

ombudsman VICTORIAN

**Investigation into a complaint about the
conduct of Authorised Officers on V/Line**

February 2014

Ombudsman Act 1973

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Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament a report into an *Investigation into a complaint about the conduct of Authorised Officers on V/Line*.



G E Brouwer

OMBUDSMAN

4 February 2014

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Introduction

1. In December 2010, I tabled a report in Parliament titled *Investigation into the issuing of infringement notices to public transport users and related matters*. In that investigation, I identified:
 - deficiencies in the authorisation process that resulted in some Authorised Officers being employed who are not appropriate to perform the role
 - the failure of public transport operators to comply with legislative requirements that they notify the former Department of Transport¹ of serious incidents involving Authorised Officers
 - examples of inappropriate conduct and excessive force used by Authorised Officers.

Complaint to my office

2. On 8 April 2013, I received a complaint about the conduct of Authorised Officers on public transport from a witness to an incident on a V/Line train. The witness was travelling from Castlemaine to Melbourne on Sunday 24 March 2013. Four other independent civilian witnesses also asked to be a party to the complaint to my office.
3. The complainants who were all in the same carriage of the train, alleged that a number of Authorised Officers had forcibly removed a male passenger from their carriage of the train at the Sunbury Railway Station. They alleged that the passenger, described by a police officer who attended the Sunbury Railway Station as a 'frail 62 year old man', had excessive force used against him by the Authorised Officers.

Authorised Officers on V/Line

4. V/Line operates more than 1,400 train services each year between Melbourne and regional Victoria. It employs over 1,400 staff, including 216 conductors and 11 Authorised Officers.
5. Authorised Officers are persons who are either employed or engaged by the Department of Transport, Planning and Local Infrastructure (the Department) or by transport companies. They are authorised to perform statutory duties and functions essential to the successful and safe delivery of public transport services.
6. Authorised Officers are so authorised by the Secretary of the Department. The Department and the relevant transport authority, such as V/Line, have a shared responsibility to ensure that Authorised Officers perform their duties in line with the *Transport (Compliance and Miscellaneous) Act 1983* (Transport Act) and undertake proper training.
7. Authorised Officers have extensive powers including the power to arrest a suspected offender.

¹ Now Department of Transport, Planning and Local Infrastructure.

Authorised Officers involved in this incident

8. The Authorised Officer Regulation, Training and Accreditation Team (AORTA) at the Department advised my office that in the past V/Line had temporarily suspended the authority of three of the Authorised Officers involved in this incident for their conduct. AORTA advised my office that:
 - One Authorised Officer was suspended in 2011 ‘due to unreasonable force (tripping) and inaccurate recording of an incident’.
 - Two Authorised Officers were suspended in 2009 ‘due to inappropriate action and statements not reflecting the true events surrounding the incident’.
9. In response to my draft report V/Line stated:

Firstly, only AORTA, not V/Line, has the authority to suspend the authorisation of Authorised Officers. Secondly, as set out in an email to [case officer] dated 5 August 2013, “V/Line does not have any record of [Officer A] or [Officer B] being suspended following the Lara incident” and I can advise that no Authorised Officer involved in this incident has been suspended from carrying out duties due to his conduct whilst an Authorised Officer at V/Line.
10. It is not clear to me if these suspensions ever took place.
11. In my 2010 investigation, I identified problems with the authorisation process and the completion of criminal records checks for individuals seeking to become Authorised Officers.
12. My current investigation identified that one Authorised Officer involved in this investigation was charged with assault in 2007 and as a result was placed in a diversion program. The Department advised my office that the officer declared this charge in his initial application to become an Authorised Officer.
13. In response to my draft report V/Line stated:

... the assault referred to occurred before that person became an Authorised Officer and no conviction was recorded.
14. The Policy Guidelines for the purposes of section 221C(1)(b) of the Transport Act, state that a ‘justifiable refusal to authorise’ includes if the applicant has been charged with a criminal offence. The Department did not refuse to authorise the officer on these grounds.

Investigation

15. My investigation involved examining V/Line records; interviewing the Authorised Officers and other witnesses; interviewing the Victoria Police officers who attended the scene; interviewing a defensive training consultant; and examining closed circuit television footage (CCTV) from the platform of the station and a video from a work mobile telephone of one of the Authorised Officers.

Issues

16. Despite my concerns in 2010, and the Department's commitment to improve the role and performance of Authorised Officers, my investigation identified serious issues in relation to the Authorised Officers' conduct as a result of their training. While the Department implemented 11 of the 12 recommendations arising from my 2010 report², the recommendation regarding the review of the training provided to Authorised Officers 'to ensure that the officers have the necessary skills and expertise to undertake their roles and are aware of their responsibilities' does not seem to have had any impact on the conduct of the officers involved in this incident.

Events on the train

17. The passenger, a 62 year old man, was travelling from Castlemaine to Melbourne on a V/Line train. The complainants raised concerns about the way two Authorised Officers approached the man and three Authorised Officers removed the man from the train. The complainants stated that the behaviour of the man prior to the Authorised Officers' approach did not cause them concern. It is not in dispute that the passenger was consuming alcoholic cider on the train.
18. The complainants said that the actions of the Authorised Officers on the train in their handling of the passenger were excessive.
19. The Train Conductor provided the contact details of two other passengers as witnesses to the incident on the train. One witness advised my officers that he was not on the same carriage as the man. The other witness considered that as it is an offence to drink alcohol on the train, the conduct of the Authorised Officers was reasonable. This witness did say however, that she could not recall what was said by either party during the incident and that one Authorised Officer 'grabbed' the man 'forcefully'.
20. Another witness to the incident contacted V/Line to make a compliment about the way the Authorised Officers handled the man on the train. This witness did not observe the initial approach by the Authorised Officers and only saw the incident when the man was being escorted down the aisle and out of the train. This witness advised V/Line in her compliment that the Authorised Officers made her 'feel safe'.

² Victorian Ombudsman, *Investigation into the issuing of infringement notices to public transport users and related matters*, December 2010.

21. There are no CCTV cameras in V/Line train carriages.
22. In response to my draft report V/Line alleged that the passenger 'assaulted' an Authorised Officer and the Authorised Officers' written statements state this. However, as the Authorised Officers declined to answer questions they could not be questioned on this issue. Also, the Senior Constable who attended at the station said: 'None of the V-Line Officers stated to me that they had been assaulted and wanted to take the matter further'.

On the station platform

23. The events as they occurred on the station platform were captured on CCTV footage and on an Authorised Officer's mobile telephone. An edited version of this footage is attached to this report³.
24. By the time the passenger is seen on the station platform CCTV camera, he is being escorted by two large Authorised Officers with his pants down around his ankles. No explanation has been given as to why the passenger's pants had fallen down. He was clearly concerned about this and can be heard complaining on the Authorised Officer's mobile phone video. The Authorised Officers say in their reports that the passenger struggled and was resisting. They therefore put him to the ground, as can be seen in the video, held him there forcibly for in excess of nine minutes, until two Victoria Police officers arrived at the scene.

Interviews of the Authorised Officers

25. While the Authorised Officers completed contemporaneous file notes about this incident, they met and discussed the incident before preparing their statements. Evidence provided to my office suggests this was consistent with their training.
26. At interview, four of the five Authorised Officers declined to answer questions in relation to the incident on the advice of their legal representatives, claiming the privilege against self-incrimination.

Arrival of Victoria Police

27. When the two Victoria Police officers arrived on the station platform, at their direction, the passenger was released from restraint on the ground and was allowed to sit, unrestrained, on a nearby bench. Subsequently, the senior of the two police officers allowed the passenger to continue his journey on the basis that 'the situation had been calmed down by myself and (the other constable)'. In the police officer's view, the passenger had been 'dealt with harshly' by the Authorised Officers. He formed the opinion that the tactics used by the Authorised Officers 'far outweighed how a reasonable and fair person would expect to be treated'.

³ The full CCTV recording and the officer's mobile phone recording were provided to both the Department and V/Line. For the purposes of this report, they have been reduced from a total of 30 minutes and 38 seconds to 3 minutes and 44 seconds of footage to cover the key issues identified in this report.

The internal review of the incident

28. After the incident, there was an informal debriefing session conducted with the Authorised Officers by V/Line. However, V/Line did not have the benefit of the CCTV footage, as this had not been provided by the Department.
29. Having been shown the platform CCTV, the Manager of Security, Emergency and Authorised Officers for V/Line acknowledged that 'from a public perception, the incident does not look good'.
30. In response to my draft report V/Line stated:

... this quote was made as part of an explanation that the entire context of an incident needs to be considered.

The Charter of Human Rights and Responsibilities Act 2006

31. Section 22(1) of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) provides that:

All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
32. It is clear from the CCTV footage and the Authorised Officer's video of the incident on the platform that the passenger was not treated in a manner that could be said to comply with section 22. He is a 62 year old man forcibly restrained on the ground by the upper body, with his pants around his ankles, for a lengthy period of time. There seems to be no valid reason for this conduct by the Authorised Officers.
33. In response to my draft report V/Line stated:

We do note that there has been in the past customer assaults ... and other situations where restraint has been required for employee safety.
34. However, it is clear that the Authorised Officers acted, whilst in a heavy handed way, in accordance with their training. In interviewing the training consultant who had previously trained each of the Authorised Officers involved in the incident, it was acknowledged that he had some reservations about the way the Authorised Officers dealt with the passenger's trousers and removal from the bench on the platform.

Conclusions

Use of force

35. It is not in dispute that the passenger was drinking alcoholic cider on the train. Nor is it disputed that the Authorised Officers were lawfully entitled to remove him from the train. However, in my view it is clear that he was handled in a heavy handed manner despite being, as described by the police officer, a frail person. I am satisfied that unnecessary force was used on him both in his removal from the train and being held for nine minutes face down on the platform by the Authorised Officers.
36. In response to my draft report the Department stated:
- It is acknowledged that ascertaining whether reasonable force was used in a particular situation will always involve degrees of subjective judgement. In this instance, however, there is demonstrably insufficient evidence available to conclude that unnecessary force was used.
- Given the differing accounts of witnesses, and the absence of CCTV footage, it is not possible for any body outside the court system to draw a conclusion on the reasonableness of the level of force applied. In order to be more balanced, the draft report needs to emphasise specifically that Victoria Police did not lay charges against the authorised officers involved. Victoria Police, accordingly, must have reached a conclusion that the use of unreasonable force by those officers could not be proved beyond a reasonable doubt.
37. However, Victoria Police were not involved in the assessment of the Authorised Officers' conduct. Rather, the police officers attended the station at the request of the Authorised Officers. In addition, I am satisfied that the evidence from independent witnesses, including the female passenger seated next to the man, and the state of the man's clothing, with his pants down, together with the CCTV on the platform, supports the view that unnecessary force was used.
38. It would appear that the Authorised Officers were simply acting in accordance with their training. I consider that the training of Authorised Officers by V/Line in restraint techniques should therefore be reconsidered in light of this incident, particularly as I am investigating another incident involving allegations of excessive use of force.
39. In response to my draft report the Department stated:
- Finally, the draft report states that the authorised officers' 'acted, whilst in a heavy handed way, in accordance with their training'. This statement suggests that the training provided to authorised officers does not address the need for those officers to take account of particular circumstances when deciding what degree of force to apply. That is not the case. The proper use of force is detailed in the 'use of force' chapter of the *Authorised Officers Law and Procedures Reference Notes*.
- Proper adherence to the detail in this chapter would result in officers refraining from acting in a heavy handed way.

40. The difficulty I have with this argument is that the CCTV of the Authorised Officers' conduct on the platform clearly demonstrates my concern about the Authorised Officers' 'heavy handed' approach. Authorised Officers used restraint techniques learned in training prior to employing other forms of de-escalation strategies. V/Line's training on the use of force is also created and facilitated by an external consultant which does not appear to reference the *Authorised Officers Law and Procedures Reference Notes* referred to by the Department in its response.

Preparation of Statements

41. While the reference notes used by Authorised Officers state that they must submit their own account, they encourage Authorised Officers to present a consistent account of events. In this particular case, they collectively discussed the incident before preparing their statements. Such joint discussion of an incident could lead to allegations of collusion to ensure that all the witnesses corroborate each other on key events. This, in my view, is inappropriate and unprofessional.
42. I consider that the training notes provided to Authorised Officers by both V/Line and the Department should be reviewed in light of this matter.
43. In response to my draft report V/Line stated:
- V/Line strives to undertake continuous improvement and will review its procedures after a notifiable incident or arrest to ensure that any professional development opportunities are identified. In particular, since this incident:
- V/Line's Authorised Officers are now reporting into our Customer function rather than Security, with an emphasis on assisting customers; and
 - we engaged Victoria Police to undertake a review of our training on the use of physical restraint.

Human Rights

44. Once the passenger was arrested and detained by the Authorised Officers, they were obliged to treat him in a manner that was consistent with his right to humane treatment, as set out in section 22 of the Charter.
45. Both the use of force applied on the passenger, particularly while on the platform, and the fact that his trousers were down for a lengthy period of time in a public place where he might be viewed by other travellers, was not consistent with complying with the provisions of the Charter.
46. I consider that the Department and V/Line's training of its Authorised Officers was deficient in this regard. I therefore consider that specific training in the provision of the Charter should be given to Authorised Officers.

CCTV

47. The CCTV on the platform provided graphic detail of the incident. It is also an objective record of what took place. There is no CCTV available in V/Line carriages. If there had been, it would have not only assisted my investigation but would have provided objective evidence rather than having to rely on the oral evidence of witnesses.
48. I note that there are CCTV cameras in Metro trains in Melbourne. I consider that CCTV cameras should be introduced in V/Line trains to provide a safe environment, both for passengers and employees of V/Line.

Self-incrimination

49. The availability of privileges in Ombudsman investigations, particularly the privilege against self-incrimination, is not consistent with the objectives of integrity investigations and unnecessarily hampers their operation and effectiveness.
50. My investigations are conducted for the purpose of ascertaining the truth. My role is not to conduct an investigation so as to prosecute or penalise individuals concerned. This is the function of criminal and civil legal proceedings before courts and tribunals.
51. I have raised my concerns about witnesses being able to refuse to answer questions on the grounds of self-incrimination in the past. I consider that the availability of the self-incrimination privilege in inquisitorial investigations such as mine is undesirable as it interferes with the effectiveness of my investigations. I note that Victorian Royal Commissions, the Commonwealth Ombudsman, the Independent Broad-based Anti-corruption Commission and the Victorian Inspectorate operate under no such constraints. I consider that such a limitation on my jurisdiction should be removed.

Recommendations

I recommend that the Department of Transport, Planning and Local Infrastructure:

Recommendation 1

Install CCTV cameras in all V/Line trains to ensure the safety of the travelling public and its employees.

Department response

The Department accepts the recommendations in the draft report, subject to necessary funding being made available.

V/Line response

V/Line also welcomes Recommendation 1 on the installation of CCTV on V/Line trains to assist in the safety of our customers and staff. As the first step in this process, CCTV equipment (saloon and forward facing cameras) will be fitted on a three carriage Vlocity train unit for six month trial commencing in late December 2013. The further roll out of CCTV on the V/Line fleet is dependent on the outcome of this trial and the promise of funding.

Recommendation 2

Review the training provided to Authorised Officers on the preparation of statements.

Department response

The Department accepts the recommendations in the draft report, subject to necessary funding being made available.

Recommendation 3

Review the training provided to Authorised Officers on use of restraints and arrest.

Department response

The Department accepts the recommendations in the draft report, subject to necessary funding being made available.

Recommendation 4

Ensure that Authorised Officers received regular training on the provisions of the *Charter of Human Rights and Responsibilities Act 2006*.

Department response

The Department accepts the recommendations in the draft report, subject to necessary funding being made available.

I recommend that V/Line:

Recommendation 5

Review its procedures for debriefing after a notifiable incident or arrest to ensure that any professional development opportunities are identified as a result.

V/Line response

Accepted.

Recommendation 6

Issue an apology to the passenger for the way in which he was treated during his arrest and detention.

V/Line response

Accepted.

I recommend that the Victorian Government:

Recommendation 7

Amend the *Ombudsman Act 1973* to remove the privilege against self-incrimination as a basis for an individual to refuse to answer questions.

Ombudsman's Reports 2004-14

2013

Ombudsman Act 1973 Investigation into children transferred from the youth justice system to the adult prison system
December 2013

Ombudsman Act 1973 Review of the governance of public sector boards in Victoria
December 2013

Ombudsman Act 1973 Report on issues in public sector employment
November 2013

Ombudsman Act 1973 A section 25(2) report concerning the constitutional validity of aspects of Victoria's new integrity legislation
October 2013

Ombudsman Act 1973 Own motion investigation into unenforced warrants
August 2013

Whistleblowers Protection Act 2001 Investigation into allegations of improper conduct by a Magistrates' Court registrar
May 2013

2012

Own motion investigation into the governance and administration of the Victorian Building Commission
December 2012

A section 25(2) report to Parliament on the proposed integrity system and its impact on the functions of the Ombudsman
December 2012

Whistleblowers Protection Act 2001 Investigation into allegations concerning rail safety in the Melbourne Underground Rail Loop
October 2012

Whistleblowers Protection Act 2001 Investigation into allegations of improper conduct by CenITex officers
October 2012

Whistleblowers Protection Act 2001 Investigation into allegations of improper conduct involving Victoria Police
October 2012

Whistleblowers Protection Act 2001 Investigation into allegations against Mr Geoff Shaw MP
October 2012

Investigation into the temporary closure of Alfred Health adult lung transplant program
October 2012

Investigation into an alleged corrupt association
October 2012

Whistleblowers Protection Act 2001 Investigation into allegations of detrimental action involving Victoria Police
June 2012

Own motion investigation into Greyhound Racing Victoria
June 2012

The death of Mr Carl Williams at HM Barwon Prison – investigation into Corrections Victoria
April 2012

Whistleblowers Protection Act 2001 Conflict of interest, poor governance and bullying at the City of Glen Eira Council
March 2012

Investigation into the storage and management of ward records by the Department of Human Services
March 2012

2011

Investigation into the Foodbowl Modernisation Project and related matters
November 2011

Investigation into ICT-enabled projects
November 2011

Investigation into how universities deal with international students
October 2011

Investigation regarding the Department of Human Services Child Protection program (Loddon Mallee Region)
October 2011

Investigation into the Office of Police Integrity's handling of a complaint
October 2011

SafeStreets Documents – Investigations into Victoria Police's Handling of Freedom of Information request
September 2011

Investigation into prisoner access to health care
August 2011

Investigation into an allegation about Victoria Police crime statistics
June 2011

Corrupt conduct by public officers in procurement
June 2011

Investigation into record keeping failures by WorkSafe agents
May 2011

Whistleblowers Protection Act 2001

Investigation into the improper release of autopsy information by a Victorian Institute of Forensic Medicine employee
May 2011

Ombudsman investigation - Assault of a Disability Services client by Department of Human Services staff
March 2011

The Brotherhood - Risks associated with secretive organisations
March 2011

Ombudsman investigation into the probity of The Hotel Windsor redevelopment
February 2011

Whistleblowers Protection Act 2001

Investigation into the failure of agencies to manage registered sex offenders
February 2011

Whistleblowers Protection Act 2001

Investigation into allegations of improper conduct by a councillor at the Hume City Council
February 2011

2010

Investigation into the issuing of infringement notices to public transport users and related matters
December 2010

Ombudsman's recommendations second report on their implementation
October 2010

Whistleblowers Protection Act 2001

Investigation into conditions at the Melbourne Youth Justice Precinct
October 2010

Whistleblowers Protection Act 2001

Investigation into an allegation of improper conduct within RMIT's School of Engineering (TAFE) - Aerospace
July 2010

Ombudsman investigation into the probity of the Kew Residential Services and St Kilda Triangle developments
June 2010

Own motion investigation into Child Protection - out of home care
May 2010

Report of an investigation into Local Government Victoria's response to the Inspectors of Municipal Administration's report on the City of Ballarat
April 2010

Whistleblowers Protection Act 2001

Investigation into the disclosure of information by a councillor of the City of Casey
March 2010

Ombudsman's recommendations - Report on their implementation
February 2010

2009

Investigation into the handling of drug exhibits at the Victoria Police Forensic Services Centre
December 2009

Own motion investigation into the Department of Human Services - Child Protection Program
November 2009

Own motion investigation into the tendering and contracting of information and technology services within Victoria Police
November 2009

Brookland Greens Estate - Investigation into methane gas leaks
October 2009

A report of investigations into the City of Port Phillip
August 2009

An investigation into the Transport Accident Commission's and the Victorian WorkCover Authority's administrative processes for medical practitioner billing
July 2009

Whistleblowers Protection Act 2001 Conflict of interest and abuse of power by a building inspector at Brimbank City Council
June 2009

Whistleblowers Protection Act 2001

Investigation into the alleged improper conduct of councillors at Brimbank City Council
May 2009

Investigation into corporate governance at Moorabool Shire Council
April 2009

Crime statistics and police numbers
March 2009

2008

Whistleblowers Protection Act 2001 Report of an investigation into issues at Bayside Health
October 2008

Probity controls in public hospitals for the procurement of non-clinical goods and services
August 2008

Investigation into contraband entering a prison and related issues
June 2008

Conflict of interest in local government
March 2008

Conflict of interest in the public sector
March 2008

2007

Investigation into VicRoads' driver licensing arrangements
December 2007

Investigation into the disclosure of electronic communications addressed to the Member for Evelyn and related matters
November 2007

Investigation into the use of excessive force at the Melbourne Custody Centre
November 2007

Investigation into the Office of Housing's tender process for the cleaning and gardening maintenance contract - CNG 2007
October 2007

Investigation into a disclosure about WorkSafe's and Victoria Police's handling of a bullying and harassment complaint
April 2007

Own motion investigation into the policies and procedures of the planning department at the City of Greater Geelong
February 2007

2006

Conditions for persons in custody
July 2006

Review of the *Freedom of Information Act 1982*
June 2006

Investigation into parking infringement notices issued by Melbourne City Council
April 2006

Improving responses to allegations involving sexual assault
March 2006

2005

Investigation into the handling, storage and transfer of prisoner property in Victorian prisons
December 2005

Whistleblowers Protection Act 2001
Ombudsman's guidelines
October 2005

Own motion investigation into VicRoads registration practices
June 2005

Complaint handling guide for the Victorian Public Sector 2005
May 2005

Review of the *Freedom of Information Act 1982*
Discussion paper
May 2005

Review of complaint handling in Victorian universities
May 2005

Investigation into the conduct of council officers in the administration of the Shire of Melton
March 2005

Discussion paper on improving responses to sexual abuse allegations
February 2005

2004

Essendon Rental Housing Co-operative (ERHC)
December 2004

Complaint about the Medical Practitioners Board of Victoria
December 2004

Ceja task force drug related corruption - second interim report of Ombudsman Victoria
June 2004

