

Backgrounder: *Bare v Independent Broad-based Anti-corruption Commission (IBAC)*

The Court of Appeal will hand down its appeal decision in the matter of *Bare v IBAC* at 9.45am on Wednesday 29 July 2015 in the Red Room of the Supreme Court of Victoria. This judgment could have far-reaching implications for the investigation of complaints against police in Victoria.

1. The issue

The current practice of investigating complaints of misconduct by police has been criticised as being ineffective and lacking institutional independence and public confidence. Currently most complaints of police misconduct end up being referred back to Victoria Police for internal investigation. Consequently many victims of this misconduct will not pursue formal complaints; fearing police reprisals and having little or no confidence in this system.

2. Complaint investigation practice

Previously the two main entities responsible for investigating complaints were the Office of Police Integrity (**OPI**) and the Ethical Standards Division (**ESD**), which is now renamed the Police Conduct Unit of Professional Standards Command (**PSC**). The OPI was an independent statutory body, while ESD was an arm of Victoria Police. Under the current system, the vast majority of complaints (2010-11 – 80% of all matters investigated) were transferred to and investigated by ESD.

The Independent Broad-based Anti-corruption Commission (**IBAC**) has not fixed these problems. In fact, by combining police oversight with public sector oversight / investigations, Victoria arguably has a weaker system with less money and less attention devoted to police misconduct.

IBAC has the power to deal with serious police misconduct. However IBAC may also refer complaints back to the Chief Commissioner of Police. In practice a very high number of police complaints received by IBAC (around 90%) are referred back to Victoria Police.

3. Background to the case

The incident (February 2009)

Nassir Bare – a young man of Ethiopian descent living in the Western suburbs of Melbourne – alleges he was physically assaulted and racially abused by police officers. Nassir had his teeth chipped while being pushed into the gutter, being capsicum sprayed while handcuffed, and being racially slurred by Victoria Police officers in February 2009, when he was 17 years old.

Nassir seeks legal advice (2010)

Nassir sought legal assistance from Youthlaw and was informed of his legal options. Nassir requested that his complaint not be sent to the Victoria Police internal police investigation body (then ESD) as he feared reprisal from police in his local area. Both he and friends had numerous experiences of this type of treatment and he was worried information about his complaint may be passed on to the officer involved.

Instead Youthlaw sent his complaint to the oversight body (then the OPI). In the letter of complaint, Youthlaw requested that the complaint be investigated by the OPI and not be referred back to Victoria Police. Youthlaw submitted that it was in the public interest for the Director to investigate the complaint because of the seriousness of the assault, the appellant's age and the alleged racial discrimination.

OPI decided that while the complaint warranted investigation, it was adequate for a referral to Victoria Police's internal ESD for investigation.

OPI decision challenged in the Supreme Court (May 2012)

With pro bono assistance, Nassir sought judicial review of the OPI's decision in the Supreme Court. The case was heard between 16 and 29 May 2012 before Justice Williams.

Nassir challenged the OPI's decision partially on the basis that it was made in error and in breach of his human rights contained in the *Charter of Human Rights and Responsibilities 2006 (Vic)* (**Victorian Charter**).

It was argued that:

- section 10(b) of the Charter includes a right to an effective investigation of an arguable or credible claim of cruel, inhuman or degrading treatment by Victoria Police; and
- an effective investigation comprises an investigation by an organisation that has no hierarchical or institutional connection to, and has practical independence from, Victoria Police.

The case attracted the intervention of the Victorian Equal Opportunity and Human Rights Commission and the Victorian Attorney-General.

Supreme Court decision (March 2013)

On 25 March 2013, Justice Williams handed down her decision finding against Nassir and in favour of the OPI (now IBAC). Justice Williams' decision held that the police could lawfully investigate Nassir's complaint against police officers.

Justice Williams decided that the Victorian Charter does not contain an implied procedural right under section 10(b) to an 'effective' investigation of a claim of a breach of human rights stated in that section.

She also found there was not any jurisdictional error tainting OPI's main decision and that section 109 of the *Police Integrity Act 2008 (Vic)*:

- makes the OPI immune from judicial review; and
- prevents her looking at whether OPI decisions were contrary to Nassir's human rights.

Nassir appeals to the Court of Appeal of the Supreme Court (April 2013)

The grounds of the appeal included:

- The judge erred in finding that there is no right under the Victorian Charter to have complaints of serious assault by police officers effectively investigated by a body that is independent of Victoria Police.
- The Court should not have been prevented from hearing and determining important human rights questions by the *Police Integrity Act 2008 (Vic)* purporting to make the OPI immune from judicial review.

Protective Costs Order granted in the Court of Appeal (2 August 2013)

On 2 August 2013, the Court of Appeal made a landmark decision to grant a protective costs order to our client Nassir Bare so that he could continue with his case in the Court of Appeal.

This is a first for Victoria and creates a legal precedent to protect people bringing public interest cases where they might otherwise be stopped from doing so by prohibitive legal costs.

In this case the protective costs order is limited to \$5,000.

Court of Appeal hearing (May 2014)

Chief Justice Marilyn Warren, Justice Pamela Tate and Justice Joseph Santamaria heard the appeal case in May 2014.

Court of Appeal judgment (29 July 2015)

Nassir is seeking the following possible orders from the Court:

- A declaration that the OPI decision is unlawful and of no force or effect.
- A declaration that the decision was contrary to section 38 of the Victorian Charter.
- A declaration that Nassir has a right under section 10(b) of the Victorian Charter to an “effective investigation” by the State of Victoria of the incident.
- A declaration that an investigation of Nassir’s complaint by ESD of Victoria Police would not satisfy the requirements of section 10(b) of the Victorian Charter.
- An order compelling IBAC to make a decision under section 58 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) in relation to the correct course for dealing with the complaint made by Nassir.

4. What change is needed?

We will be calling on the Victorian Government to put in place the mechanisms and resources required to ensure all complaints of police misconduct are independently investigated.

For a number of years we have called for a truly independent investigatory body, along the lines of the Northern Ireland model, that investigates *all* police misconduct and corruption complaints, regardless of seriousness. The Northern Ireland Police Ombudsman, established in 2000, is fully independent and investigates all public complaints using civilian dominated investigation teams (75% of staff). There is also a capacity to appeal police decisions to an independent tribunal or to direct the Chief Constable to take disciplinary action.

In the absence of something like the Northern Ireland Ombudsman, our ‘next best’ options would involve strengthening IBAC so that IBAC:

- has a specialist focus on complaints of police misconduct (ie. a discrete police investigation unit);
- investigates all serious allegations against police (eg. allegations of assault); and
- it is satisfactorily resourced to conduct these investigations.

5. More information

For more information and media comments, please contact Tiffany Overall at Youthlaw at tiffany@youthlaw.asn.au or (03) 9611 2422.