

Investigations into the use of OC spray by Victoria Police



This is a summary of IBAC’s thematic review of a series of Victoria Police internal investigations into incidents involving the use of oleoresin capsicum aerosols (OC spray) by its officers.

What is a thematic review?

IBAC’s independent oversight of Victoria Police focuses on ensuring police act fairly, impartially and in accordance with the law.

Part of this important role is to review selected internal police investigations, to assess whether they are thorough, impartial and fair, findings are evidence based, and outcomes are reasonable and in accordance with public expectations.

When IBAC identifies areas of concern indicating possible systemic problems, we conduct a thematic review. This involves an analysis of a series of reviews on a specific theme or topic and usually results in a report identifying systemic and emerging issues for Victoria Police.

Following a thematic review, IBAC works with Victoria Police to drive improvements and provide input into the development of police policies to reduce misconduct, strengthen investigation processes and increase accountability.

Why is OC spray used?

Oleoresin capsicum aerosols are available to police and protective services officers (PSOs). When sprayed into a person’s eyes, they can cause a burning sensation and temporary blindness. They also have the potential to cause other physical and psychological harm.

Oleoresin capsicum aerosols can be used in the form of a liquid spray or a foam and are often called ‘capsicum’ or ‘pepper’ spray. In this summary, we use the term OC spray.

Currently, the Victoria Police Manual (VPM) advises that OC spray should only be used where there are ‘reasonable grounds to believe the use is necessary and proportionate in situations of:

- violence or serious physical confrontation
- where violent or serious physical confrontation is imminent
- where a person is involved in violent or other physical conduct and likely to seriously injure themselves or result in suicide.’

The VPM also says that officers should not use OC spray ‘when a person is only passively resisting e.g., simply hanging limp or refusing to comply with instructions only’.

Background

IBAC regularly assesses and refers allegations of excessive use of force to Victoria Police where it is considered that Victoria Police is the more appropriate body to conduct the investigation. IBAC reviews some of these investigations once they are completed.

Incidents where Victoria Police officers have allegedly misused OC spray have attracted media attention and public concern in recent years. In some cases, alleged victims have taken legal action against Victoria Police.

IBAC has investigated specific cases of use of force including the use of OC spray in Operations Henty and Boyne.

The use of force by Victoria Police officers is an ongoing focus for IBAC.

Scope

IBAC reviewed 15 internal investigations by Victoria Police into incidents involving the use of OC spray by police officers and PSOs. All incidents occurred between January 2020 and March 2022.

In each case, IBAC looked closely at:

- police and PSO interactions and the standard of aftercare when OC spray was used
- the quality of the internal Victoria Police investigation, including critical analysis of the use of force, the physical and psychological impacts and human rights.

Key findings

IBAC identified issues with all 15 investigations reviewed and found that nine investigations were not of the expected standard. IBAC's reviews also indicated that some Victoria Police officers consider that using OC spray is a 'low level' type of force.

This was evident by the actions of officers during incidents, the classification of complaints involving the use of OC spray as 'minor misconduct', and the standard of most internal investigations that examined these incidents.

In many cases, IBAC identified:



the decisions and actions of police escalated incidents or increased the risk of safety of those involved



officers did not provide a verbal warning prior to the use of OC spray where possible, despite specific policy advising officers to do so



officers provided insufficient aftercare to people affected by OC spray in a third of cases



officers and investigators did not consider the potential physical and psychological harm caused by OC spray



officers and investigators did not properly consider human rights when using OC spray



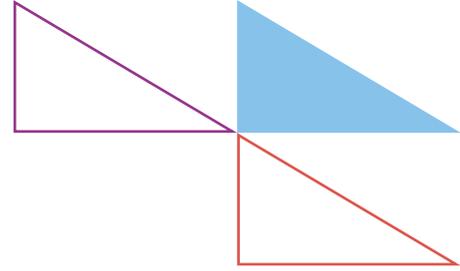
investigations into incidents involving OC spray were not rigorous



Victoria Police did not accurately record when allegations of excessive use of OC spray were substantiated



Victoria Police did not impose serious disciplinary action when allegations were substantiated.



Case studies

Three of the 15 Victoria Police investigations that IBAC reviewed are summarised on the next two pages.

Case study one

In April 2021, police responded to a request for a welfare check on a person who suggested that they might harm themselves. As the officers arrived at the house, the person called to confirm they were okay. The request for a welfare check was then cancelled.

Despite this, a number of officers remained at the house and knocked on the front door. They heard the person yelling but they wouldn't come to the door. The officers formed the opinion that the person was highly aggressive and possibly experiencing a mental health episode.

The person in the house partially opened the front door and the officers attempted to grab them. The officers stated that they thought the person was reaching for a baseball bat, so they used OC spray to apprehend them under the former Mental Health Act (this has since been replaced by the Mental Health and Wellbeing Act). Officers handcuffed the person and provided aftercare until an ambulance took them to hospital for assessment.

After the incident, a complaint was lodged alleging the officers used excessive force. Victoria Police managed the complaint through its local resolution process and recorded it as 'resolved'.

IBAC's review identified the following issues with Victoria Police's management of the complaint:

- a perceived conflict of interest was not identified by the resolution officer and the proper conflict of interest process was not followed
- the resolution officer did not contact all relevant officers and or other witnesses to make enquiries about the complaint
- the resolution officer did not explain how the matter had been resolved in their report
- the resolution officer's analysis of police conduct (including risk assessment, decision making, use of force and aftercare) lacked sufficient detail and consideration of human rights.

Case study two

In August 2021, police found out about a planned gathering to protest the Chief Health Officer's COVID-19 stay-at-home orders in a regional town. Police officers were told to approach people in the area, challenge their reason for leaving home, issue fines, and direct them to go home. Officers were told to arrest anyone who did not immediately comply with their directions.

During the operation, officers approached a person and asked them what they were doing in the area. The person asked to see the officers' identification. The officers and the person repeated their questions in a short interaction before the sergeant took them to the ground. The officers struggled with the person on the ground for several minutes, trying to turn them over and handcuff them. The person fought against the officers and asked them to stop and treat them respectfully.

The officers warned the person they would be sprayed if they didn't follow their directions. The sergeant then deployed OC spray directly to their face.

The officers then put handcuffs on the person and applied water to their face before dragging them to the police van. The sergeant asked them to put their feet fully in the van and warned that they would strike them with a baton if they didn't. The sergeant then hit the person in the legs.

The person was taken to a police station and held in custody for more than 24 hours. Their next of kin was not notified. During their time in custody, they were taken to hospital for treatment and found to have suffered multiple injuries.

Without interviewing the person first, the officers charged them with multiple offences including assaulting police, resisting police and failure to follow directions.

Case study two (continued)

The person lodged a complaint that included multiple allegations including excessive force, unlawful arrest, wrongful bail conditions, and duty failures around their care while in custody. Victoria Police's investigation only considered the allegations relating to excessive force and determined that none of the allegations were substantiated.

IBAC's review identified the following issues with Victoria Police's investigation into the matter:

- the investigation scope only included the excessive force allegations, despite the person raising issues about their arrest, time in custody and human rights
- the investigator's analysis of the use of force was limited in detail and favoured the officers' version of events
- the investigator's consideration of human rights was insufficient
- there was evidence suggesting that the officers involved in the incident and those involved in the investigation tried to cover up what happened.

Case study three

In February 2022, police responded to reports that a person was having a mental health episode, damaging property and threatening residents. As officers approached them, the person attempted to grab one of them by the throat. The officer immediately used two bursts of OC spray on their face and took them to ground. Officers apprehended them under the former Mental Health Act (this has since been replaced with the Mental Health and Wellbeing Act). They were handcuffed while lying on their stomach for eight minutes before they became unconscious. They were then taken to hospital by an ambulance.

The person also suffered a fracture however the investigation file did not explain how or when this happened.

Victoria Police conducted an oversight investigation and determined that the officers acted appropriately. The file noted that the person did not lodge a complaint.

IBAC's review identified the following issues with Victoria Police's investigation into the matter:

- the investigation was not timely
- the investigator did not contact the majority of officers involved or any other witnesses to make enquiries
- the investigator's analysis of use of force was insufficient and overly relied on body worn camera footage
- the Ethics and Professional Standards Officer (EPSO) who was overseeing the investigation did not identify any of the above issues.

The investigator's report also didn't mention important health and safety considerations such as:

- whether the person lost consciousness due to the use of OC spray
- the increased risk of suffocation when the person was handcuffed while lying on their stomach.



Recommendations

Considering the findings of this thematic review, in February 2023, IBAC recommended that Victoria Police:

- conduct regular refresher training to all officers on the appropriate and safe use of OC spray with a focus on the potential for psychological and physical injuries, and the steps for providing aftercare.
- update its policies to include advice on:
 - » the psychological and physical injuries that OC spray can cause
 - » how verbal warnings should be issued before using OC spray
 - » using OC spray on someone in charge of a vehicle.
- develop a step-by-step guide for administering OC aftercare that is accessible to officers.
- where the use of OC spray has resulted in serious physical or psychological injury, the Police Conduct Unit:
 - » classifies these complaints as ‘serious misconduct’
 - » determines whether welfare support for the complainant or affected person is required during the complaint or oversight investigation process.
- shares IBAC’s thematic review with all EPSOs and ensures EPSOs improve their monitoring of investigations into allegations of misuse of OC spray.



Victoria Police response

Victoria Police either partially or fully accepted all of IBAC’s recommendations.

In September 2023, Victoria Police provided IBAC with a progress report, which included that Victoria Police:

- identified some opportunities for refresher training about using OC spray
- intends to amend the advice within relevant manuals and policies to ensure consistency and include improved direction on OC aftercare
- presented the findings of this thematic review to the EPSOs group in May 2023.

IBAC continues to work with Victoria Police to oversight and monitor this important issue.



Useful resources

What is police misconduct?

www.ibac.vic.gov.au/what-police-misconduct

Other IBAC reviews

www.ibac.vic.gov.au/reviews



Safely report police misconduct to IBAC or provide information anonymously.



Fill out the secure online form at www.ibac.vic.gov.au



If you have difficulty accessing the online form, call us on **1300 735 135** for further assistance.



If you need help with translation, call Translating and Interpreting Service on **13 14 50** or visit www.ibac.vic.gov.au/mylanguage