



# Police Accountability and Human Rights Clinic

Report on the first year of operation

2015

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We acknowledge the First Peoples of Australia and the Traditional Owners of the land on which this project was undertaken and pay our respects to elders past and present.

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Melbourne Law School

Victorian Legal Services  
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## About the Police Accountability Project

The Police Accountability Project (PAP) is a specialist, innovative, public interest legal project located within the Flemington and Kensington Community Legal Centre, taking the lead in police accountability law and strategies. It is based in the legal centre in Kensington, Victoria, Australia.

PAP was formed in 2007 and provides victim-centred remedies, strategic litigation and case work, evidence based research, community support and policy and law reform advocacy around a range of key police accountability issues. PAP aims to drive the political, cultural and systemic change required for true police accountability.

PAP is recognised as a flagship specialist legal project and has achieved considerable impacts and national and international recognition over recent years. PAP has been able to attract considerable pro-bono assistance and a very dedicated and talented staff and volunteer base, has received numerous awards and shortlistings and has achieved some incredible and unprecedented legal outcomes.

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## About the Melbourne Law School Public Interest Law Initiative

Melbourne Law School (MLS) launched the Public Interest Law Initiative (PILI) in 2012. PILI aims to give students practical legal experience and provide the community with much needed additional resources for public interest law causes, particularly the provision of legal advice and assistance to disadvantaged clients. PILI offers a range of innovative subjects and experiential learning opportunities to students, which include external placements, internships and clinics, supplemented by induction and debrief sessions and a series of relevant seminars. These opportunities allow students to develop practical legal skills, while making a real difference to the lives of the most vulnerable in our society.

PILI provides students with experience in public interest law environments where they can develop skills through practical application of their legal knowledge. Clinical law placements allow students to facilitate access to justice for members of the community experiencing financial and social disadvantage.

Clinical legal education (CLE) is a method of teaching and learning law that involves students taking on the on the practical role and responsibilities of a lawyer in a supervised practice setting. Through working with real clients, students develop not only their knowledge of a substantive area of law and practice-related skills but an enhanced ethical and professional awareness and critical understanding of law and society. Key elements of a clinical program are the emphasis on self-reflection and development of a student's professional ethical awareness. Like most CLE programs, PILI clinical courses are a form of service learning, where student learning occurs in the context of meaningful contribution to the community.<sup>1</sup>

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<sup>1</sup> Best Practices: Australian Clinical Legal Education (2013) 10

## Introduction

In March 2015, the Flemington & Kensington Community Legal Centre's ("FKCLC") Police Accountability Project, in conjunction with the Melbourne University Law School commenced running Victoria's first state-wide police complaints clinic. This report details the first year of the clinic's operation.

In September 2015 the clinic received funding for two years from the Victorian Legal Services Board (LSB)

Victoria's first Police Accountability and Human Rights Clinic provides advice, referral, support and casework to victims of police misconduct and greatly expands FKCLC's capacity to meet this identified high legal need.

The clinic runs during university semesters and sees an average of four new clients a week during this period. The clinic also provides people with basic advice about how to make a police complaint and how to do a Freedom Of Information (FOI) application.

The aim of the clinic is to:

1. Advise people with complaints against police about how to make a complaint and obtain information from Victoria Police.
2. Provide casework assistance in relation to police complaints to people who meet our guidelines during university semesters and where capacity exists.
3. Advocate to improve people's experiences of the complaint system and if possible to improve the outcomes of the complaints process.
4. Collect data about complaints against Victoria Police and the effectiveness of Victoria's complaint system.
5. Refer people who wish to take civil action in relation to their matter to appropriate law firms;
6. Refer people seeking assistance with criminal defences in contexts where they wish to make a complaint.
7. Advocate for a more effective and independent police complaint system.

## Key findings

1. Of the 51 allegations filed through the clinic as complaints with Victoria Police during 2015, only 1 was substantiated. This is a 2% substantiation rate.
2. The most frequent allegation made was excessive force.
3. Complainants came to the clinic from around the State with the highest concentration in the inner-west.
4. There continue to be allegations of racially biased policing despite Victoria Police's zero tolerance towards racial profiling.
5. There is a far higher demand for our service than we can provide. We were able to provide ongoing casework for 67 people. 55 people seeking criminal defence work for matters linked to their police complaint were turned away. 112 people seeking ongoing casework assistance were turned away.



## The current complaint system in Victoria

In Victoria there are three ways you can file a complaint against police.

The first is to make a complaint at a local police station.

The second is to make a complaint to the Police Conduct Unit (PCU) – a Unit within Professional Services Command (PSC) of Victoria Police. The role of PSC is to enhance and further promote a culture of high ethical standards throughout Victoria Police. The Police Conduct Unit (PCU) was set up for people wishing to make a complaint or compliment on service given by a particular Police Member.

The third is to make a complaint to the Independent Broad-based Anti-Corruption Commission (IBAC). The overwhelming majority of complaints made to IBAC are either dismissed or referred to Victoria Police for investigation.

### Police Complaint Substantiation Rates

Less than 10% of all complaints to Victoria Police are substantiated. Tellingly however, less than 4% of all assault complaints are substantiated.

Substantiation statistics obtained via FOI over recent years are as follows:

	2000-2011 <sup>2</sup>	2012 <sup>3</sup>	2013 <sup>4</sup>
Assault allegations	3.6%	2.3%	3.8%
Total complaints	6.4%	7.2%	9.8%

Since 2006 the FKCLC has received a steady stream of complaints against police both from our local region and since about 2009 from further afield. Complaints commonly consist of duty failures, police using excessive force, racial or religious harassment, discrimination, and false imprisonment or unlawful arrest.

The results from the first year of operation of our police complaints clinic confirms the need for early, timely and high-quality advice and legal support to people alleging police abuse.

## Background and rationale for the Clinic

Access to justice after police assault or misconduct remains a significant unmet legal need in Victoria. According to the national Legal Needs Assessment Framework (LNAF) *Unfair Police treatment* is a 'High Relative Incidence of Legal Need' for various Socio-Economic *Relative Disadvantage* indicators, including Indigenous Australians, newly arrived migrants, Victims of Crime and those Aged: 15-24 years (source).

Very few law firms or community legal centres have the capacity or skills to take on police complaint matters. It remains a complex, resource intensive, under-funded and neglected area of law in Australia despite the clear, consistent and often grave impacts upon human rights. Clinics such as this exist in the United States and Canada.

Complaints from members of the public are the gateway to police disciplinary proceedings and criminal charges and one of the few ways that police who engage in misconduct can be removed from the force. These are not consequences that other forms of action can provide.

Civil actions result in compensation for the victim, but not criminal or disciplinary outcomes. Complaints are the mechanism by which a police agency can learn and improve.

However, complaints against police have a poor track record for substantiation (currently averaging 7% for all complaints and 3.3% for assault complaints).

Why is this? We believe that the following are major factors:

1. Complainant distrust of the process/ lack of support;
2. Biased and prejudiced police investigators who tend to disbelieve and criminalise complainants and to assist the police they are investigating to explain, justify or minimise their misconduct;
3. Poor quality investigations – failing to interview all police/witnesses/obtain all evidence
4. Investigators are from a culture that can tend to view some illegality as acceptable and to justify force and other coercive behaviour. This means they tend to misapply the law in their decision-making.

The Clinic hopes to positively influence factor 1, factor 3 and where information is made available to the complainant, misapplications of the law (factor 4). Ultimately however, these concerns are unlikely to be addressed until complaints are independently investigated by a fully resourced and empowered body.

<sup>2</sup> Herald Sun Report

<sup>3</sup> See FOI results released to the FKCLC by Victoria Police on 10 October 2014

<sup>4</sup> See FOI results released to the FKCLC by Victoria Police on 10 October 2014



# Clinic Statistics for 2015

The Clinic first began seeing clients in March 2015. Clients were largely self-referred (from our website/Facebook/media/friends) or referred from Victoria Legal Aid's information line and from CLCs around the state. We did no advertising of the clinic, except to VLA and through our website, out of concerns of inundation.

In 2015 the Police Complaints Clinic provided assistance to 179<sup>5</sup> people. The Clinic opened 67 cases for clients in relation to police complaints and provided advice/information to 112 people.

Of our 179 clients, 61 were charged for an offence that was linked to the circumstances of their complaint.

While we were able to assist 6 of the clients facing charges through our police accountability litigation practice, (a service FKCLC operates outside the Clinic) we had to refer 55 people to other CLCs and private or fee-paying practitioners for assistance.

## Clinic Intake Criteria

Due to the high level of demand on the clinic, with its current resourcing, the clinic cannot assist people with criminal defences. In addition the clinic has devised the following intake criteria for ongoing casework (that is matters where the clinic will advocate on behalf of the client and not just advise).

The intake criteria started to be applied in second semester 2015.

Ongoing casework will be provided if we have solicitor capacity AND a matter fits one of the following categories:

1. Excessive force;
2. Racial profiling and other forms of discrimination;
3. Duty failure in cases of family violence;

Once it meets one of these categories, a further screen will be applied:

- A. Are we likely to be able to have an impact on the outcome of the complaint? (Impact test)<sup>6</sup>
- B. How capable is the person to manage the matter on their own? (Vulnerability)

Once the clinic has assisted with a police complaint, clients of the clinic frequently wish to consider taking civil action. The FKCLC – police litigation solicitor has some limited capacity to take on new files involving issues arising from the clinic. Frequently however cases are referred to firms who we know conduct litigation in this area on a “no win, no fee” basis.

Separate to the clinic, FKCLC's litigation work is carefully selected to have high strategic impact on police accountability issues in Victoria and particularly in the areas of excessive force, racial discrimination, duty failure in family violence and cases that expose issues relevant to Victoria Police's accountability mechanisms. Cases are conducted across Victoria's legal system (civil, criminal, coronial, discrimination) and to the United Nations.



<sup>5</sup> CLSIS data from 1/1 to 31/12

<sup>6</sup> For example our impact is likely to be low if the person has already made a finalised complaint or the matter is older than two years.

## Unmet legal need

112 people who contacted our clinic for assistance received information only from us about the police complaint and freedom of information systems. Each of these individuals were seeking advice and on-going assistance from us. These statistics reveal that even with our clinic operating, there is a very significant unmet need in the provision of advice and casework support for people making police complaints. Our lack of resources meant that we have had to turn away a significant number of worthy complainants.

Our lack of capacity to assist complainants with their criminal defence was the greatest source of complaint to our service. (We turned away 55 clients seeking criminal representation). The overwhelming majority of these clients were not risking a term of jail had they been found guilty of the offence they were charged with and consequently were not entitled to legal aid. We anticipate that the overwhelming majority of these people would not have been able to be assisted by a CLC, would not have been unable to afford a criminal defence (81% of our clients had a low income) and would have had to represent themselves. Consequently, it is very likely the overwhelming majority would have entered guilty pleas in circumstances where they considered they were not guilty.

Defending a person from charges such as resist/hinder/assault police, failure to give name and address and offensive language is a complex task requiring considerable understanding of statutory and common law. Representation in criminal defences of these matters is a significant part of ensuring that police who engage in misconduct are held to account. The Clinic's lack of capacity to represent these 55 people represents a critical and urgent area of unmet legal need.

## Where do complainants come from?

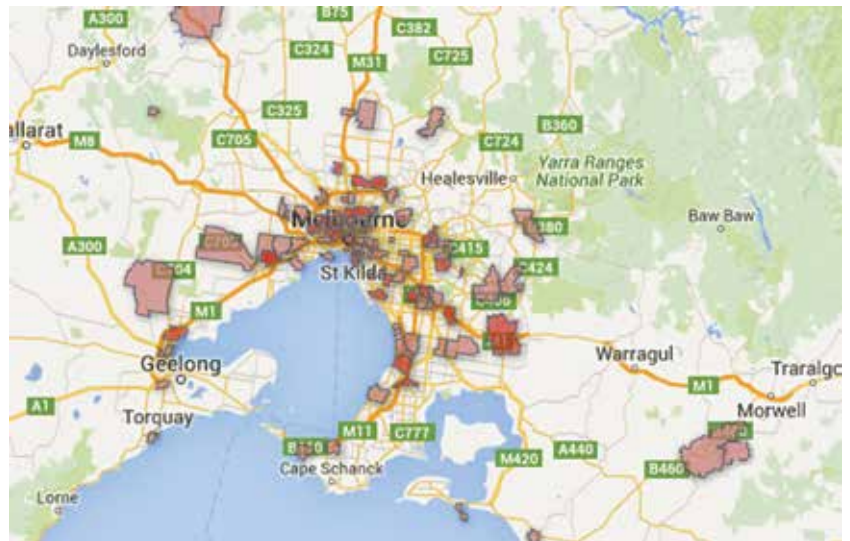
Clients came to our Clinic from postcodes throughout Victoria.

As you will see from the following three maps, while the Clinic attracted clients from around the state, our clients were most concentrated in the inner-west. On the maps, bright red indicates the highest concentration of clients, while light brown represents one or more clients.

There were significant numbers from Hoppers Crossing (8), Sunshine (4), Footscray (7), Flemington (12) Kensington (5), Preston (5), Tecoma (8) and St Kilda (5) but we also advised people from as far afield as Bairnsdale and Mildura.



(Map 1: Melbourne inner metropolitan region. Bright red indicates the highest concentration of clients, while light brown represents one or more clients.)



(Map 2: Melbourne metro)



(Map 3: Victoria)



## Where do the complainants we were unable to assist come from?

The people we were unable to assist came from across the state. However the highest concentrations of people we had to turn away were located in:

- Melbourne – 8 individuals
- Kensington – 5 individuals
- Flemington – 3 individuals
- Footscray, Preston, Pakenham, St Kilda, Narre Warren, Mill Park, Hawthorn, Ferntree Gully, Dandenong – 2 individuals (in each suburb).

These patterns reveal that among those who know about our service, unmet need occurs across the state, but is concentrated in the inner suburbs of Melbourne.

## Racial/socio-economic background of complainants

14% of clients seeking assistance from the Clinic were born in countries other than Australia. This is lower than the 26.2% of Victorians born overseas reflected in the 2011 census. 5.6% of our clients were born in Africa. 81% of clients for whom we have details have a low income.

17.9% of those who reported their income reported a medium income. Less than 1% reported a high income.

During 2015, out of concerns of being overwhelmed, the Clinic did not advertise its operation. Consequently clients coming to the Clinic were either referred through Victoria Legal Aid, CLCs or through self-knowledge.

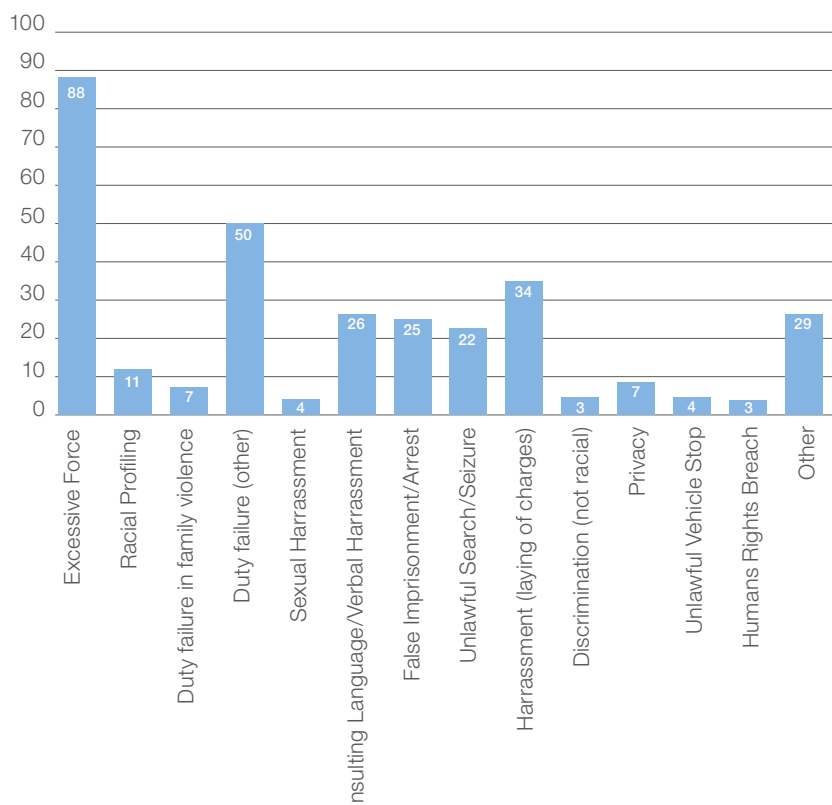
Highly vulnerable clients are those who are referred through youth workers and support services. Due to our lack of advertising, aside from one training session conducted in June 2015 we did not contact youth workers and support services about the Clinic.

Now that the Clinic has developed an intake criteria for ongoing casework and its own telephone line it is now possible to consider a widespread advertising campaign directed at youth workers and support services.

## Types of allegations made to the Clinic

The most common complaint received by the clinic was of Excessive Force (88), followed by Duty Failure (50), Harassment (complaints of unjustified laying of charges or threats to lay charges) (34), Insulting Language/Verbal harassment (26), False imprisonment/arrest (25) and unlawful search/seizure (22).

We received 11 complaints of racial profiling and seven complaints of duty failure in family violence situations.



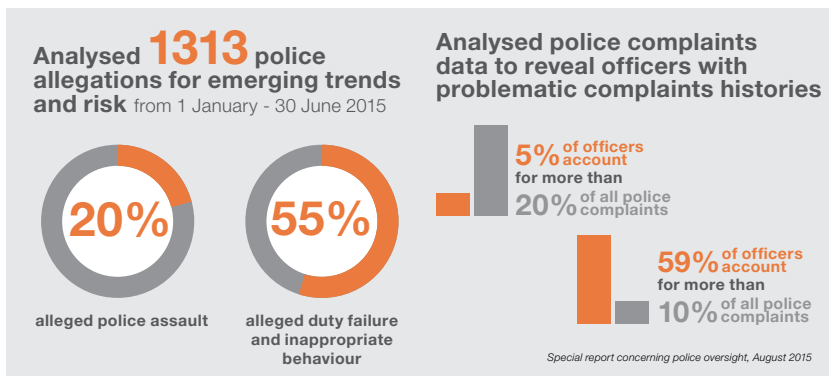
(Figure 1: Types of allegations made to the Clinic)

It is worth noting that the third highest category of complaint – unjustified laying of charges, is not normally one that should be remedied by a complaint. The way to remedy an allegation of unjustifiable charges is through a proper legal defence. The fact that people are coming to us to make complaints rather than obtaining a lawyer to assist with a defence is a further sign of significant unmet legal need in the area of criminal defence.

The low but significant numbers of racial profiling complaints and complaints about duty failure in family violence may reflect our lack of outreach in 2015. It will be interesting to see if these statistics change following different outreach strategies and our Peer to Peer education work due to commence in 2016. In 2016 outreach will be conducted through the Legal Centre's family violence solicitor, through its CLE and Peer to Peer CLE program and further outreach to support service providers and youth workers.



IBAC statistics between 1 January 2015- 30 June 2015 taken from their annual report are as follows:



28% of complaints made to the Clinic allege excessive force. This compares with 20% made to IBAC alleging assault by police during the first half of 2015. Excessive force is a complaint of unlawful assault. Unlawful assault is both a criminal and disciplinary offence deserving the highest level of investigative response.

Similarly a false imprisonment/arrest allegation is an allegation of an unlawful interference with a person's right to liberty. Criminal offences may also be relevant to these allegations. Civilians in similar circumstances might be charged with assault or kidnapping<sup>7</sup>.

Finally the high level of insulting language/verbal harassment allegations (26) are warning signals of attitudes that are not appropriate in a modern professional police agency and warrant serious investigation.

### Types of allegations made by people we were unable to assist

Allegations made by those we were unable to assist due to our lack of capacity included racial/religious harassment (2), verbal harassment (15), False imprisonment/arrest (13), Unlawful search/seizure (9), duty failure (18), sexual harassment (1), discrimination (2), assault/excessive force (18) and unlawful vehicle stop (1).

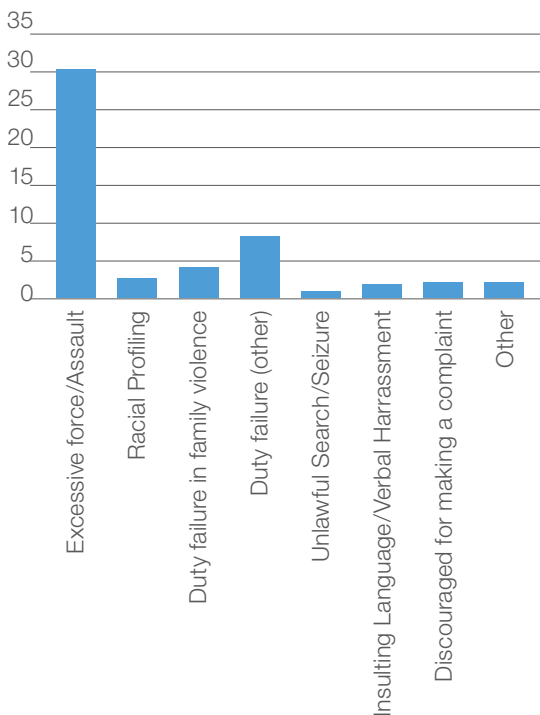
Reasons we may have not been able to assist those making allegations within our guidelines may have included, age of the complaint, inability to recontact client, withdraw of instructions, criminal defence was the dominant issue and client wish to resolve this first, client had already exhausted legal options, over-complexity (ie investigating the complaint would have taken up more than our available resources), referral made and client incapacity.

<sup>7</sup> Section 63A Crimes Act 1958

## Complaints filed by the Clinic

The Clinic filed fifty one (51) allegations of misconduct with Victoria Police on behalf of its clients during 2015. All complaints were submitted to the Police Conduct Unit (PCU) of the Professional Standards Command (PSC) of Victoria Police.

The types and numbers of allegations the Clinic filed on behalf of its clients are as follows:



(Figure 2: Types of allegations filed as complaints with Victoria Police)

During 2015, the clinic lodged 51 allegations on behalf of its clients with Victoria Police. The most frequent allegation made was excessive force. Of the complaints filed with Victoria Police, the PCU characterised them in accordance with the following table.

- (4) C2-5 – Management Intervention
- (3) C2-1 – Minor Misconduct
- (26) C3-2 – Serious Misconduct Connected to Duty
- (1) C1-5 – work file

**C2-5** Management intervention is the assignment given to complaints that are considered to be poor service delivery related complaints. They are handled generally by a line-manager of the officer involved and are resolved through conciliation.

**C2-1** This category is described as including matters such as “minor assault at the time of arrest” and “lower level” breaches of the *Equal Opportunity Act 2010* and *Human Rights and Responsibilities Charter Act 2006*.

**C3-2** This category is described as including matters such as serious injury to the complainant and high level discrimination or human rights breaches.

**C1-5** This category includes LEAP, email, other database audits.

The 51 allegations filed by the clinic in 2015 represents a fraction of the overall number of allegations yet to be filed by the clinic from clients seen in 2015.

There are a number of reasons why many complaints are not filed immediately with Victoria Police. In some circumstances complainants are concerned they may be charged by police or have been charged and wish to resolve the criminal process before lodging a complaint. In other circumstances, complainants wish to obtain further information from other sources including Victoria Police through FOI requests before they decide to make a complaint. While it is clearly preferable to lodge complaints as soon as possible, where clients instruct a delay in lodging, the Clinic makes every effort to preserve evidence that may exist at the time of the incident such as CCTV footage and witness statements.

### Choice of complaint forum

All 51 complaints made by the clinic were sent to Victoria Police rather than IBAC. From complaint work done by the FKCLC’s Police Accountability Project, it is clear that IBAC is referring the overwhelming majority of complaints to Victoria Police for investigation, including complaints involving significant assaults. IBAC’s annual report supports this observation.

More significantly however, there is a serious detriment facing complainants who complain at first instance to IBAC. Frequently complainants wish to obtain documents from Victoria Police about the circumstances out of which a complaint arose and about the complaint investigation itself. However, once a complaint has been made to IBAC, even if it is subsequently referred to Victoria Police for investigation, Victoria Police refuse to provide documents about the incident to the complainant—citing section 194 of the IBAC Act. Section 194 of the IBAC Act creates an exemption from the operation of the FOI Act, for all information received by IBAC. It has been interpreted as including all documents held by other agencies that are relevant to a complaint made to IBAC.

In February 2016, the Victorian Parliament’s IBAC Committee recommended a review of this section. We are hopeful that this second issue can be resolved fairly rapidly by legislative change.

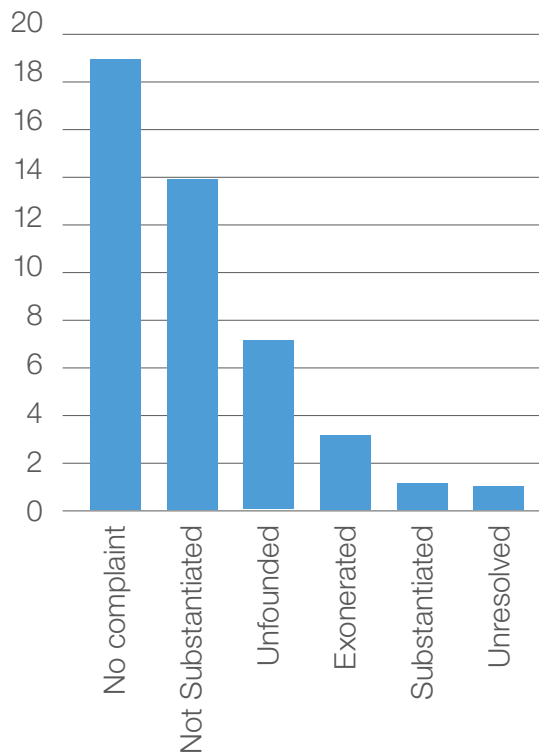
Our recommendation that clients lodge complaints with Victoria Police is not because we consider Victoria Police is the appropriate body to investigate complaints. It is because no other body is performing this task: complaints made to IBAC inevitably end up being referred back to Victoria Police. Additionally, complaints made to IBAC result in the unacceptable concealment of Victoria Police documents through the operation of section 194 of the IBAC Act.

## Outcome of Victoria Police Investigations

Of the 51 allegations made to the Victoria Police, Victoria Police determined that 19 were “not complaints”, 14 were “not substantiated”, and that 7 were “unfounded”.

In three allegations the police were exonerated.

A complaint was substantiated in only one allegation. (Please note, a complainant may make one or more allegation when they file a “complaint” with Victoria Police. )



(Figure 3: Results of Victoria Police Investigation)

The Clinic has sought IBAC review in 3 of these cases. Confusingly however, in two cases, IBAC refused to review the Victoria Police decisions primarily on the ground that the complaints were not initially made to IBAC.



## Complaint Outcomes

Only 1 of the 51 allegations made in matters lodged through the Clinic was substantiated through a Victoria Police Investigation.

With one unresolved, could it be that the 49 others were ill-founded or lacking in evidence, or is this substantiation rate (2%) an indication of bias within the investigation and decision-making process?

In our view the low substantiation rate (2%) is a clear indicator of investigative and decision-maker bias. On the basis of the material available to us, we disagree with the outcomes of numerous complaint decisions.

For example, in our view, the complaints lodged by protesters of being OC sprayed/foamed while they were not acting in a manner dangerous to anyone ought to have been substantiated. (See case study above).

OC spray is a form of force that is acutely painful and has impacts for hours, if not days, weeks and even longer. It is form of ill-treatment that falls squarely within section 10 of the Victorian *Charter of Human Rights Act 2008*. (Right to freedom from ill-treatment). How is it lawful for a police officer to use force in circumstances where it is likely innocent bystanders will be sprayed (even if collaterally)? While “collateral” damage maybe an acceptable part of doing business according to police decision-makers, there is no legal justification for such abuse. This is a set of examples where independent investigators and decision-makers are likely to have taken an entirely different approach to the investigation and outcome of these allegations.

In another example, Victoria Police found it lawful for a 15-year-old child to be pushed to the ground and grabbed around the neck in circumstances where he had done nothing wrong and was not charged with (or reasonably suspected of committing) any offence. Police decision-makers accepted that force was an acceptable part of the investigation process in this case. We believe non-police investigators and decision-makers would have come to a different conclusion. It appears to us that the officer was acting brutally to a child he viewed as defiant (ie answering back). Answering back does not justify force.

In a further example police investigators concluded that the removal of items from a home that were not listed on a search warrant and were not obviously part of a crime was acceptable. Examples of where it is reasonable for police to seize items not listed on a warrant are where police, in the process of executing a warrant, witness hydroponic equipment involved in the cultivation of cannabis or witness

the sale of goods that appeared to be tampered with and well below market value. The decision to find that seizing goods beyond the scope of a search warrant is acceptable is not, in our view, legally acceptable. A further questionable decision involved police investigators concluding that a vehicle search that a police officer had initially attempted to conduct by consent was lawful on other grounds. In this case the client refused to consent to the search. The complainant alleged that the search was without any lawful basis.

Victoria Police decisions letters refer complainants to IBAC if they are dissatisfied with a Victoria Police decision. This sets up an expectation that IBAC will review decisions complainants are not satisfied with. In the search cases, the clinic referred the Victoria Police decisions to IBAC for review. IBAC refused to review the Victoria Police decisions on the grounds that the complaint had not been initially made to IBAC.

IBAC claims that “reviews are an important component of IBAC’s oversight of Victoria Police as they help to determine if a matter has been handled fairly and investigated thoroughly<sup>8</sup>”.

However, IBAC only completed 114 reviews of Victoria Police decisions in 2014/2015<sup>9</sup>. IBACs refusal to review the Victoria Police decisions in this case – despite the fact that they raised issues such as breaches of the rights to privacy (section 13) and freedom of movement (section 12) and equal treatment before the law (section 8) and its failure to review Victoria Police decisions where requested to do so by a complainant indicates that it does not view itself as an appeal body against Victoria Police decisions. Furthermore, there appears to be no transparent criteria about when it will undertake a review. In its 2015 Special Report Concerning Police Oversight<sup>10</sup> IBAC states that use of force is a specific area of focus or risk for review. However its decision-making process must be more detailed than this and Charter considerations must be relevant<sup>11</sup>. Furthermore, we can’t see any justification for the position that complainants must initially complain to IBAC for IBAC to consider reviewing the Victoria Police investigation.

It would be of great use to complainants if IBAC published the decision-making criteria it uses to firstly investigate complaints at the outset, and secondly review Victoria Police decisions. This would enable complainants to make an informed decision about who to send a complaint to, how to frame their review requests and whether to seek review by IBAC at all or consider an alternative such as judicial review.

8 IBAC 2015, ‘Special report concerning police oversight’ <<http://www.ibac.vic.gov.au/publications-and-resources/special-report-concerning-police-oversight/3-ibac-reviews-of-victoria-police-investigations>>.

9 Ibid.

10 Ibid.

11 *Bare v IBAC* [2015] VSCA 197 per Tate and Santamaria JJ.

## Access to information about Victoria Police Investigations

Unfortunately, the clinic is only able to access very limited parts of investigation reports into its clients' complaints. Even in cases where section 194 of the *IBAC Act* is not raised, Victoria Police uses provisions of the *FOI Act* to deny large portions of these reports anyway. Consequently, complainants only receive very limited information about what the decision-making process undertaken actually was.

In *Horvath v Australia* the State's failure to provide Ms Horvath with copy of the investigation of her complaint was part of the UN's reasons for upholding her complaint:

*"In that respect, the Committee notes the author's allegations, uncontested by the State party, that neither the author nor the other civilian witnesses were called to give evidence; that the author was refused access to the file; that there was no public hearing; and that once the finding was made in the civil proceeding, there was no opportunity to reopen or recommence disciplinary proceedings. In view of those shortcomings and given the nature of the deciding body, the Committee considers that the State party failed to show that the disciplinary proceedings met the requirements of an effective remedy under article 2, paragraph 3, of the Covenant."<sup>12</sup>*

Withholding the true basis for which a decision is made from the complainant is a recipe for inconsistent, poor quality and prejudicial decision-making in which irrelevant and biased considerations can influence outcomes. This is especially concerning given the large volume of

complaints that are unsubstantiated. Secrecy invites concerns that there has been collusion between investigators and police they are investigating. If investigators have come to conclusions about credibility, the reasons for these conclusions must be provided. So too should all information that has materially affected their decision-making.

If the police officer has been exonerated, the complainant is more likely to accept the result if they can see for themselves the evidence obtained through the investigation and the full reasons the decision was made. Transparency will have a profound effect in raising trust in the investigation process and policing in general.

Other than protecting informant/complainant identity, there is very little ground for any form of secrecy concerning specific complaints, particularly once all parties to the process are aware of the investigation of the complaint and after witness statements have been obtained from police involved.

The refusal by investigators to release information during an "on-going investigation" appears very suspect when weeks, months or years have passed and an investigation is not resolved. There is no reason either to protect specific facts (identities removed) from public release. For example, and in contrast, Manitoba's Law Enforcement Review Authority's releases complaint case studies in its Annual Report. The Office of Police Complaints in Washington DC publishes the full findings of complaint adjudications on its website.<sup>13</sup>



<sup>12</sup> <http://juris.ohchr.org/Search/Details/1802>

<sup>13</sup> <http://www.policeaccountability.org.au/wp-content/uploads/2014/03/VLF-REPORT-Effective-Investigation.pdf>

## Case studies

One of the reasons the clinic exists is to support people who would be otherwise reluctant to make complaints about police conduct.

Generally we are able to facilitate the process by arranging for investigators to attend the legal centre or at a police station to take a statement from a complainant in our presence. However, on occasions our capacity to advocate on behalf of our clients is undermined when investigators contacted complainants directly.

As many complainants do not wish to speak to police on their own, direct contact by an investigator undermines our capacity to reassure complainants that we can assist them through the process. Many would not choose to make complaints if they knew an officer would turn up unannounced on their doorstep.

The six case studies below represent a very limited summary of some of the issues raised in the complaints.

### Case Study 1: Racial Profiling and Excessive Force

In February 2015, an African man, 'Deng', alleged that he was assaulted by an officer while drinking with friends in a public park. Deng alleged that he was attempting to get out his wallet when he was pushed to the ground by an officer causing his finger to break. His finger has subsequently had to be amputated. These allegations suggest breaches of s 10 (Right to protection from ill-treatment) s 12 (freedom of movement) and s 8 (right to equal treatment by the law) of the Charter of Human Rights and Responsibilities Act 2006 ("the Charter").

The clinic filed a complaint on his behalf to Police Services Command (PSC).

Despite requesting that communication between Deng and the police investigator be made through our clinic, the police investigator turned up unannounced at our client's doorstep at 9am one morning and took a statement from our client on the spot. Deng was very distressed at the process of investigation and felt that he was being investigated for committing a crime. The clinic has subsequently raised the concern with PSC and has been told that the investigator's conduct was inappropriate.

Our client's complaint was unsubstantiated.

### Case Study 2: Racial Profiling

In December 2014 African youth 'Mohamed' was driving his car in Ascot Vale and Flemington and was stopped twice by police in the space of 20 minutes.

The first time he was stopped his car was searched without his consent. The second time Mohamed was stopped, he and his two young African passengers were asked for their names and addresses and an officer entered the back seat of his car without his permission. These complaints raise issues of breaches of freedom of movement (section 12), privacy (section 13) and equal treatment (section 8) of the Charter.

In 2015, the clinic filed complaints on Mohamed's behalf with Victoria Police. While the investigator found that the search was legal in the first stop and that the officer did nothing wrong in entering the car in the second stop, the investigator also found that if Victoria Police had been issuing stop and search receipts in December 2014 for the stops, the second stop may have been less intrusive as Mohamed would have been able to show the officers his first receipt. While the officer who stopped Mohamed in the first stop claimed to have a reasonable basis to stop the car, the officer who spoke to the youths in the second stop claimed no reasonable basis to speak to them.

The case study above is an example of a situation that may have been partially averted if the police had been issuing stop receipts as they were required to do in that area during 2015 as part of the *Equality is Not the Same* – receipting proof of concept trial. The second stop could also have been prevented if police questioning of people was restricted to circumstances where police had reasonable grounds to request the identification (such as under section 456AA of the *Crimes Act*).



### Case Study 3: Racial Profiling and Excessive Force

In 2015, two Afghani men in Melbourne's outer east walked to their cars to drive separately to a café after a meal with one of their family members.

It is alleged that Police approached one the men and a male officer took the keys out of the car's ignition. It is alleged that after reading the man's id which was attached to his keys, the officer demanded more ID. It is alleged that after it was provided, the man asked for the officers' names and ranks.

Our clients alleged that the male officer who took the keys became very aggressive and started to physically assault the man. It is alleged that when the other man tried to intervene and the two called for the help of their family to escape the assault they and their family members were O/C sprayed. The men were subsequently charged with assaulting police. The officers appear to have been searching for a different Afghani man. These allegations raise issues of breaches of ss 8 and 10 of the Charter.

[Please note facts have been changed in this example to protect the identities of the individuals – the matter is ongoing]

### Case Study 4: Racial Profiling and Excessive Force

One evening in 2015, police responding to an allegation that a man had been kidnapped with a machete, arrived in force at a house in a northern suburb.

It is alleged that having established that the man who had allegedly been kidnapped was fine, the police nonetheless handcuffed and used unnecessary force to detain the approximately 4 Jamaican youths in the house.

Our clients alleged that the force used caused the youths to struggle to breathe and ongoing pain. All were searched and then detained outside the house.

A police officer called them "black dogs" during the incident.

Four of the men were released without charge. It is alleged that another young man, in terror, jumped from the second story of the house, had a gun pointed at him and ran fearing for his life. It is alleged that he was subsequently caught, forced to the ground and while lying on the ground, was repeated punched and told he was a "black dog". He was arrested, driven to a police station in a dangerous manner and subsequently released without charge. These allegations raise issues in relation to ss 8, 10, 21 and 22 of the Charter.

[Facts have been altered in this case study to protect the identity of the individuals involved. The matter is ongoing]



### Case Study 5: Excessive force at a protest

In July 2015 a group of protesters and medics at a "No Room for Racism" counter protest to a "Reclaim Australia" protest were OC sprayed by police. Complainants stated that the OC spray was intensely painful and its effects lingered for days and indeed weeks. These allegations raise issues in relation to ss 10 and 16 of the Charter.

Thirteen of these people came to the clinic to lodge complaints against the police. They alleged that the force used against them was unjustified. The clinic lodged numerous complaints on their behalf. Victoria Police investigated the complaints and all were found to be unfounded.

### Case Study 6: Arresting the Victim of Family Violence

In March 2015 our client was repeatedly and violently thrown out of her home by her male partner, while her teenage daughter was left in the house. She sustained injuries. Her partner called the police alleging violence by our client. Our client was arrested and charged with assault by the police who also obtained an IVO against her. Our client was not told the basis of her arrest and was subsequently injured at hospital by police as she attempted to flee. These allegations raise issues in relation to section 10, 21 and 22 of the Charter. Our client filed a complaint through the clinic. The Victoria Police investigation found her complaints unsubstantiated. However the IVO and the charges against our client were later dropped following our negotiations with Victoria Police prosecutors.



## Meetings with Victoria Police Command and IBAC

Staff at the FKCLC have had numerous meetings and interactions with Victoria Police Professional Standards Command and with IBAC during the course of 2015. While we have no doubts about the integrity of many individuals working in these bodies, we are concerned that cultures within both are impacting on fair, lawful, transparent and human rights compliant decision-making regarding complaints.

It is very difficult for a police officer with all the best of intentions, to step out of the thinking and attitudes associated with a work place culture arising from “the way we do things around here.”

For example, Victoria Police decision-makers consider that searches conducted by consent where the person being searched has no idea they have the right to refuse are acceptable. Furthermore force is frequently accepted as reasonable where people outside police cultural norms would take a different view. Good examples of this are the acceptability of hand-cuffing compliant individuals on arrest (handcuffs are a form of force), the widespread unnecessary use of OC spray/foam, the failure to seat belt people in the back of divvy vans when transporting them to police stations (numerous injuries are sustained in divvy van transportation).

While concluding that biases are impacting on Victoria Police investigation and decision-making, we have great respect for a large number of complaint investigators and individuals within Professional Standards Command. They have made decisions that respect the (few) complaint process rights of complainants and the concerns raised by the Clinic.

**In 2015, a complaint was assigned to an investigator who told the clinic that he was “cynical about complainants”. A complaint was made to Victoria Police command about the comment. Victoria Police re-assigned the complaint to another investigator.**

We are still waiting however, for Victoria Police’s website to set out clear information about the complaint investigation process and the rights of complainants to receive for example – updates on the investigation of their complaints and clear information about the time limits that apply.

It would also be useful for Victoria Police to set out clearly on their website how complaints are characterised, how complaint investigations are allocated and how complaints will be investigated.

Given the attitude of many of Victoria Police investigators and Professional Services Command, we have every expectation that the process of making a complaint will be greatly improved through our advocacy on behalf of our clients.

This however will not impact on the bias that is part of the Victoria Police investigation process (ie the decision about which issues to investigate and how) and the decision about whether the police conduct under investigation is acceptable.

These biases will only be overcome if complaints are investigated and decided independently of those ingrained in policing culture. This potentially includes many staff at IBAC.

The Clinic’s experience has also revealed that there is a serious problem regarding the lack of clearly articulated review rights to Victoria Police and IBAC. In the absence of any effective and transparent review capacity in the complaint system, and notwithstanding considerable financial risks in doing so, clients of the Clinic will need to explore judicial review options in the future.

## Clinical Legal Education

*"I loved the clinic. It was the perfect introduction to 'real' world legal work.... I've found it incredibly useful as a foundation in legal work that is less supported." (2015 Student feedback survey)*

Using a premier model of clinical legal education, the Police Accountability Clinic sees victims of police misconduct from across Victoria and provides much needed access to justice and greatly enhanced accountability and human rights outcomes.

Eight students from Melbourne Law School work on placement each semester seeing approximately 96 clients over the course of the academic year.

Students provide advice, referral, support and casework to victims of police misconduct and greatly expand the capacity of the Centre to meet this high legal need.

Under the supervision of an experienced practitioner, students take primary responsibility for all aspects of the Clinic casework, including client interviews, case notes, initial advice, field investigation, case strategy, witness interviews, and legal research.

Through the lens of live-client work, students examine how and where the law fits into broader efforts to improve police accountability and ultimately the criminal and civil justice system.

We believe that the clinical legal education (CLE) model is ideally suited for this project, combining high-quality immersive education with dedicated and focused client work, practical research, data analysis and advocacy. [insert further para about clinical legal education – or at beginning]

By striving for best practice CLE, this model can both support and grow the practice of social impact law in Victoria.

For law students, the clinical experience is an invaluable part of the law degree, providing a dynamic environment where students can combine theory with practice in a genuinely impactful setting. The clinical experience places the law in its sharpest context, by challenging students with real clients and real legal issues. For most of the students it will be the first time they can actively engage with the way in which legal principles operate in the community, and observe the role of law in both facilitating and impeding the administration of social justice.

*'As a capstone experience, there may be nothing as enriching for teachers and students, as developing of analytical skills and as formative of true professionalism, as a properly resourced real-client clinic.'*

– Best Practices: Australian Clinical Legal Education. (2012)

The service model also represents a unique and particularly advantageous partnership between Flemington Kensington Community Legal Centre, specialists in social impact law and advocacy, and the [Public Interest Law Initiative](#) of Melbourne Law School.

The eight placement students per semester are overseen jointly by an academic supervisor employed by the University of Melbourne and by a clinical supervisor employed by FKCLC. The academic supervisor is responsible for coordinating the academic aspects of the subject including meeting all UM and Melbourne Law School requirements, developing all course materials and the reading guide, and setting and marking assessment. The clinical supervisor is responsible for supervising and managing students while they are on site at FKCLC.

A significant amount of legal writing is involved. Students work in teams on cases or projects, and meet with the clinical supervisor regularly. Students also take responsibility for the Clinic's policy and public education work.

The Clinic teaches students to apply and critically examine legal theory in the context of public interest, human rights and police accountability law.

It teaches students to analyse and assess how and why individual cases of abuse occur and to connect them to systemic accountability issues, and to the merits of civil litigation and other strategies for remedy and policy reform.

Through immersion in live client work, students engage with fundamental issues of race, class, and gender, and their intersection with legal institutions.

Students are also instructed in legal ethics and advocacy skills in a way that compliments and deepens their academic studies, and we seek to instil in them a public service ethos as they begin their legal careers.



## Student experiences

In January 2016 we surveyed clinic students about their placement experiences. Results were overwhelmingly positive and included numerous useful suggestions and feedback.

### What did you enjoy most about the clinic?

*I enjoyed the client contact the most. I really enjoyed sitting in on and then conducting interviews with clients as I got to meet lots of interesting people.*

*Independence and interaction with clients. Having responsibility for a number of cases was an important part of the experience that made me more excited to come in each time.*

*I really enjoyed the opportunity to be self-directed in managing a caseload and also in working directly with clients. It was a really great opportunity to get an understanding of the legal assistance sector, the nature of the work, the concerns of the clients and their diverse experiences.*

*I really liked the opportunity to delve into legal research as well for the "Protest case" and I think it was a good way to understand how to approach strategic advocacy in the Victorian system and the particular barriers to public interest litigation.*

*I really enjoyed being as involved and engaged in the client matters as were, from the initial point of meeting the client at FKCLC and throughout the process of initiating a police complaint. I think that sort of approach is unusual, in the sense that many of us students would not necessarily get the opportunity to have that level of engagement and participation in client matters. I also think it makes for a better experience, because it helps you advocate better for the client because you know their story and know who they are, but also you feel like you are working towards something that you are invested in and responsible for.*

*I enjoyed the hands-on approach we were given in dealing with clients and caseload. We learned how to handle difficult clients very quickly, and were guided effectively through the process by you and Tamar. I enjoyed doing most of the work myself.*

*I loved the clinic. It was the perfect introduction to 'real' world legal work. I really appreciated how clear introductions to letter/memo writing and client interviewing were. I've found it incredibly useful as a foundation in legal work that is less supported.*

*The culture of the clinic and FKCLC was one of the best things about my time there, as well.*

*There was also excellent support in the case of difficult clients, and in dealing with difficult stories.*

*I thought we were taught and managed effectively. I liked how we became gradually more autonomous with our files, as we both grew to understand the police complaints process but also as we began meeting more clients at initial advices. We could always access assistance if we needed it, but it never felt like we were being babysat or overly monitored.*

*I really enjoyed the clinic time. If I had to change anything about my experience it would be less time spent at university as part of PILC, and more time at FKCLC.*

*I think the clinic runs great. I'd love to be able to see students undertake clients on all steps along the process. I understand specifically my clients were all new, so that was abnormal for the clinic. But I'd love to be able to see students take clients all the way through the process and hopefully come to some kind of conclusion. I would also like the guidelines strengthened for students applying for the program. I didn't really enjoy working with people who had a bias towards the police doing the right thing, rather than an open mind about the possibility that our clients may be telling the truth.*

*More training and debriefing sessions. E.g. if someone makes progress/experiences difficulties with a client/matter, sharing this with the group could potentially boost the morale (especially if the student is feeling incompetent) but provide an forum for sharing of info.*

### Has the clinic changed your plans on what you want to practice in law?

*The clinic reinforced my desire to have a career in which I can work with people, particularly those who are disadvantaged.*

*The clinic deepened my interest in public interest law and social justice and encouraged me to apply for other similar opportunities.*

*Definitely. My experience has been more outward focused to international issues or systemic human rights violations but this clinic helped me develop an understanding for client-centred practice and advocacy with immediate impact which I really appreciated and I am now pursuing job opportunities in the legal aid and community legal service sector.*

*I already had an interest in social justice, having volunteered at a CLC before, and I'm moving in the direction of criminal law practice currently. If anything, I feel like it is going to be a weird transition going from working in police complaints to working in criminal prosecution with police. It definitely affirmed my interests I already had being at FKCLC, and I think it underlined how important it is to service those who cannot access legal assistance on their own.*

*It has consolidated my interest generally. I had previously had work experience in what I would consider a failing community legal centre and I was certainly reinvigorated by my time at FKCLC.*

*FKCLC dealt with clients one-on-one in such an empathetic and client interest/focussed way. In my limited experience, I have rarely seen that and I thought it was brilliant.*

### Has the clinic broadened your interest in social justice?

*The clinic really opened my eyes to the fact that there is always two sides to a story and perhaps neither are 100% accurate. This has made me especially keen to practice in criminal law or plaintiff based law as individuals can be particularly vulnerable.*

*Yes. I think it has grounded my sense of social justice to a more human centred focus – looking at the systemic issues or problems in context rather than a purely cerebral engagement with the law.*

*Definitely. I honestly think this sort of work should be compulsory for law students, because it is so easy to be at uni and study law from a distance, devoid of any understanding of how the law affects everyday people. I think we need a grounding in this sort of practice because otherwise we become the type of lawyers that forget about the disparities, injustices and discrimination that occurs every day because of the law. FKCLC do amazing work and work that is really important.*

*Again, always wanted to work in social justice, but this experience has shown me a different way that can be achieved, and perhaps a different alley for me to explore. I thoroughly enjoyed my experience at FKCLC.*

*Absolutely! The clinic has made me more cynical/ aware of the extent and frequency of the abuses of power in government.*

*Yes. Learning about Tamar's work in strategic litigation broadened my ideas about how the law can be used in the aim of social justice.*

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