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**Integrity and Anti-Corruption System Review
Victoria**

Submission to the Public Sector Standards Commissioner

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Integrity and Anti-Corruption System Review Victoria

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1. Executive Summary

1. The Public Interest Law Clearing House (Vic) Inc (**PILCH**) welcomes the opportunity to make a submission to the Public Sector Standards Commissioner in relation to its inquiry on whether any reforms are needed to enhance the efficiency and effectiveness of Victoria's integrity and anti-corruption system (**Review**). We commend the State Government on the initiative to undertake the Review.
2. PILCH considers the Review particularly timely in light of Australia's anticipated ratification of the Optional Protocol to the United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**).
3. In this submission, PILCH examines the implications of Australia's obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**Convention**) and its signatory status to, and anticipated ratification of, the OPCAT, with particular focus on the requirement for Victoria to ensure that effective measures are taken to investigate and prevent all forms of ill-treatment of persons deprived of their liberty by a detaining authority.
4. The Convention and OPCAT principles are also reflected in sections 9 and 10 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (**Victorian Charter**), which concerns the right to life and right to freedom from torture, cruel, inhuman and degrading treatments. By extension, these rights imply obligation to establish and maintain a credible complaints investigation procedure, particularly with regard to complaints regarding abuses of police powers.
5. PILCH submits that in order for the Review to maximise the credibility of its outcomes, it must be comprehensive, independent and consistent with the Convention, OPCAT and the Victorian Charter. Accordingly, it must take into account international human rights law and the extent to which Victoria has implemented systems which are consistent with those obligations.
6. PILCH understands that the scope of the Review will cover the powers, functions, coordination and capacity of the Ombudsman, Auditor-General, Office of Police Integrity (**OPI**), Victoria Police (**Police**) and the Local Investigations and Compliance Inspectorate. However, consistent with PILCH's area of expertise and experience, this submission focuses on an analysis of State investigation mechanisms currently available in respect of complaints of abuses of Police powers and the extent to which those mechanisms fall short of human rights obligations.
7. Specific recommendations as to the particular structural reforms that would be required to establish any new investigatory body are beyond the scope of this submission.
8. A full list of PILCH's recommendations are set out in section 2 below. PILCH submits that these recommendations are consistent with the creation of a robust complaints system,

which, in turn, encourages individual and systemic accountability within the Police and all relevant investigatory bodies.

2. Recommendations

9. In summary, PILCH makes the following recommendations:

The International Human Rights Framework

Recommendation No. 1:

The Victorian Government should work closely with the Commonwealth Government in ensuring that Australia fulfils its commitment to ratify the OPCAT in 2010 and implement NPM requirements following ratification..

Recommendation No. 2:

The Review should be conducted in light of, and with a high level of regard to:

- (a) the guiding principles contained in the OPCAT in relation to the basic powers and protections necessary for an effective NPM (see s 5.2 of this submission);
- (b) the core principles of effective investigation as summarised by the Rapporteur to the European Commissioner for Human Rights on police complaints (see section 5.4 of this submission); and
- (c) the 'State initiation' principle put forward in the Hopkins Report (see section 5.4 of this submission).

The Complaint Investigation Regime in Victoria

Recommendation No. 3:

The Review must analyse the historical legislative basis on which the powers of all State investigatory bodies covering the area of policing have been developed (including, but not limited to, the ESD, OPI, Ombudsman, Auditor General and SIM) and assess the resultant level of overlap/duplication between functions and powers of each investigatory body.

Recommendation No. 4:

The Review must aim to recommend reforms which reduce the fragmentation and inefficiency of the current complaints investigation system, whilst also enhancing the independence and scope of investigations into human rights abuses by Police.

Comparison of Existing Mechanisms against International Standards

Recommendation No. 5:

Complaints of human rights abuses by Police should not be referred to local stations for investigation or management. Complaints of this kind should be investigated by civilian investigators in accordance with international principles of effective investigation.

Recommendation No. 6:

Allegations of abuses of human rights by Police must be investigated by an agency that is genuinely independent and impartial. Past or present police should not be given primary responsibility for conducting investigations into the conduct of other Police members.

Recommendation No. 7:

Allegations of individual human rights abuses must not be de-prioritised by an investigating body as against 'big picture' and major corruption issues. Greater priority must be given to these complaints in order to comply with international human rights obligations and improve police-community relationships.

Recommendation No. 8:

Investigations of complaints of abuses of Police powers must be conducted separately from, and as rigorously as, the investigation of any civilian criminal conduct.

Recommendation No. 9:

Investigators must be given sufficient power to separate and interview Police and witnesses and collect any other relevant evidence immediately after an incident, whilst the potential for comprehensive and accurate evidence collection is at its greatest.

Recommendation No. 10:

Timelines for investigations of allegations of human rights abuses must be legislated and enforceable.

Recommendation No. 11:

CCTV should be placed in all police stations and cars and data should be capable of being accessed by investigators immediately following any relevant incident.

Recommendation No. 12:

Evidence collection processes where human rights abuses by Police are alleged must not be automatically de-prioritised as against a related Police investigation. If it must necessarily occur, then it should be on the basis that the investigation of the less serious behaviour is de-prioritised against investigation of more serious behaviour.

Recommendation No. 13:

Any investigating agency charged with the responsibility of investigating abuses of human rights by Police must be complainant centred and complainant oriented.

Recommendation No. 14:

Well-trained civilian investigators are inherently more likely to apply their judgement impartially in determining whether an allegation of human rights abuse is substantiated and accordingly, should have primary responsibility for investigating complaints of this kind against Police.

Recommendation No. 15:

Investigators must be carefully selected for their ability to treat evidence given by a complainant as being no less credible than evidence given by Police.

Recommendation No. 16:

Consideration should be given as to whether a reversed onus of proof should apply to complaints involving human rights abuses resulting in physical injury, whereby ill-treatment is presumed to have occurred unless rebutted by plausible explanation by Police of the cause of the complainant's injuries being provided.

Recommendation No. 17:

Complainants should be permitted to participate (either in person or by a solicitor) in all stages of investigations of human rights abuses by Police to the full extent necessary to ensure that their interests are protected and that the process of determining whether disciplinary measures should be imposed or criminal proceedings instigated is transparent.

Recommendation No. 18:

Complainants should be entitled to an investigation report once the investigation is complete, explaining in detail the factual and legal reasons for the decision made by the investigating body.

Recommendation No. 19:

Administrative and subsequent judicial review of the merits of all investigative decisions on allegations of human rights abuses should be available to complainants.

The Way Forward: Recognition of International Obligations in Victoria**Recommendation No. 20:**

The State of Victoria should use the opportunity presented by Australia's anticipated ratification of the OPCAT to conduct a major overhaul of the State's police accountability systems.

Recommendation No. 21:

Victoria should look to PONI as the 'gold standard' for police complaints investigation agencies.

Recommendation No. 22:

Any new or restructured complaints investigation agency should follow the PONI model in the following primary respects:

- (a) Former and seconded Police officers should comprise a minority (less than 25%) of investigators employed by the agency.
- (b) Civilian investigators should be drawn from a wide range of professional, cultural and socio-economic backgrounds and marginalised groups should be adequately represented.
- (c) Investigators should be readily visually distinguishable from Police at crime scenes and during all other contact with the public.
- (d) Investigators should be highly trained in conducting thorough, evidence-based investigations.
- (e) Legislation must empower investigators to take whatever actions are necessary to gather the evidence required to make an effective judgement about whether the complaint can be substantiated.
- (f) Investigators must have power to recommend a wide range of sanctions and remedies, including criminal prosecution, warnings, fines, dismissal or other disciplinary measures.
- (g) Investigators must keep both parties fully informed of the progress and outcome of the investigation, and in appropriate cases, make general statements about the findings.
- (h) Investigators should also have power to make relevant recommendations for improvement of Police policy and practice, where an investigation has revealed inadequacies in existing policies or procedures.

Recommendation No. 23:

The State of Victoria should undertake a process of extensive consultation with representatives of civil society, academia and non-governmental organisations as well as relevant government officials in determining whether:

- (a) an existing or newly established agency should be designated as Victoria's NPM; and
- (b) that same agency should also carry wider responsibility for investigation of all allegations of human rights abuses by Police and the State.

Given the extensive shortcomings in the Victorian system in relation to complaints of human rights abuses, a newly established, specialised institution is likely to best enable Victoria to remedy these failures. It is likely that any such newly established agency could also be empowered to act as an effective NPM for the purposes of the OPCAT.

Recommendation No. 24:

Reforms should be aimed at facilitating maximum involvement of civil society in the investigation of human rights abuses.

Recommendation No. 25:

In addition to following the PONI model, any newly established investigatory or oversight body should:

- (a) have the characteristics identified by the AHRC as being necessary requirements of an effective NPM, being: adequate resourcing, access to places, information and people, independence, expertise, powers of recommendation and reporting, necessary privileges and immunities, and credibility; and
- (b) conduct its operations in accordance with the overriding principles of effective investigation as identified in this submission, being: independence, adequacy, promptness, transparency, complainant involvement and State initiation.

Recommendation No. 26:

Any newly established investigatory or oversight body should be protected by separate enabling legislation and regulations and be answerable directly to Parliament and not to the government of the day. Its key positions should be long-term appointments.

Recommendation No. 27:

The Police discipline system should be fundamentally reformed to:

- (a) simplify and improve timeliness of the system;
- (b) function as a remedial, rather than punitive, system;
- (c) streamline the dismissal process; and
- (d) require active involvement of all levels of command.

Recommendation No. 28:

Vicarious liability should attach to the State for legal wrongs committed by Police officers.

Recommendation No. 29:

Complaint investigation reports should be available to victims to assist them in civil litigation proceedings.

3. About PILCH

10. PILCH is a leading Victorian not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through four pro bono referral schemes (Public Interest Law Scheme, Victorian Bar Pro Bono Scheme, Law Institute of Victoria Legal Assistance Scheme and PilchConnect) and two pro bono outreach legal clinics (Homeless Persons' Legal Clinic and Seniors Rights Legal Clinic).
11. PILCH's objectives are to:
 - improve access to justice and the legal system for those who are disadvantaged or marginalised;
 - identify and seek to redress matters of public interest requiring legal assistance for those who are disadvantaged or marginalised;
 - refer individuals, community groups, and not-for-profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
 - support community organisations to pursue the interests of the communities they seek to represent; and,
 - encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.

12. In 2008-2009, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers, not just within private law firms but also those working in government and corporate legal departments. In the last year, PILCH also made numerous law reform submissions on questions of public interest. Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.

4. Scope and Structure of Submission

13. This submission analyses compliance of the police complaints mechanisms in Victoria, and in particular the Police and the OPI, with the standards prescribed by the Convention, OPCAT, the Victorian Charter and other human rights instruments.
14. This submission begins in Section 5 by setting out the international human rights framework before proceeding to examine the existing framework for, and some of the shortcomings of, the police complaints mechanisms in Victoria in Sections 6 and 7. Section 8 looks at the way forward for Victoria in reforming the existing mechanisms to better align with the international human rights framework.

15. Constructive suggestions for change are made throughout the submission.

5. The International Human Rights Framework

5.1 The Convention

16. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**Convention**) was adopted by the UN General Assembly on 10 December 1984, and subsequently came into force on 26 June 1987.
17. Often referred to simply as the ‘Convention Against Torture’, it is important to recognise that this description is somewhat misleading, given the much broader scope of negative behaviours that the Convention is, in fact, intended to prevent.
18. The Convention obliges State Parties to take effective measures to prevent torture, together with all other forms of ill-treatment or punishment, and contains a range of related obligations designed to prevent and prohibit such acts, including: the review of interrogation techniques, prompt and impartial investigations, the prohibition of the use of any statement obtained through torture as evidence in any proceedings, and a right to obtain redress and compensation.
19. The Convention contains the most widely recognised and accepted definition of torture, being *“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”¹*.
20. Unlike acts of torture, acts of cruel, inhuman or degrading treatment or punishment are not defined in the Convention and have been left to the interpretation of human rights experts and jurisprudence. At their broadest, these acts include any form of degrading treatment which occurs with the acquiescence of the State.
21. Current interpretations distinguish such acts from acts of torture by not requiring the pain or suffering to have been inflicted for any specific purpose. That is, acts which:
- cause severe physical or psychological pain or suffering; and
 - are inflicted by, at the instigation of, or with acquiescence of a public official or person acting in an official capacity (without justification as a lawful sanction, consistent with international standard understanding of lawful sanctions),

¹ Article 1 of the Convention.

will generally be regarded as a breach of obligations established under the Convention, and in respect of which, State Parties are obliged to implement prompt and impartial investigations of allegations of any such treatment within their jurisdiction².

22. References are made throughout this submission to 'human rights abuses by Police' and 'abuses of Police powers'. Unless express reference to the contrary is made in specific instances, each of these references should be taken to include all acts and forms of torture **and** the broad range of ill-treatment or punishment proscribed by the Convention.
23. The UN Committee against Torture (**Committee**), which is comprised of 10 independent experts, monitors compliance with obligations established under the Convention, periodically reporting on the extent to which parties to the Convention (**State Parties**) are respecting those obligations.
24. In response to the third periodic report submitted by Australia, the Committee, during its 40th session (28 April-16 May 2008) (**2008 Observations**), noted (*inter alia*) the following concerns about Australia's compliance with the Convention:
 - That the Australian Human Rights Commission (then known as the Human Rights and Equal Opportunity Commission) (**AHRC**) is not empowered to investigate complaints related to torture and other cruel, inhuman or degrading treatment arising under the Convention, and that the AHRC's complaint handing powers do not extend to investigating the acts and practices of intelligence agencies³;
 - Given that the conditions that give rise to cruel, inhuman or degrading treatment or punishment frequently facilitate torture and that the measures required to prevent torture must therefore be applied to prevent cruel, inhuman or degrading treatment or punishment, that the prohibition of ill-treatment must also be treated as non-derogable in nature⁴; and
 - Concerns about allegations against law enforcement personnel in respect of acts of torture and other cruel, inhuman or degrading treatment or punishment, noting a lack of investigations and prosecutions and recommending that Australia should ensure that all allegations of such acts "*are investigated promptly, independently and impartially and, if necessary, prosecuted and sanctioned. Furthermore, the State party should also ensure the right of victims of police misconduct to obtain redress and fair and adequate compensation, as provided for in article 14 of the Convention.*"⁵

5.2 The OPCAT

25. The OPCAT came into force in June 2006 establishing a dual system of prevention of torture and other forms of ill-treatment prohibited by the Convention amongst State Parties.

² Article 16 of the Convention.

³ Paragraph 14 of the 2008 Observations.

⁴ Paragraph 18 *ibid.*

⁵ Paragraph 27 *ibid.*

Australia signed the OPCAT on 19 May 2009, becoming the second additional State Signatory of the OPCAT in the Asia-Pacific region.

26. Australia is expected by the international community to ratify the OPCAT in the second quarter of 2010 (which commitment was noted and commended by the Committee in its 2008 Observations).
27. The OPCAT is aimed at ensuring implementation of international standards at the local level. The new approach embodied by the OPCAT relies on regular visits by investigators to places of detention for the purpose of monitoring and working constructively with each State Party towards implementing relevant recommendations. Visits are to be conducted both on a remedial and a preventative basis.
28. The OPCAT approach is based on the principle that greater transparency improves compliance and levels of public confidence, and substantively improves the administration of justice.
29. The OPCAT defines places of detention very broadly⁶, in order to provide the widest possible protection for persons deprived of their liberty. The key elements of the definition are that individuals are not able to leave the place of their own free will and that the detention has some link to public authority. The definition inherently includes:
 - police stations,
 - pre-trial centres and remand prisons;
 - prisons for sentenced person;
 - juvenile detention centres;
 - border police facilities and transit zones, international ports and airports;
 - immigrant and asylum-seeker detention centres;
 - psychiatric institutions;
 - security or intelligence services facilities with authority to detain;
 - military detention facilities;
 - places of administrative detention; and
 - prisoner transport vehicles.

The definition could, arguably, also include other places where an individual is unable to leave for reasons connected with public authority – for example, elderly persons in aged care facilities or persons coercively stopped and questioned by Police officers in public or private places.

30. The OPCAT is designed to operate on the basis of a newly established international body, the UN Subcommittee on Prevention of Torture (**Subcommittee**), which oversees and complements national bodies, known as National Preventive Mechanisms (**NPMs**), which

⁶ See Article 4 of the OPCAT.

will regularly visit places of detention as part of a continuous process of analysing all aspects of the detention system and strengthening the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

31. State Parties have the option of creating a new institution to serve as NPM, or designating an existing institution or institutions if they meet the requirements of the OPCAT.
32. The OPCAT expressly requires that NPMs be designated by the States parties within one year of ratification (this can be postponed for up to 3 years by virtue of issuance of a declaration⁷), and details some of the basic powers and protections necessary for an NPM to be effective. The OPCAT⁸ requires State parties to:
 - guarantee the functional independence of each NPM as well as the independence of its personnel;
 - take the necessary measures to ensure that the experts of a NPM have the required capabilities and professional knowledge, strive for gender balance and adequate representation of ethnic and minority groups;
 - undertake to make available the necessary resources for the functioning of each NPM; and
 - give due consideration to the principles relating to the status of national institutions for the promotion and protection of human rights in establishing NPMs.

5.3 Other international instruments

33. The OPCAT is one of a number of international instruments imposing an obligation on State parties to establish and maintain an effective investigation system where abuses of human rights are alleged. In addition to the Convention and OPCAT, other sources of international law on the duty to effectively investigate alleged human rights abuses include:
 - The International Covenant on Civil and Political Rights (**ICCPR**);
 - The United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;
 - The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and
 - European Court of Human Rights, UK House of Lords and Constitutional Court of South Africa jurisprudence interpreting the relevant international instruments;

5.4 Core principles underpinning effective investigation systems

34. Flowing from the Convention, OPCAT and other sources of international law relating to the duty to investigate, a number of core principles of effective investigation have emerged. These principles were summarised by Graham Smith, the Rapporteur to the European Commissioner for Human Rights on police complaints as follows:

⁷ Declarations are issued under Article 24 of the OPCAT.

⁸ By Article 18.

- The investigating body must be functionally and organizationally independent from the Police;
 - The investigation must be capable of gathering sufficient evidence to determine the lawfulness or otherwise of the behaviour the subject of the complaint and determining the identity of, and punishing, those responsible;
 - The investigation must be conducted promptly in order to minimise the chances of loss or concealment of evidence;
 - The investigation must be transparent – that is, open to public scrutiny at all stages in the process; and
 - Victims must be given the capacity to effectively participate in the investigation to the full extent necessary to safeguard his or her interests.
35. It has also been suggested⁹ that a ‘State initiation’ principle should be added to the Rapporteur’s list of core principles, in order to ensure that the rights of complainants who are deceased or otherwise incapable of bringing a complaint are protected and also in order to ensure the availability of disciplinary and criminal outcomes in appropriate cases.
36. State initiation allows for disciplinary measures or criminal charges to be pursued irrespective of whether satisfactory redress can or is obtained by the victim as a result of mediation or civil proceedings. This prevents subversion of the principles underpinning effective investigation – that is, it strengthens public confidence in the fact that disciplinary measures or criminal sanctions will be imposed in appropriate cases and are not dependent upon whether the complainant is compensated or not. PILCH supports inclusion of the ‘State initiation’ principle.
37. Section 6 of this submission examines the extent to which the Police complaints mechanisms comply with these principles. In doing so, PILCH has drawn from extensive domestic and international sources including the OPI’s report titled: *‘Review of the Use of Force by and against Victorian Police’* published in July 2009 (**OPI Report**)¹⁰.
38. The OPI Report was commissioned in response to concerns about “the slow progress that Victoria Police seemed to be making in implementing recommendations it had accepted in principle three years earlier.”¹¹ The OPI Report noted that the use of force by Police has been the subject of significant effort by numerous internal and external reviews since 1995, with few tangible results to show from that effort¹².

⁹, Hopkins Report, p22-23.

¹⁰ and research conducted by Tamar Hopkins (Principal Solicitor, Flemington & Kensington Community Legal Centre) in compiling the report titled: *‘An Effective System for Investigating Complaints Against Police’*, a study conducted upon a grant from the Victoria Law Foundation of human rights compliance in police complaint models in the US, Canada, UK, Northern Ireland and Australia (August 2009) (**Hopkins Report**).

¹¹ OPI Report, p10. The recommendations had arisen from *the Review of Fatal Shootings* by conducted by OPI in 2005.

¹² OPI Report , p12

Recommendation No. 1:

The Victorian Government should work closely with the Commonwealth Government in ensuring that Australia fulfils its commitment to ratify the OPCAT in 2010 and implement NPM requirements following ratification.

Recommendation No. 2:

The Review should be conducted in light of, and with a high level of regard to:

- (a) the guiding principles contained in the OPCAT in relation to the basic powers and protections necessary for an effective NPM;
- (b) the core principles of effective investigation as summarised by the Rapporteur to the European Commissioner for Human Rights on police complaints; and
- (c) the 'State initiation' principle put forward in the Hopkins Report.

6. The Complaint Investigation Regime in Victoria

6.1 ESD and OPI

39. In Victoria, ultimate responsibility for investigation of Police behaviour and imposition of disciplinary measures lies with the Chief Commissioner of Victoria Police¹³. On a day to day basis, this responsibility is undertaken by two main entities, being the Ethical Standards Department (**ESD**) and the OPI.
40. The ESD is a unit within the Police, sitting under an Assistant Commissioner who reports to the Chief Commissioner. ESD has delegated authority to compel Police members to make statements about their actions, investigate incidents by taking evidence and to recommend disciplinary procedures where it has found that a complaint is substantiated. Police disciplinary hearing procedures are not transparent. Hearings are conducted internally – that is, they are not open to the public and the complainant is unrepresented.
41. The OPI is a separate statutory body that reports directly to Parliament¹⁴. The *Police Integrity Act 2008 (Vic)* (**Police Integrity Act**) now sets out the OPI's functions and powers, which powers are significantly stronger than those previously held by the Police Ombudsman to undertake effective investigations by compelling provision of information, search and seizure powers and the power to hold hearings.
42. The OPI is headed by the Director of Police Integrity whose stated objects include ensuring that:
- the highest ethical and professional standards are maintained in the Police force;

¹³ Under the *Police Regulation Act 1958 (Vic)* (**Police Regulation Act**).

¹⁴ OPI was created as of 16 November 2004 by virtue of amendments to the Police Regulation Act.

- Police corruption and serious misconduct are detected, investigated and prevented; and
- members of the Police have regard to the human rights set out in the Victorian Charter.

43. Both the OPI and ESD are empowered to accept and investigate complaints and are broadly concerned with maintaining Police professionalism and with detecting, investigating and preventing corruption and misconduct by members of the Police.

6.2 The Victorian Ombudsman

44. The Victorian Ombudsman (**Ombudsman**) derives its powers from the *Ombudsman Act 1973*, the *Whistleblowers Protection Act 2002* and the *Freedom of Information Act 1982*. These powers are deliberately broad. Unlike specialist review tribunals or commissions, the Ombudsman reviews the lawfulness of agencies' actions or decisions and the reasonableness and fairness of those actions in the circumstances.

45. The Ombudsman is not empowered to investigate complaints about private individuals, Commonwealth government agencies, courts, tribunals or government ministers.

46. Although the majority of the Ombudsman's investigations derive from complaints from the public, the Ombudsman also has an 'own motion' power to investigate systemic problems. The Ombudsman is responsible for handling complaints against, and examining the administrative practices of, the OPI either on the basis of specific complaints, or in exercise of the own motion power.

47. Although, the Ombudsman does not have the power to vary or overrule an OPI decision, it may recommend that the OPI reconsiders its decisions. It can make recommendations that OPI take an alternative course of action, for example: offer an apology or compensation, change a policy or procedure or institute disciplinary or criminal proceedings. The outcome of any investigation must be reported to the Chief Commissioner and, if a recommendation is not accepted, the Ombudsman may also decide to report to Parliament. Any such reports do not reveal the names of complainants or Police members.

6.3 The Victorian Auditor-General's office

48. The *Audit Act 1994* establishes the legislative framework governing the role and functions of the Auditor-General. As an independent officer of the Victorian Parliament, not subject to control or direction by either Parliament or the government of the day, the Auditor-General's principal aim is to provide assurance to Parliament on the accountability and performance of the Victorian public sector

49. The Auditor-General is responsible for the audit of around 600 public sector organisations, and maintains a strong interest in the OPI, the Ombudsman and the Office of the Chief Commissioner of the Police.

50. The Auditor-General's Office has similar investigatory powers to the Ombudsman, but focuses on systemic problems rather than investigating specific complaints. It has the

power to make recommendations to Parliament based on its audits, but has no executive authority - that is, no power to force any body to do anything based upon its findings.

6.4 The Special Investigations Monitor

51. The Office of the Special Investigations Monitor (**SIM**) was created by section 4 of the *Major Crime (Special Investigations Monitor) Act 2004*¹⁵.
52. The SIM portfolio covers various government activities concerned with the reform, administration and enforcement of the law in Victoria. It incorporates the criminal justice, regulation and enforcement, civil justice, emergency services and corporate and strategic support systems. SIM's role includes monitoring compliance with the provisions of both the:
 - Police Integrity Act by the Director of Police Integrity, members of staff of the OPI and other persons engaged by the Director of Police Integrity; and
 - *Major Crime (Investigative Powers) Act 2004 (Major Crime (IP) Act)* by the Chief Examiner, Examiners, the Chief Commissioner and other members of the Police service.
53. The SIM assesses:
 - the relevance and appropriateness of the questioning of persons attending the Director of Police Integrity in the course of an OPI investigation and of any requirement made to produce documents or other things in accordance with the provisions of the Police Integrity Act; and
 - the relevance of any questions asked during an examination, or requirements made to produce a document or other thing during the investigation of an organised crime offence, by the Chief Examiner or an Examiner.
54. Complaints may be made to the SIM by persons who have provided information, documents or other things, or given evidence during the course of an investigation conducted under the Police Integrity Act. Complaints in respect of examinations or investigations under the Major Crime (IP) Act require a coercive powers order to have been made by the Supreme Court, and will be limited to investigation of relevance of questions or production requirements.

6.5 Overlap and inefficiency between investigatory/oversight bodies

55. Independent oversight bodies with comprehensive investigative and remedial powers are essential to good governance.
56. The progressive 'bolting on' of statutory powers over time as opposed to considered or comprehensive reform of the various integrity bodies has resulted in a complex regime of issue-specific bodies covering policing in Victoria.
57. Duplicated effort and inefficiency is a frequent consequence of this complexity. Issues can be the subject of more than one review, with the various bodies often being prevented by

¹⁵ which commenced operation on 16 November 2004.

legislation from sharing information during the course of an investigation or review. Overlap in powers can also lead to an unhealthy sense of competition between investigating bodies.

58. None of Victoria's investigating bodies have shown a capacity or willingness to exercise comprehensive investigative and remedial powers where human rights abuses by Police officers are alleged to have occurred.
59. In PILCH's view the Review must consider the economic and social cost of this fragmentation and recommend substantial reforms aimed at reducing the complexity of the current complaint investigation regime whilst enhancing its independence and scope, and ultimately creating a credible, accessible and efficient Police accountability mechanism.

Recommendation No. 3:

The Review must analyse the historical legislative basis on which the powers of all State investigatory bodies covering the area of policing have been developed (including, but not limited to, the ESD, OPI, Ombudsman, Auditor General and SIM) and assess the resultant level of overlap/duplication between functions and powers of each investigatory body.

Recommendation No. 4:

The Review must aim to recommend reforms which reduce the fragmentation and inefficiency of the current complaints investigation system, whilst also enhancing the independence and scope of investigations into human rights abuses by Police.

7. Comparison of Existing Mechanisms against International Standards

7.1 General

60. The Victorian Charter, Convention, ICCPR and other international instruments and jurisprudence all require that the investigation of human rights abuses (which include deaths and life-threatening injuries in custody, torture and ill-treatment, racial and other forms of discrimination and abuse) must be a primary focus of any police complaint body.
61. As identified in the OPI Report this core principle is largely unmet where complaints of human rights abuses by Police in Victoria are concerned. The OPI Report stated¹⁶ that since the 2005 Report *"there have been at least eight Victoria Police reviews relevant to the use of force... Many of the reviews have made similar recommendations, but to date there has been no demonstrable corporate commitment to affirming that the success of any operation will be measured by the extent to which use of force is avoided or minimised. Little attention has been paid to properly measuring the prevalence or extent of the use of force by and against police officers."*

¹⁶ OPI Report, p11.

62. In this Section 7, PILCH highlights some of the key failings of the primary complaints investigation mechanisms in Victoria as against international human rights principles.
63. The Ombudsman, the Auditor-General and the SIM are considered only briefly in this section, since they:
- do not investigate complaints by members of the public of human rights abuses by Police; and
 - cannot directly provide any substantive remedy to an individual whose allegations of Police abuse are found to be true,

Instead, this section focuses upon an analysis of the shortcomings of the primary investigating bodies charged with the responsibility of receiving public complaints of abuses of Police powers, being the ESD and the OPI.

7.2 Referral of complaints to ESD and local stations

64. When a complaint is made to the OPI, the OPI can either dismiss the complaint (on the grounds that it is frivolous or unduly delayed), investigate the complaint (if the complaint is against the Chief Commissioner or an Assistant Commissioner or if the OPI considers that it is otherwise in the public interest to do so) or forward the complaint to the Police for investigation (all other complaints)¹⁷.
65. When a complaint is made directly to the Police¹⁸ or the Police receives a complaint forwarded by the OPI, it will be referred to the ESD, which will classify it and either investigate it¹⁹, or send it to the regional offices for resolution or investigation.
66. The Hopkins Report estimates²⁰ that between 80-90% of complaints received by the ESD are referred for management through investigation or alternative dispute resolution by police in regional offices, with the remaining 10-20% being investigated by ESD itself and that overall, 30-40% of complaints will be investigated. There is little transparency or accountability for decisions determining these rates of investigation.
67. Even where complaints are investigated, allegations of misconduct by Police officers made to the OPI and ESD have historically resulted in a very low rate of substantiation (for example, only approximately 5% of assault allegations are treated as proven following investigation, with less serious forms of complaint having an approximate 10% rate of substantiation)²¹. PILCH submits that at least some of this low substantiation rate is attributable to lack of independence of investigations conducted by ESD and OPI, being a

¹⁷ See OPI website: <http://www.opi.vic.gov.au/index.php?i=47&m=29&t=1>

¹⁸ for example, to a Duty Inspector or the officer in charge of a Police station.

¹⁹ Where the ESD has classified the matter as involving corruption or serious misconduct.

²⁰ Hopkins Report, 103 (referencing Improving Victorian Policing Services through effective complaint handling – OPI 2008, p 11).

²¹ Law Handbook Fact Sheet 42 'Complaints against Victoria Police' published by Fitzroy Legal Service.

systemic issue that should be addressed in line with international law principles underpinning effective investigations. Section 7.3 elaborates on this issue.

Recommendation No. 5:

Complaints of human rights abuses by Police should not be referred to local stations for investigation or management. Complaints of this kind should be investigated by civilian investigators in accordance with international principles of effective investigation.

7.3 Agency capture

68. 'Regulatory capture' or 'Agency capture' describes the situation where an agency tends to further or overprotect interests, or adopt objectives that are close to those, of the individuals or agencies it is charged with investigating.
69. As mentioned earlier in this submission, existing international obligations adopted by Australia require independent investigations and the OPCAT will reinforce this. Independence is a critical component of any effective investigation system.
70. At paragraph 21 of the 2009 Concluding Observations of the Human Rights Committee on Australia²² the Human Rights Committee stated that it "*expresses its concern at reports of excessive use of force by law enforcement officials against groups, such as indigenous people, racial minorities, persons with disabilities, as well as young people; and regrets that the investigations of allegations of police misconduct are carried out by the police itself.*"
71. Insofar as agency capture undermines functional and practical independence, it must be guarded against in any effective investigation system. Not only must investigation mechanisms be independent in an actual sense, but they must also be *perceived* to be independent from the individuals or systems which they are designed to investigate.
72. The primary investigating bodies in Victoria, being OPI and ESD are highly exposed to agency capture (as a result of them being staffed by past or present members of the Police) which diminishes their organizational and functional independence from the subjects of their investigations.
73. As a specialist internal unit, the ESD investigates or refers to regional offices approximately 97% of Victorian complaints²³. ESD investigators are thus faced with the difficult task of investigating superiors, colleagues and friends within the Police.
74. Whilst OPI has been 'externalised' from the Police by establishment as a separate body, it has previously been subject to criticism arising from close relationships between an OPI Deputy Director, the Chief Commissioner and the head of the ESD. Even if that concern is unwarranted, the fact that the OPI is staffed by former and seconded Police officers and

²² As issued on 2 April 2009.

²³ Hopkins Report, p36

conducts joint operations with the Police, leads PILCH to conclude that the public cannot regard the OPI as institutionally, practically, culturally or politically independent from the Police.

75. Arguments continue to be raised that Police are best placed to investigate Police. It is said that this should not be problematic, given that other professions also investigate their own (for example, lawyers and doctors). However, these arguments fail to take account of the particular nature of policing work which makes self-investigation far more problematic, in particular, by failing to recognise the 'brotherhood' culture within the Police and the coercive nature of the work in which Police members are involved.
76. PILCH submits that the Victorian mechanisms suffer from an actual lack of independence, impartiality and transparency, and moreover, that whilst the natural conflict presented by Police investigating their own is permitted to continue, those mechanisms are incapable of being perceived by the Victorian public as being sufficiently independent and instead, will remain subject to significant community scepticism.
77. Lack of public confidence results in a downward spiral where, over time, members of the public may become less and less likely to complain when their human rights are infringed. For this reason, reduced complaint numbers may indicate a movement away from (rather than towards) alignment of the Victorian system with international obligations²⁴ to ensure that individuals' rights to freedom from all forms of ill-treatment are respected.

Recommendation No. 6:

Allegations of abuses of human rights by Police must be investigated by an agency that is genuinely independent and impartial. Past or present police should not be given primary responsibility for conducting investigations into the conduct of other Police members.

7.4 Administrative outcomes vs restorative justice

78. As set out earlier in this submission, the Victorian Charter and other domestic legislation requires compliance by Police with human rights principles. It would appear, however, that investigations of human rights abuses and restorative justice for individual complainants have been de-prioritised as incidental to 'big picture' and major corruption issues under the current investigation framework.
79. Whilst OPI has power to investigate all forms of corruption and integrity issues, undue weight appears to be given to allocation of OPI resources towards investigating complaints of corruption (for example, 'kickbacks' or inappropriate involvement in drug or sex industries by Police officers), being matters which do not, of themselves, constitute human rights abuses.
80. This undue weighting towards internal administrative and major corruption outcomes over and above restorative justice is reflected by OPI's own website where the OPI promotes

²⁴ Contrary to OPI claims that reductions in complaint numbers indicate improvements in police professionalism.

itself as *'an independent police anti-corruption and oversight organisation'* charged with the functions of detecting, investigating and preventing Police corruption and serious misconduct; examining Police practices and procedures to ensure they work effectively; and monitoring and reviewing the way the Police investigates or conciliates complaints, with a view to ensuring that the Police meets community expectations.

81. The areas of focus for 2009-2010 stated on OPI's website are:

- continued professionalisation of policing in Victoria through OPI's investigations, prevention, education and research functions;
- conducting key reviews to ensure that Police are supported by effective information management and technology;
- Police leadership and supervision;
- examining the effectiveness of Police employment policies and practices and making any necessary recommendations; and
- building resistance within the Police service to criminal manipulation.

Whilst these are meritorious, only brief mention is made on the website of OPI's legislated duty to ensure that members of the Police and OPI personnel have regard and act compatibly with human rights obligations. No mention is made of OPI investigations being conducted in accordance with core principles of cultural and functional independence, adequacy, promptness, transparency or victim participation²⁵.

82. In addition, only 7 of OPI's 130 person staff are dedicated to public complaints²⁶. In virtually all cases, those complaints will be referred to the ESD for resolution at a local level. Dealing with complaints in this way exposes those complaints to other elements of ineffective investigation²⁷, including lack of timeliness, transparency, complainant involvement and adequacy.

83. In order for the Victorian public to have effective protection of their human rights, PILCH submits that it is critical for greater priority to be given to investigation of complaints received by OPI or any similar NPM agency from the public in relation to human rights abuses by members of the Police²⁸.

84. PILCH submits that greater focus on investigation of human rights complaints received from the public has the potential to significantly improve Police-community relationships particularly with marginalised minorities.

²⁵ Being the core principles of effective investigations identified earlier in this submission.

²⁶ Hopkins Report, p105.

²⁷ that is, over and above the lack of independence dealt with in section 7.3 of this submission.

²⁸ as is the case in Northern Ireland, where the majority of the Police Ombudsman's staff are dedicated to the investigation of public human rights complaints. See section 8.2 of this submission for a further discussion of the functions and powers of PONI.

Recommendation No. 7:

Allegations of individual human rights abuses must not be de-prioritised by an investigating agency as against 'big picture' and major corruption issues. Greater priority must be given to these complaints in order to comply with international human rights obligations and improve police-community relationships.

7.5 Delay and inadequacy

85. Prompt and comprehensive evidence collection is also a fundamental element of effective investigation. Delays lead to memory and evidence loss, and worse, may expose the investigation to collusion and evidence tampering.
86. In the context of Police investigations of civilian suspects, Police are well aware of the principles that evidence must be collected promptly and that witnesses should be separated so that they will not influence each other, and will go to significant lengths to ensure that the evidence collection process is conducted in line with these principles.
87. However, PILCH is made aware of numerous examples of a lesser standard being applied to investigations of Police behaviours particularly during the early stages of investigation. For example, members of Police are more likely to be given time to recover from a traumatic incident or discuss the matter with their colleagues before being interviewed than are civilian suspects.
88. The OPI Report notes that *"as early as 2002 an internal audit found there was non-compliance and under-reporting of the use of force, incomplete or inaccurate data being forwarded to the central registry and a backlog in data being entered on the database. Recommendations to address these issues had not been implemented by the time of the 2005 OPI Fatal Shootings Review. Currently some four years later and six years after these issues were first identified, this Review has found Victoria Police has made no progress in addressing these issues."*²⁹
89. The evidence collection processes in investigations of Police behaviour appear to suffer from de-prioritisation, particularly where (as in many cases) the Police behaviour under investigation is closely related to Police investigation of civilian criminal conduct.
90. It is crucial that any investigation of alleged abuse of Police powers is conducted separately from, but no less rigorously than, the investigation of any related civilian conduct. PILCH submits that Investigation timelines and procedures should mirror those applicable in cases where the subject of the investigation is a civilian.
91. Failure to independently and comprehensively investigate at an early stage can not be remedied later. It also cannot be cured by mere oversight by an independent body. This in

²⁹ OPI Report, p11-12.

turn undermines subsequent disciplinary proceedings, civil justice and investigations (including coronial hearings³⁰).

Recommendation No. 8:

Investigations of complaints of abuses of Police powers must be conducted separately from, and as rigorously as, the investigation of any civilian criminal conduct..

Recommendation No. 9:

Investigators must be given sufficient power to separate and interview Police and witnesses and collect any other relevant evidence immediately after an incident, whilst the potential for comprehensive and accurate evidence collection is at its greatest.

Recommendation No. 10:

Timelines for investigations of allegations of human rights abuses must be legislated and enforceable.

Recommendation No. 11:

CCTV should be placed in all police stations and cars and data should be capable of being accessed by investigators immediately following any relevant incident.

Recommendation No. 12:

Evidence collection processes where human rights abuses by Police are alleged should not be de-prioritised as against a related Police investigation. If it must necessarily occur, then it should be on the basis that the investigation of the less serious behaviour is de-prioritised against investigation of more serious behaviour.

7.6 The bias towards exculpation

92. Section 26 of the ICCPR states that all persons are equal before the law. This principle is now expressly stated in section 8 of the Victorian Charter. However, the Victorian system appears to contain additional elements of intrinsic bias in favour of Police³¹.
93. All too often it appears that evidence from Police officers is accepted without the same level of critical analysis or questioning employed in relation to the collection of evidence from civilian suspects or witnesses. Complaints by the public are often dismissed by investigators on the basis of 'one word against another', where the word of the Police

³⁰ See for example: *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 337; *Bati v Turkey* [2004] ECHR (3.6.2004) para 135; *Royal Commission into Aboriginal Deaths in Custody* 1991, Vol1, p130.

³¹ that is, over and above the agency capture issues discussed at section 7.3 and delay/inadequacy issues discussed at section 7.5 of this submission.

officer in simply denying that the alleged abuse has occurred will be grounds to make a finding that the complaint cannot be proved. Often the investigation report attacks the credibility of the complainant and uses the complainant's decision not to speak to investigators (for fear of prejudice) as evidence that the incident did not occur.

94. There is a real perception that the investigation process is more of an exercise in mitigating or justifying police actions than a process designed to identify unlawful assaults.
95. Where abuses of Police powers are complained of by members of the public, investigators must be capable of treating the evidence given by a complainant as being just as credible as evidence given by members of the Police. PILCH submits that this is not possible where investigators have developed inherent bias through Police service, and is only capable of being achieved by well-trained civilian investigators.
96. Complaint substantiation is a two step process comprising evidence collection followed by evidence assessment. Even if Police investigators are capable of conducting the first step of evidence collection with the result that all available evidence is efficiently and accurately collected³², further issues of bias may arise in the second stage of the process, in relation to the standard of proof required to substantiate a complaint and the application of that standard by Police officers to complaints involving other Police officers.
97. European human rights jurisprudence places an onus of proof upon the State in cases where a complainant is injured in the custody or control of police, requiring the State to rebut the presumption that ill-treatment has occurred by providing a plausible explanation of how the complainant's injuries occurred.
98. By contrast, the Victorian process involves a determination of whether the standard of proof applicable to substantiation of a complaint (being whether there is a reasonable prospect that an adjudicator at a disciplinary tribunal could find that the alleged conduct has occurred) has been satisfied. To date, the European reversed onus of proof does not appear to have been applied in any Australian context.
99. PILCH submits that past or present Police acting as investigators, when investigating civilian complaints of human rights abuses by 'their own', will inevitably suffer from a predisposition both towards:
 - inadequate evidence collection; and
 - analysing evidence and exercising their judgment against complaint substantiation³³.

Well-trained civilian investigators are inherently more likely to apply their judgment impartially in determining whether the standard of proof substantiating a complaint is satisfied with resultant instigation of disciplinary proceedings.

³² Which PILCH submits that they are not, in line with paragraph 95.

³³ This submission is borne out by the low complaint substantiation rate referred to in paragraph 67.

Recommendation No. 13:

Any investigating agency charged with the responsibility of investigating abuses of human rights by Police must be complainant centred and complainant oriented.

Recommendation No. 14:

Well-trained civilian investigators are inherently more likely to apply their judgement impartially in determining whether an allegation of human rights abuse is substantiated and accordingly, should have primary responsibility for investigating complaints of this kind against Police.

Recommendation No. 15:

Investigators must be carefully selected for their ability to treat evidence given by a complainant as being no less credible than evidence given by Police.

Recommendation No. 16:

Consideration should be given as to whether a reversed onus of proof should apply to complaints involving human rights abuses resulting in physical injury, whereby ill-treatment is presumed to have occurred unless rebutted by plausible explanation by the Police of the cause of the complainant's injuries.

7.7 Complainant participation

100. Complainant involvement is another important element of effective investigation and Police accountability. In many cases, the victim will be the only person other than the relevant Police officer with first hand knowledge of the events and actions which are alleged to constitute a human rights abuse.
101. Community confidence in Police accountability mechanisms requires that victims of human rights abuses by Police officers must perceive that their complaint will be taken seriously by the investigating body. Victims have sufficient opportunity to be involved in the investigation to the extent necessary to ensure that their evidence is properly put and their interests protected, and must have confidence in their involvement.
102. The issue of complainant participation is closely related to transparency. When coupled with poor substantiation rates (and worse, the perception that complaint lodgement may lead to retributive action) public trust in the system suffers and increased hostility towards Police is the likely consequence.
103. At present, little complainant involvement is permitted in investigation by OPI or ESD beyond the initial stages of the investigations. Only where the investigation results in disciplinary measures or criminal charges being recommended will complainants be

required to submit evidence in person³⁴. Complainants are not permitted to participate (either in person or by a solicitor) in the substantive investigation process.

104. As a result, civil proceedings will naturally be preferred by complainants due to the ability to be more closely involved in those proceedings and secure better outcomes. The result is that Police behaviours which constitute human rights abuses are less likely to result in disciplinary measures being taken or criminal charges laid in instances of abuse.

Recommendation No. 17:

Complainants should be permitted to participate (either in person or by a solicitor) in all stages of investigations of human rights abuses by Police to the full extent necessary to ensure that their interests are protected and that the process of determining whether disciplinary measures should be imposed or criminal proceedings instigated is transparent.

Recommendation No. 18:

Complainants should be entitled to an investigation report once the investigation is completed, explaining in detail the factual and legal reasons for the decision made by the investigating body.

7.8 Failures and limitations in the review of investigative decisions

105. Whilst complaints about OPI decision making can be investigated by the Ombudsman, the Ombudsman has been criticised for its inability to prosecute abuses of Police powers.
106. The Ombudsman's close relationship with the ESD and Police (flowing from its capacity and need to request assistance and resources from ESD in the conduct of its investigations), together with the fact that the current Ombudsman previously³⁵ also held the role of OPI Director, has also caused its impartiality to come into question.
107. Like the Ombudsman, SIM also oversees the OPI, but is not empowered to review OPI's decision making process in dismissing a complaint. It also lacks power to review OPI functions³⁶, other than where that enquiry is tied to OPI's coercive hearings and other specific, process related matters.
108. Although the Auditor-General has similar powers to the Ombudsman in terms of overseeing the OPI, in practice, it does not deal with complaints from the public of

³⁴ However, as previously submitted, non-compliance with key investigation principles has resulted in inherent flaws in the ability of the Victorian system to identify and punish human rights abuses - For example, potential complainants may well be deterred from giving evidence relating to a traumatic incident involving a Police officer to another Police officer (out of fear that they will be victimised or harassed as a result). This simple impediment can result in the investigation being prematurely discontinued.

³⁵ Until May 2008.

³⁶ in particular, to broadly examine whether OPI investigations are conducted fairly, ethically and as a result of proper motivations.

individual instances of abuse, so it is similarly of limited value in improving public confidence in Police accountability where human rights violations are alleged.

109. Administrative and subsequent judicial review of investigative decisions is an essential feature of an accountable investigation system. The limited ability of complainants in Victoria to obtain a meaningful administrative or judicial review of the merits of an OPI or ESD investigative decision is an issue that requires further attention and substantial legislative and institutional reform.

Recommendation No. 19:

Administrative and subsequent judicial review on the merits of all investigative decisions on allegations of human rights abuses should be available to complainants.

8. The Way Forward: Recognition of International Obligations in Victoria

8.1 The Victorian Charter

110. Although the OPCAT has not yet been ratified, the Victorian Charter already imposes obligations on public authorities³⁷ which are consistent with Australia's current international obligations as party to the Convention and other international instruments and imminent obligations which will arise following ratification of the OPCAT including:
- the obligation to act in a way that is compatible with human rights³⁸;
 - the obligations in relation to the rights to life and freedom from torture, cruel, inhuman and degrading treatment³⁹; and
 - the unlawfulness of acts by public authorities which are incompatible with human rights or which fail to give human rights consideration in the course of decision making⁴⁰.
111. PILCH considers that the existing Victorian investigations systems fall short of the standards required for compliance with international human rights principles. Anticipated ratification of OPCAT and the NPM implementation obligations that will flow from it provides the State of Victoria with both an obligation and an opportunity to conduct a major overhaul of its current systems. PILCH submits that this legislative and institutional reform is long overdue and must be preferred to tinkering at the edges of the State's police accountability bodies and processes.

³⁷ which would include the Police, the OPI, the Ombudsman and the SIM.

³⁸ Section 1 of the Victorian Charter.

³⁹ Sections 9 and 10 *ibid*.

⁴⁰ Section 38 *ibid*.

112. The experience of Northern Ireland over the last decade provides a useful illustration of the success that can be achieved by radical reform of a police complaints system in line with international human rights principles. Some key features of that process are examined in sections 8.2 and 8.3 of this submission

Recommendation No. 20:

The State of Victoria should use the opportunity presented by Australia's anticipated ratification of the OPCAT to conduct a major overhaul of the State's police accountability systems.

8.2 A comparative analysis: the Police Ombudsman for Northern Ireland

113. The reform of Northern Ireland's police complaints system was undergone with the express aim of creating a system that is fair, easily understood, widely accessible and transparent and which has subsequently been shown to instil both greater police and public confidence in that system.
114. Established in 2000, the Office of the Police Ombudsman for Northern Ireland (**PONI**) claims title as the first fully-funded and independent police complaints body in the world, and has been described as the international 'gold standard' for police complaints investigation agencies.
115. In contrast to the Victorian investigations agencies, the structure and systems employed by PONI satisfy many of the core principals prescribed by international law for ensuring the effectiveness and credibility of its investigations.
116. Although seconded and ex police officers still have a role in this system, their involvement is balanced with the specialised expertise of civilian investigators drawn from a wide range of backgrounds. This protects the integrity of the Northern Ireland Police Service (**NIPS**) and leaves PONI less likely to be open to allegations of a 'cover-up' if they find an absence of wrong-doing by police officers the subject of their investigations.
117. PONI investigators visibly differentiate themselves from NIPS officers at crime scenes and during other public contact by the wearing of bright orange jackets. Investigators are trained in conducting thorough, evidence based investigations. PONI Investigators are also empowered by legislation to gather the evidence they need to make an effective judgment about whether NIPS officers have acted properly – for example, investigators can secure incident scenes, seize police documentation and property and enforce the provision of information by NIPS officers. In exceptional circumstances they can also arrest NIPS officers and search premises.
118. If, following an investigation, PONI investigators find that the evidence suggests that NIPS officers have broken the law or breached the police Code of Ethics, PONI can recommend that action is taken by either Northern Ireland's Public Prosecution Service or the Chief Constable. Sanctions can range from a prison sentence in the case of a criminal prosecution, or verbal warning, advice and guidance, a fine or dismissal (depending on severity of the offence) for disciplinary incidents.

119. Whether there is evidence to support the complaint or not, PONI will inform both parties to the complaint of its outcome and in cases of public interest make a general statement about the findings.
120. PONI can also make relevant recommendations for the improvement of police policy and practice where it has become clear during an investigation that police procedures or officer guidance in dealing with a particular situation were inadequate.
121. The vast majority of the recommendations made by PONI have been accepted and implemented by the NIPS. PONI claims that some of the improvements subsequently implemented by the NIPS (for example, improved conflict resolution training and revised arrangements for dealing with prisoner complaints, requests and grievances, including instructions for prompt and rigorous investigation) has impacted positively on overall complaint trends.
122. PONI categorises the complaints it receives as follows:
- allegations that NIPS officers have failed to perform the duties required of them (for example, the duty to properly investigate a crime or to respond to an emergency call) or have otherwise breached the Police Code of Ethics (**Duty Failures**);
 - allegations of assault, intimidation or harassment by NIPS officers (**Oppressive Behaviours**);
 - allegations of rudeness (**Incivility**); and
 - all **Other** allegations.
123. Incivility complaints have generally accounted for 12-16%, and Other allegations have generally accounted for 8-10%, of all complaints received by PONI⁴¹.
124. PONI regards complaints of Oppressive Behaviours as generally being the most serious form of allegation. PONI materials⁴² state that allegations within this category fell from approximately 50% of all complaints in PONI's first year of operation, to approximately 33% in 2007. This was coupled with a rise in complaints of Duty Failures from 25% to 38%. PONI have suggested that these movements may in part resulted from the implementation of improved training by NIPS, whilst the increase in Duty Failure complaints may reflect higher expectations from the public about the level of service they can expect from the NIPS.

Recommendation No. 21:

Victoria should look to PONI as the 'gold standard' for police complaints investigation agencies.

⁴¹ Figures taken from PONI's website at www.policeombudsman.org/

⁴² PONI publication titled '*The Police Complaints System in Northern Ireland*' available on PONI website.

Recommendation No. 22:

Any new or restructured complaints investigation agency should follow the PONI model in the following primary respects:

- (a) Former and seconded Police officers should comprise a minority (less than 25%) of investigators employed by the agency.
- (b) Civilian investigators should be drawn from a wide range of professional, cultural and socio-economic backgrounds and marginalised groups should be adequately represented.
- (c) Investigators should be readily visually distinguishable from Police at crime scenes and during all other contact with the public.
- (d) Investigators should be highly trained in conducting thorough, evidence-based investigations.
- (e) Legislation must empower investigators to take whatever actions are necessary to gather the evidence required to make an effective judgement about whether the complaint can be substantiated.
- (f) Investigators must have power to recommend a wide range of sanctions and remedies, including criminal prosecution, warnings, fines, dismissal or other disciplinary measures.
- (g) Investigators must keep both parties fully informed of the progress and outcome of the investigation, and in appropriate cases, make general statements about the findings.
- (h) Investigators should have power to make relevant recommendations for improvement of Police policy and practice, where an investigation has revealed inadequacies in existing policies or procedures.

8.3 Implementation of OPCAT obligations in UK (Northern Ireland)

125. The United Kingdom, whilst not a federal State, has a significantly decentralized structure comprising England, Scotland and Wales together with Northern Ireland. It has been one of the strongest supporters of the OPCAT internationally, ratifying the OPCAT on 10 December 2003. Ratification followed extensive consultation by the Human Rights Department of the UK Foreign & Commonwealth Office with national government departments likely to be affected by the instrument, independent statutory authorities and the devolved administrations in Scotland, Wales and Northern Ireland.
126. The UK was required to establish its NPM one year after the entry into force of the OPCAT (by 20 June 2007). In 2006 and 2007 a further process of consultation was initiated with various governmental actors on this issue. Representatives of civil society and academia were brought into this process together with a range of non-governmental organisations and government officials.
127. UK ultimately appointed 18 existing oversight bodies as the UK NPM, through a written ministerial statement which it issued in March 2009. The NPM's for Northern Ireland are Independent Monitoring Boards, Criminal Justice Inspection Northern Ireland, Regulation and Quality Improvement Authority and Northern Ireland Policing Board Independent

Custody Visiting Scheme. Her Majesty's Inspectorate of Prisons assumes the NPM coordination role for the 18 bodies comprising UK's NPM's.

128. Whilst not appointed as NPM in its own right, PONI's powers and procedures are consistent with and complement the functions of Northern Ireland's NPMs.

8.4 Implementation of OPCAT obligations in Victoria

129. In 2008, the AHRC released a report⁴³ of research it commissioned into options for implementing the OPCAT in Australia. The report suggests that Australia should establish a 'mixed' NPM model, with separate NPMs in each state and territory and a national coordinating NPM (which function the AHRC recommended itself as being best placed to fulfil). The recommendations would result in an Australian model not unlike the model which has been implemented by the UK.
130. AHRC recommended that the Australian NPM model should be achieved by passage of complementary Federal and State legislation rather than by imposition of Commonwealth legislation on the States.
131. The AHRC report stated that although States are likely to assume that the designation of existing agencies as NPMs would be the most expedient and inexpensive way to meet OPCAT obligations, most existing institutions would require significant organisational restructuring together with significantly increased allocation of human, logistical and financial resources in order to meet OPCAT requirements. The report indicated that it is generally a mistake for States to assume that existing institutions can effectively act as an NPM within their existing budgets, structures and working methods.
132. Careful consideration needs to be given by each State as to whether a newly established, specialised institution would best enable that State to comply with OPCAT or whether transformation of an existing institution into an effective NPM is more realistically achievable in legislative, human and financial terms.
133. The AHRC summarised⁴⁴ the key requirements for an effective NPM as follows:
- Mandate to carry out preventive visits
 - Resources to carry out full programme of visits
 - Access to all places of detention
 - Access to all relevant information
 - Right to conduct private interviews
 - Independence
 - Expertise
 - Right to make recommendations and to receive a considered response
 - Right to publish reports

⁴³ Titled *Implementing the Optional Protocol to the Convention against Torture : Options for Australia: A report to the Australian Human Rights Commission* by Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia).

⁴⁴ *Ibid*, p22.

- Necessary privileges and immunities
 - Credibility.
134. These key requirements are not only relevant to the establishment of an NPM in Victoria, but also to broader reform of Victoria's police complaints investigation mechanisms. In particular, the requirement for NPM independence necessarily implies that the institution must be perceived as being independent by those it is meant to protect. It is difficult to see how the existing Victorian agencies, as presently constituted and operating in practice, could credibly satisfy this requirement
135. Similarly, the Hopkins Report concluded that the establishment and funding of a new independent civilian agency with a focus on the investigation of complaints relating to human rights abuses is likely to be preferable to attempting 'patch up' existing systems, for example, by forcing the OPI to redefine scope of its 'public interest' investigations to include those involving human rights abuses (OPI currently only defines investigations into corruption as being investigations which it should conduct in the 'public interest').
136. The AHRC report noted that no matter how complete and robust the independence and investigative powers of an institution may appear in its empowering legislation, its effectiveness as an NPM is entirely dependent upon its public credibility, and that the best way to improve credibility of an institution, is often to facilitate greater involvement of civil society in that institution's work.
137. The State of Victoria must now make a careful assessment of the long term viability and benefits of re-purposing an existing institution to serve as an NPM as opposed to pursuing a more radical program of structural reform. Should Victoria choose to proceed with the latter of these two options (as PILCH submits that it should), PILCH submits that relevant reforms should be aimed both at providing the best possible foundation for implementation of the OPCAT NPM obligations, and also strengthening and streamlining the broader complaints investigation mechanisms in line with international human rights principles.

Recommendation No. 23:

The State of Victoria should undertake a process of extensive consultation with representatives of civil society, academia and non-governmental organisations as well as relevant government officials in determining whether:

- (a) an existing or newly established agency should be designated as Victoria's NPM; and
- (b) that same agency should also carry wider responsibility for investigation of all allegations of human rights abuses by Police and the State.

Given the extensive shortcomings in the Victorian system in relation to complaints of human rights abuses, a newly established, specialised institution is likely to best enable Victoria to remedy these failures. It is likely that any such newly established agency could also be empowered to act as an effective NPM for the purposes of the OPCAT.

Recommendation No. 24:

Reforms should be aimed at facilitating maximum involvement of civil society in the investigation of human rights abuses.

Recommendation No. 25:

In addition to following the PONI model, any newly established investigatory or oversight body should:

- (a) have the characteristics identified by the AHRC as being necessary requirements of an effective NPM, being: adequate resourcing, access to places, information and people, independence, expertise, powers of recommendation and reporting, necessary privileges and immunities, and credibility; and
- (b) conduct its operations in accordance with the overriding principles of effective investigation as identified in this submission, being: independence, adequacy, promptness, transparency, complainant involvement and State initiation.

Recommendation No. 26:

Any newly established investigatory or oversight body should be protected by separate enabling legislation and regulations and be answerable directly to Parliament and not to the government of the day. Its key positions should be long-term appointments.

8.5 Police discipline and victim compensation

138. Allegations of breaches of Police powers must be investigated. Where allegations have been substantiated, the perpetrator must be prosecuted and punished and, if found guilty, compensation should be provided to the victim⁴⁵.
139. In 2007, the OPI conducted a review of the Police discipline system, finding it to be 'archaic, punitive, bureaucratic and slow'⁴⁶. The review made a series of recommendations to fundamentally reform the system, including that: it be simplified; be remedial rather than punitive; streamline the dismissal process; and, involve active management within all levels of command. PILCH endorses these recommendations.
140. PILCH submits that the Victorian Government must take steps to ensure that Police are held legally accountable for breaches of their powers. PILCH recommends that Victorian legislation should be amended to provide that the State is vicariously liable for all legal

⁴⁵ ICCPR Article 2(3) and paragraph 27 of the 2008 Obligations.

⁴⁶ Office of Police Integrity, *'Review of the Police Discipline System'* (2007, 12. also available at <http://www.opi.vic.gov.au/index.php?i=84>

wrongs committed by Police officers in the execution or purported execution of their duties.⁴⁷

141. PILCH recommends amending State anti-discriminatory laws to ensure that Police interactions with suspects are explicitly defined as a 'service', so that those interactions are appropriately subject to the obligation to respect, protect and fulfil the right to non-discrimination on prohibited grounds. PILCH also recommends that complaint investigation reports should be made available to victims to assist them in any civil litigation proceedings that they elect to bring, reversing the position where these are often only available to criminal prosecution and Police civil defence teams.

Recommendation No. 27:

The Police discipline system should be fundamentally reformed to:

- (a) simplify and improve timeliness of the system;
- (b) function as a remedial, rather than punitive, system;
- (c) streamline the dismissal process; and
- (d) require active involvement of all levels of command.

Recommendation No. 28:

Vicarious liability should attach to the State for legal wrongs committed by Police officers.

Recommendation No. 29:

Complaint investigation reports should be available to victims to assist them in civil litigation proceedings.

⁴⁷ See Tamar Hopkins and Hugh De Kretser, *'Reform to the Vicarious Liability of Victoria Police for Wrongs Committed by Police Officers'*, Submission to Victorian Minister for Police and Emergency Services (Federation of Community Legal Centres, 2008).