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**Victoria's Integrity and Anti-Corruption System:  
Complying with the *Charter of Human Rights  
and Responsibilities Act 2006***

**Submission to the  
State Services Authority**

**1 March 2010**

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#### **About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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## 1. Introduction

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1. The HRLRC welcomes the inquiry by the State Services Authority into the effectiveness and efficiency of Victoria's integrity and anti-corruption system and is pleased to have the opportunity to contribute to that inquiry.
2. The purpose of this submission is to consider how the Victorian Government can more effectively investigate and monitor the use of force and deprivation of liberty by police and thereby enhance the efficiency and effectiveness of Victoria's integrity and anti-corruption system.
3. Public confidence in the police is vital to a robust democracy. An incident involving death or serious injury at the hands of police automatically tests that public confidence by calling into question the procedures and values of the police.<sup>1</sup> Excessive use of force by police is an abuse of power which undermines the integrity of a State's operations. Accordingly, the investigation and monitoring of the use of force by police is crucial in reassuring the community that the Victorian Government is adhering to the rule of law.
4. The *Charter of Human Rights and Responsibilities Act 2006* (**Charter**) requires the Victorian Government to establish independent and effective procedures for the investigation and monitoring of the use of force by police. These obligations arise from the right to life (section 9) and the right to freedom from torture and cruel, inhuman and degrading treatment (section 10).
5. This submission sets out the human rights framework and principles which should guide reforms to the integrity and anti-corruption system.

## 2. Recommendations

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### 2.1 Recommendations relating to police use of force

#### **Recommendation 1:**

Victoria's integrity and anti-corruption system should include appropriate institutions and procedures for investigating and monitoring police in a manner that is compatible with the Victorian Government's obligations arising out of the right to life and the right to freedom from ill-treatment protected in the Charter.

#### **Recommendation 2:**

A body responsible for investigating potential breaches of sections 9 and 10 of the Charter by the police must be hierarchically, institutionally and practically independent of the police.

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<sup>1</sup> Quebec Ombudsman, *For a Credible, Transparent and Impartial Process that Inspires Confidence and Respect* (2010), p.1.

**Recommendation 3:**

Investigations into potential breaches of sections 9 and 10 of the Charter by the police must be placed in the hands of the hierarchically, institutionally and practically independent investigating body at the earliest practicable point.

**Recommendation 4:**

The independent body investigating breaches of sections 9 and 10 of the Charter by the police must be properly established and adequately resourced.

**Recommendation 5:**

Time limits should be set in place to minimise delay in investigations into potential breaches of sections 9 and 10 of the Charter by the police.

**Recommendation 6:**

Independent review mechanisms must be in place to allow public scrutiny of investigations into potential breaches of sections 9 and 10 of the Charter by the police and their results.

**Recommendation 7:**

Investigations into potential breaches of sections 9 and 10 of the Charter by the police should involve the victim and keep victims and their next-of-kin informed of developments.

**2.2 Recommendations relating to police custody and the deprivation of liberty**

**Recommendation 8:**

Victoria's integrity and anti-corruption system should include appropriate institutions and procedures for monitoring police custody facilities.

**Recommendation 9:**

A body responsible for monitoring potential breaches of sections 9 and 10 of the Charter in police custody facilities must be hierarchically, institutionally and practically independent of the police.

**Recommendation 10:**

A body responsible for monitoring potential breaches of sections 9 and 10 of the Charter in police custody facilities must also be adequately funded and resourced.

**Recommendation 11:**

A body responsible for monitoring potential breaches of sections 9 and 10 of the Charter in police custody facilities must be empowered to regularly inspect police custody facilities.

This broad power must include: access to all information relating to the numbers of person deprived of their liberty; access to all information relating to the number and location of places of detention; access to all information relating to the treatment of persons deprived of their liberty and the conditions of detention; access to place of detention and their facilities; the opportunity to have private interviews with persons deprived of their liberty without witnesses

as well as any other person the monitoring body believes may supply relevant information; and the liberty to choose the places it wants to visit and the persons it wants to monitor.

**Recommendation 12:**

A body responsible for monitoring potential breaches of section 10 of the Charter in police custody facilities must be empowered to make recommendations and submit proposals to the Victorian Government or comment on existing or proposed legislation in relation to police custody facilities.

The Victorian Government must examine the recommendations of a body monitoring potential breaches of the section 9 and 10 of the Charter in police custody facilities and enter into a dialogue with that body about possible measures to implement those recommendations.

**Recommendation 13:**

The Victorian Government must publish and disseminate the annual reports of the body responsible for monitoring potential breaches of sections 9 and 10 of the Charter in police custody facilities.

### 3. Investigating potential breaches of the right to life and the right to freedom from ill-treatment by the police

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#### 3.1 The Charter

6. The duty to investigate deaths and ill-treatment arising from police contact arises from two fundamental rights in the Charter:
  - (a) the right to life contained in section 9 of the Charter:

Every person has the right to life and has the right not to be arbitrarily deprived of life;<sup>2</sup>  
and
  - (b) the right to freedom from torture and cruel, inhuman and degrading treatment (**ill-treatment**) contained in section 10 of the Charter:

A person must not be subjected to torture, treated or punished in a cruel, inhuman or degrading way or subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.<sup>3</sup>
7. Essentially, the right to life and the right to freedom from ill-treatment have been interpreted to mean that not only is a State (and its authorities) prohibited from taking life arbitrarily and subjecting a person to ill-treatment, the State is also required to effectively investigate deaths

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<sup>2</sup> Section 9 of the Charter reflects article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) which provides: "Every human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

<sup>3</sup> Section 10 of the Charter reflects article 7 of the ICCPR which states that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

- and ill-treatment at the hands of the State (and its authorities). All of this must be done with the aim of bringing to justice anyone who may be responsible for the death or ill-treatment of a person and preventing similar incidents in future.<sup>4</sup>
8. What follows is that the duty to investigate potential breaches of the right to life or the right to freedom from ill-treatment (**the duty to investigate**) is not just a secondary procedural obligation to those rights. Instead, the duty to investigate is inseverable from the right to life and the right to freedom from ill-treatment themselves and a failure to investigate amounts to a breach of those rights by the State.<sup>5</sup>
9. Interpreting sections 9 and 10 of the Charter in light of international jurisprudence, as provided for in section 32 of the Charter, the State is required to effectively investigate potential breaches of the right to life and the right to freedom from ill-treatment.<sup>6</sup>

**Recommendation 1:**

Victoria's integrity and anti-corruption system should include appropriate institutions and procedures for investigating police in a manner that is compatible with the Victorian Government's obligations arising out of the right to life and the right to freedom from ill-treatment protected in the Charter.

10. The question is then: what does it mean to "effectively" investigate potential breaches of the right to life and the right to freedom from ill-treatment?

**3.2 Criteria for effective investigation**

11. For the Victorian Government to discharge its duty to ensure that potential violations of the right to life and freedom from ill-treatment are investigated in the manner required by sections 9 and 10 of the Charter, the Government must ensure that systems are in place for investigations to be:
- (a) practically, hierarchically and institutionally independent;

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<sup>4</sup> The duty to investigate has been enshrined in these international instruments: the United Nations (UN) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions; the Code of Conduct for Law Enforcement Officials; and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (**Basic Principles**). In particular, the Basic Principles require governments and law enforcement agencies to establish effective reporting and review procedures for all incidents in which injury or death is caused by the use of force and firearms by law enforcement officials and "access to an independent process" for persons affected by the use of force and firearms (see articles 22 and 23 of the Basic Principles).

<sup>5</sup> *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008), 26; *R (Gentle) v Prime Minister* [2008] UKHL 20.

<sup>6</sup> Section 32(1) of the Charter provides that "[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights". This section has been described as "mandatory", "very strong" and "far reaching", and is followed by section 32(2) of the Charter which expressly states that international law and judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered for the purpose of interpreting a statutory provision.

- (b) adequate and prompt;
- (c) open to public scrutiny; and
- (d) inclusive of the victim.<sup>7</sup>

Each of these criteria is discussed in turn below.

**(a) Independence**

**(i) Guiding principles**

12. To avoid any perceived or real risk of collusion, corruption and bias, it is important that bodies investigating potential breaches of the right to life and the right to freedom from ill-treatment are truly independent from those they are investigating.
13. True independence is only achieved when an investigation is hierarchically, institutionally and practically independent of the organisation being investigated – that is:
  - (a) the investigators are not from the same chain of command as those being investigated;
  - (b) the investigators are not from the same organisation as those being investigated; and
  - (c) the investigators do not uncritically rely on the version of events they have received from members of the body being investigated.<sup>8</sup>
14. This means, for example, that investigations of the excessive use of force by police will lack sufficient independence if they are carried out by other members of the police force, even if the investigators work in a different department or an independent body oversees the investigation.<sup>9</sup> Further, it is arguable a formally independent body may not be genuinely independent if it employs a significant number of former police officers who still identify

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<sup>7</sup> See Concluding Observations of the Human Rights Committee, 9 November 1995, Hong Kong, para 11; Concluding Observations of the Human Rights Committee, 9 August 2005, Syrian Arab Republic, para 9; Concluding Observations of the Human Rights Committee, 1 December 2005, Brazil, para 13; the United Nations Basic Principles of the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles); and the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal Executions.

<sup>8</sup> *Ramsahai v Netherlands* [2007] ECHR 393 (15 May 2007), 335, 338, 340–341; *Jordan v United Kingdom* [2001] ECHR 327 (4 May 2001) 120.

<sup>9</sup> *Ramsahai v Netherlands* [2007] ECHR 393 (15 May 2007), 335, 338, 340–341; *Jordan v United Kingdom* [2001] ECHR 327 (4 May 2001) 120. See also the recent criticism of Australia by the UN Human Rights Committee in its Concluding Observations on Australia in 2009. The Committee expressed concern at reports of excessive use of force by law enforcement officials in Australia and regretted that "investigations of allegations of police misconduct are carried out by the police itself". It recommended that Australia should establish a mechanism to carry out independent investigations of complaints concerning excessive use of force and bring its legislative provisions and policies for the use of force into line with the Basic Principles: Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5, Ninety-fifth session, Geneva, 16 March- 3 April 2009, 21. Available online at: <http://www2.ohchr.org/english/bodies/hrc/hracs95.htm>.

- culturally as police because there is a risk that, consciously or otherwise, police investigators will be sceptical of complainants and 'softer' on the police concerned.<sup>10</sup>
15. To maintain genuine independence, it is important the investigating body is secure and not financially dependant on the bodies it may investigate or the State. Unless the investigating body has some long-term security of funding and tenure, there is a serious risk its independence will be compromised as it may be more vulnerable to inappropriate influences in its decision-making.

**Recommendation 2:**

A body responsible for investigating potential breaches of sections 9 and 10 of the Charter by the police must be hierarchically, institutionally and practically independent of the police.

**(ii) Independent investigations in practice overseas**

16. The requirement that the investigating body be independent does not mean that police must play no role in the investigation. The European Court of Human Rights in interpreting the right to life has acknowledged that, as a practical matter, it will be necessary to involve police in securing the scene, collecting evidence, and identifying potential witnesses in the event of death or injury involving police seeing as they are obviously going to be first at the scene.<sup>11</sup> However, while police are not forbidden from any necessary involvement in an investigation, human rights jurisprudence establishes that the investigation should be placed in the hands of an impartial authority at the earliest point it is practicable to do so.<sup>12</sup>
17. A good example of how this could work is found in Northern Ireland. There, investigators from the Police Ombudsman of Northern Ireland (**PONI**) pride themselves on being able to get to a scene within an hour of any death or serious injury involving police and distinguish themselves from police officers by wearing orange jackets. PONI investigators interview all police and civilian witnesses and, if there is an incident in which a civilian may be charged and police are investigating, the rule is the more serious allegation has primacy which usually means the PONI investigation has primacy. Any information collected is then provided to the other team afterwards.<sup>13</sup>

**Recommendation 3:**

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<sup>10</sup> Tamar Hopkins, 'An Effective System for Investigating Complaints Against Police', a study conducted for the Victoria Law Foundation of human rights compliance in police complaint models in the US, Canada, UK, Northern Ireland and Australia (August 2009), 43-45, 48.

<sup>11</sup> *Ramsahai v Netherlands* [2007] ECHR 393 (15 May 2007), 337-338, 340-341; *Jordan v United Kingdom* [2001] ECHR 327 (4 May 2001), 118-119;

<sup>12</sup> *Ramsahai v Netherlands* [2007] ECHR 393 (15 May 2007), 339.

<sup>13</sup> Submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity's Inquiry into Law Enforcement Integrity Models, House of Representatives, Commonwealth of Australia, 2008 (Tamar Hopkins), 21.

Investigations into potential breaches of sections 9 and 10 of the Charter by the police must be placed in the hands of a hierarchically, institutionally and practically independent investigating body at the earliest practicable point.

**(iii) Application in Victoria**

18. Victoria Police has attempted to deal with concerns about excessive use of force by police by establishing Critical Incident Management Review Committees (**CIMRCs**) to investigate incidents where police are present in circumstances involving deaths, serious injury or other life-threatening circumstances. It also has an Ethical Standards Division (**ESD**) which investigates allegations of misconduct and a Homicide Department which investigates deaths. Whilst these bodies may to some extent play a positive role in controlling the use of force by its officers, no internal investigations can properly discharge the Victorian Government's duty to investigate under the Charter as they are plainly not hierarchically, institutionally and practically independent.
19. Coronial inquests are another way in which suspicious deaths are investigated in Victoria. However, while the Coroner's Office is hierarchically and institutionally independent, it is arguable its investigations are not practically independent as they rely on the investigations and briefs of Victoria Police.
20. Likewise, the Office of Police Integrity (**OPI**), as a separate statutory body which reports directly to Parliament, is hierarchically and institutionally independent of Victoria Police, but may not be practically independent if it too relies on the investigations of Victoria Police. Further, in some instances, OPI may not be considered to be practically independent given amongst its employees OPI has former police officers, has capacity to use seconded members of Victoria Police and conducts joint operations with Victoria Police.<sup>14</sup> Nonetheless, a particular investigation by OPI, if adequately resourced and appropriately staffed, could be capable of being sufficiently independent in compliance with the Charter.
21. In England, some police forces have called in investigators from other localities to investigate the excessive use of force by police. Aside from the logistical difficulties of getting investigators from interstate to carry out investigations into the excessive use of force by Victoria Police, it does not overcome the problem of police investigating police.

**(b) Adequacy and promptness**

**(i) Guiding principles**

22. For an investigation to discharge the Victorian Government's duties under sections 9 and 10 of the Charter, it must be capable of gathering evidence to determine whether there has been a

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<sup>14</sup> Tamar Hopkins, above n 10, 101; Cf. In NSW, following a Royal Commission conducted by Justice James Wood which exposed substantial corruption in the New South Wales Police Force, the Police Integrity Commission (**PIC**) was set up at Justice Wood's suggestion. One of the conditions of the PIC was that no New South Wales police officer, or anyone who had anything to do with a New South Wales police officer, could be associated with the PIC in any way whatsoever: Federation of Community Legal Centres, *Time for Victorians to Scream 'Blue Murder'*, *Community Lawyers Say*, (Press Release, 28 November 2007).

- breach of the right to life or the right to freedom from ill-treatment and if so, to identify and punish anyone responsible for such breaches.<sup>15</sup>
23. Accordingly, an investigative body must be adequately empowered to, for example, attend the scene of an incident, gather evidence, interview witnesses, search premises and seize relevant materials and documents.
24. An investigation should also be capable of promptly and expeditiously safeguarding the evidence to prevent loss or fabrication of evidence and collusion.<sup>16</sup>
25. Having a timely and efficient investigation assists in dispelling fears of attempts to cover up any misconduct, which in turn instils confidence in the integrity of investigations.<sup>17</sup> This, of course, means an investigative body must be adequately resourced to carry out such prompt and full investigations. It might also require legislative time limits for the conduct of an investigation.<sup>18</sup>

**Recommendation 4:**

The independent body investigating breaches of sections 9 and 10 of the Charter by the police must be properly established and adequately empowered and resourced.

**Recommendation 5:**

Time limits should be set in place to minimise delay in investigations into potential breaches of sections 9 and 10 of the Charter by the police.

**(ii) Adequate investigations in practice overseas**

26. Again, Northern Ireland provides an example of how an adequate and prompt investigation can be run. In Northern Ireland, PONI dedicates an overwhelming majority of its staff to public human rights complaints and runs a 24 hour response service.<sup>19</sup> PONI also uses independent scientists and medical experts, attends most post mortems that are conducted by the state pathologist and is in charge of collecting evidence for the coroner.<sup>20</sup>

**(iii) Application in practice**

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<sup>15</sup> The Rapporteur on police complaints to the European Commission of Human Rights quoted in Tamar Hopkins, above n 13, 18.

<sup>16</sup> Tamar Hopkins, above n 13, 19. See *Ramsahai and Others v The Netherlands* [2007] ECHR 393 where the European Court held at 330 that, although there was no evidence of collusion, the fact that two officers were not kept separate after an incident involving police use of force and were only questioned three days later resulted in a "significant shortcoming in the adequacy of the investigation". See also the Rapporteur on police complaints to the European Commission of Human Rights cited in Tamar Hopkins, above n 13, 18.

<sup>17</sup> Rapporteur on police complaints to the European Commission of Human Rights quoted in Tamar Hopkins, above n 13.

<sup>18</sup> Tamar Hopkins, above n 10 and above n 13.

<sup>19</sup> cf. OPI which only dedicates about 5% (that is, 7 out of 130) of its staff to public complaints: Tamar Hopkins, above n 10, 101.

<sup>20</sup> Tamar Hopkins, above n 13, 21.

27. Investigative practices in Victoria have not been established which ensure adequate and timely investigations are conducted. OPI, although in many respects appropriately independent, is not resourced (and arguably not empowered) to conduct adequate investigations of potential human rights abuses by police. It is certainly not required to investigate all potential breaches of the right to life and the right to freedom from ill-treatment by Victoria Police.<sup>21</sup>
28. It is, nevertheless, empowered to compel witnesses to answer questions, summons any person to give evidence on oath and/or to produce documents or things, conduct hearings, inspect, copy, and/or seize documents and other items at the premises of public authorities including Victoria Police premises, without a warrant, obtain search warrants to enter, search, inspect, copy and/or seize documents or things relevant to an investigation, obtain warrants to use surveillance devices, seek orders under the Confiscation Act 1997 and receive telephone interception material.<sup>22</sup>
29. Coronial inquests, whilst also appropriately independent in many respects, have been held to inadequately safeguard the right to life in circumstances where they examined only the immediate causes of a person's death, did not require police to give evidence and did not impose a legal obligation on the Director of Public Prosecutions to consider the Coroner's report.<sup>23</sup> In any case, coronial inquests only look into the death of a person and not serious injuries as required by the Charter.

**(c) Public scrutiny**

**(i) Guiding principles**

30. Opening up investigations to public scrutiny reassures the community that its authorities adhere to the rule of law and carry out investigations with utmost integrity. In contrast, an investigation which is not open to public scrutiny and fails to give a convincing explanation of events looks like it has something to hide and engenders mistrust.<sup>24</sup> Consequently, there must be a sufficient element of public scrutiny of investigations and their results to secure accountability and reassure the community unlawful and inhumane acts will not be tolerated.<sup>25</sup>
31. Administrative (merits) review of investigative decisions has been identified as a critical accountability feature of good decision-making as it adds a layer of accountability and

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<sup>21</sup> Instead, OPI is only required to investigate complaints about the conduct of the Chief Commissioner, Deputy Commissioner or an Assistant Commissioner. If any other complaint is made, OPI may investigate if it is in the public interest to do so, but is not compelled to do so: sections 38, 43-44 of the *Office of Police Integrity Act*. OPI currently considers a matter to fall under the public interest category where it relates to serious corruption, not human rights abuses, and sees itself as dealing only with practice and procedure; it will not investigate conduct: Tamar Hopkins, above n 10, 104.

<sup>22</sup> Submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity's Inquiry into Law Enforcement Integrity Models, House of Representatives, Commonwealth of Australia, July 2008 (Office of Police Integrity).

<sup>23</sup> See for example *McKerr v United Kingdom*, no. 28883/95, 4 May 2001, 122; contrast *McCann v United Kingdom*, no. 18984/91, 27 September 1995, 162-163.

<sup>24</sup> Note: when such suspicious circumstances arise, the European Court has tended to find violations of the right to life, a notable example being *Anguelova v Bulgaria*, no. 38631/97, 13 September 2002.

<sup>25</sup> *Anguelova v Bulgaria* ECHR 2002 at 40.

transparency for contentious decision-making such as those involving complaints about police use of force.<sup>26</sup> It has also been suggested that making an investigative body subject to freedom of information requests would encourage openness.<sup>27</sup>

**Recommendation 6:**

Independent review mechanisms must be in place to allow public scrutiny of investigations into potential breaches of sections 9 and 10 of the Charter by police and their results.

**(ii) Application in Victoria**

32. Currently, complaints concerning OPI decisions about whether to investigate or not can be made to the Ombudsman. However, since OPI is not required to investigate potential breaches of sections 9 and 10 of the Charter, the Ombudsman is not able to compel OPI to investigate.<sup>28</sup>
33. In addition, although appeals to the Supreme Court are available, access is effectively restricted given a Supreme Court appeal is often complex, might expose a litigant to costs orders and will often require expensive legal advice.<sup>29</sup>

**(d) Victim involvement**

**(i) Guiding principles**

34. Victims play an important role in investigations by providing their account of what took place. However, many victims find it hard to trust police in light of the experiences about which they are complaining of. A fully independent and complainant-oriented investigation body is less likely to encounter this problem so its investigators are less likely to receive one-sided versions of the events. This is confirmed by the experience in Northern Ireland where the civilian-only investigators have the support of the public and find complainants are less reluctant to speak to them.<sup>30</sup>
35. The European Court has also placed increasing emphasis on involving the next-of-kin in investigations, but this does not necessarily mean the next-of-kin should have access to all documents and files.<sup>31</sup>

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<sup>26</sup> Tamar Hopkins, above n 13, 29.

<sup>27</sup> Tamar Hopkins, above n 10, 78.

<sup>28</sup> *Ibid*, 133-134.

<sup>29</sup> Tamar Hopkins, above n 10, 134.

<sup>30</sup> Tamar Hopkins, above n 13, 23.

<sup>31</sup> *Ramsahai v Netherlands* [2007] ECHR 393 (15 May 2007), 348-349; *Jordan v United Kingdom* [2001] ECHR 327 (4 May 2001) 133.

**Recommendation 7:**

Investigations into potential breaches of sections 9 and 10 of the Charter by the police should involve the victim and keep victims and their next-of-kin informed of developments.

#### **4. Monitoring potential breaches of the right to freedom from ill-treatment in police custody facilities**

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##### **4.1 The Optional Protocol to the UN Convention against Torture**

36. As stated above, the aim of investigating potential breaches of the right to life and the right to freedom from ill-treatment by police is to bring to justice anyone who may be responsible for the death or ill-treatment of a person and to prevent similar incidents from happening in the future.
37. Another way to prevent those breaches from occurring is to monitor how police treat individuals in their custody. Accordingly, monitoring potential breaches of the right to freedom from ill-treatment in police custody facilities should also fall within the remit of Victoria's integrity system.
38. The HRLRC notes that Australia has recently signed, and is currently positively considering ratifying, the Optional Protocol to the United Nations Convention against Torture (**OPCAT**). OPCAT sets up an internationally recognised and endorsed framework for monitoring places of detention with the aim of preventing ill-treatment from occurring. It provides for the maintenance, designation or establishment by State Parties of one or more independent inspection mechanisms (otherwise known as national preventive mechanisms (**NPMs**)) for the prevention of torture and ill-treatment in all places of detention, which relevantly include police custody facilities.<sup>32</sup> NPMs are given a mandate to conduct regular visits to places of detention as well as make recommendations and observations to the government and relevant authorities to improve the situation of persons deprived of their liberty.
39. Australia's signature of OPCAT means that all Australian governments are under an obligation of good faith to act consistently with OPCAT and refrain from acts which are calculated to defeat OPCAT's objects.<sup>33</sup> In any case, the domestic inspection mechanisms envisaged by OPCAT would improve the Victorian Government's ability to prevent deaths and ill-treatment in places of detention and, in doing so assist, in fulfilling the Victorian Government's obligations under sections 9 and 10 of the Charter. This would in turn reassure the community

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<sup>32</sup> Article 17 of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010]. OPCAT also mandates further specific measures, such as the criminalisation and prosecution of torture and the prohibition of the use of information obtained by torture, with the aim of preventing and punishing torture.

<sup>33</sup> Article 18 of *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

that the Victorian Government and its authorities are not abusing their power and ensure Victoria's compliance with the OPCAT if it is ratified as expected later this year.<sup>34</sup>

40. Currently there is no body in Victoria which effectively monitors potential breaches of section 10 of the Charter in police custody facilities.

**Recommendation 8:**

Victoria's integrity and anti-corruption system should include appropriate institutions and procedures for monitoring police custody facilities.

**4.2 Criteria for effective monitoring**

41. In order to effectively monitor places of detention, a monitoring body must be:

- (a) functionally independent;
- (b) adequately funded;
- (c) empowered to regularly inspect places of detention; and
- (d) empowered to make recommendations.

A State must also publish and disseminate the monitoring body's annual reports.

Each requirement of the duty to monitor is discussed in turn below.

**(a) Functional independence**

42. As with the investigating bodies discussed in Part 3 of this submission, a body which is monitoring breaches of the right to life and the right to freedom from ill-treatment in places of detention must be truly independent to avoid any perceived or real risk of collusion, corruption and bias. This means that a monitoring body must be hierarchically, institutionally and practically independent in much the same way as discussed above at paragraphs 12 to 15.

**Recommendation 9:**

A body responsible for monitoring potential breaches of section 10 of the Charter in police custody facilities must be hierarchically, institutionally and practically independent of the police.

**(b) Appropriate funding**

43. The Victorian Government must make available necessary resources for the operation of a body monitoring potential breaches of section 10 of the Charter so as to ensure it has its own expert staff and premises and financial independence from the Victorian Government.<sup>35</sup>

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<sup>34</sup> Comments of the Human Rights and Equal Opportunity Commission (HREOC) on Australia's compliance with the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, April 2008, [http://www.hreoc.gov.au/legal/submissions/2008/080415\\_torture.html](http://www.hreoc.gov.au/legal/submissions/2008/080415_torture.html) accessed 23.02.10.

**Recommendation 10:**

A body responsible for monitoring potential breaches of section 10 of the Charter in police custody facilities must be adequately funded and resourced.

**(c) Power to regularly inspect places of detention**

44. A body monitoring potential breaches of sections 9 and 10 of the Charter must undertake regular visits to places where people are deprived of their liberty so as to prevent ill-treatment. Since police custody facilities are places where people are deprived of their liberty, a monitoring body must be empowered to regularly and randomly visit and examine the treatment of persons in those facilities.<sup>36</sup>
45. This broad power of inspection must include:
- (a) access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number and location of places of detention;<sup>37</sup>
  - (b) access to all information referring to the treatment of these persons as well as their conditions of detention;<sup>38</sup>
  - (c) access to all places of detention and their facilities;<sup>39</sup>
  - (d) the opportunity to have private interviews with persons deprived of their liberty without witnesses as well as any other person the monitoring body believes may supply relevant information;<sup>40</sup> and
  - (e) the liberty to choose the places it wants to visit and the persons it wants to monitor.<sup>41</sup>

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<sup>35</sup> Article 18(3) of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

<sup>36</sup> Article 1 and 19(1) of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

<sup>37</sup> Article 20(a) of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

<sup>38</sup> Article 20(b) of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

<sup>39</sup> Article 20(c) of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

<sup>40</sup> Article 20(d) of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

**Recommendation 11:**

A body responsible for monitoring potential breaches of sections 9 and 10 of the Charter in police custody facilities must be empowered to regularly inspect police custody facilities.

This broad power must include: access to all information relating to the numbers of person deprived of their liberty; access to all information relating to the number and location of places of detention; access to all information relating to the treatment of persons deprived of their liberty and the conditions of detention; access to place of detention and their facilities; the opportunity to have private interviews with persons deprived of their liberty without witnesses as well as any other person the monitoring body believes may supply relevant information; and the liberty to choose the places it wants to visit and the persons it wants to monitor.

**(d) Power to make recommendations and submit proposals**

46. A body monitoring potential breaches of section 10 of the Charter must have the power to make recommendations to the relevant authorities with the aim of improving the treatment and conditions of persons deprived of their liberty and preventing ill-treatment.<sup>42</sup> They must also have the power to submit proposals and comment on existing or proposed legislation.<sup>43</sup>
47. This would require the Victorian Government to examine the recommendations of the monitoring body and enter into a dialogue with it about possible measures which could be taken to implement the recommendations.<sup>44</sup>

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<sup>41</sup> Article 20(e) of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

<sup>42</sup> Article 19(2) of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

<sup>43</sup> Article 19(3) of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

<sup>44</sup> Article 22 of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].

**Recommendation 12:**

A body responsible for monitoring potential breaches of section 10 of the Charter in police custody facilities must be empowered to make recommendations and submit proposals to the Victorian Government or comment on existing or proposed legislation in relation to police custody facilities.

The Victorian Government must examine the recommendations of a body monitoring potential breaches of the section 9 and 10 of the Charter in police custody facilities and enter into a dialogue with that body about possible measures to implement those recommendations.

**(e) Annual public reporting**

48. The Victorian Government must publish and disseminate the annual reports of a body monitoring potential breaches of sections 9 and 10 of the Charter which could include visit reports and recommendations.<sup>45</sup>

**Recommendation 14:**

The Victorian Government must publish and disseminate the annual reports of a body responsible for monitoring potential breaches of sections 9 and 10 of the Charter in police custody facilities.

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<sup>45</sup> Article 23 of UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199, available at: <http://www.unhcr.org/refworld/docid/3de6490b9.html> [accessed 26 February 2010].