In the most serious cases, therefore, the investigation into the police officer and the decision to prosecute are taken out of the hands of the police. This provides reputational

protection for the PSNI, the officer under investigation as well as providing community confidence in the criminal justice process.

There is no area of police activity – dealing with the public – that is outside the remit of the Police Ombudsman. In the politically charged context of Northern Ireland it was important to demonstrate that the Office had access to all areas of policing, including the most sensitive ones. This has been important in investigating policing in Northern Ireland's troubled past where most legacy investigations have examined the role of police informers and the activities of police intelligence personnel. The legislation underpinning the Office has been extremely important in this regard as it states the police *must* give the Ombudsman the information required. In 2014 the Office had to threaten the police with judicial review proceedings when they indicated they were unwilling to provide some sensitive information (Allen 2014). This stand could only have been undertaken because of the strength of the legislation which established the Office. The case did not go to court as the police provided the information requested. In day-to-day business officers are under instruction to speak to Ombudsman's investigators, although they retain the protection of 'under caution' interviews.

The organisational independence provided to PONI was considerable. Investigations were undertaken without interference from the PSNI, Department of Justice or any other police oversight organisation (eg Criminal Justice Inspection, Policing Board). In 2017 the Office publicly challenged the Minister for Justice over the funding provided to the Office for legacy investigations, highlighting the impact of the proposed cuts on the capacity to undertake these complex and serious investigations (PONI 2014; Moriarty 2017). The ability of the Office over the years – under different Ombudsmen – to challenge the police, Department of Justice, lawyers etc... reinforced in the mind of the public the independence of the organisation and therefore developed trust in the outcomes of its investigations. In 2019 / 2020, 86% of the people who responded to the PONI survey had heard of the Police Ombudsman's Office. Of those respondents who had heard of the organisation, 88% believed it was independent of the police and 85% were confident that complaints would be dealt with in an impartial manner (PONI 2020b).

The appointment of a single 'Ombudsman' to investigate individual complaints has been an important feature of the Office since its inception. The benefit of this approach is that it reinforces the independence of the Office and permits identification with a single trusted individual. It places significant responsibility upon a single individual, so it is critical that the right individual is appointed. The first Ombudsman recognised the success of the Office depended on its ability to deliver independent investigations. This model has been followed, in the main by subsequent appointees to the post. Should the Ombudsman lose the trust of families, victims, NGOs, lawyers and the police this causes significant problems (see CJINI Inspection into the Office of the Police Ombudsman 2011).

The mix of staff between those who had never worked for the police and former police officers has been critical. It has permitted the development of an organisational culture independent of the police and the civil service. The post of Senior Director of Investigations – responsible for all cases – has only been held by a former police officer. Chief Executives have been drawn from the policing world (e.g., a former Deputy Chief Constable) and civilian roles.

The post of Police Ombudsman is one of the most high-profile public-sector positions in Northern Ireland. A particular source of controversy has been into investigations into legacy policing matters, specifically the role of the RUC investigating ‘troubles’ related cases. The investigation into the Omagh bombing was considered by the first Ombudsman a ‘defining moment’. Never has an investigation of this type been published in Northern Ireland and it generated a significant response from the police. The Ombudsman’s recommendations were eventually complied with by the police (PONI 2020d). Much of the additional debate has centred around the use of the term ‘collusion’ in relation to the links between the police and paramilitaries. The sustained use of informants has been central to this debate. The Northern Ireland Retired Police Officers Association (representing those who has been members of the RUC) have taken exception to these investigations by the Office and have tried unsuccessfully on several occasions to have reports quashed (PONI 2020d).

The Police Federation (the rank-and-file trade union) initially welcomed the establishment of the Office. They have been critical of the Office, however, not only in relation to legacy reports but also to aspects of current investigations (more recently about the publication of case studies on individual investigations) (PONI 2020d). Inevitably this relationship has generated a healthy tension. In 2018 the Chairman of the Police Federation called for independent oversight of the Police Ombudsman and for redress for officers who had been subject to what he called malicious complaints (PONI 2020d). The negative views of the Police Federation leadership can be contrasted with the more positive experience of individual officers who have been investigated by the Office.

The Northern Ireland Retired Police Officers Association (NIRPOA) have been constantly critical of PONI and its investigations into the work of the Royal Ulster Constabulary during the conflict. They have undertaken several judicial reviews of published legacy reports in an effort to have them quashed. They have had limited success in claiming procedural unfairness against some officers mentioned anonymously. The challenge to the Office goes back to the report into the Omagh bombing in 2001. More recently the Ombudsman responsible for the report into the bombings was deemed by the Appeal Court to have ‘overstepped the mark’ in relation to some conclusions around collusion between the police and paramilitaries. The attempt to have the report quashed was not successful, however, and the key conclusions stood (PONI 2016 & 2020d).

Senior Management of the Police Service of Northern Ireland have been extremely supportive of PONI, despite the number of occasions the police

have come under significant criticism, as they recognize the importance for community confidence in policing of independent investigations. As noted earlier, the Ombudsman investigated the senior command team of the PSNI. The Chief Constable, who was under investigation, stated his confidence in the office to undertake its work independently stating:

People who made these complaints are entitled to make them and I'd encourage them to have the confidence that I have in the Police Ombudsman and allow him to get on with his job (cited in Breen 2017).

A senior PSNI officer gave evidence to a Queensland Corruption and Crime Commission Inquiry (JSCCC, 2015). He stated that the development of the Police Service of Northern Ireland was shaped by three factors. The first was the Hayes Report set up to review police complaints (which established the Office of the Police Ombudsman). The second was the Patten Report in 1999 which made recommendations to change policing from the militarised approach of the Royal Ulster Constabulary and supported the recommendation to establish a Police Ombudsman. The third was the Human Rights Act which imposed on all British public authorities the requirement to work within the European Convention on Human Rights including the right to trial, the right to life and absence of inhumane, unusual and perverse punishment (JSCCC 2015).

The overall community view of the Police Ombudsman for Northern Ireland, based on independent surveys, is that it has the confidence of both catholic and protestant communities in the work that it does. This is confidence cannot be taken for granted and is based on several dimensions. Firstly, the legislation underpinning the work of the Office gives it access to all areas of policing, including the ones that have been contested in the past. This overcomes concerns that the police are unaccountable for their actions. Moreover, when a report into current policing is published there is general acceptance of the work undertaken and the conclusions reached. The Office has published reports which have been both critical and supportive of the police. This reinforces confidence in the independence and impartiality of the work. The publication of reports is extremely important as it provides valuable information to the public about what can be complained about and whether these complaints have been successful. The appointment of a single ombudsman as 'corporation sole' has also been important in developing confidence in the work. The Ombudsman provides the public 'face' of the Office.

In 2011 there was a serious problem with the then Ombudsman (a former Canadian Police Officer) as he had lost the trust of families, victims and the NGOs and lawyers representing them. The Chief Executive of the Office resigned claiming that the independence of the Office has been compromised. This generated an inspection report into the Office by Criminal Justice Inspection (CJINI 2011) which concluded that the independence of the Office had been compromised in relation to the investigation of legacy cases. The Ombudsman left his position shortly afterwards and a new Ombudsman was appointed to rebuild public confidence in the Office (Maguire 2015; McCulloch

& Maguire 2022). Subsequent reports by CJINI, Amnesty International, NGOs and other stakeholders determined that this has been achieved (CJINI 2013; Amnesty International 2015).

Why is the PONI regarded as the 'gold standard' in police oversight?

There are a number of organisational features of PONI which differentiate it as a robust civilian control model of police oversight.

1. Institutional independence from the police. PONI is a separate Non-Departmental Public Body that falls within the remit of the Department of Justice in Northern Ireland. It is entirely separate from the PSNI with its own legislative base and funding regime. There is a protocol between the Department of Justice and PONI which makes it clear that the Department (ergo the Minister) is not involved in the casework of the organisation. A recent review of the Office conducted by the current Police Ombudsman has called for this to be strengthened by PONI reporting to the devolved Assembly rather than the Department of Justice.
2. PONI investigates all public complaints into the police from the relatively minor to the serious, the latter including, for example deaths in custody and deaths after police contact. It has the capacity to respond within the 'golden hour' to serious incidents. PONI conducts both criminal and misconduct investigations. Criminal investigations are reported to the Director of Public Prosecutions for decision. Misconduct recommendations are made to the Chief Constable who maintains control over the disciplinary process. PONI only investigates serving police officers. Retired officers are outside the remit of the Office as are some civilian workers employed by the police. It cannot take complaints from serving officers although this can lead to a 'call in' if there is evidence of a criminal offence/behaviour against the code of ethics.
3. It has complete control over the complaints process and can determine what is a complaint, the process through which it is investigated and the findings. Decisions on its recommendations are made by the DPP and the Chief Constable. It has the power to call in to an investigation (without a complaint being made) and can publish the findings of its investigations.
4. PONI staff have the powers of a police officer and can seize property, search homes and lockers and arrest officers if necessary. Serving police officers are obliged to speak to the Ombudsman (under disciplinary sanction) within the constraints provided by the right not to self-incriminate. PONI legislation requires that the police *shall* give the Office any information it requests in relation to an investigation.
5. The organisation is transparent in its operations. PONI regularly conducts surveys of complainants, police officers and members of the public. The results of these surveys are published on a regular basis. Where a complaint is subject to investigation, the complainant receives a closure letter which details the findings of the investigation and the recommendations made. In the more serious cases a report into the

investigation is also published in the public interest. In serious cases a family liaison officer keeps families involved of the stages of investigation and emphasises the independence of the process from the police.

6. While the organisation benefits from the experience and expertise of former police officers there is a cultural identity which is entirely separate from the police. Strict protocols exist to ensure conflicts of interest are managed. Staff are aware of the importance of the civilian oversight role and independence is emphasised throughout the organisation. The quality assurance processes regularly test for consistency in decision making across the organisation. Serious cases are reviewed by the Ombudsman (a civilian) and their senior team. A recent review carried out by the current Ombudsman has called for a legislative underpinning to ensure that the Police Ombudsman cannot have been a serving police officer.
7. The PONI is appointed by Royal Warrant and is statutorily independent from Ministers, the Department of Justice, and the police service. Experience has shown that confidence in 'The Ombudsman' is an important component of developing public confidence in the Office.

Comparing the Northern Ireland civilian control model of police oversight with the Victorian civilian review model

It will be apparent that there are significant differences between police oversight in Victoria and Northern Ireland. Major differences relate to the interlinked issues of organisational complexity, operational independence, transparency, complaint outcomes and community confidence in the system (McCulloch & Maguire 2022).

Complexity. In Northern Ireland there is one organisation that investigates public complaints against the police. This includes both criminal and misconduct investigations. Victoria has a complex hybrid model where responsibility for investigations is shared between IBAC and Victoria Police. In addition, IBAC is not solely responsible for investigating and overseeing the police but instead investigates corruption across the public sector.

Independence. IBAC is legally independent of police, notified of most police complaints and monitors and reviews those complaints and police investigations. It can investigate those matters referred to it by police and can initiate its own investigations in the public interest, take over police investigations, audit Victoria Police and recommend improvements to its practices. At face value IBAC appears independent and has many of the powers of PONI. There are, however, significant structural, legislative resourcing and operational differences. Unlike PONI which investigates 100% of public complaints against the police IBAC investigate only 2% of the allegations it determines warrant investigation, referring the rest to Victoria Police. There is, therefore, a false assurance in Victoria that complaints against the police are independently handled. In addition, IBAC staff do not have the powers of a police officer. PONI staff have the powers of arrest and can seize police possessions and arrest police officers. Where IBAC determines that the police may have engaged in criminal conduct the matter is typically referred back to Victoria Police.

Transparency. The system for external oversight of police misconduct and corruption in Victoria, compared to Northern Ireland, is opaque. The complexity referred to above creates a barrier to transparency. The Victorian Parliamentary Inquiry report noted the lack of publicly available information and robust data on the operation of the police oversight system. IBAC's anti-corruption role mitigates against open reporting and the complex hybrid model of investigation between the Police and IBAC means no-one is seen as responsible.

Complaint outcomes and community confidence. In Victoria it is estimated that the substantiation rates of complaints against the police is between 2% and 9% (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee 2018: 287-288). One reflection of the lack of data in Victoria is that no accurate generalisation figures are available. Between 2013 and 2018 in Northern Ireland the average substantiation for complaints subject

to a full investigation was 24%. While this has never been a performance metric for PONI it is indicative of the independence of investigations. It has also been a contributory factor to the overall levels of community confidence of PONI, which established a reputation early in its development of not being afraid to criticise the police. When PONI reports that the police have done no wrong these reports are not challenged. This is a protection to the officers and the reputation of the PSNI. When an incident occurs, they immediately refer to an independent PONI investigation. As we have seen above, community confidence in PONI and awareness of its independence is strong. Victorian research suggests declining levels of confidence in the integrity of Victoria Police (see, Police Accountability Project 2022; Human Rights Legal Centre 2022).

Recommendations

1. Establishment of a new police oversight body that explicitly reflects the civilian control model. Consistent with this the new police oversight body should be entirely independent of police.
2. Given the ongoing history of colonialism and the negative impacts of policing on Victorian First Peoples, the new police oversight body should ensure the culturally appropriate handling of complaints made by Victorian First Peoples. This should include the employment of Aboriginal investigators and staff as well as training for all staff on issues related to cultural safety and the culturally appropriate handling of complaints. Such training should be provided by an Aboriginal Community Controlled Organisation such as the Victorian Aboriginal Legal Service.
3. The new police oversight body should investigate all public complaints against police except for minor customer service matters. It should also have the power to initiate investigations in the public interest in the absence of any public complaint.
4. The new police oversight body should have complete control over what is considered a complaint warranting investigation and how complaints are investigated.
5. The staff of the new police oversight body should have the powers of a police officer including the powers of arrest and the power to search property and homes.
6. Police shall be required to provide information requested by the new police oversight body for the purposes of an investigation.
7. The new police oversight body should be transparent in its operations engaging with the community, complainants and police officers. This transparency should extend to the ability to publish reports in the public interest.
8. In order to reinforce the new oversight body's independence and civilian control of complaint investigations, the head of the new police oversight body should not be a police officer or former police officer.
9. The new police oversight body should be headed by a single Ombudsman rather than commissioners. The Ombudsman should be an officer of the Parliament rather than under the Department of Justice.
10. The new police oversight body should be adequately resourced.

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Appendix 1



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Reforming police oversight in Victoria: lessons from Northern Ireland

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ABSTRACT

This article focuses on the system of civilian oversight of police in Victoria and the prospects for the Independent Broad-based Anti-corruption Commission (IBAC) Committee, Ireland. It considers the 2018 report and recommendations of a based Anti-corruption parliamentary 'Inquiry into the external oversight of police Commission; police corruption and misconduct in Victoria' by the Independent accountability; Police Ombudsman Northern Broad-based Anti-corruption Commission (IBAC) Committee, Ireland. along with the cases and scandals that fuel calls for reforms to the current system. It compares the extant hybrid model of civilian review and investigation between police and IBAC in Victoria with the civilian control model in Northern Ireland where investigations of police misconduct and corruption are undertaken exclusively by the Police Ombudsman for Northern Ireland (PONI). It reflects on the current social and political factors in Victoria which might support or undermine reform in the context of lessons from Northern Ireland, where policing and police oversight underwent extensive reform at the turn of the millennium.

KEYWORDS

Introduction

This article considers the current arrangements for civilian oversight of police in Victoria. It also looks at the prospects of reform to these arrangements in the wake of the 'Inquiry into the external oversight of police corruption and misconduct in Victoria' 2018 report (hereafter the Inquiry report) by the Independent Broad-based Anti-corruption Commission (IBAC) Committee—a joint parliamentary committee (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018). It sets out the background to the establishment of the Inquiry and its major findings and recommendations. It contrasts the system of police oversight in Victoria to that in Northern Ireland where wholesale reform of both the police service and the system of police oversight was undertaken at the start of the millennium. It draws on the Northern Ireland experience to reflect on the prospects of reform in Victoria, providing an explanation for why it was politically possible to establish the Police Ombudsman for Northern Ireland (PONI) to independently and effectively investigate police. It discusses the political and social factors present in Victoria that might assist or detract from achieving substantive reform to police oversight.

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Civilian oversight of police is a core aspect of holding police to account for wrongdoing and harm. Others include civil actions for compensation undertaken by individuals (see McCulloch & Palmer, 2003; for recent civil actions re the actions of Victoria Police see Escourt, 2018; *Cruse v State of Victoria* [2019] VSC 574; Smith, 2019) and disciplinary action undertaken internally by police organisations (see Chapman, 2014). While there are connections between systems of external oversight and these other aspects of accountability, this article focuses on systems of external oversight. Police accountability is located within the broader context of integrity and accountability in public office. There are a number of reasons, however, to consider police accountability a distinct issue. As Chapman points out:

The need to maintain the reputation of the police and the trust of the public imposes on the police the need for a code of conduct and standards more demanding than those required in society at large, public confidence is critical, policing is more important than any individual officer. (2014, p. 8)

One of the reasons that police require ‘standards more demanding’ is that police, along with the military, are empowered to use force, including deadly force, so that police accountability is then central to the ‘rule of law’ in democratic political systems (Green & Ward, 2004, pp. 68–85). Where police are not held accountable for corruption and misconduct, including excessive use of force, human rights are severely compromised (see, for example, McCulloch, 2017).

Scandal and reform

The history of inquiries into policing and police and accountability is also one of scandal and conflict (see, for example, Prenzler, 2011, 2016). From the early days of the colony of Port Phillip (Victoria from 1851) the behaviour and reputation of police was fiercely contested. Early policing was based not on the English model of unarmed police, but the heavily militarised Royal Irish Constabulary approach, partly because Irish-born police dominated the force in the nineteenth century (Finnane, 1994). The military character of early Victorian Police is significant because the military is separate from and not accountable to the community. Less militaristic, democratic, civil policing models rely substantially on community cooperation and confidence (see McCulloch, 2016 for the philosophical differences between the police and the military). Public cooperation and confidence relies in significant part on independent oversight that is seen to be effective in holding police to account for behaviour that amounts to corruption or misconduct (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, pp. 139–142). When police were first deployed in what is now known as the state of Victoria in 1836, their main task was to create space for white settlement. Police were integral to ridding the colony of its ‘Aboriginal problem’, including killing Aboriginal people with impunity (Bridges, 1971). In the mid-nineteenth century, militarised policing formed the backdrop to one of the most controversial events in Victoria’s history: the ‘Kelly Outbreak’ in the 1870s, which saw the police and bushranger Ned Kelly and his gang engage in a form of class war. The conflict led to a Royal Commission which is credited as the harbinger to less militaristic styles of policing in Victoria (Jones, 1995, pp. 326–334).

More recent scandals have led to calls for reform to the system of police oversight. The following gives a flavour of some of the most high profile of these from the late twentieth century. A spate of fatal shootings by police in the late 1980s through to the mid-1990s led to calls for a Royal Commission, a series of 11 coronial inquests, the eventual charging of 11 police officers over two fatal shootings and a comment in Amnesty International’s Australian report on Victoria’s high incidents of fatal shootings by police (Amnesty International, 1995). An important milestone on the path to the recent Victorian Inquiry into police oversight was the 2014 findings of the United Nations Human Rights Committee (UNHRC) in the case of *Horvath v Australia*. In 1996, when Horvath was 21, she was assaulted and seriously injured by a group of police during an unlawful raid on her home. Her complaint to police about the incident was not upheld. She successfully sued the police in 2001, but despite a court ruling was never compensated, and the police involved were not disciplined or prosecuted. After a failed attempt to appeal to the High Court, the case was taken to the UNHRC in 2008 (Horvath, 2008). In 2014, 18 years after the assault, the UNHRC found, amongst other things, that Australia had failed to show that the investigation by the Victoria Police Professional Standards Command into her complaint met the requirements of the International Covenant on Civil and Political Rights (ICCPR) (UNHRC, 2014). In the wake of the findings, a coalition of legal, human rights and social justice organisations wrote to Victoria’s premier, Daniel Andrews, and other key politicians seeking a review of the Independent Broad-based Anti-corruption Commission Act 2011 (Vic) to ensure conformity with the ICCPR (Kelly, 2014).

The Inquiry was established in July 2016. Before its report was released, further scandals highlighted what many stakeholders asserted was a need for reform in Victoria’s external oversight system. In September 2017, six police officers were captured on CCTV assaulting a disability pensioner during a welfare check. The six officers hit the pensioner repeatedly with a baton, punched him, sprayed him in the face at close range with capsicum spray and repeatedly used a jet spray of water to hose him down. The CCTV footage of the assault supported investigative journalism focused on Victoria Police

use of excessive force and lack of police accountability (see McKenzie, 2018). The media coverage both fuelled and reflected public concern. In addition, the integrity of the leadership of Victoria Police's internal investigations unit, which investigates the overwhelming majority of complaints against police, has been questioned. In 2018 it was revealed that the (then) assistant commissioner in charge of Victoria Police Professional Standards Command used a pseudonym to post deeply offensive racist and homophobic comments, including encouraging violence against African people. Complaints against police often involve allegations of racism and excessive force (see, for example, Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, pp. 151–154; Weber, 2020). The assistant commissioner also made derogatory comments about Victoria Police leadership. The Independent Broad-based Anticorruption Commission investigated and concluded that the assistant commissioner's 'behaviour risked damaging the integrity of, and confidence in, Victoria Police investigations' (Houston & Vedelago, 2019). The assault on the disability pensioner and the behaviour of the assistant commissioner were referred to in the Inquiry report. It stated that 'the maintenance of confidence in the current system has not been helped by a number of scandals and high profile allegations of serious misconduct on the part of some police officers, including a leading officer, in Victoria Police' (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 144).

The contribution of this article on research into police accountability

There is an extensive literature on the nature and importance of police accountability, and particularly independent oversight of the investigation of police misconduct and corruption. This literature tends to focus on the trends in and different models of police oversight such as civilian oversight, civilian control or internal affairs (Goldsmith, 1991; Prenzler, 2002, 2011) and the social and political context of reforms (Lewis, 1999; Goldsmith & Lewis, 2001; Prenzler, 2011; Prenzler & den Heyer, 2016). Linked to this there is also literature that points to the challenges and difficulties of achieving reform to police oversight in Australia and internationally (see, for example, Ellis, 2021; Freckelton, 1991; Prenzler & Ransley, 2002; Rowe, 2020). There is, however, no literature which explores the current Victorian system for handling complaints against police, beyond the small amount of grey literature produced by legal bodies (Parliament of Victoria Independent Broadbased Anti-corruption Commission Committee, 2018, p. 57). There is also the Inquiry report which is a focus in this article. This article contributes to the literature by providing a critical account of the Victorian system of external oversight of police using Northern Ireland's system as a point of comparison. The following is divided into five parts. The first sets out the details of the Inquiry report. The second provides a history and context of the pathway to reform in Northern Ireland. The third compares the civilian review model in Victoria with the civilian control model in Northern Ireland. The fourth part considers the lessons for successful reform from Northern Ireland. The final section discusses the extent to which the factors that enabled substantive and sustained reform in Northern Ireland might exist in Victoria today.

The prospects of, and success of any reform to police oversight, like other policy domains, is highly dependent on the jurisdictional context. What are considered successful reforms cannot simply be transplanted from one jurisdiction to another. Regardless, the experiences in one jurisdiction may provide valuable lessons in another. The comparison of police investigation and oversight systems and the road to reform between Victoria and Northern Ireland is instructive for four reasons. First, PONI is considered the 'gold standard' in police accountability (see, for example, Prenzler & den Heyer, 2016, p. 18). Second, and linked to the first, PONI was pointed to as the preferred model by many that made submissions to the Inquiry. Third, PONI is a civilian control model which provides a useful point of contrast to the Victorian civilian review model. Finally, the Inquiry report repeatedly used PONI as a measure of comparison and frequently as an example of best practice. In addition, while the focus here is on Victoria and Northern Ireland, the insights are likely to be instructive in other Australian and international jurisdictions, where police accountability remains contentious.

Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee: Inquiry into the external oversight of police corruption and misconduct in Victoria

The Inquiry report published in September 2018 maintains that:

Some stakeholders called for the creation of a new, independent body to receive, handle and investigate all complaints about police, instead of Victoria Police and IBAC, along the lines of the Office of the Police Ombudsman for Northern Ireland (PONI). In response to these concerns, the Committee determined in July 2016 to self-reference an inquiry into the external oversight of police corruption and misconduct in Victoria. (p. xvi) The inquiry had four terms of reference:

- . Examine the current system for the oversight of police corruption and misconduct in Victoria.
- . Identify and assess best-practice models for the oversight of police.
- . Identify and review the main challenges to the effective oversight and investigation of complaints and disclosures about police in Victoria.
- . Consider best-practice strategies to improve the oversight and investigation of police corruption and misconduct and how they may be implemented in Victoria (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, xiii).

The current system of investigating police misconduct in Victoria is a mixed civilian review or oversight system. This model broadly provides for an independent check of police investigations without excessive interference in police management. This is the dominant model internationally and throughout Australia (see, for example, Goldsmith & Lewis, 2001; Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 33). The Victorian model also fits with the trend towards replacing the separate Police Ombudsman model of oversight with a public sectorwide commission model (Prenzler, 2011).

The Inquiry report contrasts the Victorian model with the civilian control model, of which PONI is the leading example (Prenzler, 2016, p. 18). The governing principle of the control model is that police should not investigate or determine complaints against police as this is considered a fundamental conflict of interest (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, xx–xxi). The Inquiry report sets out what it considers each model's weaknesses and strengths. It notes that the models exist on a spectrum so that the mixed review system can, for example, be minimalist and involve minimal external body engagement with the complaints process or more robust engagement, which could include, for example, undertaking a relatively high proportion of investigations, and more control over the police complaints handling process. Under Victoria's mixed civilian review model although handling and investigating complaints is shared between Victoria Police and IBAC, Victoria Police investigate the overwhelming majority of complaints (see below).

Many submissions to the Inquiry, in line with the philosophy underlying the civilian control model, fundamentally object to the current model where police investigate police. A joint submission from 15 community legal centres, peak legal and community organisations and institutions argued that the extant system is inadequate, claiming that:

'Oversight', even by an independent body, cannot compensate for a lack of effective and independent investigation. ... Oversight cannot cure deficiencies in investigations and cannot restore community confidence in an investigative process that is overshadowed by a conflict of interest and/or defective investigation. (quoted in Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 145)

Many of those who made submissions also considered the embedding of a police oversight body within an anti-corruption body an issue. They noted that while IBAC, as the name suggests, is primarily an anti-corruption body, the majority of complaints it receives about police are about misconduct, especially excessive use of force, not corruption (see, for example, Kelly, 2014). It was considered that IBAC's dual function created tension, as:

In most circumstances, it will not be appropriate for a corruption body to be transparent as this would hinder investigation. However, transparency is at the heart of an effective police misconduct complaints body. (Robinson Gill Lawyers 2017: quoted Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 46)

The Inquiry report found that ‘the complaints and police oversight system needs significant improvement’ and made 69 recommendations ‘to improve the transparency, impartiality, effectiveness and efficiency of the system’ (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. xv). It found that ‘a range of stakeholders who presented evidence to this Inquiry consider that there is a lack of confidence in the current system for handling complaints and disclosures about police’ (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018 Finding 9, 146) and that ‘[p]ublic confidence in the Victorian system for handling complaints and disclosures about police is essential to its effective operation’ (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018 Finding 7, 143). It identified the need for improvements with regard to impartiality (including the management of conflicts of interest), complainant involvement, communication and timeliness. It also considered the range of complaint determinations used by Victoria Police after the completion of an investigation were confusing and needed to be streamlined. In addition to this, it pointed to the lack of publicly available robust data about the system (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, Recommendations 7 and 8, 134) and found that the information provided about the system for making complaints about police needs to improve (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018 Finding 10, 166).

The Inquiry report did not undertake an in-depth review of disciplinary proceedings, as it considered it outside its scope. It did, however, recommend an amendment to legislation to make it clear that such proceedings may commence where an officer was subject to criminal charges, rather than being held off until the conclusion of the criminal proceedings. It also noted concern with the nature and effectiveness of the discipline system and recommended that the Victorian Government instigate a separate review into it (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, Recommendation 64, 310).

Significantly, it concluded that:

Compliance with the best practice principles for the receipt, handling, investigation and oversight of complaints and disclosures about police does not require the establishment of a complaints and police oversight system along the lines of the Office of the Police Ombudsman for Northern Ireland. (Parliament of Victoria Independent Broad-based Anticorruption Commission Committee, 2018, Finding 3, 50; our emphasis)

The Inquiry report instead recommended the establishment of an adequately staffed and empowered Police Corruption and Misconduct Division within IBAC (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, Recommendations 2, 3 and 4). It found that ‘it is essential for the maintenance of public confidence in the Victoria’s complaints system that IBAC, rather than Victoria Police generally investigate ... serious police misconduct’ (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, xxvi; see Recommendation 37).

A new approach to police oversight: background to the establishment of the Office of the Police Ombudsman for Northern Ireland

During the ‘Troubles’ in Northern Ireland from the 1960s, the legitimacy of criminal justice institutions was fiercely contested, with large sections of the nationalist and Catholic communities distrustful of the role of justice bodies and the police. These concerns were not without foundation. The Royal Ulster Constabulary (RUC) drew the overwhelming majority of its members from the Protestant community and was widely seen to be active, partisan participants in the political conflict

(see, for example, Ellison & Mulcahy, 2001). The RUC's Special Branch was the subject of particular criticism as it was seen to be operating as a 'force within a force' (Holder quoted in Cobain & Bowcott, 2018), responsible for extra-judicial killings and state terror (Rolston, 2005). Policing reform and police accountability was therefore seen as a necessary part of the overall political reform agenda designed to end violent conflict.

Policing was seen as too divisive an issue to be explicitly included in negotiations as part of the peace process initiated in the 1990s (Murphy, 2013). The culmination of this process, the 1998 Good Friday Agreement, instead provided for the establishment of an independent commission to look specifically at police reform and to make recommendations on the nature of that reform (see Adams, 2003 for an overview of the peace process and the Good Friday Agreement). The contemporary model of police accountability in Northern Ireland is therefore inextricably linked to the complex reform agenda established by the 1999 Independent Commission on Policing in Northern Ireland (ICPNI), also known as the Patten Commission (Topping, 2016). Its terms of reference were to:

[I]nquire into policing in Northern Ireland and ... bring forward proposals for future policing structures and arrangements designed to ensure that ... Northern Ireland has a police service that can enjoy widespread support from, and is seen to be an integral part of, the community as a whole. (ICPNI, 1999, p. 123)

The Commission made 175 recommendations including a change in the name, badge and uniform of (what was then known as) the RUC. Notably, it maintained that changes should not be a cluster of unconnected adjustments that could be bolted onto an organisation that already exists. Rather 'the changes that we propose are extensive and they fit together like the pieces of a jigsaw puzzle ... holistic change of a fundamental nature is required' (ICPNI, 1999, p. 5). Recommendations included the replacement of the RUC with the Police Service of Northern Ireland (PSNI) and the creation of a new Policing Board and District Policing Partnerships. Significantly, and of most relevance here, it endorsed the creation of a new approach to the investigation of police misconduct and the handling of police complaints. The 1997 Hayes Review recommended the creation of a Police Ombudsman for Northern Ireland. Similar to the 2018 Victorian Inquiry report (see above), Hayes noted the inadequacies of the existing system including widespread dissatisfaction with complaint handling, low substantiation rates, low levels of awareness of the complaint-handling organisation and fundamental concerns about independence. He indicated that:

The overwhelming message I got from nearly all sides and from all political parties was the need for the investigation to be independent and to be seen to be independent ... the main value impressed on me was independence, independence, independence. (Hayes, 1997, p. v)

Changes to policing and police oversight were made in tandem with other reforms to the criminal justice system including the establishment of an independent Director of Public Prosecutions as well as strengthening oversight arrangements with the creation of a Criminal Justice Inspectorate. The independence of a range of decision-making bodies was a critical dimension of the reform agenda. In particular, the creation of the PSNI meant that police reform and police oversight were established in separate but complementary processes. A critical and consistent theme across all criminal justice reforms was the need to improve community confidence in policing and criminal justice in Northern Ireland. The establishment of PONI was part of an overall criminal justice and policing reform agenda. Hayes recommended its creation so that the police would no longer investigate complaints against police. Hayes' recommendations were largely incorporated into the Police (Northern Ireland) Act 1998 and after some months of preparation PONI opened its doors in November 2000.

Comparing the Northern Ireland civilian control model of police oversight with the Victorian civilian review model

There are a number of significant differences in the model of civilian oversight of police in Victoria and civilian control in Northern Ireland. Major differences relate to the interlinked issues of organisational complexity, operational independence, transparency, complaint outcomes and community confidence in the system.

In Northern Ireland there is one organisation (PONI) devoted exclusively to investigating police corruption, misconduct and crime, and that organisation undertakes all investigations into the same. Victoria, as set out above, has a hybrid model where responsibility for investigations is shared between IBAC and Victoria Police. In addition, IBAC is not solely responsible for investigating and overseeing police but instead investigates corruption across the public sector. The complexity of the Victorian model compared to the relative simplicity of the Northern Ireland model reflects the history of the development of the different systems. Reform in Northern Ireland was comprehensive and undertaken wholesale in a discrete period of time as part of the peace process. Reform in Victoria, by way of contrast, has been piecemeal and has taken place over decades. The evolution from Victorian Police handling all complaints in the 1970s through to the short-lived Independent Police Complaints Authority (IPCA) in the 1980s (see below), to the Deputy Ombudsman (Police Complaints), Office of Police Integrity, and currently IBAC, was driven by the different political priorities and practical difficulties of establishing strong independent oversight arrangements (for a brief overview of the history of the current arrangements, see Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, pp. 3–5).

The Inquiry report described Victoria's system as 'based on an intricate, overlapping and sometimes fraying patchwork of laws, policies and processes governing Victoria Police and IBAC' (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. xvii). It states that:

The legislative framework is extremely complex, involving parallel but nevertheless interacting systems for the receipt, handling, investigation, oversight and review of both complaints and disclosures from members of the public and police personnel about police. (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 55)

il independence

IBAC is legally independent of police, notified of most police complaints and monitors and reviews those complaints and police investigations. It can investigate those matters referred to it by police, can initiate its own investigations in the public interest, take over a police investigation, audit Victoria Police and recommend improvements to its practices (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. xxi; 29–36). IBAC is subject to oversight by the Victorian Inspectorate (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 5). IBAC and PONI both employ former police to investigate police. At face value then, IBAC appears independent and has many of the same powers as PONI. There are, however, significant structural, legislative, resourcing and operational differences between IBAC and PONI which impact the former's operational independence. Unlike PONI, which investigates 100% of complaints against police, IBAC investigate only 2% of the allegations it determines warrant investigation, referring the rest to Victoria Police to investigate (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. xv). The small number of IBAC investigations is largely a result of a lack of resources. However, despite complaints about resources by IBAC and external stakeholders, very little has been done to improve its resourcing (see, for example, Houston, 2019).

In addition, and significantly, IBAC investigators, unlike investigators of other such commissions throughout Australia, do not have the powers of police officers (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 252). PONI staff have the powers of a

police constable and are able to seize police possessions and arrest police officers. By way of contrast, where IBAC determines that police may have engaged in criminal conduct, the matter is typically referred back to Victoria Police because IBAC do not have the police powers necessary to investigate crimes (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, pp. 252–253). PONI's strong legislative powers mean that police in Northern Ireland are, with the exception of the laws against self-incrimination in criminal matters, required to provide the Office with information when it is demanded (Kearney, 2014).

It is clear, however, that constant vigilance is required to maintain substantive independence in any system. PONI's Ombudsman was forced to resign after the Criminal Justice Inspectorate published a report which found that the Office's independence had been undermined by the way in which it investigated historical cases (Criminal Justice Inspectorate for Northern Ireland, 2011). The focus of the subsequent Ombudsman was to recalibrate the organisation to be robustly independent. External assessments by Non-Government Organisations, families and their legal representatives and the Northern Irish Criminal Justice Inspectorate confirm that this has been achieved (see, for example, Criminal Justice Inspectorate, 2014).

IBAC's low level of investigations of complaints has meant that in operational terms it can be argued that little has changed since the 1970s when there was no mechanism for substantive oversight of police complaints and the Victoria Police Internal Investigation Department (as it was then known) was responsible for receiving, handling and investigating all complaints against police. Yet, it is widely agreed that the 'internal affairs' approach that was the dominant model for handling police misconduct and corruption in common-law countries until the 1970s is outmoded (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 30). The current system for investigating and reviewing police complaints and misconduct in Victoria risks giving a false level of assurance that complaints are handled independently of police. The reality is that in Victoria, as compared to Northern Ireland, overwhelmingly complaints against police are investigated by police (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. xv). As was pointed out by stakeholders in submissions to the Inquiry, review and oversight will typically not expose or rectify any problems with a police investigation (see Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 145).

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The system for external oversight of police misconduct and corruption in Victoria, compared to Northern Ireland, is opaque. The complexity referred to above creates a barrier to transparency. The Inquiry report noted the difficulty of understanding the Victorian system and how it needed to piece together information from a variety of sources (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 57). The Inquiry report noted the lack of publicly available, robust data on the operation of the system and stated that by way of contrast:

PONI provides an excellent example of a police complaints-handling agency providing best practice, comprehensive, publicly available statistics regarding the complaints and allegations they have received. (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 134)

It noted that Victoria should provide publicly available data 'across a range of variables, including age, gender, ethnicity and Aboriginality of complainants' (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 134). It also found '[t]hat the information Victoria Police provides about the system for the making, receipt and handling of complaints and disclosures about police needs improvement' (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 166).

Apart from the lack of publicly available data and clear information about the system of making complaints, Victoria IBAC's anti-corruption role mitigates against open reporting and the complex

hybrid model of investigation, and oversight between Victoria Police and IBAC means that no one individual is seen as responsible. In Northern Ireland the ‘Corporation Sole’ governance structure of PONI contributes to transparency by investing considerable profile and power in the person of the Ombudsman. The advantage of this is that the work of the office is made public through the publication of highprofile reports by an individual the community are familiar with (Maguire, 2019).

outcomes and community confidence

The differences between the interlinked issues of PONI’s and IBAC’s legislative base, level of resourcing, remit and powers may account for the substantial difference in complaint outcomes under the Northern Ireland and Victorian system. In Victoria it is estimated that the substantiation rate of complaints against police is somewhere between 2% and 9% (one reflection of the lack of data in Victoria is that no accurate generalisable figures are available). The rate of complaints against police substantiated by PONI in 2016/2017 was 22% (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, pp. 287–288). The relatively low substantiation rates in Victoria fuel the perception that the investigation of complaints against police is not sufficiently independent and effective.

There is no data publicly available that points to the level of community confidence in Victoria’s system. Unlike PONI, Victoria does not use complainant surveys to gauge satisfaction with the system and process, although the Inquiry report recommended this be initiated (Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee, 2018, p. 138). A key theme in the Inquiry report was a perception of loss of community confidence in the system (see, for example, Parliament, 2018, p. 144). Community confidence in PONI, and integral to this, community perceptions of its independence, are strong. The latest information from 2018–2019 shows that awareness of and confidence in the Office is high. A survey found that 86% of people in Northern Ireland had heard of PONI; 80% of those who had heard of PONI had confidence that it dealt with complaints in an impartial way and 82% believed it helped to ensure police did a good job. Police also expressed confidence in PONI. Seventy-five per cent of police officers investigated felt the complaint against them had been handled independently, and 78% of police subject to investigation felt they had been treated fairly (PONI, 2019).

Reforming police external oversight: lessons from Northern Ireland

There are a number of lessons from Northern Ireland that may be valuable in considering the prospect and outcomes of any reform to the system of police oversight in Victoria. This section overviews some of the significant interlinked factors that facilitated effective sustained reform in Northern Ireland, including political will and clarity of purpose: overcoming resistance to change within the police organisation; strong legislation and adequate resources; and maintaining independence and public confidence in the reformed system.

ill and clarity of purpose

A clear lesson from the experience of reform in Northern Ireland is that developing the building blocks for change requires political will underpinned by clarity of purpose. PONI emerged out of a clear need to rebuild confidence in policing as part of a package of reform measures both internal and external to the police. Prior to the reforms, Patten undertook a broad and independent review of policing and the criminal justice system which allowed difficult issues to be considered outside of politics. Political will for change was inherent in the peace process and put into action through British rule. Reform to police oversight was imposed by the government in Westminster. The reform of police and police oversight did not depend on its acceptance by the people or politicians of Northern Ireland or the extant police organisation.

g resistance to change within the police organisation

Another lesson from Northern Ireland is that overcoming resistance to change and building support amongst police is a vital aspect of sustained and successful reform to external oversight of police. It is well established in the literature that police culture tends to demand unconditional support and loyalty to fellow officers and resistance to cooperation with or support of external oversight bodies (see, for example, Commission of Inquiry Pursuant to Orders in Council, 1989, pp. 199–212). Police opposition to more robust oversight is highly likely to undermine any reform agenda. Overcoming police opposition to and building support for independent oversight necessarily involves changing police culture. The inclusion of the words ‘A New Beginning’ in the title of the Patten report demonstrates a clear recognition of the need for holistic change, as was the insistence that its recommendations should be accepted as a ‘package’ and not selectively. The disbandment of the RUC and the establishment of the new PSNI meant that the reforms to police oversight happened in tandem with police reform (and criminal justice system reform more broadly). The PSNI expectation from the beginning, then, was that of the civilian control model of robust independent oversight including investigations carried out by an external body. PONI built and retained the support of the PSNI (see, for example, PONI, 2019). One reflection of cooperation was the development and implementation of a human rights-based code of ethics within the PSNI, which is used as a basis for misconduct investigations by PONI.

slation and adequate resources

The process of reform in Northern Ireland also demonstrated that sustained and substantial reform requires that an external oversight body have strong powers. PONI’s legislative power, including police powers to investigate, demonstrates the seriousness with which complaints are taken and underpins the authority and robustness of its processes (Topping, 2016). While political will, clarity of purpose and reform to policing supported the establishment of PONI, its independence could not have been maintained or demonstrated without a strong legislative base. When PONI was challenged by the PSNI, its powers allowed it to stand firm. In 2014, for example, PONI threatened the PSNI with judicial review over its refusal to provide information. The Ombudsman argued that it was not for those being investigated to determine what information would be provided, and the information demanded was subsequently provided by the PSNI (Kearney, 2014). In addition, when the PSNI objected to the way PONI dealt with historical investigations linked to the country’s troubled past, the strength of its legislation proved critical in weathering some of the associated political storm (Maguire, 2015).

As well as strong powers, external oversight bodies also need adequate resources. From the beginning, PONI was adequately resourced. Resources were provided for the recruitment of experienced and skilled staff to exercise its powers of investigation (Police Ombudsman for Northern Ireland, 2016, 2020). Failure to provide such resources makes it likely that expectations will not be met, and confidence in the system of oversight will be undermined. It has been the case with PONI, for example, that resources have been constrained as part of broader austerity measures in Northern Ireland. This had a significant impact on PONI’s ability to conduct investigations into legacy cases arising from the political conflict (Maguire, 2015, 2016). The ability of PONI, however, to state publicly the challenges related to resources, assisted to reinforce the independence of its position (McCaffery, 2014). The battle for resources remains constant given competing demands on public funds.

ice and community confidence

A final lesson from Northern Ireland is that demonstrating independence and gaining community confidence in the police oversight body is critical. As indicated above, increasing community confidence in policing including police oversight was a key aim of the peace process reforms in

Northern Ireland. A 2005 investigation by the UK Parliament Northern Ireland Affairs Committee noted:

Significant progress has been made by the Office in establishing an effective complaints system. We received strong evidence that the Ombudsman is contributing to positive changes in policies and practices despite the difficult political context and had made good progress in gaining the confidence of many in the communities. (Northern Ireland Affairs Committee, 2005, p. 11)

There continues to be a high degree of confidence in PONI's independence from the police, and, flowing from this, confidence in its investigations (PONI, 2019, see above for details). In part, this is due to the ability of the Office to publish high-profile and often controversial reports which are critical of the police or exonerate them as appropriate.

The prospects for reform in Victoria: discussion in light of the lessons from Northern Ireland

The implementation of a civilian control model of police oversight, in tandem with other criminal justice reforms and a very substantial transformation of policing itself, has led to a situation today where the PSNI is considered the world's most accountable police organisation (see, for example, Prenzler, 2016). This does not appear to have undermined operational policing, an argument often made against the model of civilian control. To the contrary, there is strong evidence to suggest it has significantly improved policing (Topping, 2016). Despite this, it remains the reality that achieving substantial and sustained reform towards greater effectiveness, impartiality and independence in police oversight is politically fraught, difficult to achieve and hard to sustain. This section considers the distinctive political and social environment in Victoria and the extent to which this may support or undermine reform to the system of police oversight, both in terms of the Inquiry report recommendations and broader reforms that would establish a model of civilian control.

Continue to fuel calls to reform to police oversight in Victoria

More than two years after the Victorian Inquiry report was published in September 2018, the Andrew's Labor Government has not implemented its recommendations though policing scandals continue to emerge locally, nationally and internationally, maintaining calls for reform to police oversight. The Victoria Police use of a criminal barrister, Nicola Gobbo, as an informant against her clients and the strength of the global movement around Black Lives Matter stand out amongst these. In relation to the former, a Royal Commission into police management of informants (2020) was established in 2018 after the High Court commented that:

Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF [Gobbo] to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer. (AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58)

The Royal Commission revealed serious gaps in the current system for investigating police misconduct, especially where it might include criminal acts (see McCulloch & Maguire, 2020). The Black Lives Matter movement was (re)ignited in the United States and globally in May 2020 with the brutal murder of George Floyd, a 46-year-old African-American man, by a white veteran Minneapolis police officer, Derek Chauvin. The video of the murder taken by a bystander and posted on social media was viewed billions of times. In Australia, Floyd's murder focused attention on First Nations peoples' deaths in custody, racist policing and the failure to hold police to account (see McCulloch, 2021). Indigenous Australian deaths in custody, linked to systematic police racism, remain one of the nation's most enduring human rights, social justice and criminal justice issues (see Guardian, 2020; Royal Commission into Aboriginal Deaths in Custody, 1991). However, as Ellis points out, scandal, exposure and outrage over police brutality, misbehaviour and corruption are not sufficient to achieve reform. Though Ellis' analysis is focused specifically on campaigns linked to the capture of police violence on video, it can usefully be applied more broadly. While such campaigns

may lead to pressure on police to account, achieving substantive change to the systems of police accountability is far more difficult (Ellis, 2021).

Factors that support or hinder the prospects of reforming police oversight in Victoria

As in Northern Ireland, politics is key to understanding the prospects of reform in Victoria. The Andrews Labor Government appears sympathetic to reform, though the government's failure since the delivery of the Inquiry report to implement its relatively modest recommendations suggests at least a cautious approach. Supporting the prospect for reform is Victoria's progressive political culture. Along with the Australian Capital Territory it is one of only two Australian jurisdictions to have a charter of human rights. Victoria has a strong, mature and politically well-connected community legal centre movement that has been exposing police misconduct and brutality over the previous 50 years and remains a driving force for reform (see Flemington/Kensington Community Legal Centre, 2020 for an overview of its Police Accountability Project; McCulloch & Blair, 2012). Victoria is the first Australian jurisdiction to embark on a treaty process with First Nations people, and in tandem with this has announced a truth and justice process, the Yoo-rrook Justice Commission (Victorian Government/ Aboriginal Victoria, 2021). The Commission will investigate historical and ongoing injustices committed against Aboriginal Victorians since colonisation. The treatment of Aboriginal people by police, historically and today, especially Aboriginal deaths in custody, continues to be a major issue underpinning calls for changes to police and police oversight (see, for example, Pearson, 2020). The Commission's likely investigation of what has been termed the 'justice gap' in the treatment of Aboriginal people will keep reform of the police oversight system on the agenda (Wright, 2020). None of this, however, amounts to the political will for change to policing and police accountability or the clarity of purpose towards building broad community confidence in police that was evident in Northern Ireland as part of the peace process. The coalition of legal and social justice organisations pushing for reform to police accountability have broadly supported the Victorian Inquiry's recommendations (Police Accountability Project, 2019). The coalition's willingness to advocate for the Inquiry's relatively modest recommendations, over the civilian control model which they argued before the Inquiry was preferable, is a reflection of pragmatism about what they consider achievable. The government inaction to date is likely linked to the political challenge of achieving reform in the face of opposition from the politically powerful Police Association and Victoria Police. Imposing unwelcome change upon police involves political risk. The close relationship between the police and the media combined with the dynamics of 'law and order politics' mean that political parties' electoral success may depend on their perceived support for police (see, for example, Hogg, 1998; McCulloch, 2004).

Lessons from previous attempts at reforming police and police oversight in Victoria

All state governments in Australia do, however, have levers when it comes to reforming police. The appointment of chief commissioners is one such lever. When Christine Nixon was appointed Victoria Police chief commissioner in 2001 by the Brack's Labor Government, she was the first female chief commissioner in Australia, and one of the first internationally. Nixon, an avowed feminist, challenged police culture by rejecting the trend towards militarisation and by placing an emphasis on inclusion, community safety and social harmony. As part of this, Nixon emphasised integrity over the police 'brotherhood' that prioritised loyalty to fellow officers over accountability (Nixon, 2011, pp. 129–144). However, it is clear that issues persist. The evidence of former deputy chief commissioner of Victoria Police (2009–2011), Sir Ken Jones, to the Royal Commission into the management of police informants pointed to what he perceived to be a police culture in Victoria resistant to independent oversight (Jones, 2019). According to the Royal Commission, more than 100 people in Victoria Police knew about the use of criminal barrister Nicola Gobbo as an informant against her own clients— police conduct the High Court found to be reprehensible (see above)—but none raised concerns with its internal Ethical Standards Department or IBAC (2020).

The short-lived Victorian Independent Police Complaints Authority (IPCA) provides just one historical example of the difficulties of achieving substantive and sustained reform where political will is weak, the oversight body's powers are limited and the external body encounters police resistance. The IPCA was abolished by the John Cain Jr. Labor Government in 1988 after its establishment only two years earlier by the same government. The IPCA encountered opposition from Victoria Police, the Victoria Police Association and the media, much of the latter mirroring police criticism. The challenge to the IPCA arose when it dubbed itself a 'Clayton's Watchdog', called for clarification and strengthening of its powers, initiated its own investigations following media reports of controversial police tactics and publicly pointed out the lack of professionalism and effectiveness of the police Internal Investigations Department—as it was then known (for a detailed account of the IPCA's demise see Freckelton, 1991). As Prenzler and den Heyer note, there is a constant tendency for police, once a scandal has passed, to slip back into patterns of misconduct and self-protection, part of which involves the non-support of or thwarting of substantively independent oversight (2016, p. xiv).

The limits of the current proposals for reform to police oversight in Victoria

The Inquiry into police oversight in Victoria, compared to Patten in Northern Ireland, had a narrow remit. In line with its terms of reference, there is no suggestion in the Inquiry report that substantial reform to police will accompany any of the recommended reforms to oversight. There is also no suggestion that Victoria Police or the Police Association are ready to embrace reform to the system of oversight towards a more robust model of oversight. This will undermine the prospects of implementing the recommendations of the Inquiry by raising the political risks for the government. It will also impact on the likelihood of any reforms being operationalised effectively or sustained over time. Significantly, the recommended reforms do not extend to the external oversight body being given police powers. Additionally, the continued embedding of police oversight within a broad-based public sector anti-corruption body will undermine its ability to be transparent and build community confidence.

Conclusion

Policing scandals in Victoria, including a critical report by the United Nations Human Rights Committee, formed the background to the parliamentary Inquiry into the external oversight of police corruption and misconduct in Victoria. In 2018 the Inquiry report made 69 recommendations for reform. Key amongst these was that IBAC investigate all cases of serious misconduct and that a separate division be created to investigate and review police complaints. This article has compared police oversight models in Victoria and Northern Ireland arguing that there are valuable lessons from Northern Ireland's successful reform to police oversight. It used these lessons from Northern Ireland to reflect on the necessary building blocks for reform and considered the extent to which these might be present in Victoria.

The differences in the approach to police complaints handling in Northern Ireland and Victoria can be traced back to the political purpose and context behind the establishment of oversight mechanisms. In Northern Ireland the genesis of reform and the establishment of the Police Ombudsman for Northern Ireland was decades of violent conflict and the political will to change the nature and functioning of the criminal justice system, especially policing. It was believed, rightly, that confidence in the police service, as part of an end to conflict, required a fundamental change in how the police did their business, including strong independent oversight. One of the important lessons from Northern Ireland is that, in the absence of fundamental changes in police culture, any sustained reform will be challenging.

In contrast to the wholesale reform in Northern Ireland towards a cohesive system of civilian control, the hybrid system of civilian review of police oversight in Victoria has been developed in a spasmodic and fragmented way. With IBAC there is some confusion around what the organisation is designed to do and the benefits it provides. It is not the job of IBAC to investigate complaints against the

police, despite many believing this to be the case. It is, as the name suggests, a broad-based anti-corruption organisation across the public sector. While this is inherently valuable, it is not necessarily a basis for the effective handling of complaints and the investigation of misconduct. Complaint handling and anti-corruption are linked but they are not the same and often require a different approach. It is not clear that the Inquiry report recommendation to create a separate division within IBAC can ameliorate this problem. The experience of PONI points to the benefits of a strong independent body specifically designed to investigate complaints against the police and establishing community confidence in the process. It is acknowledged, however, that the context in Victoria today is not conducive to establishing such a body.

Scandals in relation to police use of excessive force and brutality, Aboriginal deaths in custody, racist policing and the Victorian Royal Commission into police management of informants demonstrate the need for stronger oversight measures to break the tendency for police to slip back into patterns of misconduct and self-protection. However, in the absence of political will and a clear police reform agenda in Victoria, it appears that at least in the short term, the status quo will continue or there will be very slow incremental change, driven at a pace which the police find acceptable. Calls for police to be accountable will likely continue to be fuelled by police scandals, yet holding police to account is likely to remain elusive.

Disclosure statement

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